Neutral Citation Number [2010] IEHC 32

THE HIGH COURT
COMMERCIAL

2007 4691 P

BETWEEN

HANSFIELD DEVELOPMENTS, VIKING CONSTRUCTION, MENOLLY PROPERTIES AND MENOLLY HOMES

PLAINTIFFS

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

DEFENDANTS

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

PART I

1. This is an application brought by way of a notice of motion on the defendants' behalf to dismiss the plaintiffs claim for failure to make discovery or in the alternative for an order that the court doth declare a mistrial.

2. The court is conscious that some 400 homeowners from the Drynam, Myrtle and Beaupark estates in North County Dublin have instituted legal proceedings against the plaintiffs in respect of alleged defects in houses which they purchased from the plaintiffs, and that the plaintiffs in turn have joined the defendants in these proceedings as third parties in the homeowners' proceedings.

3. Accordingly, having regard to the position of the home owners and bearing in mind the reliance placed by Mr. O'Neill on the first and fifth named defendants behalf in moving this motion on the written submissions as submitted to the court, I propose to attach to this judgment by way of a schedule a review of the extensive affidavits that have been filed by both parties in respect of this motion, the first and fifth named defendants written submissions and the written submissions as filed on the plaintiffs behalf in reply to the first and fifth named defendants written submissions. The second, third and fourth named defendants did not file written submissions and I have separately in the judgment referred to the oral submissions of Mr. MacCann, on their behalf.

4. The factual background to the present motion is set out in the outline written submissions filed on behalf of the first and fifth named defendants, and the following is a review of that information.

These proceedings were commenced by a plenary summons issued on 22nd June 2007, pursuant to which the plaintiffs sought, *inter alia*, a declaration that the defendants were obliged to indemnify the plaintiffs in respect of costs, expenses, losses, liabilities and claims, arising from the construction of residential units within the Drynam, Myrtle and Beaupark estates constructed using aggregate infill susceptible to swelling and allegedly containing unacceptable excessive levels of pyrite, damages for breach of contract and damages for negligence.

The Statement of Claim alleged that the infill supplied by the first named defendant from its Bay Lane quarry was causing heaving within and through the floors of the residential units in the three estates. It was alleged that

> "this pressure result[ed] in the bulging and cracking of floors and/or the cracking of partition walls and door frames as a consequence of upward pressure from the floors on which the said walls and door frames are constructed" (paragraph 17 of the Statement of Claim)

The proceedings were entered into the Commercial List in November 2007 and were subject to extensive case management up to the trial of the action.

The plaintiffs alleged that the fill material supplied by the first named defendant had been used under the ground floor units throughout the three estates and contained pyrite which had undergone a chemical process resulting in the production of gypsum and the expansion of the fill material, which in turn was causing heave with resulting damage to the properties in the three estates.

In their Defence, delivered on 31st January 2008, the defendants denied the contention that the damage which was manifesting in these estates (where it existed) could be attributed to pyritic induced heave and, in fact, was caused by a number of contributing factors, including, *inter alia*, defective design and construction, poor workmanship, inadequate ground conditions and deficient quality control during the construction of the three estates.

In particular, it was pleaded by the defendants that pyritic swelling was not occurring in the manner alleged, that no expansion of the infill resulting in heave was taking place underneath the ground floor slabs in the units in the three estates, and that the damage which was manifesting (where it did manifest) was largely insignificant, was not of a structural nature and was attributable to relatively common defective construction practices. Furthermore, where the defects in question were more significant, the damage was more isolated in nature and was explainable by specific problems in the construction of the property in question.

The defendants maintain that they have been at a distinct disadvantage from the outset in that they were not involved in the construction of these three estates and, therefore, had no access to contemporaneous information or knowledge relating to what actually occurred between 2003 and 2007 (the time during which the three estates were built). On this basis a large scale information gathering exercise had to be implemented.

A Notice for Particulars was delivered on behalf of the defendants (through their previous solicitors) on 10th December 2007. This notice sought extensive particulars relating to a huge range of issues concerning construction and, in particular, the extent to which and the locations in which it was alleged the plaintiffs used the defendants' infill during the construction of the properties in the estates.

Replies to these Particulars were furnished on 10th January 2008, following which the defendants delivered their Defence on 31st January 2008. A Reply to the Defence was delivered on the 14th February 2008. The defendants sought voluntary discovery by way of a letter dated 10th March 2008. There followed an exchange of correspondence between the solicitors for the plaintiffs and the defendants relating to that letter, which ultimately culminated in an agreement by the plaintiffs to discover 102 categories of discovery, covering a very broad range of issues relating to both the construction of the estates and the development of the allegation of pyritic induced heave since the estates were constructed and the homes sold.

Ultimately, the plaintiffs made discovery in an affidavit sworn by Mr. Brendan O'Byrne on 30th June 2008. There followed a supplemental affidavit sworn by him on 15th July 2008. Pursuant to these affidavits the plaintiffs discovered 56,070 non-privileged documents and 20,990 documents in respect of which privilege was asserted. A review of these documents was

conducted between July and September 2008 and following this review a letter was sent by the defendants' solicitors to the plaintiffs' solicitors on 6th October 2008 in which a range of queries were raised. Ultimately, and on foot of directions issued by this Court, these queries led to an application to dismiss or strike out the plaintiffs' case for failing to make proper discovery, or, in the alternative, for an order for further and better discovery. An exchange of affidavits took place, following which the motion was compromised. Pursuant to that compromise, a Supplemental affidavit of Discovery was sworn by Mr. O'Byrne on 23rd December 2008.

Throughout the period during which these exchanges relating to the plaintiffs' discovery took place, the proceedings were under regular case management by this Court. In particular, in addition to the discovery issues, this Court had suggested with the agreement of the parties, that a selection of houses be chosen which would be representative of the issues arising in the trial. Ultimately, after intense negotiation between the parties the selection or "basket" of houses, was chosen and it culminated in a "Case Management Agreement".

Thereafter, directions were given whereby the plaintiffs were to furnish their witness statements on or by 22nd December 2008 and the defendants to furnish their witness statements on or by 2nd February 2009. A trial date was also set for 23rd February 2009.

The plaintiffs furnished their witness statements on the 22/23nd December 2008, encompassing well over 1,000 documents. In response the defendants furnished their witness statements on the 2/3rd February 2009. The plaintiffs also served a re-amended Statement of Claim prior to Christmas 2008 and a second re-amended Statement of Claim on 30th January 2009. Further motions relating to discovery and a challenge to privilege arose following on from the affidavit of Brendan O'Byrne dated 23rd December 2008. The trial commenced on 23rd February 2009 and ran for 52 days of hearing.

Evidence relating to the nature and process of pyritic induced heave has been heard during the course of the trial. In that regard the following persons have given evidence on behalf of the plaintiffs. These are Michael Maher, Alan Bromley, Fred Shrimer, Alain Blanchette, Robert Donnelly, Brian Hawkins, Kieran Butterly, Gareth Healy, Peter Strogen, Robbie Goodhue, Marc-Andre Berube and Trevor Orr. In addition to the foregoing there has been a number of site visits during the course of the trial at which Paul Forde (on behalf of the plaintiffs) and Pearse Sutton (on behalf of the defendants) have given evidence.

A vast amount of issues have been examined, canvassed and heard in evidence in the trial to date. In addition to this, a huge volume of reports and documentation have been prepared for the trial.

Most of the queries which arose out of the discovery review between July and September 2008 pointed to the absence of specific categories of documents some of which have since been disclosed in the new discovery furnished in late June and August 2009. As has been made clear in the affidavits of Peter Lennon grounding this motion, the queries themselves demonstrated that the plaintiffs knew of the defendants' concerns with respect to the absence of documentation at least 8 months prior to the new discovery being furnished in late June and August 2009.

In response to the letter dated 6th October 2008, the plaintiffs' solicitors responded on 9th October 2008 stating that the plaintiffs were reviewing the queries and would respond by 31st October 2008. However, on 14th October 2008, it was indicated on behalf of the plaintiffs to the Court that a response would be forthcoming by 20th October 2008. Given the vast volume of queries raised the defendants were surprised that the plaintiffs would have the ability to respond to those queries within such a short period of time. It is the defendants' contention that when the response was furnished on 20th October 2008 it exhibited a lack of willingness on the plaintiffs' part to engage with the defendants.

The queries raised were divided into very specific queries relating to what can be classified now as the "missing attachments" and a large number of general queries pointing to specific gaps which were apparent in the plaintiffs' discovery. In a letter dated 20th October 2008 the plaintiffs gave a repetitive stock answer to these general queries, which was in the following terms

> *"you have listed types of documents you would have expected to see in this category… we have reviewed over 268,000 documents and provided you with the documents relevant with the agreed category of relevant Discovery as agreed inter party. If any of the above…types of documents were adequately requested in an agreed category of voluntary Discovery, such documents that are in the Plaintiff's power, possession or procurement have been discovered"*.

This response did not satisfy the defendants. Arising out of this response a motion was issued to strike out or dismiss the claim. There then followed a series of affidavits and exchanges.

The plaintiffs' initial response was set out in an affidavit of Mr. Butler, sworn on 10th November 2008, followed by another affidavit of Mr. Butler, sworn on 12th November 2008. Again, averments were made in these affidavits specifically stating that certain types of documentation were not in the possession, power or procurement of the plaintiffs. A letter from Lennon Heather to BCM Hanby Wallace dated 17th November 2008 probed further the averments and issues which the plaintiffs had ventilated in the affidavits of 10th and 12th November and identified the defendants' continuing concerns. That letter was responded to on behalf of the plaintiffs but the response did not provide the answers with respect to obvious gaps to which the plaintiffs were pointed.

Thus, further affidavits were sworn by Mr. Lennon on 1st and 2nd December 2008. Mr. Butler then swore a further affidavit on 5th December 2008, which, once more, specifically stated that certain of the documents which the defendants complained were absent were not in the plaintiffs' power, possession or procurement. There then followed a further replying affidavit of Mr. Lennon and a further replying affidavit of Mr. Butler. As the affidavits themselves demonstrated the defendants' queries were extensive and gave clear warning to the plaintiffs that the defendants were maintaining their discovery was deficient. Notwithstanding this, the plaintiffs maintained the position on affidavit that they had furnished all relevant documentation in their power, possession and procurement and a compromise was reached with respect to the motion for further and better discovery on the basis of a Supplemental affidavit of Discovery being sworn by Brendan O'Byrne dated 23rd December 2008. The defendants contend that the averments in Mr. O'Byrne's affidavit have now been demonstrated as being manifestly deficient.

A number of further issues arose after Christmas 2008, which should have alerted the plaintiffs to the fact that the defendants were maintaining there were serious deficiencies in the plaintiffs' discovery. A number of types of documents were discovered at various points in 2009 despite earlier assurances that full discovery had been made.

Ultimately, on 18th May 2009, the defendants' solicitors received a letter from the plaintiffs' solicitors enclosing:

· Site Diary of Mr. Kevin Kelly dated 2008.
· Site Diary of Mr. Kevin Kelly dated 2006.
· Notebook of Mr. Kevin Kelly and Niall O'Toole.
· Site Diary of Mr. Kevin Kelly Junior dated 2007.

Given the specific assurances which were made with respect to all site diaries the failure of the plaintiffs to disclose these at an earlier stage was of grave concern to the defendants.

The furnishing of the Kevin Kelly diaries (and other complaints about the inadequacy of the discovery made by the plaintiffs) precipitated the bringing of the present motion. This motion resulted in a response from the plaintiffs by way of a replying affidavit of Mr. Butler, sworn on 25th May 2009, which in turn generated a further response from the defendants by way of an affidavit sworn by Mr. Lennon on 27th May 2009. This motion was then made returnable for hearing on day 51 of the trial (28th May 2009) during which it was indicated on behalf of the plaintiffs that there were further documents (at that stage approximately 400), which had not been discovered by the plaintiffs. Various reasons were advanced for the deficiencies in the discovery at that stage.

On 18th June 2009, the plaintiffs informed the Court that the running total of non- discovered documents was significantly

higher and the fact that the total was then estimated to be in the region of many thousands. On 25th June 2009, the plaintiffs served an affidavit of discovery of Mr. O'Byrne. The schedule of the affidavit of discovery ran to approximately 12 lever arch folders. Once the documentation was uploaded onto CT Summation it then became clear that the running total as of 29th June 2009 was 47,433 documents filling 90 bankers' boxes. Whilst some of these documents fell into new categories of discovery (for which the plaintiffs were not in default) these were insignificant in comparison to the total number of documents which were previously discoverable and for which the plaintiffs were in default.
On 14th July 2009 the defendants received a further letter indicating that further documents had been omitted from the affidavit of discovery of Mr. O'Byrne of 25th June 2009.
On 15th July 2009 the defendants received a further letter from BCM Hanby Wallace indicating that further documents had been obtained and that these would now be discovered in conjunction with the other documents already received.
In addition to the foregoing, the defendants wrote to the plaintiffs on 12th July 2009 in relation to a claim of privilege which was being maintained over thousands of documents discovered in the affidavit of 25th June 2009. The response to this letter came on 20th July 2009. Privilege was waived by the plaintiffs over a number of these documents. On 23rd July 2009 the defendants received a letter from the plaintiffs stating that there were further problems with the affidavit of discovery dated 25th June 2009 and that through a further electronic search a further "pool" of documents had been discovered. On 24th July 2009, the plaintiffs confirmed that this pool amounted to approximately 8,000 documents. Ultimately when these documents had been reviewed by the plaintiffs the pool in question amounted to over 2,000 further documents not previously discovered.
In total, therefore the plaintiffs have sworn the following affidavits of discovery:

1. Affidavit of Discovery of Brendan O'Byrne 30/06/2008
2. Supplemental Affidavit of Discovery of Brendan O'Byrne 15/07/2008
3. Supplemental Affidavit of Discovery of Brendan O'Byrne 31/10/2008
4. Third Supplemental Affidavit of Discovery of Brendan O'Byrne 24/11/2008
5. Supplemental Affidavit of Discovery of Brendan O'Byrne 05/12/2008
6. Supplemental Affidavit of Brendan O'Byrne 10/12/2008
7. Supplemental Affidavit of Discovery of Brendan O'Byrne 23/12/2008
8. Supplemental Affidavit of Discovery of Brendan O'Byrne 19/01/2009
9. Affidavit of Discovery of Brendan O'Byrne 26/01/2009
10. Supplemental Affidavit of Discovery of Brendan O'Byrne 23/02/2009
11. Supplemental Affidavit of Discovery of Brendan O'Byrne 26/02/2009
12. Supplemental Affidavit of Discovery of Brendan O'Byrne 25/06/2009
13. Supplemental Affidavit of Discovery of Brendan O'Byrne 07/08/2009
14. Confirmatory Affidavit of Discovery of Brendan O'Byrne 07/08/2009

Since the defendants' outline written submissions were compiled, a further supplemental affidavit of discovery was sworn by Mr. O'Byrne on 4th November 2009.
After a review of these documents was conducted throughout July and August 2009 the defendants served a further affidavit (sworn by Mr. Lennon on 15th September 2009) in support of the motion to dismiss the plaintiffs' claim for failure to make proper discovery or alternatively, seeking a mistrial. The defendants contend that they have been prejudiced to an irretrievable extent and that the plaintiffs' failure to discover documents, and to conduct a proper review of their own processes and methods in light of clear warning signals that their discovery was insufficient, requires that the claim be dismissed. In the alternative, the defendants' contend that the proceedings to date should be declared a mistrial in circumstances where the prejudice suffered by the defendants can only be cured by being put in the position they would have been in had full and proper discovery been made in July 2008.

5. <u>Submissions on behalf of the Second, Third and Fourth Named Defendants</u>
Mr. MacCann on behalf of the second, third and fourth named defendants, being the Northern Ireland companies, presented his submissions to the court by referring to the fact that insofar as his clients are concerned, the claim as against them is partly reflective and partly secondary. He referred to the fact that during the relevant financial years the second, third and fourth named defendants have given s. 17 guarantees which, therefore, give rise to a liability in respect of the trading activities of the first named defendant and that is the secondary liability.
Mr. MacCann refers to the reflective liability or, as it may be described, a derivative liability insofar as it is said to arise against all of the defendants that there was negligence in allowing defective infill material to be placed on the market. The alleged negligence arises on the part of Irish Asphalt directly as a party that puts the product onto the market and in a derivative manner in respect of the Northern Ireland companies, on the basis that the holding companies caused or permitted the trading company to allow the product onto the market.
It is contended on behalf of the Northern Ireland company defendants that insofar as there is any prejudice caused as a result of a failure by the plaintiffs in relation to discovery that is a prejudice which necessarily in a derivative and secondary manner prejudices the second, third and fourth named defendants.
Mr. MacCann relies on the principles as set out in *Mercantile Credit Company of Ireland Ltd. v. Heelan* [1998] 1 I.R. 81, *Murphy v. J. Donohue Ltd.* [1996] 1 I.R. 123 and *Johnston v. Church of Scientology* (Unreported, Supreme Court, 7th November 2001).
Mr. MacCann posits that the legal principles applicable are such that once there has been a default in discovery, whether it be intentional, reckless or negligent, once the consequence of that default is to render a fair trial impossible then there must be a strike out having regard to the constitutional requirement of due process, whether in criminal or civil cases. It would seem to be inconceivable, Mr. MacCann submits, that a Court would be in a position to allow a situation to arise where an unfair trial would be permitted. Culpability can be that of either wilful default or negligence, and is not confined solely to wilful default.
Mr. MacCann relies on the judgment of Kelly J. in *Geaney v. Elan Corporation plc* (Unreported, High Court, 13th April 2005) and succinctly submits that the proposition that the jurisdiction to strike out arises where the culpability involves wilful default or negligence leading to a situation where it is no longer possible for the affected party to have a fair trial.
Mr. MacCann refers to the discretion which vests in the Court in dealing with this application, to the potential for imposing appropriate costs orders and to the potential for remedying any prejudice that is suffered by the defendants by having additional costs orders imposed upon the plaintiffs. He submits that while at one level this may be so, certainly in the United Kingdom the courts have expressed a degree of caution as to whether that is necessarily the appropriate course of action to take, and what an order for costs can never do is to reverse the litigious disadvantage that the defendants will now have in any second cross-examination of the plaintiffs' witnesses. He accepts that, although in Commercial Court cases there is a degree of advance knowledge and less trial by ambush because of the presence of witness statements, the effectiveness of the cross-examination of a witness will inevitably be impaired where those witnesses will now have had access to the affidavits pointing out the deficiencies and will know in advance effectively the questions that are to be put to them if they are recalled. In the particular circumstances that occur, Mr. MacCann submits that a costs order is not appropriate because there are elements of the prejudice that cannot be addressed purely by a costs order.
Mr. MacCann refers to *Arrow Nominees v. Blackledge* [2000] 2 B.C.L.C. 167. He accepts that the conduct on the part of the

litigant in that case was in degrees of culpability much more serious than anything that may be said in relation to the plaintiffs here, in that there was absolute deliberate and conscious wrongdoing.
Accepting that the Court in *Arrow Nominees* was dealing with a most egregious and deliberate flouting of a court order, Mr. MacCann submits that it is clear from the judgment of Chadwick LJ that the fundamental requirement that the Court has to undertake is to consider whether the consequence of the breach of the order, whether it is deliberate or otherwise, is such as to render a fair trial impossible. If it is impossible the Court cannot allow that injustice to be perpetuated as against the affected litigant. Mr. MacCann refers in particular to para. 55 of the judgment where Chadwick LJ states:-

> "Further, in this context a fair trial is a trial which is conducted without an undue expenditure of time and money and with a proper regard to the demands of other litigants upon the finite resources of the court."

Mr. MacCann, however, does accept that the court has to determine to what extent any additional duration of the trial is disproportionate to what was the original anticipated length of the trial.
He concludes that the underlying test is whether the affected litigant has been placed in a such a position that he can no longer get a fair trial. If a fair trial is found to be no longer possible, the culpability such as to justify a strike out is either wilful default or negligence.
Mr. MacCann criticises the methodology adopted by the plaintiffs in the preparation of their discovery and refers to the lack of centralised filing, the lack of proper processes and procedures in place from the outset so as to deal with any difficulties that might be experienced as a result of the lack of centralised filing of documentation and the acknowledgment on the plaintiffs' behalf that there was insufficient central control over the persons who were being asked to collate the documentation. He refers to the failure to discover the Helsingor documentation and, in particular, the Monaghan report, the fact that there is no satisfactory explanation as to why the hard copies of the CD disc was not discovered. There was criticism of Menolly for not making the relevant documentation available and in particular, of senior management who are the persons best placed, subject to legal advice, to know what is and is not relevant, to the failure of employees to have understood their obligations as regards discovery and while they may have made innocent errors, nonetheless these were negligent errors.
Mr. MacCann criticises Mr. O'Byrne and submits that there is a lack of explanation offered by him for the failure to comply with the plaintiffs' discovery obligations. He further criticises the failure of the plaintiffs to rectify their own deficiencies in terms of records to ensure that all relevant records were properly retrieved, the failure by the plaintiffs to have appointed a single person or group of persons within the company structure to take charge of the discovery process and to ensure that all locations had been properly searched. Mr. MacCann refers to the issue of site diaries and submits that either these were deliberately withheld or alternatively, there was negligence on the part of the plaintiffs' employees in not furnishing the site diaries so as to enable them to be discovered. He also criticises the manner in which documents were stored in a random and haphazard way.
Mr. MacCann refers to the aspect of electronic or e-discovery and refers to the situation where, as the law then stood, there was an obligation on every litigant to discover all relevant documentation within agreed categories of discovery and there was no provision for engaging in an electronic search with a view to identifying documents that may fall within categories of relevance. As the plaintiffs did choose to engage in an electronic search by reference to particular search words, they were inevitably exposing themselves to a potential impairment in relation to the quality and integrity of the discovery that was being made by them. Mr. MacCann refers to the plaintiffs embarking on an e-discovery process using certain selected search words without informing the Court and without informing the plaintiffs.
He submits that while deficiencies in relation to the plaintiffs' discovery may have been remedied by the very late and very extensive discovery that the plantiffs have undertaken, there is still a serious question mark over the integrity and completeness of the discovery that is being made in this regard.
Mr. MacCann posits that the Court has a jurisdiction to dismiss where there has been wilful or negligent default such as renders a fair trial impossible. There has been a significant negligent default on the part of the plaintiffs, a default which by all accounts still runs the risk of relevant documentation not being discovered to the defendants. The consequence of the plaintiffs' default is to render a fair trial for the defendants impossible and, therefore, justifies the court in exercising its strike out jurisdiction.

6. <u>Submissions in Reply on behalf of the Plaintiffs</u>

In the course of their written submissions the plaintiffs state that they have accepted at all times that the deficiencies which resulted in the making of late discovery ought not to have occurred. However, the failure to make discovery was not deliberate nor was it dishonest; the evidence makes it clear that those omissions which did occur were a consequence of a combination of human error and oversight, the complexity of the proceedings and issues therein, the volume of documentation which had to be (and was) discovered by the plaintiffs, and the nature of and particular circumstances in which the plaintiffs' business found itself at the relevant time. These are explanations, rather than excuses, for the failures. They occurred, however, in a context in which the plaintiffs gave clear instructions that full discovery should be made, in which they had retained the services of experienced solicitors to that end, and in which those solicitors in turn retained a dedicated team of Junior Counsel to assist in discovery. It submitted that it is impossible to conclude that the failures were the product of dishonesty or deliberate suppression of documents.
The plaintiffs refer in their submissions to three principal aspects relevant to this application. They are first, the question of whether the defendants have in fact sustained prejudice as a consequence of the matters of which they complain, second whether such prejudice as has been sustained can be remedied without a retrial and third whether there are circumstances which would suggest that the Court should in any event and in the exercise of its discretion, not grant the relief of a retrial. They refer to the legal principles applicable to the motion to dismiss the claim and those applicable to the motion to declare a mistrial. The written submissions filed on behalf of the first and fifth named defendants and of the plaintiffs are set out in full in Schedules II and III respectively to this judgment.

7. <u>Issues Arising</u>

Taking into account the full written and oral submissions as delivered on behalf of the first and fifth named defendants and the plaintiffs, and the oral submissions of Mr. MacCann on behalf of the second, third and fourth named defendants, there are eight principal issues that arise for consideration in the overall context of the defendants' application and these are:-

I: E-Discovery

II: Failure to Engage

III: Non-Bay Lane Houses

IV: Concrete Delivery Documentation

V: Ground Conditions

VI: Quality Control and Workmanship

VII: Red Arches

VIII: Development of Cracking

I will proceed to deal with each of these issues in turn.

Issue I – E-Discovery

Mr. O'Neill, on behalf of the first and fifth named defendants, submits that it is only in Mr. O'Byrne's affidavit of 4th November 2009 that the full story is given as to how e-discovery was dealt with. He refers to Mr. O'Byrne's affidavit of 6th October 2009, which states that BCM raised the issue of e-discovery and Mr. Quinn of Menolly liaised with BCM on this issue. Mr. O'Byrne refers to an assurance from Mr. Murphy of Waterford Technologies that the search would pick up key words used in email attachments. Mr. O'Neill queries how 13 search terms were provided on 31st January 2008, before any request for discovery. He refers to passages from the affidavit of 6th October and submits that they lead one to believe that BCM had some input into or knowledge of the 13 search terms used, and that BCM were involved from the outset in relation to e-discovery.
Mr. O'Neill notes Mr. O'Byrne's averment concerning the understanding of one person from a site meeting in February 2008 that only documentation relating to pyrite issues should be furnished. He submits that this calls into question what employees were told at this meeting, and that it would have been prudent to give them a document identifying the scope of the discovery required. He submits that it is extraordinary that, as Mr. O'Byrne avers, hard drives of desktop computers were not searched. He also notes Mr. O'Byrne's averment that this meant that the process depended on computer users producing relevant documents. Mr. O'Byrne avers that leaving matters to individuals has proved unreliable for obtaining all relevant documents.
Mr. O'Neill refers to a number of further passages, including the averment that 21 hard drives were reviewed manually by Mr. Quinn and Mr. O'Byrne and no relevant documents were found. He submits that it has been suggested that only BCM and junior counsel made decisions as to relevance. In 2009 however, there was a review of relevance by Mr. Quinn and Mr. O'Byrne. Mr. O'Neill also notes the review in 2009 but submits that it was only after Lennon Heather raised a query regarding email accounts of Mr. Blain that the plaintiffs looked further into the matter and found a significant number of emails. This again shows the practice which seems to have developed in 2008 of placing the onus on the defendants' solicitors to raise queries as to the adequacy of discovery.
Mr. O'Neill notes averments in Mr. O'Byrne's affidavit of 4th November 2009 concerning search terms and wonders how the plaintiffs could have overlooked the expanded list when Mr. O'Byrne was making his very comprehensive affidavit of 6th October and had three months to consider this element of that affidavit. He queries why Mr. O'Byrne did not indicate to the Court that what it had been told regarding search terms was not entirely correct. It seems fundamental to identify the entire scope of the search terms used if the use of search terms is appropriate. In addition, Mr. O'Byrne avers that BCM had adverted to the use of search terms as a means of checking whether all relevant documents had been retrieved. Mr. O'Neill submits that BCM identified it for this purpose, not for carrying out the search but rather for checking. He also suggests that the reason why we are not told what the non-exhaustive list suggested by BCM is may be because it was much more extensive than the list used by Menolly. Mr. O'Byrne then states that there was a breakdown in communication, a phrase which gives the Court no insight as to what happened. From what is not stated it must be inferred that there was no follow-up on the part of Menolly or BCM with the other regarding this very significant aspect of discovery. Mr. O'Byrne then reveals that the use of search terms to locate documents, and not simply to check whether all documents have been retrieved, was not brought to BCM's attention until May 2009. Mr. O'Neill queries why all of this was not included in Mr. O'Byrne's affidavit of 6th October and why Mr. Butler, having referred to that affidavit in his affidavit of the same date, did not correct the wrong impression given. Had Mr. Lennon not criticised the electronic searching, Mr. O'Neill wonders whether the Court would ever have learned of the position as identified in Mr. O'Byrne's affidavit of 4th November. No explanation is given for this complete change in information given to the Court. Mr. Butler had said in his affidavit of 25th May 2009 that extensive advices had been given to Menolly senior management. He should therefore have stated that he meant to say that they gave advices as to hard copy discovery but were not involved in the e-discovery. Mr. O'Byrne states that the discovery process was overseen and controlled by BCM, an averment contradicted by what he says in relation to e-discovery. We are not told what enquiries, if any, BCM made as to electronic information which would be included when these issues were raised from October to December 2008.
Even if the search methodology used was comprehensive and searched the hard drives and the Menolly central server, there is an enormous limitation on the methodology used. The shortcomings of this process are identified in the report from Servient Inc. It states that e-discovery begins with the identification and preservation of potentially relevant electronically stored information (ESI) The litigant should carefully document the potential data sources. Mr. O'Neill submits that that was clearly not done here. The plaintiffs failed to identify the most fundamental source of electronically stored documents, that is to say hard drives and the main Menolly server. The report also states that the litigant should identify all employees who may have created or stored potentially relevant ESI and the location of all such ESI stored by employees. Mr. O'Neill submits that this was a step which it would appear the plaintiffs did not take. The report states that thereafter, a litigant should copy potentially relevant ESI to a static archive. The litigant should conduct the collection with either forensic imaging tools that take an exact copy of the entire drive, CD, server, etc. or active file collection tools that collect selected files. Mr. O'Neill submits that that does not appear to have happened here.
The report states that the collected data is then processed to enable a search filter to be applied. It is essential that the parent/attachment relationship for emails is maintained during the processing so that the legal team can review the true representation of the actual email. Mr. O'Neill submits that that was not done. The attachments to parent documents were separated in such a way that it is impossible to locate those attachments and to relate them to the parent documents. The report also states that the aforesaid processing must also address file encryption since files are often protected by passwords what will restrict the ability to search the files unless the passwords are removed. Mr. O'Neill submits that we are not told whether that was done.
The report goes on to say that the processing phase also requires an identification of documents that do not have text and, therefore, are not searchable. An example of such a file would be a document scanned and emailed. Such a document is in a format that is not searchable and is therefore sure to be missed in any search. Mr. O'Neill submits that that must be one of the most fundamental and obvious shortfalls of any form of electronic searching. The report adds that the collected ESI should then be searched to identify documents that should be reviewed by the legal team. Studies have shown that a single run of a few

key words will not reliably identify responsive data. Servient's experience is that it is almost certain that a single search with a handful of terms will miss a large percentage of the responsive documents in the collected data set. Finally, the report states that a proper search process involves the design of a search protocol with input from both the client and the opposing parties. The lawyer must be the one who directs the search as the lawyer's involvement is essential to the design of a reasonable search protocol. Mr. O'Neill submits that there was no lawyer involvement in 2008, and no lawyer involvement in the identification of a reasonable search protocol. The intention to use a searching protocol was not disclosed to the defendants. This is essential to ensure that a search protocol is appropriate and likely to collect all of the relevant documentation.
Mr. O'Moore, on behalf of the plaintiffs, submits that Mr. O'Neill has been careful to confine his comments to the 2008 discovery, and there is no doubt that the 2008 discovery was not done properly. However, Mr. O'Neill submits that his comments are not so confined. Even in the 2009 discovery the Court is not told of the extent of the search words used and the defendants are not told of this until the affidavit of 4th November. No attempt was ever made to involve the defendants in the identification of the appropriate search method. In addition, even after they received the Servient report the plaintiffs did not attempt to address these shortcomings in the most recent affidavits. It must therefore be surmised that the shortcomings, both in 2008 and 2009, are recognised as being valid criticisms and shortcomings which still exist in the process. The process of using search words will almost certainly miss a large percentage of the responsive documents in the collective data set. That criticism is levelled at both the 2008 and the 2009 discovery.
Mr. O'Moore submits that, although it is true that the defendants were not told of the extra search terms in June 2009, they were told of the earlier 37 search terms and given a copy of these at that time. There was no complaint about those search terms or about e-discovery in Mr. Lennon's affidavit of September 2009. No complaint was made about the search terms until the affidavit of 27th October 2009. In addition, the Servient report is not put in any context. It is not known what Mr. Wilson of Servient was asked. In addition, the defendants are not entitled to an insight into the plaintiffs' discovery process which they did not afford to the plaintiffs. Mr. O'Moore also submits that, in relation to the plaintiffs' motion concerning the defendants' discovery, Mr. Lennon and Mr. Lagan have never identified what they have done regarding the retrieval of electronic documents. Mr. O'Moore submits that it is wasteful to spend a great deal of time exploring the 2008 discovery, which he concedes was a mess.
Mr. O'Neill submits that it was not until the affidavit of 4th November that the defendants were informed of the 51 search terms used. In addition, what the Court was told in June 2009 regarding search terms was not on the basis of an affidavit. What the Court is told in this case as to aspects of discovery has on almost every occasion proved incorrect. In this regard Mr. O'Neill refers to the increases in the number of documents the defendants were told in 2009 had not been discovered. On this basis any criticism that the defendants have not dealt with what counsel for the plaintiffs indicated to the Court in circumstances where the defendants know it will be reduced to affidavit, at which stage a full picture would be hoped for, is unjustified. The defendants cannot be criticised for not anticipating the contents of Mr. O'Byrne's affidavit, which might involve wasting the Court's time by exploring avenues which later prove to have no substance. In addition, the Servient document was only received on 23rd October. What the Court was told regarding the 2008 and 2009 searches was misleading. As to the defendants' discovery, Mr. O'Neill submits that they did not use electronic searching. They looked at the documents, as the plaintiffs should have done and as seems to have been suggested by BCM in 2008. BCM stated that electronic searching was useful for checking to ensure that everything relevant has been identified, not for carrying out discovery.
Mr. O'Neill submits that the defendants could not and could not be expected to deal with shortcomings in the 2008 and 2009 discovery until they were told what had taken place. They were told that an explanation would be given.
He submits that, although the plaintiffs concede that the 2008 discovery is a mess, it is characterised as an innocent and explainable one, and it is neither. It results from an absolute disregard for discovery obligations. It was bound to be a mess not just because of unfortunate events but because of breakdowns in communications. It was doomed from the outset and all parties must have been aware of that.
Mr. O'Neill refers to the group of 37 search terms. Additional search terms were added on 18th June and on 20th June 2009. In relation to those search terms, they seem to have very limited regard for the agreed discovery. They seem to comprise mostly the names of the estates and the various roads within them. They would be appropriate to include, but they were prepared at a time when serious issues were arising as to the adequacy of the diaries, and in relation to the DBFL reports and the documentation derived from suppliers to the plaintiffs, yet none of those terms were included. No suppliers' names were included, there was no mention of Goode Concrete, Halston or CM Groundworks, nor was there a reference to DBFL or gypsum, for example. Mr. O'Neill submits that one could no doubt list a vast number of words that were not included, but at least those particular words or categories of words should have been included.
One of the search terms is 'Baldoyle Phase 1'. Baldoyle is Myrtle. Mr. O'Neill queries why the search term is limited to Phase 1 when Myrtle was being developed and commonly referred to as Baldoyle. Discoverable documentation relating to Phase 2 might emerge. There seems to be no justification for limiting it to Phase 1, thereby missing any document relating to Phase 1 which does not contain the phrase 'Baldoyle Phase 1'. It is difficult to imagine that people producing documentation concerning Myrtle would refer to it as Baldoyle Phase 1 rather than simply Baldoyle.
The other limitations are that searches were confined to emails together with such attachments as could be read, an inability to search scanned documents or manuscript documents including PDF documents. Mr. O'Neill questions whether the use of optical recognition software was considered if the use of such terms was deemed appropriate.
Looking at Mr. O'Byrne's averments considering deficiencies in the 2008 discovery, it is hard to imagine, when numerous queries were raised from October onwards, why these matters were not addressed. Mr. O'Neill refers to two passages in the plaintiffs' submissions, delivered in February 2009, concerning their motion to strike out the defendants' defence. The first is a passage from the judgment of Budd J in *Atlantic Shellfish v. Cork County Council* (Unreported, High Court, 15th August 2006). The second passage is from the judgment of Kelly J in *Balla Lease Developments Ltd. v. Keeling* (Unreported, High Court, 21st December 2006). Both concern the duties of a solicitor in relation to discovery. Mr. O'Neill submits that the plaintiffs are clearly fully cognisant of their obligations as to discovery. Those submissions must have prompted a review within the minds of the plaintiffs and their advisors as to how they had approached the discovery up until the start of the trial. Unfortunately, that does not appear to have occurred. On the contrary, Mr. Butler's affidavit of 25th May 2009 gives the impression that discovery was under the full control and supervision of BCM and a number of junior counsel.
The actual position is that there was no BCM input in the context of search words; no communication of discovery categories to employees; no meetings with Menolly staff after February 2008; Menolly personnel generally of the view that only houses affected by pyrite were relevant; no individual or group taking charge to ensure that all locations were searched; it was left to individual employees to gather documents; and Mr. O'Loughlin, the co-ordinator, believed that privileged documents need not be sent to BCM, so he decided what was privileged. The plaintiffs did not bother to search or ensure that there was compliance with their obligations. Even the explanations given for the shortcomings are inadequate. Mr. O'Neill queries why the plaintiffs will not disclose the email circulated by Mr. Dalton to Menolly employees on 29th January 2008, and why the plaintiffs will not disclose what the employees were told at the meetings in February 2008. He wonders why BCM's lack of involvement in the e-discovery was not divulged immediately. He also queries why affidavits were not procured from the relevant people, for example Mr. Ross Sr. and Mr. Ross Jr. in relation to what was done with the Monaghan report. Mr. O'Neill submits that they are probably aware that if they do not swear an affidavit, they cannot be cross-examined. Instead, Mr. O'Byrne, who does not appear to have been involved with the discovery process other than to swear the affidavits of discovery, is the person who makes the

affidavit identifying the process undertaken by Menolly in the 2008 and 2009 discovery.
There has been a most cavalier, reckless attempt by the plaintiffs to comply with their discovery obligations, not only as to the original discovery but also regarding the manner in which, when shortcomings were identified from October 2008 onwards, there was a failure to deal with the issues raised and an apparent failure of between BCM and Menolly to communicate or a failure on Menolly's part to disclose the shortcomings that they must have known existed. Throughout Mr. O'Byrne's affidavit of 6th October there are statements to the effect that the plaintiffs wanted to get their case on. Mr. O'Neill submits that that is why the discovery was as inadequate when the case started as it was. The plaintiffs' sole concern was to get their case on against a background where they were being pursued by the homeowners. This desire to get a case on cannot disregard the rights of the defendants. The case was proceeded with in circumstances where the plaintiffs knew of the prejudice likely to be caused to the defendants by inadequate discovery. In dealing with this case the defendants are in an obvious and in some ways unique position of disadvantage because they were not present when these estates were built. The plaintiffs were present on a daily basis and know what was happening on the estates. Therefore, apart from site investigations and house investigations taking place some years after the houses were built, the only other source of information and the most important one is the document trail. Deficiency in the document trail must inevitably lead to significant prejudice to the defendants.
Mr. O'Neill refers to a letter, discovered in 2009, from BCM to a homeowner indicating that pyrite is present in his house. It is unclear why that letter was not previously discovered. If it is an electronic document it contains search words. Reference is made to this letter, and a number of other documents discovered in November 2009, not to suggest that a prejudice arises from the failure to discover them earlier but to query why they were not discovered and to raise the question of whether full discovery has been made.
Mr. O'Neill also refers to the Helsingor documents recently obtained from Helsingor through non-party discovery, some of which should have been picked up in the e-discovery. These documents are discoverable but are not referred to as having any particular significance but rather to point out that there documents that should have been discovered and have not been. There is an email of 30th January 2007 from Brian Clarke to Matt Carroll in Menolly referring to the Peadar Monaghan visit. However, Peadar is spelled 'Peader' here. The search spelling used was 'Peadar' and there were a number of spellings of the Monaghan name used in the plaintiffs' list of words. The email also refers to 'phase 1', which was one of the search terms. If it had been properly applied this document should have surfaced. The defendants were told that this document could not be located. There is also a contract programme headed 'Talavera House, phase 1, Baldoyle'. The plaintiffs stated that they could not locate this document, but it contains search words: Talavera was one of the search words, as was phase 1 Baldoyle. There is also a letter dated 26th March 2007 referring to 'phases 1 and 2'. Because the relevant search term was 'phase 1', the search would not find 'phases 1'. It also uses the spelling 'Peader' for Peadar, so again it would not be picked up. A further letter, dated 14th March 2007, uses the spelling 'Peadar' and refers to 'Baldoyle phase 1', so it should have been caught.
However, Mr. O'Moore submits that there is no reason to believe hard copy correspondence was scanned in at all. The letter of 14th March 2007 is a hard copy letter and would not appear in any electronic storage form. The letter encloses a CD, so it must have been sent in hard copy form. Mr. O'Neill submits, however, that we know there were attachments to emails which the defendants are told cannot be found. There is no doubt that the email is a computer-generated document. Commenting on the letter of 26th March 2007, he acknowledges that an electronic search based on search terms will not pick it up if it is not on a computer, but they either have the letter or hard copy or received it electronically. In addition, the reason put forward for these documents not being identified was that they were not picked up by the key word search. Mr. O'Neill points to the statement to this effect in respect of the letter of 26th March. He submits that the illustrations given are not intended to be exhaustive.
Mr. O'Moore refers to the defendants' e-discovery and notes the issue regarding the phrase 'digital archives' used in a letter from Lennon Heather dated 5th October 2009. This matter is addressed in Part II of the present judgment, which concerns the plaintiffs' motion to strike out the defendants' defence for want of discovery. He queries a number of the defendants' statements concerning their e-discovery contained in correspondence from Lennon Heather. Mr. O'Moore also refers to the averment of Mr. Canavan in his affidavit of 9th November 2009 that he spent a weekend carrying out enquiries and reviewing the paper and electronic files of the Northern Ireland companies. Mr. O'Moore submits that this mean he was able to read every single electronically stored document on the part of the second, third and fourth defendants in a weekend, because Mr. O'Neill said that the defendants read every document.
Turning to the plaintiffs' e-discovery, Mr. O'Moore submits that as to the challenge to their discovery at this time there are a limited number of documents discovered on 4th November, several of which were tidying up exercises, one of which arose because the plaintiffs had acquired documentation in October. There is also the suggestion that Helsingor documents should have been discovered but the plaintiffs do not believe they are relevant.
Mr. O'Moore refers to a booklet entitled 'E-retrieval limitations'. It contains only 17 documents. The first three relate to a communication of a health and safety document which has no significance and none is advanced by the defendants with regard to it. The defendants say it falls within category 64. However, a comment in respect of this document notes that it does not contain any key words, so this document does not indicate a failure in the search. The defendants can advance no loss to them in relation to this document. It might be suggested that although this document may be anodyne, but we do not know what other documents have not come to light. However, the line must be drawn somewhere. The plaintiffs have discovered 130,000 documents between the two discoveries. They have used search terms to interrogate an electronically stored range of over 1,000,000 documents, and the law suggests that that is an appropriate thing to do. The key words were announced to the Court without any complaint being made until late October.
In respect of an email from Mr. Clarke to Mr. Carroll of Menolly the defendants comment that it is unclear why this was not retrieved by the keyword search as the word Phase 1 is used. However the defendants do not say that this document is discoverable. This email concerns arrangements for Mr. Monaghan to visit Baldoyle. This is of marginal significance. The defendants also refer to an email from Mr. O'Byrne to Mr. Carroll. They state that no keywords appear in this email which demonstrates the limited nature of the keyword search. However they do not suggest that this is a discoverable document. This is unsurprising considering that the email states that Menolly would issue a board pack to the Helsingor Board prior to a particular meeting containing a section on various items. The absence of keywords in this document shows the efficacy of this search because this document does not add anything and it would have been a wasteful exercise to pick it up. There is also a program containing the word Talavera. However the defendants are acting on the assumption that the document appears to be generated from a computer. Mr. O'Moore queried as to whether it was a Menolly computer it was generated from, if it was generated from a computer. The defendants note that a further document contains keywords but also note that it may never have been saved electronically. Mr. O'Moore queries how it could have been stored electronically as it is a Ballymore document sent to Menolly enclosing a CV.
The defendants refer to a further document which refers to "Phases 1" instead of "Phase 1" and refers to "Baldoyle Phase 1". It also refers to Mr. Monaghan but gives his first name as "Peader" instead of "Peadar". However Mr. O'Moore submits that the defendants knew they were using those keywords and never complained about it and in addition the document itself would actually be of assistance to Menolly in that it shows Menolly taking issue with certain statements on the Monaghan Report. A further document was not picked up because it does not contain keywords. However the document simply discusses the decision to retain a clerk of works to give comfort to the directors in relation to various matters. Mr. O'Moore queries how it is seriously suggested that there is some form of loss resulting from the failure to discover this document. A further document was

not picked up because of a misspelling of the name Peadar. However that was a document relating to Mr. Monaghan's name been suggested for a particular position. Mr. O'Moore queries whether this gives rise to loss and whether it was discovered by the discovery at all.
The defendants complain in respect of another document that it was not retrieved because it did not contain keywords and if it was stored electronically it would therefore not have been picked up. This document refers to a payment being made by Helsingor to Menolly but conditional to some extent on the way in which Menolly was carrying out the Baldoyle development. However this document does contain the word pyrite so if it was stored electronically it would have been picked up but it was not. Mr. O'Moore refers to another document which refers to a fax from Mr. Clarke. Mr. O'Moore queries what the defendants' point is in referring to that document. The defendants also refer to a further document in respect of which they say that if it was stored electronically it would have been retrieved through the keyword search. However it appears to be a fax or a letter. The defendants also refer to another document in respect of which they state that it is unclear as to why it was not retrieved using a keyword search because it contains the word Myrtle. This document is said to be relevant to a category in respect of the ownership and unsold units in Myrtle. However Mr. O'Moore submits that if it has said relevance it is very tangential. The letter relates to an instruction to BCM not to release the purchaser of 38 Myrtle house from the Contract.
There is also a certificate of Practical Completion from Project Architects in respect of which the defendants state that if this document was stored electronically it should have been retrieved by a keyword search. Mr. O'Moore queries why a certificate would be assumed to be electronic stored. There is also a letter from Mr. Carroll to the Board of Directors of Helsingor enclosing a schedule about the units in Myrtle which are complete and are to be handed over. The defendants state that this document contains the keyword Myrtle. However Mr. O'Moore submits that it is difficult to see why it would be picked up through a discovery and it is not one of the examples given by Mr. O'Neill.
The adoption of search terms was known to the defendants before the plaintiffs completed the June discovery. If they are concerned about documents not being picked up because of search terms they should have approached the plaintiffs and sought an explanation when they received the documents in respect of which they have a concern.
Instead the defendants assembled a range of accusations about the e-retrieval system, none of them referring to a document that is of any significance and in circumstances where they protested the plaintiffs' discovery by obtaining non-party discovery not only from Helsingor but from a range of other sources. The plaintiffs are checking to ascertain whether or not two or three of these documents were missed by the keyword search even though they contained keywords.
Mr. O'Moore submits that adequate discovery has been made. He refers to *Digicel (St. Lucia) Limited & Others v. Cable and Wireless plc.* [2009] 2 All ER 1094. In that case the plaintiffs were alleging conspiracy and sought discovery of certain classes of electronic documents. Morgan J noted the possibility that in a conspiracy case a revealing statement might be found in an email. He noted that as against that the applicable rules did not require that no stone should be left unturned as they required a reasonable search for relevant documents. He stated that they may mean that a relevant document even "a smoking gun" is not found. This attitude is justified by considerations of proportionality. Mr. O'Moore submits that there is also Irish authority for the reasonable search concept and the concept of proportionality. Mr. O'Moore refers to a number of passages from the judgment in Digicel. Placing emphasis on a passage to the effect that the proportionality of adding an additional keyword must be considered, Mr. O'Moore submits that although the approach in Digicel is based on rules which apply in England it is consistent with the approach that should be taken in Ireland with the use of keywords. A keyword search endeavours to eliminate from a huge range of electronically stored documents which ones have a relevance and which ones do not. It is not simply a case of carrying out a keyword search and the results of the search being a discovery that is made. Mr. O'Moore also refers to *Dome Telecom Limited v. Eircom Limited* [2008] 2 I.R. 726. Unlike in Digicel no special rules apply to new discovery in this case. In *Dome Telecom* the High Court ordered discovery of information held on a data base. The Supreme Court allowed the appeal. Mr. O'Moore refers to the dissenting judgment of Geoghegan J which he submits is to some extent consistent with the other judgments of the Supreme Court in that case. Geoghegan J stated that the Courts are not necessarily hidebound by interpretation of a particular rule of Court and that more general concepts of showing fair procedures and efficient case management are frequently overriding considerations. Mr. O'Moore refers to a number of further passages from the judgment of Geoghegan J in *Dome Telecom*. Mr. O'Moore submits that the judgment of Fennelly J also indicates that the Court should be astute to ensure that genuine discovery cannot be effectively trammelled by the rules. Fennelly J also referred to considerations of proportionality and referred to the burden on the defendant of ordering the discovery sought and the likely benefit to the plaintiff if such discovery were ordered.
Kearns J in *Dome Telecom* stated that the assessment of what is necessary or proportionate must take account of any factual admissions or concessions made by either or both parties which can resolve the matter. Kearns J also referred to necessity and proportionality and stated that the more necessary a document is the more proportionate it will be for the requesting party to obtain discovery. Mr. O'Moore submits that the approach in *Dome Telecom* is entirely consistent with *Digicel*. He submits that if that is the approach taken towards ordering discovery it follows that it is the approach that should be taken in policing the discovery actually made or to be made particularly where a large amount of documents are involved and were possibly each side could continue always looking for further discovery from the other.
Mr. O'Moore refers to *Atlantic Shellfish* in which the Court was faced with two appeals from the discovery orders made by the Master of the High Court. Budd J refers to a duty of diligence searching which an order for discovery imposes. He states that a party is required to make a reasonable search and identifies four factors which are among those relevant in deciding the reasonableness of the search. Mr. O'Moore submits that this case and the decision in *Dome Telecom* are consistent with the approach in *Digicel*, namely that a reasonable search must be undertaken but the standard is not that no stone should be left unturned.
Mr. O'Moore refers to an excerpt from Mr. O'Neill's submissions in which he said that there was no attempt in the most recent affidavits to address the shortcomings identified in the survey and report from which it must be surmised that the shortcomings both in 2008 and 2009 are recognised as valid criticisms and shortcomings which still exist. Mr. O'Moore submits that it should not be inferred that the plaintiffs accept that criticisms levelled for the first time at the end of October are in any way justified. Mr. O'Neill also stated that the process of using search words is almost certainly going to miss a large percentage of the responsive documents in the collective data set as is clearly stated in the Servient report. Mr. O'Moore submits that that is incorrect and even the Servient report does not say that. The Servient report states that one attempt at searching using keywords will miss a certain amount of documentation.
As to when the defendants learned that the plaintiffs were using search words Mr. O'Moore queries why, if they did not believe the 37 search words submitted to the Court in June were the search words being used, they did not raise this matter earlier. The second explanation given by the defendants as to why they did not raise the use of search terms sooner is that they were waiting for an affidavit explaining how the discovery was made. However Mr. O'Moore submits that they were not waiting to be told how the 2009 discovery was being made as they were told that on 18th June 2009. The third version given by the defendants is that Mr. Lennon indicated a concern in relation to search terms in his affidavit of 15th September. Mr. O'Moore submits that this is not the case. In addition Mr. MacCann submitted that search terms were used without informing the Court. Mr. O'Moore submits that the Court was told about the 37 search words and Mr. MacCann's instructing solicitor was also provided with them. Mr. O'Moore also notes a statement of the 18th June that the extension of the search terms from 12 words to 37 words made an extra 9,000 documents available for review. Mr. O'Neill refrained from commenting on the search terms other than to point out that there was no reference to Moyglare among them and that he would have thought Moyglare would

be one of the terms that should have been put in. Also on that occasion Mr. O'Moore indicated that it would be helpful to know in the immediate future if a serious issue was to be raised about the search terms. Despite that express invitation the defendants did not raise any issue about the search terms on any of the number of occasions on which the Court has sat since the 18th June and these discovery issues have been raised in Court during that time. No issue about the search terms was raised in correspondence either. Mr. O'Moore also submits that no issue about the search terms was raised until the affidavit of 27th October.

Mr. O'Moore refers to the Servient report. It is unknown what Mr. Wilson, the author of the report was asked to express a view on or what material he was given. The report indicates that it gives a brief overview of the current standard practice to discovery of electronic ally stored information in the United States. It is not a report from an expert operating in Irish circumstances. The report states that studies have shown that a single run using a few keywords will not reliably identify responsive data. It states that based on Servient's experience it is almost a certainty that a single search with a handful of terms will miss a large percentage of the responsive documents in the collected data set. Therefore Mr. O'Moore submits Mr. Wilson is not saying that one cannot use a few key words. He is saying that it is necessary to perform a few runs using the same keywords. Mr. O'Moore also submits that this is a report of dubious origin with no qualifications given in respect of Mr. Wilson or his authority to give this evidence. The plaintiffs have carried out a new discovery process with two specialists in this country. Mr. O'Byrne avers that the search in 2009 was carried out with the co-operation and assistance of BCM Hanby Wallace and of Price Waterhouse Coopers. The plaintiffs submit that that is sufficient.

The defendants refer in their outline written submissions to a duty to engage or co-operate including a duty to assist in the prompt and economical disposal of litigation Mr. O'Moore queries how this later duty is fulfilled by remaining silent in relation to the keywords the discovery is long since completed and deploying this objection at the end of October. This was a mammoth discovery exercise being conducted in a very limited period of time. Had the defendants suggested the addition of new search words the plaintiffs would have had to consider this and would have had to consider whether to request more time to make the discovery. The only intervention was the suggestion of Moyglare's search term. This suggestion was acted upon and Moyglare was included among the search terms.

Mr. Barniville in reply submits that both the hard copy and electronic discovery in 2008 were conducted in a negligent manner. He also submits, referring to the decision in *Donovan v. Landy's Ltd.* [1963] I.R. 441, that recklessness means a high degree of carelessness and that there was recklessness in this sense in the manner in which the original discovery was conducted. It is not necessary for the defendants to individually go through each failing and say whether it is negligence or recklessness and if so did it cause a particular loss. Instead the cumulative effect of the failings is what is relevant. The defendants submitted that the 2008 discovery was negligent and reckless and Mr. O'Moore has not given a substantive response to the substance of the criticisms.

Mr. Barniville submits that between January 2008 and May 2009 when BCM were informed that the search terms had been used to search for documents the issue of search terms does not appear to have arisen between BCM and the plaintiffs despite the fact that during that period some 11 affidavits of discovery were sworn on behalf of the plaintiffs and there were challenges to the discovery in late 2008 and late 2009 and affidavits were sworn in response to those challenges.

Mr. Barniville submits that the criticism that the defendants did not properly engage in relation to the use of search terms when they were first disclosed on the 18th June is unfair. On that date Mr. O'Moore indicated to the Court that the numbers of documents that had not been discovered were very significantly more than had been anticipated. He identified the various classes of error which at that stage appeared to be part of the reason why these documents were only then discovered. Two of the reasons related to e-discovery, the first being the use at that stage of 12 search terms which was later increased to 37 and the second concerning the search carried out by Waterford Technologies. Those 37 search terms were handed up to the Court on 18th June in circumstances where the discovery was to be made the following week the 25th June. Mr. O'Neill states that it was very difficult to express any view on the position at that stage and it would be necessary to look at the discovery. He expressly stated that he would not comment on the search terms save to make the point about Moyglare. At that stage the defendants clearly did not know the full extent of the discovery or all of the problems in relation to the discovery which was to be made. At that time discovery was to be made the following week so that was not the time for engaging on the use of search terms. On the 7th July Mr. O'Neill stated to the Court that the search words used were undoubtedly inadequate. Mr. Barniville submits that at that stage the understanding was that there would be no further discovery after the additional discovery that had already been made. However further problems appeared to have arisen with the new discovery searching after that. The position was evolving at the time and the defendants were unaware of a number of things. It was reasonable to wait to see the discovery and see the explanation being advanced for the historic difficulties and how they were being rectified in relation to the new discovery. The defendants did not have these detailed explanations when Mr. Lennon's September affidavit was sworn and he adverted to the issue of search terms in general terms rather than in detail. In that affidavit the defendants could only go into detail after receiving Mr. O'Byrne's affidavit of the 6th October. In addition again the search terms were increased from 37 to 51 in June and that was only disclosed to the Court in Mr. O'Byrne's affidavit of the 4th November.

In relation to the Servient Report Mr. Barniville submits that it is unfair to suggest that it was held back by the defendants. This allegation was not made on affidavit and Mr. Lennon's affidavit of the 27th October makes clear that the report was received on 23rd October. Mr. Barniville points to a number of problems highlighted by the Servient Report including the difficulties associated with the single run with the use of search terms. The defendants do not know how many runs were done in this case. The defendants dispute that it is permissible under Irish law to use search terms, but even if it is permissible, if agreed between the parties or directed by the Court, that was not done in this case. In addition the defendants maintain that the discovery made by the plaintiffs now is inadequate. The defendants do not accept that the discovery of the 4th November was just a tidying up exercise. Mr. Barniville submits that it is a much more serious matter than that, particularly in view of the history of the discovery in this case and the message that must have been very clear to the plaintiffs, if not in 2008 then in June 2009, that the discovery had to be fully and properly made at that stage. Substantial additional discovery was received on 7th August and further documents on 4th November. The discovery of 4th November reveals a problem that had been identified from the outset which is the attachment problem. One of these attachments is the preliminary safety and health plan referring to the Gaybrook Stream, which the defendants regard as a significant document. No adequate explanation as to why it was not previously discovered has been given.

Mr. O'Moore suggested that the defendants should have gone to Helsingor seeking discovery themselves. However the defendants would have had no reason to do this in 2008 and it is not excuse for failing to discover relevant documents such as the Monaghan Report and the Helsingor Minutes at the appropriate time in 2008. Mr. O'Moore suggested that a letter from Mr. Monaghan to Mr. Clarke and Mr. Ross Jnr. dated 25th June 2007 was irrelevant to the case however Mr. Barniville things that it is relevant and important in the context of the lead up to the involvement of Mr. Monaghan. It is particularly important in the context of the whole issues of workmanship and quality.

Mr. O'Moore also suggested that the Court should look at what the defendants were doing in relation to the discovery. Mr. Barniville submits that that is a matter for the other motion and in any event Mr. Lagan avers in his affidavit of 2nd November that the first defendant has carried out a search of all of its electronic records and Mr. Lagan is satisfied that no other documents exist.

Mr. Barniville submits that there are documents which are undoubtedly electronic and which contain search terms and have not been picked up in the discovery. They emerge from the Helsingor discovery. Mr. Barniville gives two examples of this the first is

an email from Mr. Clarke to Mr. Carroll of Menolly. It addresses the visit of Mr. Monaghan to assess various quality issues and there is a reference to 'Phase 1', which is a search term. The second example is an email from Mr. O'Byrne and Mr. Clarke of Ballymore and it contains the search term Myrtle. The second flaw emerging from these documents is that important documents containing terms that are very similar to search terms but not containing actual search terms are not picked up. Mr. Barniville refers in this regard to a letter generated by Menolly and sent to Helsingor. It is a response to Mr. Monaghan's report. Again the defendants say that this is an important document but it was not picked up because it states Phases 1 instead of Phase 1 and the name Peadar is mis-spelt. This letter was clearly generated on the Menolly system. These are merely examples of how the discovery is still deficient.

Mr. O'Moore said that the plaintiffs were looking into why these particular documents have not been picked up but that matter should not be arising at this stage. If both parties came together to agree search terms Mr. Barniville is unsure whether it would take long to complete such a search. He submits that a number of names of people identified in the letter for voluntary discovery were not included in one of the search terms and Helsingor was not a search term. Mr. O'Moore submits that if the Court is of the view that there is an issue about the search terms the plaintiffs would of course engage on that issue. He also submits that the Helsingor discovery was made available to the defendants on 21st October but the first time the plaintiffs' attention was called to those search terms was on 17th November by Mr. O'Neill. A letter enquiring as to why documents appear not to have been picked up would have been expected. If there is any outstanding issue with regard to the discovery that the Court feels has been inadequately addressed the plaintiffs unequivocally undertake to meet that.

Mr. Barniville refers to a letter from Lennon Heather to BCM in 2008 seeking to have what is known as a discovery e-room an offer to engage in relation to the discovery.

Mr. Barniville submits that the rules in this jurisdiction do not permit the use of search terms unlike in England where search terms are permitted under particular conditions requiring early engagement and co-operation at an early stage. However if the matter had been raised when discovery was being sought and being made initially the parties could have engaged on the matter and people would have known whether the search terms were appropriate and whether the search words used at the time were appropriate. If there was disagreement the issue could have been brought to the attention of the Court. Mr. Barniville submits that while the search terms are not permitted under the rules he would accept that if it had been expressly agreed between the parties or was directed by the Court it may have been admissible. However that did not happen here.

In *Digicel* the Court was clearly operating under the express provisions of the relevant rules and a practice direction. The Court directed that additional search words should be used. That is understandable where there is an established regime dealing with search terms, which is not the case here. Mr. Barniville distinguishes *Dome Telecom* on the grounds that discovery was being dealt with in that case at the time when it was being sought so it was open to the Court to determine whether or not the requirements of relevance and necessity the later concept incorporating proportionality were satisfied in the case. Here the issue was raised approximately a year after the initial discovery was made. Mr. Barniville also submits that irrespective of whether search terms are used there is an obligation to ensure that all documents which would otherwise have been required to be discovered under the traditional rules are caught by the search terms. Even in the United Kingdom there would generally be an obligation to manually search or visually search electronic documents. Matthews and Malek which deals with the law in the United Kingdom states that the use of keyword searches will rarely be sufficient to ensure the disclosure is given of all documents falling within standard disclosure. It will usually be necessary for the email accounts of the persons most closely involved to be searched individually by a member of the legal team. Mr. Barniville refers to the judgment of Budd J. in *Atlantic Shellfish* but notes that Budd J refers to standard disclosure which is not a concept which exists in Irish law and the paragraph relating to that matter is almost a direct quote from the Civil Procedure Rules in the UK. This part of the judgment is not part of the guidelines Budd J was laying down which start later in his judgment. Mr. Barniville refers to a passage from the judgment of Budd J dealing with the duty of solicitors in respect of discovery and submits that this shows that Budd J was not earlier in his judgment narrowing the extend of parties obligations on discovery. Mr. Barniville accepts that discovery encompasses the concept of proportionality. However he queries how it could be suggested that the discovery in this case was disproportionate in circumstances where the plaintiffs had accepted that the discovery made up to August 2009 and presumably also up to November 2009 is relevant, necessary and by implication proportionate. There is no evidence for the Courts to suggest that any of the gaps which have been identified would be disproportionate for the plaintiffs to address.

Conclusion

It is clear and not disputed that the plaintiffs' discovery as carried out in 2008 was deficient in a number of respects. The plaintiffs acknowledge that the discovery was "a mess". The plaintiffs have sought to address the deficiencies which arose and retained the services of a dedicated team of Junior Counsel and the additional services of Price Waterhouse Coopers, Chartered Accountants, to assist in the process. The plaintiffs at all times were under a duty to the Court and the defendants to ensure that full and proper discovery was made arising out of the categories of discovery. The plaintiffs opted for electronic search terms and the initial searches were clearly deficient. The Court does not consider in the particular circumstances that arise on this motion that it is necessary to consider or decide the issue as to whether or not the use of search terms is permissible under Irish Law for the purposes of making discovery. The plaintiffs have apologised to the Court and the defendants for the deficiencies in their initial discovery, and in June 2009 indicated to the Court 37 search words which they were proposing to use. The Court does not consider that criticism of the defendants' solicitors for not engaging at that point in time with regard to the search terms as outlined to the Court is unfair, because the onus is on both parties to engage and, if the defendants considered that the 37 search words were inadequate they did have the opportunity to suggest additional terms and, indeed, they did so in respect of one term, "Moyglare", which was added by the plaintiffs as a search word. Subsequently, the plaintiffs utilised 51 search terms and, with the assistance of the services of Price Waterhouse Coopers, have attempted to remedy the earlier defects. In the Court's view, there remains a concern as to whether or not complete discovery has been made. In this regard, however, the Court has to bear in mind that proportionality is a relevant consideration with regard to discovery. As Murray J. (as he then was) states in the course of his judgment in *Framus Ltd. v. CRH plc* [2004] 2 I.R. 20:-

> "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 of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial."

During the course of submissions on the plaintiffs' behalf, Mr. O'Moore indicated that the plaintiffs were in the process of trying to determine how certain documents which were stored electronically were not found and discovered, bearing in mind that such documentation has subsequently turned up by other means, such as non-party discovery. It is clear from the Servient report that a number of runs may be necessary to ensure that all documentation relevant to the search terms is captured for the purposes of discovery.

The plaintiffs' legal advisors are very familiar with the various concerns that have been expressed to the Court in respect of the e-discovery as carried out by them. The Court has already indicated that it has a concern as to the completeness of the e-discovery as achieved, notwithstanding that the Court accepts that the plaintiffs have made strenuous efforts with the assistance of expert professionals to try to rectify the situation that has arisen. In the circumstances, the Court directs that the plaintiffs' legal advisors set out a programme which they propose to undertake to meet the various concerns expressed,

which programme is to be endorsed by Price Waterhouse Coopers and is to be furnished within an agreed period of time both to the Court and to the defendants' solicitors. The defendants' solicitors in turn are to have the same period of time to respond constructively and in a reasonable manner, bearing in mind the issues of relevance and proportionality. If the parties cannot agree on a final programme the Court will give further directions. As matters presently stand, and having regard to the nature and extent of the e-discovery as made subsequent to the July 2008 discovery, the Court does not consider that the defendants have suffered any irreparable prejudice and the matters arising can adequately be dealt with by the recall of any of the expert witnesses who have already given evidence to the Court and by the making of any amendments to expert reports that are considered appropriate.

Issue II – Failure to Engage

Extensive references have been made in submissions and affidavits concerning allegations that the plaintiffs failed to engage with the defendants in relation to queries raised in respect of adequacy of discovery. By letter dated 6th October 2008 the defendants' solicitors raised a variety of queries noting perceived absences of documentation in the 2008 discovery. These issues were canvassed further in an exchange of correspondence and affidavits. The defendants' solicitors queried a lack of attachments, many of which were unaccounted for even following reviews conducted by the defendants and the plaintiffs. Mr. Lennon's affidavit of 15th September 2009 and the outline written submissions on behalf of the first and fifth named defendants detail the failures to engage with the defendants in this and other respects.The defendants raised queries in relation to a variety of matters, such as concrete data, lime modification and soil testing documentation, architects' and engineers' instructions, minutes of site meetings, documents relating to the location of infill and site diaries. The Court considers that the plaintiffs' responses in relation to these matters were unsatisfactory. If the plaintiffs and their solicitors had endeavoured to adequately deal with the queries raised the major gaps in their discovery would in all probability have been discovered. Many of the difficulties raised in the present motion could therefore have been avoided if the plaintiffs had properly engaged with these queries rather than asserting that they had, in effect, gone above and beyond the call of duty in relation to discovery, when in fact they had not done so.

Issue III – Non-Bay Lane Infill in Houses

On behalf of the first and fifth named defendants Mr. O'Neill submits that there was non- disclosure to the defendants and inaccurate Replies to Particulars were furnished to them. In addition, in July 2008 counsel for the plaintiffs informed the Court that it was relatively easy to identify from the records where fill had been placed and that the plaintiffs' records in that regard were very complete. That led to discovery enquiries being made. An affidavit of 23rd December 2008 stated that the position had been overstated by counsel. However the defendants were not told that Dr. Strogen had prepared a spreadsheet in March 2008 raising question marks in relation to the source of infill in a number of houses. To expect the defendants to test all of the houses even though they were then unaware of the actual constructional detail is unreal. It is quite reasonable to rely as one normally would upon Replies to Particulars. In view of the number of houses the practicality required the defendants to prioritise their enquiries. The plaintiffs well knew that the defendants had not been given the benefit of the doubt in terms of source of infill as had previously been asserted. They knew of complaints in respect of re-test houses and Moyglare houses. They knew there was crushed gravel in some houses which could not be Bay Lane. Even if they did not know that in January 2008, when they became aware of that doubt they surely should have corrected the Replies. The plaintiffs suggest that the defendants should have realised that there was a doubt by applying detective work. The plaintiffs point to re-drilling and retesting of houses. However Mr. O'Neill submits that the defendants were not told why re-drilling and retesting were being carried out. Mr. Lennon points to a letter of June 2008 concerning 4 Boyd House which recommends re-sampling to definitively assess the status of infill in the house. As Mr. Lennon avers in his affidavit of 27th October the defendants took this as relating to the pyrite levels rather than the source of the infill. Mr. O'Neill notes Mr. O'Byrne's averment that source identification was not the primary purpose of retesting and queries how the defendants could then be expected to realise that source identification was a secondary purpose of retesting. When the doubt arose the results should have been handed over to the defendants in accordance with the order of January 2008. The plaintiffs respond to this by saying that these are only preliminary tests. Mr. O'Neill submits that this is incongruous in view of the correspondence sent to homeowners. The plaintiffs also say that this is not data generated in tests as is identified in the order of January 2008.

Mr. O'Neill acknowledges that the defendants had the report of Dr. Strogen of December 2008. However Dr. Strogen does not state that houses that are not on the list are houses that contain non-Bay Lane material. He simply states that the tests are not completed. The December 2008 Report of Dr. Strogen also lists some houses as Bay Lane which we now know not to contain Bay Lane infill. As regards the question marks on maps appended to Mr. Forde's statement the defendants were assured in February 2009 that there was no uncertainty. It is also said that the Bruce Shaw reports should have alerted the defendants to the fact that there were houses containing non-Bay Lane material other than those identified. However, again that involves an enormous amount of detective work. There are now over 70 houses which contain non-Bay Lane material. The defendants should not be blamed for failing to ascertain by detective work information which they would have had but for the plaintiffs' default.

Mr. O'Neill refers to a spreadsheet analysis as to source of infill in respect of Drynam and submits that even if that document was originally privileged that privilege was lost because the Replies to Particulars specifically referred to the source of the infill for Drynam being based on a spreadsheet analysis. Mr. O'Neill refers to averments of Mr. O'Byrne and Mr. Lennon in respect of this issue. Mr. O'Neill also refers to *Buttes Gas and Oil Company & Another v Hammer & Another (No. 3)* [1981] Q.B. 223 and *Hannigan v DPP* [2001] 1 I.R. 378 in support of the submission that the privilege is lost. In addition he submits that even accepting that the Replies were initially given inadvertently in a misleading way the plaintiffs were obliged in law to correct those inaccuracies.

In relation to the assertion that privilege applies to DBFL Reports Mr. O'Neill submits that the contents of these reports were furnished to the homeowners and clearly their purpose was to inform the plaintiffs as to what the position was in relation to each of the houses and then communicate that on to the homeowners. It is somewhat strange to say that the reports were prepared in contemplation of litigation particularly when it is borne in mind that a large number of the DBFL reports were discovered in 2008 with no claim of privilege. There is inconsistency in the plaintiffs approach in this regard. The defendants submit that these documents are not privileged.

In relation to spreadsheets Mr. O'Neill submits that the spreadsheet furnished by means of an attachment to the Reply to Particular 3.9.2 is not the same as the spreadsheet referred to above and there is no suggestion in Mr. O'Byrne's affidavit of the 6th October that it is the same spreadsheet. Mr. O'Neill submits that it was apparent at least from March 2008 that the information being given was misleading as far as the defendants were concerned.

Mr. O'Neill refers to documentation in respect of 8 Stapolin Avenue, a house in respect of which no Bay Lane infill has been found in any of the samples. The defendants inspected this property in August 2008 and it has not been remediated. Mr. O'Neill compares the situation in respect of No. 8 with that in respect of 25 Drynam View which is a pure Bay Lane house. He submits that it would appear that there are more cracks in 8 Stapolin Avenue then in 25 Drynam View. However, the Bay Lane house, No. 25, was sent forward for remediation whereas the non-Bay Lane house, No. 8, was not. The defendants now have the DBFL Report for 8 Stapolin Avenue but only received it after the basket had been selected and after the opportunity to carry out

inspections to prepare for the case had passed. The defendants received the Report in 2009 during the trail. However Mr. O'Moore submits that they received it in December 2008.
In relation to the cross-examination of Dr. Maher, Mr. O'Neill submits that it would be highly unsatisfactory and very prejudicial to the defendants to effectively give the witness in advance questions to be asked of him. Mr. O'Neill also submits that documentation indicates that a 1% pyrite benchmark was applied. The plaintiffs say that no benchmark was applied and that the defendants would have seen a 1% reference from the previous discovery. This is correct but that reference is in a letter from a home owners solicitor which is different from the plaintiffs talking about a benchmark.
Mr. O'Neill also refers to 10 Stapolin Avenue a property contain a mix in the infill. This house has not been remediated though it has been recommended for remediation. The same is true in respect of 18 Drynam Crescent, a pure Bay Lane house. Mr. O'Neill refers to defects recorded in a report concerning 10 Stapolin Avenue. He acknowledges that this property and 18 Drynam Crescent are available for inspection but submits that that is less than satisfactory once the hearing has commenced. Mr. O'Neill raises the issue of the basket of houses in this respect and Mr. O'Moore responds that he has no problem with the suggestion that these houses be added to the basket but submits that the whole purpose of the basket was that evidence about other houses could be adduced while the basket issues were being determined. Mr. O'Neill also refers to a reappraisal report in respect of 18 Drynam Crescent. Mr. O'Moore submits that 18 Drynam Crescent was inspected on behalf of the defendants but 10 Stapolin Avenue does not appear to have been. The reappraisal report notes cracks in 18 Drynam Crescent and recommends that it be remediated. The report seems to focus more on the level of pyrite than the actual cracking. However Mr. O'Neill submits that the extent of the cracking in that house is less than the extent of cracking seen in 10 Stapolin Avenue which contains a mix of Bay Lane and Non Bay Lane infill and a lower level of pyrite.
12 Stapolin House is, according to the plaintiffs, a mix of Bay Lane and non-Bay Lane infill. O'Connor Sutton Cronin surveyed 12 Stapolin House in October 2008. Mr. O'Neill refers to defects noted in this house being noted in the DBFL Report. This house has now been recommended for remediation. However Mr. O'Moore submits that it has not been remediated. He would have no difficulty with this house being added to the basket. He submits that it does not make much difference whether this house is in the basket or there is evidence otherwise available about it. Mr. O'Neill and Mr. O'Moore agree that the agreement in respect of the basket was a grouping of houses agreed between the parties in respect of which there would be concentration but there was nothing to prevent either side in the case adducing evidence in respect of other houses.
Mr. O'Neill submits that the defendants have been deprived of the opportunity of focusing on these houses. The basket was chosen as houses that were to be focused on. There are houses that have not been remediated but a large number of houses have been and it is impossible to go back and look at them. In respect of 38 Parker House the samples taken to date are pure non-Bay Lane. A letter indicating that the infill in this property may not be from the same source as the problematic infill was discovered in 2008 but the defendants did not have the DBFL Report in respect of this property. 38 and 39 Parker House were examined on behalf of the defendants. 39 Parker House contains no Bay Lane material in two of the samples taken from it and some Bay Lane material in the third according to Dr. Strogen's assessment. Mr. O'Neill refers to a DBFL Report in respect of this property. The reports in respect of 38 and 39 note *inter alia* that the hall and living room floors measured off level may represent early signs of defects observed elsewhere that are typical of those associated with the expansion of the infill. The level of pyrite in No. 38 was found to be 0.93%, 0.18% of which had oxidised while for No. 39 the level was 0.92% pyrite of which 0.34% had oxidised. The DBFL Report for No. 39 states that remediation is not required at this time. However No. 39 is identified in the Replies to Particulars of June 2009 as a property to be remediated. Mr. O'Neill submits that despite very similar pyrite levels the house in which no Bay Lane infill has been found is not to be remediated while the one containing some Bay Lane fill is to be remediated.
Mr. O'Neill refers to 21, 22 and 23 Talavera House. These properties were remediated in October 2007. Mr. O'Neill notes that Dr. Strogen stated in his December 2008 Report that when there are large samples especially when the floor slab has been lifted there is no difficulty in reaching an unequivocal determination as to the source of the infill. In those circumstances Mr. O'Neill queries why the defendants were not told that these properties had a mix of Bay Lane and non-Bay Lane infill until the Replies to Particulars dated 16th June 2009.
Mr. O'Neill refers to a letter which he submits indicates that there is some form of benchmarking being applied in relation to the level of pyrite.
The defendants submit that the new information in relation to all of these properties gives significantly more information concerning the houses in respect of which there is either no Bay Lane material or a mixture in different degrees.
The reports also show that on the plaintiffs' own analysis of properties and categorisation of the cracking and defects in those houses there was a different approach emerging in respect of houses that contained Bay Lane infill and those in which no Bay Lane infill or very little Bay Lane infill was found. Had the defendants known when looking at a particular house that it was not a Bay Lane house or was a house containing a mix in different degrees that clearly would have been a very significant factor in determining whether that house would be concentrated on for the purpose of comparison with a similar Bay Lane house and whether or not houses in that category should have been included in the basket. The defendants were aware from the outset of the Moyglare houses as not containing Bay Lane material. These houses were built by Menolly but by different workmen and they were built as show houses, for which reason one would expect the quality of construction to be better than would appear in other houses. In relation to the benchmarking, documents in this regard would have been relevant to be put to Dr. Maher, Mr. Blanchette, Dr. Bromley, Dr. Hawkins and Dr. Strogen. It is most unsatisfactory that the defendants would have to revisit those witnesses with this documentation. In addition the momentum of cross-examination is lost and the impact of the cross-examination is affected accordingly. It is no answer to say that these witnesses can be recalled for cross-examination in circumstances where they are effectively given a list of the questions that it is necessary to put to them. Mr. O'Neill submits that after assurances were given that there was no doubt in respect of infill source the defendants were told in March 2009 that there is a doubt. At that stage they began examining samples. They examined samples between then and the time Dr. Strogen was examined.
Mr. O'Neill submits that inspections were carried out in respect of 8 Stapolin Avenue, 12 Stapolin House, 38 and 39 Parker House. No inspection was carried out in respect of 10 Stapolin Avenue or 21, 22 and 23 Talavera House. 25 Drynam View and 18 Drynam Crescent were also inspected. Those inspections were carried out by O'Connor Sutton Cronin and / or Bickerdike Allen. There are working papers in respect of these properties but no finalised reports. Mr. O'Neill acknowledges that a number of DBFL Reports were appended to the witness statement of Mr. Forde received in December 2008. DBFL Reports concerning the houses referred to by Mr. O'Neill become significant in that the defendants now know that there is an issue in relation to source of infill in these houses, and some of the DBFL Reports which are reports prepared on behalf of the plaintiffs refer to possible pyritic heave in properties containing non-Bay Lane infill, for example 38 Parker House, which does not contain any Bay Lane infill on the basis of the samples identified. The contents of the Reports themselves are of less significance than the subsequent acknowledgement that these properties are non-Bay Lane properties. Mr. O'Neill notes a submission made by Mr. O'Moore that the defendants had received all the reports of which they made complaint in December 2008. Mr. O'Neill submits that that is incorrect as the defendants received additional reports in March 2009 which were the Moyglare Reports. Mr. O'Neill submits that there were two inspections on behalf of the defendants in respect of 25 Drynam View and 39 Parker House.
On behalf of the plaintiffs Mr. O'Moore submits that Mr. O'Neill is incorrect in asserting that there are only working papers in respect of the properties referred to prepared by O'Connor Sutton Cronin. He points to a reference in Mr. Lagan's affidavit of Discovery in July 2008 referring to draft structural inspection reports for 38 Parker House and 12 Stapolin House. In addition he

submits that the Moyglare Reports do not form any part of this motion. The relevant reports were with the defendants since 23rd December 2008. He submits that the defendants had all the information in substance of which they complain in relation to the non-Bay Lane House section at the latest by 3rd April 2009. Mr. O'Moore queries why, if this development is so important, there is no complaint of prejudice in respect of it in Mr. Lennon's affidavit of 20th May 2009. His affidavit of 27th May 2009 refers to great prejudice but this cannot have been sufficiently grave prejudice to warrant a declaration of mistrial because presumably he would have said so.

At heart the non-Bay Lane issue is about two strands of documents. One is the documentation available to the plaintiff's concerning the identification of the source of the infill. This strand consists of 11 documents. The second strand is the DBFL Reports and Mr. Lennon makes it clear that one strand is of limited use without the other. Mr. O'Moore submits that the defendants have at all times had access to the houses of which Mr. Lennon complains. In law the onus is on the defendants to persuade the Court to give the relief sought. They should be able to offer crisp evidence to the Court about any issue which is material. Where prejudice is alleged due to a lack of access to inspection reports, what the reports on the defendants' behalf contain is clearly of the highest relevance. Mr. Lennon suggests that the reports of Mr. Forde and Dr. Maher have a particular significance because they show what the plaintiff's representatives themselves received and therefore the matter is beyond doubt. However this does not carry the mistrial application anywhere as witnesses must give their evidence and are challenged on it in relation to any inconsistency of approach alleged. Mr. O'Neill can cross-examine Mr. Forde on that point. The defendants' experts still have access to every one of the houses referred to by Mr. O'Neill and these are unremediated houses and it was agreed between the parties that the basket would constitute remediated houses that could have been changed but was the working arrangement between the parties.

Mr. O'Moore submits that both strands of documents are privileged documents in their entirety. In relation to the argument that there was a waiver of privilege in respect of a spreadsheet because it was referred to in the Replies to Particulars Mr. O'Moore submits that this reference was not sufficient to amount to a waiver of privilege. In this regard he refers the judgment of the English Court of Appeal in the Arm and Hammer case and the judgment of the Supreme Court in Hannigan. In addition Mr. O'Moore submits that the spreadsheet referred to by Mr. O'Neill is not the spreadsheet referred to at reply particular No. 3.9.4. The plaintiffs believe the spreadsheet referred to at particular 3.9.4 is the same spreadsheet referred to at 3.9.2 and enclosed with the Replies to Particulars. Mr. O'Moore also refers to the judgment of McKechnie J on issues concerning privilege in respect of the present case. That judgment deals with, *inter alia*, spreadsheets and Golder DBFL documents and reports, and in respect of these documents McKechnie J. found the privilege applicable.

In respect of this motion the first three documents are the three which seem to exercise the defendants most actively in respect of this claim of prejudice. They are analyses prepared by Dr. Strogen in March and April 2008. The first is exactly the sort of document described by McKechnie J. Privilege was claimed over it in 2008 but not challenged. The plaintiffs have since waived the privilege in respect of it. Mr. O'Moore also refers to the next two documents in this regard which he submits meet all the requirements of the judgment of McKechnie J. In relation to the defendants' argument that they relied on the Replies to Particulars, Mr. O'Moore submits that the decision not to test the infill themselves was the defendants' decision and that saving money was the stated reason for that decision. By making this decision they have hampered their own ability to defend the case by not checking the source of infill or even performing a random check of the source. That decision does not entitle them to seek rolling disclosure of privileged documents from the plaintiffs who have paid for the infill to be examined. Mr. O'Moore submits that in respect of this group of documents they were prepared by an expert witness and made available to the plaintiffs to educate them about the case and for no other purpose, and he queries on what basis it can be disputed that such documents are privileged. Mr. O'Moore refers to a number of documents in this strand which he submits are privileged. Mr. Lennon also referred to a portion of a map but that map was furnished with the Replies to Particulars in January 2008 as Mr. O'Byrne refers and Mr. Lennon does not pursue any suggestion that it might be new in his affidavit of October 2009. Mr. Lennon also refers in his September 2009 affidavit to a map as having been intended to indicate where the Irish Asphalt fill was placed. However this map is irrelevant to these proceedings because it relates to a part of Beaupark that is not the subject matter of these proceedings but rather of separate proceedings. Mr. O'Moore notes that Counsel for the defendants made a concession in their privilege proceedings before McKechnie J that one could expect that litigation had been contemplated in March 2007. In relation to this strand of documents Mr. O'Moore submits that one of them is completely irrelevant, that is to say the map in relation to the properties not the subject of these proceedings. The second document Mr. Lennon accepts does not in itself change things but might have some significance when seen in the context of others. There is a document that was effectively provided save that Moyglare was misspelled. There are four privileged documents one of which was subject to a claim of privilege that was never challenged and there are the three Strogen spreadsheets which are absolutely privileged. A claim of privilege in respect of the April spreadsheets was made in 2008 and not challenged. In conclusion all of these documents are documents the defendants would never have received. Noting the assertion of the defendants that they relied on assurances from the plaintiffs in respect of source of infill Mr. O'Moore queries why they relied on the plaintiff's assertions in this regard he submits that that approach is particularly surprising in this litigation where every assertion is being challenged yet in this fundamental issue the defendants chose to rely on the plaintiffs assertions. The defendants also give two other versions as to why they decided not to carry out a full scale investigation involving a visual inspection of infill to determine source. In his October 2009 affidavit Mr. Lennon avers that such an investigation appeared to be disproportionate allocation of resources given what the plaintiffs were alleging and what they had stated to the defendants. The third version given by Mr. Lennon for this decision is that on the basis of Counsel's Statement to the Court on the 31st July 2008 a decision was taken to await the discovery with a view to assessing the records referred to by Counsel as regards source of infill. Mr. O'Moore queries this explanation on the basis that the statement by Counsel was made on 31st July 2008 which was after discovery had been made. Mr. O'Moore submits that a map appended to Mr. Forde's witness statement raises a question as to the infill source in respect of a range of different properties. Drawings in this regard for each of the three estates are appended to Mr. Forde's witness statement and the presence of those reports as appendices he has noted in the body of the statement. Similar detail about uncertainty as to the infill also appear in the Kavanagh Mansfield Report. Lennon Heather went on to raise the issue of the uncertainty as regards infill source in respect of Drynam in a letter of January 2009. It was suggested by the defendants that a letter of 2nd February 2009 from BCM stating that there was no doubt in regard to the infill source misled them. However a letter from Lennon Heather dated 11th March 2009 makes it clear that Lennon Heather did not accept this assertion and states that they do not accept that the plaintiffs are entitled to resile from the assertions in the Paul Forde maps and the Kavanagh Mansfield map. When Mr. Lennon's affidavit of the 20th May 2009 was sworn the defendants had had the DBFL Reports in respect of the properties in question for the previous five months and were aware of the doubts about a range of houses across the three estates. None of Mr. Lennon's team or advisors say to the Court that the case cannot go on because of this non-Bay Lane issue when that affidavit was sworn despite the fact that they had all the relevant material that now grounds this application for a mistrial in respect of this section of the alleged prejudice. None of this supports a mistrial application. Mr. O'Moore submits that of the 74 houses, apart from the Moyglare houses and Sweetman House, which Mr. Lennon contends contain non-Bay Lane material, the DBFL maps attached to Mr. Forde's statement identifies most of them. They identify the 24 houses which became known as the re-test houses in the Drynam map of the 15 houses in Beaupark 21 are identified in the map of the Beaupark estate while of the 36 houses in Myrtle in question 31 were identified in the Forde map. Mr. Lennon concedes that the defendants were on notice of 10 houses in Myrtle in respect of which correspondence had been sent by Menolly to Arthur Cox indicating that there was a doubt in respect of the infill in those 11 houses. He also accepts that the defendants

were on notice in respect of 6 Stapolin Avenue by virtue of January 2008 Replies to Particulars. Mr. O'Moore submits that despite knowing about 6 Stapolin Avenue since the January 2008 Replies because the representative from Bickerdike Allen who was supposed to inspect it did not arrive to inspect it. Mr. O'Moore points to this fact in connection with Mr. Lennon's assertion that a non-Bay Lane property is a perfect control to be used in comparison with a Bay Lane property. Mr. O'Moore notes that the defendants did not assert in correspondence following the production of the maps in September 2008 that the revelations concerning properties in respect of which there was a doubt as to infill source had such a transformation and effect on the case as is now asserted. In addition they took no action in relation to the discovery of 11 letters in 2008 stating that the infill in the properties to which they related did not appear to be the problematic infill found elsewhere.

Mr. O'Moore refers to averments of Mr. O'Byrne concerning information that was available to the defendants in 2008. Mr. O'Moore also notes Mr. Lennon's reference to the 11 letters to homeowners not contained in the 2008 discovery. There are 11 letters in identical form in the 2008 discovery, including one in relation to 8 Stapolin Avenue and these houses were not set up as controls or monitors. None of the steps that Mr. Lennon avers would have been taken was taken.

The defendants' complaint about the DBFL/Golder reports relates to the use of control houses. However, the defendants had the 25 Moyglare properties available from the start and could have used them as control houses. Mr. O'Neill submitted that a decision was made not to use them because they were show houses. Mr. O'Moore queries this explanation, referring to ground conditions issues and wondering whether it was concluded that those issues would not apply to the show houses. In addition, he submits that the defendants are wrong about the show houses, and in any event 6 Stapolin Avenue could have been used as a control. In addition, the other 10 houses in respect of which letters to homeowners were discovered in 2008 could also have been used as controls.

Mr. Lennon avers that the analysis of DBFL and Golder in their report on 10 Stapolin Avenue would have been used in cross-examination of many witnesses to date, but Mr. O'Moore notes that that report was appended to Mr. Forde's statement. In relation to the DBFL/Golder reports concerning the non-Bay Lane properties, Mr. O'Byrne avers in his affidavit of 4th November 2009 that they were properly privileged. Mr. O'Moore submits that the DBFL/Golder reports fall within the judgment of McKechnie J insofar as it concerns DBFL/Golder reports. Even apart from that judgment, they are clearly privileged, as is the documentation regarding infill source. At the heart of that documentation as the analysis performed by Dr. Strogen in March and April 2008, which could not be other than privileged and also falls within the judgment of McKechnie J. It is an analysis form generated by experts retained in the litigation for the purposes of the litigation and provided to the solicitors. Mr. Lennon avers in his affidavit of 27th October 2009 that the Dr. Strogen analysis documents should have been furnished on foot of the agreed testing protocol. Mr. O'Moore submits that the motion concerns failures regarding discovery rather than failures to adhere to an agreed protocol, and even if this were not so, the consequence of failing to adhere to a protocol would not be a mistrial or dismissal. In addition, he submits that Dr. Strogen's analyses are not the type of tests intended to be captured by the protocol. Mr. O'Neill also submitted that there was an obligation on the plaintiffs to correct their Replies to Particulars if they realised that they were wrong. However, Mr. O'Moore disputes this and submits that this motion seeks to have the plaintiffs' claim dismissed or a mistrial declared based on a failure to make discovery rather than a failure to correct Replies to Particulars.

Mr. O'Byrne refers in his affidavit of 6th October 2009 to the 11 houses in respect of which letters to homeowners were discovered in 2008, including 6 Stapolin Avenue. Mr. O'Byrne avers that no efforts were made by the defendants to inspect this house despite their knowing since January 2008 that there was non-Bay Lane infill in it. As noted above, Mr. O'Moore observes that an appointment to inspect this property was missed by a Bickerdike Allen representative, but he submits that if this house was to be used as a control the appointment would have been rearranged. Mr. O'Moore goes on to averments of Mr. O'Byrne regarding the information available to the defendants concerning the other 10 properties in respect of which the defendants had the homeowner letters. These are 1, 3, 4, 10, 13 and 20 Stapolin House, 35, 38 and 39 Parker House and 8 Stapolin Avenue. Mr. O'Byrne avers that in this light it is very difficult to accept Mr. Lennon's claims regarding any of the 11 properties in respect of which the homeowner letter was not discovered until June 2009 that the defendants would have carried out extensive investigations to identify whether damage that manifested at these properties was comparable to damage experienced elsewhere in the estates, applied to put the houses in question into the basket or cross-examined Dr. Maher, Mr. Blanchette and Dr. Strogen on these issues. They took none of these steps in respect of the 11 for which they had the homeowner letter. In response Mr. Lennon avers that only if all 22 letters had been discovered in 2008 along with all the other information which revealed vast uncertainty as to infill source would the defendants have obtained a better picture of the extent to which the January 2008 Replies were incorrect and misleading. However, Mr. O'Moore submits that this means the prejudice only arises if the defendants are entitled to all of the other information, which they are not because it is privileged.

Mr. Lennon avers that there are an additional 74 houses which are stated to contain non-Bay Lane infill in the June 2009 Replies in comparison to the January 2008 Replies, which only revealed 28, and it was the plaintiffs' contention that the 25 Moyglare houses were not suffering damage. He then avers that the defendants were on indirect notice of a further 10 from the homeowner letters. There are three further houses, in addition to the 74, which it is agreed contain non-Bay Lane material, although it appears to be concrete rather than fill.

Mr. O'Moore refers to further averments of Mr. Lennon, including an averment that full discovery would have triggered an investigation by the defendants into the situation at Drynam, which would have enabled them to find out what they now know regarding the re-test houses. Furthermore, he avers, such an investigation would most likely have resulted in the experts determining that there were further houses (not classified by the plaintiffs as containing non-Bay Lane material) which the defendants contend do contain such material. He refers in this connection to three houses in Drynam. However, Mr. O'Moore queries why this was not brought to the Court's attention prior to the trial, in view of the maps with question marks which they received in December 2008. There is no evidence that the defendants did any of these things. In addition, the 11 homeowner letters triggered no investigation in respect of Myrtle. Mr. O'Moore accordingly queries the suggestion that a similar investigation would have been carried out with regard to Drynam. Mr. Lennon also avers that with respect to 7 of the 11 properties for which homeowner letters were discovered, the defendants did not have the full facts relating to them, particularly in circumstances where no DBFL report was discovered and where that report records cracking comparable to other pure Bay Lane properties. However, Mr. O'Moore submits that it was open to the defendants to inspect those properties and the reports are privileged.

In relation to the pyrite benchmark issue, Mr. Lennon avers in his September affidavit that the recent discovery reveals that the plaintiffs' experts appear to have adopted a different position in respect of the benchmark for swelling potential regarding infill at Sweetman House in contrast to Bay Lane infill. This is evidenced from a number of Golder certificates. Mr. Lennon refers to a letter from Golder to Menolly of 16th April 2008 concerning 9 Sweetman House, which states that the results for a sample from this property indicate very low pyrite content. They conclude that the sample is not susceptible to swelling and is suitable for use as underfloor infill. The results are indicated as 0.73% pyrite with the total sulphur being 0.47%. Mr. Lennon avers that this document reveals an inconsistency in the approach of the plaintiffs' experts in their diagnosis of swelling potential and that this can be clearly seen for example in the DBFL/Golders report for 59 Grange Lodge Avenue. In his October affidavit Mr. Lennon notes Mr. O'Byrne's averment that the alleged approach was not the one adopted and that rock quality was also considered in assessing susceptibility to swelling. However, Mr. Lennon avers that the letter of 16th April 2008 appears to suggest that 0.73% pyrite is safe regardless of rock quality. On this basis Mr. Lennon avers that this document had implications for other properties with equivalent or lower pyrite levels. A document of this kind would therefore lead to a line of enquiry which would enable the defendants to examine those houses to see whether the plaintiffs were alleging damage in them indicative of pyritic heave. In response Mr. O'Byrne avers that the defendants had the same information in the 2008 discovery which leads Mr.

Lennon to his conclusion regarding the analysis carried out by Golder. In this regard Mr. O'Moore refers to a letter discovered in 2008 which he submits is in exactly the same terms, albeit concerning replacement infill. The defendants could have pursued the line of enquiry in question from the documentation available to them.
Mr. Lennon also avers in his September affidavit that in June 2007 infill samples from 8 Stapolin Avenue were tested and the results were 0.65% pyrite of which 0.06% was found to be oxidised. It appears the owners of this property were informed that as the pyrite level was below 1% Menolly was not prepared to undertake remedial works. This document provides clear evidence of a benchmark which Menolly was adopting in respect of some of the houses in Myrtle. This benchmark would have provided very useful information in assessing the relevance and importance of various properties in the estate and in analysing damage in properties with comparable pyrite levels. However, Mr. O'Moore refers to a letter from Arthur Cox in the 2008 discovery relating to 8 Stapolin Avenue stating that their clients were told that their property tested negative. The letter states that this means that it below the benchmark of 1% as set by Menolly and that Menolly was therefore not prepared to undertake remedial works.
Mr. O'Byrne avers in his affidavit of 6th October that the idea of a 1% benchmark originates from the Drynam booklet given to homeowners, which stated that pyrite concentrations typically over 1% were high. The 1% reading was used by Menolly to analyse if a pyrite reading was high or low. Mr. O'Byrne avers that the reference to a benchmark in correspondence from homeowners must result from a conversation between a site employee and a homeowner, but this was not the result of instructions or a formal view from Menolly. Menolly used the 1% figure to see if it could reach any conclusions about particular houses, but was not very helpful and was abandoned by Dr. Strogen as he provided the answers by identifying infill source.
In relation to cross-examination of witnesses, Mr. O'Moore submits that the rules of the Commercial Court endeavour to avoid trial by ambush. It is quite different to most other litigation, in which a witness can be surprised by an argument, a fact or a document. Dr. Maher and most of the other witnesses who have given evidence are expert witnesses. The witness statements from all sides in this case have been detailed on technical issues and have many appendices and subsidiary reports, therefore from the outset no matter was going to come as a surprise to an expert witness.
Mr. Barniville in reply submits that, in respect of the assertion that certain infill source documents and DBFL reports were privileged, it is necessary to consider what the plaintiffs knew at particular stages and what they were communicating to the defendants. He also submits that there is an unreality to the privilege argument in respect of documents which were discovered in 2009 without a claim of privilege. While Mr. O'Moore submitted that the plaintiffs wished to discover documents in 2009 to avoid unnecessary rows, Mr. Barniville notes that they nevertheless claimed privilege over approximately 5,000 documents. Mr. Barniville refers to one of the spreadsheets, which is dated 1st June 2007, and notes that it expresses doubt as to the supplier of infill in respect of many houses. He also notes a letter of 2nd August 2007 from BCM stating that the infill beneath all of the houses in Drynam with the exception of the 25 Moyglare houses was supplied by the defendants. Information was being provided to the defendants in this letter and in Replies to Particulars, but at the same time spreadsheets conveying a different picture entailing doubt and other suppliers for many houses. While the discovery was being sought Dr. Strogen was also carrying out various analyses and producing spreadsheets which the defendants first saw in April 2009. The defendants say there is a very serious issue as to whether the defendants could have successfully claimed privilege over the spreadsheets had they discovered them in 2008.
Some of Dr. Strogen's earlier spreadsheets were discovered in 2008 and privilege was claimed over them. Mr. Barniville submits that ordinarily it would be difficult to challenge a privilege claim regarding such spreadsheets, but the problem in this context arises from the fact that the plaintiffs had certain information and chose to release some of it and to hold back the rest. Mr. Barniville accepts that the defendants made a concession during the course of the motion challenging privilege that litigation was in contemplation in March 2007. However, in relation to the spreadsheets the plaintiffs have chosen to release some information to the defendants in Replies to Particulars and correspondence but did not disclose other privileged material touching on the information released. In those circumstances the defendants submit that there is a serious risk of a privilege which might otherwise exist being lost. Mr. Barniville refers to *Fyffes v. DCC plc* [2005] 1 I.R. 59, in which Fennelly J stated at p. 72 that:

> "a party who seeks to deploy his privileged documents by partially disclosing them or summarising their effect so as to gain an advantage over his opponent in the action in which they are privileged, runs a serious risk of losing the privilege."

Mr. Barniville submits that the Replies state the percentage of infill supplied by the first defendant to Drynam and identify the suppliers. It also states that there is no sign of heaving or cracking in 1 to 13 Drynam Glen, where Moyglare infill was used.
Mr. Barniville submits that it is not entirely clear whether the spreadsheet referred to at para. 3.9.4 of the Replies is the same spreadsheet as one referred to earlier in the Replies. Mr. Barniville also submits that the material in the spreadsheets was effectively deployed in the Replies to Particulars. Mr. O'Byrne avers that various documents were reviewed by the plaintiffs in preparing the map appended to the Replies. The Replies also state that the map was prepared on the basis of, *inter alia*, diary entries, photographs and the recollections of site staff. The defendants submit that it is likely that the spreadsheets that the plaintiffs had would also have been consulted in preparing information provided in the Replies and that in those circumstances such information was deployed. The principle identified by Hardiman J in *Hannigan* to the effect that the defendants must be given the opportunity of satisfying themselves that what the plaintiffs have chosen to release represents the whole of the privileged material. In addition, Mr. Barniville submits that there is an obligation on the plaintiffs to ensure that the Replies are correct and to correct them if it emerges that they are not. He submits that the Replies were incorrect even as of January 2008 and refers in this regard to the spreadsheet of 1st June 2007 referred to above. Even if it was not clear to them in January 2008, it must have become clear to the plaintiffs in March and April 2008 that there was an inaccuracy in the Replies when Dr. Strogen's spreadsheets were being prepared and furnished to the plaintiffs and to BCM. In addition, as of July 2008 74 houses were identified as non-Bay Lane. Mr. Barniville refers to *Shelly-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232, in which the Supreme Court emphasised the importance of ensuring accuracy in Replies to Particulars. Mr. O'Moore submitted that the motion was not about Replies to Particulars, but Mr. Barniville submits that the point is that this is an issue relevant to the prejudice asserted. Privilege was asserted in relation to earlier Strogen spreadsheets in the 2008 discovery and the defendants had no reason to believe that that privilege was not correctly claimed. They had no information to give rise to a doubt sufficient to warrant a challenge to the claim. In relation to the Strogen spreadsheets Mr. Barniville submits that the problem arises here as in respect of the other spreadsheets that some but not all of the privileged material was disclosed and the information given was inconsistent with the information withheld. The obligation to correct Replies is also equally applicable to the Strogen spreadsheets.
Mr. O'Moore referred to the judgment of McKechnie J concerning privilege issues arising in these proceedings, but Mr. Barniville submits that while McKechnie J was addressing spreadsheets he was not considering these spreadsheets because privilege was not claimed over them.
In relation to the DBFL/Golder reports provided with Mr. Forde's statement in December 2008, Mr. Barniville submits that those documents would normally be privileged as expert reports prepared in contemplation of litigation. However, he submits that there are two difficulties for such a claim. The first is that inconsistent bases are advanced on behalf of the plaintiffs for the assertion of privilege in this regard. He refers to averments of Mr. O'Byrne and Mr. Butler on this matter. The second difficulty is that the plaintiffs' case from the outset was that only houses with Bay Lane fill are suffering the sort of harm seen in Bay Lane houses. However, there are DBFL reports for houses that do not contain Bay Lane material or contain a mix, which is inconsistent with that assertion. The selective or partial disclosure of some DBFL reports but not others puts at serious risk the

assertion of privilege, even apart from the inconsistency identified, in view of the judgment of Fennelly J in *Fyffes*. Accordingly, Mr. Barniville submits that there is a prejudice in relation to the spreadsheets and DBFL reports and the Court can take this matter into account in its assessment of prejudice.
Mr. Barniville submits that in relation to Dr. Strogen's evidence the defendants were still receiving reports and supplemental reports until 8th May 2009. Mr. Barniville refers to further documents to demonstrate that the plaintiffs did not have everything previously.
In relation to the benchmark issue he submits that the letter of 16th April 2008 gives rise to a strong inference that in respect of 9 Sweetman House the basis for the conclusion that the infill was suitable was the two tests referred to and the pyrite percentage determined based on them. In this regard Mr. Barniville refers to 30 Myrtle House, which contained non-Bay Lane fill and had a pyrite percentage of 0.54%, lower than that in 9 Sweetman House, and was remediated. Mr. O'Moore submitted that the defendants knew the test results for 9 Sweetman House from the 2008 discovery. This is true but the point is that it appears from the letter that it was solely the test results that led to the conclusion of suitability. That was not apparent from the results. Mr. O'Moore also submitted that another letter conveyed the same information. However, Mr. Barniville submits that that letter would not have led to the same train of enquiry because it does not contain the same form of wording as the letter of 16th April 2008. Mr. O'Moore also referred to a series of letters in respect of which he submitted that the same form of wording was used. Mr. Barniville accepts this, but submits that one of these letters relates to replacement infill. The other two properties concerned have very low pyrite levels of 0.38% and 0.44%, so they would not have led to the same line of enquiry as the level of 0.73% relating to 9 Sweetman House would have led to. Equally, the existence or otherwise of a benchmark would have been put to a number of witnesses.
As to the 1% benchmark issue, Mr. O'Moore submitted that this information was also contained in a letter from Arthur Cox in the 2008 discovery. However, the significance of the newly discovered document is that it emanates from the plaintiffs' solicitors rather than Arthur Cox, as Mr. Lennon avers in his October affidavit. Mr. Barniville also points to the averments in that affidavit concerning the 1.2% pyrite benchmark issue.
Mr. O'Moore submitted that the defendants had all the necessary material when this motion was issued on 28th May 2009 but did not assert that the case could not proceed. Mr. Barniville submits that at that stage the defendants sought a dismissal rather than a mistrial. In addition, the defendants did not have all the relevant material. Mr. Barniville refers in this regard to a number of documents which were not received until the 2009 discovery. In addition, Mr. Lennon's affidavit of 27th May 2009 stated that the defendants had been gravely prejudiced and stated that until the further discovery had been received the defendants would be reserving their position.
In relation to 5 Stapolin House, the defendants have accepted that they received similar snag lists to those regarding this house in respect of which complaint was made. However, the defendants did not know until April 2009 that this was an entirely non-Bay Lane property. In relation to 8 Stapolin Avenue Mr. Barniville submits that the defendants were not told in the Replies or subsequently that this property contained non-Bay Lane material but it is suggested that they were supposed to indirectly recognise it from the homeowner letter in the 2008 discovery. In respect of this house there are relevant, newly discovered documents which bear on the issue as to whether this house would have been an appropriate one for the basket. In this regard Mr. Barniville refers to two documents regarding cracking at this property. In addition, when Bickerdike Allen inspected this property in August 2008 the defendants did not have the DBFL report or the cracking documentation just referred to, and did not know that this house was pure Bay Lane, though it is accepted that they had the homeowner letter in the 2008 discovery.
Mr. O'Moore submitted that the defendants had never sought to include a Moyglare house in the basket. However, Mr. Lennon avers that the defendants had received three DBFL reports in the 2008 discovery and it did not appear from those reports that they were showing a similar type of damage to that occurring in other houses in Myrtle. For that reason as well as the reason submitted by Mr. O'Neill, it was not thought appropriate to include a Moyglare house. In respect of 6 Stapolin Avenue, Mr. Barniville submits that at the time of the planned inspection the defendants did not have the DBFL report, which they received in December 2008 appended to Mr. Forde's report, so they did not have all the information necessary to ascertain whether or not this was an appropriate house for inclusion in the basket. That is also the position in relation to the 11 houses in respect of which homeowner letters were discovered. The defendants did not have DBFL reports for those houses and in those circumstances they were not adverted to as appropriate or necessary controls or basket houses, for example the two DBFL reports for 38 and 39 Parker House referring to possible floor heave.
Mr. O'Moore refers to a number of authorities in relation to the privilege issue. He submits that in *Fyffes* Fennelly J referred to partially disclosing privileged documents or summarising their effect, rather than to partial disclosure of the information in the document. In addition, Mr. O'Moore cites the judgment of Ebsworth J in *Kershaw v. Whelan* [1996] 1 W.L.R. 358 to the effect that waiver of privilege is not to be inferred lightly. In addition, in *Hannigan* McCracken J stated that a litigant must be able to communicate freely with his or her legal advisors and must be entitled to obtain expert evidence from third parties to assist not only in the preparation of the case but in the assessment as to whether there is a case to be made. Mr. O'Moore also submits that Mr. Barniville did not submit that the documents were not privileged or that privilege had been waived, but rather that there is a serious risk that the privilege would be waived. Mr. O'Moore also submits that a version of the document of 1st June 2007 referred to by Mr. Barniville was discovered in 2008 and the claim of privilege over it was not challenged. He also refers to Strogen analysis lists in respect of which the same is true. As to the argument concerning the Replies to Particulars, he submits that the plaintiffs did not have the obligation contended for and that the defendants quite properly did not disclose Mr. Sutton's draft report when he expressed the view that curling was not present even though that issue was mentioned in their Defence. In addition, the views expressed by Dr. Strogen in March and April 2008 caused confusion and concern and there was a need to carry out further investigation, which took a significant period of time. Mr. Barniville suggested that it is likely that the plaintiffs would have consulted and taken into account spreadsheets in preparing the Replies, but Mr. O'Moore submits that even if that is so it does not make the documents discoverable. In addition, the DBFL reports are privileged and there is no partial disclosure of any individual DBFL reports. It is wrong to suggest that if some reports are provided and others not, there is a selective disclosure by reason of which the privilege is waived in all the reports.

Conclusion

I reject the defendants' contention with regard to the issue of privilege in relation to the spreadsheets and the DBFL reports. I consider that the documentation referred to was entitled to a claim of privilege as the documentation, in my view, was clearly prepared in contemplation of litigation. I am fortified in this conclusion in particular by the judgment of McKechnie J. in *Hansfield Developments and others v. Irish Asphalt Ltd. and others* (Unreported, High Court, 21st September 2009) in relation to a challenge to privilege that related *inter alia* to documents similar to those with which the Court is presently concerned. The reference in Replies to Particulars to the spreadsheets is, in my view, a bare reference. In the *Fyffes* case, it is clear that the entire report was being disclosed in confidence to the stock exchange with a view to persuading the DPP not to prosecute Fyffes for insider trading.
In this regard, I prefer the submissions as made on the plaintiffs' behalf and in particular, the judgment of Donaldson L.J. in *Buttes Gas and Oil* at p. 252 wherein he states:-

> "On waiver McNeill J. held that reference in the pleadings to a document or to its contents does not of itself waive any privilege which attaches to it. It must be right that a bare reference to a document in a pleading does not

waive any privilege attaching to it otherwise there would be no scope for taking objection under the rules."

He further states:-

"If, on the other hand, a document is reproduced in full in the pleading its confidentiality is gone, no question of privilege could arise. Where the line is drawn between these two extremes may be a matter of some nicety…."

Accordingly, in my view, the spreadsheets and the DBFL reports were documents properly entitled to a claim of privilege, no loss of that privilege occurs in respect of the spreadsheets because of the reference to them in the Replies to Particulars. Accordingly, no prejudice can arise from a failure to discover these documents because the defendants would never have seen them in any event.

In my view, taken against the breadth of the submission as made on the defendants' behalf, it is quite clear that in the original discovery of June 2008, a significant number of reports as prepared by Mr. Forde of DBFL were discovered and that in December 2008, some 600 reports were attached to the witness statement of Mr. Forde. On a reasonable perusal of the maps appended to Mr. Forde's witness statement in respect of Drynam, Beaupark and Myrtle, it would have been evident that there was uncertainty in respect of infill source in some 67 houses. A letter from Lennon Heather of 28th January 2009 raised the issue of indications in the Drynam map of uncertainty as to stone infill used in certain properties in that estate. This letter did not raise the issue in respect of the other two estates. However, even if this means that they had not adverted to those maps by that stage, the fault for this cannot be attributed to the plaintiffs. The maps were appended to Mr. Forde's statement and there is a reference in the statement to these maps. In addition, although BCM advised Lennon Heather that there was no uncertainty regarding infill source, the letter of 11th March 2009 from Lennon Heather in response clearly indicated that the defendants' solicitors were not accepting that there was no problem with regard to the identification of the stone infill. The number of houses involved with only non-Bay Lane infill or a mix of infill has to be considered in the light of the fact that there are 800 potentially affected units over the three sites and to date, 400 sets of legal proceedings have been instituted. The defendants advance a number of reasons such as reliance on the Replies to Particulars and appropriate deployment of resources but the simple fact, in my view, is that they had the relevant information furnished to them openly in December 2008. After that it was a matter for the defendants to adopt whatever course they considered appropriate in the light of the overall situation pertaining.

A substantial number of the houses referred to have already been inspected, some on more than one occasion on the defendants' behalf by O'Connor Sutton Cronin and/or Bickerdike Allen, including 8 Stapolin Avenue, 12 Stapolin House, 38 and 39 Parker House, 25 Drynam View and 18 Drynam Crescent. The Court was advised that there are no reports in respect of any of these properties but the situation appears to be unclear as to the level of detail contained in the documentation relating to the investigations because various references have been made to "no finalised reports" and to "working papers" in respect of these properties. The Court's attention was drawn to the averment of Mr. Lagan to the effect that in respect of 38 Parker House and 12 Stapolin House there were draft structural inspection reports over which privilege was claimed.

The defendants, at all times, were aware that 25 Moyglare houses contained non-Bay Lane infill, and that 6 Stapolin Avenue contained non-Bay Lane infill. In the June 2008 discovery the defendants received the homeowner letters in respect of 11 houses, including 6 Stapolin Avenue, stating that the infill did not appear to be from the same source as the problematic infill found elsewhere.

There was much debate before the Court in respect of this issue. The Replies to Particulars furnished by the plaintiffs were inaccurate and the plaintiffs' solicitors became aware they were inaccurate but failed to advise the defendants' solicitors of the true position. The situation, in any event, was clarified with a measure of agreement reached between the experts prior to Dr. Strogen commencing his evidence in May 2009.

The defendants raise the issue that if they had known when looking at a particular house that it was not a Bay Lane house or was a house that contained a mix of infill material in different degrees that that clearly would have been a very significant factor in determining whether a particular house should be concentrated on for the purpose of comparison with a similar Bay Lane house and for a decision to be taken as to whether a particular house with non-Bay Lane infill or a mix of infill should have been included in the basket of houses. In this regard, the defendants had the various houses already referred to inspected for damage and were aware of the potential for an infill source problem by January 2009. At all times the defendants had available to them the Moyglare houses, and the 11 houses including 6 Stapolin Avenue in respect of which homeowner letters had been discovered and had the maps appended to the witness statement of Mr. Forde. No effort was made in any of these instances to use the houses as control houses against a background where the defendants had inspected a substantial majority of these houses even though they may not actually have drawn up full reports. The Court has particular regard to the information that was available to the defendants in respect of the 11 houses referred to, which did not lead to steps such as their use as control houses. In addition, a number of properties containing a mix or exclusively non-Bay Lane infill have been inspected on the defendants' behalf, there are at least working papers or draft reports in relation to them, and the defendants now have DBFL reports in respect of them and information regarding infill source. The plaintiffs are agreeable to some of the houses as referred to being included in the basket of houses. That is not absolutely necessary because it has at all times been understood that evidence can be adduced in respect of any other houses. Furthermore, the situation arises whereby it was specifically agreed between the parties that the houses in the basket would be remediated houses, but again the plaintiffs are agreeable that if the defendants so wish unremediated houses may be added to the basket.

It is submitted on the defendants' behalf that the momentum for cross-examination has now been lost. However, it is quite clear from the rules of the Commercial Court that the entire emphasis is on both sides to litigation being fully apprised as to the nature and extent of the case they have to meet. In this particular instance the Court is concerned with expert witnesses in their own field dealing with technical matters. It has to borne in mind that the basis of the plaintiffs' contention is that they were not given the full picture. However, since at the very latest May 2009 they have been in possession of the full picture and have reached a level of agreement in respect of the nature of the infill utilised under the houses. I do not consider that counsel for the defendants will be prejudiced in any way in the cross-examination of the witnesses to be recalled.

Finally, in relation to the suggestion that a benchmark level was applied, it appears to the Court that while the defendants did not have all of the information which they should have received, they nevertheless had sufficient information to highlight that there was an issue at least in respect of pyrite benchmarking. For example, a letter from Arthur Cox discovered in 2008 refers to a pyrite benchmark of 1%. This may not have been akin to a statement to this effect in a document authored by the plaintiffs' own solicitors, but it must at least have given rise to a suspicion in this regard that a benchmark had been applied. Any new information of assistance to the defendants in this regard, such as a statement in a document from the plaintiffs' solicitors regarding a 1% pyrite benchmark, can now be deployed in cross-examination. It is also open to the defendants to put to the plaintiffs' witnesses the case that there was an inconsistency of approach as between Bay Lane and non-Bay Lane houses insofar as pyrite benchmarking is concerned.

Accordingly, for the foregoing reasons, the Court does not consider that the defendants have suffered any irreparable prejudice in relation to this aspect of the present motion, and the Court does not propose to direct that any further steps be taken.

Issue IV – Concrete Delivery Documentation

On behalf of the first and fifth named defendants Mr. O'Neill submits that the latest discovery reveals 1,375 instances of water and/or sand being added to concrete mixes. In the original discovery there are only six dockets dealing with the addition of

water. Mr. O'Neill submits that the plaintiffs are fundamentally wrong in seeking to minimise the frequency of consequences of the addition of water. Mr. O'Neill notes the averments of Mr. O'Byrne and Mr. Lennon concerning the frequency of the addition of water and the number of slabs in respect of which this occurred. Mr. Lennon also gives figures for the number of slabs in respect of which sand was added.
Mr. O'Byrne suggests that where sand is added extra cement is also added. However Mr. O'Neill submits that there is no evidence that this was done. The defendants' experts heavily disagree with the suggestion that the addition of water is quite usual and quite appropriate. Mr. O'Neill submits that the addition of water must increase the likelihood or extent of shrinkage. The plaintiffs say that the compressive strength of the concrete is not affected. The defendants say that there may be some affect on the compressive strength but that is not really the issue. The issue is that there are slabs with cracks that the defendants say are attributable to shrinkage. The tensile strength is affected. In addition Mr. O'Neill refers to the Keegan Quarries conditions of sale and submits that they do not suggest that a practice of adding water is a common or appropriate practice. Mr. O'Neill refers to an averment of Mr. Lennon to the effect that the defendants experts fundamentally disagree with the suggestion that a decision to add water would have been taken by the ready mix supplier. In this regard Mr. Lennon notes the practice of recording the addition of water to protect the ready mix supplier if a mix turns out to be problematic. Mr. Lennon also refers to a passage from the cross examination of Dr. Maher in which he stated that he had seen three or four dockets noting the addition of water on site and this was documented by the ready mix supplier because they could be held responsible if the concrete does not meet strength requirements and therefore when water is added it is usually documented on the docket to protect the supplier.
The plaintiffs suggest that the addition of water was in order because what was ordered was a higher strength than that required by the Homebond Manual. However this ignores the issue of shrinkage and the fact that once the slab is cracked its strength as a unit is lost. The plaintiffs' suggestion also ignores the specifications which have been discovered on drawings which identified the strength of the concrete required. There is a specification identified by Fenton Fitzsimons of a concrete of a particular strength which we now know the plaintiffs decided to ignore which also brings into play the quality control issue. The plaintiffs say the testing of concrete is not usual in housing construction and is not required by standards. The defendants disagree and say that the requirement for testing is even more important where water is added to the mix. In his affidavit of 4th November Mr. O'Byrne avers that the mixes used in the estates were designed mixes. Mr. O'Neill refers to the Homebond Manual which states that designed mixes are supplied on the understanding that the concrete would be sampled and tested quite frequently by the purchaser on site. It goes on to state that concrete test cubes are the basis of the most important quality control there is for checking on hardened concrete. It then goes on to identify the sampling procedure for concrete cube tests. Mr. O'Neill contends that Mr. Forde agreed with Mr. Sutton that shrinkage can take place over a period of years but the majority of the shrinkage occurs in the first twelve months. Mr. O'Neill refers to an article stating that shrinkage takes place over a long period: some movement has been observed even after 28 years. In addition the Peadar Monaghan report refers to an assumption by Mr. Monaghan that concrete cube testing is taking place. Another document indicates similar assumption on the part of DBFL and a direction that concrete cube testing take place. There is no testing in respect of Drynam and Beaupark save for Block 21 in Beaupark and the plaintiffs say no testing was carried out. Mr. O'Neill submits that this highlights a lack of quality control.
Mr. O'Byrne avers in his affidavit of the 6th October that there is no relationship between the water cement ratio above a particular threshold as shrinkage. Mr. O'Neill submits that he does not identify what he means by above a particular threshold. The defendants say that quite clearly that relationship exists. The water will evaporate. The more water there is the more evaporation there will be, and therefore the more contraction or shrinkage will occur. The defendants now have information pointing to a wide spread and persistent practice of adding water and to a lesser extent sand to the mixes. The addition of sand was presumably at the behest of Menolly but carried out by the supplier presumably in the factory. Mr. O'Neill submits that there is a significant basis for the proposition advanced by the defendants' independent professional advisors that they see the fresh documentation relating to the addition of water and sand as being very significant and as giving rise to very significant issues, the absence of which they say has placed the defendants at a very significant disadvantage. The plaintiffs say the defendants always knew that water was added to the concrete. However STATS started out from basic principals looking at all aspects of the concrete. It was only at the end of those investigations in May 2008 that the question of a high water cement ratio became apparent. By then the basket had been agreed. The defendants experts say that had they been alerted to this high incidents of water and sand being added they would have focused on that and carried out a much more detailed testing regime on floor slabs. They would have focused on the matter from early on in their investigations rather than wasting valuable time. That would have informed the defendants of the appropriate houses to be included in the basket. The plaintiffs suggest that a high water cement ratio found in 1 Drynam Close should have alerted the defendants to the issue in relation to water being added. However, while that may identify a high water cement ratio in one particular house, it does not disclose the fact that this was a pervasive practice. The defendantscontend that had they been alerted to this high incidence they would have constructed a model floor slab mimicking the conditions that are seen in the houses and one would then see whether or not the cracks which appear in a number of the houses occur in that model floor. The plaintiffs suggest that it would not be possible to get the conditions correct in respect of such a floor. The defendants fundamentally disagree. If this were true a model floor slab could never be built to any useful purpose.
The defendants contend they would also have been able to correlate the data in relation to water added to specific properties. They could have focused on how floor slabs where water has been added are functioning contrasted to those where water has not been added. The plaintiffs say that that could never have been done because the concrete delivered was poured in batches. Mr. O'Neill submits that this does not constitute an answer: it simply means that instead of one slab being constructed from one delivery a number of slabs are constructed from the particular delivery to which it is now known whether or not water has been added.
The initial discovery reveals only about two or three mixes. The defendants now know that there are over 50 of them. STATS have carried out tests on some of the cores. The plaintiffs criticise those tests and one of the grounds of criticism is that it is not possible to carry out a proper test unless you know the constituents that go into making up the concrete. If that is so then the evidence of STATS is undermined solely because of the default on the part of the defendants. Had the documentation to which the defendants were entitled been provided STATS could have identified the relevant constituents and the plaintiffs criticism could not have been made. Clearly it is very important from the defendants' point of view to include in the basket houses where water or sand has been added and houses in which no water or sand has been added and to compare and contrast the performance of the slabs in those houses. When investigations and enquiries were being made the defendants had little more than a partial picture. Mr. O'Neill also refers to a passage from the cross-examination of Dr. Maher in respect of which he submits that the issue of the frequency of the addition of water to the concrete mix could not be pursued properly because of the lack of documentation.
In addition Mr. O'Neill submits that category 68 does cover the documentation in question and some delivery dockets, invoices and order forms had been made available in the original discovery.
On behalf of the plaintiffs Mr. O'Moore submits that the delivery documentation or documentation relating to water cement mix does not fall within category 68. It is for the defendants to show that the category includes the delivery dockets. If they fail to do so Mr. O'Moore submits that the vast bulk of this allegation of prejudice falls way. Mr. O'Moore refers to the portion of the letter of voluntary discovery of 10th March 2008 from Lennon Heather setting out category 68 which refers to copies of all

correspondence, reports, emails or communications passing between, *inter alia*, the plaintiffs and the suppliers of concrete to the three estates. Mr. O'Moore submits that a delivery docket does not fall within the various correspondence, reports, emails or communications. He also submits that the reason given for the category 68 request also supports his submission in regard to category 68 and a question of the water cement mix was not an issue in the proceedings at this time. It was only introduced as an issue in the amended defence delivered on 16th October 2009. A letter of the 25th March 2008 from BCM states that this category of document is too wide however the plaintiffs agreed to provide voluntary discovery of documents that passed between *inter alia* the plaintiffs and any suppliers of concrete in respect of the three estates. Mr. O'Neill submitted that the dockets are clearly communications, and that even if they were not, they are documents. However Mr. O'Moore submits that BCM were not saying in that letter that the defendants request was too wide but they were now going to broaden it to include all documents. Mr. O'Moore refers to pleadings prior to 10th March 2008 in support of his submission that there was no indication at that time that water cement ratio was an issue.

The addition of water and sand to the mixes is referred to in the amended Defence. Mr. O'Moore submits that the case made in the amended Defence is a materially different one to that which was in play when the discovery was agreed. Mr. O'Moore refers to a passage from the affidavit of Mr. Butler dated 6th October 2009 and submits that BCM were wrong to allow certain delivery dockets to be disclosed but very few were disclosed. In addition BCM should have communicated their view of category 68 to the defendants. However neither error gives the defendants an entitlement to discovery of the delivery dockets. Mr. O'Moore submits that nowhere is it suggested that the absence of delivery dockets is in any way impeding the work, particularly of Dr. Sims of STATS, in dealing with the water cement ratio issue as he had been for some months before Mr. Lennon's October affidavit was sworn. Mr. O'Moore submits that the Lennon and Heather letter of October 2008 contains a transient reference to the delivery dockets. One can see that it is not an issue, it is not covered by category 68 and even if it was Mr. Lennon's experts were not telling him that he needed to see this documentation or have it for them because they needed it for their own enquiries.

In relation to the assertion of prejudice concerning the selection of houses for the basket Mr. Sutton expressed the view to the Court that a water cement ratio between 0.7 and 0.9 is extremely high and that with the water cement ratio 0.9 there will be a lot of shrinkage. Mr. O'Moore notes that the STATS Report indicates that in January 2009 STATS had established water cement ratios for a number of the basket properties. Of those for which results are given five have a water cement ratio of 0.9 and all but one have water cement ratios of 0.7 to 0.9. Mr. O'Moore queries how there could be more houses in the basket with a high water cement ratio then STATS had found.

Mr. O'Neill also noted that Dr. Maher had criticised the testing carried out by STATS because they did not know the individual components of the concrete mix concerned. Mr. O'Moore rejects the suggestion that the plaintiffs are criticising STATS on the basis of a lack of information when the lack of information was due to the plaintiffs default. Mr. O'Moore submits that this does not make sense because the STATS Report does not contain any caveat about not having access to the constituents or components of the concrete mix, the aggregate used and the cement used. STATS never say that they would have carried out the testing in a different way if they had had access to these items of information. In relation to the model floor slab issue Mr. O'Moore wonders why this was not done on the basis of the discovery that the defendants already had. They knew about 50 mixes in terms of the cement supplied and seemed to have been alert to the fact that in their view there was a high water cement ratio. If they thought a slab would have worked they could have constructed it on the basis of the original discovery but did not. It was never suggested prior to Mr. Lennon's September affidavit that the defendants were hampered in not creating a model floor slab. The plaintiffs say that it cannot be done but if it was to be done Mr. O'Moore wonders why it was not done. Mr. O'Moore queries which of the 50 mixes of concrete they knew about in 2008 the defendants would have used. Mr. Lennon puts forward this idea in his evidence in an absolutely incomplete fashion so that no prejudice can possibly flow from it.

The fourth item of prejudice is the need to reconcile the delivery dockets indicating the addition of water and or sand with different houses in order to assess whether or not a particular mix has caused the damage. In his September affidavit Mr. Lennon avers that had the defendants been in possession of the relevant information, a cross referencing exercise could have been carried out to determine which properties contained mixes which were unusual or which contained added extra water. On the basis of that cross referencing a thorough examination and extensive testing regime would have been carried out by the defendants' experts to ascertain the exact water cement ratio and whether any damage which was manifesting itself could be attributed to shrinkage or other problems relating to the mix itself. However Mr. O'Moore submits that that is exactly what STATS have done in a different way. They have ascertained the original water cement ratio and have said that that is the cause of the cracking. The thorough examination and extensive testing regime has in fact been in existence. Mr. Lennon goes on to aver to the need to carry out a proper cross referencing exercise to establish the likely destination of all concrete deliveries to get an accurate picture as to which mix was used in each property. Mr. Lennon avers that the defendants are very concerned that they may be irreparably prejudiced in relation to this line of enquiry if it becomes clear that the houses which have been remediated thus far turn out to contain unusual mixes. However, Mr. O'Moore submits that this cross referencing exercise which the defendants say they can only now carry out, that is to say the exercise regarding the establishment of the likely destination of all concrete deliveries to get an accurate picture, has never been done, or if it has been done the Court has not been informed about it. The plaintiffs do not believe it can be done because you would not have a reference to a particular house because the deliveries relate to a pouring area that is done from the same delivery, so it is not possible to allocate a particular addition of water to a particular house.

Mr. O'Moore notes the averment of Mr. O'Byrne that the defendants were aware in 2008 of four suppliers as opposed to seven and of 50 mixes as opposed to 51. Mr. O'Moore submits that it has now emerged that there are more mixes than that. However, in any event there were 50 mixes available to the defendants in 2008 and they never carried out any of these elaborate tests. No model slab was produced and there was no correlation of data. In relation to the frequency of the addition of water Mr. Lennon avers that his experts advise that it can be presumed that where water is added it will always be to ground floor slabs. Mr. O'Moore submits that Mr. Lennon's calculation of the number of slabs affected is premised at least in part on this view, but the first document Mr. Lennon refers to in this regard relates to foundations. His response is that it is not necessarily the case that the concrete referred to in this docket was only in the foundations. He is advised that there is a distinct possibility that concrete of this type would have also been used in the floor slab.

Mr. Lennon refers in his September affidavit to prejudice in relation to the cross-examination of Dr. Maher. He refers to excerpts from Dr. Maher's cross examination in this regard. Mr. O'Moore submits that there are two issues in this regard, one concerning the conscious addition of water at the behest of Menolly and noted as such on the delivery docket, and the other concerning Menolly complaining to Goode Concrete about the quality of the concrete and in particular the fact that it was too weak. However Mr. O'Moore submits that there is no evidence of further documents of complaint relating to concrete in the new discovery and in that sense Mr. O'Neill's cross examination was not affected in any way. There is a further excerpt from the cross examination of Dr. Maher concerning the water cement ratio. Mr. O'Moore submits that the debate is still whether the addition of water is a pervasive practice as Mr. Lennon describes it or is it a practice that is within the norm and one which has not caused this problem. Mr. O'Neill was free to have this debate with Dr. Maher. Mr. O'Neill submitted that he would not want to telegraph his questions in advance. Mr. O'Moore rejects this response. Dr. Maher was clearly an expert witness with an obligation to the Court. They are not the sort of witnesses that have to be ambushed. More importantly Mr. O'Neill can now put the information now available to him to Dr. Maher. Dr. Maher clearly gave evidence realising that there was a limited number of dockets. He said that he did not know if all the dockets were available. Mr. O'Moore submits that it is a cross examiners dream

to put to a witness some months after his earlier evidence that when he gave that evidence he did not know about the existence of the other dockets and to enquire of him whether it would change his evidence.
Mr. Barniville in reply submits that the delivery dockets clearly fall within Category 68. There are communications which pass between the plaintiffs and the supplier of concrete in relation to the three estates. They are undoubtedly communications because they amount to the delivery or transfer of information and therefore are within the ordinary meaning of a communication. In addition delivery dockets are expressly referred to in respect of this category in the Lennon Heather letter of October 2008. Mr. Barniville submits that it is not correct to describe this reference as fleeting. In addition if it was the intention to communicate a contrary construction in respect of the delivery documents there were several opportunities to do so but the defendants were never told that it was the view on the plaintiffs side that delivery dockets were not covered. There were 265 delivery dockets, 260 of which related to Myrtle, in the old discovery. Mr. Butler acknowledges that that could have given a misleading impression to the defendants.
Mr. Barniville submits that the response of BCM to the effect that category 68 as sought was too broad was stated for two reasons neither of which relates to the manner of describing the documents therefore the category of voluntary discovery they offer in this regard is in no way limited to exclude what would certainly be a document and in event a communication being the delivery dockets and containing important information about the quality of mix of the concrete delivered to the estates. Mr. Barniville queries why a need to communicate the plaintiffs interpretation of category 68 which was felt if its meaning was so clear. He also queries why they needed to expand the category when it came to making the 2009 discovery and why this was never raised at any stage until this motion was brought.
Mr. Barniville accepts that the concept of the water cement ratio in respect of concrete is not expressly mentioned in the Defence as originally delivered and is mentioned in the amended Defence delivered in October 2009. The concrete floor slabs were very much an issue in the Statement of Claim and formed an essential part of the case being made by the plaintiffs in the original Statement of Claim. In addition in the Replies to Particulars of 6th March 2008 there is express reference to the performance of the floor slabs albeit no express reference to the water cement ratio. Mr. Barniville submits that that is not something that did specifically expressly need to be mentioned to render the delivery dockets relevant and discoverable under the category agreed. Mr. Barniville also refers to other portions of the Replies to Particulars which he submits make clear the relevance of the concrete and its performance thereby rendering relevant the documentation under which the concrete is delivered. Mr. Barniville submits that it was arguably unnecessary to specifically mention the water cement ratio when they amended the Defence. There is reference to this issue in the STATS Reports and it was never suggested that the plaintiffs were caught unawares by the raising of the water cement ratio. Mr. Barniville therefore submits that these documents were covered by the pleadings as they stood at the time discovery was ruled.
As to the suggestion that the non-discovery of the delivery dockets was not pursued Mr. Barniville submits that it is clear from Mr. Butler's affidavit of 6th October 2009 that he seemed to be under the impression that the documents were being sought because he avers that it should have been made clear at that time when the challenge was made that the plaintiffs' position was that the documents were not discoverable. They therefore appear to be aware that there was a challenge by the non discovery of the delivery dockets. Clearly Lennon Heather were pursuing the absence of concrete delivery dockets in the letter of the 10th March 2008. In addition in his affidavit of the 30th October 2008 Mr. Lennon points out that specific queries were raised in relation to categories 55 to 77. He exhibits the list of queries. In addition Mr. Lennon refers to the lack of documentation in relation to concrete suppliers and says that is very surprising as such documents would have fallen within a number of categories, including Category 68. He also avers in his 30th October 2008 affidavit that the quality and strength of the concrete as used by the plaintiffs in the development of these estates will be crucial to the proceedings. In addition, in their letter of the 24th November 2008 BCM state that they requested from the suppliers of concrete to the three estates any correspondence reports, emails and communications in their possession that passed between each of them and any of the plaintiffs and Helsingor Limited in respect of Drynam, Myrtle or Beaupark. They state that they further confirm that all documents that were relevant to the categories of voluntary discovery provided to the plaintiffs pursuant to these requests have been included in discovery already made to the defendants. Mr. Barniville submits that nothing was said to indicate that the dockets were not relevant. The fact that they were discovered in 2009 is testimony to the fact that they should have been discovered.
In relation to prejudice Mr. Barniville submits that there were only two mixes discernable from the delivery dockets in respect of the Drynam and Beaupark deliveries in the original discovery. Mr. Barniville submits that the essential prejudice in regard to this area is that had the defendants been aware of the extent of the addition of water from the delivery dockets they would have carried out far more extensive sampling and testing with greater analysis of cores. They would have sought more cores from houses and would have conducted a more detailed survey of the concrete not only in respect of the slabs from the houses where the cores or samples were taken but from a far greater number of houses. They would have done water cement ratio testing in order to demonstrate the impact of the extent of the addition of water as evident from the delivery dockets. The defendants would have sought access to other houses in which sampling and re-sampling was being carried out by the plaintiffs. They would have sought extra samples of cores from remediated houses also.
In respect of the suggestion that there are many houses in the basket with a high water cement ratio indicated in the STATS Report Mr. Barniville submits that STATS make it clear that testing is on the basis of one core from each house. The defendants would have advised more extensive testing, more extensive sampling, the taking of more cores from more houses to demonstrate to the Court that the practice was as significant as they regarded it to be. The STATS Report does contain high water cement ratio results but severe criticism was directed on behalf of the plaintiffs that the testing carried out by STATS on the basis that they did not know what the mix in the concrete was when carrying out their tests. The defendants had two mixes for Drynam and Beaupark and neither showed the addition of water. The defendants now have the significant number that do. The view of the defendants' experts is that it would have been essential to carry out further testing.
In addition when Mr. Sutton gave evidence in the houses and addressed the question of the water cement ratio he was doing so without knowledge of the extent to which the practice was carried out. The delivery dockets indicate a far more extensive level than had previously been understood to be the case. STATS were performing tests and looking at all possible causes. They were not particularly focusing their attention on the water cement ratio as being the critical issue. Between July 2008 and August 2009 when the additional documents were discovered the reports were prepared, the investigations were done, the evidence was given to a certain extent on the issue.
Mr. O'Neill confirms that the defendants have not carried out any further investigations as a result of the discovery that has now been made.
Mr. Barniville submits that the approximately 50 mixes that were present in the old discovery were those that were discernable from the Myrtle dockets.
Mr. Barniville rejects the criticisms in respect of the model floor slab issue. He also rejects the criticisms of the level of detail in respect of this complaint because to meet the test at least for mistrial it is unnecessary to give precise detailed evidence as to all aspects but it is necessary to identify the areas that would have been pursued.
Mr. Barniville also refers to the assertion of prejudice in respect of Dr. Maher's cross examination. In this area Dr. Maher is the principal expert on behalf of the plaintiffs in respect of the concrete. Mr. O'Moore submitted that the defendants could have sought non party discovery in September 2008 in respect of the delivery dockets. However these are documents that have now emanated from the plaintiffs themselves and the defendants should not have had to seek non party discovery at that stage in

respect of documents the plaintiffs had. They sought non party discovery after the 2009 discovery and received non party discovery from various suppliers.

Conclusion

I accept that there was an arguable basis for the plaintiffs' legal advisors to advise that the concrete delivery dockets from the various identified suppliers were not discoverable on the basis that they did not come within the ambit of category 68. The reality of the situation is that, other than a fleeting reference, correspondence between the parties did not, in my view, adequately identify the desire of the defendants to have the delivery dockets discovered, and likewise, the refusal by the plaintiffs to discover them.
It also has to be borne in mind that a small number of delivery dockets were discovered, and in subsequent correspondence the situation, in my view, should have been clarified by the plaintiffs. The situation is further complicated, and I do accept the submissions as made on the plaintiffs' behalf in this regard, by reason of the fact that the addition of water and sand to the deliveries of concrete was not adequately or at all identified by the defendants in their pleadings as an issue in the case, and has only been pleaded as such in the recent further amended defence as delivered on the defendants' behalf in October 2009. I do accept that for the defendants the addition of water and sand is a significant aspect of the proposed defence, and was being extensively investigated by the defendants' experts. Arising from the initial discovery the defendants did have the benefit of six delivery dockets revealing that water was added to concrete on delivery in respect of Myrtle. Furthermore, the defendants had the benefit of having the concrete suppliers identified, and it was at all times open to them from June 2008 to bring an application for non-party discovery from the suppliers, which action they did take approximately a year later. 260 dockets in respect of Myrtle, and only three and two in respect of Drynam and Beaupark respectively, were discovered in the original discovery. In view of the stark contrast between these figures, together with the number of houses on each of the three estates, it must have been obvious to the defendants that there had to be more dockets, at least in respect of Drynam and Beaupark, which had not been discovered.
Mr. Lennon makes the case that the newly furnished delivery documentation provides clear evidence that the practice which was adopted by the plaintiffs with respect to the pouring of the concrete floor slabs constitutes a major deviation from the applicable building regulations and standards, which has led to the damage now manifesting in many floor slabs across the three estates. Mr. Lennon relies on building regulations and technical guidance documents. These are clearly matters touching on the issues to be decided by the Court.
In relation to the complaint regarding the basket of houses, if one considers the content of the STATS Report of January 2009 taken in conjunction with the evidence of Mr. Sutton as given to the Court while on a site visit to the Judge's houses, it is quite clear that all the properties in the basket were available for examination and testing and that the majority of these houses, at least by January 2009, had been tested to establish the original water-cement ratio. Mr. Sutton's evidence to the court was that 0.7 to 0.9 represented an extremely high water-cement ratio and accordingly, all but one of the basket properties that had been tested by January 2009 has an extremely high water-cement ratio on the basis of the testing by STATS considered in conjunction with Mr. Sutton's evidence. As Mr. O'Moore on the plaintiffs' behalf submits to the Court, according to the defendants themselves the basket of houses is flooded with houses with a high water-cement ratio.
A further criticism raised by Mr. O'Neill on the defendants' behalf, is that Dr. Maher in his evidence was of the view that the water-cement results from the defendants' testing was in some way unreliable because they did not have access for testing of the individual components of the concrete mix concerned. However, there is no caveat regarding lack of sufficient information in respect of this issue attached to the STATS report of January 2009, the defendants have now had the relevant delivery dockets since June 2009 and it is not indicated on the defendants' behalf that the tests would have been carried out in some different manner if they had had access to the concrete delivery documents. Furthermore, it is quite clear that by agreement Dr. Maher is to be recalled to the witness box for further examination, and with the benefit of the delivery dockets he can be cross-examined as regards this entire aspect. It also has to be borne in mind that Mr. Forde is the lead construction witness on the plaintiffs' behalf and he has not yet commenced to give his evidence in Court.
I do not consider that there is any realistic basis for the defendants' contention that if they had obtained discovery of the delivery dockets they would have created a model floor slab, which would have mimicked all the conditions that are seen in the houses and they then would have been able to ascertain whether or not the cracks which they find in a number of the houses appear in the model floor, and that such an exercise would be divorced entirely from any infill and any issue in relation to pyrite. In my view this could have been done at any time, if considered appropriate. It now appears that there are approximately 80 concrete mixes involved, that water was added in different quantities and that the sand was added, according to Mr. O'Byrne in any event, in the factory premises. I consider that there can be no basis to the allegation concerning the model floor slab. The defendants had access to 50 mixes from the 2008 discovery in terms of the cement supplied and it is clear from the STATS report that they were alive to the issue of the high water-cement ratio. It may be that all but two of these related to Myrtle, but that does not detract from the point that these mixes were known. The additional mixes can now be considered by the defendants' experts to determine if they give rise to any concern.
A further complaint is that the defendants will want to carry out a reconciliation of what water has been added to what concrete mix for each particular house, and the reality of the situation, having regard to the manner in which the concrete was delivered and utilised, is that this is not and never was an exercise that could be reliably carried out.
The underlying basis for the defendants' argument is that the adding of water to the concrete on delivery was a pervasive practice, and would have had an effect on the potential for cracking and on the strength of the concrete. The number of dockets indicating the addition of water and/or sand is disputed. The plaintiffs maintain that the addition of water was not a pervasive practice taking place in less than 8% of the deliveries of concrete to the sites and that in any event it is within the norm and one which, more importantly, has not caused the problems in the houses, which is the central issue in this case. Clearly these are all matters which I will have to decide on the basis of the evidence adduced in Court. Insofar as the defendants are concerned, however, counsel on their behalf will have every opportunity to cross-examine Dr. Maher again, in his capacity as an expert witness, and the remaining witnesses on construction who will give evidence on the plaintiffs' behalf, and I do not accept that in any way, having regard to the realities of this case, there is any basis for the defendants to say that further cross-examination of Dr. Maher would be quite unsatisfactory because the questions to be asked of him would now be telegraphed in advance.
In my view the defendants have not suffered any irreparable prejudice and, in any event in the background, were carrying out their own extensive tests and always considered that the addition of water and sand was a significant element of their defence. They are now armed with the delivery documentation, and clearly an issue is going to be the defendants' view that the practice was pervasive and not in accordance with relevant regulations and not in accordance with normal practice on building sites. The dockets can now be used by the defendants for the purpose of cross-examination of the plaintiffs' witnesses, and can be used by their own expert witnesses if it be the case to fortify their arguments. I also bear in mind that the concrete delivery documentation was discovered in June 2009. The defendants' experts have clearly had access to it for a considerable period of time as their views in relation to the significance of this documentation have been ascertained and outlined in Mr. Lennon's affidavit of 15th September 2009. I consider that there is no irreparable prejudice and the matters arising can be dealt with by the recall of any relevant witnesses, and I propose to take no further steps with regard to this aspect.

Issue V - Ground Conditions

Mr. O'Neill on behalf of the first and fifth named defendants submits to the Court that they were led to believe that the ground conditions were good. The defendants can go on site and inspect the conditions, but that is insufficient because it is carried out after the development has been completed. It is therefore necessary to look to the documentary evidence available. For that reason there are specific discovery categories dealing with ground conditions.

In his affidavit of 27th October 2009 Mr. Lennon avers that the defendants sought documentation of the type that has now come to light because they considered that these documents were both relevant and necessary for the defence of the proceedings. Mr. Lennon notes that the plaintiffs agreed the request for discovery and no issue was taken with the necessity to discover these documents. He asserts that it is insufficient for Mr. O'Byrne now to assert that these documents were never necessary. This is not a simple case where one inspection of a particular property might provide all the information an expert would need to give an opinion on the issues presented. There are hundreds of houses built over varying ground conditions and which contain constructional detail underground to which the defendants would not be privy. The plaintiffs have a natural advantage in the case in that they and their experts were involved in the construction of these estates from a greenfield site. Therefore, documentation concerning the construction of these estates and their conditions before construction is central to providing the essential context and direction to experts investigating the cause of damage a number of years after the seeds of the damage have been sown. It is wrong to claim that one would not need documents to formulate an approach to investigation where, for example, that documentation revealed important underground drainage detail which the defendants could not be expected to know.

Mr. O'Neill emphasises that the defendants say that the damage manifesting in the houses is not significant and is attributable to a number of causes. Therefore, in determining the cause of damage for any particular house or portion of the estate, one has to look not only at the building practice in the house but also the ground conditions that prevailed in that area.

Mr. O'Neill contends that the defendants now know there are problems in particular areas. In Drynam for example, they knew that lime stabilisation had occurred but did not know that the surface water which would normally percolate into the ground has been taken by drains into the surface water system, which results in more water in the surface water drainage system. Like all drains, the surface water drains are gravity fed and this leads to all of the surface water going down to the lowest part of the site, which is the north eastern section. There are flooding problems and water problems there. Mr. O'Byrne says there was flooding in August 2008 but it was due to extreme weather. The discovery of 4th November 2009 reveals that DBFL cautioned in relation to the redundant Gaybrook stream, running from the north to the north eastern section of Drynam, that it could be an area of ground water accumulation and care should be taken in installing the services in this area.

Mr. Lennon refers to the water at 22 Drynam View, which is in the north eastern section, and the difficulty of pumping it out. The defendants' experts advise that this is a clear indication of surface water drainage issues in this area. Mr. Lennon also states that the attenuation systems should be designed to enable them to cater for a 1 in 30 year return storm event with the site designed to withstand flooding from a 1 in 100 year storm event. Mr. O'Byrne responds by saying the flooding in No. 22 is due to a combination of ground water and surface water. In relation to the surface water he says this occurred because the pipes were cut when remediation was being carried out. Mr. O'Neill finds this difficult to understand. His understanding is that all surface water issues are gravity fed and in other words drop away from the house rather than into it, so it is difficult to see how that would afford an answer to the significant water at No. 22. The north eastern section also contains soft soils which the defendants say would be susceptible to settlement due to the presence of water.

The defendants were unaware of these issues until the 2009 discovery. The defendants say they are significant issues and issues they would have been advised by their experts to investigate. On foot of that advice a stand pipe/water monitoring well would have been installed together with data loggers to monitor water levels over time to record seasonal variations. The initial site investigation conducted for the plaintiffs had one stand pipe but it was not in the north east section. A more detailed site investigation would have identified serious drainage problems and the possibility of a link between this new information and the damage manifesting in the north eastern section. The opportunity has now gone.

The construction of houses over the lime stabilised area is another issue. The defendants knew it was a lime stabilised area and knew houses had been constructed in the area but did not know the constructional detail. A fax dated October 2004 from Menolly to DBFL states that reinforcing mesh was used only where at least 500mm of stabilised soil existed beneath the relevant foundation, and that in other areas the foundations were sunk to virgin soil and the stabilised ground only supported the like of sub-floor parts. It then identifies a number of houses, noting the foundation detail for each. This was one of the documents in the old discovery which was discovered in parts and proved impossible even for the plaintiffs to put together. Without the full document it was meaningless. The result of the information in this fax is that you may have, depending on the topography, a house built partly on stabilised soil and partly on virgin soil. This creates a potential for differential settlement of foundations.

Mr. Lennon avers that the issues ventilated between him and Mr. O'Byrne cannot be resolved in this application. However, he states that the defendants now have specific information as to which houses were built on top of lime stabilised soil as opposed to those houses which were sunk down to the virgin ground. Furthermore, there are specific constructional details including the type of concrete utilised and the form of reinforcing mesh used in these specific properties. This information would have enabled the defendants' experts specifically to examine those properties mentioned in the list contained in the fax to investigate whether any damage to those properties can be attributable to settlement arising from weakening stabilised soil. In addition, the defendants say that there is scientific literature which suggests that lime stabilisation would only have a short term effect in stabilising boulder clay.

Mr. O'Byrne avers that a document in the old discovery clearly put the defendants on notice of the precise nature of how the foundations were founded on stabilised soil. He states that, in addition, DBFL certificates for houses with specialist foundations stated that the foundations for the relevant block of houses were founded on stabilised ground, while the certificate for houses where specialist foundations were not used stated that no specialist foundations were used.

Mr. O'Neill submits that it is implausible to suggest that the defendants should divine from the different wording, even though it is not stated, that specialist foundations were in fact used.

In relation to Beaupark, Mr. Lennon notes a number of documents which indicated major concerns regarding concrete washed down contamination, blockage of drains and the need to treat a settlement pond. He also states that meetings revealed issues relating to groundwater and settlement ponds. There is also a reference to the fact that Moylans' resident engineer on site had to issue and oversee a report compiled by NTC Environment in relation to this problem, although Mr. Lennon avers that it appears from the discovery that this report has not been provided. Mr. O'Neill submits that it does not appear that the issue of the non-discovery of that report is addressed by the plaintiffs in their subsequent affidavits.

The defendants' experts are of the view that the issues arising provide early indicators of poor ground conditions and drainage problems of which the defendants were not previously aware. There are comments in the diary of Kevin Kelly Jr. relating to the high water table and significant water ingress at some properties.

Mr. O'Byrne states that the defendants had access to the remediated properties and, therefore, once the infill is removed, one would be down to virgin soil and all of these issues would have become apparent. However, the defendants' experts were entitled to attend at various stages and, insofar as is relevant in this aspect, they were entitled to attend before the infill was removed and after the slab had been taken up. They were not allowed to be present when the infill was being removed. They were entitled to return only once after the infill had been removed and make their observations. After that they could only

return after the new infill had been placed. It is therefore being suggested that by virtue of one visit or a visit to one of a number of properties, one should have divined issues of which the plaintiffs were aware and which they had failed to disclose. It is submitted that this is hardly an appropriate answer to the plaintiffs' discovery failings and is hardly a satisfactory way from a professional's point of view to conduct the examinations a professional would wish to conduct.
AGEC would have recommended at least one water-monitoring well and the installation of data loggers to monitor water levels over time to record seasonal variations, would have carried out a thorough geophysical examination, and would have installed ground penetrating radars and/or seismic sensors in gardens and roads. In Beaupark they would have employed boreholes, stand pipe and a data logger for continuous monitoring. The defendants' experts would also have undertaken a more focused investigation of houses in the lime stabilised areas and each of these steps would have led to a better understanding of the ground conditions and would have made the defendants better able to meet the case against them. In addition, the results may have led to the inclusion of houses in the basket. Also, the defendants were unable to put to Dr. Maher any of these significant issues in relation to soil conditions. If he were recalled to have these questions put to him, with the defendants having displayed their stall, this would be like giving him a list of questions in advance which he can mull over and come back with answers. This is not the way cross-examination works in our system and no barrister would wish to conduct a cross-examination in this way.
There are also new documents relating to ground conditions. Reference is made in Mr. Lennon's September 2009 affidavit to a "major hollow" in the back garden of 4 Stapolin Avenue and to the DBFL structural certificate for the houses on Stapolin Avenue stating that the foundations for these houses were piled. Another structural certificate indicates that no specialist foundations were used for the houses on Stapolin Avenue. Other documents in the new discovery indicate that lime stabilisation works at Myrtle may not have been to a very high standard. A document states that the plaintiffs' specialist consultant, Mr. Frank Motherway, was "less than complimentary towards the operation as a whole".
Site diaries also raise points in relation to drainage issues which the defendants say could not be picked up from inspections. Had the defendants been aware of the issues that have manifested themselves, they would have sought greater inspection facilities.
There is also a preliminary health and safety plan by DBFL referring to the Gaybrook stream and the warning by DBFL that care should be taken when installing services in this area because it could be an area of groundwater accumulation as a result of this stream.
On behalf of the plaintiffs Mr. O'Moore notes that Mr. Lennon refers to a 6" diameter pipe running at the back of a number of houses in Drynam. This is a drainage detail so small that it does not even feature in the drainage details disclosed in 2008. Even Mr. Lennon eventually accepts that the only significance this pipe could have is if it had actually led to flooding and was therefore connected with a flooding problem in the northeast of the estate.
Mr. O'Moore submits that for the drain to have any significance there must be local flooding because if no local flooding occurs the drain is performing its function.
Mr. Lennon points to a series of documents in the new discovery and states that had AGEC been aware of certain information concerning drainage they would have insisted that at least one water-monitoring well was installed in this part of the site or adjacent to Feltrim Road. Mr. Lennon is also advised that the ground water level appears to be changing rapidly and it would have been necessary to install data loggers to continuously monitor the water levels.
Mr. Lennon refers in this context to a letter from Moylan's as being newly discovered, but the defendants have had this letter since 2008. They had this documentation and it did not lead to the dramatic effects AGEC now argue for. There are emails dated August 2008, but that is after the cut-off point. There is also a handwritten note referring to drainage problems alleged at 18 Drynam Green, but a letter from Arthur Cox discovered in 2008 relating to this property sets out the position in great detail, stating that the homeowners were visited by Dyno-Rod twice to have blocked drains cleared as the homeowners were told the fall in the drains was wrong. This gives more detail than the handwritten note. Mr. Lennon also refers to a letter in respect of 47 Drynam View, but this letter was discovered in 2008. With the exception of the drainage detail and the documents post-dating the cut-off point, all of this documentation was discovered in 2008, except the handwritten note which is more than covered by the Arthur Cox letter. This is another contrived allegation of prejudice. The defendants say, as they have to, that the drain caused the flooding and is therefore significant. The flooding only occurred in August, so the significance of the drain could not have been apparent to anyone even if the documentation was discovered in June 2008.
Mr. O'Byrne explains the flooding by reference to the extreme weather conditions during the relevant weekend. The Met Éireann report for the relevant weekend states that this was a once in 237 years event. Mr. O'Byrne avers that there has been no such flooding in Drynam View before or since that weekend.
He also avers that AGEC were aware from the SIL report that the groundwater level at Drynam was recorded in December 2001 at what Dr. Maher considers a relatively high groundwater level. In addition, during the remedial works AGEC supervised dynamic probing and the undertaking of window sample boreholes at the perimeter of the houses. A number of window sample boreholes in houses in Drynam recorded high water levels. The Golder report gives water monitoring results for three wells in Drynam. In addition, in February 2009 AGEC undertook three sample boreholes in Drynam, two of which had groundwater well installations included, and the excavation of a trial pit and six dynamic probes in Drynam. Mr. O'Byrne also avers that it is clear from the cross-examination of Dr. Maher that the defendants' experts were contending that there were significant variations in the groundwater levels and that this could have an impact on the performance of the foundations.
Mr. Lennon avers that during the remediation of 22 Drynam View, one of the Judge's houses, the excavation of sub-base material was flooded and it was noted that water was entering to a height in excess of one metre above foundation level. Furthermore, it was noted that this water could not be easily pumped to reduce the water level and the attempts to do so had failed. The defendants' experts advise that this is a clear indication that there are surface water drainage issues in this area. Again however, that post-dates the cut-off point. The alleged significance of this drain is intimately linked with things that happened after the cut-off point.
On this entire issue there are two newly discovered documents, one the handwritten note, which is replicated and elaborated on in a letter discovered in 2008, the other the drainage detail for a tiny drain too small to be included in the drainage details provided in 2008, given a grossly overstated importance by the defendants. Even on their account, this only had a significance in the light of the fact of flooding in August 2008.
The plaintiffs reject the claim that a 150mm diameter pipe serving 18 houses will bring about huge pressure on the surface water system and cause local flooding. The discharge from a 150mm diameter pipe is negligible when compared with the total run-off and this pipe is connected to the 1200mm diameter outfall pipe. Dr. Maher stated in evidence that groundwater levels higher than foundation level would be acceptable to him provided that they were no higher than the underside of the floor slab. The plaintiffs do not believe that the discovery of a short section of a 150mm diameter drain in the back garden of 18 houses would have triggered additional investigations involving ground penetrating radars and/or shallow seismic sensors.
In relation to lime stabilisation, the defendants knew that houses in Drynam were founded on lime stabilised soil. The issue Mr. Lennon raises is that they were unaware whether there were houses being constructed solely on the stabilised portion or whether they had all been sunk through to the virgin soil. He notes that this detail is contained in a fax, the attachments to the cover sheet of which the plaintiffs could not locate when their absence was queried by the defendants. He avers that evidence that the plaintiffs were building on lime stabilised areas and using different constructional detail based on the vertical depth of the stabilised soil would have been crucial in the defendants' investigations of the ground conditions under the houses at

Drynam. He notes the scientific literature referred to above as to the short-term effect of lime stabilisation. Had the defendants' experts been aware houses were built on top of lime stabilised soil where there was depth of 500mm and were not sunk down to the virgin ground investigations in order to sample the soil for classification testing would have been required.
The plaintiffs reject the assertion that lime stabilisation has only a short-term effect in stabilising boulder clay and refer to a paper by Mr. Paul Quigley which states that lime stabilisation techniques are suitable for typical Dublin brown boulder clays. Dr. Maher also referred to this paper in evidence and stated that there was nothing unusual about the use of this technique. He pointed to the fact that the work was done by a specialised contractor and was supervised by DBFL, who were prepared to say that it was done correctly and issued foundation certificates.
Mr. O'Moore notes that the fax in question was discovered in 2009 one page after another, but was not discovered with all of its pages together in 2008. However, leaving aside the fact of its association with another document, a handwritten page of the fax containing the constructional detail in relation to different depths of stabilised soil and identifying houses with virgin soil foundations and houses where mesh was used was discovered in 2008. This page in itself gives precisely the information Mr. Lennon says was not available. There is also a page referring to foundation types, whether or not mesh was used, etc., and a map in respect of various areas where different forms of construction in relation to the lime stabilised ground were used, both discovered in 2008. Mr. Lennon states that these two documents appeared to have no direct relation to the fax cover and their significance was not apparent. The document which drew all of these together (the handwritten page referred to above) was found approximately 3,000 documents away from the cover sheet and had a different date. In addition, the author field was missing. Mr. Lennon believes it was impossible for the defendants to know this was the second page of the four-page fax.
Mr. O'Moore acknowledges that it had a different date, but notes that the transmission date, which is the same date as the parent document, is printed on the top of the page. In addition, irrespective of its connection with the fax, this page indicates the precise constructional design that Mr. Lennon said would be so important.
There is also a constructional detail from DBFL which was discovered in 2008 and states "If this dimension is less than 500mm the foundation to be dug down to suitable ground which will be inspected by DBFL engineers." It then states that a specified mesh is to be used throughout.
Mr. Lennon states in his October affidavit that he does not maintain that the defendants' experts never knew the houses were built over lime stabilised ground, but rather that there was a lack of clarity as to which specific homes were built on top of the stabilised soil. Mr. O'Moore suggests that this represents a shift in position following Mr. O'Byrne's points as to what was discovered in 2008. Mr. Lennon states that while the old discovery contained general instructions on how to build over lime stabilised ground, the defendants did not have specific information as to where this actually occurred and which houses were built upon lime stabilised soil itself and which were sunk down to the virgin soil. This information would have been of particular use in specific inspections carried out in these individual properties. In respect of houses built on top of lime stabilised soil investigations such as trial pits would have been required in either the back gardens or under the roads to sample the soil for classification testing.
However, the houses in Drynam Drive identified in the handwritten note referred to above were available if the handwritten note had been looked at. The complaint that there was no correlation between a house identity and the form of construction in respect of stabilised soil is also wrong. In this regard Mr. O'Byrne points to Doc ID 09118, which is the handwritten note, as clearly putting the defendants on notice of the "precise nature" of how foundations were founded on stabilised soil. Mr. O'Byrne also refers to the DBFL foundation certificates cited by Mr. O'Neill.
Mr. Lennon avers that the new discovery indicates that there were considerable problems with surface water and groundwater in Beaupark. He avers that a document indicated that there was a major concern regarding concrete wash down contamination and that drains in the main street had been blocked and the settling pond had to be treated. There is reference to an engineer having to issue a report on this problem but this report has not been provided. Other documents and minutes of site meetings reveal issues regarding groundwater and settling ponds. AGEC advise that stand pipe and data loggers would have been employed at the north of Grange Lodge Avenue. The defendants' experts would also have insisted on installing a data logger to obtain continuous water level readings. A significant period of time is required in relation to these water level readings to account for seasonal variations. The defendants have lost the opportunity to obtain such evidence which could have been produced at trial. These investigations would also have been prompted by other information which has come to the defendants' attention in relation to significant problems with flooding and ground water problems in Beaupark.
Mr. O'Byrne avers that AGEC identified water in most of the houses in Hoey Court and Hoey Close during remediation "suggesting a high water table (but possibly a result of surface water during the wet summer of 2008)". It is also clear that AGEC believed the water table at Beaupark was very close to the surface. It is also clear from the Golder report that high water levels had been experienced in Beaupark. AGEC performed further ground investigation at Beaupark in February 2009, which involved the drilling of rotary cored boreholes, the installation of two ground water wells, a trial pit and several dynamic probes. Mr. O'Byrne then notes some of the water levels recorded. He also refers to a drawing in Appendix 4 to the Golder report, which contains a report for Beaupark showing the locations of former ditches on the site. The same report also presents the results of water level monitoring from three wells constructed surrounding Beaupark. He concludes that the defendants have had every opportunity to carry out whatever testing they thought appropriate regarding the presence of water in Beaupark.
Mr. O'Moore submits that the documents Mr. Lennon refers to indicate a high water table, which is precisely what AGEC were looking into, perhaps not since they began the works but certainly right up to their report.
Mr. Lennon states in his October 2009 affidavit that Mr. O'Byrne's response is that the defendants' experts had access to these particular properties and will have noticed themselves water ingress occurring. However, the defendants' experts' inspections were on different days to those recorded in Mr. Kelly's diary and they would not have been in a position at that point from a visual inspection to determine whether the water was due to a recent rainfall or a high water table. Mr. O'Byrne does not acknowledge that whilst the defendants had access to the homes during remediation their access was much more limited than that enjoyed by the plaintiffs' experts who were carrying out the remediation. Therefore, the plaintiffs' experts' commentary as to what they were witnessing in these properties is of obvious significance and importance.
However, the form of access to the properties is on foot of a protocol agreed between the parties. The protocol was not entered into blindly with regard to this problem because AGEC are aware of the question of the high water table.
Mr. Lennon states that while AGEC identified water in most of the houses in Hoey Court and Hoey Close during remediation, their examination would have been based on a one off visit whereas a confirmation by the plaintiffs' experts that water ingress in this area related to a high water table was something of significance.
Mr. O'Moore contends that there is no prejudice and this can all be put to the relevant witnesses in cross-examination. More importantly, if AGEC consider that there is an issue about a high water table and that has caused the cracking, they can say that they knew about this without these documents and now have these documents which support their position.
Mr. Lennon says it is not sufficient for Mr. O'Byrne to say that the testing carried out by AGEC was adequate. However, Mr. O'Moore submits that AGEC are best placed to express a view as to what testing was required and clearly felt at the time that the testing was adequate.
Mr. Lennon states that the defendants were entitled to all relevant information which was discoverable in July 2008 and given the natural disadvantage of not having full access to the properties under remediation and not having an intimate knowledge of the construction of this estate, all information as to what was occurring on site whether during construction or remediation which was discoverable would have been used by the defendants to provide direction to their testing and investigations.

Mr. O'Moore contends that this is a much weaker argument regarding prejudice than the argument advanced in Mr. Lennon's September 2009 affidavit, because that argument does not survive Mr. O'Byrne's points that the high water table issue was on the AGEC agenda and they performed a range of tests which investigated that issue perfectly competently.
In addition, the plaintiffs say that the contamination referred to is an issue on many building sites, that settlement ponds are common on many sites and that these items have no relevance to the damage caused to the houses in Beaupark.
Mr. Lennon avers that there appear to be serious issues in relation to ground conditions at Myrtle. For example there is evidence that there were grave problems in relation to ground conditions at Stapolin Avenue. Two emails refer to subsidence at 4 Stapolin Avenue and a major hollow in the garden. There is also a reference to the fact that No. 4 is "sinking further". These comments must be viewed in the context of other documents indicating that there was a public watercourse in this area. If this is so and if the watercourse was terminated, the defendants' experts advise that construction in this area would have been affected by the ground conditions.
Mr. O'Moore however points out that Mr. Lennon had the document referring to No. 4 sinking further since the 2008 discovery. The newly discovered document is less striking and in truth adds nothing. In addition, Mr. O'Byrne avers that the watercourse is unrelated to No. 4 as the email from which Mr. Lennon quotes identifies the location of this watercourse "to the rear of No. 58/59" and does not mention No. 4. Mr. O'Byrne avers that the watercourse issue was addressed in September 2005 without further incident.
The plaintiffs reject the assertion that the "major hollow" is evidence that No. 4 is "sinking further" and state that this allegation is not supported by the documents referred to. They also note that the foundations of the houses on Stapolin Avenue were not piled, and DBFL corrected the structural certificates suggesting that they were piled by issuing new structural certificates. The plaintiffs also state that lime stabilisation was not carried out in Myrtle.
The Gaybrook stream issue arose in Mr. Lennon's fifth affidavit as it was mentioned in a document discovered on 4th November 2009. There Mr. Lennon notes that Mr. O'Byrne indicates that there is no drainage problem in Drynam. However, Mr. Lennon avers that he has clearly indicated that there are a number of incidents revealed in the documents newly disclosed (and events which have occurred) that show that there is an abnormal level of problems relating to flooding and the gathering of water in the north east section of Drynam. The defendants' experts' view is that these incidents are all indicative of a drainage problem in this section. Again, considering the damage manifesting in some of this section, the possibility of a drainage problem in this area is of great significance. Mr. O'Byrne states that the surface water drainage system which serves Drynam View is not linked to the surface water system that serves Drynam Drive. However, it is clear that the land drain system is constructed as going towards the north east section. Furthermore, the precise relation between this surface water drainage system and the existing drainage system in this section is not clear. Mr. O'Byrne refers to the additional water which flowed into 22 Drynam View. He states that this was due to local drains and down pipes serving the drains which had been cut off as part of the excavation works. The defendants' experts' view is that the accumulation of this water was indicative of a ground water accumulation. Furthermore, among the documents discovered on 4th November 2009 is a preliminary health and safety plan by DBFL dated November 2002 which notes potential problems as to ground water accumulation in the north and north east section of Drynam. It states "The redundant Gaybrook stream could be an area of groundwater accumulation and care should be taken when installing services in this area".
Mr. O'Moore contends that this is not a document that indicates groundwater accumulation and it does not indicate a problem regarding flooding. If it did, it would be put in a proper, stronger way.
Mr. Lennon then states that he is advised that this stream runs to the north east section of Drynam and there may be a specific link between what DBFL had noted in November 2002 and the drainage problems which the defendants say exist in this section.
Mr. Lennon's contention is that there are flooding problems in the northeast section of Drynam. Because of that any detail regarding drainage assumes significance. However, it only assumes significance once there is an indication of flooding, and the plaintiffs say the flooding was due to an exceptionally high level of rainfall and not indicative of any systemic flooding problems.
Mr. Lennon notes that Mr. O'Byrne refers to the relation between the potential drainage issues which exist in the north east section and the preliminary site investigation carried out by the plaintiffs. Whilst Mr. Lennon accepts that the preliminary investigation would not have specifically dealt with the surface water issue which arose from the drainage works, there is no doubt that the site investigation itself failed to examine the potential problems which might exist in the north east of Drynam.
Mr. O'Moore points out that Mr. Lennon has known about this site investigation since June 2008.
Mr. Lennon avers that, for example, had this investigation recognised that the low lying part of the north east section contained soft soils that had potential drainage problems, the implementation of a land drain system which ran into the north east section might have been reconsidered. Furthermore, the recent discovery of the DBFL preliminary safety and health plan of November 2002 shows that there was a potential ground water problem in this area by virtue of the redundant Gaybrook Stream. This is not adverted to in the preliminary site investigation. In this respect the new documentation shows the potential inadequacies of the original site investigation. Therefore, the site investigation should have revealed what the plaintiffs needed to know in advance in order to ensure problems of this nature could be avoided.
Mr. O'Moore notes the above excerpt from the preliminary safety and health plan and submits that the document is not a message from DBFL not to build in the area of the redundant Gaybrook stream but rather amounts to an instruction to keep in mind when installing services in the area that there is a redundant stream there. Mr. O'Byrne avers that the line of the redundant stream follows the northern boundary of the site and was piped with a 300mm diameter land drain shown on a drainage map discovered to the defendants in 2008. No accumulation of ground water along the line of the redundant stream occurred during the construction of the works and Mr. Lennon's concerns in this regard are misplaced. DBFL advise that the contents of section 4.2 of the plan are standard and that the issues raised are certainly not "out of the ordinary" for such a development. Mr. Lennon also misquotes section 4.2 and his reference to the "newly discovered land drain" is misplaced. Again, Mr. O'Byrne avers that that land drain is apparent from the drainage maps furnished in June 2008.
In addition, Mr. O'Moore notes that the AGEC report of January 2009 refers to mapping reviewed, including three Ordnance Survey of Ireland maps and a pre-construction topographical survey. One ordnance survey map has been formulated into a drawing of Drynam prepared by AGEC, which contains an arrow. The arrow is a clear indicator that there is a redundant stream in that direction. The plaintiffs say it indicates the flow of the stream. It certainly indicates the flow of a stream of some sort. The defendants knew the stream was there, they were aware of the consequences it might have for the estate and were presumably aware that it is a redundant stream. The only new item in the 2009 discovery that can in any way suggest prejudice is that DBFL indicated, not in a constructional document but in a health and safety plan, that there should be some care taken in installing services at that area because of a possible issue regarding the accumulation of groundwater. The uncontradicted evidence is that in fact no issues arose.
In relation to the ground conditions section of Mr. Lennon's September affidavit, there is no prejudice indicated, and certainly nothing like the level of prejudice required for a mistrial to be declared. In a number of cases, such as lime stabilisation, the information was there had it been sought out and looked at.
Mr. Barniville in reply submits that while the 6" drain is not a great aqueduct and is not on the drainage detail map, it is a feature specifically designed and directed by DBFL to cope with the impermeability of the lime stabilised soil in the area. The defendants' experts say that the DBFL document referring to this matter and the design feature referred to therein disclose a serious issue which required extensive investigations to establish whether there was a link between the drainage issue the

subject of the design feature and the issues arising in houses in the northeast of Drynam. The view of the defendants' experts is that it could lead to a significant risk of surcharging downstream and flooding in the northeast section. They would very much have wished to see this design feature and the documentation associated with it when the initial investigations were being carried out.
Mr. Blaine's drainage analysis, whose significance Mr. O'Moore seeks to downplay, concerns 17, 18 and 19 Drynam Green. These houses are located right behind 22 Drynam View, one of the Judge's houses. Mr. Sutton has indicated that No. 22 has suffered from major flooding problems. The document refers to a drainage problem alleged at No. 18. The defendants had some other documents referring to drainage and subsidence issues in some houses in the northeast section, for example a letter concerning No. 18, but the issues referred to in this correspondence took on a heightened significance in light of the design detail referred to in the two newly discovered documents just mentioned. These houses are in the northeast section, so it is the view of the defendants' experts that there are potential surface water drainage issues arising from the new documentation. It renders more significant the documentation originally discovered.
The investigation carried out by AGEC did not focus in any way, because there was no reason to focus in any way, on any particular issue arising in the northeast section. Mr. Lennon avers that AGEC would have installed an additional monitoring well in this section. They would have installed data loggers which would have had readings more frequently than on a weekly basis. They would have installed extra standpipes across the estate to determine the groundwater profile. They would also have installed a high quality benchmark to rock to enable water readings to be taken by reference to known datum. In addition they would have given further consideration to geophysical examination to determine the implications of the drainage system in question for the northeast section. AGEC considered performing a geophysical examination at the time of their initial investigation but did not do so because there was no apparent reason to do so. The existence of this drainage system is a reason to do so.
The second area of prejudice is associated with Dr. Maher's cross-examination. The defendants were not in a position to put any of this information to him. They say that recalling Dr. Maher would not remedy the prejudice suffered.
The third area of prejudice is that Mr. Sutton has already given evidence in one of the critical houses in this area, 22 Drynam View, which again is one of the Judge's houses. He gave evidence in relation to particular drainage and flooding issues in No. 22 in the absence of any knowledge of the drainage detail in question.
Mr. O'Moore suggests the documentation to which Mr. Barniville has referred only becomes relevant because of a subsequent event, the flooding in August 2008. The defendants submit that the documentation was relevant from the start. The fact that flooding arose corroborates its significance, but does not render relevant and significant documents which were not previously relevant and significant.
Turning to lime stabilisation, the significant document is the fax of October 2004. The version of this fax that appeared in the old discovery had no date, time or fax information at the top. Mr. Barniville notes the manner in which this document was originally discovered, as outlined above, with the second page separated from the others and bearing a different date. The plaintiffs averred on affidavit that the attachment to the fax was missing. While the defendants and their experts knew that some houses in Drynam were built on lime stabilised soil and had some detail of how that was done by reference to a DBFL drawing, they were unaware of the identity of all of the houses where that was done and of the precise construction detail used in those houses.
In relation to page 2 of the fax, the defendants did not connect it with the other three pages and they were in a sense misdirected on that. Secondly, when the documentation is brought together, you see a considerably greater number of houses that had this particular feature. In relation to the structural certificates, where the mesh was used under the foundations that is not stated in the certificates. All that is stated is that the houses were founded on stabilised soil. As regards those houses on stabilised soil where it was necessary to dig to virgin ground, the certificates do not indicate that they were houses built on lime stabilised soil. Had the defendants known of all this information they would have done further testing, trial pits to sample the soil and would have taken samples. In addition, the information would have enabled the examination of properties to take place to see whether any damage to the properties in the area covered by the lime stabilised soil was due to settlement caused by the deterioration of lime stabilised soil.
As regards surface water and groundwater in Beaupark, AGEC would have insisted on greater access to properties in Beaupark and there would have been greater testing and investigations carried out. In addition, additional monitoring would have been put in place in an area north of Grange Lodge Avenue. The defendants should have been provided at the relevant time with the information about the concrete wash down concern and significant amounts of groundwater being discharged into the sewer system. It is far too late now to be getting that documentation.
Mr. Kelly's diary discloses the existence of water on the floors of a number of houses which the plaintiffs associated with a high water table. It is true that AGEC had identified a high water table in Beaupark, but what is significant is that the presence of water in the houses that are referred to in Mr. Kelly's diary was being attributed by the plaintiffs and their experts to the high water table. The defendants were not provided with a full picture and were not on-site the entire time.
In relation to ground conditions at Myrtle, an email refers to the termination, or suspected termination, of a public watercourse in the Stapolin area. In the context of complaints from residents in a property on Stapolin Avenue, it is of concern to the defendants' experts that the defendants did not have this document. They would have wished to see it, particularly when they consider an exchange of emails in the old discovery referring to subsidence at 4 Stapolin Avenue. The newly discovered document puts in context, and has an importance in relation to, two emails. One was previously discovered and refers to a major hollow and to the possibility of a section of the garden sinking further. The other is a newly discovered email referring to subsidence in the garden being remedied as part of the snag list. The view of the defendants' experts is that the watercourse issue could well be relevant to the issues raised in these two emails. The defendants should have been afforded an opportunity for investigation in this regard but were not. The fact that the plaintiffs may have considered that nothing came of the investigation into the implications of the possible termination of a public watercourse does not detract from the fact that it is something the defendants' experts would have wished to consider and investigate.
The preliminary safety and health plan prepared by DBFL certainly should have been discovered previously and appears to have been covered by at least three discovery categories. The defendants say there is no adequate explanation as to why it was not previously discovered. The defendants' experts are of the view that this is a significant document. They would have wished to see it earlier when they were conducting their investigations in respect of Drynam. They advise that there may be a link between the flooding and drainage issues in the northeast of Drynam and the so-called redundant Gaybrook stream.
Mr. O'Moore says that AGEC were aware of the stream and no accumulation of water in fact occurred. Mr. Barniville does not believe this was a contention made on affidavit by the plaintiffs so it is not addressed in the affidavits. Mr. O'Moore suggests that a map attached to the AGEC report illustrates that AGEC were aware of the stream. That is not supported by the report. Looking at the text of the report, the part relating to the map in question makes no reference to a stream, but rather refers to ditches and field boundaries. That is what AGEC had marked on the map, so one cannot say from the AGEC report that AGEC were aware of the stream.
In any event, they were denied the opportunity to consider the issue when they conducted their investigations, because it was not a document disclosed at the appropriate time. They did not know about it and were certainly unaware of any area in the northern part of the site, including the area identified by Mr. O'Moore, which could give rise to a possible source of groundwater accumulation.

Conclusion

The existence of the 150mm land drain should have been revealed in the 2008 discovery. However, I accept that the only new information in this connection in the 2009 discovery was the existence of the drain itself. It is said that the possibility that it caused some of the damage would have been investigated, and in this regard it may have a significance independent of the subsequent flooding. However, although I recognise that the defendants attribute the damage in the estates to a variety of causes, some of which would only relate to particular houses, little has been advanced in support of the theory that it might be a cause of the damage in this area of Drynam. It appears to be quite a minor detail. Much is made of the flooding that occurred in August 2008. It is said that, although this drainage detail was also relevant previously, its relevance was corroborated by the flooding. However, it is clear from the Met Éireann report for the weekend in question that this was a particularly exceptional event. Mr. O'Byrne avers that no such flooding has occurred in the northeast section before or since. It is also clear that the defendants already had much of the information relating to drainage issues about whose absence they now complain. For example, a letter from Arthur Cox discovered in 2008 refers to blocked drains at 18 Drynam Green and gives more detailed information than a handwritten note contained in the new discovery, referring to alleged drainage problems at that address, in respect of which a complaint is made. In respect of Mr. Sutton already having given evidence in one of the Judge's houses, 22 Drynam View, it has to be borne in mind that the condition of the house was extensively covered by the video recording. In addition, in relation to the groundwater level at Drynam, AGEC knew of a relatively high groundwater level being recorded at the estate in December 2001. AGEC also undertook their own investigations in Drynam in relation to this issue and high water levels were recorded at a number of window sample boreholes in houses in the estate. In these circumstances the defendants have not established that they are prejudiced by the failure to make discovery in relation to this issue.

In relation to lime stabilisation at Drynam, it is not disputed that the defendants knew such a practice was being adopted in that estate. The complaint relates instead to the particular houses affected by this issue and the constructional detail employed. However, the handwritten note which is the second page of the fax dated October 2004 is crucial in this regard. That page was discovered in 2004 and gives details of the different constructional details depending on depth of foundations where lime stabilisation was used and identifies a range of houses and the detail employed in each. It is true that the page in question was originally discovered in such a way that it was far removed in the documentation from the other pages of the fax. It bore a different date and the author field was missing. For these reasons the defendants could not have been expected to identify this page as part of the fax. Indeed, when the absence of the attachment to the fax was queried, the plaintiffs averred that it was missing. However, the fact remains that it was discovered in 2008. Even as a self-contained document regarded as not being related to any other, it states all the information necessary in relation to three groups of houses in Drynam Drive and specifies the constructional detail used in each. As Mr. O'Moore submitted on behalf of the plaintiffs therefore, the defendants were clearly on notice as to the "precise nature" of how foundations were founded on stabilised soil. In addition, the defendants had the DBFL drawing instructing that a different constructional detail should be used depending on depth. There was also contained in the original discovery a page referring to such matters as foundation types and whether or not mesh was used, and a map in respect of various areas where different forms of construction regarding lime stabilised ground were used. In such circumstances it is clear that the defendants had a wealth of information in relation to lime stabilisation at Drynam. The Court does not consider that they have been irreparably prejudiced by a failure to make discovery in relation to this issue.

Turning to surface and groundwater problems in Beaupark, it is apparent from the investigations undertaken that AGEC were very much alive to the issue of a possible high water table in the estate. AGEC considered that there was a suggestion of a high water table, albeit noting that it might have been due to the wet summer of 2008. In addition, Mr. O'Byrne avers that it is clear from the Golder Report that high water levels had been encountered in Beaupark. AGEC performed a ground investigation involving rotary cored boreholes, two ground water wells, a trial pit and several dynamic probes. Accordingly, the Court does not consider that any irreparable prejudice arises in this regard.

Issues are raised in the new discovery relating to concrete washed-down contamination, blockage of drains and a settlement pond. The extent, if any, to which these issues could have a bearing on the damage which has occurred can be addressed in the reports of the defendants' experts and in evidence. However, the issue concerning the reference to a report having to be compiled by NTC Environment, which Mr. Lennon avers does not appear to have been discovered, must be addressed. If it has been discovered the plaintiffs can clarify the matter, but if it has not it will be necessary for the plaintiffs to make discovery if it is a discoverable document.

In relation to Myrtle, assuming Mr. O'Byrne is correct in his clarification about piled foundations, Mr. Lennon does not think that any further issue arises as to documentation indicating that foundations were piled at Stapolin Avenue. In relation to the difficulties at 4 Stapolin Avenue, it seems clear that the defendants had all the necessary information from the 2008 discovery. In addition, Mr. O'Byrne notes that the email relating to the public watercourse is "to the rear of No. 58/59" and does not mention 4 Stapolin Avenue. Accordingly, it is difficult to see how it adds new significance to the emails relating to that property. In addition, Mr. O'Byrne avers that the watercourse issue was addressed in September 2005 without further incident. The plaintiffs state that no lime stabilisation was employed at Myrtle. Mr. O'Byrne avers that Mr. Butler's previous averment that this technique was used in relation to some road works at Myrtle was erroneous. Mr. O'Byrne avers that the lime stabilisation referred to in the Frank Motherway documents did not take place at Myrtle. Mr. O'Byrne refers to a letter from Barry & Partners dated October 2009 which states that soil stabilisation works in respect of road construction were carried out at Red Arches and not at Myrtle. However, Mr. Lennon contends that a number of other documents seem to suggest that lime stabilisation was being carried out in Myrtle. Even if Mr. Butler's earlier averment is correct however, it does not refer to lime stabilisation being carried out under houses. In the circumstances, the Court does not consider that any irreparable prejudice arises.

The final issue relates to the Gaybrook stream. The preliminary safety and health plan cautions that care should be taken in installing services in this area as it might be an area of groundwater accumulation. It was submitted on behalf of the plaintiffs that AGEC knew of this stream, which knowledge was said to be evident from a map appended to their report. In view of what was pointed out on behalf of the defendants regarding the text relating to this map, it may not be safe to conclude that they had such knowledge. However, as was submitted on behalf of the plaintiffs, the preliminary safety and health plan does not amount to an instruction not to build in the area. Clearly the concern was not regarded as being so great as to warrant such an instruction. The document, insofar as it is relevant to this aspect, merely states that care should be taken in installing services in the area because of a possibility of groundwater accumulation. As Mr. O'Moore submitted, the uncontradicted evidence is that in fact no issues arose.

In addition to the above considerations, the documentation newly discovered in 2009 (save of course the documents over which privilege was successfully claimed) is now available to the defendants. Apart from the evidence given on site visits, the defendants have not yet gone into evidence and the plaintiffs' main witnesses as to structural matters have not yet begun to give their evidence. The defendants' witnesses can therefore take into account, to whatever extent they consider necessary, the information contained in the newly discovered documents, and the plaintiffs' witnesses can be cross-examined in relation to these matters. In addition, those of the plaintiffs' witnesses who have already given evidence can, if necessary, be recalled so that the new information can be put to them to ascertain their views. In addition, expert reports can be amended if necessary. For the reasons set out above, the defendants are not irreparably prejudiced by the failure to discover documents relating to ground conditions which were newly discovered in 2009.

Issue VI – Quality Control and Workmanship

Mr. O'Neill on behalf of the first and fifth named defendants refers to the Helsingor documentation and notes that Ballymore Homes suggested the appointment of a resident engineer and a clerk of works. Menolly were reluctant to accede to this suggestion but Mr. Peadar Monaghan was ultimately appointed to provide a report on works at Baldoyle. Mr. O'Neill submits that Mr. Monaghan produced reports on both the Myrtle and Red Arches Phases in which he was very critical of Menolly's work and work practices. Mr. O'Neill refers to Helsingor Board Meeting Minutes referring to concerns as to quality expressed by Ballymore Homes and the recommendation that Helsingor should appoint directly a resident engineer to report primarily on civil engineering matters and a clerk of works to report on internal and external finishes and quality generally. Mr. O'Neill refers to a minute of 23rd January 2007 noting that various concerns have been raised by the directors in relation to quality matters, both the quality of engineering construction and the quality of finishes within the individual residential units. The Minutes states that the principal project manager of Menolly Homes had insisted that Menolly were implementing new changes which would address all of the quality issues. Progress had not been made and it was agreed that an independent consultant would be appointed.
The Monaghan Report for Phase 1 states that Peadar Monaghan Project Management were requested to visit the site at Baldoyle and give their opinion on the standard of workmanship, the quality of the materials used, the health and safety on site, the compliance with the fire certificate and any other matters of concern on site. The report refers to the failure to furnish some of the drawings which were requested and notes a definite resistance to their presence on site. The report notes that they are gravely concerned that some areas of the buildings were undermined during the installation of major drainage works close to the fully constructed buildings for access to drainage and service pipes which were apparently left short at the time of installation. They also note that a lot of retaining mass concrete walls were made good with a cement wash and they are concerned at what might be covered up. They note ingress of water through the retaining wall joints in some car parks. Mr. O'Neill submits that the new discovery has only become available after the defendants' investigations have been undertaken and after a significant number of houses were remediated. He believes that in respect of approximately 37 houses the remediation was completed between July and December of 2008. He concedes that remediation has not started on a large number of houses and Mr. O'Moore submits that this is true in respect of the majority of them. Mr. O'Neill submits that all of the houses in the basket are remediated apart from 3 Drynam Square. Mr. O'Moore submits that remediation is not in progress at present and there has been no request from the defendants since this issue arose that the remediation pause. Mr. O'Neill refers to passages from the Monaghan Report detailing concerns about drainage including a passage stating that they are extremely concerned that the standard of workmanship and layout of much of the drainage from the blocks of houses to connect to the main drain. This part of the report also refers to poor compactions of filling which Mr. O'Neill submits can give rise to subsidence and therefore can lead to cracks in floor slabs.
The report states that it appears to Peadar Monaghan Project Management that there was very poor co-ordination of services and drainage on site and they noted lots of services being laid in damaged pvc ducting or no ducting. The report also states that the concrete to walls, landings and string courses in the courtyard areas was poorly placed and badly vibrated and that cement wash is used to patch this up and it will most likely chip way in time.
The report goes on to state that the workmanship in the inside of the residences varies. Painting is generally acceptable. There is a very big gap under the doors everywhere. The plumbing generally in their opinion is totally unacceptable. The report states that from their observations on site Peadar Monaghan Project Management are of the opinion that separate subcontractors carry out similar works to different standards. They state that there is a lot of activity in relation to drains, surveys, CCTV and clearing drains leading them to believe that there may be difficulty ahead. The report also states that there seems to be a lack of proper application of specification "if there is one". The quality of finishes for a number of sectors is described as poor. For Sector 18 Grange Square West the report refers to "horrible mix of drains and service all at front door of house". The report also refers to "broken precast slab – this was not being replaced – it was being covered (see photo 4). Mr. O'Neill submits that photograph 4 appears to show a cracked slab. This appendix to the report also refers to "undermining of main foundations for access to drains and services". Mr. O'Neill submits that again that would be an issue which would potentially cause settlement and cracks in the slab. Mr. O'Neill notes further references to poor workmanship in this appendix to the report. The appendix of the report relating to Sector 19 Talavera Square West contains a variety of criticisms in relation to workmanship including issues in relation to absence of compaction which Mr. O'Neill submits would lead potentially to settlement and consequent potential cracking of ground floor slabs. In relation to Sector 21 the report notes generally good work in respect of quality of finishes better than the rest of Phase 1. In relation to Sector 22 the report notes "major water in car park floor" and queries where this comes from. Poor quality concrete is also noted. For Sector 23 the report notes "slabs not protected" and "bad concrete and protection to car park". Mr. O'Neill also refers to passages from the Phase 2 report which relates to Red Arches. Mr. O'Neill also refers to a letter 1st May 2007 from DBFL to Menolly. He submits that both DBFL and Peadar Monaghan refer to the necessity for concrete tube tests which were not undertaken in Drynam or Beaupark except in Block 21 of Beaupark.
Mr. O'Byrne avers in his affidavit of 6th October 2009 that the perception of Menolly was that the creation of the Monaghan Report in relation to Phase 1 arose in the context not in a real dispute about standards of workmanship but rather jockeying between the Menolly and Ballymore interests in connection with the finances of the project. However he concedes that this report should have been discovered in 2008.
However he avers that the context of the report is of some importance in determining Menolly's attitude towards it. The issues relating to project costs between the Menolly and Ballymore interests were substantially dealt with in April 2007 after which no further issues arose out of the Phase 1 report. In response to the suggestion regarding jockeying for position, Mr. O'Neill submits that the fact that these issues are raised at Board level and not at site meetings would indicate that they have significance. The concerns go beyond merely finishes. Mr. O'Neill is not suggesting that they identify existing structural defects but the defendants' case is not that there are significant structural defects but rather that the cracks that have manifested themselves are due to a variety of factors, including poor workmanship and poor supervision. Mr. O'Neill refers to a Helsingor minute of 11th July 2007 noting Brian Clarke's statement that his understanding was that progress on resolving the very serious issues raised over many months at the various Helsingor Board meetings and as described in the Monaghan Reports was to be made and a course of action was to be agreed if necessary.
Mr. O'Neill submits that this indicates that Mr. O'Byrne was wrong in his averment that everything was sorted out by April 2007. This Minute indicates that Ballymore saw this as being a significant issue in July 2007. This Minute also refers to cracks in basement floor. Mr. O'Neill submits that the appointment of Mr. Monaghan as a Clerk of Works is not indicative of quality control but is indicative of a problem that had to be addressed by his appointment. Mr. O'Byrne avers that the Minutes were considered by BCM or Junior Counsel as not relevant. Mr. O'Neill submits that it is difficult to see how such a conclusion could have been reached. Mr. Butler does not expand on this matter in his affidavits. It is very difficult to believe the Peadar Monaghan Report is forgotten about. It is very difficult to see how the reading of the Minutes and the determination that they were not relevant would not jog ones memory having regard to the references to Mr. Monaghan and his report in the Minutes. If attention was being paid to discovery obligations it is difficult to see how both the report and the Minutes would not have been discovered.
There was very little information relating to Myrtle in the original discovery but there is now a report indicating a large number of problem areas in Myrtle. The problem now is that many of the houses have been remediated. For example 13 Myrtle House which contains no Bay Lane material has been remediated.

The defendants submit that the cracks are not structural. They are aesthetic and caused predominantly by shrinkage but it is necessary to look at each particular crack and there are other causes also. The defendants have done very little testing in Myrtle. The level of involvement by the defendants in Myrtle has been very limited. They have inspected three houses in that estate. The problem was that it was not until January 2008 that an inspection protocol was put in place. During 2007 many of the houses in Myrtle had been remediated so the defendants had very little knowledge in respect of those remediated houses. When Mr. Monaghan became involved he saw in the ongoing work quite significant problems. The significance of this for the defendants is that if there were such problems being identified when the houses were being constructed that is indicative of poor workmanship and the lack of control. Had the defendants been apprised of this as being a significant issue in 2008 when the discovery should have been made they would have focused their attention much more closely on these particular issues. More extensive testing would also have been carried out and the defendants would have required greater access to a greater number of houses. That would have been relevant not only in allowing a greater inspection and a more in-depth analysis of the materials but would have allowed the defendants to compare Bay Lane and non-Bay Lane houses to see how cracks were developing or what cracks were apparent in what category of houses as distinct from what cracks are apparent in another category of houses to show that the cracks that had appeared have nothing to do with pyritic heave. It is a combination of an absence of information over a wide range of areas.

Mr. O'Neill again refers to the expression of grave concern in the Phase 1 Report that some areas of the buildings were undermined during the installation of major drainage works close to the fully constructed buildings. Mr. O'Neill submits that such undermining could cause subsidence and therefore could cause a crack in the floor slabs. There is also the reference to poor compaction that could lead to settlement. There is also a reference to serious undermining of the foundations of the free standing brick canapés which Mr. O'Neill submits would be an issue that could cause subsidence and settlement. The appendix relating to Sector 18 refers to a broken precast slab and undermining of main foundations. There is also a reference to patios at rear of house mainly supported by clay top soil. The report states that the broken precast slab just referred to was not being replaced and was being covered. In relation to Sector 19 the report notes a number of problems including drains not bedded in lean mix and a further reference to some drains bedded and some drains not, some drains resting on concrete foundation, danger of pipe cracking. Mr. O'Neill submits that if the pipe cracks that may cause settlement which may then cause a crack in the floor slab. In relation to Sector 22 the report notes "major water in car park floor" and poor quality concrete. In relation to Sector 23 the report notes slabs not protected and bad concrete and protection to car park. In respect of Sector 23 there are issues in relation to quite a number of things including the concrete. Boyd house which is a basket house is in Sector 23. Mr. O'Neill submits that having regard to the defence being advanced all of this documentation relating to bad workmanship is necessary without which it is much more difficult for the defendants to successfully make their case in relation to this issue. Mr. O'Neill acknowledges that the three estates were completed by the time discovery was made. However in the meantime the defendants have had to prepare their reports and remediation of a significant number of houses is taking place and the defendants had to make their selection of houses to be included in the basket on the basis of limited information by agreement with the plaintiffs. Having regard to the information newly available the selection of houses for the basket would have been significantly different because the defendants would have included houses in problem areas or non-Bay Lane houses versus Bay Lane houses. Particularly having regard to the categorisation of cracks by DBFL and Golder in relation to what now transpires are non-Bay Lane houses. Mr. O'Neill also refers to passages from the Phase 2 Report indicating the concerns relating to Red Arches. Mr. O'Neill is not aware of any reference to cracking of the floor slabs in the Monaghan Reports. However the defendants say that is not significant because if there were cracks in the slab they are not structural issues. The defendants say they are aesthetic. Mr. O'Neill submits that there must have been hairline cracks in slabs and in walls. This would be absolutely normal and it is only the abnormal issues that Mr. Monaghan was pointing to prior to the advent of the pyrite theory DBFL were attributing cracks in the slabs to shrinkage and similar causes. In other words they were saying that they were of no significance. Mr. Monaghan in contrast is referring to more serious issues. He deals with what he considers to be bad practice either from a structural point of view or health and safety. It cannot be that of all the houses he visits there is not one crack in them. He does not refer to insignificant cracks. He does not refer to cracks in the walls or in the slab. The report for Phase 1 states that Peadar Monaghan Project Management visited all the blocks in Phase 1 but were unable to gain access to some blocks due to unavailability of keys or due to the blocks being occupied so Mr. Monaghan would not have seen the floor slab or indeed any of the internal areas of those houses.

In the recent discovery there are 106 snag lists in relation to Myrtle. The plaintiffs correctly point out that there are 69 snag lists in the original discovery. They say that from those snag lists the defendants should have been aware of the problems manifesting themselves or that are identified in the Monaghan Report. However Mr. O'Neill submits that the Monaghan Report was prepared at an earlier stage before matters were covered up. He could therefore see potential issues with the foundations and could see undermining of houses by virtue of the drainage being put in at a late stage. When the snag lists were completed the drainage and all other items had been installed and therefore it would not be apparent to anyone that there may be potential problems caused by the manner and sequence in which the construction took place.

A letter of 28th January 2005 from Barry Donovan to Matt Carroll states that a block wall fell down on the site. A man was injured and Stephen Murphy the Project Manager stated that the quality or suitability of the mortar had been called into question the previous day. The letter states that Mr. Murphy is preparing a substantial report on the matter. Mr. O'Neill submits that the defendants were told that that report was not prepared and submits that if it was not prepared this shows a lack of appropriate supervision and control of the site if a person was injured due to poor quality work or poor quality mortar and no report was prepared. Mr. O'Neill queries whether if the man in question had not been injured or the wall had not collapsed anything further would have been heard about the quality of the mortar. This issue clearly points to very poor standards on the site. It would have enabled the defendants to focus their enquiries and investigations more particularly on these issues. The letter also refers to a statement by the Site Safety Officer that mortar used in a wall was still soft 48 hours later. This was checked in the presence of an engineer. Mr. O'Byrne averred in his October 2009 affidavit that it was ultimately determined that the wall collapsed because too many courses of blockwork were laid on the same day. Mr. O'Neill submits that apart from the instability aspect, that also adds to the potential for cracking.

The defendants say there are 818 newly discovered architect / engineers instructions which should have been discovered previously. The plaintiffs say that the information in the engineers' instructions could be gleaned from the drawings that were subsequently prepared. This response is simplistic and incorrect. Mr. O'Neill refers to Mr. Lennon's October 2009 affidavit. There is also a reference to a basement in Block 21 in Beaupark and the statement that the design is flawed as they did not take account of tidal waters. This is within Menolly. This issue points to ground conditions. Mr. O'Neill notes instructions in relation to the construction of retaining walls for excavation close to 109 Drynam Drive, a retaining wall being necessary because there is a problem in the area.

Mr. O'Neill refers to a report on 158 Grange Lodge Avenue by DBFL. The report is dated 11th April 2008 and reports bad constructional detail. Mr. O'Neill refers to the averments of Mr. Lennon in his September 2009 affidavit concerning this report which deals with the slab and insulation extending into the adjacent property. Mr. O'Neill submits that this constructional detail goes further then what is seen in other houses where there is a slab over the internal rising wall. He submits that this report discloses a half suspended slab and a half floating slab. This report was annexed to Mr. Forde's 2008 witness statement but it is one of 716 reports annexed to that statement and Mr. O'Neill submits that it was justifiably assumed that all reports had previously been discovered. It is suggested that even though the plaintiffs did not pick up that this had not been discovered

the defendants should have carried out the appropriate detective work and found this out. No. 158 has been remediated. Had the defendants been aware of the constructional detail in this report, they could have focused in on it in greater detail and related the cracking in that house to poor constructional detail. Because that house has now been remediated it is too late to include it in the basket or carry out any further examination. Mr. O'Moore submits that the report on No. 158 was not discovered because it was privileged. In addition Mr. Duckenfield states in his December 2008 Report that this constructional detail is not good building practice. Mr. Duckenfield's report was made available to the defendants with the witness statements in December 2008.

Mr. O'Neill refers to the averments of Mr. Lennon in his October 2009 affidavit in relation to the site diaries. The site diaries raise drainage issues which the defendants say could not be picked up from inspections. There is also a reference to a rock breaker being used to remove fill which the defendants say suggest overcompaction. Mr. O'Byrne avers that the defendants' experts were present in the house and the rock breaker had to be used because the fill was fused together. The defendants' response is that they were not allowed to remain in the house having regard to the terms of the protocol. Had the defendants been aware of the issues that manifested themselves in 2009 they would have sought greater inspection facilities and it is difficult to see how that could be resisted having regard to the issues that have arisen. The diaries also referred to block work issues and the requirement to rebuild certain walls. There is also a reference in the diaries to poor concrete and poor constructional detail. Having regard to all of the workmanship and quality control issues including lack of supervision and bad practices identified in the Monaghan Report and other documents that have now been discovered the defendants would have called for greater inspection and investigation facilities. This would also have given the defendants an opportunity to take many more samples of the block work and mortar and carry out more tests on them. It would have provided material for cross examination of Dr. Maher especially and would have been a factor in determining the composition of the basket. The assertion at the opening of the case that Menolly Homes was one of the best builders in Ireland and never had any problems is not what is seen from the documentation made available.

On behalf of the plaintiffs Mr. O'Moore submits that no prejudice can have been caused to the defendants by a failure to discover the Phase 2 Monaghan Report or a letter from DBFL in respect of that report in 2008. Mr. O'Moore submits that Mr. O'Neill failed to zone in on aspects of the Phase 1 Report in respect of cracking in the floor slabs. Mr. O'Moore submits that Mr. O'Neill was wrong to challenge the suggestion that the Monaghan Report was jockeying for position on the basis that the issues were raised at Board level rather than at Site level. Mr. O'Moore submits that if there is jockeying for position between two significant builders in respect of a joint venture it will not take place on site. It will take place in the boardroom where the business people operate. The fact that the Ballymore interests were presenting the matter as being serious some time after the reports were presented is exactly what would be anticipated. A letter of the 30th July 2007 in respect of Baldoyle from Mr. Mulryan of Helsingor to Mr. Ross Senior states that in the interest of ongoing relations Ballymore is not opposed to the making of payment but the letter reiterates that there are a number of quality issues identified in recent reports. Mr. O'Moore submits that this is indicative of the jockeying for position. However whatever the purpose of commissioning the report the real significance is what it says about matters relevant to the case and what prejudices are caused to the defendants as a result of the failure to discover it earlier. In his September 2009 affidavit in relation to the Monaghan Reports Mr. Lennon identifies two generic areas of prejudice, one in respect of the evidence given already and the other in respect of investigations undertaken. However Mr. O'Moore submits that this affidavit does not identify any prejudice with regard to investigations. Mr. O'Moore refers to averments of Mr. Lennon in his September affidavit concerning Minutes of Helsingor Board Meeting and the Monaghan Reports. Mr. O'Moore submits that Mr. Lennon's averments in this regard are far from suggesting that extra steps be taken to look at the water table levels in Myrtle or that particular things would have been done in terms of the water cement ratio. The Court is simply being told that the defendants have been prejudiced in the investigations undertaken in some way. In his October 2009 affidavit Mr. O'Byrne avers that DBFL were satisfied as to the adequacy of the construction of all buildings in Myrtle and certified them following their completion. The defendants will be able to cross examine Mr. Forde in relation to the supposed structural issues raised by Mr. Monaghan in his report and call their own witnesses in due course so there has been no prejudice to the defendants. Mr. O'Moore submits that the defendants can also call Mr. Monaghan if they wish.

In his October 2009 affidavit Mr. Lennon refers to a document prepared by Mr. Gerard Leech of Menolly in response to the Peadar Monaghan Reports. Mr. Lennon averred that these documents refer to Red Arches. They are highly relevant to the issues in the proceedings as they give an insight in to the general construction standards and practices which were being adopted by the plaintiffs. Mr. Lennon also refers to a letter of 1st May 2007 from DBFL in response to the Phase 2 Report. Mr. O'Moore submits that the letter of 1st May 2007 is again not one that the plaintiffs were required to discover. Mr. Lennon refers in his October affidavit to prejudice in inspections and examinations. Mr. Lennon notes that 30 Myrtle House is a non-Bay Lane property and remediation works commenced in September 2008 during which time the defendants would have had an opportunity to inspect it but without the advantage of the information contained in a snag list of August 2007. The defendants' experts advise that any defects which would have been noted in 30 Myrtle house could be linked to the issues raised in that snag list but the defendants never had the opportunity to pursue this. Mr. O'Moore submits that the defendants' experts could have looked at 30 Myrtle house before and during its remediation, whether or not they did so. Mr. O'Moore refers to a number of further averments of Mr. Lennon in his October 2009 affidavit including averments in relation to the broken precast slab in Sector 18 of Phase 1. However Mr. O'Moore submits that this is a precast slab, that is to say a slab cast at the point where it was manufactured. The reason for its breaking does not impact on the likelihood of damage or cracking being the cause to floor slabs being poured in the houses. In addition the fact that a broken precast slab was not being replaced but was being covered may be shoddy but Mr. O'Moore queries the relevance of that to the investigations that the defendants' engineers are carrying out. If it is relevant to the case it can be put to Mr. Forde. Mr. O'Moore notes Mr. Lennon's averments in relation to problems noted in Sector 19 of Phase 1. However Mr. O'Moore queries the relevance of this in relation to any prejudice suggested. He submits that no prejudice is suggested. Mr. O'Moore goes on to refer to averments of Mr. Lennon concerning Sector 23 and Mr. Lennon's rejection of the suggestion of Mr. O'Byrne that the non discovery of this documentation has caused absolutely no prejudice to the defendants. However Mr. O'Moore submits that no prejudice is identified here.

Mr. Lennon complained that the defendants did not have all the relevant information to enable them contradict Dr. Maher's position that the evidence of bad workmanship did not give rise to the cracking. However Mr. O'Moore submits that there is nothing in the Monaghan Report that suggests bad workmanship gave rise to the cracking of floor slabs. Mr. Lennon averred that the defendants would have been in a position to cross reference the new documentation relating to poor workmanship with new information relating to homes that contained non-Bay Lane fill. However Mr. O'Moore submits that the information relating to homes that contained non-Bay Lane fill is the information that the defendants made a conscious cost benefit decision not to seek themselves. Instead they seek privileged documents from the plaintiffs. This cross referencing does not seem to have been done since the defendants received the information and that is not the fault of the plaintiffs.

Mr. Lennon stated that in those circumstances Dr. Maher's evidence could have been tested to explain the apparent similarity and damage in Bay Lane and non-Bay Lane properties in circumstances were there was other evidence suggesting that the damage in the non-Bay Lane properties arose from poor workmanship and poor quality control. However Mr. O'Moore submits that the defendants can put matters to Dr. Maher when he is recalled but they have accepted he is not the witness to deal with workmanship issues. Mr. O'Moore submits that Mr. Lennon has not given evidence about any prejudice arising in relation to the Monaghan Report. No example is given of anything that would have been done differently had the report been in the original discovery.

Mr. O'Moore refers to a number of passages from the evidence of Dr. Maher on Days 12 and 13 of the present action and submits that Dr. Maher said repeatedly that the matter of workmanship was really something to be taken up with the engineers. It is not for Dr. Maher to give conclusive or particularly significant evidence on that point. It should be put to DBFL witnesses. Mr. O'Moore submits that in the section of the affidavit dealing with the Monaghan Report Mr. Lennon is wrong in suggesting that the defendants have been prejudiced because of investigations undertaken. He has not identified anything the experts would have done differently. He is also incorrect in stating that the defendants have been prejudiced in regard to examination of witnesses as Dr. Maher can be recalled and in any case he is not the witness on workmanship.

In relation to the snag lists Mr. O'Neill submitted that the plaintiffs were wrong to suggest that the problems in the Monaghan Report would have been apparent from the snag lists that had been discovered in 2008. However Mr. O'Moore submits that there is no complaint about the snag lists in truth. Mr. O'Neill accepted that there is no material difference between the snag lists discovered in 2008 and those discovered in 2009. Mr. O'Moore refers to Mr. Lennon's reference to the collapse of the wall issue referred to previously herein and Mr. O'Byrne's response to the effect that it was ultimately determined that this had occurred because the block layer had built too many courses on the same day and Mr. Val Harrison the mortar supplier was not asked to make any changes to his mortar mix after the incident and there were no complaints from the block layers about the mix. Mr. O'Moore submits that that resolves the matter. Mr. O'Moore notes the averments of Mr. Lennon in relation to the report of 11th April 2008 concerning 158 Grange Lodge Avenue. Mr. Lennon avers that a report of this nature would have been addressed in the defendants experts reports and would have been employed in the cross examination of Dr. Maher and other witnesses and in their investigations. However Mr. O'Moore submits that this DBFL Report is one of the reports provided on 23rd December 2008. In addition this particular construction detail was described in the report of Mr. Duckenfield in December 2008. Mr. O'Moore highlights this in regard to the claims of prejudice just referred to in relation to the report on No. 158. Mr. Lennon avers that a report of the nature of the report on 158 Grange Lodge Avenue would have been explored further with Dr. Maher. In addition a report of this nature would have been brought to the Courts attention during the site visits to the Judges houses and documents of this type take on a greater significance when analysed in conjunction with other documentation.

However Mr. O'Moore submits that the report for No. 158 was appended to the witness statement of Mr. Forde and there is a reference in the body of the witness statement to appendix 5.6.1 containing remedial works reports in respect of 50 units including No. 158. In addition Mr. Duckenfield's statement contains a sketch showing the gable wall at No. 158. His statement says that the ground floor slab and sub floor insulation are built in to the gable wall and this is not good building practice. There is a potential instability of the gable wall. The restraining effects of the front and back walls significantly assist with the stability of this gable wall. It is to be stressed that there was no damage seen in any of the walls as a result of this detail. The statement notes that DBFL has stated that remedial work was carried out to this wall during the remediation process. The author has noted this defect in only one house. In his opinion the gable wall defect is not the cause of the cracks seen in the walls and the ground floor slabs. This information is contained in the text of the Duckenfield statement rather than in an appendix to it. In this context Mr. O'Moore notes Mr. Lennon's evidence that this information would have been firstly addressed in the defendants' expert reports and secondly employed in the cross examination of Dr. Maher and other witnesses. Again the witness statements of Mr. Forde and Mr. Duckenfield were delivered in December 2008. In relation to No. 158 Mr. O'Neill submitted that it has now been remediated and it is too late to carry out further examination of it or include it in the basket. However Mr. O'Moore submits that No. 158 was remediated by the time discovery was made in 2008. Mr. O'Moore submits that even when there is a detail of some significance described as a poor constructional detail on the part of Menolly in the body of Mr. Duckenfield's statement with a diagram to illustrate it the defendants do not seem to have adverted to that. If they did Mr. O'Moore wonders why they did not do what Mr. Lennon says they would have done in relation to it. In addition the defendants' experts attended at No. 158 on two occasions before it was remediated. Mr. O'Byrne avers that they attended in February and March 2008 and that the defendants' experts must have been aware of the relevant structural detail at No. 158 at that time. Mr. O'Moore refers to Mr. Lennon's averments in his affidavit of 27th October concerning this matter and submits that these averments ignore the fact that the construction detail is in the Duckenfield Report and the fact that the defendants' own experts had attended before remediation and must have seen that detail.

Mr. O'Moore submits that Mr. O'Neill did not go into detail in relation to site diaries except in relation to one diary entry relating to a compaction issue. This entry was from a diary of Mr. Alan Kearney dated 28th July 2008. It is the diary entry referring to the use of a rock breaker at 37 Beaupark Square detailed above. Mr. Lennon avers in his September affidavit that this is potential evidence of poor workmanship and indicates overcompaction of the fill material under the slab. However Mr. O'Moore's notes that this is a diary entry from July 2008 and therefore could not have been discovered so there is no ground for an allegation of prejudice in respect of this diary entry. In addition Mr. O'Moore refers to averments of Mr. O'Byrne in response to the issue raised about this diary entry.

Mr. Lennon refers in his September affidavit to a site diary entry of Mr. Kearney dated 27th June 2008 referring to "House No. 7 Beaupark" where the fill did not appear to be tightly compacted and when disturbed with a shovel it fell away loosely. Mr. Lennon avers that information of this kind would have been directly relevant to Dr. Maher's cross-examination and to the evidence presented already by the defendants in their expert reports. Mr. O'Byrne responds as follows in relation to this diary entry at para. 592 of his affidavit of 6th October:-

> "….I have been informed by Mr. Kearney and believe that Richard Huard from Bickerdike Allen (experts retained by the Defendants) was present on that particular day and so the condition of the fill should not be news to the Defendants. Mr. Kearney has also informed me that he believes that the entry which reads "the infill in the house does not appear to be compacted tightly. It is not as tight as it could be, when disturbed with a shovel it falls away loosely" is a record of words used during a conversation between the Defendants' experts which Mr. Kearney overheard. It is Mr. Kearney's recollection that it is not his wording…."

In response Mr. Lennon avers that he is informed that the property in question was 7 Beaupark Place and Bickerdike Allen carried out an inspection of this house on 27th June 2008. Mr. Lennon avers that the inspection on that day was only permitted when the trial pits had begun and only a small amount of the fill for one pit had been removed before the defendants' experts had to leave for another inspection, therefore he is advised that it is not clear whose observation this was. However Mr. O'Moore submits that in this regard Mr. Lennon is expressing a doubt but is not gainsaying what Mr. Kearney said.

Mr. O'Moore submits that this was a conversation between two of the defendants' experts but apparently had so little significance to them that they did not report it back or include it in their reports or pass it along for the cross examination of Dr. Maher.

Mr. O'Moore refers to the passage from Mr. Lennon's affidavit of September 2009 in which he refers to the incident with staff repeatedly drinking alcohol during working hours referred to in a site diary of Mr. Sean Martin of Menolly dated 2004. Me. Lennon avers that this is relevant in terms of the overall level of quality control and standards. In response Mr. O'Byrne notes that the diary entry in question states that two named individuals were found drinking during and both were informed if caught again they would be dismissed instantly. Mr. O'Byrne avers that this entry demonstrates a concern that standards be upheld. Mr. O'Moore notes that the matter does not end there and Mr. Lennon's affidavit of 27th October 2009 avers that he would take issue with the view that only giving a warning to employees who were drinking during a breakfast break reflects professional standards. However he accepts that the characterisation of this incident is not something which can be resolved in the present application but it would have been relevant to issues which emerged to date relating to quality control. Mr. O'Moore queries how seriously any example of prejudice can be taken when that is given as such an example. He submits that it shows the levels to

which the defendants have gone in making allegations of prejudice in these proceedings.
In relation to 158 Grange Lodge Avenue Mr. O'Neill submits that the report of 11th April 2008 referred to previously herein is not an appendix to the Paul Forde witness statement but rather an appendix to a report that is itself appended to that statement. The report to which the report of 11th April 2008 is appended is dated 3rd December 2008. The defendants therefore knew that the report to which the report of 11th April 2008 was appended was a new report and could not have been in the original discovery.
In his September affidavit Mr. Lennon refers to a site diary of Mr. Paul McCarthy of 2005. In response Mr. O'Byrne avers that a relevant extract of this diary was discovered in 2009 but the entirety of this diary was discovered in 2008.
Mr. Lennon refers to a site diary of Mr. Kearney dated April 2009 which contains a list of all faults and leaks identified during an inspection of manholes, gullies and water mains in Drynam. This information evidences not only poor workmanship but also possible leaks from sewers which can increase the risk of subsidence. The same diary also reveals that there was a Myrtle land drain installed by Mulleady's Civil Engineers. This raises similar issues to those concerning the existence of the land drain in the rear gardens at Drynam previously discussed. Mr. Lennon goes on to aver that he believes that a number of site diaries raise concerns as to the ground conditions particularly in relation to flooding in the three estates. Evidence of this kind must be seen in conjunction with the documents referred to earlier concerning flooding issues of which the defendants had not previously been aware. Mr. O'Moore submits that the documents concerning flooding issues are the documents in relation to the northeast of Drynam and dated August 2008.
They are the documents that give these diary entries significance. Mr. Lennon notes another document discussing the issue in relation to the leaking in the basement of Block 21 in Beaupark. He submits that this information correlates with other evidence of a high water table in Beaupark.
There is also a map showing Block 21 beside which there is a reference to flooded areas. This is further evidence that there was significant problems with the ground conditions in Beaupark. This document also indicates a problem with saddles and the water main are apparently leaking badly with respect to a number of housing units. Furthermore this could be indicative of poor workmanship.
The same document refers to a problem with leaking in Block 1 which is at the opposite end of the site to Block 21. This potentially implies that the high water table extended throughout the Beaupark site and could therefore be indicative of poor ground conditions.
However Mr. O'Moore submits that a high water table is precisely what the defendants were investigating in relation to the estate. AGEC were present with investigators dealing with these issues and if they were not that is not the plaintiffs fault.In response to Mr. Lennon's complaints in this regard Mr. O'Byrne avers that a high water table should not be equated with poor ground conditions. As Dr. Maher stated in evidence it is impossible to design always to have the water table permanently below founding levels. The critical thing is that the water table should not come up close to the underside of the floor of the house. The document referred to by Mr. Lennon states that the water problem in the basement of Block 21 is now being addressed and that it has been suggested that the under floor basement drainage be abandoned in favour of a different system. This statement is not in itself indicative of a high water table. Mr. Lennon refers to a map referring to flooded areas but Mr. Forde advises that this map references flooded area beneath the 6.5metre contour.
The houses at Beaupark are constructed at levels at least 3 metres higher than the area noted flooded area and poor ground conditions have not been found to be an issue in any of the houses inspected including all remediated houses.
In addition Moylans were aware there were perhaps three or four leaks from water main saddles shortly after construction but these were promptly repaired by Menolly to the satisfaction of Dublin City Council. In addition Mr. McQuaid of Moylans does not recall any significant problems with ground water during the construction of Block 1 at Beaupark. Some problem with drainage arose due to the basement slab being cast over damaged drainage before the damage was noticed. At that stage it was very difficult to access the pipes to carry out repairs. The cracked pipes were allowing ground water infiltration to the under slab drainage system which took some time to resolve.
However in the opinion of Moylan, Menolly dealt with the issue in a reasonable manner and the leaks were repaired. Mr. O'Moore submits that this is therefore a small scale issue. He cannot recall whether AGEC were present in Beaupark or only in the other estates but it was open to them to carry out any enquiries they wished to and they did look at least in one if not two of the estates at the question of the high water table. If this enquiry is considered appropriate the defendants' experts have ample incentive to carry it out. In addition Mr. Lennon does not identify particular things with regard to this issue that could or would have been done.
Mr. Lennon refers to engineer's instructions relating to 109 Drynam Drive detailing extensive earthworks carried out in close proximity to the foundations of this house. Mr. Lennon avers that the placement of fill material to a depth of 4 metres adjacent to this property raises the prospect of the likelihood of settlement. The DBFL Report for this property furnished in the original discovery records a pattern of cracking visible on the external front side and rear elevations of the building similar to that which could be indicative of settlement of subsidence. The defendants cannot know this from a documentary trail but had this engineer's instruction been made available previously it would have significantly influenced how the defendants' experts would have approached the investigation of the damage and the interpretation of the crack patterns appearing in this property. This information may have led the defendants' experts to carry out geophysical testing and examinations on the property to determine the extent of sub surface features in the backfill ground and it may have been recommended that trial pitting and high quality boreholes be carried out to provide information as to the nature and condition of the fill adjacent to the site. Mr. O'Moore emphasises the use of the phrases 'may have' and 'may have been recommended' in this connection. Mr. O'Moore refers to Mr. O'Byrne's averments in response on this issue.
In reply Mr. Lennon avers in his affidavit of 27th October 2009 that given the cracking pattern which was visible on the external front side and rear elevations of this property information of this kind should have been made available in July 2008 and could have been considered by the defendants' experts. It would have been extremely informative for the inspections carried out on this property. Mr. O'Moore submits that this represents a retreat from allegations of prejudice stated earlier. Mr. Lennon goes on to aver that in his September affidavit he referred back to the discovery of the land drains in lime stabilised areas of the Drynam estate. He noted that this document raises serious implications with respect to potential drainage issues and flooding in the northeast section of Drynam. He avers that the point he was making was that this was another engineer's instruction and had the plaintiffs engaged with the defendants in relation to the obvious gaps in their discovery information of this kind would have come to light a lot sooner. Mr. O'Moore acknowledges that that may be true but queries where the allegation of prejudice is.
An issue was raised as to whether a document indicated there was a design flaw in the construction of the basement of Block 21 in that it did not take into account tidal waters. Mr. O'Byrne's response was that this was an off the cuff comment from Mr. Leach and in any event they were not having problems. In reply Mr. Lennon avers in his affidavit of 27th October 2009 that the basis on which Mr. O'Byrne seeks to trivialise this opinion expressed by Mr. Leach is unclear and Mr. Leach has sworn no affidavit. However this was something the defendants were entitled to know from the discovery documentation and was a potential line of enquiry which they could have pursued. Mr. O'Moore submits that this is quite an insipid allegation of prejudice.
None of the allegations of prejudice in respect of workmanship and quality control issues stack up. Some are not even stateable, for example a reference to a diary entry in July 2008. Even taken together, they do not involve the sort of level of prejudice required by the authorities.
Mr. Barniville in reply submits that an extract discovered in November 2009 from the Peadar Monaghan Report is said by Mr.

O'Byrne to have been looked at by the discovery team and thought not to be relevant. Mr. Barniville submits that this was a mistake because it was a document identified as a relevant document but said not to be requested. In this regard Mr. Barniville refers to a passage from Mr. O'Byrne's October 2009 affidavit. The conclusion that it was not requested is mistaken as it was clearly caught by Category 110 of the discovery. In addition insofar as Helsingor documents are concerned Mr. O'Moore submitted that the defendants should have gone directly to Helsingor. However, the defendants had no reason to approach Helsingor in 2008.

Mr. Barniville submits that the Monaghan Report and the Helsingor Minutes disclose serious concern in relation to the quality of engineering and construction matters in Myrtle and Red Arches. In relation to the jockeying for position suggestion Mr. Barniville submits that in view of the report itself and the minutes and the fact that Mr. Monaghan, an independent project manager, was brought in to consider these issues and took the view that they were serious issues, it is very hard to conclude that what was happening was a mere jockeying for position. Mr. Monaghan was clearly not involved in a jockeying for position. He is a known independent person brought in to report and that is what he did.

There is nothing in the letter of 30th July 2007 from Ballymore to Mr. Ross Senior that would entitle the Court to infer that this was part of some jockeying for position. It appears to be the opposite because Ballymore is indicating that it is not opposed to making a particular payment and it is simply repeating the concerns that had previously been expressed. In respect of this part of the complaint the defendants assert that had they received this information on discovery it would have affected the investigations carried out and those investigations and inspections of houses in the area of Myrtle specifically covered by the areas the subject of the Monaghan Report would have been informed by evidence of what is happening on site. Since the report was not available that evidence was not available when those inspections were carried out. That prejudice applies to the preparation of reports in advance of the trial and to the inspection of houses and the evidence that will be given by the defendants' experts in respect of damage to houses in Myrtle.

A specific form of prejudice is asserted in relation to 30 Myrtle House which is in Sector 18 of Myrtle. Mr. Barniville notes the concerns expressed in the Monaghan Report in relation to Sector 18. 30 Myrtle House was remediated in September and October 2008. The defendants' experts were present on 9th and 10th October 2008 but they did not know at that time that this area was the subject of significant criticism in the Monaghan Report and was the subject of a snag list also prepared by Mr. Monaghan in August 2007. They were also unaware that 30 Myrtle House contained non-Bay Lane material.

In his December 2008 report Dr. Strogen identified this house as a house that was all Bay Lane and it was not until the Replies to Particulars dated 16th June 2009 that the defendants were told that 30 Myrtle House was one of the non-Bay Lane houses. Mr. Barniville assumes that it is a mix rather than all non-Bay Lane. The fact that the defendants did not know these things when that house was being remediated puts them at a significant disadvantage. In addition the defendants say that it was essential that all documents concerning the manner of construction and workmanship issues that arose during the construction of the estate were clearly relevant and significant to be provided in circumstances where the defendants were not involved during the construction of the properties in question. The fact that they did not receive the documents therefore gives rise to particular prejudice.

Although the Monaghan Report does not make specific reference to the cracking of floor slabs it does refer to other concerns that could well have caused the damage to houses in that area including the concern expressed as to the undermining of the foundations due to the problem of installing drainage after the foundations had been constructed. In addition the defendants' case is that there are a range of possible causes for the damage to the various houses. In addition Mr. Barniville submits that the cracking of the floor slab is not a necessary prerequisite to a decision by the plaintiffs to remediate houses. Houses have been remediated and recommended for remediation in circumstances where there is no cracking of the floor slab.

Furthermore it was not possible to cross-reference houses found to be non-Bay Lane but suffering damage and falling in the area covered by the Monaghan Report that includes Myrtle House, Talavera and Boyd House. Mr. O'Moore submitted that this cross-referencing could not have been carried out in any event because information not previously disclosed concerning whether a property was non-Bay Lane was privileged information. Mr. Barniville refers to his earlier submissions in this regard and submits that the defendants could not carry out the cross-referencing exercise at the necessary and critical time in the run up to the case and at the earlier stages of the case. The defendants also submit that they are prejudiced in relation to the cross-examination of Dr. Maher. Mr. Barniville accepts that there were aspects in relation to workmanship in respect of which Dr. Maher said DBFL would be better dealing with them. However he did not avoid expressing a view in relation to workmanship. In this regard Mr. Barniville refers to his assertion in re-examination that he did not think that examples of poor workmanship shown to him in a series of photographs gave rise to the cracks in the slabs and the other defects identified in the house in question.

In relation to the snag lists Mr. Barniville submits that there are a large number of new snag lists in the 2009 discovery and the 2008 snag lists do not provide anything like the sort of informational detail and analysis relevant to the workmanship and construction issues arising in the houses covered by the Monaghan Report as one finds in the Monaghan Report itself.

In relation to the letter about the collapsing wall and soft mortar Mr. Barniville refers to averments of Mr. Lennon and Mr. O'Byrne. In his October affidavit Mr. Lennon avers that the defendants would have wanted to see this letter and that it bore generally on the workmanship issues on the site but that the defendants are not saying anything more than that it would have given them a better picture of what is happening rather than advancing any specific serious prejudice arising out of it.

The defendants' experts regard the site diaries as significant and important in that they provide a good account of what is happening on the estates at various stages in the construction. Mr. Barniville submits that the prejudice suffered in relation to the site diaries newly discovered in 2009 is that they would have fed into and further influenced the investigations and inspections being carried on by the defendants' experts. They would have provided further lines of enquiry to follow and would have afforded a further basis for Dr. Maher's cross-examination. The defendants were informed in September 2008 that there were no further site diaries to discover. They then received more site diaries in January 2009 and a raft of further site diaries in the 2009 discovery.

The defendants accept that Mr. Kearney's site diary of July 2008 post-dates the June 2008 cut-off. Accordingly, as Mr. Lennon avers in his October affidavit, the defendants do not rely on this document. In relation to the June 2008 diary entry from Mr. Kearney containing the observation that the infill at 7 Beaupark Place did not appear to be tightly compacted, Mr. Barniville submits that Mr. O'Byrne in his October affidavit is quite careful in what he says in relation to this and considerably more qualified than what Mr. O'Moore submitted. Mr. Barniville refers to Mr. O'Byrne's averments in this regard and submits that Mr. Kearney expressed a belief that the words recorded were used during a conversation between the defendants' experts but this belief appears certainly to envisage an element of uncertainty. In the part of the diary in question there is no reference to the presence of any of the defendants' experts at that stage or to the attribution of the comments he records to anyone other than himself.

There is a reference to the defendants' experts earlier in that extract from the diary. There is no suggestion in the diary that the defendants' experts were present at the relevant time. Mr. Richard Huard from Bickerdike Allen had left earlier that morning. Mr. Barniville refers to an averment of Mr. Lennon in his October affidavit in this regard and submits that the clear inference is that the observation in question was not the observation of any of the defendants' experts who had by that stage left. Another element of the prejudice arising here is the question of compaction which is something Dr. Maher addressed in evidence and something the defendants would have wished to put to him also. Mr. Barniville refers to a diary extract from Mr. Niall O'Toole's diary referring to problems with blockwork and the inside walls having to be rebuilt. Mr. Barniville submits that the properties in

question are 14 and 16 Drynam Rise, which are both retest houses which therefore contain some non-Bay Lane infill. Therefore evidence in relation to damage to blockwork and rebuilding inside walls is something the defendants would have wanted to have at the appropriate time. Mr. Barniville also refers to the averments of Mr. Lennon and Mr. O'Byrne concerning the diary of Mr. Owen McElroy.
Mr. Barniville submits that the plaintiffs appear to accept that there were certain problems in Block 21 and Block 1. Mr. O'Moore submitted that these were small issues and they were sorted out. The defendants submit that they should have been given an opportunity of exploring them. Mr. O'Byrne's October affidavit makes it clear that the particular drainage or flooding issue that arose in the basement in Block 21 had been caused due to the slab being laid over damaged pipes and it appears that someone had walked or driven over these pipes and that had not been noticed before the slab was cast. This was an important issue which the defendants say should have been disclosed and gives rise to prejudice.
The defendants say that newly discovered engineers' instructions would have provided them with a proper picture of what was happening during the construction and design of the properties on the estates. Mr. Barniville refers to averments in respect of 109 Drynam Drive in this regard. The defendants attended at that house for inspection in May 2008 and January 2009 but did so without knowledge of the instruction contained in the document referred to in the affidavits concerning 109 Drynam Drive.
There is a further issue concerning Block 21 in Beaupark, which is that when Block 21 was being constructed there was an instruction by Moylans to be careful not to undermine the foundations of the houses adjacent to that block while the foundations were being excavated. Newly discovered site meeting minutes refer to "repairing leaks in basement" in relation to Block 21. There is also a reference to Mr. Leach being of the opinion that the basement should have been tanked. The floor was leaking and the basement had a flawed design and did not take into account tidal waters. There is a reference to talking to Drumloe to see if there are any problems there. Mr. O'Byrne suggested that the reference to a design flaw in the basement was an off-the-cuff remark, although Mr. Barniville submits that it is not clear on what basis that is said. It appears significant in light of the concerns previously expressed by Moylans as to how activity in the basement area of Block 21 should be carried out in light of the houses adjacent to Block 21. There is a remediated property, 12 Beaupark Street, adjacent to Block 21.

Conclusion

It is clear from the documentation newly discovered in 2009 that there were considerable failings on the part of the plaintiffs in relation to discovery of documents relating to quality control and workmanship issues. The Court accepts that the newly discovered documentation raises potentially significant issues from the perspective of the defendants' case. The Court considers that, even if the Monaghan Report was commissioned as a result of a jockeying for position, it contains the observations and conclusions of an independent expert and its significance is therefore not diminished in any way by the motivation for its commissioning.
It is suggested that some of the documentation would have been relevant to inspections and investigations undertaken. In this regard the defendants place considerable emphasis on the Monaghan Report in relation to Myrtle. However it has to be borne in mind that the defendants have had opportunities to carry out inspections and investigations on that estate, as at Drynam and Beaupark. It may be that the investigations carried out in Myrtle were less extensive than those at Drynam and Beaupark but the O'Connor Sutton Cronin Report suggests that they have attended 18 remediations in Myrtle.
Mr. O'Moore informs the Court that as of December 2007 the defendants had been notified of 41 remediations and of those have attended six. In addition since the discovery cut-off date only two properties in Myrtle have been remediated, 2 Boyd House and 30 Myrtle House. Mr. O'Moore also informs the Court that the majority of houses in the estates have not been remediated. Again, the defendants' experts have had the opportunity to carry out inspections and investigations in relation to a wide range of houses. They have had the opportunity to observe the damage in many houses and can relate their observations to the information contained in the documents which are newly discovered. Any amendments which need to be made to their expert reports in light of the newly discovered documentation can now be made. It must also be remembered in relation to this issue that the defendants had a very considerable amount of information available to them from the 2008 discovery.
It is instructive to consider a number of examples with regard to the issues of quality control and workmanship. 30 Myrtle House, in Sector 18 of Myrtle, which contains non-Bay Lane material, was remediated in September and October 2008. The defendants' experts were present on 9th and 10th October 2008 and presumably have available whatever notes or draft was prepared. The defendants now also have the Monaghan Report and the snag list of August 2007, also prepared by Mr. Monaghan. The Court is of the view in these particular circumstances that the defendants now have sufficient information taken in conjunction with their two site visits to adequately deal with the position arising. The one feature the Court does not have however is the content of the defendants' experts' notes or draft.
It is difficult to envisage how the issue of prejudice relied on in respect of two workers consuming alcohol during a breakfast break as referred to in the diary of Seán Martin in 2004 is of significant relevance to the issue of quality control. The incident happened and was adequately dealt with at the time. It does not appear that the issue was other than isolated.
Reliance was placed by the defendants on an extract from the diary of Paul McCarthy discovered in 2009, whereas in fact the entire diary was discovered in 2008.
In addition, it has to be borne in mind that by June 2008 the three estates which the Court is concerned with were completed and thus the documents discovered were only coming to hand after all construction work was complete.
Most of the plaintiffs' evidence in relation to construction issues has yet to be given in any event and so the relevant information can also be put to the witnesses in relation to structural issues. In addition, relevant material from the newly discovered documents can be put to the plaintiffs' experts in cross-examination who, as noted previously herein, can be recalled if necessary. In this regard it is crucial to note that the Court is concerned with expert witnesses, who can be expected to give their evidence in accordance with their specialised knowledge rather than taking partisan positions. Accordingly the Court does not consider that the defendants are irreparably prejudiced in relation to this issue.

Issue VII – Red Arches

Section 7 of Mr. Lennon's affidavit of 15th September 2009 relates to Red Arches, a development which does not form part of the subject matter of the present proceedings and which Mr. Lennon describes as a section of Myrtle. The plaintiffs dispute this categorisation, contending that Red Arches is an estate separate from Myrtle. The defendants state that there is a reasonable dispute in this regard. In his affidavit of 27th October 2009, Mr. Lennon states that the controversy as to whether the discovery categories encompass Red Arches can only be advanced by way of submission.
Mr. Barniville, for the defendants, refers to a number of factors connecting Red Arches and Myrtle. Red Arches is also known as Baldoyle Phase 2, while Myrtle is Baldoyle Phase 1. They were constructed by the same builder and what appears to be the same or a very similar arrangement with Helsingor pertained in relation to the construction. The defendants supplied infill for both, although in respect of Red Arches it was used only for the haul roads and not as underfloor infill. In addition, Mr. Lennon avers that construction practices in Red Arches were similar to those conducted in Drynam, Beaupark and "the rest of the Myrtle estate", and that the Peadar Monaghan Report refers to both phases and throughout it appears there was no specific distinction made between these two developments in that both developments form part of the same lands owned by Helsingor

and developed by Menolly. Mr. Lennon refers to a coincidence of construction practices in circumstances where this estate is part of the same development in which Myrtle is situated and was constructed by the same builder, owned by the same company and employed similar construction techniques. In contrast, Mr. O'Byrne avers that it is a separate estate.
The question is an important one from the perspective of the categories of discovery, some of which refer to "the three estates". Mr. O'Moore, for the plaintiffs, points to discovery categories concerning contractual documentation for Drynam, Beaupark and Myrtle and states that where the phrase "the three estates" is used subsequently in the discovery letter from Lennon Heather it means Drynam, Beaupark and Myrtle. This must be the case, not only because these estates are dealt with in relation to contractual documentation in earlier categories but also because of later references to "the three estates the subject matter of these proceedings", a phrase which can only refer to Drynam, Beaupark and Myrtle. Other references to "the three estates" would make little sense in the context of this case if they were construed otherwise. In addition, Mr. O'Moore notes Category 110, which refers to various documents regarding workmanship "in respect of the construction of the three estates the subject matter of these proceedings and/or pertaining to the ground conditions on the three estates." This is a further indication that "the three estates" and "the three estates the subject matter of these proceedings" encompass the same estates.
Mr. Lennon avers that Red Arches is part of the Myrtle estate. If this were correct then documents relating to Red Arches would be discoverable. However, the Court does not consider that Red Arches is a part of Myrtle. While they share certain links as adverted to by Mr. Barniville and Mr. Lennon, these are not sufficient to justify the conclusion that one is a part of the other. Myrtle and Red Arches form part of the same Baldoyle development and were constructed by the same builder, but neither this nor the other factors mentioned above indicate that Red Arches is a section of Myrtle. Indeed, some of the commonalities referred to, such as the fact that the defendants supplied infill to Myrtle and Red Arches and the similar construction practices, are present also when Myrtle is compared with Drynam and Beaupark. Mr. O'Byrne, as the Group Director of the fourth named plaintiff, is clearly in a position to know whether or not Red Arches is a part of Myrtle, and he avers that Red Arches is a separate estate. Nothing in the submissions or in the evidence tendered on affidavit is sufficient to undermine that averment. It is true to say that the defendants discovered a considerable number of documents relating to Red Arches in 2009. However, Mr. O'Byrne avers that this was done in error, and there is nothing before the Court which displaces that contention. Even if some of these documents have the relevance and significance suggested by the defendants, they do not relate to any of the estates and therefore do not fall within the discovery categories. Accordingly, the defendants have not been prejudiced by any failure to make discovery in respect of this aspect of the motion.

Issue VIII – Development of Cracking

The defendants' complaints of prejudice in relation to this aspect are stated in Mr. Lennon's September affidavit, a review of which is contained in Schedule I to the present judgment. Briefly stated, the issue in this regard relates to the stage at which cracking is said to have appeared in houses in the estates the subject matter of these proceedings. The defendants assert that documentation newly discovered supports their contention that the cracking in the estates is too premature to be indicative of pyritic heave. Mr. Lennon avers that a comprehensive analysis would have been carried out to show that for a large number of properties the development of cracks occurred too early to support the plaintiffs' allegations in this regard.
On behalf of the plaintiffs Mr. O'Moore referred to a number of passages as detailed in Schedule I to the present judgment from the affidavit of Mr. Lennon dated 15th September 2009 concerning the discovery in 2009 of documentation relating to *inter alia* the interval between the pouring of foundations and floor slabs and the emergence of cracking in houses. Mr. O'Moore notes that the averments in this section indicate that the information is essential. The defendants have suffered severe prejudice by not having it at an earlier stage and it would have led to a comprehensive analysis. Mr. O'Moore refers to a number of averments of Mr. O'Byrne in his affidavit of 6th October 2009 and averments of Mr. Lennon in response in his affidavit of 27th October 2009. Mr. O'Moore submits that Mr. O'Byrne's affidavit of 6th October shows how absolutely flawed and unreliable the evidence given on behalf of the defendants is. Mr. O'Moore goes on to refer to averments contained in that affidavit which indicate the extent to which the information in respect of which Mr. Lennon makes complaint in this section of his affidavit was available to the defendants from the 2008 discovery, the Replies to Particulars of January 2008 and the inspections carried out by the defendants' experts.
Mr. O'Moore notes that Mr. Lennon averred in his affidavit of the 15th September that it is only now that the defendants have a full grasp of the cracking in the three estates. The documentation as described as undeniably crucial to enable the defendants obtain a proper view. The documentation is deemed vital to enable the experts properly to analyse the causes for the damage and to allow the defendants' experts to determine the most appropriate houses to be chosen for the basket. Mr. O'Moore submits that that evidence is not correct or if it is it is not good for the defendants that no action was taken on it.
Mr. O'Moore refers to the averment of Mr. Lennon in his affidavit of the 27th October 2009 in which he refers to a snag list for 1 Hoey Close. He avers that two documents referred to by Mr. O'Byrne in this regard contain nowhere near the same detail as the snag list and neither document refers to damaged brick work. The snag list discovered in 2009 also has considerable detail as to the state of the property as of May 2005. Mr. Lennon further avers that the defendants' experts were not at the property in 2005 and this snag list would have provided very important information in order to assess whether the matters listed therein could be linked to the damage recorded for this property. He avers that this shows the prejudice suffered by the defendants.
Mr. O'Moore notes that the snag list does state "repair all damaged brick work particularly at left corner of porch. Mr. O'Moore submits that this does not impact on any of the issues in the case but even if he is wrong in his assessment it can be put to the relevant witness for the plaintiffs who deals with workmanship. Mr. O'Moore submits that Mr. Lennon's complaint of prejudice in relation to the documents concerning the development of cracking across the estates comes down to the reference to the damaged brick work. Mr. O'Moore submits that nothing in this section discloses any form of prejudice.
On behalf of the first and fifth named defendants Mr. Barniville submits that Mr. O'Moore presented the position in relation to this issue unfairly. It is true that some documents were referred to in Mr. Lennon's September affidavit that had been discovered in 2008. However that arose due to the duplication exercise that appears to have gone wrong on the plaintiffs' side when making the 2009 discovery initially. There are some documents within this section which are relevant and which the defendants rely on to support a claim of prejudice.
The defendants rely in particular on what Mr. Lennon describes as the Drynam Pour Dates document which was first discovered in 2009. It draws together a range of information and sets out in a very clear and concise manner the dates on which foundations for houses in Drynam were poured and on which complaints were first made. Mr. O'Moore submitted that the information in this document could have been pulled together from a range of other sources in the 2008 May discovery. Mr. Barniville does not dispute the fact that there are other documents from which if they were all put together you could ascertain the same information however this document sets it out in a clear concise way and clearly should have been discovered. The fact that the information could be pulled together from a range of other documents in the discovery does not in any way diminish the prejudice suffered in relation to it.
The second type of documents on which the defendants rely in relation to this section is a series of snag lists. Mr. Barnville refers in this regard to a snag list for 15 Myrtle house and a snag list for 1 Hoey Close. The later is the one that refers to the need to repair damaged brick work. The defendants do not suggest that this document is a smoking gun but it forms an important part of the picture of what was going on in these houses and bears very much on the defendants' case that there is

a combination of factors that led to the damage in particular houses. The document forms part of a pattern that emerges for the first time in the 2009 discovery.
Mr. O'Moore in reply submits that Mr. O'Byrne in his affidavit of the 6th October identifies how easily the information in the Drynam Pour Dates document could be pulled together from different sources in the 2008 discovery. Mr. O'Moore submits that Mr. Lennon subsequent to his affidavit of the 15th September did not make any suggestion that there would have been any difficulty in pulling together that information from those different sources.
This suggestion of prejudice is made by Mr. Barniville. Mr. O'Moore submits that it is not grounded in the evidence of Mr. Lennon but that even if it is Mr. O'Byrne has shown how easily that information could be pulled together. In addition Mr. Barniville has raised a specific instance of prejudice in respect of 30 Myrtle house. His experts did not know that that house contained non-Bay Lane fill or a mixture. However no-one knew that during the course of the discovery of 2008 or the remediation that took place in September 2008. Mr. O'Byrne points this out in his affidavit of 6th October. The suggestion of prejudice by virtue of this not being known is accordingly somewhat unreal. This information was unknown because Dr. Strogen had not identified that dwelling as a non-Bay Lane or a mixed dwelling in his investigations at that time and because the defendants had not sought to source the infill in respect of any house across the three estates.

Conclusion

Mr. O'Byrne's averments in his affidavit of 6th October make clear the extent to which the defendants had the information about whose absence they complain in relation to pour dates and the dates on which cracking is said to have first emerged. It is true that they did not have the Drynam pour dates document which laid out this information in a concise form in one document. However, the fact remains that they had the information required as has rightly been conceded. Accordingly any prejudice to the defendants in this regard arises not from a failure to make discovery but from a failure on the part of the defendants to put together the relevant information in respect of what is a very significant issue in the defendants' defence, namely the assertion that the cracking occurred at too early a stage to have been caused by pyritic heave.
In respect of 1 Hoey Close it is clear from the averments of Mr. O'Byrne that a snag list and a visual inspection report relating to this property had already been discovered. Mr. Lennon avers that the newly discovered snag list in respect of 1 Hoey Close contains considerable detail as to the state of the property. He cites the reference to damaged brick work in the snag list. However, the information already available to the defendants in respect of both this and other houses must be recalled. In addition, the information in respect of which the defendants complain in this area can be canvassed in cross-examination of the relevant expert witnesses for the plaintiffs when they are recalled. Accordingly the Court is of the view that there is no irreparable prejudice to the defendants as a consequence of the failures to make discovery in respect of this area.
However there is one outstanding point which the Court would wish to address. In his affidavit of 6th October 2009 Mr. O'Byrne avers that an inspection condition report concerning Apartment 71, Sweetman House, fell outside the scope of the original discovery because it was an attachment to an email sent to Menolly on 24th July 2008 and the plaintiffs therefore received the report after 30th June 2008. In response Mr. Lennon avers that this report is dated June 2008 and it is irrelevant that it may have been received after the cut-off point. This is a similar issue to that which arises in the context of the Duggan Brothers letter referred to in the context of complaints in relation to Bay Lane material in the section of this judgment dealing with the plaintiffs' motion. Lennon Heather have conceded that the earlier assumption that it was not discoverable because it was attached to a letter that post-dated the cut off point was a misapplication of principle, although Mr. McDonald on behalf of the plaintiffs enquired as to whether other documents had been the subject of the same misapplication.
The appropriate course in dealing with the matter of the inspection condition report appears to the Court to be the same as the course which the Court will also direct in relation to the issue concerning the Duggan Brothers letter. Consequently the Court will direct that all documents received by the plaintiffs within a specified period of the cut-off date for the original discovery are to be checked to ascertain whether there are any attachments to them, which pre-date the cut off point and are discoverable and were not previously discovered.
The Court considers that the defendants will not suffer any irreparable prejudice as a result of any failure on the plaintiffs' part to discover in June 2008 the relevant documentation under this section.
The affidavit of 15th September refers to a number of documents that had already been discovered in 2008. This has been attributed to the assurance from BCM that they had "carried out a major duplication exercise to ensure where possible there is no duplication of documents" as between the old and new discovery. The assurance given by BCM was not absolute and the Court is of the view that a thorough examination of the documents ought to have revealed the true position. The Court does accept however that there was extensive duplication to an extent greater than would have been implied on a reasonable interpretation of the assurance given.
Finally, an issue arose at the conclusion of the submissions in relation to documentation which was discovered by Kilsaran Concrete Ltd. on 25th November 2009. This documentation falls into four categories, the first three of which relate to infill that Kilsaran had delivered to the plaintiffs and the fourth of which relates to concrete delivered to the plaintiffs by the same company. In relation to the first category, which concerns infill deliveries to Baldoyle, the plaintiffs say that all of the invoices and dockets relate to Red Arches and are therefore not discoverable. The defendants challenge this assertion and refer to a document from the plaintiffs' discovery which refers to a delivery of materials to Baldoyle which the plaintiffs have said were delivered to and used in Myrtle. On behalf of the plaintiffs BCM referred to various sources of information grounding the assertion that this delivery documentation relates to Red Arches. However, Mr. O'Neill on behalf of the first and fifth named defendants refers to documents in the Kilsaran discovery and documents previously discovered by the plaintiffs in challenging some of the bases on which the plaintiffs assert that the documents in this category relate to Red Arches. He submits that there is at least a significant question mark as to whether or not the documents evidence further deliveries to Myrtle. He submits that the Court should require the plaintiffs, as a condition to proceeding with this action, to make proper discovery and give proper explanations as to the destination of the deliveries of infill identified in the Kilsaran discovery.
The second category of documentation concerns Donaghmede, which the defendants have always understood to be Beaupark. BCM stated in correspondence that this documentation concerns Red Arches, but the defendants dispute this.
The third category concerns deliveries of infill not previously discovered but identified in the Replies to Particulars, that is to say the defendants have been told that deliveries took place but have not been given the delivery dockets. In response to the defendants' query regarding this category, BCM stated in a letter of 8th December 2009 that some of the dockets were referred to in invoices that had been discovered in 2008, although these dockets themselves had not been discovered as they were not in the plaintiffs' power or possession, but the information in these dockets was contained in appendices to the Replies to Particulars. In addition, BCM referred to an invoice in this category relating to Red Arches which was not discoverable. They also stated that an invoice relating to Myrtle was discovered in 2008. In a subsequent letter of 17th December 2009 BCM stated that some of this documentation was not in the plaintiffs' power or possession but was signed for on site by Menolly personnel and a copy of the document would have been given to the Menolly personnel on site at the time of delivery. Mr. O'Neill submits that despite what was said in the letter of 8th December the plaintiffs are now saying that they had these dockets in their power or possession having previously said that the dockets were not discovered as they were not in the plaintiffs' power or possession. No explanation is given as to what happened to these documents and why they are no longer in the power or possession of the plaintiffs, and no offer is made to discover them.

The final category concerns concrete delivery documents. Mr. O'Neill submits that the same point arises as arises in respect of the previous category of documents: these documents were in the possession of the plaintiffs but no indication is given as to what happened to them. He submits that the plaintiffs should be directed to make proper discovery in respect of these documents and any other relevant documents. Some explanation should be given as to how 140 or 160 documents, whichever may be the correct figure in relation to this category concerning concrete, and about a dozen documents in respect of infill, seem to have been disposed of and the circumstances in which that disposal took place.
Mr. O'Moore, on behalf of the defendants, submits that the documents in the first and second categories referred to relate to Red Arches. He refers to the sources of information on which this conclusion is based, including the Menolly accounts system and the signatures on delivery dockets.
In relation to the dockets which were used for the purposes of the Replies to Particulars, Mr. O'Moore submits that the defendants had all of the information there.
In addition, Mr. O'Moore refers to the second schedule to the affidavits of discovery of 25th June and 7th August 2009. Each of the invoices that was missing is listed in the second schedule. The plaintiffs did not do this with respect to the delivery dockets because that would have involved an enormous exercise. However, with regard to these specific concrete delivery documents the defendants know of the existence of the delivery dockets because they were in the invoices discovered by the plaintiffs.
Mr. O'Neill in reply submits that even on Mr. O'Moore's analysis it would seem that three of the five sources of information on which the plaintiffs relied in identifying the destination of some of the infill referred to in the delivery documentation discovered by Kilsaran as being Red Arches are incorrect and cannot be relied upon. He further submits that the defendants should have identified the delivery dockets in the second schedule.
The Court is of the view that it is necessary for the plaintiffs by way of a supplemental affidavit to clarify their position in relation to Kilsaran Concrete Ltd. invoices and delivery dockets having regard to the arguments as raised by Mr. O'Neill, and *inter alia* to complete a second schedule to include invoices and delivery dockets which were not discovered by way of a second schedule to any previous affidavit of discovery.

8. <u>OVERALL CONCLUSION</u>

As regards the discovery made by the plaintiffs in June 2008 it is quite clear that this was inadequately handled by or on behalf of the plaintiffs. In the Court's view, the plaintiffs showed little respect for the importance of the function that was being carried out as part of the judicial process. There was in the Court's view a serious breakdown in communication as between the plaintiffs' solicitors, the plaintiffs, the relevant members of the management team who were involved in the discovery process and the employees of the plaintiff companies also involved. There was in the view of the court a failure by the plaintiffs, their servants or agents to engage in the discovery process.
Various reasons are advanced on the defendants' behalf as to why there may have been such a failure on the part of the plaintiffs, for example, an anxiety and desire to proceed with the trial of the action, but whatever the reason, the plaintiffs' discovery in June 2008 failed to achieve the standard that is necessarily required by the Court.
As enunciated by Clarke J. in *Dunnes Stores (Ilac Centre) Ltd. v. Irish Life Assurance Plc & Anor* (Unreported, High Court, Clarke J., 23rd April 2008) discovery relies to a large degree on trust. The purpose of the agreement that was reached between the parties hereto was to define the obligations of the parties concerning disclosure of documents, and it was then incumbent on those persons charged with swearing the affidavit of discovery upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. As Clarke J. pointed out, mistakes can and do happen and they can range from the entirely innocent and understandable to those which might be characterised as blameworthy to a greater or lesser degree. At the other extreme are cases where there has been a deliberate failure to disclose material information. If a party does not fully understand any aspect of the obligation imposed in respect of discovery, for example, with an issue such as privilege, the obligation is to take proper legal advice and to act upon it.
In the particular circumstances that arise there was, in my view, a failure by the plaintiffs to conscientiously and diligently deal with the task of assembling the relevant documents for discovery and in the swearing of the affidavits of discovery. There was in my view a failure by the plaintiffs, their servants or agents, in the duty of care which was owed to the Court, the judicial process and the defendants in the preparation of and the discovery made by the plaintiffs in June 2008. The actions of the plaintiffs in my view in the particular circumstances that arise can be characterised as blameworthy to a significant extent. The use of terminology to the effect that the plaintiffs' discovery in June 2008 was a mess is an appropriate summation of the situation.
There was not, however, in my view, in respect of the June 2008 discovery process, a wilful attempt to suppress documentation that ought to have been discovered, nor was there any attempt on the part of the plaintiffs to deliberately interfere with the conduct of the case. I do not consider that the failures which occurred were deliberate or dishonest.
The defendants have strongly urged upon the court that the plaintiffs have not and, effectively, will not make discovery. I am not so satisfied. I note the apology tendered to the Court in respect of the June 2008 discovery and the acceptance on the plaintiffs' behalf of the necessity to engage with the defendants and to comply with their discovery obligations. I note the retention of a dedicated panel of Junior Counsel and the additional retention of Price Waterhouse Coopers, chartered accountants, to assist with the e-discovery. I note the assurance given on the plaintiffs' behalf that they will abide by any direction of the court as regards ongoing discovery. I take the view that the directions which have been given in respect of the several issues that arise will bring about a situation whereby if complied with, the plaintiffs will have made full discovery.
I have an in-depth knowledge of the evidence tendered to the Court to date over some 50 days and the issues that arise in this case. I am conscious that in the evidence tendered to date most of the time has been spent on the geological aspect, save for the evidence of Dr. Maher, the evidence of Mr. Forde and Mr. Sutton as tendered on the various site visits, and the two homeowners. The lead construction expert witness for the plaintiffs has not yet commenced to give his evidence in Court. In real terms the aspect of the construction evidence is hardly underway, and I have little doubt that once started it will take several months to conclude between the parties.
The defendants have had possession now of the updated discovery documentation for a considerable period of time which in my view is more than ample to have enabled the defendants and their expert witnesses to digest its content and significance and they have had ample time to consider the implications arising therefrom with regard to the defendants' defence of these proceedings. The defendants have outlined the nature of investigations they would or may have carried out if this documentation had been made available to them in June 2008 and have emphasised that they may have adopted a different attitude to certain aspects of the plaintiffs' claim. For the reasons which I have set out in dealing with the eight principal issues that arise on this motion, I do not accept that there is a realistic basis for these contentions. In any event, it has been entirely at the defendants' option to adopt whatever course of action they considered appropriate to their defence of the plaintiffs' claim in the light of the further discovery made. It is clear from the case as made out on the defendants' behalf that most, if not all, the expert witnesses who have given evidence to date will have to be recalled to satisfy the misgivings as expressed on

the defendants' behalf, and in this regard they will be in a position to put newly discovered material and concerns arising from it to the witnesses. Dr. Maher was to be recalled in any event at the defendants' insistence and Mr. Forde is already sworn and in the course of giving his evidence by reason of the various site visits as, indeed, is Mr. Sutton on the defendants' behalf. Having regard to the Rules of the Commercial Court, the purpose of which is that parties should not be taken by surprise, it is in my view clear that there is no realism to the submission as made on the defendants' behalf that they are in some way hampered or at a disadvantage by reason of the fact that issues touching on any such cross-examination have been ventilated during the course of this motion. The defendants have by now had ample opportunity to discuss and consider the implications arising from the additional documentation discovered with their expert witnesses, and the recall of whatever witnesses the defendants require for the purpose of further cross-examination, together with any amendments to expert reports which are considered necessary, will, in my view, satisfy the various contentions as raised on the defendants' behalf and will suffice to rectify the situation that has occurred. In the circumstances outlined I consider that the defendants will not suffer irreparable prejudice. Accordingly I come to a conclusion that the plaintiffs, their servants or agents were guilty of negligence in failing to comply with their obligation in the preparation and furnishing to the Court and the defendants of their discovery of June 2008, and that as a result thereof having regard to the further discovery as made the defendants will not suffer any irreparable prejudice.

Order 31 Rule 21 of the Rules of the Superior Courts provides as follows:-

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

In 'Discovery and Disclosure' (2007), Abrahamson *et al* state:

> "The principles applicable appear to be the same regardless of whether the party in default is the plaintiff or defendant."

It is clear from the authorities that an order to dismiss a claim or to strike out a defence pursuant to O. 31 r. 21 should not be granted lightly. Such an order does not follow inevitably from a failure to make sufficient discovery. In *Mercantile Credit Company of Ireland Ltd. v. Heelan* [1998] 1 I.R. 81 at p. 85 Hamilton C.J. (O'Flaherty and Denham JJ concurring) stated, having quoted O. 31 r. 21:-

> "The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.
>
> It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect.
>
> The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."

Similarly in *Murphy v. J. Donohoe Ltd.* [1996] 1 I.R. 123 at p. 142 Barrington J., with whose judgment Hamilton C.J. and O'Flaherty J. agreed, stated:

> "Order 31, r. 21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court. Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendant's defence. But such cases will be extreme cases."

Barrington J. then referred to Hamilton C.J.'s conclusion in *Mercantile Credit* that the relevant powers should not be exercised to punish a party for failure to comply with a discovery order within the time limited by the order.

In *Johnston v. Church of Scientology* (Unreported, Supreme Court, 7th November 2001) Keane CJ in an *ex tempore* judgment stated:

> "…when the trial judge came to deal with the notice of motion requiring that the plaintiff's claim should be struck out because of failure to comply with this order for discovery he quite rightly in my view approached the case on the basis that it was an extraordinarily wide ranging order for discovery and in applying the principles that he did and correctly, in my opinion, he quite rightly took into account the nature of the order of discovery made. The court has a jurisdiction and there is no issue about this, to strike out proceedings or to strike out a defence filed by a defendant where it is satisfied that the extent of the non-compliance with the court's order is such that it is not possible to have a fair trial as a result and of course that may also arise where it appears from the affidavit that some particular documents or some category of documents have been in fact destroyed by the party concerned, whether innocently or whether deliberately in order to interfere with the further conduct of the case. There is no doubt that the courts enjoy such a jurisdiction but the law is stated as follows by Mr. Justice Barrington speaking for this court in the case of Murphy…
>
> *"undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and such cases will be extreme cases".*
>
> As Chief Justice Hamilton put it in Mercantile Credit…, the powers of the courts to secure compliance with the Rules and Orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."

Keane C.J. went on to apply those principles, noting that it was not disputed on behalf of the defendants that they were the principles to be applied. Like the judgment of Barrington J. in *Murphy*, the judgment of Keane C.J. in *Johnston* does not appear to contemplate any distinction between a motion to strike out a plaintiff's claim and a motion to strike out a defendant's defence in terms of the principles applicable to each. The conclusion of Abrahamson *et al* that the principles applicable in both contexts are the same appears to be correct.

A question arises as to whether a wilful refusal to make discovery is required or whether a negligent failure to comply is sufficient. It was submitted on behalf of the plaintiffs that there would have to be a wilful refusal to make discovery in order for the Court to dismiss the plaintiffs' claim. They refer to the references to wilful default and wilful refusal in the judgments of Hamilton C.J. in *Mercantile Credit* and Barrington J. in *Murphy* respectively. Although Keane CJ referred in *Johnston* to the Court having jurisdiction to grant the order where it is satisfied that it is not possible to have a fair trial due to non-compliance with the discovery order, the plaintiffs submit that no departure from the principles enunciated earlier was intended as Keane C.J. went on to quote from the passage of the judgment of Barrington J. in which he refers to the possibility that a wilful refusal to comply with the Discovery Order may prevent the other party from getting a fair trial. In contrast the defendants submitted that negligence is sufficient. The latter submission derives support from the judgment of Hamilton C.J. in which he referred to the need for "wilful default or negligence". While it is true that he stated earlier in his judgment that the Court should not grant an order striking out the defendant's defence unless satisfied that the defendant is endeavouring to avoid giving discovery, he appears then to envisage that a neglect to comply may suffice, although he states that the relief should not be granted where the failure is not a culpable one, giving the examples of loss of memory or illness. He goes on to state that the order should only

be made where there is wilful default or negligence. The latter word is a legal term of art, whose meaning is well known not to include an element of wilfulness. In referring to "wilful default or negligence" the judgment therefore clearly contemplates two alternative bases on which an order to strike out a defendant's defence may be granted. In view of what I have said above I am satisfied that the same principles apply in relation to an order dismissing the plaintiffs' claim. While the judgment of Barrington J. in *Murphy* does refer to the possibility that a wilful refusal may prevent a fair trial he did not expressly state that an order pursuant to O. 31 r. 21 could never be granted in the absence of a wilful refusal. Barrington J expressed no wish to dissent from the views expressed by Hamilton C.J. in *Mercantile Credit* and it is clear that he was aware of that judgment as he went on to refer with approval to the portion of that judgment immediately following the reference to wilful default or negligence.

However, that is not to say that a negligent failure to make discovery, without more, will suffice to warrant a dismissal or strike out. It is also necessary, as the passages quoted above from the judgments of Barrington J. in *Murphy* and Keane C.J. in *Johnston* indicate, to consider whether a fair trial can be achieved notwithstanding this failure. As Clarke J. said in *Dunnes Stores* at paras. 3.5 to 3.6 of his judgment:

> "3.5 I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned.
>
> 3.6 It is only if it is proper and appropriate to conclude or infer from the failure to make proper discovery in the first place that the failure concerned was designed for the purposes of not giving access to the other side to relevant information and where it would be appropriate to infer, in turn, from such a finding, a particular view on the issues to which that information refers, that it would be appropriate to allow a failure to make proper discovery to influence the courts decision on the merits of the case…."

In the context of ensuring a fair trial it may be useful to note a number of steps ordered by the trial judge in *Carey v. Ontario* [1991] O.J. No. 1819. Although this case concerned an application for a mistrial, it is relevant also in the present context because it concerns steps taken to remedy prejudice in order to ensure a fair trial. This is a concern common to an application for an order to dismiss a claim or strike out a defence and to an application for a declaration of a mistrial. In *Carey* the trial judge made an order for costs in the plaintiff's favour and also directed, *inter alia*, that the plaintiff should have leave to amend his Statement of Claim, if so advised; that his counsel be permitted to correct his opening remarks, if so advised; and that his counsel be allowed to recall him to give further evidence, if so advised. The curative steps identified in *Carey* do not constitute an exhaustive list of the courses of action that may be taken in order to remedy prejudice. The relevant steps, and whether or not any such steps would be sufficient to remedy the prejudice that has arisen in a given case, will of course depend on the circumstances of the particular case.

In my view, the appropriate course to adopt in the circumstances of the present case is to bring about a situation whereby after some 50 days of evidence the plaintiffs will have complied with their discovery obligations and the various witnesses as appropriate can be recalled to deal with the additional documentation now to hand. I believe that the interests of justice will be served between the parties by adopting this course of action, and thereby enabling this case to proceed to a conclusion to be decided on the evidence adduced before the Court. I reach this conclusion in the exercise of my discretion and on the basis that in the particular circumstances that arise on this motion, there are not exceptional circumstances and in my view it remains possible to have a fair trial as the defendants have not suffered irreparable prejudice for the reasons stated previously herein. In my view, there is not in the circumstances of this motion any basis for contending that the plaintiffs should be deprived of the judgment seat without a determination of the issues and there is not in my view a basis for contending that the future conduct of these proceedings, once the Court's directions have been complied with, would be unsatisfactory.

I, therefore, decline to accede to the defendants' application to dismiss the plaintiffs' proceedings for failure to comply with their discovery obligations.

Turning to the separate question of the defendants' application for a declaration of a mistrial, the Court is satisfied that, notwithstanding that there is no Irish authority which establishes that it has jurisdiction to grant the mistrial declaration which the defendants seek, such an order comes within the inherent jurisdiction of the Court, as has now been accepted on the plaintiffs' behalf. I derive considerable assistance from the judgments as handed down by the New South Wales Supreme Court in the case of *Southern Cross Exploration N.L. v. Fire and All Risk Insurance Company Limited* [1985] 2 N.S.W.L.R. 340, the Federal Court of Alberta in *Sawridge Band v. Canada* [2007] F.C.J. No. 895, the Ontario Superior Court of Justice in *Tupper v. Van Rody* (*c.o.b Past Reflection Antiques*) [2006] O.J. No. 1419, and the Court of Appeal of British Columbia in *Dobranski v. Dobranski* [1998] Carswell V.C. 234.

It has to be borne in mind that the difficulties which have arisen with discovery are brought to the fore at a time when the Court has been hearing evidence for a period in excess of 50 hearing days against a background where the case commenced on 23rd February, 2009, and very substantial amounts of money have been expended by all parties by way of legal costs and expenses in respect of a case which has been described in Court as one of the most significant commercial cases in the history of the State.

The jurisdiction to declare a mistrial is set out in *Sawridge Band* where Russell J. concluded at para. 407 of his judgment that the jurisprudence supports the conclusion that a court can consider a motion for a mistrial in a civil context and describes the jurisdiction in the following terms:-

> "Assuming that I have jurisdiction, it seems to me that, from the cases cited, the principles that should guide me on the mistrial issue are as follows:
>
> 1. The decision to grant a mistrial in the present case is discretionary;
>
> 2. In exercising that discretion, should I [sic] consider whether, in all of the circumstances of the case, a mistrial is needed to prevent a miscarriage of justice and whether the facts and arguments placed before me disclose a real danger of prejudice or miscarriage of justice or, at the very least, a reasonable possibility of prejudice to the plaintiffs;
>
> 3. I should bear in mind that a mistrial is extraordinary relief and that, even if I think that prejudice has occurred, before granting the remedy, I should allow other options to be canvassed to see if the trial can be saved in a way that is just and fair in the circumstances."

The Court in *Southern Cross Exploration* at p. 357 specifically referred to a situation where it was established that a failure to give discovery was dishonest and the court was of the view that such a feature "might be taken to support a claim of prejudice upon the basis that non-disclosure by a person who was well aware of the consequences would support an inference that it was likely adversely to affect the presentation of the case of the opposite party."

In *Southern Cross Exploration* the Court in refusing the relief claimed attached considerable significance to the consequences if the relief sought by the plaintiff was granted. It was stated at pp. 359-360:-

> "It is also important to have regard to the circumstance that the trial has now taken ninety-seven days and the evidence was regarded as virtually concluded at the time when the discovery application was made. No doubt if the trial continues additional time will be taken up as a result of directions given for the purpose of preventing prejudice

to the plaintiffs but nevertheless the amount of time which will be required to conclude the trial must be short in comparison to the time already taken. A number of counsel and solicitors have been engaged on both sides and clearly a great volume of work has been undertaken outside of court hours. It is unlikely, I think, that the total costs of the trial to date are much less than one million dollars while other very substantial costs have been incurred in applications concerning security for costs, the discovery application, and this application. A clear case of irreparable prejudice would, I think, be required to justify granting a new trial at this stage when to do so would largely waste the time and money which has so far been put into it."

Having considered these authorities and with the benefit of the submissions of counsel I consider that the following criteria are appropriate for declaring a mistrial and granting a retrial:

The Court as a constituent of its inherent jurisdiction has the power in a civil action to direct a retrial after a hearing has commenced, where there has been a failure by a party to make proper discovery and where discovery is only achieved during the course of the trial. The jurisdiction is discretionary and the Court has to bear in mind the far-reaching implications that arise. Accordingly the jurisdiction should only be exercised in exceptional circumstances. The Court has to balance the rights of the parties and consideration should be given to the question as to whether the trial can be saved by some means that is just and fair in all the circumstances. If however the Court is satisfied that there is a real risk of a miscarriage of justice by reason of irreparable prejudice the Court should grant the relief sought.

It has to be borne in mind that while this case may be some 50 days at hearing, all that has been achieved to date is the conclusion of the plaintiffs' geological evidence in addition to the construction evidence as given at several site attendances and the overview of Dr. Maher. While the *Southern Cross* case may have been 97 days at hearing, the evidence was regarded as virtually concluded. At this point in time and remove from the last day of actual evidence, the defendants have had a very significant period of time to consider the vast bulk of additional documentation that was made available to them at the beginning of August 2009. I do not consider the plaintiffs' failure to make adequate discovery in June 2008 was so prejudicial or fundamental that expenditure of further time and expense would be wasteful. I consider that with the recall of the geological witnesses and Dr. Maher, and bearing in mind that Mr. Forde, the leading construction witness on the plaintiffs' behalf, has yet to begin his evidence in Court, there is no question in this case of a miscarriage of justice. There is, in my view, no irreparable prejudice. I take the view that the steps which the Court has put in place are adequate to repair any detriment that has been caused to the defendants.

In my view, no case for a declaration of a mistrial has been made out and, accordingly, I decline to grant the relief as sought in this regard.

SCHEDULE

I. Review of the affidavits as filed on behalf of the various parties.
II. Written submissions as furnished to the court on behalf of the first and fifth named defendants.
III. Written submissions as furnished to the court on behalf of the plaintiffs.

SCHEDULE
PART I

I. OVERVIEW OF THE AFFIDAVITS AS FILED ON BEHALF OF THE PARTIES AS SIGNIFICANTLY REFERRED TO IN THE COURSE OF SUBMISSIONS

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Introduction

This document is an overview of the affidavits as filed on behalf of the parties as significantly referred to in the course of submissions, Mr. Lennon, solicitor, making the affidavits on behalf of the first and fifth named defendants, Mr. Butler, solicitor, and Mr. O'Byrne, Group Director of Menolly Homes, making the affidavits on behalf of the plaintiffs.

Affidavit of Peter Lennon
15th September 2009

This affidavit is sworn in support of the application to dismiss the plaintiffs' claim for failure to make discovery in line with the Rules of the Superior Courts or to seek a mistrial because the defendants are irreparably prejudiced by the recent discovery of almost 52,000 documents after 52 days at hearing. The defendants will apply if necessary to have the Notice of Motion amended in support of the application for the alternative relief of a mistrial.

There has been a failure until recently to make discovery of about 52,000 documents under Rules of the Superior Courts obligations and agreed categories of discovery as sought by the defendants on 10th March 2008. Averments herein are based on a review insofar as it has been possible to do a full review in the time available. For a number of reasons the defendants still do not know the full extent to which they are prejudiced. Resolution of the challenge to the plaintiffs' claim of privilege and a number of motions for non-party discovery due to the new discovery may give rise to more issues.

The defendants have contacted the plaintiffs regarding missing details etc. regarding new documents.

The new discovery furnished amounts to 51,937 documents. There is a claim of privilege over 6,658 of these, resulting in a total of 45,279 "non-privileged" documents. The defendants have conducted a review of these. The application for dismissal and / or mistrial is brought on foot of this review.

Section 1: The Plaintiffs' Discovery – A Systemic Problem

It is astonishing that after all that has happened in the case the plaintiffs failed to realise they had a further more than 45,000 documents they had not discovered. This raises grave concern as to the ability of the plaintiffs to ever satisfy the defendants that they have and can make full and proper discover in accordance with their obligations. There have been repeated assurances and repeated reversals of same. The way the plaintiffs set about complying with their discovery obligations in the first place was wholly inappropriate and doomed to failure from the start. The defendants have been handicapped due to a vast informational deficit while the plaintiffs have enjoyed a corresponding information surplus which has effectively vitiated the balance of justice. Mr. Lennon does not believe that a fair trial is now possible.

The plaintiffs have a natural advantage due to first hand knowledge of construction of the estates. The documents furnished now are fundamental in many ways to the defendants' case. They support the defendants' case. The Court and the assessors have been deprived of vital information highly relevant to the just and correct determination of these proceedings. Mr. Lennon does not believe the discovery at this stage of the vast amount of documentation in question can remedy the position or allow a fair trial.

The suggestion that the current discovery was prompted by an unsolicited and voluntary audit by the plaintiffs of their own discovery processes is not correct. Many if not most of the documents that have come to light in the new discovery were repeatedly and specifically looked for by the defendants since the first tranche of discovery was received in August 2008 and not provided despite such requests. The defendants noticed missing documents and thought there should be more in 2008. There was a failure to engage with the defendants' request for discovery.

Throughout an exchange by way of correspondence and affidavits the plaintiffs were put on notice that they were at risk in respect of their averments in relation to the absence of documentation. Mr. Lennon believes the defendants ultimately agreed to settle this motion on the basis of assurances given in affidavits. It is now clear that the plaintiffs were at the time in manifest breach of the assurances which were given.

The plaintiffs took an obstructive position regarding the claim of privilege over documents exchanged between the plaintiffs and Homebond. The plaintiffs agreed to disclose some of these documents only after a motion for inspection was brought. As counsel for the plaintiffs acknowledged before McGovern J., No such privilege should ever have been claimed over these documents.

When faced with obvious gaps in discovery the plaintiffs chose not to face up to this and simply failed to engage. If a litigant especially a plaintiff in a Commercial Court action such as this adopts this approach it is on risk if this course of action results in prejudice to another party.

Section 2: Prejudice

Mr. Lennon's experts have advised that the documentation now discovered has far-reaching consequences for the conduct of the defence of the proceedings so far and for the trial itself. In many instances prejudice suffered due to not receiving these documents sooner cannot be cured such that a fair trial cannot now take place. Having carefully considered the position with the defendants and their experts there is no question but that taken together the absence of the information has meant the defendants are placed at a significant litigious disadvantage which in turn has unjustly benefited the plaintiffs. The resulting imbalance cannot be rectified. The approach taken from the outset and the context in which the evidence has been read and examined to date would have been radically different had all the relevant information been made available to the defendants, the Court, the assessors and the plaintiffs' own experts.

The defendants' experts have come to the following conclusions in relation to various issues in their range of expertise:

1. The absence of the new documentation has prejudiced earlier investigations and conclusions reached.
2. The new documentation raises fresh lines of enquiry which would have been made had the documentation been discovered previously.
3. The new documentation raises issues which the defendants' experts would have elaborated on in detail in their expert reports and

which the plaintiffs' own experts would surely have addressed in their reports.
4. The new documentation would have materially affected the choice of houses to be included in the basket of houses.
5. The new documentation raises issues which would have a direct bearing on much of the evidence given by many if not all of the witnesses to date and the manner in which they were cross-examined.

Section 3: Concrete Delivery Documentation

There are thousands of documents relating to the delivery of concrete to the three estates. The defendants' experts advise that information in these documents goes to the heart of the defendants' case and the defendants' defence.

There is an alarming incidence of water and sand being added to concrete mixes radically altering the water/cement ratio which can lead to a significant increase in concrete shrinkage. So far 1,375 documents have been found where water and / or sand was added. It is likely further documents in the discovery illustrate the same practice. The frequency raises huge concerns as to the suitability of the concrete mixing used and as to the quality control which was being exercised on site during the pour of the foundations on the concrete slabs. This shows a pervasive practice of adding water and sand which in many instances must have led to concrete shrinkage. The absence of this documentation has greatly prejudiced the defendants in demonstrating that the defects in a number of the slabs arise due to problems with the concrete. This prejudice can be clearly seen from a review of Dr. Maher's evidence. The defendants were prejudiced in the cross-examination of Dr. Maher. They were prejudiced also more fundamentally in that this documentation, had it been available, would have prompted far more extensive investigation into the precise affect the practice of adding water to the mix would have had and its relationship to the problems.

There were potentially 51 different concrete mixes being delivered to the three sites. The defendants' experts advise that as a result far more extensive sampling and testing of concrete is needed. Dr. Maher referred to the existence of at least four different mixes rather than 51. Had the defendants known this information they would have been required to conduct a far more extensive testing regime regarding concrete cores and samples. They would also have carried out thorough research comparing all those samples with all the mix designs that applied to the sites.

If O'Connor Sutton Cronin had known of the extent of the water addition, which appears to have averaged between 200 to 400 litres, the possibility of shrinkage arising could have become the single major issue relating to their analysis of the cracking of the slabs. Not only would extensive testing have been carried out but Mr. Lennon is advised that O'Connor Sutton Cronin would have recommended a model floor slab be built with similar type mixes and the models would have been monitored for a period to assess for shrinkage.

There is new documentation relating to pour dates. It is clear from the pour dates that an analysis would have to be performed with respect to the delivery dates of the concrete and the pour dates for all three estates. This correlation is absolutely necessary to assess the various mixes which were used in the slabs of the various houses across the estates. It is of particular concern to the defendants that many homes which may have had unusual mix designs in the concrete have been remediated so the defendants will not have the chance to properly examine whether an unusual mix had a bearing on the water/cement ratio in the slabs.

400 litres of water were added in respect of 12 Drynam Walk, a property in which DBFL Golders noted damage in the living room which they attributed to heave. It is not now possible to investigate further whether the addition of water contributed to the damage of this property because this property has been remediated. The defendants would have insisted on extensive examination regarding a property of this type if information had been provided in line with discovery obligations by August 2008.

The addition of sand occurred in respect of 142 Grange Lodge Avenue. This property is now remediated. It is very likely that investigations would have been carried out. The defendants' experts say the addition of sand can inter alia increase shrinkage potential. Extra sand was also used at 6 and 8 Beaupark Square. The plaintiffs' experts recorded damage to the floors and concluded it could be attributable to heave.

If the defendants had had this information a cross-referring exercise could have been carried out to determine which properties had mixes that were unusual or contained added water. A thorough examination and extensive testing regime would have been carried out on the basis of that cross-referring to ascertain the water/cement ratio and whether any damage could be attributed to problems relating to the mix. The defendants have been hugely and irretrievably prejudiced by the failure of the plaintiffs. The precise extent of that prejudice is still not clear as the defendants need to carry out a proper cross-referencing exercise. The defendants are very concerned in light of what has been seen to date that they may be irredeemably prejudiced in relation to this line of enquiry if it turns out that the remediated houses contain unusual mixes. There was a failure on the part of the plaintiffs to satisfy requests for discovery in this regard.

There are a number of documents referring to cube tests taken. For example a document refers to mass tests, compression tests on concrete in 2005. These tests show the results were poor. The same is true in relation to cube tests evidenced in another document. Further cube test results demonstrate varying quality of concrete. Some indicate very low concrete results for properties in Beaupark.

There is new discovery in relation to concrete mix designs, but the defendants' experts say there still appears to be an alarming lack of documentation in relation to concrete mix designs. The defendants still have real doubts as to whether all the documentation relating to concrete has been discovered.

Due to the failure in relation to concrete the defendants are fundamentally prejudiced. If this discovery had been made earlier significant new lines of enquiry and significant further investigations would have been carried out. The current basket does not reflect appropriate selection of representative houses for the Court's consideration. At a minimum it would be necessary to significantly revise the basket. This would disrupt the trial and undermine the relevance of evidence given to date.

Section 4: Ground Conditions

There is information relating to problems with soil and ground conditions which would have prompted a full investigation into these issues and would have been dealt with in cross-examination. New documents indicate there are serious concerns relating to drainage conditions and drainage systems at Drynam. A fax contains a proposal for a drainage system and attaches part of the drainage detail. The defendants' experts say the result of this detail is a significant increase in surface water runoff. The defendants experts say that because this drain runs through the rear gardens of quite a large area of the estate this would put huge pressure on the surface water systems and attenuation storage facilities during wet conditions. The drainage system in Drynam could lead to flooding in the northeast section of the estate. It could have serious implications for foundational integrity of the houses in areas where surcharging and flooding could occur. Various problems relating to the drainage system are present. Flooding did occur and is evidence of a

serious drainage problem in the northeast section of Drynam.

The defendants' experts say that there is significant evidence to suggest a serious drainage problem particularly in the northeast corner of Drynam caused or contributed to by the land drain system. The defendants' experts advise that there is a strong possibility of a link between this new information and the damage in this section of the estate. Water monitoring would have been necessary. The absence of these measures has greatly prejudiced the defendants.

The defendants' experts say that if they had been aware of this land drainage system thorough geophysical examination would have been required to examine the implications of the system for the properties in the estate.

Where foundations were built on 500mm or more of stabilised soil, reinforcing mesh was used underneath the foundations. Where less than 500mm of stabilising soil was used, the foundations were "sunk" to the virgin soil underneath. Evidence that the plaintiffs were building on lime stabilised areas and adopting different constructional detail based on the depth of stabilised soil would have been crucial to the defendants' investigations of the ground conditions under houses at Drynam. There is scientific literature suggesting that lime stabilisation would only have a short-term effect in stabilising boulder clay due to relatively high silt and low clay content. Had the defendants' experts been aware houses were built on top of lime stabilised soil where there was 500mm and were not sunk down to the virgin ground, investigations in order to sample the soil for classification testing would have been required.

In relation to Beaupark a number of documents indicate that there were considerable problems in dealing with surface water and ground water.

For example, a document notes that there was a major concern in relation to concrete washed down contamination and that the situation was unacceptable and needed to be resolved. This document refers to the fact that drains from the main street had been blocked and the settlement pond had to be treated. Furthermore there is reference to a report compiled by NTC Environment having to be issued in relation to this problem, although it appears from the discovery that this report has not been provided.

AGEC advise that stand pipe and data loggers would have been employed at the north of Grange Lodge Avenue. The defendants' experts would also have insisted on installing a data logger to obtain continuous water level readings. A significant period of time is required in relation to these water level readings to account for seasonal variations. The defendants have lost the opportunity to obtain such evidence which could have been adduced at trial. These investigations would also have been prompted by other information which has come to the defendants' attention in relation to significant problems with flooding and ground water problems in Beaupark.

There appear to be serious issues in relation to ground conditions at Myrtle, for example evidence that there were grave problems in relation to ground conditions at Stapolin Avenue. There was subsidence at 4 Stapolin Avenue. There is an email regarding termination of a public water course in this area. If this is so the defendants' experts advise that construction in this area would have been affected by the ground conditions.

A DBFL structural certificate relating to Stapolin Avenue states that the foundations for these houses were piled. This is unusual and would have prompted further investigation by the defendants. This also would have influenced the defendants' decision on where to locate borehole and trial pit investigations of the sub soil conditions in this area. There is a conflict between the old discovery, which says no specialist foundations were used, and the new discovery (piled foundations at Stapolin Avenue). The defendants would have been entitled to pursue this conflict in the preparation of their defence.

A fax indicates the testing procedure accompanying the soil stabilisation operation was called into question during the first phase of the operation at Myrtle by the plaintiffs' specialist consultant. The fax is clearly critical of Adrian La Roche, who appears to be an employee of Conform who carried out testing of soil conditions in Myrtle. This raises serious questions relating to lime stabilisation at Myrtle.

AGEC did not ask to carry out site investigation at Myrtle because the original investigation appeared to be competent. It now appears that there are issues relating to lime stabilisation at Myrtle and that the work carried out may not have been to a very high standard. The defendants' experts consider that they can no longer rely purely on the original site investigation and that at the very least they would have requested trial pitting to collect samples in the open areas if this information had been available.

The defendants' experts are of the view that there are significant lines of enquiry regarding ground conditions and soil stabilisation works which existed in the three estates and would have been pursued by the defendants. Mr. Lennon is advised that these lines of enquiry are of potentially great significance in assessing whether any of the damage in the estates relates to any issues in the new discovery. These lines of enquiry would have had significant bearing on the defendants' choice of houses for inclusion in the basket.

There is new documentation relating to potential problems with flooding and ground water levels directly relevant to the evidence given by Dr. Maher and to specific lines of examination the defendants were attempting to pursue. New evidence in relation to drainage, flooding and ground water conditions would have been hugely relevant to a line of enquiry which the defendants would have undoubtedly have put to Dr. Maher.

New documentation contains a number of documents and reports regarding lime stabilisation works at Myrtle. These reports reveal that concerns were raised relating to quality control of the works and demonstrates some of the difficulties encountered in ensuring these works were properly carried out.

Clearly testing and monitoring were being conducted relating to lime stabilisation works at Myrtle but the defendants see no equivalent documentation relating to these works at Drynam. Without material relating to Drynam the defendants are greatly prejudiced.

Dr. Maher was clearly placing great reliance on the supervision conducted by DBFL in relation to these works. However it is clear from the new documentation that supervision in relation to the works at Drynam paled in comparison to what was apparently taking place at Myrtle. Given the level of concerns raised by Frank Motherway & Associates regarding the works at Myrtle, similar problems must have been encountered at Drynam. The defendants have seen no records of steps that would have been taken to ensure those problems were adequately addressed.

Failure to furnish this documentation in relation to lime stabilisation works is remarkable in circumstances where the defendants specifically queried the absence of this documentation.

Section 5: Documents relating to Quality Control and Workmanship

There is a large amount of documentation highlighting very poor construction practices and workmanship standards in construction of the estates. It is apparent from this documentation that there were major problems in relation to the standard of workmanship and quality control on site.

There is new documentation concerning construction of Myrtle regarding serious concerns raised by Helsingor Ltd. in relation to the standards being applied by the plaintiffs. Minutes of meetings and reports disclose growing concern amongst Helsingor representatives relating to the quality of work they were observing on site during construction. Directors of Menolly said they had responded and that organisational changes and the appointment of new personnel at Baldoyle would obviate the need for Mr. Peadar Monaghan to be appointed as a Clerk of Works. A report of Mr. Monaghan was commissioned.

Mr. Monaghan states that he was promised co-operation on site but this was not given. The Peadar Monaghan documentation demonstrates serious concerns in relation to what was happening in Myrtle. For example, he expressed serious concerns relating to drainage, including the possibility that some areas of the buildings were undermined during the installation of major drainage works. The report also criticises aspects of workmanship, noting there were very big gaps under doors. Mr. Monaghan described the plumbing as being totally unacceptable.

Mr. Lennon is advised that the concerns voiced in Mr. Monaghan's report and by Helsingor directors present a damning picture of the standard of workmanship on site in Myrtle. They also show the plaintiffs exercising very little quality control, particularly given the apparent lack of professional supervision on site. It is hard to imagine the plaintiffs could have forgotten about these damning reports. The defendants have been greatly prejudiced in relation to the evidence given and the investigations undertaken, for example Dr. Maher's evidence relating to quality control.

Further documents reveal serious issues relating to quality control on site and workmanship practices employed. Concerns as regards mortar are raised. Clearly evidence of this kind would have been directly relevant to Dr. Maher's evidence on certain issues as regards mortar and block work throughout the estate and to the investigation and enquiries the defendants' experts would have carried out.

There are a number of minutes of site meetings noting instances of poor workmanship and bad quality control. Documentation of this type shows clear problems relating to the quality control that existed throughout the three estates. Clearly documents of this type would have been reported on in the defendants' expert witness statements and would have been put to witnesses in cross-examination, in particular Dr. Maher.

More fundamentally, Mr. Lennon is advised that had this information been available to the defendants earlier their expert engineers would have insisted on far greater access to the remediated properties throughout the remediation process. The defendants' engineers were not permitted, for example, to be present during the entire removal of the slab or during the removal of the infill.

O'Connor Sutton Cronin would have requested more samples of blockwork and mortar to be examined. Since it was only in the remediated properties that the relevant form of testing and inspection could have been carried out, the defendants are irredeemably prejudiced.

Documents relating to pour dates reveal potentially significant issues as regards foundations remaining open for periods of time before being poured. For many of the houses it appears the foundations were left exposed for significant periods of time. This would have an effect on the ground conditions beneath. The defendants' experts said in their reports that if foundations were left open for a period of time it may reduce the capacity of the soil to support the foundations. The significance of this matter is best illustrated by Dr. Maher's evidence. Documentation relating to this would have greatly informed the defendants' expert investigations and reports and would have influenced cross-examination.

The important information relating to ground conditions and quality of workmanship was in documents such as minutes of site meetings, minutes of meetings and engineers' instructions. The defendants repeatedly pointed to the absence of this kind of documentation and consequently brought a motion for further and better discovery. Mr. Butler averred that all available and relevant documents relating to engineers' instructions had been discovered. It is incomprehensible that so many documents could have been overlooked when the defendants were making specific requests for them. There is a similar situation relating to minutes of site meetings. It is very difficult to see how these documents were overlooked when the defendants specifically sought them.

New discovery shows extensive earthworks close to the foundations of 109 Drynam Drive. The original discovery shows patterns of cracking on the exterior of the house similar to that which could be indicative of settlement or subsidence. Had the new document been discovered previously it would have significantly influenced how the defendants' experts would have approached the investigation of the damage and interpretation of the crack patterns appearing in this property.

This information relating to this property becomes even more significant when another engineer's instruction identifying the newly discovered land drain is considered. This drain may have ended in or around 109 Drynam Drive, which might provide an explanation in relation to the cause of the damage at this property. This issue cannot be conclusively determined by a documentary audit, but the defendants' experts would have pursued this as a line of enquiry.

The documentary audit also reveals a significant line of enquiry in relation to whether there are issues with the basement in Block 21 in Beaupark which affect adjacent properties and whether there are issues relating to "tidal waters". Adjacent properties include 12 Beaupark Street, which DBFL Golders recommended remediation of due to damage.

A fax indicates the land where the shop units in Drynam are situated was made up of filled ground. Information of this type would have prompted an investigation.

A fax from Moylan Consulting Engineers relating to Block 1 in Grange South, Beaupark, refers to removal of unsuitable fill material between the road and the building line of Block 1. This document shows that Moylan had concerns about the suitability of ground

conditions to support traffic and illustrates the poor work practices being carried out by Menolly and/or their subcontractors.

New documents demonstrate that the plaintiffs were aware of potential problems arising due to certain construction details employed in the foundations of units in the estates. A DBFL report of 2008 concerning 158 Grange Lodge Avenue states that during remediation it was discovered that the insulation under the slab extended across the top of an internal rising wall and the insulation and slab extended into a portion of the gable wall. It also indicated the slab extended through the party wall into the adjacent property without stopping short of the wall on the other side. The report states that this construction detail could not be deemed acceptable, but concludes that this detail did not contribute to the defects which were manifest in the slab. A report of this nature would have been addressed in the defendants' expert reports and in cross-examination of Dr. Maher and other witnesses and in their investigations. It is quite clear from a further document that the detail prescribed by DBFL is markedly different from the detail reported by DBFL for 158 Grange Lodge Avenue.

Site diaries also reveal an alarming rate of instances of poor workmanship and potential problems with ground conditions. A site diary of Alan Kearney lists faults and leaks identified during an inspection of manholes, gullies and water mains. This information evidences possible leaks from sewers, which can increase the risk of subsidence. This diary also reveals there was a Myrtle land drain. This raises similar issues to those concerning the land drain at Drynam. A further site diary of Mr. Kearney notes that a rock breaker was required to break up hardcore during remediation of 37 Beaupark Square. This indicates overcompaction, an issue directly relevant to issues relating to the creation of laminations. This issue was addressed with many witnesses. An analysis of the fill from 37 Beaupark Square may have been directly relevant to ascertain any instances of fractures on laminations to investigate whether those fractures were created by heave or by compaction. Simple lines of enquiry of this nature could have been hugely significant for the defendants' case and for the effective cross-examination of many witnesses.

A further site diary of Mr. Kearney refers to a Beaupark house where the fill does not appear to be tightly compacted. Information of this kind would have been directly relevant to cross-examination of Dr. Maher and to the defendants' experts' reports. This diary notes a gas pipe running in the floor of the sitting room of 24 Drynam View. It is likely that if the pipe was imbedded in the slab it would likely cause cracking along the length of the pipe.

A site diary of Mr. Niall O'Toole indicates repairs were carried out at the back door and there is a note to rebuild inside walls. The houses concerned are two houses at Drynam.

A site diary of Mr. Barry Sullivan indicates potentially poor work practices in relation to the construction of the retail unit at Myrtle.

It will be demonstrated that the retail area at Sweetman did not contain Bay Lane fill although the plaintiffs suggested in May 2009 Replies to Particulars that one or two loads of Bay Lane infill may have been used. The entire retail unit was remediated and there is evidence of poor workmanship during construction. This opens a further line of enquiry. Another site diary reveals issues in relation to blockwork at 30 Drynam Crescent, a non-Bay Lane property.

Further documents reveal instances of potentially poor workmanship during construction, including a site diary referring to poor concrete and a holding pond. The existence of a holding pond is relevant to drainage conditions. There is a note discussing poor construction at Myrtle and discussing issues relating to floor levels. A further site diary refers to an incident where staff were said to be drinking alcohol.

A number of site diaries raise concerns relating to ground conditions, particularly in relation to flooding in the three estates. For example, reference was made to leaking at Blocks 1 and 21 at Beaupark, which potentially implies that the high water table ran throughout Beaupark and could therefore be indicative of poor ground conditions. A map bears a reference to flooded areas beside Block 21. There is evidence of a high water table in Beaupark.

A further diary refers to a land drain which could be either at Beaupark or Myrtle. The use of a land drain suggests poor ground conditions and/or a high water table.

Again the defendants specifically sought site diaries and the plaintiffs on numerous occasions maintained that no further site diaries existed.

The fact that statements such as Mr. Butler's averment that he believed the plaintiffs did not know of any other site diary were made raises grave concerns about the failure to comply with discovery obligations. More site diaries were discovered after this averment was made. The defendants sought and obtained assurances that there would be no more site diaries, after which two further site diaries were discovered. In the new discovery the defendants have found approximately 490 documents amounting to site diaries or extracts from site diaries. The defendants can no longer have any confidence in the assurance from the plaintiffs that they have complied with all discovery obligations.

Section 6: The Non-Bay Lane Houses

From the outset one of the most fundamental issues has been the extent to which the defendants' product was used in each house. The plaintiffs provided a map of the Drynam estate and indicated that the only houses which did not contain Bay Lane infill were the 25 Moyglare houses. It was said that the plaintiffs had given the benefit of any doubt to the defendants. The plaintiffs were therefore asserting that after full investigation the only houses that did not contain the defendants' infill were the Moyglare houses. The plaintiffs' solicitors stated that the plaintiffs would be undertaking a similar exercise in respect of Myrtle and Beaupark.

The clear case being made by the plaintiffs was that they had firmly established the source of the fill underneath the houses in the three estates and this came from Bay Lane. The plaintiffs had conveyed the impression that they had no doubt in respect of the origin of the infill in the houses and that if there was such a doubt the defendants would get the benefit of it.

The plaintiffs recently confirmed that they now say that there are 38 houses in Drynam that contain non-Bay Lane fill, 77 in Myrtle and 15 in Beaupark. It has been finally confirmed that of these houses, 41 have been determined to require remediation. This changes the entire landscape of the proceedings. It is clear from the new discovery that:-

a) the plaintiffs knew all along there were serious doubts relating to the origin of infill in respect of hundreds of houses but failed to inform the defendants

b) the plaintiffs knew many houses in the three estates did not contain Bay Lane infill and in some instances they communicated this to homeowners but not to the defendants
c) the plaintiffs had documents in their possession which would have alerted the defendants to the existence of these non-Bay Lane properties and to the fact there was great confusion in relation to the source of the infill
d) the plaintiffs knew and had documentation that properties with non-Bay Lane infill were exhibiting damage and this damage was comparable to that appearing in the Bay Lane properties.

The importance of this information and the consequent prejudice due to its absence cannot be overstated. The plaintiffs placed reliance on the now groundless assertion that only Bay Lane properties exhibited damage, an assertion contained in their written and oral opening statements. Real and significant lines of enquiry have been closed to the defendants due to the plaintiffs' failure in relation to discovery.

Only in April 2009 through a witness statement and expert report of Dr. Strogen did the defendants become aware that the plaintiffs had serious doubts as to which addresses in Myrtle contained Bay Lane infill. Dr. Strogen carried out an in-depth analysis resulting in a first report from a spreadsheet dated 25th March 2008 which details the source of fill for Drynam. It clearly indicates that as of the 25th March 2008 the plaintiffs were aware of serious doubts over the origin of fill in respect of a number of houses beyond the Moyglare houses. In relation to Myrtle it is clear that as of the 15th April 2008 Dr. Strogen had found 32 houses where the source of the infill was questionable. This was in addition to 40 houses known as Sweetman House that contained non-Bay Lane infill.

In January 2008 the defendants were informed that the only units in Myrtle that did not have fill supplied by the defendants were those in Sweetman House and units 2, 4 and 6 Stapolin Avenue. However, it is clear from the updated spreadsheet or Dr. Strogen compiled on 15th April 2008 that a whole range of further units appeared not to contain Bay Lane infill. These units were later confirmed as containing non-Bay Lane infill.

Had the defendants known, there is no doubt their experts would have insisted that many of these properties be included in the basket. Mr. Lennon believes that had the defendants received the documentation in the new discovery they would have been in a position to do so. He believes that these documents would have alerted the defendants to the fact that many of these properties did not contain Bay Lane infill and many of these properties were exhibiting damage.

The defendants were never told that 8, 10 and 12 Stapolin Avenue contained non-Bay Lane material. Dr. Strogen, and maybe others, knew they contained non-Bay Lane infill. Further new documents indicate damage comparable to the damage in Bay Lane properties. Homeowners were apparently told in respect of No. 8 that there was less than 1% pyrite, therefore no remediation works would be needed. The defendants were never told about this benchmark which would have been very useful.

DBFL/Golders found extensive damage in No. 8 of a similar nature to the damage in Bay Lane houses.

Documentation of this kind would have played a crucial part in the defence of the proceedings. The defendants would have required a full inspection and would have sought to include a property of this kind in the basket. 8 Stapolin Avenue could have been used as a natural control vis-à-vis houses containing Bay Lane infill. There is clear evidence of extremely poor workmanship.

No. 10 displays the same trend. It is a non-Bay Lane house. The plaintiffs say it requires remediation. The defendants learned of this in May 2009. DBFL were satisfied with the foundations. There is clear damage in this house despite the absence of Bay Lane infill. Documents of this type were specifically requested. The plaintiffs averred that there were no further documents of this type.

There was extensive cracking in No. 10 on a par with many containing Bay Lane infill.

Oxidised pyrite levels noted in a report of February 2008 were low. The defendants have been denied a very important piece of evidence which strongly bolsters their case. The defendants would have used Golders/DBFL analysis in cross-examination. The plaintiffs told third parties of the origin of the fill but the defendants were effectively kept in the dark. There is very little doubt that the defendants' experts would have insisted on a full examination so that a property of this kind could have been included in the basket.

An inspection of No. 12 revealed no defects, but there was a high level of pyrite so remediation was decided upon. The defendants know from May 2009 Replies that this is a non-Bay Lane property. It would have been examined to compare any damage there with damage in Bay Lane houses. Remediation has been done and it is therefore too late.

The defendants now need a chance to re-examine documents generated in the course of remediation. There are matters which the defendants' experts would have wished to include in their reports and which the defendants would have wished to put to certain witnesses.

2, 4 and 6 Stapolin Avenue contain non-Bay Lane infill. The defendants now know that there may have been significant damage in some of these. Very low levels of pyrite and oxidised pyrite were found in No. 6 in 2007. Results for this property are contained in a report of February 2008 and are of huge importance to the defendants' case. The damage and cracking are of a level commensurate with damage and cracking in many Bay Lane houses.

There were significant questions relating to damage at No. 6, though the infill was non-Bay Lane and the pyrite level was extremely low. Serious consideration would have to have been given to the inclusion of this house in the basket. It would probably have provided very important evidence for expert reports and cross-examination.

Documents relating to No. 4 raise a significant question relating to ground conditions in this area. The homeowner referred to subsidence and a major hollow in the garden. This was an important line of enquiry.

The documents reveal inconsistencies in approach relating to pyrite levels. This was something the defendants were entitled to explore by way of reports and cross-examination.

The May 2009 Replies reveal that 16 Boyd House contains non-Bay Lane infill. There is a disagreement in relation to the proportion of

Bay Lane infill in this house. The fact that it appears to contain Bay Lane infill is crucial. The defendants would have analysed this with a view to inclusion in the basket. A spreadsheet recording the sources of the infill for many properties at Myrtle has been discovered. There were repeated assurances that no such documentation existed. This spreadsheet indicates that 16 Boyd House has Huntstown infill. Had this information come to light other information would have acquired new significance. A report on this house which was discovered in August 2008 details a level of damage consistent with damage recorded in many other houses with Bay Lane infill. The report says that continuing damage is likely, therefore the house cannot be certified and therefore the infill should be replaced. When the defendants read this they did not know that the fill was potentially non-Bay Lane. It appears DBFL and Golders were then unaware of this also.

The plaintiffs changed their attitude when they learned the fill was non-Bay Lane. The recommendation to replace the fill was gone and instead it was stated that there were numerous defects but they were insufficient to require remediation at this time. The information that this was a non-Bay Lane house is pivotal to the geological evidence relating to different types of rock with the same pyrite level, one requiring removal, the other not. There is an inconsistency in the plaintiffs' approach. The defendants are entitled to explore and evaluate this inconsistency. They were denied that line of enquiry and the new information requires a full review of this property.

According to the original Replies in January 2008, the only properties containing non-Bay Lane infill were at Stapolin Avenue and Sweetman House. However, the May 2009 Replies revealed that 12 units at Stapolin House contain non-Bay Lane infill. Due to the plaintiffs' failure the defendants were not party to crucial information relating to some properties including the fact that some were non-Bay Lane and the fact these properties exhibited damage comparable to other properties containing Bay Lane infill.

Crushed gravel was the infill at 5 Stapolin House and at Myrtle Court. If the defendants had been aware of this, extensive investigations would have been carried out to see whether there was comparable damage.

There are snag lists relating to common areas in Stapolin House. It is likely that these would have a bearing on 5 Stapolin House. There are references to cracking, water egress and hairline cracking. Experts would have insisted on full re-inspection with a view to potential inclusion in the basket. Documentation of this kind and results of any such inspections would have been included in the expert reports and would have been the subject of questioning in respect of a number of witnesses.

There are similar issues relating to 14 Stapolin House. The fact that it contained non-Bay Lane infill only came to light in the evidence of Dr. Strogen and his report furnished well into the trial. The plaintiffs communicated to the owners of No. 14 that the infill did not appear to be from the same source as the problematic infill found elsewhere. There is evidence that damage existed in these properties comparable to damage found in other properties throughout the estates. The May 2009 Replies reveal that this house was earmarked for remediation. The defendants have been severely prejudiced by the unavailability of this line of enquiry.

9 and 12 Stapolin House contained non-Bay Lane infill. No. 12 was earmarked for remediation according to the May 2009 Replies. The reason for this is unknown. A report details examples of cracking and defects commensurate with other properties that do contain Bay Lane fill. However, the report concluded that because the pyrite level was low no remediation was required at the time. The defendants would have wished to conduct further examination with a view to including this house in the basket.

The May 2009 Replies also reveal that 11 Stapolin House contains non-Bay Lane fill. However, this house is said to require remediation. Comparing the DBFL report for this house to that for No. 12 it is apparent that the amount of cracking is equal to or less than that found at No. 12 but the report recommends remediation in respect of No. 11 and not No. 12.

10 Stapolin House also contains non-Bay Lane infill. There is cracking throughout comparable to other houses alleged to be damaged by heave. The conclusions of the report are very significant for the defendants. It states that there is a possibility of pyrite expansion and that the hall and living room floors measured off level may represent early signs of defects typical of those associated with expansion. Information of this kind was vital to the full cross-examination of several witnesses.

13 Stapolin House contains non-Bay Lane fill, a fact the defendants only learned of from the evidence of Dr. Strogen and his report furnished in April 2009. The defendants are now also aware that this property manifests damage on a par with damage that has been seen elsewhere. The levels of pyrite were very low. The defendants were therefore denied a very significant line of enquiry.

There was no indication that the properties at Parker House contained non-Bay Lane fill until April 2009. The Replies in May indicate that a large number of houses at Parker House contain non-Bay Lane infill and have been earmarked for remediation. This is clearly very significant and would have prompted further investigations with a view to including units from Parker House in the basket. The homeowners of a number of Parker House properties were told that their properties did not have Bay Lane infill and that the fill beneath their property was not susceptible to swelling. The defendants were not informed of this. There were some similar letters in the old discovery relating to other addresses at Parker House. However, letters relating to different addresses at Parker House have been newly discovered and were relevant to the cross-examination of Dr. Strogen and Dr. Maher. In addition, had the defendants known that these houses contained non-Bay Lane fill Mr. Lennon believes that the defendants' experts would have carried out further investigations with a view to including these properties in the basket. There is evidence of cracking in respect of a number of properties at Parker House.

In relation to 9, 24 and 31 Parker House the defendants have been given snag lists of the common areas of the building in which these units are situated on the ground floor. There are references to cracking and to issues relating to the closing of doors. Such documents would have prompted further investigation into the nature of the damage in the common areas of these properties with a view to including these properties in the basket. This is of clear relevance especially as 9, 24 and 31 Parker House were designated for remediation. An email states that the owner of No. 24 is very anxious because the cracks are quite evidenced and he wants the situation rectified immediately.

There are a number of newly discovered DBFL/Golder cracking reports in respect of the non-Bay Lane properties. These reports would have been of huge interest to the defendants' experts. For example, a DBFL report regarding 35 Parker House records a number of cracks throughout the property. It is also noted in the report that the living room floor was off level at the patio doors to the terrace. However, the report indicated that the levels of pyrite were relatively low and that the cracking was insufficient to require remediation. However, because of the presence of pyrite it was recommended that the property be re-surveyed and re-sampled. It was indicated that floor boards in the living room were to be lifted and examined. This information would have prompted further investigation.

A report relating to 38 Parker House gives examples of cracking and states that the hallway floor is "off level at the entrance doorway" and this was "possible floor heave". The report notes percentages of pyrite and states that the hall floor off level may represent early signs of defects seen elsewhere typical of those associated with expansion. It goes on to say that the house should not be remediated at the time but should be re-surveyed. This is highly relevant to cross-examination and would have triggered a line of enquiry vital to the defence.

It appears the same situation pertains in respect of 39 Parker House. Extensive cracking is noted throughout the property and the floor level is off level in parts. The report notes that the hall and living room floors measured off level may represent early signs of defects observed elsewhere typical of those associated with expansion. The report does not recommend remediation.

This documentation is strong corroborative evidence that the cracking in these properties is not due to heave but due to common problems of poor constructional detail and faulty workmanship. This new information requires the defendants to further investigate properties such as those in Parker House with problems to identify whether those problems are similar to problems experienced elsewhere in the estates. The defendants had to go through 50 days of trial without vital evidence sustaining and corroborating their position. Evidence of this kind would have been directly relevant to the evidence of numerous witnesses.

The May 2009 Replies reveal that 21, 22 and 23 Talavera House contained infill not from the defendants. This information completely changes the context of two DBFL reports relating to 21 and 22 Talavera House. There are two DBFL reports in the new discovery detailing cracking and defects of a similar nature to that found in the Bay Lane properties due to which the plaintiffs' experts recommended remediation. A report concerning No. 21 reveals cracking and pyrite percentages and DBFL/Golder conclude that cracks in the floor are in their opinion associated with expansion. They state that remediation is necessary. Remarkably similar damage is noted in No. 22. The DBFL/Golder report concludes that cracks in the floor are in their opinion associated with expansion. Pyrite percentages are noted and removal of infill is said to be necessary. The documents are of huge significance because they indicate a pattern of cracking that DBFL and Golder seem to consistently associate with swelling of infill even though the fill consisted of material not sourced from the defendants. Had all of this documentation been disclosed to the defendants and their experts the defendants would have carried out an extensive review and analysis of all the infill in the properties in Myrtle. It is now clear that there was serious confusion among the plaintiffs' experts relating to the source of infill and the safety parameters to be applied. This would have triggered an investigation relating to all fill material being sampled at Myrtle which would have alerted the defendants to the true position much earlier.

There are very important documents relating to houses at Talavera House which the defendants say contain non-Bay Lane fill. The old discovery shows remediation was recommended in relation to 30 Talavera House and that DBFL/Golder noted "well advanced" cracking in the floor and the use of a floor levelling compound. The report states that cracks in the floor are in their opinion associated with expansion. They recommend replacement. Mr. Lennon is advised that the use of a levelling compound would indicate that the surface of the concrete floor was potentially uneven. The pour date for this property is now known. It is very likely that such unevenness could be related to poor workmanship and not heave. The defendants' experts advise that it is very unlikely that such cracking and unevenness in the slabs would have been caused within such a short period after the pour date. This is crucial evidence which the defendants would have used in the argument that damage of this nature was not due to pyritic heave. Evidence of this kind would have been directly relevant to the evidence already given by a number of witnesses.

In January 2008 the plaintiffs informed the defendants that Bay Lane fill was not used at Sweetman House. The new discovery indicates the use of a different benchmark relating to swelling potential in Sweetman House vis-à-vis infill from Bay Lane. This is evidenced from Golder certificates relating to Sweetman House. A letter relating to 9 Sweetman House indicates alarming inconsistency relating to diagnosis of swelling potential and is of fundamental significance.

A report relating to 59 Grange Lodge Avenue reveals lower levels of pyrite than those at 9 Sweetman House but recommends replacement by virtue of the expansion of the fill. Clearly the conclusions in this report are influenced by the nature of the cracking in the house. Extensive cracking is recorded. The report notes what appear to be significant defects in the floor slab. The report states that it is evident that most of the defects are caused by expansion and that the expansion has caused upward and horizontal pressure and that the upward pressure has caused the slab to heave in places.

The glaring inconsistency in the plaintiffs' experts' approach in relation to their diagnosis of pyritic induced damage is only apparent from the recent disclosure of these letters from Golders. Documents relating to Sweetman House clearly show for even higher pyrite levels remediation was not required. In relation to the documents made available in respect of Sweetman House, a spreadsheet indicates the plaintiffs adopted a benchmark of 1.2% pyrite level to assess whether or not remediation would be required. The absence of this information has prejudiced the defendants in their investigations and in the preparation of their defence. For example, this information would have been very relevant to the analysis the plaintiffs adopted in respect of the retail area at Sweetman House, which the defendants now know has been remediated although the basis for this is still unclear. Two recorded samples of pyrite levels for the retail area in Sweetman House in July and August 2007 determine that the pyrite level was 1.38% and 0.5% respectively. Golder test results in respect of 55-60 Sweetman House state that the pyrite levels under these properties were 1.22%. This document was previously discovered but its significance is heightened by the benchmark of 1.2%. It is not clear why these properties were not determined to require remediation. The defendants' experts would have been entitled to pursue this as a valid line of enquiry. The benchmark level has undoubtedly been a live issue. The defendants are greatly prejudiced by the lack of documentation referred to in this section. They could not put inconsistencies to the plaintiffs' witnesses. Dr. Maher stated that there was no universal benchmark level, therefore Golders letters setting a benchmark were relevant to cross-examination.

This documentation would also have been relevant to the cross-examination of Dr. Bromley and Mr. Blanchette, and to a line of enquiry the defendants were trying to pursue with Dr. Shrimer.

The new discovery reveals there are further documents indicating properties at Sweetman House are manifesting damage and cracking potentially comparable to cracking in other Bay Lane properties. These documents would have prompted further investigation by the defendants' experts as these documents indicate damage may be manifesting at the properties at Sweetman House where the plaintiffs' experts determined the fill was not susceptible to swelling.

Much cracking is noted in common areas in Sweetman House, in addition to "significantly strained" doors. There is a complaint relating to settlement cracks at 21 Sweetman House.

The fact that Golders appeared to lay down a benchmark as to the susceptible level of pyrite in relation to properties in Sweetman House is of considerable relevance to the approach the defendants' experts would have taken in relation to other properties in the estates with equivalent levels of pyrite. A comparative analysis could have been carried out to investigate such properties. It is now clear that such an analysis would have led the defendants to the properties that now turn out to contain non-Bay Lane fill. Information the defendants had and now have would have taken on greater significance in that context. For example, 4 Boyd House contains non-Bay Lane fill and the pyrite levels are less than those at 9 Sweetman House. Given the close similarity between the results for these two houses, any evidence of damage in respect of the former becomes highly significant. The old discovery referred to cracking at 4 Boyd House.

45 Morrow House contains non-Bay Lane fill and also has lower pyrite levels than 9 Sweetman House. In this context all evidence of damage concerning this property would take on a greater significance, including the fact that DBFL noted a number of cracks in the walls. It is not possible from this documentary review to assess the level of damage at No. 45, but investigations would have been carried out to assess whether it was manifesting comparable damage and whether it would be included in the basket.

The May 2009 Replies indicate that 30 Myrtle House contains non-Bay Lane fill. There are lower pyrite levels than at 9 Sweetman House. The defendants suspect some damage at No. 30 because the plaintiffs say it requires remediation. Golders' approach in relation to Sweetman House is also relevant to a number of properties in Beaupark which the defendants know contain non-Bay Lane fill.

The defendants also would have examined properties such as 7 Hoey Close and potentially included it in the basket. The old discovery indicates 0.75% pyrite and 0.17% oxidised pyrite in this house. The cracking here takes on new significance since Golders considered this level safe in relation to properties at 3 Sweetman House. Due to defects in the external walls at the back of the house, a report recommends that the stone under the footpath should be tested for pyrite.

Had the defendants known the plaintiffs' experts considered pyrite levels of this nature unconducive to swelling, it is likely the defendants' experts would have insisted properties of this type be included in the basket for special attention.

There are inconsistencies of approach regarding 16 Beaupark Close. The first report, in the old discovery, states that the defects are generally minor and there is no need for remediation. The second report states there is no significant defect progression but based on testing and observation in the estates and levels of pyrite in the original sample, the infill should be replaced. Also, 7 Beaupark Square has just below the 1.2% pyrite threshold relating to Sweetman House. A DBFL report notes generally minor defects and states that the property does not need remediation. However, the May 2009 Replies indicate it has been designated for remediation, which suggests the adoption of a different approach.

From the most recent Replies and the new discovery, the defendants conclude that they cannot have any confidence in information provided regarding the source of fill. No doubt a large proportion came from the defendants, but the plaintiffs' records as to destination are vague at best. It is vital to the defendants and to the proper determination of the action that the defendants are satisfied that properties alleged to contain Bay Lane fill actually do. Houses not containing such fill but with damage/defects that the plaintiffs contend is indicative of heave are hugely significant. The defendants repeatedly raised queries in respect of documentary evidence which would identify the location of infill, but the plaintiffs failed to disclose documentation they had.

The defendants have now seen documents that reveal the source for many properties was "Moyglare or Lagan" or "Keegans or Moyglare or Lagan". Another spreadsheet indicates Lagan in respect of most of these properties. The defendants should have been informed of any change of position. They were not given the benefit of the doubt as to source of the fill.

Mr. Lennon is advised in consultation with the defendants' experts that an entire review of the fill material in all the estates is now necessary. In particular the defendants will need to examine fill in properties where the plaintiffs clearly had a doubt as to its source. An example is 16 Drynam Close, identified in a document as Moyglare or Lagan. Dr. Strogen concluded on a visual examination that it was not Bay Lane.

Section 7: The Myrtle Estate and New Documents relating to Red Arches

There is much documentation regarding the Red Arches part of Myrtle, which is not part of the action because the defendants' fill was not used there. The defendants' stone was used, but not as infill according to the new discovery. The new discovery reveals that there may well be damage of a comparable nature at Red Arches to that in the rest of Myrtle and in Beaupark and Drynam. The potential problems at Red Arches would have been investigated further. A number of delivery dockets and invoices indicate the addition of extra sand and water on site. There are also documents relating to lime stabilisation. This would have prompted extensive investigation into the nature of the damage, given that construction at Red Arches was similar to the rest of Myrtle and to Drynam and Beaupark.

Section 8: New Documents relating to Development of Cracking across the Three Estates

A vast amount of documents are informative as to the development of cracking across the estates. Spreadsheets log and detail the development of cracks for each unit across the estates. There are also documents clearly setting out pour dates in respect of many of the properties.

Cross-referencing the development of the cracks with the pour dates gives a clear picture of when these cracks began to appear. This information is absolutely vital for the defendants and for the determination of the action. Pyritic heave cracking occurs with time and the defendants assert that the cracking in these estates is too premature to indicate pyritic heave. A comprehensive analysis would have been carried out to show that for a large number of properties the development of cracks came too early to support the plaintiffs' allegations, if the defendants had had the following documentation.

The new discovery contains almost 1,000 letters from homeowners detailing complaints and damage. These letters contain vital information, for example a letter noting cracking after about six months in one house. A snag list, which would have been drawn up on practical completion, indicates a gap in the floor, a crack in the post and doors catching in another house. A document detailing pour dates for Drynam contains examples of houses where cracking occurred early, which provides strong evidence it was not due to heave. There was also a failure on the part of the plaintiffs, despite requests, in relation to legal correspondence or pleadings from homeowners.

There are about 106 documents in relation to homeowners' complaints and homeowner-commissioned reports. Some contain vital

information relating to the case, for example damage to houses.

There are also 219 new reports from the plaintiffs' experts. This is an incomprehensible failure. These reports are vital. Many are DBFL reports on cracking and a large number relate to non-Bay Lane houses at Myrtle. There are a number of very important reports relating to other houses, including 20 Boyd House and 16 Talavera House, both of which were the subject of a recommendation to remediate. A report on cracking at 31 Drynam Crescent states that the defects are generally minor but there is a relatively high amount of pyrite. This is important because it is now known that the fill in this property did not come from Bay Lane.

The development of cracking and the creation of a narrative in relation to each unit for that cracking was vital to enable the experts to properly analyse the causes of damage and to allow the defendants' experts to determine the most appropriate houses for the basket.

More spreadsheets relating to pour dates and the dates of the first appearance and development of cracking have been discovered. Some houses exhibited signs of cracking within two years of the pour date.

Only now can the defendants get a full grasp of the extent of the development of cracking in the estates.

Owing to the complexity of the case and the vast amount of existing information there was a heightened onus on the plaintiffs to furnish all relevant information given that the estates were constructed over three years and the defendants can have no first hand knowledge of what occurred.

Section 9: Missing Attachments

With respect to the vast volume of documents now furnished, the defendants had raised specific queries in relation to its absence in their motion issued in October 2008. Mr. Lennon believes that when the defendants first raised these queries the plaintiffs did not make any real attempt to engage with the defendants with respect to those queries. He believes that had these queries been properly addressed the plaintiffs would almost certainly have uncovered the vast tranches of documentation which have now come to light.

The exchange relating to missing attachments best illustrates this. Unsatisfactory replies were received in relation to queries raised concerning this matter. The defendants received assurances that the documents were either not relevant or not in the plaintiffs' possession, power or procurement or were privileged. Many attachments could not be located. Now, many of these attachments are in the new discovery.

There is an Excel sheet of documents that were not in fact missing. A number of these have turned out to be of great significance, some of which have been referred to earlier in the affidavit.

Examples include an attachment containing constructional detail in relation to lime-stabilised zones. There is also an attachment relating to the extent of bad ground at Block 21 and another relating to lime stabilisation at Myrtle. There is a further attachment consisting of certificates in relation to remedial works. It contains information of note concerning the methodology of the plaintiffs' experts in determining suitability of replacement fill after remediation. Another attachment relates to 2 and 4 Stapolin Avenue, which contain non-Bay Lane fill. Test results for both are given and are of significant interest because the pyrite level is around 2.16%.

Conclusions

The failure to discover so many documents significant to so many issues in one of the largest commercial actions in the history of the State is astonishing. The plaintiffs' allegations imperil the defendants and, if conceded, would have enormous implications for the entire quarrying and construction industry across this country. In this context, the failure to discover so much information undermines the balance of justice to such an extent that the trial can no longer be considered fair.

The defendants have gone to great lengths, but they and their experts are at a natural disadvantage. They were not present during construction, unlike the plaintiffs and their experts. Testing, investigations, etc., were very limited without access to documents which provide context, specific lines of enquiry and insights. The defendants suffered a handicap due to inaccess to this resource.

The Court, the assessors, the defendants' experts and, in some cases, the plaintiffs' experts, have been progressing on an incorrect premise. The defendants have been defending the case under an enormous handicap placing them at an unfair litigious disadvantage. In many instances the evidence of the plaintiffs' witnesses could have been challenged more effectively. In addition, the trial has laboured under the myth that only Bay Lane properties suffer from the damage and defects complained of.

It is apparent that the plaintiffs were aware for some time that far more houses in the estates contained other fill and exhibit cracking and defects, and that the plaintiffs were aware for some time, probably from the outset of the proceedings, that they could not know for sure which houses had which fill.

There was incomplete information as to the source of infill. The defendants were led to believe there was no real confusion and that they would get the benefit of any doubt. The defendants would have told the Court on the opening day that there were non-Bay Lane properties with similar problems. If the action is not dismissed, the defendants would have to reset from the beginning many of their investigations in order to properly and fully present the real picture regarding houses that do not contain Bay Lane fill.

The defendants are still not confident that they have all the relevant information that they are entitled to and that is necessary to properly defend the action. Clear disregard was paid to the repeated queries raised by the defendants about the absence of documentation.

Mr. O'Byrne has sworn 15 affidavits of discovery, in each of which he averred that the plaintiffs had no further documents relevant to the categories sought. It is clear that he was incorrect on 14 of these occasions. The explanation provided for this is inadequate. Given the protracted history of broken declarations in circumstances where it must have been obvious that further documents existed, the defendants have no confidence that the fifteenth affidavit will be the last.

Certain documents and types of documents have been set out in detail above but these instances are not exhaustive.

The defendants were not involved in the construction. They can only approach the case based on inspection of properties as built and documents available. The plaintiffs persistently asserted that the ground conditions were adequate and were not the cause of the cracking. They also asserted that proper quality control was in place during construction to ensure that, for example, concrete mixes were not altered by the addition of water/sand, the infill was properly compacted, and defects when discovered were remediated. It is apparent from the new discovery that these assertions are false.

The approach of the defendants and their experts would have been quite different. Much more extensive testing would have been carried out. This is no longer possible in the case of remediated houses. All but one of the basket houses has been remediated. Even where limited testing could be carried out, it is not practical or feasible to do this during the trial. The defendants' resources are directed toward the defence of the action, which would be seriously prejudiced by the diversion of resources for testing and examination. Such testing would also be completed too late for use in the trial.

The defendants would have insisted that houses in which non-Bay Lane material was used would have been included in the basket.

The defendants' reports are based on information discovered. It is unsatisfactory and unfair to expect experts to revisit their reports with a view to delivering supplemental reports.

The defendants' approach to cross-examination is largely grounded on the documentation discovered. The cross-examination of a large number of witnesses has been significantly hampered. This prejudice is not met by recalling the relevant witnesses for further cross-examination. Part of the impetus of cross-examination arises from the ability to undermine a witness in one area which can carry over into other areas. This potential impetus has been irretrievably lost.

Affidavit of Gerard W. Butler
6th October 2009
Introduction

Mr. Butler has read in final draft form the affidavit of Mr. O'Byrne and agrees with its contents and endorses as correct those elements of the affidavit of which he has personal knowledge.

Category 68 and the Discovery Challenges in October 2008

At Section IV of his affidavit Mr. O'Byrne addresses documents discovered under Category 68. BCM gave advice in respect of the initial discovery in 2008 that delivery dockets, invoices and order forms were not covered by Category 68. That advice was given on the basis of advice from Senior Counsel and Mr. Butler believes it to be correct. The plaintiffs acted on that advice. However, despite that advice there was discovery of documents, in particular delivery dockets, which may have given the defendants the misleading impression that all delivery dockets, invoices and order forms in respect of the estates were discovered. These classes of documents should not have been discovered and Mr. Butler understands why the defendants may have formed an inaccurate impression of the plaintiffs' view as to the scope of Category 68.

In addition BCM had always intended that the construction of Category 68 adopted by the plaintiffs would be expressly notified to the defendants so that they could take issue with that construction if they wished. This should have been done and the failure to do so is the responsibility of BCM.

As to the challenges to discovery mounted by the defendants in October 2008, BCM was then of the view that all documentation covered by the discovery agreement had been provided to BCM. Mr. Butler also believed that all such documents had been uploaded onto summation. Working on those assumptions he addressed queries about discovery posed by the defendants' solicitors in October 2008 and in subsequent months. Both assumptions were incorrect, although this was revealed by the process of self-review commenced by the plaintiffs and not by any pressure exerted by the defendants. During the 2009 review and in light of the seriousness of the matter an expansive approach to the discovery entitlements of the defendants was taken. For this reason the construction of Category 68 was widened to include delivery dockets, invoices and order forms. This changed approach gave rise to discovery of more than 10,000 documents.

Section 9 of the Affidavit of Mr. Lennon: Attachments

(i) Background

Because parent documents and attachments were scanned individually and reviewed on a document-by-document basis, attachments could be separated from the parent documents where an attachment was adjudged to be not relevant or privileged. This separation occurred at the final stage of the methodology adopted by the plaintiffs in the review of documentation in 2008.
Mr. Lennon states that the plaintiffs failed to engage with the defendants' queries raised on the attachments issue on 6th October 2008. Mr. Butler believes he is incorrect in asserting that the plaintiffs failed to engage on this issue.

(ii) The Plaintiffs' work on the attachments issue

The plaintiffs responded to the defendants on 20th October 2008 indicating that the Doc ID numbers could be used to find the attachments and to view the files in their original sequence and that if a document was missing it was because it was not relevant or was not in the plaintiffs' possession, power or procurement or was privileged. The defendants then undertook a review of the approximately 2,000 missing attachments and found the attachments for only 388 of the queried documents. The review failed to identify a number of attachments which were clearly in sequence with the parent document in the summation omnibus case. The plaintiffs later went to great lengths to remedy the problems associated with a document-by-document type review using electronic discovery software. Adeo Legal Technologies Ltd. stated that it would carry out an exercise concerning the defendants' then 1,214 outstanding attachment queries.

Adeo created an attachments case on summation which was reviewed by Junior Counsel in BCM, where a number of exercises were carried out. Attachments previously marked "not relevant" were marked "relevant" and made available to the defendants. A list of documents where the attachment was not physically present on the physical file or electronic file and was therefore missing was created.

The physical files were not consulted in the efforts to locate the missing attachments. This was because of assurances from Adeo that the documents were scanned onto the summation system in the manner in which they appeared on their paper files. As the paper files were 'mirrored' on the summation system, BCM did not see a need to consult the hard copy files. The plaintiffs could have

contacted the source author or recipient of each document where an attachment was missing. However, contacting the original source of documents was not considered as it was believed all relevant documentation had been made available and had been scanned onto summation. In addition, the original author or recipient would have had to conduct an extremely broad search which would have amounted to an extremely lengthy and unwieldy process.

There are a number of reasons why an attachment would not be present on a physical file and therefore not discovered to the defendants, although a duplicate may have been discovered elsewhere in the plaintiffs' discovery.

The systems adopted by Adeo and the document-by-document system of review adopted by the plaintiffs created confusion for the defendants in respect of the 1,214 attachments queried. However, the plaintiffs performed a vast amount of work in order to remedy the difficulties created and to identify insofar as possible the attachments sought by the defendants. 386 further documents were discovered arising out of the defendants' queries. The plaintiffs dedicated considerable resources to the attempts to locate the attachments.

The parties' Senior Counsel agreed a compromise whereby the plaintiffs would include the missing attachments in the second schedule to the their affidavit of discovery. In accordance with this the remaining 689 attachments were included in the second schedule.

(iii) The Defendants' sequence review

Mr. Lennon refers to a review conducted by the defendants to see whether the attachment was in sequence with the parent. However, the defendants' review was not particularly effective as many of the documents which remained queried by them ought to have been captured by their review.

(iv) List of attachments

At para. 422 of his affidavit Mr. Lennon exhibits a list of attachments which he says the plaintiffs failed to discover previously. Each of the 97 documents listed in the schedule has been checked against the 2008 discovery. Of the 97 documents relied on to ground claims of prejudice there are only 14 instances where the attachments were not discovered in whole or in part or where similar versions or drafts were not discovered. Mr. Lennon avers at para. 422 that a number of these documents have turned out to be of great significance. The majority of the documents listed in the schedule were in the defendants' possession since 2008. It is surprising that their importance to the defendants was not apparent long before this motion.

(v) Specific examples cited by Mr. Lennon

Mr. Lennon refers to a fax in the 2008 discovery but says that the plaintiffs did not provide the attachments to that fax in the 2008 discovery. However, attachments to this document were in the 2008 discovery. Mr. Lennon avers that the defendants at great expense checked the three documents either side of the parent for its attachments. Had this review been carried out properly, two attachments at the very least would have been located. It is very difficult for the plaintiffs to accept the accuracy of the averment as to the significance of the particular attachments and the prejudice suffered when the documents were in their possession at all times.

Mr. Lennon complains in respect of the discovery of an attachment to a fax at paras. 424 and 425. In fact this document was in the 2008 discovery. It is surprising that the document was not found in view of the sequence review carried out by the defendants.

Mr. Lennon states at para. 426 that, in relation to a letter which was stated to enclose a soil stabilisation report, the report was not discovered. The report was discovered erroneously in the 2009 discovery. It was marked not relevant in 2008. It does not relate to Myrtle, it relates to Red Arches. It does not relate to the three estates and does not fall within any of the agreed categories of documents. At para. 427 Mr. Lennon refers to an email attaching certificates. He states that the attachment contains information of note. However, the defendants were furnished with exact duplicates of this document in the 2008 discovery as well as almost identical documents.

Mr. Lennon refers at para. 428 to a letter to the solicitors for the homeowners at 4 Stapolin Avenue. He states that the test results in the region of 2.16% are of significant interest, but these results were provided to the defendants in January 2008. The 2008 discovery also shows the test results for 2 Stapolin Avenue as 2.16%.

(vi) Conclusion

A number of the attachments missing from the 2008 discovery were in the plaintiffs' power, possession or procurement. However, despite this default of the plaintiffs, the defendants have not suffered the prejudice claimed.

Terms and Conditions

In respect of the opening of the case, counsel was instructed that the plaintiffs had not been furnished with any documentation incorporating the terms and conditions on which the first defendant supplied infill. The fresh discovery reveals two such documents, a credit note and an invoice. These documents were not discovered by the defendants and Mr. Lennon does not refer to them. However, it follows that the plaintiffs no longer say they never received such documentation. The legal effects of receiving these two documents remain disputed however, and the plaintiffs maintain that they are not bound by the terms and conditions.

Conclusion

Mr. Butler repeats his apology for the failings on the part of BCM. Having regard to the totality of the evidence and for the reasons to be advanced in submissions, he asks the Court to refuse the relief sought.

Affidavit of Brendan O'Byrne
6th October 2009

I Introduction

Mr. O'Byrne is the Group Director of the fourth plaintiff. A substantial number of documents that the plaintiffs were obliged to discover were omitted from the affidavits of Mr. O'Byrne prior to those of 25th June and 7th August 2009 and Mr. O'Byrne apologises on his own behalf and on behalf of the plaintiffs for this.

II The 2009 Discovery

As a result of the plaintiffs' review and the additional categories the plaintiffs agreed to discover in May 2009, the plaintiffs discovered 49,433 documents on 25th June 2009. Certain documents which should have been discovered on that date were not. These totalled 2,973 documents and were discovered in the affidavit of 7th August 2009. Apart from documents within the two new categories of discovery (112 and 113) agreed in May 2009, the plaintiffs have discovered since May 2009 an additional 30,713 documents (privilege not claimed) and a further 5,739 documents (privilege claimed).

(i) First of the additional categories which the plaintiffs agreed to discover

The case management agreement allowed the defendants to seek discovery of "all documents evidencing communications passing between the plaintiffs and local authorities and / or residents associates in respect of the common areas on the estates and the alleged use of the first named defendant's quarry products in the said footpaths and boundary walls". In April 2009 Lennon Heather referred to "the agreement…to make discovery in relation to the footpaths, boundary walls and external common areas which are the subject matter of these proceedings". In May 2009 BCM informed Lennon Heather that they were not entitled to documents listed in Categories 1 to 9 but the plaintiffs agreed to discover documents within a revised version of Category 10. This category is now referred to as Category 112. 12,488 documents were discovered in the affidavit of 25th June 2009 because they were within the ambit of Category 112. Privilege was claimed over some of these. A further 60 were discovered in this category in the affidavit of 7th August 2009, with privilege being claimed over four of these.

(ii) Second of the additional categories which the clients agreed to discover

On 28th May 2009 the plaintiffs agreed to discover all letters of complaint in respect of workmanship including emails and all diary entries noting complaints up to 28th May 2009. This is referred to as Category 113. Including some documents over which privilege was claimed, the plaintiffs discovered 3,464 documents in this category on 25th June 2009 and a further 49 on 7th August 2009.

(iii) The other documents discovered by the plaintiffs since May 2009

Apart from Categories 112 and 113, the plaintiffs have since May 2009 discovered an additional 30,713 documents over which privilege was not claimed and an additional 5,739 documents over which privilege was claimed, although in respect of some of those documents the claim to privilege has since been abandoned. Mr. O'Byrne therefore challenges Mr. Lennon's averment alleging the plaintiffs' failure to discover approximately 52,000 documents pursuant to their obligations and the agreed categories of discovery as sought on 10th March 2008.

III The Discovery Process and the Discovery Review Process Undertaken by the Plaintiffs

(i) The discovery process

In early 2008 BCM advised Menolly of the extent of documentation likely to be required by discovery obligations. The details and number of discovery categories did not become known to Menolly until March 2008. BCM gave advice at various stages on the interpretation of those categories. The discovery involved the requirement to locate vast numbers of documents over an extensive period. The plaintiffs agreed to make discovery across 102 different categories. Menolly followed very similar development and building processes for each of the three sites. These processes were virtually the same as for all other Menolly developments, so one would have expected that broadly similar documentation comprising issues of a discoverable nature would exist for all the sites. In early 2008 Menolly was not aware of all of the issues the defendants have now raised in their expert reports. Menolly had not previously been involved in this kind of a litigation discovery process and received extensive guidance from its lawyers on this.

Since May 2009 the plaintiffs have undergone a rigorous process. The omissions were accidental and innocent but should not have occurred. When it became known in May 2009 that there was an issue with the 2008 discovery, Menolly commenced a thorough review without hesitation.

The plaintiffs have always regarded discovery as an important part of the proceedings which had to be taken very seriously. Menolly personnel were told to gather together and hand over all documents in their possession that related to Beaupark, Myrtle and Drynam estates. In particular that instruction was conveyed by an email of 28th January 2008 which gave examples of documents. Within Menolly, specific management structures were put in place to facilitate the discovery. There were meetings between BCM solicitors and Menolly personnel in February 2008 to explain the discovery process.

Menolly's management believed the instruction regarding handing over of documentation was simple and unambiguous. It required each employee to hand over all documents he or she had pertaining to the estates and thus did not invite the individual to decide what was relevant. The message conveyed was that if there was any doubt the document should be sent to BCM. A number of office-based Menolly personnel carried out searches for documents, boxed the documents arising from these searches and sent the boxes to BCM. Apart from requiring Menolly personnel to hand over documentation, searches were conducted in Menolly's offices in Lucan, in site offices, within a store of old files dubbed 'the Farm' and at an equipment storage facility known as 'the Plant Yard'.

Mr. Charlie Blain, a site foreman on the Drynam and Myrtle estates, was assigned to work solely on discovery from early March to mid-May 2008. During this time he was primarily based in BCM's offices where he reviewed and scheduled the contents of boxes. On occasion he visited locations where he believed documents of a specific nature that ought to exist might be held. From late April 2008 he was assisted by Mr. Clonan, a trainee quantity surveyor who worked in BCM's offices for approximately four weeks and thereafter returned to Menolly's offices, where he assisted other Menolly personnel who were working on discovery and in particular searching for relevant documents referable to their specific areas of responsibility. Joe Sweeney of DBFL was also based in BCM's offices to review documentation.

It was not for Mr. Blain or Mr. Clonan to decide what should be discovered. It was intended that BCM and Junior Counsel should determine whether the documents should be discovered.

Menolly was actively involved in communicating with others outside the company regarding requests to them to provide various discoverable documents to BCM. Progress on discovery matters was discussed regularly at various meetings in Menolly. It was always envisaged that Menolly would make complete and open discovery. Considerable resources and a huge amount of work on the part of Menolly and its legal advisors was invested to meet the deadline by which discovery had to be made. However, a variety of factors and events led to the discovery affidavits of 30th June and 15th July 2008 being deficient. A number of difficulties beset and hindered the discovery process.

(ii) Hard copy documents

A lot of difficulties hindered the effectiveness of the hard copy discovery process in 2008 but the electronic discovery went some way towards ensuring that a lot of documents which might otherwise have been omitted were in fact discovered.

Rather than an organised central source, files were in various locations and diaries and papers were in the possession of current and former Menolly personnel. The vast majority of those documents were not held in such a way that they could be easily located and submitted to BCM.

There was insufficient central control over the discovery process within Menolly. No record was maintained at the time in relation to whether a particular employee had produced any documents and, if so, what documents. The process was exposed to the possibility of personnel either partially or entirely failing to hand over relevant documents and, in the case of ex-employees, being unaware of the need to hand over documents they had retained, and such omissions going undetected.

A senior employee, Mr. Ciarán Lee, left Menolly in May 2008. Four boxes of his office files were not furnished to BCM, including a hard copy of the Monaghan report referred to at paras. 130-136 of Mr. Lennon's affidavit.

There are two Monaghan reports and only the first is relevant to Myrtle. It is this report which Mr. O'Byrne refers to as 'the Monaghan report'. The perception of the Menolly interests in Helsingor was that the report arose in the context not of a real dispute about workmanship standards but rather jockeying between the Menolly interests and the Ballymore interests in connection with project finances. The issues relating to project costs were substantially dealt with in April 2007, after which no further issues arose out of the report. Mr. Monaghan was appointed client representative from July to September 2007.

Mr. Lennon is wrong in saying that the document at Book 5 Tab 31 is a DBFL response to the Monaghan report. It is a response to the Phase 2 report prepared by Mr. Monaghan.

Because of the above described view of the report taken by Menolly, copies were not widely distributed. This was one of the factors leading to the failure to discover the report. Menolly management believes it received in March 2007 four hard copies of the Monaghan report and a CD also containing it. Due to its size the report was not capable of being emailed on the Menolly system.

The complete report was not stored electronically on the Menolly system, and the electronic search did not locate a number of references to it because the words "Phase 1" were not used as search words. When Menolly first received the report it was intended to respond to it but Menolly ultimately felt the best way to address it was to resolve the issues on site, which is what occurred. An extract from the report was in a box sent to BCM for the 2008 review but was marked "relevant not requested" by the discovery review team and was not discovered. A number of emails referring to the report were given to BCM but marked "not relevant" and were not discovered. Menolly senior management were surprised by the failure to discover it.

Mr. O'Byrne disputes Mr. Lennon's characterisation of the report. He believes what Mr. Lennon says is not borne out by the contents of the report and three expert engineering witnesses agree. The issues in the report only relate to engineering and construction matters, but even if Mr. Lennon is right, the Monaghan report can be used to challenge those involved in the construction of Myrtle and the expert engineers. In addition, the defendants' experts can supplement their reports and the defendants can provide fresh witnesses to deal with the report.

Mr. Lee's files included documentation relating to HomeBond which was the subject of an unsuccessful challenge by the defendants.

Other newly discovered documents included minutes of the weekly construction meetings, documents relating to complaints and maintenance issues and documents relating to Block 21 in Beaupark. There were also some documents relating to litigation matters including the reports of DBFL and Golder but these documents had been discovered in 2008.

A small number of employees handed over to BCM only documents which referred to matters dealing with pyrite issues. Also, Menolly staff generally believed properties unaffected by pyrite, although in one of the estates and not the subject of the claim, were not relevant. This interpretation of each individual's understanding seems to have been taken from the meeting involving Menolly staff and BCM in February 2008. It also appears DBFL had a similar misunderstanding regarding Block 21 in Beaupark. However, a number of the documents which were "newly" discovered in 2009 are duplicates of documents in the 2008 discovery.

Mr. Albert O'Loughlin, who was extensively involved in the litigation, appears to have thought privileged documents did not have to be sent to BCM. His documents included documents over which privilege was asserted and maintained.

There was also an instance where a number of site quantity surveying files were either not sent to BCM or not recorded as being received by BCM. In addition, documents now being treated as possibly within Category 68 were not given to BCM because of its advice as to the interpretation of this category. The expansion of the category has given rise to the discovery of over 10,000 new documents.

In 2008 BCM advised that documents and files of minutes of certain Helsingor Board meetings were not discoverable as they belonged to Helsingor. In 2009 these were discovered in consultation with Helsingor's lawyers. Many of these documents were the subject of the defendants' motion challenging privilege, and in respect of these documents the application was rejected.

Again, Menolly began gathering documents before the defendants' letter dated 10th March 2008 was received. Senior management directly involved in the case discussed the letter with BCM but the ultimate parameters were not communicated to Menolly personnel,

who were supposed to hand over everything relevant to the estates. A reminder meeting might have disabused site and other personnel of their misconceptions.

Mr. O'Byrne has learned that during the construction of the estates Menolly did not have a systematic policy for document creation and management. Menolly site personnel did not maintain a centralised filing system. Some boxed their site files diligently and transferred them to the Farm but in some cases site files could end up on different sites or in the Plant Yard. In addition, some site personnel kept excellent records while others did not keep adequate ones, which made it difficult to identify which documents should exist, so it was impossible to say a given file was missing.

Due to the downturn and a re-organisation, many employees directly involved in the estates were made redundant. In some cases they did not accede to requests for co-operation in discovery. Mr. O'Loughlin devoted considerable time to discovery, but no individual or group in Menolly ensured that all locations had been properly searched. Physical searches in 2009 yielded boxes of documents, which shows that the searches in 2008 were deficient. Many of those who conducted the searches were unfamiliar with the estates. Great reliance was placed on Mr. Blain to find site-based documentation, but he had not been involved in the construction of Beaupark. Further problems beset Mr. Blain's searches. There appears to have been a misunderstanding in Menolly as to whether he was locating all relevant files or looking for specific documents he believed to exist. In addition, some six weeks before the first affidavit of discovery, dated 30th June 2008, Mr. Blain withdrew from the identification and gathering of documents. It is likely that this had an adverse effect on the process.

A significant number of site diaries were discovered in 2008. However, some persons only provided site diaries which dealt with pyrite matters and therefore failed to provide all of their prior year diaries. Nobody prepared a reconciliation of what diaries were provided for what site personnel and for what year, but this was done for 2009. The site diary of Mr. Kearney referred to by Mr. Lennon at paras. 180 to 187 was not discovered in 2008 for the reasons explained in Mr. Butler's affidavit of 25th May 2009. Also, it was not generally understood by Menolly senior management at the time of the 2008 discovery that many employees kept such records.

With hindsight it seems clear that searches at the Farm were hindered and incomplete because it did not have an organised archiving system. Large numbers of documents had built up there over many years in a random and haphazard fashion. These documents included accounting related information and individual site related files. Menolly had no record of what documents had been sent to the Farm or what might have been removed. It is now painfully evident how certain documents held at locations including the Farm, the Plant Yard and in the site offices were missed.

As regards the failure to identify gaps in the documents that had been found by the 30th June 2008 deadline, it was difficult to get a clear picture of the vast amount of documentation that was forthcoming. Material was sent to BCM piecemeal when located and therefore was not in the form of complete and self-containing collections of documents on a particular issue. BCM prepared a summary list of the contents of each box, but this list was not comprehensive. There was no way Menolly could have performed a completeness check, so it was impossible to identify if any documents which should have been discovered were not. The gathering of hard copy documents for the 2008 discovery was not as comprehensive as it should have been.

At the end of May 2009 Menolly began compiling a list of all of its current and former employees so that each could be contacted and asked whether they had any documents pertaining to the estates which should have been handed over for review. A number of staff were assigned to conduct exhaustive searches of Menolly's headquarters, site offices and the Farm to address the new categories and ensure that previously missed documents would be reviewed for discoverability. Menolly accepts these steps should have been taken for the 2008 discovery.

(iii) Documents in electronic form

BCM raised the issue of electronic discovery at the beginning of 2008. Mr. Ronan Quinn of Menolly was assigned to coordinate the discovery of documents that were in an electronic format. Mr. Quinn liaised with Mr. Conor Smyth of BCM's IT department. Menolly sought the assistance of Waterford Technologies (WT), which had supplied it with a system for archiving emails in 2007. WT holds itself out as having expertise and experience in respect of, *inter alia*, 'e-discovery'. Mr. Brian Murphy of WT assured Mr. Quinn that the search would pick up keywords used in email attachments. Mr. Quinn provided Mr. Murphy with 13 search terms. The review was updated in the period leading to the affidavit of discovery.

This electronic review had shortcomings. The range of search terms was too narrow. A widening of the search parameters to 37 words in June 2009 resulted in a review of more than 90,000 documents. The WT exercise was confined to emails together with such attachments as the WT interrogation software could read. The search had limitations as regards attachments to emails that comprised encrypted files or certain types of PDF documents. There were further difficulties concerning the discovery of electronic documents.

One member of Menolly site personnel had been using personal (non-Menolly) email accounts for communicating with purchasers in relation to snagging issues. The site personnel had apparently not understood that they should have furnished documentation regarding snagging. The hard-drives of desktop computers and laptops of Menolly personnel were not subjected to interrogation, which meant that the process depended on individual users producing relevant documents on foot of the overall direction concerning the furnishing of all documentation relating to the estates. Consequently, in June 2009 Price Waterhouse Coopers Forensic (PWC) were instructed to carry out a search of hard-drives and the Menolly central server using more search terms. It was intended that they would check for duplication as against the 2008 discovery.

Before the June 2009 affidavit WT confirmed that it had reviewed Menolly's electronic documentation using a tool for e-discovery and legal investigations. WT also confirmed that this tool interrogates the entire email database. In July 2009 Lennon Heather raised queries regarding Mr. Blain's four email accounts and WT was asked to search the Menolly server for any documents concerning these accounts. 141 emails were found, of which only 21 had been found in earlier searches of the Menolly emails. On foot of this information, which was inconsistent with earlier information from WT, Menolly conducted further enquiries regarding emails. On 22nd July 2009 Mr. Murphy of WT accepted that a mistake had been made in not searching email attachments during any of the earlier searches for their relevant search items. At that stage Mr. Murphy estimated that over 11,000 emails had not been identified because of this error. 11,280 were provided to Menolly and reviewed.

After being engaged at the beginning of June 2009, PWC worked on capturing and analysing data to produce a set of documents that would be given to BCM. This involved a download of hard-drives and the Menolly file server, but PWC was instructed not to include

certain areas because these had been the subject of the WT exercise. Until the events described above, Menolly believed the WT search had captured all relevant emails that had passed through the Menolly email server. BCM also provided further documents which had not been reviewed by WT. The vast majority of documents created in Menolly are saved to the central server. Very rarely, documents may be saved to a part of the hard-drive unconnected to the central server. The central server and the hard-drives were analysed. 21 hard-drives were reviewed manually by Mr. Quinn and Mr. O'Byrne and no relevant documents were found. This does not mean the users of these drives did not have any discoverable electronic documents but merely that no such documents were on their hard-drives. Discoverable documents would have been picked up from the WT review of the email systems and the PWC review of the centralised storage server database.

(iv) Conclusion

Based on numbers from BCM, the total number of documents which were newly discovered in 2009 relating to the 102 agreed categories of discovery was 36,452. Privilege was claimed over 5,739 of these. Of the 30,713 non-privileged documents, 2,584 came from DBFL which arose partially due to their understanding relating to Block 21 in Beaupark and the request for discovery relating to categories 112 and 113. 10,452 of the newly discovered non-privileged documents relate to the difference in the interpretation of Category 68. 9,105 arose from the changes to the Menolly electronic discovery and 2,218 arose from BCM emails. 3,882 came from Menolly reviews of its hard copy files. 2,435 arose from the re-review of the 2008 discovery documents by BCM. 37 relate to invoices from Goode Concrete and CPI scheduled as missing in the 25th June 2009 affidavit but since provided by those companies and discovered. Mr. O'Byrne is confident that proper discovery has now been made.

IV Section 6 of the Affidavit sworn by Mr. Lennon on 15th September 2009

(i) Introduction

In the following sections Mr. O'Byrne responds specifically to Mr. Lennon's affidavit, but this response to that affidavit should not be taken as acceptance of statements of Mr. Lennon which are not addressed.

Mr. Lennon complains in Part 6 concerning documents which he contends are relevant to the extent to which the defendants' product was used in each of the dwellings in the estates. No prejudice of the nature alleged by Mr. Lennon could possibly have been caused by the failure of which he complains. Very many of the documents to which he refers in this part as having been first discovered in 2009 were discovered or otherwise made available in 2008. In respect of other documents, they in large part communicated information available to the defendants from the 2008 discovery, witness statements or matters advised in sharing testing information. Despite this, none of the actions Mr. Lennon says would have been taken had the defendants been aware of those documents was actually taken. Houses he says would have been proposed for inclusion in the basket were not sought to be included. Inspection and investigation of houses he says would have been undertaken were not. Matters he says would have been pursued in cross-examination were not. Apart from this, most of these actions can still be taken in relation to the vast majority of properties to which they refer.

This appears from the following matters. Mr. Lennon alleges that 14 DBFL/Golder reports referred to in this part are newly discovered. Three of these are drafts of reports which are not signed by Dr. Maher. A signed version of these three reports was discovered in 2008. One of the reports he refers to was discovered in 2008. The remaining 10 were given to the defendants in December 2008 with Mr. Forde's witness statement. None of the steps Mr. Lennon says would have been taken had these been discovered originally was taken. He emphasises letters advising certain homeowners that there was a doubt as to whether their homes contained Bay Lane infill. There were 22 such letters to the owners of properties which had been tested and appeared not to be Bay Lane. 11 of these were discovered in 2008. They knew in respect of these 11 that there was an issue as to whether they were Bay Lane properties but took none of the steps referred to.

In addition, Mr. Lennon instances 41 properties which he describes as non-Bay Lane and having cracking consistent with damage in other properties alleged to be due to heave. However, as is seen from the 16th June 2009 Replies, 32 of these 41 have been diagnosed by the plaintiffs' experts as containing some Bay Lane infill. The defendants knew from an early stage that there were properties the source of the infill in which was problematic and they have had since December 2008 maps identifying almost all properties in respect of whose infill the plaintiffs had a doubt. Most critically, of the nine properties in Myrtle samples from which to date have not resulted in the identification of any Bay Lane infill, five are properties which the defendants have known from early in the proceedings were being categorised as potentially containing non-Bay Lane infill. They also knew that a further home was being re-tested. They took none of the steps referred to, and even within these nine properties, it may transpire that some contain Bay Lane infill.

Mr. O'Byrne believes that a consideration of the recently discovered documents viewed in the light of the documents previously discovered and the activity or inactivity of the defendants will show that Mr. Lennon has disproved in his averments his own claim that the importance of the information in the new discovery and the prejudice caused by its alleged absence "cannot be overstated".

(ii) Testing of the Infill

Having regard to the very high quantities of Bay Lane infill used in the estates, the plaintiffs assumed that the overwhelming majority of the houses contained infill from Bay Lane. This assumption has been borne out by testing and re-testing. Following Dr. Strogen's very detailed work, the number of properties which appear to have no Bay Lane infill is very few. From an early stage the defendants were clearly advised that there were certain properties containing no Bay Lane infill or appearing to contain a mixture of Bay Lane and other infill. The Replies delivered on 10th January 2008 advised that there was a series of properties in Drynam Glen, Drynam Grove and Drynam View which contained Moyglare product and that there were three buildings in Drynam Way which might contain a mixture of Lagan and Moyglare product; that in Beaupark, 94.04% of the infill was supplied by the defendants; and that in Myrtle, 2, 4 and 6 Stapolin Avenue contained mixtures of the defendants' infill and infill from other suppliers, and that the defendants did not supply infill to Sweetman House and some of the units on Stapolin Avenue. This information came from diary entries, detailed photographs and the recollections of employees. The defendants never sought to have any of the properties advised as containing other infill included in the basket, nor did they request any particular tests thereon.

The plaintiffs understood the necessity to adduce geological evidence of infill source. Dr. Strogen was engaged for this purpose. In spring 2008 certain properties were proving problematic as regards identification, which resulted in a re-testing schedule. By December 2008 the clear conclusion had been reached that the basket houses were Bay Lane properties, but the analysis of all samples taken from properties on the re-test schedule did not begin until January 2009. This was interrupted and continued in March and April 2009, with the results being reduced to the reports and spreadsheets furnished to the defendants during Dr. Strogen's

evidence. All of this has been agitated during the proceedings and the defendants had all information well in time to cross-examine Dr. Strogen and Dr. Somerville regarding it, and in good time to cause their own experts to undertake a similar process.

A perusal of Mr. Lennon's affidavit would suggest that a large number of properties have no Bay Lane infill at all, but this is not the case. Dr. Strogen has identified seven properties in Drynam, two in Beaupark and nine in Myrtle as having no Bay Lane fill. This excludes the 25 Moyglare properties and others in Myrtle and Beaupark that never formed part of the case. Mr. Lennon's figure of 129 includes the 25 Moyglare houses and the 29 Sweetman House houses, which are not part of the claim. As outlined in the Replies of May and June 2009, there are 129 houses containing some or all non-Bay Lane infill. 57 of these have been deemed to require remediation, not 41.

Whatever concerns the plaintiffs had as of April 2008 about the source for a small number of properties in Myrtle, it was not until April 2009 that the plaintiffs could clearly conclude that some properties in the estate (apart from Sweetman House) contained non-Bay Lane infill. Only nine of the houses re-tested in Myrtle were completely non-Bay Lane, and this conclusion is taken from the samples: it is quite possible that upon lifting the floor or bulk sampling they will be found to contain Bay Lane infill. 20 were a mixture. The comments from the opening statements quoted by Mr. Lennon at paras. 214 and 215 remain correct. The acute form of heave and cracking is only evident in houses containing infill purchased from the defendants, and the floor heave in the Bay Lane houses is limited to those houses.

The overall sense of Mr. Lennon's comments appears to be that the defendants were in some sense lulled into a belief that there were no doubts as to where all the infill was located and they were unfairly prejudiced by the provision of the information transmitted in April 2009. This is a remarkable position for the defendants to adopt. The defendants had available at all times samples of the infill from a number of properties, and it was open to them to take whatever other samples they wanted. They could test the samples and have their experts express a view as to their provenance. Pursuant to the terms of settlement agreed on 11th January 2008 and further modifications thereto, the defendants were notified and give the opportunity to attend at properties for inspections, sampling and testing. They were notified and afforded the opportunity to attend at properties under remediation for the same purposes. Mr. O'Byrne is advised that the defendants' experts did not always attend scheduled inspections and testing and did not always avail of the chance to take samples from properties for testing. Given the assertions as to examinations/investigations the defendants would have carried out regarding certain properties, this should be compared to the examinations/investigations actually performed at the properties in respect of which they had notification. It appears the Court is asked to infer prejudice based on the non-provision of information without being advised what information the defendants actually had.

Again, the defendants knew that letters had been sent to at least 11 homeowners suggesting their properties might not contain Bay Lane infill because those letters were discovered in 2008. They were advised that the plaintiffs were undertaking a renewed drilling schedule in summer 2008 and their experts attended at the taking of samples in the course of re-testing in at least eight houses. In December 2008 they received Dr. Strogen's report, which did not list every property as containing Bay Lane infill and made it quite clear that there was further information to come. The defendants also received maps containing a legend indicating, *inter alia*, properties with "Uncertainty over Stone Infill Used". These were identified by a "?". While there is one omission - 14 Boyd House should also have been identified with a "?" - these maps by and large advise the defendants of which properties were proving problematic in terms of identification. The defendants had all the information they required to conduct testing to ascertain the source of the fill comfortably in advance of the trial. The defendants were very aware of these maps. In January 2009 they referred to the Drynam map and in particular the legend where it referred to "Uncertainty over stone infill used" and stated that a number of properties identified in the map were in distinct contrast with the map in the Replies to Particulars. The letter demanded clarification about the uncertainty as to source. Further correspondence followed and the plaintiffs clarified by letter in March 2009 which houses in Drynam they understood to contain infill which was not from Bay Lane.

In addition, since 24th October 2008, when the defendants received the updated particulars of damage and loss, it would have been evident to them that, with the exception of 8 Parker House, all of the properties marked as "Uncertainty over Stone Infill Used" had not been claimed for in the Statement of Claim. A booklet entitled "Menolly Homes Reinstatement Cost Myrtle 3rd October 2008", which accompanied the updated particulars, listed all of the units being claimed for in Myrtle. Again with the exception of 8 Parker House, this list did not contain any of those properties. If the defendants had input the booklet information onto a map of Myrtle they would have seen that 31 properties in Myrtle had not been claimed for in the Statement of Claim.

The defendants were not advised of the provisional views expressed by Dr. Strogen in April 2008 because they were provisional, with ongoing re-testing. Many of the properties which on initial sampling suggested a non-Bay Lane content proved to contain Bay Lane infill in quantity.

(iii) The DBFL/Golder cracking reports

Mr. Lennon refers extensively in this part of his affidavit to DBFL/Golder reports showing cracking and other issues. Again, three of the reports he refers to are draft reports which were not signed by Dr. Maher. A signed version of these was discovered in 2008. Another was discovered in 2008. The remaining 10 were given to the defendants in December 2008 with Mr. Forde's witness statement. With regard to the remaining 10 to which Mr. Lennon refers, the reason for the non-discovery was that there were draft reports for those properties which were not approved for issue to the homeowners on or before 30th June 2008 and further investigation was considered necessary. These reports were properly the subject of a privilege claim but were not listed in the first affidavits because they were overlooked by a Menolly employee. BCM received a number of the emails sending these draft reports in June 2008 but these emails were not discovered due to the issue regarding the internal BCM emails after 9th April 2008. All 10 which were not discovered in 2008 were given to the defendants in December 2008 as an appendix to Mr. Forde's witness statement. The defendants took none of the steps they say they would have taken had they got the documents earlier. The claims of prejudice regarding these documents are demonstrably contrived.

(iv) Letters to homeowners

The plaintiffs sent 22 letters to homeowners advising them that their houses might not contain Bay Lane infill. 11 of these were discovered in 2008 and 11 were not discovered until 2009. The format of all 22 is identical although they give different pyrite readings. 11 were sent by BCM where solicitors were on record, 11 by Menolly where no solicitors were on record. The latter 11 were not discovered in 2008. None of the steps Mr. Lennon says would have been taken had those letters been discovered were taken in respect of the properties for which the defendants had the same letter. The prejudice claims connected with these letters have been manufactured for this application.

(v) The pyrite *benchmark*

Mr. Lennon suggests the plaintiffs had been applying an undisclosed pyrite benchmark. Total sulphur and equivalent pyrite contents were used to assess infill. Less reliance was placed on them as the plaintiffs' experts became more familiar with the situation and began obtaining geological descriptions. The plaintiffs' approach has been to rely much more on the geological description of the rock and the likely source of the infill. In Sweetman House the infill in the units was consistently a crushed gravel. Most of the pyrite levels were low but there were occasional higher ones. However, the consistent crushed gravel, which is virtually immune to pyritic heave and shows little chemical sign of pyrite oxidation, allowed the plaintiffs' experts to conclude that the units in Sweetman were not susceptible to heave damage. On the other hand, 6 Stapolin Avenue has generally very low pyrite levels but has been determined to need remediation because it contains Bay Lane infill. Another reason why the plaintiffs could not simply rely on pyrite levels is that, with infill from mixed sources, the results are a blend of those sources. In a number of cases it is evidently possible to separate out the different rock samples in the bulk sample and obtain totally different pyrite levels on each component. Some examples of this show how it is impossible to just consider pyrite contents in isolation to the geological information. The plaintiffs have never applied a threshold for pyrite levels because it is technically impossible to establish a useful threshold for this purpose. Correspondence from homeowners has referred to a benchmark being used by the plaintiffs' employees when communicating with particular homeowners. The idea of a 1% benchmark came from the Drynam booklet which states that pyrite concentrations typically over 1% are high. The 1% figure was used by Menolly to see if it could come to any conclusions about particular houses, for example whether a particular row of houses had low levels and might therefore represent a good vein in Bay Lane or have come from another quarry. The benchmark was not that helpful and was abandoned as Dr. Strogen provided answers.

(vi) Replies to Particulars and Basket of Houses

Mr. Lennon refers to Replies dated 11th May 2009. The date of these replies is actually 16th June 2009.

Mr. O'Byrne believes the basket was agreed by both sides. The number of houses available for inclusion was limited as both sides acknowledged that the houses in the basket had to have been remediated houses which had been the subject of ongoing monitoring and testing by both sides. The defendants refused to accept any Myrtle houses as they argued they were not present and did not have the opportunity to participate in the remediation of those houses. This left only 48 houses available for consideration. It was later agreed that a Myrtle house (2 Boyd House) and an unremediated house (3 Drynam Square) could be included.

(vii) Specific houses addressed by Mr. Lennon in Part 6 of his Affidavit

(a) 8 Stapolin Avenue

Mr. Lennon avers that the defendants were never made aware that this property may have contained non-Bay Lane material. This is incorrect. In this regard Mr. O'Byrne refers to a letter from BCM to Arthur Cox discovered in 2008. The property is also marked with a "?" on the relevant Paul Forde map. A survey in a DBFL/Golder report of February 2008 which identifies cracking and defects was not discovered in 2008, but it was an appendix to the witness statement of Mr. Forde delivered in December 2008. None of the steps Mr. Lennon asserts as being required in light of this document appear to have been taken. In addition, the report does not state that "although the pyrite levels are low there is extensive cracking" as Mr. Lennon suggested. It states that the property is low risk due to the low pyrite results and that the defects noted are not sufficient to require remedial works, but that it should be re-surveyed and re-sampled in nine months to assess whether remedial action has become necessary.

Mr. Lennon appears to suggest that it was only on receipt of this DBFL/Golder report in June 2009 that the defendants learned that in June 2007 samples were tested and low pyrite levels found. He is mistaken in this regard. The 2008 discovery contained the same test results as those in the report delivered in December 2008. He also appears to suggest that it was only in June 2009, upon receipt of Docid EM00349, that the defendants learned that the homeowners were informed that as the pyrite level was below 1% Menolly was not prepared to undertake remedial work. This is also wrong. A letter from Arthur Cox to BCM contained in the 2008 discovery clearly communicated this. In addition, a claim of privilege should properly have been asserted over Docid EM00349. The email circulating this document was discovered in 2009 but privilege was claimed over it. This email is dated 27th May 2008. It was not discovered in 2008 as BCM felt all relevant emails from 9th April onwards had been provided by Menolly or Golder and that a search of BCM emails from 9th April to 30th June 2008 was therefore unnecessary.

Mr. Lennon states that "it has become apparent that DBFL/Golders carried out a survey of this property on the 22nd November 2007". In fact the defendants' solicitors were notified by letter dated 21st November 2007 of the schedule for DBFL surveys on Friday, 23rd November 2007, including an appointment for this property at 11 am. While there is clearly an error regarding the date of the survey either in this letter or in the DBFL/Golder report, the defendants' solicitors were being notified of surveying so that the defendants could arrange for their experts to attend. Mr. O'Byrne believes it will be clear from the report that it is not significantly added to by the other documents referred to by Mr. Lennon concerning 8 Stapolin Avenue. Mr. Lennon referred to possible inclusion of a property of this kind in the basket, but this house has not been remediated and the plaintiffs' experts have not recommended its remediation. It would therefore not be suitable for inclusion as the parties are gathering their evidence during remediation. The defendants were aware of houses that did not contain Bay Lane infill when the basket was being agreed and never requested that such houses should be included as "controls". Furthermore, the defendants were notified that this property was to be re-tested and re-surveyed on 25th August by email from BCM dated 15th August 2008, so they had access to this property for the purpose of carrying out their own inspection.

The documents referred to in the context of this property as discovered in 2009 do not add to the information available to the defendants from the 2008 discovery and since the end of 2008. The defendants' inactivity when in possession of that information gives the lie to Mr. Lennon's claims as to prejudice consequent not only upon the failure to discover these documents but, by inference, the complaints he makes in relation to other information from the most recent discovery.

(b) 10 Stapolin Avenue

The same trend continues when the averments in respect of this property are examined. Mr. Lennon refers to a DBFL report which he says clearly would have been utilised in the cross-examination of many witnesses to date. Again, this report was provided in December 2008 and the fact of the report is clearly advertised in Mr. Forde's statement. None of the witnesses has been asked a question regarding this property. Mr. Lennon states that the report "reported extensive cracking throughout the property on a par with many other properties throughout these three estates which contain Bay Lane fill." The report actually states: "In this house

minor cracking defects are noted, however pyrite is present." Mr. Lennon also refers to pyrite test results for this property but does not advise that the 2008 discovery contains these results. His other complaints in respect of the report appear to be in relation to the level of cracking, which was apparent from the drawings in the 2008 discovery, and the recommendation to re-survey and reassess the property. The defendants' solicitors were notified by letter dated 2nd October 2007 that this property would be tested on 4th October 2007. They were also notified by email dated 26th August 2008 that it was being re-tested and re-surveyed on 3rd September 2008.

Mr. Lennon refers to steps that would have been taken, but the defendants had the above information and do not appear to have carried out any testing of any samples they took from the property. It appears from the omission of this property from appendices A and B of an O'Connor Sutton Cronin report that the defendants' expert engineers did not take the opportunity to inspect it on 3rd September 2008. In addition, the facts in the DBFL report which the defendants had would have communicated all relevant information contained in documents EM02235 and ID D-02042.

Mr. Lennon refers to a letter advising the owners of this property that it did not contain Bay Lane infill. Again, this document is similar to 11 others which similarly advised homeowners. At para. 235 of his affidavit Mr. Lennon quoted selectively from the letter, which refers to further testing being recommended. Also, 10 Stapolin Avenue did not feature in the claim in any of the particulars of the proceedings, was not listed in the schedule to Dr. Strogen's report as a Bay Lane property, and was designated with a "?" in the Paul Forde map. Mr. Lennon states that a DBFL structural certificate indicated that the foundations of the houses were piled, that the piles were tested and that the results were satisfactory. He states that this information has heightened significance as the house manifests clear damage although it does not contain Bay Lane infill. It is evident from Dr. Strogen's report of 3rd April 2009 that Bay Lane infill has been found in samples from this property. The foundations to these houses (2, 4, 6, 8, 10 and 12 Stapolin Avenue) were not piled. The structural certificate was incorrect. The error was corrected by a revised structural certificate. This certification was confirmed in a further structural certificate which was discovered in 2008.

(c) 12 Stapolin Avenue

An error in Dr. Strogen's report which was carried into the June 2009 Replies caused some confusion in relation to this property. It is a non-Bay Lane property. The sample in question is from 12 Stapolin House, which contains Bay Lane and non-Bay Lane infill. The relevance of this property to this application is unclear as Mr. Lennon does not idenfity any documents relating to it discovered for the first time in 2009. He acknowledges the DBFL/Golder report was discovered in 2008 but fails to advise that it was furnished to the defendants' solicitors in November 2007. Since then the defendants have known of the high level of pyrite and type of damage in this property.

(d) 6 Stapolin Avenue

Mr. Lennon's errors in relation to 8 and 10 Stapolin Avenue are repeated in relation to No. 6. He places very considerable importance on a DBFL/Golder report that, again, was provided in December 2008. The report did not display damage and cracking at a level commensurate with damage and cracking in many of the Bay Lane houses, suggesting significant structural damage. It concluded that the defects noted were not sufficient to require remediation at that time. Mr. Lennon also misquotes the report. In addition, he refers to samples taken in 2007 and found to have very low pyrite levels. This information is in the 2008 discovery. Four further documents were not discovered, but it is not evident that they add significant relevant information.

Mr. Lennon appears to suggest that before receiving the report the defendants were unaware of any damage manifesting in this property. Correspondence in the 2008 discovery shows that the homeowners were complaining about defects. The defendants were aware from the plaintiffs' 2008 discovery that the plaintiffs' experts had not reached a definitive view on the status of the infill in this property, and it was marked with a "?" on the Paul Forde map. They were also aware from the January 2008 Replies that this house contained non-Bay Lane material.

Mr. Lennon acknowledged that the documents referred to at para. 242 came into existence after the swearing of the affidavit of discovery and Mr. O'Byrne does not understand there to be any criticism for failure to discover them previously. However, he appears to suggest the defendants only became aware in the 2009 discovery that further testing was done at the property in August 2008. The defendants' solicitors were notified in advance that the property was scheduled for re-testing and re-surveying on 21st August 2008. On that date the defendants had the opportunity to inspect, take further samples and carry out testing on samples from this property. They were aware that there was non-Bay Lane infill in the house. Despite the information they had, they did not seek to have this house included in the basket, nor was it referred to in cross-examination. Finally, Mr. Lennon describes No. 6 as a non-Bay Lane house, but Dr. Strogen's most recent analysis suggested two of the four samples contained some Bay Lane infill.

(e) 4 Stapolin Avenue

The defendants have known since the January 2008 Replies that this property contained some non-Bay Lane infill. Dr. Strogen's December 2008 and April 2009 reports confirm this. Mr. Lennon refers to four documents in connection with this house, one of which post-dates the original discovery. The emails raise an issue in relation to the garden, not the ground conditions. More importantly, the email in the string email at Docid EM05033 in respect of which he complains was discovered in 2008, so the defendants were aware of the homeowners' complaint of a major hollow in the garden. The plaintiffs undertook to remediate the property before completion of the sale, which completed in June 2008. Neither of two snag lists compiled by homesnag.ie in 2008, and contained in the 2008 discovery, identifies any issue with the "garden sinking".

Mr. Lennon's reference to a watercourse appears to be unrelated to this area as the fax from which he quotes locates this watercourse "to the rear of No.58/59" and does not mention 4 Stapolin Avenue. The watercourse was not terminated as stated in Mr. Lennon's affidavit but was piped. Finally, he avers that the report in relation to this property and 6 Stapolin Avenue refers to the fact that pyrite levels in one of the No. 6 samples were 0.26% with 0.09% oxidised. These results were discovered in 2008. Mr. Lennon has provided no reference for the documents in the new discovery which he states indicate 4 Stapolin Avenue had the infill replaced with new infill containing 0.38% pyrite with 0.07% oxidised. He does not advert to a letter in the 2008 discovery enclosing test results for the new infill.

(f) 16 Boyd House

Mr. Lennon suggests that the defendants only learned from Replies dated 11th May 2009 that this property contained non-Bay Lane

infill. This information was in the June 2009 Replies (the 11th May reference is incorrect). However, while the original sample was identified as Huntstown and thereafter crushed gravel, a second sample was examined in April 2009 and concluded to be from Bay Lane. It is helpful to contrast the action taken (or not taken) by the defendants in respect of 4 Stapolin House when armed with precisely the information which they now contend is of such importance in properties such as 16 Boyd House. They were aware from the 2008 discovery that the plaintiffs' experts had stated that the infill at 4 Stapolin House did not appear to be from the same source as the problematic infill. The defendants' solicitors received an email dated 18th August notifying them of re-testing and re-surveying to be carried out at this property on 26th August 2008. As they were on notice as to the assessment of the source of the sample, it is of note that they did not seek to include this property in the basket, nor did they request further testing or inspection outside of the agreed protocol.

Returning to 16 Boyd House, the document Mr. Lennon complains about is Document EM01184, which is privileged and was discovered in error in the First Schedule, First Part of the 25th June 2009 affidavit of discovery, so no claim of prejudice can be maintained in respect of this document. The information relating to the source of the infill was taken from a spreadsheet discovered by the plaintiffs in 2008 which was the subject of a privilege claim. EM01184 is not an historical document from the construction of Myrtle evidencing precisely the source of the infill in each property. The information in respect of which complaint is being made by Mr. Lennon is the result of a visual inspection of particular samples to indicate the experts' view as to source in preparation for this litigation. The defendants had the opportunity to carry out the same type of analysis on samples from this property. The defendants' solicitors were notified that this property would be re-tested on 10th November 2008 and Golder records confirm the defendants' representatives were present when the sample was taken on that date. The plaintiffs are unaware of the results of any testing or analysis on any samples taken by the defendants' representatives from this property. The defendants were aware as of April 2009 that Dr. Strogen had determined this property contained Huntstown material.

The January 2008 Replies and the up-to-date Particulars of Claim of October 2008 would have alerted the defendants to the fact that this property is not included in the claim. It was not listed in Dr. Strogen's December 2008 report as containing Bay Lane infill and was marked as a property for which the source was uncertain in the Paul Forde map. It is therefore difficult to accept the steps Mr. Lennon says would have been taken would in fact have been pursued. He appears to wish to insinuate that the plaintiffs' experts changed their position in relation to whether the infill in this property should be removed and that this change was prompted by the realisation that the infill might not be from Bay Lane. In fact, the earlier report recommended no remedial works and the later report did. The reason for the change was that in June 2008 Dr. Strogen had expressed the view that a sample from this house was limestone rich gravel in Bay Lane matrix. In addition, the later report, discovered in 2008, is a draft report. The same document was discovered in 2008, save that Dr. Maher's signature was on the version discovered in 2008.

(g) 5 Stapolin House

Mr. Lennon refers to three newly discovered documents relating to this property. The third post-dates the 2008 discovery. The first is one of the group of 11 letters dated 30th June 2008 from Menolly to homeowners that was not discovered. The second is EM01184, which is dealt with above in relation to 16 Boyd House and the above comments relating to this document apply equally concerning this property. Insofar as prejudice is claimed in relation to this property, although the plaintiffs are unaware of the results of any analysis of any samples taken by the defendants' representatives from this property, they had the opportunity to carry out the same type of analysis as the plaintiffs on samples from this property. The third document, dated 10th July 2008, post-dates the 2008 discovery and Mr. O'Byrne therefore does not believe the plaintiffs can be faulted for not discovering it. It is a reinspection snag list on Stapolin House. Mr. Lennon refers to snags detailed therein and states that the defendants would have insisted on a full re-inspection had they had documents suggesting cracking as outlined. However, an earlier (September 2007) snag list on Stapolin House discovered in 2008 details the exact same snags Mr. Lennon picked out. The defendants never requested a full re-inspection nor did they seek to include this house in the basket. The snag list was not put to Dr. Maher, Mr. Blanchette or Dr. Strogen.

The failure to discover the first two documents should not have occurred, but has not had the prejudicial effect claimed. The defendants caused none of the "extensive investigations" to which Mr. Lennon refers to be carried out in respect of other properties in respect of which similar information was in their possession. 5 Stapolin House was designated with a "?" on the Paul Forde map. It has not been claimed for in the Statement of Claim and was not identified as containing Bay Lane material in Dr. Strogen's December 2008 report.

(h) 14 Stapolin House

A similar position pertains in relation to 14 Stapolin House. Mr. Lennon refers to one of the 11 letters to homeowners dated 30th June 2008 mentioned above which were not discovered. In respect of the 11 properties in Myrtle for which the defendants received the letter of 30th June 2008 in the 2008 discovery, Mr. O'Byrne will detail how the defendants took no steps to carry out extensive investigations nor was any reference made to the letter in cross-examination of the plaintiffs' experts. Mr. Lennon refers to a number of snag lists emanating from Noel Larkin & Associates. There are three snag lists by this firm referable to Stapolin House in the 2009 discovery. They were discovered in relation to Categories 112 and 113 which came about in May 2009. The explanation for their non-discovery is that they all post-date 30th June 2008. As noted in relation to 5 Stapolin House, each of the snags picked out of the 10th July 2008 snag list in para. 255 of his affidavit was also in the September 2007 version discovered in 2008. A visual structural inspection report by O'Connor Sutton Cronin for 14 Stapolin House dated 5th February 2009 does not refer to the points Mr. Lennon picked out. Despite having the information he picked out since July 2008, the defendants have not "pursued this line of enquiry" as Mr. Lennon asserts they undoubtedly would have.

The snag list for Stapolin House dated 3rd February 2009 does not mention any of the snags Mr. Lennon picked out, the implication being that they had been remedied by that date.

Mr. Lennon is aware from Dr. Strogen's April 2009 report that his analysis of samples from this property in April and August 2008 showed Bay Lane infill in the samples as well as non-Bay Lane infill. The defendants had the September 2007 Noel Larkin snag list for Stapolin House since 2008 but the plaintiffs are unaware that any "line of enquiry" was taken by the defendants in relation to 11, 18 or 19 Stapolin House, properties they knew had been determined to require remediation since October 2008. 14 Stapolin House was identified with a "?" in the Paul Forde map. It should also be noted that Bay Lane infill has been identified in 14 Stapolin House, albeit in small quantities.

(i) Homeowners letters: 9 and 12 Stapolin House

Mr. Lennon refers to letters concerning these properties which are among the 11 letters dated 30th June 2008 which were discovered

in 2009. Mr. O'Byrne does not believe the defendants have been prejudiced by the non-discovery of these documents.

(j) 12 Stapolin House and DBFL/Golders Report

Mr. Lennon refers to a DBFL/Golders report on cracking in 12 Stapolin House in the new discovery. He says that had this report been available to him, the defendants would have wished to conduct a further extensive examination with a view to inclusion in the basket. This report was made available in December 2008 as an attachment to the statement of Mr. Forde and was clearly identified on page 87 of that statement. O'Connor Sutton Cronin attended at the property and it can only be assumed that the defects noted by DBFL for the purpose of preparing their draft report were also visible to O'Connor Sutton Cronin.

Golder records show that representatives of the defendants were present when Golder took a sample of the infill in November 2007. The defendants were notified that this property was scheduled to be re-tested and re-surveyed on 6th October 2008. Mr. Lennon suggests an inconsistency between the approach to remediation in this report and in the Replies dated 16th June 2009. However, Mr. Lennon misquotes the recommendations, in that he states that despite the cracking the report concluded that no remedial works were required at that time, but fails to refer to the first sentence, which stated that the defects were insufficient to require remediation at the time but since pyrite is in the infill it is recommended that this house be re-surveyed and re-sampled in nine months to assess whether remedial action is necessary. The defendants will have been aware since receipt of the Replies and the up-to-date Particulars of Damage and Loss dated 24th October 2008 that this property had not been claimed for in the Statement of Claim as of that date. The plaintiffs have taken a careful and analytical approach to determining whether or not this property required remediation. As a result of the extensive testing previously completed by the experts retained by Menolly on the Bay Lane infill and based on the damage caused by this stone as reported on by DBFL, it has consistently been the conclusion of all of these experts that the Bay Lane stone infill is not fit for purpose and must be removed. Based on the findings from this additional investigation and confirmation of the presence of Bay Lane material in the infill, DBFL and Golder have recommended that this house be remediated.

The defendants had the same opportunities as the plaintiffs to test and survey this property and to analyse the infill. It is difficult to accept Mr. Lennon's contention that the defendants' failure to see DBFL/Golders record of the same inspections and testing their own experts carried out has resulted in the defendants being unable to conduct further extensive examination of the property with a view to including it in the basket. 12 Stapolin House has shown traces of Bay Lane. It was marked with a "?" on the Paul Forde map. The defendants had communicated to them everything they now say they needed to know to undertake all the tasks which they now claim would have been brought to bear on this property. They knew there was a query over whether it was Bay Lane and the type of damage it was manifesting but took none of the steps Mr. Lennon asserts this information would have prompted.

(k) 11 Stapolin House

There is no inconsistency in the approach adopted in respect of 11 Stapolin House, which has always been a Bay Lane house with only traces of non-Bay Lane infill being identified there. The property had a pyrite level of 2.43%. The defendants have known from Dr. Strogen's report since 3rd April 2009 that this property contains both Bay Lane and non-Bay Lane infill. Of the two documents Mr. Lennon refers to in relation to this property, one post-dates the 2008 discovery and the other was discovered in 2008. He is well aware from the appendices to Dr. Strogen's report that this house contains Bay Lane infill. His statement that it does not contain it is misleading.

(l) 10 Stapolin House

Mr. Lennon refers to two documents at para. 266. One is a DBFL report which was an appendix to the witness statement of Mr. Forde delivered to the defendants in December 2008 and was clearly flagged at page 87 of the statement. A letter from BCM to A&L Goodbody dated 25th September 2007 gave notification of testing of this house and surveying on 27th September 2007. An email from BCM to Lennon Heather dated 14th August 2008 notified that the property was to be re-tested and re-surveyed by DBFL on 22nd August 2008. DBFL records confirm O'Connor Sutton Cronin attended at this property when DBFL were carrying out their survey and appendices to their report confirm that they have inspected it. Golder records confirm that representatives of the defendants attended at the property when it was being re-tested. Mr. O'Byrne believes it has to be assumed that the defects which were visible to DBFL when attending at this property must have been evident to O'Connor Sutton Cronin who attended with them and that the defendants' experts notified the defendants of what they saw.

In addition to the DBFL report delivered in December 2008, the defendants had since July 2008 a letter from Arthur Cox to BCM referring to lots of cracking in walls and a letter from BCM to Arthur Cox stating that the plaintiffs' experts had advised that the infill beneath the property did not appear to be from the same source as the problematic infill elsewhere and consequently might not be susceptible to swelling. The defendants must also have had the findings of their engineers arising out of their attendance at the survey of the property with DBFL. None of these documents was put to Dr. Maher or Dr. Strogen when they were cross-examined about this property. It is very difficult to accept that the defendants have been prejudiced by the fact that the report was not previously discovered. The property was identified as potentially non-Bay Lane but shown to contain Bay Lane fill in one of the samples subsequently taken. The property was identified with a "?" in the Paul Forde maps.

(m) 13 Stapolin House

Mr. Lennon is incorrect in stating that the defendants only learned that this property contained non-Bay Lane fill during trial. One of the letters from BCM dated 30th June 2008 stating that the plaintiffs' experts had advised that the infill beneath the property did not appear to be from the same source as the problematic infill elsewhere and consequently might not be susceptible to swelling was discovered in 2008. Mr. Lennon stresses that had the defendants had the information contained in this letter they would have carried out extensive further investigations, would have applied to have the property included in the basket and would have cross-examined Dr. Maher, Mr. Blanchette and Dr. Strogen about its contents. Dr. Strogen was cross-examined about this property and no reference was made to the letter.

In addition, the report whose non-discovery is said to have prevented the defendants from pursuing a very significant line of enquiry was one of those appended to the witness statement of Mr. Forde and was clearly flagged at page 87 of the statement. Golder records confirm that representatives of the defendants attended this property to take an infill sample and BCM notified Lennon Heather in advance that this property was to be re-tested and re-surveyed. The plaintiffs are unaware of any results from testing on this property by the defendants. Mr. Lennon does not refer to a snag list discovered in 2008 referring to cracks in walls. He refers to low pyrite results but they were discovered in 2008. No "significant line of enquiry" was pursued by the defendants in relation to this

house since December 2008 as far as the plaintiffs are aware.

(n) Parker House Letters

As Mr. Lennon states, the 2009 discovery contains a number of letters dated 30th June 2008 not discovered in 2008 which were sent to residents of Parker House advising them that their houses might not contain Bay Lane infill. Of the 11 properties in respect of which letters of that date were discovered in 2008, three (Nos. 35, 38 and 39) were in Parker House. The defendants undertook no detailed examination of these houses, did not proffer them for the basket and never raised the letters of 30th June 2008 in cross-examination.

(o) 35, 38 and 39 Parker House

O'Connor Sutton Cronin confirm in appendices to their expert report of 30th January 2009 that they inspected these three houses. Golder records show that representatives from the defendants attended with Golder during sampling at 35 and 38 Parker House in October 2007. They were notified of re-testing to be carried out on Nos. 38 and 39. Despite these opportunities to investigate these three properties and the information the defendants had in relation to them, none of the nine visual structural inspection reports of February 2009 by O'Connor Sutton Cronin deals with the three houses. During Dr. Maher's cross-examination about No. 35 and Dr. Strogen's cross-examination about No. 38, no reference was made to the letter of 30th June 2008. Based on the above, it is very difficult to accept Mr. Lennon's claim that the contents of the 11 identical letters discovered in 2009 were indisputably relevant to the cross-examination of Dr. Strogen and Dr. Maher.

In addition, in respect of five of the six properties in Parker House the subject of the letters that were discovered for the first time in 2009, the defendants had information which, contrary to Mr. Lennon's averments, clearly put him on notice that there was an issue as to whether same contained Bay Lane infill. For example, they were not listed in Dr. Strogen's December report as properties which contained Bay Lane infill, nor was the sixth of these houses. In addition, the defendants were notified of the initial testing of infill in these houses. The defendants were also notified of re-testing by email to Lennon Heather in respect of these houses.

The defendants therefore had, or had available to them, samples from those houses which could easily have been reviewed at any time. As with other parts of his affidavit in which he addresses these letters, Mr. Lennon partially quotes from them, and in so doing, obscures their actual effect. Each letter referred to the need for further testing and that only following such testing would it be possible to advise definitively on the status of the infill. Finally, document M-052-031 referring to 31 Parker House appears to be included in error in the list of documents at para. 276 of Mr. Lennon's affidavit, as it is not a letter concerned with non-problematic infill. It was discovered in 2008.

(p) 9, 24 and 31 Parker House: Common Area Snag List

Mr. Lennon refers to three documents at paras. 281-285 of his affidavit. The document to which he attaches the greatest significance (EM06941) was dated 10th July 2008. It could not have been discovered in the first discovery. Mr. Lennon also refers to a snag list on Parker House by Noel Larkin & Associates. This document is unsigned but the signed copy of the same document was discovered in 2008. In addition, it does not have the relevance suggested. In assessing the credibility of Mr. Lennon's claims of prejudice, it is important that the Court bears in mind that in his executive structural report on properties in the three estates Mr. Sutton states that O'Connor Sutton Cronin "have viewed 379 properties from August 2007 until November 2008" and that "[a] list of houses is shown in Appendix B". Appendix B shows that O'Connor Sutton Cronin "viewed" all ground floor units in Parker House except Nos. 23, 24 and 29. Nos. 9 and 31 were viewed. Any snags or damage in these units were and the other 16 units they viewed were apparent to them at that time. No special or additional testing of these units was raised or carried out by the defendants. Appendices to Mr. Forde's witness statement included listings of homes whose owners had informed Menolly had cracking problems. No special or additional testing was raised or carried out by the defendants. Another appendix to Mr. Forde's witness statement contained the early DBFL reports on 20 houses in Drynam, which contained many references to cracking but no special or additional testing was raised or carried out by the defendants.

The other document Mr. Lennon refers to is a short email relating to 24 Parker House. It states "DBFL has recommended a re-assessment for six months. He is anxious as the cracks are quiet [sic] evident and wants this situation rectified immediately as he is very concerned." The DBFL report on cracking at this premises was discovered in 2008 and states that the house should be re-surveyed in six months' time. The email was not discovered because it was deemed not relevant by the team of Junior Counsel engaged for the 2008 discovery.

(q) 38 and 39 Parker House: DBFL/Golder Report

At paras. 290-294 Mr. Lennon refers to two reports which were discovered for the first time in 2009. He catalogues a range of steps that would have been taken had his clients had this information before the trial. Once again, however, these documents were in the appendices to Mr. Forde's witness statement made available to the defendants in December 2008 and no witness was questioned regarding the contents of these documents or relating to the properties to which they refer. In particular, the report on 38 Parker House was not referred to during the cross-examination of Dr. Strogen about that property. Appendices to the expert report of O'Connor Sutton Cronin dated 30th January 2009 confirm that they inspected both of these houses. DBFL records confirm that O'Connor Sutton Cronin attended at 38 and 39 Parker House with DBFL when DBFL surveyed them. It must be assumed that the defects outlined in their reports would have been as apparent to the defendants' engineering experts as they were to DBFL. Finally, of the houses referred to by Mr. Lennon in this part of his affidavit (Nos. 7, 9, 24, 31, 35, 38 and 39), all but one of these were determined on re-testing to contain some Bay Lane infill.

(r) Talavera House

Mr. Lennon's averments in respect of 21, 22 and 23 Talavera House show the nature and extent of the exaggeration prevalent throughout his affidavit in relation to his allegations of prejudice. He focuses on two DBFL reports in respect of Nos. 21 and 22. As with previous such reports, it is stated that various lines of enquiry would have been followed had these been drawn to the attention of the defendants. The report for No. 21 was discovered in 2008. The DBFL report for No. 22 is a draft report not signed by Dr. Maher. The signed version was discovered in 2008. The draft version was attached to an email. The email was marked not relevant by the team of Junior Counsel in 2008.

Mr. Lennon states that the defendants were first advised in the June Replies that 21, 22 and 23 Talavera House contained non-Bay

Lane fill. None of the properties was listed as containing Bay Lane fill in Dr. Strogen's expert report dated 19th December 2008. Appendices to his April 2009 report listed No. 21 as "Crushed Gravel", No. 23 as "??" and No. 22 as "HT" in Appendix 3 and as "Crushed Gravel" in Appendix 4. In addition, the levels of pyrite in these properties were high, so despite the absence of Bay Lane fill in the samples viewed to date, the indicators are that the fill may contain Bay Lane fill.

Mr. Lennon again complains that he was in some sense unaware that there was uncertainty as to the source of the stone in some of these properties, but this was observed in Mr. Forde's witness statement of December 2008 and highlighted in the Paul Forde map at Appendix 4.3. The O'Connor Sutton Cronin expert report dated 30th January 2009 prepared for the defendants demonstrates the extent of the investigation carried out by their engineering experts in respect of the doubtful properties. There is no basis for the suggestion that the defendants in some sense lacked information they required to address the matters referred to by Mr. Lennon.

Mr. Lennon refers to a statement in the report for No. 22 that "recent floor levelling compound may cover possible cracking". The plaintiffs' experts advise that Mr. Lennon is incorrect to say with certainty that this "would also indicate that the surface of the concrete floor was potentially uneven". Mr. O'Byrne is advised that the floor levelling compound was poured to make good the reinstatement of the slab after it had been cored to facilitate the taking of the infill sample. No issue of unevenness of floor arose. Mr. Lennon refers to the floors in 30 Talavera House being poured on 9th October 2006. He points to page 37 of Document EM00677. This is a spreadsheet over which litigation privilege should have been correctly claimed. It was marked not relevant by Junior Counsel in 2008. The date Mr. Lennon refers to as a pour date is in fact the date on which the sale of this property was closed. The spreadsheet refers to some "pour dates" but these refer to pouring after remediation. Mr. Lennon is aware from the foundation pour map of Myrtle furnished in April 2009 that the foundations in Talavera House were poured between approximately 23rd February and 21st March 2006.

Mr. Lennon's conclusions from his assumptions that it is very unlikely that such cracking and "unevenness" in the slabs could have been caused within such a short period after what he believed was the pour date, i.e. after nine months, are misplaced. Menolly received complaints of cracking from homeowners between 12 and 24 months of their taking occupation of houses in Drynam. Appendices to Mr. Forde's witness statement list houses in Drynam with early cracks and record re-opening cracks in the 20 early DBFL reports.

(s) Units at Sweetman House

The document referred to at paras. 302 and 304 of Mr. Lennon's affidavit is a letter from Golder to Menolly in relation to 9 Sweetman House. However, the essential information therein which Mr. Lennon regards as being "of fundamental significance" is contained in a document discovered by the plaintiffs in 2008. Furthermore, in a letter discovered in 2008 Golder state that based on testing of infill used in, *inter alia*, No. 9, the results indicate it is not susceptible to swelling and is therefore suitable as underfloor infill. The document referred to at paras. 302 and 304 added nothing to the defendants' knowledge of any issue relevant to this house.

(t) 59 Grange Lodge Avenue

At paras. 306-309 of his affidavit, Mr. Lennon addresses this property. He appears to be aware of the discovery of this report in 2008 as the Docid he refers to is where an incomplete copy of the report was discovered in 2008. The complete version was also in the 2008 discovery. Furthermore, this report was attached to Mr. Forde's witness statement. Mr. Lennon appears to complain that Golder was declaring infill safe where the pyrite level was approximately 0.73% in units at Sweetman House but concluding that it was swelling at 59 Grange Lodge Avenue where the pyrite levels were at only 0.58%. The 2008 discovery contained all of this information. Even aside from these matters, the alleged inconsistencies are not there.

In any event, the plaintiffs have consistently excluded Sweetman House from the claim. It should therefore not surprise Mr. Lennon to see letters from Golders stating that they conclude the aggregate sample tested is not susceptible to swelling and is suitable as underfloor infill. Golders have consistently been of the opinion that it is not only the level of pyrite which influences swelling potential but also the quality and type of the stone itself.

(u) 9 Sweetman House

A document stating that the original percent of pyrite present for 9 Sweetman House was 0.87% was discovered in 2008. A letter from Golder Associates stating that the infill used in this property had been sampled and tested, and that based on this testing Golder confirm the results indicate that this infill is not susceptible to swelling and is therefore suitable for use as under floor infill, was also discovered in 2008. The defendants were therefore aware of both the test results in respect of that property and the recommendation of Golder as to the suitability of the infill under it from the 2008 discovery. In addition, the defendants were furnished with test results in respect of this property in January 2008.

(v) 61 Sweetman House

The defendants were aware from the 2008 discovery that the original percent of pyrite present for 61 Sweetman House was 0.82% and that the recommendation of Golder was that the infill under this property was suitable. In addition, the defendants were furnished with test results in respect of this property in January 2008. Since the defendants also had the DBFL/Golders report in respect of 59 Grange Lodge Avenue, they cannot claim to have been unaware of this perceived inconsistency in assessment of whether remediation was required. Further, it is important to bear in mind, insofar as 59 Grange Lodge Avenue is concerned, that while the first sample from this property was viewed as non-Bay Lane, the second was identified as all Bay Lane.

(w) Sweetman House Spreadsheets

Spreadsheet EM06505 was not discovered in 2008. However, all test results therein are set out in a document discovered in 2008. The defendants knew from the 2008 discovery that a number of the units in Sweetman House were exhibiting pyrite levels higher than that found at 59 Grange Lodge Avenue. The second spreadsheet Mr. Lennon refers to in this part of his affidavit is EM02147, which was not discovered in 2008. This document does not evidence the recommendation by the plaintiffs' experts of the use of a 1.2% benchmark. The defendants have incorrectly assumed that the plaintiffs' experts advised on the use of a benchmark of 1% or 1.2% pyrite based on two documents discovered by the plaintiffs in 2009. Menolly compiled information on the basis of properties containing above or below a certain percentage of pyrite but this type of benchmarking was not on the basis of advice of the plaintiffs' experts and the decision as to whether to remediate was taken by Menolly on the advice of its experts. The plaintiffs and their experts

understood at the time of the preparation of the Replies dated 10th January 2008 that the defendants' infill was not used in Sweetman House. The defendants knew this.

It is disingenuous of Mr. Lennon to state that the defendants now know that the retail area at Sweetman House (41 Sweetman House) has been remediated although the basis for this is still unclear. The defendants were fully aware from correspondence between BCM and Lennon Heather of the reason why the plaintiffs decided to remediate the retail unit. Furthermore, they were afforded the opportunity to attend during remediation and took a number of samples from this property on 15th May 2008. Again the defendants were aware from the 2008 discovery of the plaintiffs' test results of 1.38% and 0.5%. The 2008 discovery contains three letters from Golders to Menolly dated 6th May 2008 which set out Golders' confirmation that the results for Units 55 and 56 below Units 57, 59 and 60 indicate that this infill is not susceptible to swelling and is therefore suitable as underfloor infill.

(x) Snagging at Sweetman House

At paras. 320-327 Mr. Lennon identifies seven documents which it is accepted should have been discovered in 2008. Mr. Lennon asserts that the properties at Sweetman House are manifesting damage and cracking "potentially comparable" to cracking in other Bay Lane properties. The damage in Sweetman House is not comparable to that in the Bay Lane properties.

Six of the documents have been reviewed by Mr. Forde, who advises that the issues they disclose are not structurally significant. The defendants were notified of testing at 15 and 67 Sweetman House and therefore had an opportunity to attend and inspect. At para. 327, Mr. Lennon refers to two documents which post-date 30th June 2008 and were discovered on the basis of the new discovery categories.

(y) The implications of the newly discovered Sweetman House documentation

Mr. Lennon suggests that had he been aware of the benchmark level of pyrite this would have been of relevance to the approach the defendants' experts would have adopted to other properties in the three estates whose infill had equivalent levels of pyrite. Again, Golders' assessment of the suitability of the infill beneath Sweetman House was not based on a "benchmark". The quality of the infill beneath Sweetman House was a very important consideration and, as the defendants know from the January 2008 Replies, it was the plaintiffs' understanding at that time that the infill was not from Bay Lane. The defendants are further aware from correspondence in April 2008 that the plaintiffs had been advised that some Bay Lane infill had been used in the retail unit of Sweetman House, which was a factor taken into account by the plaintiffs' experts in recommending remediation.

Regarding the new information, Mr. Lennon refers to four properties – 4 Boyd House, 45 Morrow House, 30 Myrtle House and 7 Hoey Close. However, a consideration of the documents referred to in this regard demonstrates that any failure of the plaintiffs to discover documents in respect of these properties has had no effect on the defendants' ability to defend these proceedings.

4 Boyd House

Mr. Lennon states that "4 Boyd House has now been confirmed by the Plaintiffs as containing non Bay Lane infill". This is misleading as both the plaintiffs' and defendants' experts have confirmed that one of the samples from this property is Bay Lane infill. The Joint Expert Report notes that this property is one where the experts agree on the composition of the samples of infill but differ in respect of the proportions of the various components. The suggestion that this information was only recently communicated is also false; this property was marked with a "?" on the Paul Forde map. Mr. Lennon claims that any damage at 4 Boyd House has now assumed great significance, but the defendants had all of the information from the 2008 discovery that now appears to lead to this conclusion, save the reference to concrete in relation to this property, in EM01184, which again is a privileged document over which privilege was inadvertently waived. The part of Docid M-80-107 which refers to 4 Boyd House was discovered in 2008. The defendants therefore had from the 2008 discovery snag lists which record the cracking now referred to; legal correspondence noting the homeowners' complaints; pyrite levels for Boyd House of 0.73% with total sulphur levels recorded as 0.39%; and analytical test results for 4 Boyd House as seen in M-80-107. The defendants also knew from the 2008 discovery that the plaintiffs' experts had recommended further sampling and testing at this property as the results obtained had been inconclusive to definitively assess the status of the infill under this property.

They were also aware that these levels were less than the results for 9 Sweetman House and that Golders had confirmed to Menolly that based on the testing at 9 Sweetman House the results indicated this infill material was not susceptible to swelling and was therefore suitable for use as underfloor infill. The defendants availed of the opportunity to inspect and take samples from this property. Despite all of the information they had, they did not seek to include this property in the basket or to carry out additional or further testing in relation to it.

45 Morrow House

Mr. Lennon states that the defendants now know that 45 Morrow House is a property which contains non-Bay Lane infill. This is misleading as both the plaintiffs' and defendants' experts have confirmed that one of the samples from this property is Bay Lane infill. The Joint Expert Report notes that this property is one where the experts agree on the composition of the samples of infill but differ in respect of the proportions of the various components. The plaintiffs have not claimed that this property contains non-Bay Lane infill in the Replies dated 16th June 2009. The DBFL report referred to is a draft report not signed by Dr. Maher. The same draft report, but signed by Dr. Maher, was discovered in 2008. The report sets out a pyrite level lower than the level for 9 Sweetman House furnished in the 2008 discovery. O'Connor Sutton Cronin inspected this property. DBFL have confirmed that the defendants' engineers did not attend at the re-assess survey of this property. What Mr. Lennon describes as the newly discovered snag list by Noel Larkin & Associates referring to 45 Morrow House post-dates the first discovery and was discovered on the basis of Categories 112 and 113. An almost identical earlier version of this snag list for Morrow House by Noel Larkin & Associates was discovered in 2008, but no investigation of the type Mr. Lennon refers to in para. 333 took place since that document was received.

30 Myrtle House

In his December 2008 report Dr. Strogen assessed a sample of this property as being Bay Lane. Only after remediation was it found to contain a mixture. Mr. Lennon refers to test results for this property of 0.54% pyrite of which 0.09% had oxidised. This result was discovered in 2008. The part of Docid EM03110 which Mr. Lennon refers to was discovered in 2008. A letter to the defendants' solicitors dated 22nd April 2008 informed them that this property was to be retested on 23rd April 2008. Golders confirm that a

representative of the defendants was in attendance when these further samples were taken. The test results obtained by Golders in respect of samples from this property were furnished to the defendants on dates in 2008 and 2009. The defendants are fully aware of the condition of this property. Appendix B to the O'Connor Sutton Cronin Executive Structural Report on properties in the estates notes that O'Connor Sutton Cronin inspected this property. It appears from test results furnished by the defendants' solicitors that they carried out various tests on samples from this property. Despite the low pyrite level seen at Docid P02343 and the evidence gathered during remediation, the defendants did not seek to include this property in the basket.

7 Hoey Close

Similarly, and as Mr. Lennon acknowledged, the 7 Hoey Close test results to which he refers were in the first discovery.

(viii) The (allegedly) non-Bay Lane Properties in Beaupark

The heading of this section of Mr. Lennon's affidavit is misleading. In respect of 16 Beaupark Close and 7 Beaupark Square, the plaintiffs' and defendants' experts agree in general with the composition of the infill samples but differ in detail with respect to the proportions of the various components. Mr. O'Byrne is uncertain what point Mr. Lennon is making in connection with these two houses. The defendants have had the DBFL report referred to at para. 340 since the first discovery, and the six month reappraisal report referred to by Mr. Lennon at para. 341 only came into existence on 25th July 2008. The DBFL report referred to at para. 344 was annexed to Mr. Forde's witness statement. The test results in respect of this property were in the 2008 discovery. The Executive Structural Report of 30th January 2009 notes that this property has been inspected by O'Connor Sutton Cronin, so the defendants have been able to make their own assessments in respect of defects in the property.

(ix) Documentation demonstrating the Plaintiffs' alleged uncertainty regarding sources of infill
Mr. Lennon refers to a map at para. 358, but this map was furnished to the defendants in the January 2008 Replies. Mr. Lennon's version simply has a handwritten note correcting the spelling of Moyglare.

EM04020 is an email relating to properties in Beaupark but is not relevant to the properties the subject matter of these proceedings. In relation to document M-35-011, the minutes of a number of Helsingor Board meetings were reviewed by BCM in 2008 but incorrectly marked not relevant. The information therein is not prejudicial to the defendants. Phase 1 (i.e. Myrtle) contains the properties that are the subject matter of these proceedings and the fact Lagan infill was used in Phase 1 is well known to the defendants. Phase 2 is Red Arches, where Bay Lane infill was not used under the properties, which do not form part of these proceedings. Document M01683 appears to be a working draft of a map identifying the source of infill in Drynam. It was marked not relevant by the team of Junior Counsel in 2008. The defendants were furnished with a map identifying the source of infill in Drynam based on the review carried out by Menolly in the January 2008 Replies.

(x) Spreadsheet dated 1st June 2007 showing pour dates, location and source of infill
At para. 360 Mr. Lennon refers to a spreadsheet furnished in the 2009 discovery. This document was an early attempt to ascertain the source of infill. The reference to Moyglare supplying stone in July 2003 was in fact incorrect. A version of this spreadsheet was discovered in 2008; a claim of privilege was asserted in respect of this document as it was prepared in preparation for these proceedings. Again, spreadsheet EM07945 was compiled for the purpose of this litigation and the homeowner litigation. The information therein was later corrected. As the defendants know from the January 2008 Replies, the plaintiffs reviewed various documents for the purpose of compiling information in relation to the supplier of stone to each property in Drynam. The defendants were furnished with this information in the replies. Again, EM01184 is based on Dr. Strogen's findings at that time. The Peter Strogen document containing this information was discovered in 2008; a claim of privilege was made in respect of this document. EM03325 was discovered in 2008 and a claim of privilege was made in respect of it.

(xi) The Alleged Prejudice
Again, 11 of the letters to homeowners dated 30th June 2008, indicating that the plaintiffs' experts had advised that the stone infill beneath their properties did not appear to be from the same source as the problematic infill found elsewhere and consequently might not be susceptible to swelling, were discovered in 2008.

(a) 6 Stapolin Avenue

As Mr. Lennon accepts, the defendants were advised that this property contained non-Bay Lane infill in the January 2008 Replies. While Golder records note that a representative of the defendants attended with them at this property on 20th September 2007 when Golders were taking a sample, it is not apparent that the defendants have carried out any analysis of infill samples from this property. The plaintiffs have not received any testing results under the Terms of Settlement 2008. No efforts were made by the defendants to inspect this house despite the defendants' knowledge.

(b) 20 Stapolin House and 4 Stapolin House

Visual Structural Inspection Reports on these properties by O'Connor Sutton Cronin were delivered to the plaintiffs in June 2009. These reports do not refer to the letters or the information they contain. The defendants had that information in respect of both houses since July 2008 but it appears their engineering experts were unaware of it or did not view it as significant. It is clear that even though the defendants had samples of infill from 4 Stapolin House, had the letter, had an engineering inspection of the house and knew since the January 2008 Replies that this house was not claimed for, they took no steps to carry out further investigation of the property. The defendants received advance notice of testing and surveying to be carried out at 20 Stapolin House. The report of O'Connor Sutton Cronin on this property states that they have not carried out any test on the fill below the slab.

(c) 8 Stapolin Avenue, 35 Parker House, 38 Parker House and 39 Parker House

These houses were dealt with above. In each case the defendants had the letter, they were notified of the re-testing schedule in August 2008 (8 Stapolin Avenue, 38 and 39 Parker House), O'Connor Sutton Cronin attended all three of the Parker House properties yet no Visual Structural Inspection Report has issued for these properties.

(d) Stapolin House: 1, 3, 10 and 13

The defendants had the letters for these houses since July 2008. No Visual Structural Inspection Report by O'Connor Sutton Cronin was furnished in respect of any of these houses despite confirmation in their expert report that Nos. 1, 3 and 10 were inspected by them. It is not apparent that the defendants carried out any analysis of samples from the properties as no test results identifying them were furnished pursuant to the Terms of Settlement. This is against a background of notifications of testing and scheduling.

None of these 11 houses was identified as containing Bay Lane material in Dr. Strogen's December 2008 report and none is claimed for in the Statement of Claim. The defendants did not seek to include any of these 11 in the basket, nor did they seek any further testing or inspections of these properties outside of the agreed protocol. No reference was made to the letters in the cross-examination of Dr. Maher concerning two of these properties or in the cross-examination of Dr. Strogen concerning six of them. It is very difficult to accept Mr. Lennon's claims in relation to any of these 11 properties that had the letter been discovered the defendants would have carried out extensive investigations to identify whether damage was comparable to damage elsewhere in the estates, applied to put the houses in the basket or cross-examined Dr. Maher, Mr. Blanchette and Dr. Strogen on these issues. They took none of these steps in respect of the 11 Myrtle houses for which they had the letter.

V Section 3 of the Affidavit Sworn by Mr. Lennon: Concrete Delivery Documentation

(i) The additional delivery dockets discovered in June 2009

Mr. Lennon refers to dockets showing the addition of "water and/or sand". Mr. O'Byrne believes he has misread and mischaracterised the dockets with regard to the alleged addition of sand and with regard to the addition of water. The dockets do not suggest that sand was added on site. Extra sand was included in the mix by the readymix supplier. Insofar as the addition of the water is concerned, Mr. O'Byrne believes that of the 3,738 dockets discovered in June 2009, water is noted on the dockets to have been added in 315 cases, with only 294 of these being relevant dockets where water is recorded as having been added in relation to the three developments the subject matter of these proceedings. This represents about 7.16% of the 4,101 dockets (the 3,738 just referred to plus 363 recently discovered by Halton Concrete). If the addition of water was the principal cause of the damage then, if Mr. Lennon is correct, one would expect to find evidence of damage in no more than 7.16% of the houses. This is far less than the number exhibiting signs of distress.

The water/cement ratio results obtained by STATS are based on an inaccurate test procedure, the results of which are contradicted by their own compressive strength testing and the results of their petrographic examinations. Dr. Maher indicated that the water/cement ratio results obtained by the defendants are inherently inaccurate since a series of assumptions had to be made to establish them in the absence of actual data relating to the individual components of the concrete mix.

Despite the fact that six dockets in the 2008 discovery noted that water was added on site, the defendants' experts clearly proceeded on the basis that they believed there was a likelihood that water had been added to the readymix concrete delivered to the estates.

(ii) The assertion that the Defendants have been prejudiced by the non-discovery in June 2008 of the delivery dockets

Mr. Lennon contends that the absence of this documentation has prejudiced the defendants not only in relation to the cross-examination of Dr. Maher but also in a more fundamental way in that this documentation, had it been provided in the original discovery, would have prompted a far more extensive investigation. He also states that had the defendants known of the extent to which water was being added, the possibility of shrinkage could have become the single major issue regarding O'Connor Sutton Cronin's analysis of the cracking of the slabs. Mr. O'Byrne has given very careful consideration to these averments and to the materials the defendants have placed before the Court to date. He does not believe the contentions advanced by Mr. Lennon bear scrutiny when, *inter alia*, they are considered in the context of the other materials placed before the Court by the defendants.

Mr. O'Byrne believes it is quite apparent from the material placed before the Court before June 2009 that the defendants had identified that the addition of water to the concrete was a very significant issue (from their perspective) from a very early stage. This is apparent from the reports of several of the defendants' experts, particularly the report of Dr. Sims and Dr. Blanchard of STATS entitled "Alleged Damage caused by Pyrite-Induced Heave". It is inconceivable that having regard to his expertise Dr. Sims would not direct that all appropriate testing be carried out. It is quite apparent from the report that the issue of the concrete and the water/cement ratios was a significant issue for STATS and that it carried out a range of testing on the concrete as it considered appropriate. The report is dated January 2009 but it is clear that STATS have been involved on the defendants' part at least since February 2008. It is clear that STATS, in preparing their report, and in carrying out testing, proceeded on the basis that it was likely that water had been added to concrete on site and that they regarded this practice as something which was to be expected.

Guided by their experts, the defendants were therefore careful to require that samples of the slab should be obtained from each of the remediated houses. One of the principal tests carried out on the defendants' behalf was to determine the water/cement ratio in the concrete used to create the slabs. These tests were conducted from a very early date, and were not in any way dependent upon the plaintiffs' discovery. The defendants have taken ample concrete samples to enable them to carry out such testing as they see fit. Mr. O'Byrne believes that it is apparent from the STATS report that significant emphasis was placed by the authors on the results of the water/cement ratio testing undertaken by them. The defendants' experts clearly regard the results of the STATS water/cement testing as indicative that the concrete had disproportionately high water content. STATS conclude in their report, *inter alia*, that damage to the slabs at many of the properties at Drynam Hall and Beaupark can be attributed to drying shrinkage of a relatively wet, weak, thick and unreinforced concrete slab.

Neither O'Connor Sutton Cronin nor Bickerdike Allen carried out any testing in relation to the water/cement ratio. They appear to have relied on the testing undertaken by STATS and Queformat. However, it is clear from Mr. Sutton's evidence to date that he has identified the addition of water to the mix as a significant cause (in his view) of the cracking. It appears the number of tests carried out by Queformat was relatively small. Most of these tests appear to have related to the infill and underlying soil. However, testing of concrete cores from slabs was also carried out. The authors of that report suggest that in the samples they tested the aggregate in the concrete was "porous". They suggest that it would consequently have been necessary to add more water to the mix. They refer to shrinkage and state that this may explain in good part the cracking appearing in photographs sent in an email. From the reports of the defendants' experts and Mr. Sutton's evidence to date, it is quite clear that the defendants' experts were aware of a practice in the building industry of the addition of water to concrete on site and that they were seeking to place considerable emphasis on the results of their testing as to the water/cement ratio. It is evident that, from the outset, the defendants' experts were focusing on the water/cement issue and on the likely addition of water to the mixes; they were therefore clearly on notice of the issue from their own investigations. It was open to them at any time to pursue any additional tests they considered might be appropriate.

(iii) Selective references to the transcript

Mr. Lennon, on the basis of selective references to the transcript, seeks to convey the impression that, in some way, the defendants were on Day 8 prevented from pursuing the issue of the addition of water to concrete in their cross-examination of Dr. Maher. This issue was pursued very fully in his cross-examination on Days 10 and 11. On Day 8 counsel for the defendants makes the case that, from their perspective, what was important was not who added water to the mix but the results of the tests which (on the defendants' case) provide readings (based on the water/cement ratio) demonstrating that too much water had been used in the slabs. Mr. O'Byrne believes it is clear from Mr. Sutton's evidence that the defendants were at all material times proceeding on the basis that water had, in all probability, been added to the mixes resulting in what the defendants contend are unusually high water/cement ratios likely to have led to shrinkage.

(iv) The additional test suggested at para. 59 of Mr. Lennon's Affidavit

In view of the above, Mr. O'Byrne believes it is clear that the defendants have been strongly canvassing that water has been added to concrete on site and that the results of the tests in relation to water/cement ratio in the slabs show the presence of too much water. He cannot accept that the production of the additional delivery dockets in the June 2009 discovery would have alerted the defendants to carry out additional testing. They already had sufficient information available to cause them to carry out any further testing of the kind they now contend for (including the construction of the model floor suggested at para. 59). Mr. Forde and Dr. Maher advise that the test proposed in para. 59 would serve no useful purpose given, *inter alia*, the number of slabs in place, the fact that extensive testing and inspections have been carried out on these slabs and the fact that they have the advantage that they clearly represent actual in situ conditions and usage. The plaintiffs' experts advise that it is a well accepted characteristic of concrete that shrinkage will occur. It is therefore difficult to understand why new research would be needed to understand this phenomenon. It is impossible to understand why the defendants did not build a model slab before now if they considered it necessary to study shrinkage. The only "new" information is that some of the extra water the defendants were alleging was in the mix was added on site and not at the plant. Where it was added has no bearing as to its alleged impact.

(v) Other issues in relation to concrete

Mr. Lennon raises a number of additional issues in relation to concrete.

(a) The concrete mixes

Mr. Lennon contends that 51 different mix designs were employed and that consequently the defendants' experts advise that the defendants would have to carry out far more extensive sampling and testing of the concrete as the quantity of mix designs is directly relevant to the amount of testing required. He contends that "this fact was acknowledged by Dr. Maher" in evidence and refers to a passage from Dr. Maher's evidence. Mr. O'Byrne believes it is apparent from a consideration of Dr. Maher's evidence on Day 6 that Mr. Lennon is taking this extract from his evidence out of context. The point being made by Dr. Maher was that one needed to have samples of the original specific aggregates and cement used by the various suppliers in their concrete mixes to allow better assessment of the water/cement ratios by means of the test methods being used by STATS.

Making one set of assumptions to account for all the aggregates and cements used so as to interpret the results of the water/cement ratio testing, where there are potentially seven different sources of aggregates and cements involved, makes the exercise completely unreliable. Information from the additional concrete dockets has no impact on the magnitude of this unreliability and provides no additional basis to permit the inadequacies in the test to be addressed. Additional repetitions of the same unreliable test will not allow any better interpretations. The number of mixes is really irrelevant. The critical issue is that there were multiple suppliers. It was evident from the 2008 discovery that there were a number of suppliers and a number of mixes, yet the defendants made no distinction between them when carrying out their tests. Dr. Maher referred to "mixes" on Day 6, but Mr. O'Byrne believes it is clear that he was really referring to suppliers. Suppliers are likely to use the same type of aggregate and the same type of cement in their mixes. Furthermore, the plaintiffs have identified a total of 50 mix designs identified in the 2008 discovery. The relevant comparator between the defendants' knowledge when Dr. Maher gave evidence and their knowledge after the June 2009 discovery is therefore four as against seven in respect of the suppliers and 50 as against 51 in respect of the mixes.

(b) The average water added

Of the 294 dockets noting the addition of water on site, Mr. O'Byrne has calculated that the average amount of water added was 211 litres.

(c) The delivery docket dated 8th December 2004

Mr. Lennon refers to a docket dated 8th December 2004 which notes that 400 litres of water were added to the mix and indicates a number of addresses including 12 Drynam Walk. He states that the defendants are not now in a position to properly investigate further as to whether the adding of water in fact contributed to the damage recorded in this property because the property has since been remediated. He contends that the defendants would have insisted that extensive examination be carried out in respect of a property of this type. Mr. O'Byrne believes Mr. Lennon is mistaken in this connection. The relevant docket identifies that the concrete in question was used for foundations and not for slabs. The specified mix was 25N/mm². Mr. Forde advises that HomeBond specify 15N/mm² for foundations, so there was considerable scope to add water. Furthermore, although both sides had access to this house during remediation, no-one suggested that there was any problem with the foundations. In addition, it is clear that the defendants took a concrete core from the slab of this property. There is no reason why the defendants could not have carried out testing on the samples or indeed why the defendants still could not carry out such testing. Mr. O'Byrne believes there is no substance to the assertion that the production of this docket is of "huge significance" or that the defendants have been prejudiced.

(d) Extra sand

Mr. O'Byrne believes Mr. Lennon is mistaken in suggesting that "extra sand" was added to the mixes on site based on a number of delivery dockets. What these dockets indicate is that "extra sand mixes" were supplied. Dr. Maher and Mr. Forde advise that it is common for these to be ordered where a smooth finish for concrete is required. An "extra sand mix" involves a mix which contains additional sand in place of some of the coarser aggregate.

(e) Cross-referencing

Mr. Lennon states that the defendants must carry out a proper cross-referencing exercise to establish the likely destination of the concrete deliveries to get an accurate picture as to which mix was used in each property. Mr. O'Byrne believes the defendants have suffered no prejudice in this regard. The plaintiffs' experts advise that despite the discovery of the additional concrete dockets, such an exercise is not possible to conduct.

(f) Unusual mixes

Mr. O'Byrne believes there was nothing unusual about the mixes used and it is therefore misleading and inaccurate for Mr. Lennon to contend that the defendants have suffered prejudice in the event that it becomes clear that the houses remediated to date contain "unusual mixes". All the mixes ordered were production mixes supplied by the relevant suppliers. Such mixes are batched according to pre-determined recipes developed by the suppliers and are all covered by their quality control procedures and product guarantees. In addition, the defendants had ample opportunity to identify the components in each of the mixes examined by them and to determine whether, in their view, any of the mixes were "unusual".

(g) Concrete cube test data

At paras. 77-80, Mr. Lennon asserts that a number of documents in the June 2009 discovery evidence or refer to cube tests taken. All relevant cube test data results within the plaintiffs' power or possession were discovered in June 2008. They all related to Myrtle and/or Blocks 1 and 21 of Beaupark. Cube testing was undertaken in Myrtle and Blocks 1 and 21 of Beaupark because these units were designed by engineers who specified the concrete strengths and sought confirmation of these strengths by cube testing. Mr. Lennon complains that EM07395 containing 25 pages of cube tests was not previously furnished. This is incorrect as each of the cube tests in this document had been discovered individually by the plaintiffs in June 2008. He also refers to further cube tests included at EM07584. Again, all of these were previously discovered in June 2008. The June 2009 discovery of cube test data does not relate to any of the properties the subject matter of these proceedings. There are no cube test results for any houses in Drynam or Beaupark because no such tests were undertaken in relation to the houses. The plaintiffs' experts advise that it would not be usual to carry out cube testing of concrete for houses. The builder relies on his suppliers for compliance with relevant standards/specifications. HomeBond does not require testing of this kind for houses.

(h) Concrete mix designs

Mr. Lennon suggests that there remains an "alarming lack of documentation in relation to concrete mixes designs". The plaintiffs' experts advise that it would not be usual in ordinary house building practice in Ireland for concrete mix designs to be prepared "in house" by a builder or for a builder to engage an engineer to do so on its behalf. Normally, the builder will simply rely on a reputable supplier in relation to the design of the mix and to achieve the strength requirements in the HomeBond manual.

(i) The basket of houses

Mr. O'Byrne believes the basket was agreed by both sides. As indicated in Section IV, the number of houses available for selection was limited due to the criteria for inclusion, which left only 48 houses available for consideration. The parties later agreed that one house in Myrtle and one unremediated house could be included.

Mr. O'Byrne believes it is clear that the nature of the damage in the houses in the estates follows very clear patterns. The basket is very large and he doubts whether it will be necessary to consider each of the 28 houses individually. He believes it should be possible to decide the issues arising on the basis of a much smaller number of houses. In addition to the basket houses, the defendants have had access to each of the five 'Judge's houses' and it is clear from Mr. Sutton's evidence that they are, for example, placing considerable emphasis on the water/cement ratio in those houses. The defendants are not confined in any way to the 28 houses. In addition, as is reflected in the case management agreement, there is no restriction on the defendants raising evidence from houses outside the basket.

Mr. O'Byrne believes there is no basis for Mr. Lennon's contention that the defendants would have used the documentation now discovered in determining the selection of the basket and that the current basket will have to be significantly revised to include new properties. Since June 2008 the defendants had available to them water/cement ratio results for 1 Drynam Close indicating an original water/cement ratio of 0.9, which STATS regard as "well in excess" of the acceptable range. However, the defendants never sought to include this property in the basket. It is therefore inconsistent for them to argue that, based on the documentation now available to them, they would select different houses for the basket. Furthermore, if it is their case that the characteristics of the current basket houses and the 'Judge's houses' do not allow them to prove their case, it would appear to follow that the issues they wish to prove cannot be very widespread within the houses.

(vi) General

Mr. Lennon refers to "further documents in relation to concrete generally" which he states should have been discovered by the plaintiffs. He refers to a list of "some of these documents". The list identifies 28 documents which the defendants contend were not previously discovered. Six of them were in fact discovered in 2008. Five of the remaining 22 are concrete invoices and their earlier non-discovery relates to the expansion in the scope of Category 68.

VI Section 4 of the Affidavit Sworn by Mr. Lennon

In para. 85 Mr. Lennon again embarks on a series of generalisations which mischaracterise the contents of documents and the actual situation concerning the properties in these proceedings and the lands on which they are constructed. He is incorrect in asserting at para. 85 that there were "grave problems with the soil, ground and drainage conditions throughout the three estates" and that the documents recently discovered support such a contention. He asserts that this documentation would have "prompted a full investigation" of soil and ground conditions. However, the defendants have carried out extensive supplemental ground investigation and ground water testing in the estates and have significant knowledge of the ground conditions pertaining on all three estates (from the original site investigation reports, their own supplemental ground investigations and their own first hand observations and in situ testing and sampling during house remedial works).

Mr. Lennon attempts to present the facilitation of drainage in a part of Drynam where there was lime stabilised soil as symptomatic of

"serious concerns with respect to drainage conditions and drainage systems constructed in the Drynam estate." There were no such concerns with the facilitation of drainage. In any event it is a 'red herring' as lime stabilisation and this drainage detail only applied to part of Drynam and thus cannot be a factor in explaining the problems in all three estates. Furthermore, there is no more severe damage in the northern area of Drynam, where lime stabilisation occurred, than elsewhere in that estate. Mr. Lennon refers to Docid D-01-422, which was furnished by DBFL to BCM in May 2009 for review in relation to Category 112. Documents containing similar information were discovered in 2008.

Contrary to what the defendants' experts advise, the plaintiffs' experts advise that the drainage detail referred to in para. 88 will not result in "a significant increase in surface water run-off". This detail does not affect the quantity of surface water run-off. Mr. Lennon's interpretation of Docid D-01-422 is incorrect. He has confused the 150mm land drain in the rear gardens of some of the Drynam Drive houses with the 300mm land drain along the line of the ditch which formerly ran behind the gardens of some Drynam Drive houses. He is incorrect in stating that the 150mm drain runs through "quite a large area of the estate" as it amounts to only 18 houses. He is also incorrect in claiming that this detail will put "huge pressure on the surface water system and attenuation storage facilities during wet conditions". This part of Drynam drains directly into the outfall pipe and does not drain to the attenuation tank. Details of the site drainage are shown on a DBFL drawing in the 2008 discovery.

Mr. O'Byrne rejects Mr. Lennon's averments in para. 89. He is advised that, due to the presence of the lime stabilised ground in these rear gardens, natural percolation of water would not be possible. He disputes Mr. Lennon's allegation that this constructional detail could "result in local flooding and increased water penetration under the housing units". This drainage system removes water from the back gardens and is therefore an aid to drainage. Mr. O'Byrne also rejects Mr. Lennon's claim that this drainage system could have serious implications for foundational integrity. The drainage system reduces the possibility of flooding and can have no negative impact on the houses or their foundations. Again, details of the site drainage are shown on the DBFL drawing referred to above. Mr. Lennon is incorrect when he seeks to characterise this drainage information as "newly discovered".

Mr. Lennon refers to Docid M00123, a handwritten note by Charlie Blain which was marked inadvertently as not relevant to the discovery categories by BCM's Discovery Review Team in 2008. A letter from Arthur Cox identifying the homeowners' alleged problems with their drains was discovered in 2008 and put the defendants on notice of issues in relation to drains at 18 Drynam Green. Mr. Lennon refers to Docid EM00617, a fax from Arthur Cox to BCM. This fax was discovered in 2008. The document discovered in 2009 is a duplicate of it. Mr. Lennon also refers to an email (Docid EM06774) which post-dates the original discovery.

The hypothesis as to flooding in the northeast of Drynam advanced at para. 91 is misconceived and is not supported by the documents referred to.

Mr. Lennon refers to a further email dated 13th August 2008. The internal email dated 15th August 2008 between Menolly representatives is a simple clarification that extreme weather caused the flooding to which the email of 13th August 2008 relates. The internal email also states that Menolly had carried out work to the foul drains and not to the surface water drains (i.e. the problem was not caused by any works to the surface water drain). This further email also post-dates the original discovery. There was an abnormally high amount of rainfall in Dublin over the course of the weekend of 9th and 10th August 2008. A Met Éireann report includes a case study on the "Development of Heavy Rainfall on 9 August 2008". Such flooding occurs every number of years as all drainage systems are designed to cater for rainfall of a certain intensity, beyond which flooding occurs. Mr. O'Byrne understands that there has been no such flooding in Drynam View before or since that weekend.

At para. 93 Mr. Lennon refers to a letter from Moylan Consulting Engineers to Gannon Homes. This document was discovered in 2008. Mr. O'Byrne does not understand the suggestion that the defendants only learned following the June 2009 discovery that the original site investigation conducted in December 2001 by Site Investigations Ltd. (SIL) was intended only to be preliminary in nature and was not intended to represent a comprehensive investigation of the site as a whole. The defendants have known this for a considerable period of time and the report was discovered in June 2008. The plaintiffs never represented the report as anything more than a preliminary site investigation.

Mr. Lennon suggests that the letter from Moylan identifies that there was only one standpipe at the higher part of the site. However, this was apparent from the SIL report. He also contends that the defendants' experts have only now learned that there is a "serious drainage problem particularly in the north east corner of the Drynam Estate caused by, or being contributed to, the land drain system of which the defendants have only now been made aware". As is clear from Section 3.1 of their report, AGEC were fully familiar with the ordnance survey maps for Drynam and were aware of where the relevant drains and water courses ran across Drynam. In addition, the Golder drawings appended to the Golder report showed ditches in blue specifically to indicate that they were drainage features. Dr. Maher advises that these drawings showing the drains in that way were based on the same ordnance survey maps as were available to AGEC. Specific reference is also made in the report to two Drynam houses having been built on or near the location of drainage ditches and water courses. It is clear that AGEC familiarised themselves with the relevant topography of the area and will therefore have known of the existence of the pre-existing water courses. These water courses are a normal feature of agricultural land, which was the prior use of the lands at Drynam. The defendants' experts also had sufficient information from the June 2008 discovery to know where drains were constructed. Mr. Lennon refers to advice from the defendants' experts of a "strong possibility" of a "link" between this "new information" and damage manifesting in this section of Drynam. Mr. O'Byrne does not believe that there is any correlation between the damage and proximity to the drain and notes that Drynam View is the road most proximate to the drain in issue.

At para. 94 Mr. Lennon details steps he is advised the defendants' experts would have taken had they been aware of this information and says that the "absence of these measures to date has greatly prejudiced the Defendants". Mr. O'Byrne believes there is no substance to any of these contentions. He notes that AGEC were aware from the SIL report that the ground water level in Drynam was recorded at 0.9m bgl on 19th December 2001. Dr. Maher advises that this is a relatively high ground water level. In addition, during remedial works AGEC supervised dynamic probe testing and the undertaking of window sample boreholes within the perimeter of the houses. A number of window sample boreholes in four houses in Drynam encountered high water levels as reported in the AGEC Report. Dr. Maher advises that these were high water levels and were recorded within house perimeters and so were more relevant to understand the current local groundwater regime affecting the houses than a recorded groundwater level in a borehole drilled before development in 2001.

The Golder report summarises the results of water level monitoring in three wells in Drynam. These wells were installed across the Drynam site to gather specific information on the groundwater regime. It was stated that the monitoring clearly showed that the water levels fluctuate throughout the year and could submerge foundation levels. It was also noted that high water levels were observed during remediation of some houses.

In November 2008 the defendants sought and obtained permission to access the previous wells installed by the plaintiffs in Drynam. Mr. O'Byrne believes it is clear from this correspondence that the defendants undertook a sampling regime which involved the sampling and measurement of the depth of ground water and with the provision to monitor water levels at weekly and fortnightly intervals. The fact that the defendants wished to undertake monitoring at such regular intervals shows that they were allowing for variable water levels at that time. In February 2009 AGEC undertook additional sub-surface investigations at Drynam. The plaintiffs believed the testing carried out by the defendants was excessive and unnecessary. The plaintiffs' experts advise that they continue to believe this. It is difficult to understand why AGEC would not have carried out all the appropriate tests in the wells, boreholes, probe holes which were being undertaken by them.

It is clear from the cross-examination of Dr. Maher that the defendants' experts were contending that there were significant variations in the groundwater levels and that this could have an impact on the performance of foundations in the case. Furthermore, the defendants' experts have witnessed actual groundwater conditions at every remediated house site they have visited. The remediation works have taken place throughout the year, including periods when very wet conditions have been encountered. For example, in respect of 23 Drynam Crescent, photographs show an accumulation of water at the bottom of an excavation in the infill which had been made through the slab. Mr. O'Byrne believes it is clear that the defendants already have very extensive information in relation to water conditions encountered in the houses in situ. He believes that current observations in relation to what has been encountered at the houses as constructed are surely the most relevant for the purposes of the trial.

AGEC have recommended that at least one water monitoring well should be installed close to the Feltrim Road. Insofar as this suggestion is based on the material referred to at paras. 88-92, Mr. O'Byrne believes it is clear that the defendants have misinterpreted those documents. Insofar as the suggestion is based on the letter from Moylans, this letter was discovered in June 2008. There have already been five water wells drilled and tested on the Drynam site in addition to a multitude of window sample boreholes and dynamic probes. No new relevant information can be gained with respect to house performance from additional wells given the size of the site.

Mr. O'Byrne believes the same considerations arise in relation to the other species of testing which Mr. Lennon says AGEC are recommending. Mr. O'Byrne does not understand the basis for the suggestion that data loggers should be installed to continuously monitor water levels given that the defendants and their experts clearly knew the ground water level was very variable. AGEC have seen no need to install data loggers in the wells they have installed to date. Mr. Lennon says that AGEC have advised that they would have recommended the installation of "extra standpipes across the site to determine the ground water profiles elsewhere in Drynam". Mr. O'Byrne does not understand the basis for this contention either given that AGEC were clearly aware of groundwater conditions in Drynam. AGEC considered it necessary only to install water level monitoring standpipes in two of the three wells they constructed in Drynam. They advanced 14 dynamic probe holes in common areas in Drynam. Boreholes could have been advanced at any of these locations to allow for standpipes.

Mr. Lennon says that AGEC would have directed the employment of a high quality benchmark to rock in accordance with BRE 386 which would enable the water level readings to be referenced to a known datum. It is especially difficult to understand how this could be said to have been prompted by the additional discovery. The plaintiffs' experts advise that the suggestion that a "high quality benchmark to rock" would be required to permit the water levels to be referenced to a known datum shows a lack of consistency. It appears that if Mr. Lennon is correct in saying that AGEC have suggested this is required, this must mean that the precise level of floor slabs by Coastways are unreliable or that monitoring of water levels in a well requires greater than 0.1mm accuracy. Mr. Lennon states that if the defendants' experts had known "of this land drainage system which is now evidenced in the new discovery documentation", a thorough geophysical examination would have been carried out to examine the implications of the system for various properties. Mr. O'Byrne believes the defendants and their experts have clearly misinterpreted the documents in relation to drainage. There is nothing in the damage in these houses which suggests that they have suffered more damage than any of the other houses in the estate. The plaintiffs' experts advise that there is no valid technical basis to suggest that a small diameter perforated land drain in back gardens designed to deal with localised rain soaking into gardens could have any conceivable negative impact on the performance of the houses. Furthermore, the defendants canvassed the suggestion to undertake further site investigations by geophysical methods in December 2008.

Mr. Lennon refers at para. 97 to a fax from Menolly to DBFL. This document was discovered in 2008. He asserts at para. 98 that evidence that the plaintiffs were building on lime stabilised areas and were adopting different constructional detail based on the vertical depth of the stabilised soil would have been crucial to the defendants' investigations of the ground conditions beneath the houses at Drynam. This information was already available to the defendants. The plaintiffs' experts' reports made clear that some of the foundations of the houses had been built on lime stabilised ground. In addition, a DBFL drawing in the 2008 discovery clearly showed the foundation detail in lime stabilised ground with a minimum dimension of 500mm and noted that if this minimum was unavailable the foundations were to be "dug down to suitable ground". It is also clear from the AGEC report that they were aware that houses had been constructed on the lime stabilised area, though they wee unsure of the extent to which this had happened. It is also apparent from the report of O'Connor Sutton Cronin that that firm proceeded on the basis that houses had been built on lime stabilised ground. The suggestion that there is scientific literature suggesting that lime stabilisation would only have a short-term effect in stabilising boulder clay due to the relatively high silt and low clay content is incorrect. This is clear from a paper published by Mr. Paul Quigley.

Mr. O'Byrne takes issue with the assertion that "there were considerable problems in dealing with surface water and ground water in the Beaupark estate."

Minutes of a site meeting on 6th October 2004 were not discovered. Minutes of a meeting on 22nd January 2008 were not discovered, although a document with similar information was. At para. 101 Mr. Lennon refers to a minute of a meeting authored by KSN Project Management. It states that concrete wash down contamination remains a major concern and the situation is unacceptable and needs to be resolved. This sort of contamination is an issue on many building sites, but Mr. O'Byrne believes it has no relevance to the damage to houses the subject matter of these proceedings. Mr. Lennon notes that the document refers "to the fact that drains from the main street had been blocked". The minutes also refer to 'LD's' pond having been treated. Settlement ponds are common on many sites but have no bearing on the damage to the houses at Beaupark. Mr. Lennon refers at para. 102 to a diary which records remedial works at the entries referred to by him. However, the defendants' representatives were present during those remediation works. Further, in respect of para. 102 Mr. Lennon has incorrectly attributed the words quoted from Mr. Kevin Kelly Junior's 2008 diary to Grange Lodge Avenue when they relate to 1 Hoey Close.

Mr. Lennon also refers to a diary entry indicating that in respect of 49 Beaupark Square there was significant water ingress, and that

this was due to the "water table". He refers to steps he is advised AGEC would have taken and states that the defendants could have been carrying out this work since August 2008 and evidence relating to these investigations could have been adduced at trial. He contends that the defendants have lost the opportunity to obtain such evidence. There is an implicit suggestion that until the defendants saw Mr. Kelly's diary they were unaware of high water levels in Beaupark. Mr. O'Byrne does not believe there is any substance to Mr. Lennon's suggestion. The water reported by Mr. Kelly Junior was noted during remediation of the houses in question. The defendants' experts have had full access to these houses during the remedial works and have made their own observations. Mr. O'Byrne does not believe there is any basis to suggest that the defendants needed to see Mr. Kelly's diary to inform them that water was observed during house excavations. He believes the reference in Mr. Kelly's diary to 49 Beaupark Square is erroneous as there is no such address. Mr. O'Byrne believes the reference should be to 49 Grange Lodge Avenue. The defendants were present at this property on 13th March 2008. It can be seen from a Golder photograph of that property taken on that date that the ground was very muddy, there was water on the surface and the bottom course of blockwork was damp – all indicative of groundwater. AGEC identify water in most of the houses in Hoey Court and Hoey Close during remediation "suggesting a high water table (but possibly a result of surface water during the wet summer of 2008)". It is also clear that AGEC believed the water table at Beaupark was very close to the surface. It is also clear from the Golder report that high water levels had been experienced in Beaupark.

AGEC performed further ground investigation at Beaupark pursuant to agreements of December 2008 to January 2009. Furthermore, a drawing in the reports contained in Appendix 4 to the Golder report shows the locations of the former ditches on the Beaupark site. The same report presents the results of water level monitoring from three wells constructed surrounding the Beaupark site. The defendants therefore had every opportunity to carry out whatever testing they thought appropriate in relation to the presence of water in Beaupark.

In para. 106 Mr. Lennon refers to EM05354 and EM05033. The latter was discovered in two parts in 2008, one of which contains the snag list details the subject of Mr. Lennon's complaint. The defendants therefore knew of the homeowner's June 2007 complaint. Mr. Lennon also refers at para. 106 to D-05-022, a document which was not received by BCM in 2008 but formed part of the 2009 discovery review and was marked relevant to Category 112. Mr. Lennon also asserts at para. 106 that two emails from the owner of 4 Stapolin Avenue constitute evidence of "grave problems with the ground conditions at Stapolin Avenue." Neither email suggests "serious issues" or "grave problems" with the ground conditions for this house. They relate to a "major hollow" in the garden. There is no reference that 4 Stapolin House is "sinking further" as claimed by Mr. Lennon. He goes on to attempt to draw a completely unwarranted connection with a watercourse referred to in an email. That is unrelated to 4 Stapolin Avenue. JB Barry & Partners were asked to inspect the watercourse and report back. This occurred in September 2005. This issue was addressed without further incident.

In para. 107 Mr. Lennon refers to D-02-042, a document enclosing a DBFL structural report. This was furnished to BCM in 2009 for review in relation to Category 112 but was not furnished by DBFL in 2008. However, a later structural certificate for 2, 4, 6, 8, 10 and 12 Stapolin Avenue was in the 2008 discovery. The foundations for these six houses were not piled. The structural certificate issued to Project Architects was incorrect and was later corrected. At para. 109 Mr. Lennon refers to EM09715, a document marked 'not relevant' in 2008 because it related to Road 19, which is not on any of the estates. The document was discovered in error in 2009 and is not within any of the agreed categories.

Mr. O'Byrne does not believe there is anything in the additional discovery which is new and therefore does not believe the additional discovery has any impact on the evidence Dr. Maher has given. He accepted in cross-examination that the groundwater levels were occasionally very high at the site.

Mr. Lennon makes another incorrect assertion at paras. 109-124. No lime stabilisation was carried out in Myrtle. Some was carried out in the nearby Red Arches site solely in connection with road construction. It was this road construction that was the subject of various documents. Consequently, nothing has occurred that would justify AGEC altering their original decision not to request that site investigation work be carried out at Myrtle because "the original site investigation appeared to be competent". No lime stabilisation occurred in Beaupark either and Mr. Lennon has provided no basis for his suggestion to the contrary.

At para. 114 Mr. Lennon refers to D-05-018. Pages 2 and 3 of this document were discovered in 2008. The first page of this three page document was not scanned by Adeo. At para. 115 Mr. Lennon refers to D-05-019, which was discovered in 2009 and relates to Red Arches and not Myrtle. At para. 116 he refers to D-05-017, which contains a 31 page report. The first nine pages were received by BCM in 2008 and marked 'not relevant' as the report related to Road 19 which is outside Myrtle. The entirety of the report was discovered in error in 2009. The test results at pp 12-19 of D-05-017 were discovered in 2008. Mr. O'Byrne is advised that the soil stabilisation works at Red Arches met the required design strength. At para. 118 Mr. Lennon refers to EM01101. This is a report which was correctly marked 'not relevant' in 2008 as it related to Road 19. The document was erroneously discovered in Category 112 in 2009.

Adequate pre-testing and post-construction plate testing was carried out in respect of the lime-stabilised area in Drynam, as is apparent from the Conform and Powerbetter documents. These were provided to the defendants as part of the January 2008 Replies and were discovered in June 2008. Although DBFL did not supervise the lime stabilisation works, they reviewed the test results and were satisfied with them. Those results were discovered in 2008 and the defendants did not pursue any issue. The lime stabilisation works at Drynam were evaluated in detail by the defendants' experts including evaluation of the Conform and Powerbetter documents. The supposed concerns set out at paras. 121-124 have been constructed on an entirely false premise, namely that the lime stabilisation referred to in the Frank Motherway documents on which Mr. Lennon relies occurred in Myrtle.

VII Section 5 of the Affidavit Sworn by Mr. Lennon

Mr. O'Byrne does not believe Mr. Lennon's claim that newly discovered documentation highlights "very poor construction practices and workmanship standards employed in the construction of the various estates" can be substantiated on an objective reading of the documents in question. The reference to "serious concerns raised by Helsingor Limited" in para. 126 is a misdescription. The issue of quality is discussed with any properly managed residential building scheme where the objective is to market units successfully. There are five sets of minutes mentioning quality issues. The only report referred to is the Peadar Monaghan Report. If Helsingor had "serious concerns" over quality, they would have taken more drastic action than obtaining a report from a third party. The issue of quality that arose mainly concerned finishes, that is to say snagging items such as chips in wood and paint splashes. The Helsingor minutes were considered by BCM prior to the June 2008 discovery and deemed not relevant to the classes sought and were the property of Helsingor. In June 2009 these documents were revisited in consultation with Helsingor lawyers. Redacted versions of these minutes were discovered with the consent of Helsingor's legal advisors in 2009. A further meeting note was discovered under Category 110, while another does not relate to and/or evidence defective workmanship and/or complaints about workmanship in respect of Myrtle.

Mr. Lennon suggests in reliance on minutes of a Helsingor Board meeting on 19th June 2006 that Brian Clarke first raised concerns about the quality of workmanship in summer 2006. There is no such statement in that document. Mr. Clarke did not comment on quality until September 2006 and his comments related to "finishes" which are generally matters of a superficial and aesthetic nature. At para. 128 Mr. Lennon refers to the minutes of a Board meeting in October 2006. The engagement of a clerk of works is an indication of the quality control put in place by Helsingor and no more than that. The documents referred to at para. 129 refer to concerns about quality, but again the examples given related to the quality of finishes.

Mr. Lennon incorrectly refers to a report prepared by Matt Carroll at M-87-011. This is the Menolly response to Mr. Monaghan and deals specifically with his Phase 1 Report. It also covers general comments throughout the two reports, i.e. Phase 1 (Myrtle) and Phase 2 (Red Arches). The DBFL response referred to by Mr. Lennon is not a response to the Phase 1 Report but to the Phase 2 Report.

Mr. Lennon refers at para. 132 to a document authored by Mr. Monaghan consisting of "Sector 18 Observations". Sector 18 is Myrtle House. This document is essentially a mid-construction stage snag list and lists many "finishes" issues which are not relevant to the issues in this case. No structural matters are listed. The contents of the list are not unusual given the stage of construction. The supposed "Peadar Monaghan trail of documentation" in fact comprises three documents, only one of which (the report dated February to March 2007) raises any query in relation to structural matters. While Mr. Lennon makes selective references to what he had to say, Mr. Monaghan had been looking in a superficial way at work in progress. Menolly takes issue with the suggestion that a "damning picture of the standard of workmanship on site in Myrtle" was presented. The damage to the properties in Myrtle (which allegedly mirrors that in Beaupark and Drynam) did not come about by reason of any issue noted in the Peadar Monaghan Project Management Report. DBFL were the appointed structural engineers on Myrtle, which engagement included the duty to carry out inspections of the structures during construction. DBFL were satisfied as to the adequacy of the construction of all buildings in Myrtle and certified them following their completion. The defendants can cross-examine Mr. Forde in relation to the supposed structural issues raised by Mr. Monaghan in his report and call their own witnesses. Accordingly they have suffered no prejudice in this regard.

Mr. Lennon suggests that the new discovery regarding quality of workmanship impacts on Dr. Maher's evidence. Dr. Maher will be proferred for further cross-examination if the Court thinks it desirable. However, he has already been cross-examined quite extensively in relation to bad workmanship. He accepted on several occasions that workmanship identified in photographs put to him was bad workmanship but said that the questions would be better answered by the structural engineers. He also took the view that the examples of poor workmanship put to him did not give rise to the cracks in the slabs and the other defects.

At para. 140 Mr. Lennon refers to a letter dated 28th January 2005 from Barry Donovan to Matt Carroll with the subject "Re: Bearing block work or steel work". Mr. Lennon incorrectly states that the letter relates to "a collapse of a bearing block wall and steel work on site". Various possible reasons for the wall falling were examined and it was ultimately determined that it was because the block layer built too many courses high on the same day. Val Harrison, a supplier of mortar to Menolly at the time, was not asked to change his mortar mix and there were no complaints from the block layers about the mix. Mr. Lennon refers to prejudice as to evidence of Dr. Maher on certain issues in respect of mortar and block work and to the investigation and enquiries the defendants would have carried out. He appears to be trying to suggest that the defendants would have needed to be prompted to look into this question by a document and have missed out by not getting it sooner. This is fanciful and divorced from how one would rationally go about investigating structures and materials available for physical inspection and testing. It is patently obvious that, regardless of the documents forthcoming on discovery, the defendants' experts were prepared to look into the issue of mortar and proceeded to conduct extensive tests of mortar samples taken from houses throughout the estates during remediation.

In para. 145 Mr. Lennon makes an overblown allegation of "poor workmanship and bad quality control" which the plaintiffs completely reject. He also claims that the information from which he fashions this charge was new to the defendants. Mr. O'Byrne rejects the assertions of Mr. Lennon contained in this paragraph. In para. 146 he refers to three documents which are three versions of the same document. Two are headed "Summary of Site Meeting Number 33" and the third is headed "Summary of Site Meeting Number 32". The text of all three is identical. Summary (albeit with handwritten notes thereon) was discovered in 2008. In para. 147 Mr. Lennon refers to M-05-002, which records the minutes of a meeting held by Menolly in respect of roof remedial works. It refers to remedial works required to roofs rather than "roof defects" as Mr. Lennon claims. These works were completed. Letters from Wyse Managing Agents dated April 2009 confirm that all items raised in the snag list for Myrtle House, and in the snag list for Parker House, have been addressed to a satisfactory standard. Mr. Lennon refers at para. 148 to M01188, a meeting note taken by Gannon Homes Ltd. This was marked not relevant in 2008 but was marked relevant in 2009. Mr. Lennon points to a reference to ponding due to pavement settlement, but the minutes clearly record that this issue occurred opposite Block 20, which is not part of Beaupark.

At para. 149 Mr. Lennon refers to M01323, which records the minutes of a site meeting held at Gannon Homes in October 2004. This document was marked not relevant in 2008 and relevant in 2009. These site minutes record "concrete wash down contamination is still a major concern to the development" and "pH rose significantly when Block 1 construction work commenced". The defendants would have been aware of this issue for some time due to a Moylans' file in the 2008 discovery which also dealt with this issue in relation to Block 21. Mr. Lennon's assertions at paras. 150-153 mirror the claims of supposed prejudice contained elsewhere in his affidavit. The defendants have had every opportunity to identify and develop the lines of argument that seek to divert attention away from their infill. Their experts have had full access to the houses as part of the testing, sampling and remediation process since July 2007 in accordance with the arranged protocols.

Lennon Heather referred to 3 Drynam Square as a "pivotal" house. In December 2008 the defendants indicated that they planned to enter into an arrangement with the owner of this house for its deconstruction and reconstruction, presumably with a view to identifying aspects of its construction which the defendants believed would assist their defence. However, no works of the kind identified by them have occurred at 3 Drynam Square. In circumstances where they have foregone an opportunity for analysis that was within their control, Mr. Lennon's protestations regarding what they might otherwise have insisted upon elsewhere regarding the remediation process ring very hollow, particularly when he prays in aid documentation that is supposedly new but was in fact discovered in 2008.

At para. 154 Mr. Lennon refers to M-50-043, an email dated May 2007 enclosing a list of properties and pour dates. This email and attachment were deemed not relevant in 2008. The spreadsheet was an early attempt to collate information in relation to foundation pour dates at Drynam. The definitive and accurate position was outlined in the map prepared by Charlie Blain attached to the January 2008 Replies and discovered in June 2008. At para. 156, Mr. Lennon refers to M01238 for the purpose of constructing a flawed hypothesis that "foundations were left exposed for significant periods of time". This document is a fax from Charlie Blain to HomeBond dated May 2003 and previously discovered in 2008. Mr. Blain has since confirmed that this fax only intended to ask HomeBond to carry

out *foundation* inspections on 20 to 24 Drynam Green and that the other houses referred to were properties which required *structural* inspections. This is confirmed by another document also in the 2008 discovery, namely the HomeBond structural inspections dated June 2003. These documents, all of which were available to the defendants since 2008, show that there is no issue in respect of the foundations remaining open for periods of time prior to the foundation being poured.

In para. 158 Mr. Lennon asserts that he specifically pointed to the absence of architects' instructions in the documentation furnished by the plaintiffs in his affidavit of 30th October 2008. However, he does not continue or substantiate any complaint thereafter with regard to the discovery of architects' instructions. The 2008 discovery contained over 12,000 documents authored by the three architects' firms relevant to the estates. In para. 160 Mr. Lennon asserts that the plaintiffs have newly discovered 649 documents which he posits are "engineers instructions or documents which relate to an instruction given by an engineer". 125 of these documents were in the original discovery and the plaintiffs have identified a further 355 documents discovered in 2008 which contain similar information to those discovered in 2009. Similarly, in para. 161 Mr. Lennon claims that the plaintiffs have newly discovered 350 documents which he describes as "minutes of site meetings". 239 of these were in the original discovery and the plaintiffs have identified a further five documents discovered in 2008 which contain similar information to documents discovered in 2009. In addition, in para. 161 Mr. Lennon does not accurately describe the raising of the issue of site minutes. The issue he raised in October 2008 was restricted to site minutes in relation to Drynam.

The foundations of 109 Drynam Drive were taken down to depths shown in a document to ensure that no settlement could occur. Mr. Forde advises that there is no substance to the allegations regarding settlement made by Mr. Lennon in para. 163. There is no substance to Mr. Lennon's claims in para. 164 regarding how the defendants' experts might otherwise have formulated their approach. Details of the drainage levels in this area were included in the drainage drawings for the development of the site and these have been available to the defendants since 2008. The relevant DBFL drawing was discovered in June 2008.

In paras. 167-170 Mr. Lennon refers to the excavation of the basement in Block 21 in Beaupark and whether this had an effect on adjacent properties, one of which is 12 Beaupark Street. He draws attention to three documents at para. 167. Two of these were discovered in 2008. At para. 171 Mr. Lennon claims that the information in a fax concerning land on which the shop units in Drynam were constructed would have prompted further investigations. However, pages 1 and 3 of this document were discovered in 2008 and page 2 is simply an enlargement of the map referred to in page 3. If follows that no credible claim of prejudice arises regarding this document. At para. 172 Mr. Lennon refers to D-05-051, a fax from Moylans to Menolly. However, this document was discovered in 2008.

At para. 174 Mr. Lennon refers to a DBFL report dated 11th April 2008. He says at para. 176 that "[c]learly a report of this nature would have been addressed in the defendants' expert reports and would have been employed in the cross-examination of Dr. Michael Maher and other witnesses, and in their investigations." This claim does not bear the slightest scrutiny. The report was not in the 2008 discovery but a copy of it was appended to Mr. Forde's witness statement dated December 2008. A report dated 11th April 2008 on construction details encountered during remediation at 158 Grange Lodge Avenue is contained in an appendix to his witness statement.

There is an acceptance of poor workmanship in the report of 11th April 2008. The Project Management Report which the defendants likewise received on 23rd December 2008 also dealt with this issue, with Mr. Duckenfield noting a particular constructional defect that was not good building practice. He noted this defect in only one house and it is his opinion that the gable wall defect is not the cause of the cracks seen in the walls and the slabs. The report of 11th April 2008 also discusses the remedial works carried out at 158 Grange Lodge Avenue. The defendants' experts attended at this property twice in early 2008 and must have been aware of the relevant structural detail at 158 Grange Lodge Avenue at that time. At para. 178 Mr. Lennon is confusing the detail of suspended floors in Drynam with the required remediation works detail specified for 158 Grange Lodge Avenue. D-01-405, a Charlie Blain fax, was discovered in 2008.

The plaintiffs take issue with Mr. Lennon's claim that the defendants and their experts were unaware of matters referred to in site diaries until their review of those documents produced the "revelations" alleged to have been experienced.

Contrary to what Mr. Lennon claims at para. 180, there is no list of supposed faults and leaks identified in the April diary of Alan Kearney. One of Mr. Kearney's main functions during 2008 and early 2009 was to be present during the inspection of houses (in particular houses in the course of remediation) by the defendants' experts. It is clear from his diary that their experts had full access to these houses and could therefore make their own observations in relation to whether or not the underfloor material was compacted tightly or loosely. In addition, Mr. Lennon refers at para. 181 to an entry in a diary of Mr. Kearney dated July 2008, which post-dates the June 2008 discovery and was discovered for the purposes of Category 112. The entry is to the effect that a rock breaker was required to break up hardcore material during the remediation of 37 Beaupark Square. Mr. Lennon claims this indicates overcompaction. The plaintiffs reject this hypothesis, but it is puzzling that it did not occur to Mr. Lennon or to the defendants' experts before. Mr. Kearney informs Mr. O'Byrne that representatives of the defendants' experts were at the property on that date and took samples. The use of a rock breaker could hardly have escaped their attention. Mr. Kearney did not state that the material was over-compacted but rather noted that it "seemed fused together". The plaintiffs' experts advise that the more compaction, the better. The state of the infill as described at No. 37 is consistent with how the plaintiffs' experts described the process which occurs when pyrite oxidation occurs in infill. It was clear from the defendants' own experts that they had also encountered cementation of this kind.

At para. 185 Mr. Lennon refers to a site diary of Mr. Kearney with an entry relating to "house no. 7 Beaupark" for 27th June 2008. Mr. Kearney informs Mr. O'Byrne that he believes that the entry which states that the infill does not appear to be compacted tightly and falls away loosely when disturbed with a shovel is a record of words used in a conversation between the defendants' experts which Mr. Kearney overheard. It is his recollection that it is not his wording. Mr. Lennon's averments in para. 188 mischaracterise what was recorded in the relevant entry in the site diary of Mr. O'Toole. The re-execution of works during construction, to which the diary entry attests, is consistent with the maintenance of standards and ongoing supervision, rather than poor workmanship. The attention to and exercise of quality control, encountered on most construction projects, is likewise manifest from the entries in Mr. Sullivan's diary referred to by Mr. Lennon at para. 189. Put simply, the outcome was that Menolly took on board the advice and instruction that was given by its engineers.

At para. 191 Mr. Lennon refers to M0020. He is incorrect in asserting that this diary entry for 2nd November 2007 "revealed issues in relation to block work at number 30 Drynam Crescent". He also asserts that it is "of notable interest that 30 Drynam Crescent is a non Bay Lane property." This is absolutely incorrect. A & L Goodbody were notified that this property would be ready for inspection on 31st October 2007. The defendants have discovered a series of test results for analyses they carried out on samples taken from this

property during remedial works on 30th October 2007.

At para. 192(i) Mr. Lennon refers to the diary of Owen McElroy dated 2004 as having references to poor concrete and the existence of a holding pond. Holding or settlement ponds are common on most building sites and have no bearing on the damage caused to the houses at Beaupark. There is nothing new about attention being paid to the quality of concrete. Menolly's concerns pertaining to the quality of some concrete were reflected in correspondence sent by Menolly to Goode Concrete. Mr. O'Byrne refers in this regard to two documents which were discovered in 2008. The same point applies in respect of the handwritten note at para. 192(ii). This is a note of Barry O'Sullivan and contains his assessment of the work being carried out by Mulleadys to ensure they were performing it properly. At para. 192(iii) Mr. Lennon presents an extreme and unfair interpretation of a diary entry. The relevant passage states that two named individuals were found drinking during the breakfast break by Mr. Blain and were informed that if caught again they would be dismissed instantly. This entry records the infraction and demonstrates a concern that standards be upheld.

In para. 193 Mr. Lennon comments on entries in site diaries on "ground conditions particularly in relation to flooding in the three estates." He states that "[a]gain evidence of this kind must be seen in conjunction with the documents referred to earlier concerning flooding issues of which the Defendants had not been previously aware". In paras. 194 and 195 he refers to flooding while adverting to a high water table in Beaupark. He conveniently avoids acknowledging matters in respect of which the defendants have been firmly on notice. In particular, high water tables were previously dealt with in the Golder report furnished in December 2008.

In para. 194 Mr. Lennon concludes that "[t]his potentially infers that the high water table ran throughout the Beaupark Site and could therefore be indicative of poor ground conditions". A high water table should not be equated with poor ground conditions. As Dr. Maher testified, it is impossible to design always to have the water table permanently below founding levels; the critical thing clearly is that the water table should not come up close to the underside of the floor. Mr. Lennon refers to "flooded areas" on a "map". Mr. Forde advises that this "map" contains a contoured survey as its background and references "flooded area" beneath the 6.5m contour. The houses in Beaupark, which are the relevant issue here, are constructed at levels which at a minimum are 3m higher than the area termed "flooded area" and poor ground conditions have not been found to be an issue in any of the houses inspected, including all remediated houses.

In para. 195 Mr. Lennon contends that M-51-025 shows that problems with the water in the basement of Block 1 were "indicative not only of potentially poor workmanship but also of the significant problems with the high water table which appears to exist in Beaupark". Mr. McQuade of Moylans Engineers does not recall any significant problems with groundwater during the construction of Block 1 at Beaupark. Some problems with drainage arose but were due to the basement slab being cast over damaged drainage pipes. The problem took some time to resolve but, in the opinion of Moylans, Menolly dealt with the issue in a reasonable manner and the leaks were repaired. Mr. Lennon refers at para. 196 to Paul McCarthy's 2005 site diary. A relevant extract from the diary was discovered in 2009, but the entire diary was discovered in 2008. Mr. Lennon's comments suggest that the diary entry has recently given rise to a number of issues of significance to the defendants. His averments should be read in tandem with a passage from a letter from Lennon Heather to BCM dated January 2009. The statement contained in this passage as to the attention paid and analysis given by the defendants' advisors to such diaries and the averments in para. 196 of Mr. Lennon's affidavit are impossible to reconcile with the discovery of this diary in 2008. That it was apparently ignored in the context of this earlier discovery by the defendants and their advisors shows that yet again a document appears to have been elevated in terms of its significance to fashion a claim of prejudice that is at least disingenuous.

At para. 203 Mr. Lennon repeats the inflated figure of "approximately 50,000 documents" as the total number forthcoming as a result of errors in the plaintiffs' discovery. Mr. Lennon is well aware that the new discovery comprised additional categories which the plaintiffs were not previously obliged to discover and he owes the Court an explanation as to the serious exaggeration he has made on oath. Further, Mr. Lennon advances the premise in para. 204 that the plaintiffs have newly discovered 490 documents which he describes as "site diaries or extracts from site diaries". The plaintiffs have identified 16 of these which were available to the defendants since 2008.

VIII Section 7 of the Affidavit Sworn by Mr. Lennon

Mr. Lennon analyses various documents pertaining to Red Arches for the purpose of asserting prejudice due to the plaintiffs' failure to comply with their discovery obligations. This claim of prejudice is without substance and is extremely opportunistic because, as Mr. Lennon acknowledges, Red Arches is not part of the claim because none of the defendants' infill was used in the construction of houses there and the defendants were never entitled to discovery of documents pertaining to it. Such discovery as occurred was made in error, so the defendants can hardly complain that they should have received the documents sooner. Red Arches is not a section of the Myrtle estate and the fact that it is not part of the claim did not need to be confirmed by any discovery as he seeks to suggest in para. 370.

In paras. 370-371 he refers to M-54-011 and M-23-033. The Helsingor Board pack in which these documents were contained was deemed not relevant to the classes of discovery sought and they were in any event the property of Helsingor. The matter was revisited in June 2009 in consultation with Helsingor lawyers in relation to the new categories of discovery sought and with particular emphasis on Category 110. This document was then reviewed and discovered as it was prepared by Menolly as a briefing document to the Board of Helsingor.

Mr. Lennon is incorrect in para. 372 when he claims that "the new discovery reveals that there is evidence in the Red Arches estate which appears to be comparable to some of the damage recorded in property throughout Beaupark, Myrtle and Drynam." No comparison whatsoever can be drawn. What has been seen in Red Arches comprises the normal snagging items encountered in practically all new houses.

From the outset, the defendants have been free to investigate any Menolly-built estate, including Red Arches which is close to Myrtle but is not suffering from the serious problems besetting the houses located on that estate.

In para. 380 Mr. Lennon engages in a conflating of documents and sites so that he can advert to "the coincidences of similar construction practices occurring in the Red Arches section of Myrtle with those practices concluded in Drynam and Beaupark and the rest of the Myrtle estate…". Again, Red Arches is not a "section of Myrtle". The documents in question dealt with soil stabilisation conducted as part of road construction in Red Arches. The lime stabilisation in part of Drynam did not concern road construction. Conversely, houses were not built on the lime stabilised area in Red Arches. There was no lime stabilisation carried out in respect of the bulk of Drynam and none was carried out in Beaupark or Myrtle. In circumstances where there is no coincidence of the kind contended for by Mr. Lennon, and in particular no houses constructed on lime stabilised soil in Red Arches, it is impossible to see how the defendants' experts can complain that they would otherwise have been prompted to engage in the "extensive" but undefined

investigation to which Mr. Lennon obliquely refers.

IX Section 8 of the Affidavit Sworn by Mr. Lennon

In Section 8 Mr. Lennon deals with an area he describes as new documents relating to the development of cracking across the three estates. He describes this as information which was "absolutely vital […] to the determination of the issues in these proceedings". At para. 383 he states that the defendants have been severely prejudiced by non-disclosure of information before 2009 and that, if documentation he describes had been in the possession of the defendants at an earlier stage, "a comprehensive analysis would have been conducted to demonstrate that for a large amount of properties the development of the cracks came too early to support the Plaintiffs' allegations." Mr. Lennon's averments in this regard are utterly misplaced. A large amount of the documentation to which he refers was available to him in advance of the 2009 discovery. If no "comprehensive analysis" was carried out on the defendants' behalf, that is the fault of the defendants and their legal advisors.

The first document Mr. Lennon refers to is a letter of 9th July 2008 which the plaintiffs were not obliged to discover until an agreement reached on 28th May 2009. The second is a June 2007 snag list for 15 Myrtle House. Mr. Lennon does not refer in the body of his affidavit to the fact that this is a second snag list for this property. The first is exhibited to Mr. Lennon's affidavit and was discovered in 2008. The two snag lists are very similar. The difference between them, as highlighted by Mr. Lennon, appears to be a reference to a gap in the floor in the second snag list which does not appear in the first. He has not explained how this difference prejudices the defendants.

He places great stress on the "Drynam pour dates document". It was prepared by Menolly to collate information in relation to suppliers to the estates and its contents may not be entirely accurate. He claims that this document for the first time enables the defendants to ascertain when the foundations of individual properties were poured. He couples that with correspondence showing, in respect of these individual properties, when cracks first occurred. He concludes that this documentation (relating to pour dates and the first appearance of cracking) was "absolutely crucial in order for the Defendants to piece together how the damage in the three estates began to manifest itself". Mr. Lennon's case in this regard is absolutely false. The pour dates document was only recently discovered, but with regard to each of the dwellings Mr. Lennon refers to in this section of his affidavit the pour dates have been known to the defendants since January 2008. In conjunction with the Drynam pour dates document, Mr. Lennon complains about the failure to provide in respect of three of these four houses communications from homeowners indicating when cracking first occurred. Again, this is an unfounded complaint. Mr. Lennon refers to a letter from Arthur Cox regarding 21 Drynam Square. This letter was discovered in 2008. He refers to a Statement of Claim regarding 4 Drynam Close but this is dated 9th July 2008 and was therefore not caught by the plaintiffs' original discovery obligations. The same is true of a Statement of Claim to which he refers relating to 24 Drynam Square as it is dated 7th July 2008. Regarding 36 Drynam Rise, the Statement of Claim was delivered on 1st July 2008 and therefore fell outside the initial discovery obligations. Pleadings or correspondence which post-dated 30th June 2008 were discovered in 2009, but on foot of the fresh categories agreed in May 2009. However, the 2008 discovery contains a letter from Arthur Cox stating that around December 2004 the owners of 36 Drynam Rise first started to notice cracks in the walls. That was the information which was also in the Statement of Claim. Mr. Lennon's complaints with regard to this "absolutely crucial" documentation are without merit and are not based on the facts.

His complaint about 13 houses identified at paras. 402-405 of Mr. Lennon's affidavit is equally baseless. Put simply, Mr. Lennon's complaint about each of these is that spreadsheets (relating to pour dates and the dates on which cracking was first reported) were only recently discovered.

With regard to 6 Drynam Drive, the defendants knew the approximate pour date from Replies to Particulars. A letter from Arthur Cox claiming that the homeowners first began to notice damage in or around summer 2006 was discovered in 2008. For 9 Drynam Drive, the January 2008 Replies state that the pour date is 28th March 2004. A letter from Arthur Cox claiming that the owners first began to notice damage in early 2006 was discovered in 2008, as was a maintenance request noting a complaint from the owners in August 2006. For 12 Drynam Drive the Replies indicate that the pour date was 27th April 2004. A maintenance request noting a complaint from the owners dated 4th October 2006 was discovered in 2008. For 31 Drynam Drive the January 2008 Replies state precisely the same dates (for the pouring of the foundation and the pouring of the floor) as the newly discovered spreadsheets. A maintenance request noting a complaint on 21st November 2006 was discovered in 2008. O'Connor Sutton Cronin inspected this property according to their report of 30th January 2009.

Regarding 89 Drynam Drive, the spreadsheets and the Replies give the same date for the pouring of the foundation. On 27th November 2006 there was a complaint notification form noting a complaint from the owners. This form was discovered in 2008. O'Connor Sutton Cronin inspected this property according to their report of 30th January 2009 and an inspection report in respect of this property dated 5th February 2009 was prepared. Regarding 3 Drynam Square, the spreadsheets give virtually identical dates to the January 2008 Replies in respect of the pouring of the foundation and the pouring of the floor. There was a complaint notification form noting a complaint from the owners of this property on 13th November 2006, which was discovered in 2008. For 10 Drynam Drive identical pour dates for the foundation and the floor are given in the spreadsheets and in the January 2008 Replies. A complaint notification form dated 7th February 2007 in respect of cracks in walls and ceilings was discovered in 2008.

For 14 Drynam Drive the spreadsheets and the Replies give the same date for the pour of the foundation and the pour of the floor. A complaint notification form noting a complaint from the owners of this property dated 7th February 2007 was discovered in 2008. For 28 Drynam Crescent (one of the 'Judge's houses') one of the spreadsheets gives 1st November 2006 as the first date for complaint while the other does not give a date. A maintenance request form dated 1st November 2006 and a complaint notification form of the same date were discovered in 2008. Regarding 50 Drynam Crescent a complaint notification form discovered in 2008 notes the date of closing as the end of 2004 and the date of first complaint as 2005. Spreadsheet EM03325 does not give a date on which defects in the house were first notified but EM07945 gives the first date of complaint as the end of 2004. That is likely to be an error, but in any event the defendants were aware from the original discovery that there were complaints reported in respect of this house in 2005, the closing of the sale having occurred in 2004. It is therefore impossible to see how Mr. Lennon can claim prejudice in respect of these houses.

Equally, no prejudice has been caused to the defendants in respect of the DBFL inspection reports, first discovered in 2009. Of the 219 "newly discovered reports" to which he refers under the heading "DBFL Inspection Reports", 122 were discovered in 2008, six relate to Category 112, 27 both relate to Category 112 and post-date the original discovery, and the balance include many documents which were appended to Mr. Forde's witness statement.

Mr. Lennon refers to three properties with regard to this head of complaint: 20 Boyd House, 16 Talavera House and 31 Drynam Crescent. With regard to 20 Boyd House, the DBFL report was in draft form incorrectly containing the test results for 36 Boyd House.

In its final form the report was appended to Mr. Forde's witness statement containing the test results for this property. Mr. Lennon's complaint appears to be that the report contained a recommendation for remediation. The house was remediated in August 2007. The defendants' solicitors were notified of the dates of the removal of the slab, the removal of the hardcore, the putting of new hardcore and the pouring of the new slab and asked to advise if the defendants' experts wished to attend. There is a DBFL structural certificate certifying the remedial works in the 2008 discovery together with other documentation evidencing the carrying out of the remedial works. Test results for this property were also in the 2008 discovery. The defendants have therefore been well aware since August 2007 of the remediation of this dwelling.

The report of DBFL regarding 16 Talavera House was also appended to Mr. Forde's witness statement. This report is similar to that in respect of 20 Boyd House. The house was remediated in 2007 and the defendants' solicitors received advance notification of the proposed removal of the hardcore. The structural certificate of DBFL in respect of the remedial work on this house was discovered in 2008, as were the test results in the DBFL/Golders report. A similar situation applies to 31 Drynam Crescent. The test results in the report were discovered in 2008 and the report is appended to Mr. Forde's witness statement. The property appears to have been inspected by O'Connor Sutton Cronin according to their report of 30th January 2009 and they prepared an inspection report for this property dated 5th February 2009. Mr. Lennon incorrectly states that it is now known that the fill in this property did not come from Bay Lane. The report of experts states that the three experts agreed that this property contains a mixture of non-Bay Lane and Bay Lane aggregate.

Mr. Lennon complains at paras. 392-396 in relation to the provision in the new discovery of snag lists and other homeowner commissioned reports on damage. He provides a printout which he says runs to approximately 106 documents. It appears that 25 of these were previously discovered. Four relate to Category 112 and 11 post-date the original discovery.

Mr. Lennon refers to an inspection condition report in relation to Apartment 71, Sweetman House. The plaintiffs received that report after 30th June 2008 so it fell outside the scope of the original discovery. The second document, a report commissioned by a homeowner in respect of snags at 15 Myrtle Close, was discovered in 2008. The third snag list relates to 1 Hoey Close and was marked "not relevant" in 2008. However, two documents discovered in 2008 make it clear that there were issues with regard to crack pointing, missing pointing and leaks. In addition, this property was remediated in April 2008, at which stage the defendants' solicitors were given a schedule of remedial works in order for the defendants' experts to carry out the requested inspections and testing during remediation. The property was surveyed by O'Connor Sutton Cronin. The defendants have therefore not been prejudiced by the omission of this document.

Mr. Lennon refers in a third printout to "almost 1,000 letters from homeowners detailing complaints and damage arising at various properties across the estate". 673 of these were discovered in 2008. A further 27 relate to Category 112 and another 134 post-date the 30th June 2008. There are therefore 105 extra documents some of which are not relevant to the categories of discovery and none of which have been demonstrated by Mr. Lennon to have occasioned any prejudice to the defendants. 11 of the documents on the list of "almost 1,000 letters from homeowners" constitute correspondence between BCM and Lennon Heather. Mr. O'Byrne does not think Mr. Lennon's complaints are well founded in relation to any of the letters to which he refers.

X Conclusion

The omissions from the 2008 discovery should not have occurred, but they were inadvertent and have not caused the prejudice alleged by Mr. Lennon. The vast bulk of the information in the new discovery was available to the defendants before the commencement of this trial. The defendants can deploy the information they now have in their own evidence and in the cross-examination of the plaintiffs' remaining witnesses.

By contrast, to cause a recommencement of the trial now would cause the plaintiffs very considerable prejudice. Vast resources have been deployed to date in the prosecution of this action. To restart the process would involve the complete wastage of those resources and a negation of the Court time invested. It would also inevitably further delay the determination of the issues of liability in this case and, by extension, the cases of the homeowners. That all this occurs in a context where the plaintiffs are operating in a business which is in the midst of a significant downturn threatens to gravely exacerbate the prejudice that would arise were the trial to have to restart and the monies expended to date be effectively thrown away.

Affidavit of Peter Lennon
27th October 2009
Part 1: Introduction

It is noteworthy that Mr. O'Byrne apologises on behalf of the plaintiffs and on his own behalf for the deficiencies in the plaintiffs' discovery and for the delay they have caused. The starting point for the Court in considering this application should be a recognition that the interruption to the hearing of these lengthy and complex proceedings is attributable entirely to the conduct of the plaintiffs. The implied suggestion that these proceedings have become delayed and/or "fossilised" due to any action on the part of the defendants is incorrect, grossly unfair and inconsistent with the above noted averments of Mr. O'Byrne.

Assertions made on 7th October 2009

Counsel for the plaintiffs asserted before the Court that Mr. Lennon had made averments which were in effect misleading and that "nothing Mr Lennon says on oath can be taken without being tested seriously..." It was alleged (without notice that such an accusation was forthcoming) that:

> "Mr Lennon has not been accurate in the evidence he has given to the Court, to be as mild as one can about it."

Mr. Lennon completely rejects these accusations. Had the defendants known such an attack was forthcoming, the following facts would have been outlined which demonstrate Mr. Lennon's *bona fides* and call in question the plaintiffs' approach to this application. The defendants were concerned that some of the documents in the new discovery would be duplicates of documents in the old discovery. It was of concern that if there was such duplication an extensive process would be required to cross reference every single document (approximately 46,016 which pre-dated July 2008) with every single document in the old discovery (approximately 63,850 non-privileged documents). Lennon Heather wrote to BCM noting its duplication concerns and that it was impossible for them to know regarding duplication as there was no correlation between the new document numbers and those in the "old" discovery. Lennon Heather asked BCM to indicate how they proposed to deal with the problem. BCM's response dated 6th July 2009 stated:

"We have carried out a major duplication exercise to ensure where possible there is no duplication of documents".

The defendants conducted their review on this basis, relying on the assurance that BCM had carried out a "major duplication exercise". This position was not corrected at any stage prior to the plaintiffs' replying affidavit of 6th October 2009. The plaintiffs appear to have now carried out this duplication exercise in circumstances where it entirely suits their purposes, yet at no stage did they feel the need to correct the assurance they had given. Mr. Lennon takes grave exception to the plaintiffs' accusations. Such assertions are remarkable when it appears that the plaintiffs must have known for some time that their assurance was incorrect.

The prejudice suffered by virtue of this late discovery is very real. The documents Mr. Lennon relied on in his previous affidavit are, on the whole, newly discovered documents, which contain new information of which the defendants were not previously aware. Given the incorrect assurance and the vast amount of documentation between the old and new discovery, it is a mark of the defendants' *bona fides* that the documents they have identified from the new discovery are "genuinely" new documents. These documents raise new issues of serious concern and identify serious lines of enquiry of which the defendants were not previously made aware. On occasion, as must have been inevitable given the assurances and the vast amount of documentation between the old and new discovery, the defendants have relied upon a small number of documents which now appear to have been in the old discovery. Where this has occurred Mr. Lennon has withdrawn any allegation of prejudice.

The image counsel for the plaintiffs attempted to paint on 7th October was a complete mischaracterisation of the defendants' approach to this application. The list to which he referred was from the new schedule of discovery which the plaintiffs provided. It was the plaintiffs who had stated that every document on this list was new. The assertion that the plaintiffs had to "go through a painstaking exercise of looking at the large number of documents" is not the fault of the defendants or their legal team.

Mr. O'Byrne repeatedly seizes upon every opportunity to highlight that a document is also in the old discovery. In most instances he is either wrong or the import of the discovered document could not have been appreciated because newly discovered information has come to light. Mr. Lennon takes exception to Mr. O'Byrne exploiting the incorrect assurances to challenge his *bona fides*.

The 2009 Discovery

The new discovery contains 51,861 documents, 46,016 of which pre-date the cut-off point of 1st July 2008. Mr. O'Byrne seeks to justify the late discovery on the basis that many documents came within Categories 112 and 113. The defendants' request for these further documents arose as a result of the new information about non-Bay Lane material used on the estates disclosed, on foot of the defendants' persistent queries, during the hearing. At the beginning of the hearing the plaintiffs emphasised that none of the non-Bay Lane houses was showing defects. During the trial it was revealed that this assertion was totally without substance. Due to this inaccuracy and the wholesale confusion that still exists as to the use of Bay Lane material in the estates, the defendants were compelled to seek this further discovery. Consequently, it is incorrect to suggest that the discovery of the aforesaid documents under Categories 112 and 113 arose from no fault on the plaintiffs' part.

A large number of the documents in Categories 112 and 113 were discoverable (or potentially discoverable) in July 2008. Category 112 appears to have a vast number of documents which pre-date 1st July 2008 and which clearly fall under a range of existing categories of discovery. For example, the plaintiffs classified architects'/engineers' opinions as to compliance with planning or building regulations as falling within Category 112. There are 115 of these in the new discovery under Category 112. They were clearly discoverable in July 2008 and a number of these were discovered at that time under other categories. The defendants queried the lack of architects' opinions or certification in their motion for further and better discovery in October 2008 and were told that the plaintiffs did not have all the architects' opinions but all such opinions in their power, possession or procurement had been discovered. Mr. Lennon could not assess whether these opinions were in the old discovery. In Category 113 there are 418 documents listed as having no date or a date before 1st July 2008. Mr. Lennon does not see how the plaintiffs can state that these documents must fall into Category 113 as relating to complaints after the cut-off point. Even if the Court regarded this additional discovery as in some way excusable, there remains no valid or excusable explanation for the discovery of 33,588 documents which should have been discovered in the earlier affidavits.

In light of this, the plaintiffs are wrong to describe Mr. Lennon's assertion that they failed to discovery 52,000 documents as being "seriously inaccurate and misleading".

Part 2: The Discovery Process and the Discovery Review Process undertaken by the Plaintiffs

(i) The Discovery Process

Mr. O'Byrne refers to the requirement to locate vast numbers of documents over an extensive period of time. The plaintiffs repeatedly emphasised in 2008 that they wanted an early trial date. It was always a source of surprise to the defendants that the plaintiffs were able to respond to their request for discovery and make discovery within quite a tight timeframe. It appears their desire for an early hearing date prevented them from fulfilling their discovery obligations. It is also apparent from para. 20 of Mr. O'Byrne's affidavit that the plaintiffs did not assess their discovery obligations in respect of the estates individually but assumed "that broadly similar documentation comprising issues of a discoverable nature would exist for all the sites."

At para. 21 Mr. O'Byrne states that during early 2008 Menolly was unaware of all of the issues the defendants have now raised in their expert reports. However, any issues raised in the expert reports are raised to advance the defence that pyrite was not the cause and the damage alleged had other more mundane causes. In circumstances where the defendants were denying pyritic heave it must have been apparent to the plaintiffs that one of the potential causes of the cracking was shrinkage bringing into play the water/cement ratio. For the avoidance of doubt, the defendants in their second amended defence have specifically pleaded this issue, but it is not a new case being made by the defendants.

It is difficult to see how Mr. O'Byrne can aver that the plaintiffs' omissions in discovery "were accidental and innocent" since the discovery deficiencies appear to be due to the failings of many persons within the plaintiffs. It is of considerable concern to the defendants that the structure put in place by the plaintiffs to organise their discovery seems to have been put in place by individuals working for the plaintiffs. The role of the plaintiffs' solicitors appears to have been subordinate to that of their employees. The responsibility for making discovery was put onto individual Menolly employees. In addition, it is wholly inappropriate that a site foreman should be brought into a solicitors' office to review and schedule documentation that had been sent there for review by experienced legal practitioners aware of the requirements of the law of discovery. The plaintiffs contend that it was never the function of Mr. Blain

or Mr. Clonan to decide on what should be discovered. However, it is evident from Mr. O'Byrne's affidavit that they were clearly playing a central role in the discovery process. It is also apparent that the plaintiffs' solicitors were wholly dependent on the plaintiffs to furnish them with the relevant documentation before this documentation was considered by any member of the plaintiffs' legal team. In February 2009 the plaintiffs highlighted to the Court, *inter alia*, the duty of a solicitor in respect of discovery. They referred to Volume 13 of Halsbury, which notes the responsibilities of solicitors in this regard. The plaintiffs also highlighted the consequence of failure to produce relevant documentation. In doing so they relied on the judgment of Johnson J. (as he then was) in *Murphy v. J. Donohoe Ltd.* [1996] 1 I.R. 123. It is ironic that they were prepared to make these submissions when their own compliance with discovery was, as they now accept, grossly deficient.

It is noteworthy that Mr. Butler made no mention in the "Overview of the Discovery Process" section of his affidavit of 25th May 2009 of the specific role of employees of the plaintiffs. That affidavit seeks to present a discovery process directed and governed by a team of personnel in BCM and five Junior Counsel.

(ii) Hard Copy Documents

(a) Centralised Filing

It remains of major concern to the defendants that the vast majority of the plaintiffs' documents "were not segregated or held in such a way that they could be easily located, extracted and submitted to BCM". The absence of an organised central source means that it cannot be asserted with any confidence that all relevant documents have been considered, let alone discovered.

(b) Menolly Employees

At para. 40 Mr. O'Byrne avers that the discovery process within Menolly relied on each person taking responsibility for identifying their documents relating to the estates and sending them to BCM. In February 2009 the plaintiffs told the Court that the solicitor cannot simply allow the client to make whatever list of documents the client thinks fit nor can the solicitor escape the responsibility of careful investigation or supervision. The defendants accept this principle but the plaintiffs only paid lip service to it. Their performance of their discovery function centred on employees, past and present, identifying documents they thought relevant on the basis of some criteria identified by the plaintiffs' solicitors which Mr. O'Byrne has declined to identify fully. Notwithstanding the laxity and inappropriateness of this approach, it appears that it was not even applied to former employees.

(c) The Monaghan Report

The haphazard and wholly unreliable manner in which the plaintiffs carried out the discovery process is evident from their failure to discover the Monaghan report. This documentation was on shelves at Menolly's headquarters. The documentation on these shelves was obviously never searched or considered. Further, the reliability of the plaintiffs' employees in complying with their discovery obligations cannot be relied upon considering that Mr. Lee claimed he recalled asking his secretary to box his files and send them to BCM. It is suggested that the reason the report was not discovered during the electronic search of Menolly's IT systems was the storage space occupied by the photographs it contained. It is inconceivable that when the Defence was delivered the plaintiffs did not identify or recall the Monaghan Report, which exposed considerable defects in the building works carried out by the plaintiffs in Myrtle. The defendants believe it was deliberately withheld. This belief is supported by the fact that a six page extract from the report was considered and marked "relevant not requested". Furthermore, emails referring to the report were described as "not relevant". The report was clearly relevant and had been requested in the request for documentation under Category 110. The defendants have been prejudiced as a result of not having access to it during the hearing. Most if not all of the plaintiffs' witnesses to date have been questioned about what the defendants contend are defects in the quality of building on the estates. The Monaghan Report would have been put in detail to them as proof of the very poor standard of building work carried out by the plaintiffs. Mr. O'Byrne's suggestion that "no further issues arose out of the Monaghan Report" as a result of a Board meeting between Menolly and Ballymore Homes does nothing to diminish its importance as a document illustrating defective workmanship.

(d) Discovery of Pyrite Related Documents

Mr. O'Byrne refers to the "erroneous understanding of a number of Menolly personnel". This understanding would not have been formed had the duties of a solicitor in respect of discovery been complied with. The affidavit does not assert that Menolly personnel were furnished with a list of discovery categories. Any brief examination of the categories would reveal the incorrectness of the understanding that only documents which related to pyrite were required. Mr. Matt Carroll is a crucial witness in these proceedings, yet some of his files were not furnished to BCM. Again, it is revealing that the documents not disclosed were documents such as snag lists and details of maintenance issues which would have assisted the defence.

(e) Privilege

Mr. Albert O'Loughlin thought that privileged documents did not have to be sent to BCM. In effect, this means he was deciding what was and was not privileged. Again, this points to the domination of the discovery process at its earliest stage by the plaintiffs and their personnel. This dominance and the haphazard nature in which the documentation was kept make the defendants extremely concerned that they do not have all relevant documentation that should have been discovered.

(f) Control and Co-ordination over Transfer of Files

Mr. O'Byrne refers to a box of documentation sent to BCM but not received or recorded by it. The failure of the plaintiffs even to transfer some documentation to their solicitors or to be aware whether it was transferred undermines the whole process of discovery that they carried out.

(g) Category 68 and Documents relating to Helsingor Ltd.

But for this application, the inconsistency at the heart of the plaintiffs' approach to Category 68 would never have become apparent. The failure to communicate this inconsistency knowingly put the defendants in a disadvantageous litigious position. Also it appears that the Helsingor documentation would not have been discovered but for this application. Further, this failure to engage must be seen in the light of the defendants' repeated queries in October 2008 with respect to absence of delivery documentation and other

documents concerning concrete.

(h) Circulation of Information about Discovery Categories

At para. 58 Mr. O'Byrne states that Menolly was so anxious to do everything necessary to expedite the prosecution of the proceedings, it set about the task of gathering documents before receiving the defendants' letter seeking voluntary discovery dated 10th March 2008. The truth is that Menolly was so anxious to do everything necessary to expedite the prosecution of the proceedings that it did not comply with its discovery obligations and performed them in a haphazard manner. More significantly, this paragraph confirms that the specific categories the Court directed the plaintiffs to discover "were not communicated to Menolly personnel generally". It appears that most of the advices in respect of discovery were furnished before the Court directed discovery of 102 categories. It seems the Menolly personnel were never informed what categories of documents they were required to discover. They were never informed by Menolly senior management as to what had to be handed over.

Mr. O'Byrne has sought to present the plaintiffs as being so concerned about discovery that they were organising discovery meetings before 10th March 2008. Mr. Lennon believes such an averment is an attempt to disguise the reality that no instruction on the discovery required was provided to the Menolly personnel after that discovery was sought on 10th March 2008. Mr. Lennon believes this was a deliberate decision by the plaintiffs to pay lip service to their discovery obligations probably influenced by the desire to get the earliest possible hearing date.

(i) Maintenance of Documents on Sites

Mr. Lennon has considerable concern about the prospect of there being other relevant documents in the plaintiffs' possession which have not been discovered. Documents which were on the three sites do not appear to have been stored centrally, nor was there any system for filing this documentation on site. It is clear from para. 59 that a considerable number of documents which were left after a site was completed may have been thrown out.

An integral part of discovery is discovery of documents which were previously but no longer are in one's possession. The plaintiffs have furnished no detail as to what efforts they made to request their personnel to list relevant documentation of this kind. In addition, the plaintiffs chose not to disclose to the defendants that relevant documentation may have been destroyed. This must have been a conscious decision. Given the haphazard nature of document retention by the plaintiffs, such information should have been sought from Menolly personnel. The failure to do so is an ongoing deficiency.

(j) Departure of Menolly Employees

No detail is given as to how many former employees did not accede to the request for co-operation with discovery. Such information is relevant because if Menolly cannot procure the documentation from them, the defendants could have made efforts to seek them through non-party discovery. Only when detail such as the identity of the individuals concerned is provided can the defendants and the Court form a view as to the extent of the non-compliance that remains. It is also astonishing that the plaintiffs did not physically search their offices for documentation before swearing 11 affidavits of discovery. Searches carried out by Mr. O'Loughlin in 2008 again reveal the total disregard the plaintiffs' senior management had for the discovery process. It is now admitted that the persons involved in the searches for documents before the first affidavit of discovery "were unfamiliar with the three estates and the type of documents that ought to exist…".

(k) Searches carried out by Mr. Charlie Blain

Mr. Blain appears to have been the person responsible for locating documents yet even now the plaintiffs do not appear to be aware of whether he was seeking all relevant documents or looking for specific documents he believed to exist. It is of considerable concern that after his preliminary search many documents may have been moved or destroyed, making them unavailable for the 2009 discovery.

(l) The Departure of Mr. Charlie Blain

Mr. Blain was not prepared to assist the plaintiffs from mid-May 2008. His knowledge in respect of what documentation is missing remains of considerable concern.

(m) Site Diaries and Notebooks

Mr. O'Byrne again blames site personnel for their "erroneous understanding" but fails to recognise that they were never apprised of the specific categories. He says that the site diary of Alan Kearney was not discovered in 2008 for the reasons in Mr. Butler's affidavit of 25th May 2009. Mr. Lennon can find no reference to Mr. Kearney's site diary in that affidavit.

(n) Storage of Historical Records

How the Farm operated is of deep concern. In particular, the averment that access to the Farm and any other locations where files were held was not confined to any particular personnel appears to mean the integrity and safety of documentation kept by the plaintiffs cannot be guaranteed. Mr. O'Byrne points to an absence of signing in and signing out requirements and states that no record was kept of documents that might have been removed for temporary review.

(o) Gaps in the 2008 Discovery Process

Even when documentation was furnished to BCM for the 2008 discovery process, a comprehensive list of what BCM received was not prepared. The plaintiffs were never going to be in a position, therefore, to determine whether documents which should have been discovered were in fact discovered. In addition, a list of former Menolly employees has now been sought and provided and the defendants have grave concerns over the extent to which all relevant documents have been retrieved from these people.

(iii) Documents in Electronic Form

Mr. Lennon believes that despite technological development it remains incumbent on a litigant to examine each document for the purpose of determining relevance for discovery. The search of documents in electronic form should never have proceeded as it did. The issue should have been brought back before the Court before any decision was made by the plaintiffs to base their discovery of electronic documents on a format that did not require them to review individually each document. This is not a process that appears to have been controlled or properly overseen by BCM. The collaboration with WT resulted in a decision in favour of 12 search terms. It appears that BCM had no involvement in this search process. Such an unorthodox departure from the rules of discovery should have been brought to the Court's attention. The inadequacy of the 12 search terms is evident from the omission of the word 'pyrite'. This attempt was doomed to failure from the outset. The current electronic discovery is based on 37 search terms. Mr. Lennon believes there should have been a proper review of all electronic documentation by the plaintiffs, rather than limiting this review to a search for 37 words.

No detail is given as to how many hard-drives were searched or what is the make up of the Menolly central server. A total of 21 hard-drives were not furnished to Price Waterhouse Coopers because they were operated by Menolly personnel in the finance or planning departments. The history of the plaintiffs' discovery should have taught them that all relevant documentary locations should be searched properly. This clearly has not been done.

It is a fundamental rule that in searching electronic documentation one does not break the parent/attachment relationship, but the plaintiffs have broken up emails from their attachments. The emails and attachments should have been reviewed rather than subjected to interrogation by a software package. WT revealed in July 2009 that due to an error in this process over 11,000 emails had not been identified. No detail is given as to how PWC searched the electronic documents. The work carried out by WT (in whom the plaintiffs clearly do not have any or any sufficient confidence) has not been reviewed by PWC in respect of the email documentation. The plaintiffs unilaterally adopted a search method that has not been approved by our Courts. The unilateral deviation from the rules on discovery should not be permitted unless the Court is satisfied that the search by WT on the emails is adequate and if the PWC search has been properly explained. To date neither has happened. The defendants have received a document from the Chief Executive of Servient Inc, an American corporation that provides specialist advice to litigants on electronic discovery technology. The document provides a brief overview of the current standard practice on discovery of electronically stored information in litigation in the United States. It is apparent from this overview that the plaintiffs did not comply with the current standard practice in the United States.

(iv) Conclusion

Neither Mr. Butler nor Mr. O'Byrne avers that full discovery has now been completed. The height of the plaintiffs' claim in remedying the deficiencies is Mr. O'Byrne's averment that he is confident that proper discovery has now been made. The defendants do not share this confidence. The failures in the plaintiffs' discovery wholly undermine the discovery they have made. There appear to be considerable gaps in the discovery and evidence of other documents in existence which are not discovered. It is apparent from Mr. O'Byrne's explanations that there was a systemic failure in the plaintiffs' discovery which gives rise to a serious concern that the defendants do not have all documentation they are entitled to.

The plaintiffs have sought to blame others but responsibility for the deficiencies in their discovery rests on them and the affidavits made on their behalves. The explanations for the deficiencies are grossly inadequate and suggest, if not deliberate concealment, a reckless disregard on the part of the plaintiffs. The deficiencies were only exposed as a result of the persistence and diligence of the defendants and their advisors. The defendants still have the greatest of concerns that all relevant documentation has not been discovered. The history of the process leaves them with no confidence that proper discovery has been made. Furthermore, the Court has been deprived of affidavit evidence from all the many persons involved in the discovery process except Mr. O'Byrne and Mr. Butler.

3 Further Problems with the Plaintiffs' Discovery

Despite numerous opportunities to do so, the plaintiffs have still not made proper discovery.

Menolly Employees

Mr. O'Byrne avers that the process was exposed to the possibility of personnel partially or entirely failing to hand over relevant documents, and in the case of former employees being unaware of the need to hand over documents they had retained. The absence of a proper system to ensure retrieval of documents from employees who had left or were leaving raises serious concerns as to whether all relevant documents were in fact preserved and can ever be retrieved. Mr. O'Byrne notes that many employees who were directly involved in the estates have been made redundant. He provides very little detail of when employees left and what efforts were made since to retrieve all relevant documentation from these persons. It is very likely that many of these employees would have operated their own laptops or computers given that their employment would require them to travel. Mr. O'Byrne notes that Mr. Blain had four separate email accounts (not obviously linked to the plaintiffs' servers or computer systems) which had to be separately interrogated. It is unclear that this exercise was carried out for other employees. The plaintiffs have furnished a list of current and former employees of Menolly. The following are examples and demonstrate that there may be very many documents not retrieved from the electronic files of former employees which have not been discovered.

Discrepancies: Email Accounts of Menolly Employees

A search of the 2008 and 2009 discovery shows that, in respect of six current/former employees, they received emails that were discovered but no outgoing emails from them have been discovered. This raises the very real possibility of a deficiency in relation to the discovery of these persons' email accounts, and that only emails from the Menolly servers have been retrieved. 21 current/former employees have no record in the discovery of ever having sent or received an email. There are six other current employees in respect of whom there is a record of having an email account but very few or no emails have been discovered. In respect of a further eight former employees, there is a record of an email account but they have discovered few or no emails. In a number of instances there is one-way email traffic, which indicates that although these former employees have had emails in their accounts, they have either not been responding to or have not been receiving relevant emails. Alternatively, there was two-way email traffic but they have not been discovered.

Individual Cases of former employees where there appears to be discrepancies

The plaintiffs have discovered approximately 350 received emails and only 40 sent emails for Ciarán Lee's email account. The ratio of emails received to emails sent is surprising, particularly in light of the nature of his employment as Head of Construction. Owen McElroy seems to have had a project management type role. Surprisingly, he received approximately just 20 emails and authored none. This is particularly odd given the number of letters and faxes he wrote/received. This is suggestive of a deficiency in discovery in respect of Mr. McElroy. David Murphy, who was employed as a quantity surveyor, received approximately 40 emails and authored none on the summation database. Again, this would suggest only emails from Menolly's server were caught, while outgoing emails from Mr. Murphy were not. Radoslaw Powozinski was also employed as a quantity surveyor. He authored only approximately 24 emails but received none that are on summation. Barry Donovan seems to have had a site supervisory role. He received approximately 17 emails that are on summation but there is no discovery of emails he may have written. He has no record of any other type of correspondence. In respect of Vincent Conneely, although he had an email account there is no record of any emails save for two he received in relation to house snag lists.

Missing Attachments

Numerous exchanges took place between the parties regarding missing attachments which culminated in Mr. Butler stating that all efforts had been made to deal with the attachments issue. Mr. O'Byrne swore an affidavit in December 2008 stating that these attachments were missing. However, it appears from Mr. Butler's affidavit that, with respect to a number of attachments, this was not the case. 97 of the attachments Mr. O'Byrne averred were missing and could not be retrieved were in the 2009 discovery. Mr. Butler now accepts that no efforts were made to contact the source of the document where an attachment was missing. Given the clear evidence that an attachment exists because the "parent" pointed to this, it is wholly unsatisfactory that such efforts were not made, particularly when Mr. Butler averred that the plaintiffs had done all in their power to locate the missing attachments. In addition, the splitting of attachments from their parent documents and scanning them separately onto summation was fraught with danger, as is recognised in the report by Servient Inc. For example, a parent document can in many instances provide context and meaning to the attachment (and vice versa). The determination of its relevance to a category can therefore be affected. This can particularly apply when trying to determine whether a document is privileged, for example an attachment might be privileged but if its cover letter shows that it has been circulated to a third party then privilege could be lost. It appears from the old discovery that privilege was claimed over two letters from DBFL to Menolly indicating uncertainty over the status of fill in two units. It appears these letters were also sent to the homeowners' solicitors by way of a cover letter dated 19th June 2008. Mr. Lennon does not understand how these letters were the subject of privilege when they were sent to homeowners. This may have arisen from splitting an attachment from the parent document with the possible consequence that the reviewer might not have known that the document was sent to the homeowners. If this arose from the system adopted by the plaintiffs it gives rise to considerable doubts over whether the defendants have received all relevant discoverable documents and whether all documents over which privilege has been claimed (in both the new and old discovery) have been properly discovered.

The practice of splitting has caused the defendants enormous difficulty in conducting their review of the plaintiffs' discovery. This is perhaps best illustrated by a document the defendants say is of considerable significance for the defence. This is one of many examples. At para. 97 of his previous affidavit Mr. Lennon referred to a fax containing the constructional detail for particular foundations built on lime stabilised soil. Mr. O'Byrne avers that this document was discovered but Mr. Lennon takes serious issue with the averment that it was discovered as he said. The cover sheet was discovered in 2008. It appeared to be an important document and the defendants asked the plaintiffs to provide the attachments to it. The initial response was that the attachments should have a sequential Doc ID number. However, the two sequential Doc IDs appeared to have no connection to the fax cover sheet. Doc ID 12371 appeared to have no obvious correlation to it and 12372 contained a map of Drynam. When these documents were reviewed they appeared to have no direct relation to the cover sheet and their significance was not apparent. The defendants now know that the missing link was a Doc ID 09118, appearing approximately 3,000 documents away from the cover sheet. 09118 had a different document date and the author field was missing on it. It was therefore impossible for the defendants to know it constituted the second page of the four page document which now appears in full in the new discovery.

Mr. Butler criticises the defendants for failing to conduct a proper review to locate missing attachments when this issue first arose. However, even if some attachments were missed in the defendants' sequence review, most attachments were not in sequence. Mr. Lennon considers it unfair to criticise the defendants in this way as it is often not apparent whether a document is an attachment of the parent – usually only the author or recipient would know this. Mr. Butler criticises the defendants for failing to acknowledge that some of the 97 "missing" attachments were in the old discovery. However, in circumstances where the plaintiffs had sworn these attachments were missing it is unsurprising that the defendants were unaware that they were in the old discovery. Further, most of the attachments Mr. Butler now says were always there were not in sequential Doc ID number to the parent in the old discovery. Furthermore, it is not true that 83 of these attachments are in the original discovery. Some are not fully discovered in the old discovery, due to missing pages, redactions, etc.

As the defendants now know that the original author was not approached, this brings into question whether attachments are missing and whether the plaintiffs have made appropriate efforts to ensure that full discovery has been made. The defendants have come across further documents which indicate that there may well be attachments which have still not been discovered.

Gaps in Correspondence – Special Attention Homes

In addition to the above, there appear to be a number of gaps in correspondence in relation to properties which have a particular significance to the issues in the case. In this regard Mr. Lennon refers to lists of non-Bay Lane properties and remediated properties where there appear to be definite gaps in correspondence.

Documents received from Non-Parties

Despite Mr. O'Byrne's statement that he has made full discovery, the defendants have obtained inspection of documents through non-party discovery from a number of non-parties. Some of these documents clearly show that they were sent to or from the plaintiffs. However, these have not been discovered.

The defendants also received on 22nd October 2009 nine banker's boxes of discovery documentation from Helsingor Ltd. As the defendants have not yet had an opportunity to assess these documents they reserve their position in relation to any prejudice suffered in relation to them.

In light of the foregoing, and given the broad range of gaps, discrepancies and documents still appearing not to have been discovered – particularly given the manner in which the plaintiffs have approached their discovery obligations – the defendants can have no

confidence that the plaintiffs have made or will ever make proper discovery.

4 The Non-Bay Lane Houses

At pp. 31-130 Mr. O'Byrne attacks the defendants' legal team. This attack is designed to give the impression that the assertions Mr. Lennon made in his previous affidavit were "contrived", "clearly manufactured" and constitute a "lie". Mr. O'Byrne fails to demonstrate any grounds for such far-reaching allegations. For the most part his accusations can be pared down to two propositions: that the defendants ought to have known what is known now on the basis that they had been given half the picture as evidenced in the 2009 discovery; and that they ought to have deduced the rest of the picture had they read signals which were emanating from the plaintiffs. Mr. Lennon utterly rejects the insinuations and express accusations Mr. O'Byrne has made at pp. 31-130. He also takes serious issue with the fact that an attempt has been made to question the *bona fides* of the defendants and their legal team when the defendants feel genuinely aggrieved by the fact that a vast amount of information and documentation was not disclosed to them earlier. More fundamentally, the plaintiffs, as expressed through Mr. O'Byrne's averments, appear to be adopting a position that it is entirely legitimate for a party partially to disclose information whilst keeping to itself information which would disclose the full picture.

Throughout his affidavit Mr. O'Byrne repeatedly states that the defendants ought to have known what was happening with respect to the non-Bay Lane houses had they read the signals which were being given, while at the same time maintaining that it was entirely proper that the plaintiffs held back from the defendants the information to which those signals were pointing. In many instances where he claims that the defendants should have known of the situation with the non-Bay Lane houses the supposed signals could not have put the defendants on notice without being privy to the knowledge which the plaintiffs had. In other circumstances where a signal was given by the plaintiffs it was, for the most part, followed up only to be met by evasive responses, obfuscation and the bringing of the matter before the Court. Mr. O'Byrne's argument has an inherent problem. If the plaintiffs were indirectly communicating the true position with respect to the non-Bay Lane houses, why did they refuse directly to communicate the position?

In many instances the defendants had either none of the information which has emerged from the new discovery or partial information which was in itself insufficient in circumstances where the new discovery completely changes the context of what the defendants already knew (or could have known). In some cases Mr. Lennon has referred to documents in the new discovery that were also in the old discovery. However, in every instance where this occurred his reference to those documents does not detract from the prejudice suffered. The plaintiffs led the defendants to believe that the new discovery contained no duplication. In other instances Mr. O'Byrne has clarified certain documentation demonstrating that the import the defendants attached to it was based on a misunderstanding. Where that clarification has been provided Mr. Lennon has withdrawn the point previously raised. However, when one strips away what was known and what was not known the prejudice apprehended is very real.

What the Defendants knew – the Defendants' perspective

Many of Mr. O'Byrne's averments appear coloured by his own intimate knowledge of what was occurring on the plaintiffs' side. He appears to be unaware of the extent to which the defendants were in the dark about the confusion the plaintiffs had encountered with respect to the source of infill for so many properties. Mr. Lennon refers to correspondence noted at paras. 205-212 of his previous affidavit relating to source of infill. There are now new documents in the July 2009 discovery which clearly show that there was great confusion on the plaintiffs' part with respect to the source of infill for a range of units at Drynam. Given the extent of that doubt as evidenced by spreadsheets there can be no question of any benefit of doubt being given to the defendants, as was asserted. There is no doubt that the defendants relied on the assurance given that the plaintiffs were undertaking a similar exercise with respect to Myrtle and Beaupark in that the same information would be provided as to source of fill at these properties when it came to hand.

A Notice for Particulars in December 2007 queried the source of fill. The Replies given were, in the main, unequivocal, and stated that the houses which used the Moyglare product showed "no sign of heaving or cracking" and that the Moyglare houses were the only ones at Drynam which did not contain Bay Lane fill. The plaintiffs made clear that with respect to Drynam the results were conducted on foot of a spreadsheet analysis. No indication was given that this spreadsheet analysis was ambivalent and, as the defendants now know, unreliable. Had the plaintiffs furnished the spreadsheets in the new discovery this would have been clear. With respect to Myrtle, the plaintiffs were equally unequivocal with the position as they knew it.

Mr. O'Byrne states that with respect to a number of units in Parker House the defendants had information which clearly put them on notice that there was an issue as to whether same contained Bay Lane infill. One of the reasons given for this was that these properties were not listed in the January 2008 Replies at number 10.1 as being the properties included in the plaintiffs' Statement of Claim. Reply 10.1 dealt with the reference at para. 22 of the Statement of Claim to 178 houses and apartments that had been tested and surveyed. It was pleaded that 162 of these required remedial works. However, if these units at Parker House were not listed because they did not contain Bay Lane fill, Mr. Lennon wonders why the plaintiffs specifically refrained from listing these units at Reply 3.11.3 or at Reply 9.8 where the defendants had specifically asked which properties did not contain Bay Lane fill. It is a remarkable coincidence that effectively all of the units which have since emerged to contain non-Bay Lane fill were not included at Reply 10.1. Mr. O'Byrne suggests this put the defendants on notice, but Mr. Lennon suggests that this could only be apparent to him due to his special knowledge of his case. All the defendants knew was that the plaintiffs had told them which units did not contain Bay Lane fill or which contained a mix (by virtue of the other Replies) and those Replies did not suggest doubt over the source for the properties not listed at Reply 10.1. The plaintiffs had previously indicated that the defendants would get the benefit of the doubt where there was doubt. That turned out not to be the case.

Mr. O'Byrne criticises the defendants for their apparent failure to test the source of fill. However, the defendants knew they had supplied a large quantity of material to the estates. It would have been a massive operation to conduct a full scale infill examination of every property with a view to second guessing the specific assurances the plaintiffs had given, and an unnecessary one had those assurances been correct. Given that the defendants lacked vital inside information as to where Bay Lane fill was used or not used, it was decided that the cost could not be justified where the plaintiffs had given specific assurances.

Mr. O'Byrne does not acknowledge that it is for the plaintiffs to prove their allegations. It is not for the defendants to prove that the damage is not caused by pyritic heave. If the plaintiffs contend that only the properties containing Bay Lane fill manifest damage they cannot choose to withhold vital information which might undermine that contention. This applies *a fortiori* where the plaintiffs hold all the cards regarding the requisite knowledge as to where infill was placed. In addition, given that the plaintiffs were asserting that those properties in Drynam which did not contain Bay Lane fill were showing no signs of damage, the defendants had to focus all of their resources in an extremely tight timeframe on investigating and disproving the heave allegation from a geological and geotechnical perspective with respect to these properties. The defendants were also advancing that the case that the damage was due to far more mundane causes. Given what the plaintiffs were alleging and based on what they had stated in their correspondence and replies,

a full scale investigation involving visual inspection of infill to determine its source appeared to be a disproportionate allocation of resources. The defendants' approach was further confirmed by other assurances from the plaintiffs that there was a documentary record which would conclusively establish source of fill for various properties. The Court was told on 31st July 2008 that the discovered documents could identify where the infill went. This statement was made at a time when (as the defendants now know from Dr. Strogen's April 2009 report) there was serious confusion as to source for 74 houses beyond those mentioned in the Replies. Mr. Lennon understands that the plaintiffs have since indicated that this statement was made on instructions which inadvertently over-stated the position, but one must consider the effect such a statement had on the defendants.

The July 2008 discovery was reviewed and an extensive list of queries arising from that review was raised, including very specific queries relating to the documentary records evidencing where the infill went. In particular, repeated questions were raised as to what had been stated before the Court on 31st July 2008 requesting clarification as to whether the plaintiffs had specific documents regarding where the infill went. A number of letters and affidavits were exchanged in relation to this issue and on each occasion the plaintiffs' responses were at least evasive. Eventually, on 23rd December 2008, Mr. O'Byrne averred that there were no documents in the discovery provided which identified where the defendants' infill was used. By then the opportunity for inspection and examination to determine which houses would be included in the basket was gone, the basket having been agreed, and the defendants were in the course of preparing their expert reports in anticipation of the expert reports from the plaintiffs' experts. However, Mr. O'Byrne failed to aver to the fact that there were documents in the plaintiffs' possession containing specific references to where the infill was placed and these had not been discovered although they were discoverable. No reference was made to the plaintiffs' great uncertainty as to source.

By the time the contents of Mr. O'Byrne's affidavit of 23rd December 2008 had been reviewed and explored the deadline for the defendants' witness statements was upon them. Furthermore, all necessary investigations and inspections which were required to be carried out for the purposes of those reports had already been carried out and the basket had been decided.

What the Plaintiffs knew

Dr. Strogen was directed to furnish a supplemental report relating to his investigations with respect to properties where infill identification was problematic. This was furnished in April 2009 and reveals what the plaintiffs knew regarding the uncertainty as to source. On 25th March 2008 Dr. Strogen completed his first review of infill source at Drynam. The details of this review are set out at Appendix 2 of his report. It is clear therefore that as early as March 2008 he had serious doubts about whether the infill under a number of Drynam houses (thought to be from the first named defendant) came from Bay Lane. These are the re-test houses. The plaintiffs were aware this material was not from Bay Lane and that their own expert was of the view that it was from Huntstown. It is manifest from the document itself where "HT" appears beside a number of the re-test houses that he was inclined to this view. The plaintiffs were also aware at this stage that these houses were manifesting damage. They had by then received letters of complaint in respect the re-test houses, except four of them. They had also carried out inspections of all of the re-test houses and had determined that these houses were manifesting cracks. Notwithstanding all of this, the plaintiffs kept this information from the defendants. The plaintiffs did not attempt to correct their Replies, or at least notify the defendants of a possible inaccuracy in this regard, once they received the information from Dr. Strogen as set out in the March 2008 document. This document and the data from Dr. Strogen's test results for infill was never disclosed to the defendants. Mr. Lennon believes this was in direct breach of the agreement of 11th January 2008.

On 21st April 2008 Dr. Strogen presented a spreadsheet containing further analysis of Drynam to the plaintiffs. The spreadsheet again confirmed that the re-test houses did not contain Bay Lane infill. Again, the defendants were not notified of this. A further spreadsheet relating to Myrtle and presented on the same date made clear that Dr. Strogen had encountered 32 houses where the source was questionable. This information contradicted information in the plaintiffs' Replies but they made no attempt to correct the position. In his April 2008 report, Dr. Strogen also notes that a significant number of houses in Myrtle contained crushed gravel and that it appeared that 14 units at Parker House and Stapolin House contained a mix of Bay Lane fill and crushed gravel. Their Replies stated that the infill beneath all houses and apartments in Myrtle was from the first named defendant excluding Sweetman House and some units on Stapolin Avenue. By April 2008 the plaintiffs knew this was incorrect, yet no attempt was made to notify the defendants.

In his April 2009 report Dr. Strogen states that a meeting was held in May 2008 with Menolly and BCM representatives to discuss the re-test houses and that re-examination of the samples and further HomeBond samples over the next several weeks changed little. The plaintiffs therefore appear to have been fully aware of the significant problem as to the origin of the fill for a number of houses and that the evidence before them indicated these houses did not contain Bay Lane infill.

What the Plaintiffs say the Defendants ought to have known

Mr. O'Byrne points to a number of matters which he says ought to have put the defendants on notice as to the situation with properties which might not contain Bay Lane fill.

Notification of a "re-test" program

The first indicator is that the defendants were aware of a renewed drilling schedule and re-test program in late summer 2008. Mr. Lennon agrees the defendants were given numerous notifications regarding a re-test schedule on the properties they now know contain non-Bay Lane infill. However, the defendants were never told the reason for this re-testing. The plaintiffs did not indicate to the defendants that the basis for this review was because their own experts had advised that the fill in these properties contained non-Bay Lane infill. Mr. Lennon wonders why the plaintiffs did not directly communicate what the situation was to the defendants.

The fundamental incongruity of Mr. O'Byrne's position can be clearly illustrated from his averments relating to 4 Boyd House where he refers to documents which he alleges would have put the defendants on notice of the uncertainty. He refers to a June 2008 letter from DBFL in this regard. However, this letter does not indicate that the uncertainty relates to the source but rather that "test results" have proved inconclusive. If Mr. O'Byrne contends this letter was evidence that the plaintiffs had uncertainty as to source, Mr. Lennon wonders why the plaintiffs did not advise that the reason for this uncertainty related to Dr. Strogen's conclusion that the source was uncertain. The new discovery contains two other such letters relating to 24 and 36 Parker House. Both these letters are in the exact same terms and indicate that re-testing has to be carried out because the status of the infill appears uncertain. If these letters are a communication of the fact that the infill was uncertain then there is no reason why the plaintiffs could not have directly disclosed this to the defendants.

Mr. Lennon referred in his previous affidavit to spreadsheets recording the source of infill for various properties. He referred to a spreadsheet which includes data relating to fill source for properties at Myrtle. Mr. O'Byrne argues that the information in this spreadsheet is privileged and that even if this document had been in the old discovery the plaintiffs would have been entitled to claim privilege over it. However, if the plaintiffs are relying on letters concerning 4 Boyd House and 24 and 36 Parker House as indirect communications of uncertainty Mr. Lennon does not believe the plaintiffs could claim privilege over precisely the same information which is contained in that spreadsheet. The contradiction adopted by Mr. O'Byrne is even more apparent when one considers the 22 letters to homeowners sent in June 2008 noting that the infill did not appear to be from the same source as the problematic infill. The spreadsheet just referred to contains a number of entries indicating that the source of fill for various properties was either uncertain or was not Bay Lane. In many of these instances this information was communicated to the homeowners. Mr. Lennon wonders why information of this type was being disclosed to third parties but was being kept from the defendants under the cloak of privilege. Privilege was claimed over the letters for 24 and 36 Parker House in the old discovery even though these letters were sent to homeowners.

Mr. Lennon refers to the DBFL letters in respect of 4 Boyd House and 24 and 36 Parker House and wonders why, if the plaintiffs were treating their experts' conclusions relating to the source of fill, referred to in the letters, as "test results", the experts did not hand over these results pursuant to the protocol agreed in January 2008. In fact, all the notifications provided in late summer 2008 were expressed to relate to "re-testing". The defendants had always presumed that the testing referred to related to levels of sulphate, sulphur and pyrite. It now appears that it related to source. This was clearly "data generated" arising from analysis of these samples, yet the plaintiffs took no steps to furnish these test results to the defendants. Mr. Lennon wonders why the plaintiffs did not disclose the results of this re-testing pursuant to the January 2008 protocol. It is clear that Dr. Strogen considered that the "re-testing" regime on the non-Bay Lane houses in late summer 2008 was in effect a "testing" regime in all houses where the source had proved problematic, and there are further letters in the new discovery which post-date the cut-off point and show that DBFL considered these investigations to be effectively a testing program. It is hard to see why the plaintiffs' results and data generated in the "re-testing" program were not furnished pursuant to the January 2008 protocol as they should have been. Had this been done the prejudice suffered might not have occurred or might have been lessened.

The report of Peter Strogen dated the 19th of December 2008

Mr. O'Byrne's contention in respect of Dr. Strogen's December 2008 report is to the effect that the houses the defendants now know contain non-Bay Lane fill were not listed therein, which was a clear sign that any house not mentioned contained non-Bay Lane fill. This was therefore a trigger for the defendants to begin investigating the houses not mentioned. However, if Dr. Strogen was aware that a number of houses did not contain Bay Lane fill, Mr. Lennon wonders why this was not adverted to in his report. Mr. O'Byrne insists it is the defendants' fault for not realising that the plaintiffs were not communicating the full picture. That cannot be correct.

Mr. O'Byrne interprets Dr. Strogen's report as indicating that every house not included in the list in the appendices must have contained non-Bay Lane fill. This is clearly not what the report is saying. What is being said is that the plaintiffs do not know the status of the infill with respect to the houses not in the list. However, this was not the case as the appendices to Dr. Strogen's April 2009 report clearly show. Furthermore, Dr. Strogen's December 2008 report actually includes some properties listed as containing Bay Lane fill which the defendants now know are not pure Bay Lane.

The maps attached to Paul Forde's witness statement

Mr. O'Byrne refers to the fact that maps attached to the witness statements of Mr. Forde and Kavanagh Mansfield furnished on 22nd December 2008 concerned evidence of uncertainty as to source for a range of properties. Again, while the plaintiffs were willing to disclose this information directly by virtue of maps in appendices running to approximately 20 bankers' boxes, they were unwilling to communicate this in open correspondence and thereby correct the inaccurate particulars. The defendants did raise specific queries regarding the question marks in these maps. Despite these queries the plaintiffs responded in unequivocal terms that there was "no controversy" regarding these question marks and any such controversy had been resolved. Contrary to Mr. O'Byrne's assertions, it was the defendants' persistent queries on this matter that led to the provision of more information as to the plaintiffs' position regarding the non-Bay Lane houses. Despite an assurance in a letter dated 2nd February 2009 that there was no uncertainty, the plaintiffs wrote to the defendants on 20th March 2009, and only pursuant to a direction of the Court on the exchange of details with respect to complaints arising from non-Bay Lane properties, confirming that there was uncertainty as to source of fill in Drynam and that there were 24 re-test houses which appeared to contain non-Bay Lane fill. In addition, this letter disclosed a number of DBFL reports on the 25 Moyglare houses and an explanation for the non-discovery was given. The plaintiffs stated that the letter of 2nd February had expressed the position with excessive confidence. However, the position had been expressed (and permitted to remain) with excessive confidence from January 2008 until the letter of March 2009. Even then the plaintiffs failed to advise that there was also great uncertainty regarding a number of properties in Myrtle and Beaupark. Given the above it is truly astonishing that Mr. O'Byrne has averred that the defendants should have known of the true position by virtue of the Paul Forde maps furnished with his witness statement.

In referring to this map and to the witness statement of Dr. Strogen dated December 2008 Mr. O'Byrne fails to appreciate that, even if this information could be deemed to have put the defendants on notice, it was furnished after the window of opportunity for inspections and examinations had closed. As the plaintiffs know the basket and all the evidence gathered for the purpose of preparing expert witness reports had to be effectively completed by the defendants before the receipt of their witness statements and expert reports. Information of this kind should have been in the July 2008 discovery. The basket was agreed in early December 2008, before which there was intense negotiation and intense deliberation on which houses to choose and the best strategy for presenting the defence. In any event the information did not come before Christmas 2008. It came in March and April 2009 and was not confirmed until 16th June 2009. The information in question appeared only to arise out of specific enquiries made by Lennon Heather after the furnishing of witness statements. It was only on receipt of Dr. Strogen's updated report on 3rd April 2009 that the defendants learned of the position with respect to the non-Bay Lane houses and discovered that there had been considerable uncertainty on the plaintiffs' part beginning in March of the previous year.

The Bruce Shaw reports

Here again, if the plaintiffs were indirectly communicating the position through data omitted, Mr. Lennon wonders why the plaintiffs did not directly communicate this information. Mr. O'Byrne refers to three pages which state at the top "breakdown of house type and address Myrtle". These pages form part of one of nine lever arch folders which accompanied the updated particulars of loss and damage served on 24th October 2008. It appears Mr. O'Byrne is claiming that the defendants ought to have been aware that there

was a whole range of houses in Myrtle which contained non-Bay Lane fill on the basis of a three-page extract document which does not refer to those houses. Further, the document only contains a list of homes where estimations of remediation cost had been given. It contains nothing to indicate that if a house is not listed therein then that is because it contains non-Bay Lane fill.

The DBFL/Golder cracking reports

Whenever Mr. Lennon has referred to a DBFL report which is in both the new and the old discovery, he has not argued that it is this specific document which is the cause of the prejudice to the defendants. With respect to these reports their significance could not have been known in July 2008 because it is the new information with respect to the property that makes the content of the report particularly significant. Secondly, to the extent that Mr. Lennon omitted to indicate that this report was in the old discovery this is solely because of the plaintiffs' assurance that they had carried out a major duplication exercise to ensure where possible that there was no duplication of documents. The defendants relied on this assurance and Mr. Lennon therefore entirely rejects any insinuation that an omission to advert to the previous discovery of a document was somehow done with a view to misleading the Court.

In respect of the DBFL reports which were not previously discovered (and upon which Mr. Lennon does claim the defendants have been prejudiced by their non-discovery) Mr. O'Byrne's sole response is to indicate that these reports were furnished with Mr. Forde's witness statement, which was received on 22nd December 2008. This response is completely unsatisfactory and does not cure the prejudice suffered for the following reasons. First, again all inspections, examinations, investigations and preparations necessary for the conduct of the defence had to, by and large, be completed before the basket was agreed and before the finalisation of the defendants' expert reports. To say that it is sufficient to provide discoverable documentation as appendices to written statements just before Christmas Eve when that documentation should have been discovered approximately six months earlier when it could have been analysed and employed in preparation for the defence is not an acceptable answer to the prejudice complained of. Secondly, the DBFL reports on which Mr. Lennon relies were in a specific appendix to Mr. Forde's statement which in itself ran to 13 bankers' boxes. These boxes contained approximately 641 DBFL reports and in themselves constituted one of 57 separate appendices to Mr. Forde's witness statement. His statement was one of 10 expert witness statements delivered, most of which run to many lever arch folders in addition to approximately 156 witness statements of fact. More fundamentally, no notification was given to the defendants that reports which should have been discovered approximately six months previously were being included in the appendices to Mr. Forde's witness statement. The defendants had presumed that any DBFL report pre-dating the cut-off point would have been discovered and passed on to the defendants' experts through the systems the defendants had adopted for distribution of information. The volume of documentation is inordinate. A system had been set up with respect to the documentation which came in through discovery and it was not for the defendants to presume that Mr. Forde's witness statement included a number of DBFL reports that should have been discovered. The witness statements and reports were received just before Christmas 2008 and once the information in those reports was put together a system had to be set up to distribute those statements around the world. When it came to the DBFL reports on cracking the defendants presumed that all DBFL reports pre-dating the cut-off point had been given to the defendants' experts as this information would have been provided already through discovery. It was presumed that if the plaintiffs were discovering new documents they would have notified the defendants of this fact. They did not do so.

It appears the plaintiffs' contention is that the defendants failed to cross-reference every single document received with the witness statements in December 2008 with the existing discovery. This would be an inordinate task which the defendants were entitled to presume did not need to be carried out. Furthermore, Mr. O'Byrne fails to indicate when the plaintiffs realised they had failed to discover these DBFL reports. If they knew they were submitting new DBFL reports it was incumbent on them to notify the defendants and swear an affidavit with respect to them. Unless the failure to point out this shortcoming in discovery was deliberate, it clearly establishes that the plaintiffs themselves did not carry out any cross-referencing. The defendants did not have these reports during the crucial period during which they were required. The absence of these reports in a number of cases gives rise to significant prejudice.

These reports provide crucial information as to the nature of damage in houses but more importantly provide crucial information in respect of the diagnosis of cracking which the plaintiffs' experts are making. This has a particular relevance with respect to a non-Bay Lane property. A crucial plank of the plaintiffs' case is that only the Bay Lane properties show damage. The defendants' position will be that the properties which contain non-Bay Lane fill also manifest comparable damage to that which can be seen in many of the properties containing pure Bay Lane fill. The defendants' experts have always maintained that generally the damage is not of a significant nature and falls within Category 0, 1 or 2 of BRE Digest 251. This categorisation of cracking represents aesthetic and not structural damage. The defendants contend that the cracking is standard cracking of an aesthetic nature which is very common and which arises from far more mundane causes. However, the plaintiffs disagree. Therefore their specific diagnosis of cracks in various homes as recorded in the DBFL/Golders report is of vital significance because this provides a record by the plaintiffs' own experts of what they saw and how they analysed the cracks which appeared.

Where a DBFL report has been drawn up for a non-Bay Lane property it provides very useful information as to what the plaintiffs saw so there can be no ambiguity when making a comparison between what the plaintiffs diagnosed in a non-Bay Lane property versus what they diagnosed in a Bay Lane property. While the defendants' experts may have inspected a property and usually would report that there is no damage of any particular significance, this does not detract from the important issue that the damage (although not significant from a structural perspective) is of a parallel nature to the damage diagnosed and recorded in pure Bay Lane properties. Finally, Mr. O'Byrne contends that even if these reports had been discovered in July 2008 they would have attracted a claim of privilege. There is no evidence for the contention that these reports would have attracted a claim of privilege. The plaintiffs did not even get the opportunity to challenge privilege of these reports because they were not discovered in July 2008.

Letters to homeowners

Mr. O'Byrne refers to the 22 letters dated June 2008 sent to homeowners in Myrtle. Mr. Lennon does not dispute that 11 of these were in the old discovery and he specifically referred to their existence in his previous affidavit. He fully accepts that the defendants were therefore on notice that there was an issue with respect to the source of fill for the particular property to which the letter relates and that these letters would have triggered an enquiry in relation to what damage was manifesting in these particular properties. However, nine of these 11 properties were inspected for the purposes of assessing damage and one of the other two, 6 Stapolin Avenue, was missed due to an oversight on the part of one of the defendants' experts. However, Mr. Lennon has specifically referred to some of these properties because new information has come to light. In particular, a DBFL/Golders report has been drawn up for these properties which records cracking comparable to cracking which may exist in other Bay Lane properties and which has been diagnosed and recorded by the plaintiffs' own experts.

Mr. O'Byrne is incorrect in saying that the existence of these 11 letters should have opened the defendants' eyes to the true position

regarding what was going on on the plaintiffs' side regarding the non-Bay Lane houses. These were only 11 letters and in total there are 77 properties which contain non-Bay Lane fill throughout the estates of which the defendants were not previously aware.

Comparing the June 2009 Replies with the January 2008 Replies, there are an additional 74 houses which are stated to contain non-Bay Lane fill. Furthermore, it was the plaintiffs' contention that the original 25 Moyglare houses were not suffering any pyritic heave damage. From the July 2008 discovery the defendants were on indirect notice of a further 10 houses in Myrtle due to the discovery of the June 2008 letters (the letter in relation to 6 Stapolin Avenue is not counted as the defendants were on notice in relation to this property from the January 2008 Replies). Had the defendants known there were in fact 74 further properties which contained non-Bay Lane infill it would have had a transformational effect on their approach to the proceedings. There are three further houses which it is agreed contain non-Bay Lane material, although it appears that is concrete rather than fill.

Had full discovery been made, the defendants would have been aware that the plaintiffs' documentary analysis with respect to Drynam was fundamentally unreliable and riddled with confusion and contradictions. They would have been aware that there were a vast number of properties in Drynam where there was a serious doubt as to infill source. This would have triggered an investigation into the situation at Drynam which would have enabled the defendants to find out what they now know regarding the re-test houses. Furthermore, such an investigation would have most likely resulted in the experts determining that there were further houses (not classified by the plaintiffs as containing non-Bay Lane material) which the defendants contend do contain such material. The defendants would also have been aware that there were 22 houses rather than 11 where the homeowners had been told the fill appeared not to emanate from Bay Lane. With respect to seven of the 11 Myrtle properties for which June 2008 letters were discovered, the defendants did not have the full facts in relation to them, particularly where a DBFL/Golders report which was not discovered records cracking comparable to other pure Bay Lane properties.

Had full discovery been made, the defendants would also have been aware of a further 10 properties in Myrtle (in addition to the 22) which contained non-Bay Lane material. This would have been evident, for example, from the spreadsheet document relating to Myrtle which was discussed earlier in the context of an assertion of privilege. Again, it is difficult to see how this spreadsheet was privileged when most of the information therein was being communicated to homeowners. The defendants would also have been aware of the pyrite benchmark level which appeared to be applied regarding 9 Sweetman House which has implications for a number of properties.

In summary, it is likely the defendants would have been aware (or would have been led on a line of enquiry to discover) that there were 56 houses in addition to those mentioned in the January 2008 Replies which contained non-Bay Lane fill. Given this number, it is also likely that this would have led onto enquiries where they would have ascertained the full picture of 77 houses well before Christmas 2008. In contrast, given the July 2008 discovery, all the defendants could have known was that there were 10 houses in Myrtle which possibly contained non-Bay Lane fill. In respect of seven of those houses the defendants were unaware that the plaintiffs had recorded cracking therein comparable to cracking in pure Bay Lane properties (there appears to be no DBFL report for the remaining three).

The Pyrite Benchmark

Mr. O'Byrne states that no pyrite benchmark was applied. The issue is crucial to the case. If the plaintiffs worked off a pure pyrite analysis they would be unable to explain why they have concluded that some non-Bay Lane material containing equal levels of pyrite to Bay Lane material could be deemed safe. The newly discovered documentation suggests that in fact a pyrite benchmark was used. Mr. O'Byrne's arguments show precisely why these new documents are so important.

The Basket of Houses

Mr. O'Byrne refers to the basket selection process. The basket was chosen from the remediated properties as these were the properties to which most access was available during remediation. However, it was the plaintiffs who determined which houses were to be remediated. Therefore, these houses were likely to exhibit damage which the plaintiffs contend was the most consistent with pyritic heave. The defendants did not realise that there were 77 homes which contained non-Bay Lane material. In these circumstances the scope for a proper diagnostic comparison was huge. Had what is known now been known then, a selection of non-Bay Lane properties would have been chosen for inclusion as a natural comparator. Furthermore, the plaintiffs have confirmed that of these 77, 57 have been determined to require remediation.

8 Stapolin Avenue

Mr. O'Byrne states that Mr. Lennon was incorrect in stating at para. 224 that the defendants were never made aware that 8, 10 and 12 Stapolin Avenue contain non-Bay Lane material. However, Mr. Lennon stated at para. 224 that they were never told that these three properties contained non-Bay Lane material in the January 2008 Replies. There was never any direct communication to the defendants before the delivery in April 2009 of Dr. Strogen's report regarding the fact that No. 8 contained non-Bay Lane material, although the homeowners were told of this. Mr. O'Byrne refers to the 30th June 2008 letter relating to this property. However, Mr. Lennon acknowledged in his previous affidavit that there were letters of this kind in the old discovery. It is not this letter that has caused prejudice. Rather, the defendants point to other documents newly discovered which change their understanding of this particular property. Mr. Lennon relied in his previous affidavit on a newly discovered DBFL/Golders report. Had it been discovered this report would have revealed that DBFL and Golders had recorded that there was cracking in this home comparable to cracking in other properties. The defendants also rely upon the documents referred to at para. 228 which note cracks. These documents indicate evidence of poor workmanship.

The plaintiffs' attempts to dismiss the nature of the cracking are not relevant. They were mounting a case that any property which did not contain Bay Lane fill did not evidence or manifest damage. It now emerges that there were documents in the plaintiffs' possession which contradicted that proposition. The defendants were entitled to all relevant information in accordance with the discovery timeframe to prepare properly for all necessary inspections and examinations to pursue this line of enquiry. They did not have these documents when they were carrying out investigations to select properties for the basket and to prepare expert witness reports. These documents disclose a property where the plaintiffs' own experts had recorded cracking comparable to that in (other) Bay Lane properties. The report instructs that "all cracks are to be chased and filled". If this occurred the defendants' experts should have known of it at the time of their inspection.

Mr. O'Byrne states that the DBFL report on 8 Stapolin Avenue was furnished as an appendix to Mr. Forde's witness statement. By the time this statement was delivered the entire focus of the trial had changed to the basket. Mr. Lennon notes the volume of

documentation attached to this statement. It had been presumed that all pre-July 2008 DBFL reports would already have been discovered. The experts assigned to analyse Mr. Forde's witness statement and appendices did not have the time or resources to cross-check every piece of information in the report with the discovery already made. More fundamentally, at that stage the defendants had carried out all the inspections they believed were necessary and had to focus on collating all information made available from those inspections so that it could be inserted into their experts' reports. The plaintiffs note that the defendants were notified that DBFL and Golders intended to re-test and re-survey 8 Stapolin Avenue on 25th August 2008. Mr. O'Byrne criticises the defendants for failing to attend at the property for inspection. The defendants' records indicate that their architects, Bickerdike Allen, did inspect this property and Mr. Lennon apologises for his earlier averment to the contrary. This inspection was carried out without the DBFL/Golders report for this property, which would have provided crucial information relating to the state of damage in the property as of November 2007 and would have enabled them to assess whether the damage had since progressed. This would have been more important had the cracks been "chased and filled". The inspection by the defendants' experts was done without all the pertinent information.

The plaintiffs reject the crack classification system in BRE Digest 251 and therefore reject how the defendants' experts classify cracking. In those circumstances, the fact that there is a DBFL/Golders report for a non-Bay Lane property is highly significant because it enables the defendants to compare the cracking in this property as recorded by DBFL/Golders with the cracking in pure Bay Lane properties as recorded by DBFL/Golders. There can thus be no ambiguity in the interpretation of the cracking as it is recorded by the same expert. Mr. Lennon believes this report shows cracking that is extensive in that it exists throughout the property. More importantly, very similar patterns of cracking manifest in houses which are alleged to contain Bay Lane fill. For illustration purposes, Mr. Lennon compares the damage recorded by the plaintiffs' experts in 8 Stapolin Avenue and 25 Drynam View. The prejudice in respect of 8 Stapolin Avenue has not been contrived or manufactured for this application. Mr. O'Byrne's comment to the contrary is merely an attempt to turn the Court's attention away from the fact that the plaintiffs were manifestly in breach of their discovery obligations.

Mr. O'Byrne alleges that Mr. Lennon suggested that it was only upon receipt of the DBFL/Golders report in June 2009 that the defendants learned that samples of the infill were tested and low levels of pyrite found. This is a distortion of what Mr. Lennon said and he never made an averment to the effect that the defendants were not previously aware of the test results for 8 Stapolin Avenue. Furthermore, it is not the absence of test results for this property which has caused prejudice. Mr. O'Byrne states that the defendants should have been aware of the alleged benchmark by virtue of a letter from Arthur Cox. However, the newly discovered document is authored by the plaintiffs and acknowledges that they were applying a 1% benchmark. This is of a completely different order to the second reference to a benchmark in a letter from a homeowner. Mr. O'Byrne's comments show that had this letter been relied on the plaintiffs' response would have been that the reference to a benchmark must result from a conversation with a site employee whose view as to a benchmark did not result from Menolly instructions.

Mr. O'Byrne relies on the fact that the defendants' solicitors were notified of an inspection which was taking place on 22nd November 2007. However, between November 2007 and July 2008 the defendants were led to believe that 8 Stapolin Avenue contained only Bay Lane fill. The defendants cannot therefore be criticised for deciding not to inspect this property up until that point. Mr. O'Byrne criticises the defendants for not requesting full access to 8 Stapolin Avenue since receipt of the DBFL report but again the defendants were unaware this report had been furnished as they had been led to believe all reports pre-dating July 2008 had been previously furnished. Mr. O'Byrne also criticises the defendants for not having included this property in the basket despite having the letter indicating that the material might not be from the same source as the problematic infill. Again, when the basket was being agreed the defendants did not have the full picture with respect to this property and therefore this criticism has no substance. Mr. Lennon entirely refutes the allegation that the defendants' claim as to prejudice constitutes a "lie".

10 Stapolin Avenue

Mr. O'Byrne fails to disclose that during the crucial period available to the defendants for carrying out inspections and investigations and before the selection of the basket houses it was not made known to the defendants that 10 Stapolin Avenue appeared to be a home which contained non-Bay Lane fill; that it manifests damage comparable (or potentially comparable) to other properties which did contain Bay Lane fill; and that this information would have been made available had the plaintiffs complied with their discovery obligations.

The DBFL report on this property was one of those included with Mr. Forde's witness statement received in December 2008. Furthermore, at this stage the defendants were unaware of any issue as to the source of fill in 10 Stapolin Avenue, so there was no reason to think the damage therein held any special significance. In this regard Mr. O'Byrne's criticism that no question was put to any witnesses regarding this property is misplaced because the defendants did not know until very recently that the property contained non-Bay Lane fill. Mr. O'Byrne suggests Mr. Lennon has misrepresented the contents of the DBFL report. Mr. Lennon notes that the report states that the cracking in the house is "minor". However, there are a myriad of reports of a similar nature in relation to properties which contain Bay Lane fill and which record similar cracking to that contained in 10 Stapolin Avenue. For example, Mr. Lennon compares the cracking recorded for this property with 18 Drynam Crescent.

Mr. O'Byrne emphasises that test results were previously discovered. However, Mr. Lennon did not make any particular assertion that the information in respect of the pyrite result was new to the defendants. The prejudice from not receiving the DBFL report arises not from the pyrite results therein but from the fact that the defendants did not know that this property contained non-Bay Lane fill and that the plaintiffs' experts had recorded cracking on this property commensurate with cracking in (other) Bay Lane properties. Mr. O'Byrne notes that the defendants' solicitors were notified in October 2007 and August 2008 that this property was being re-tested and re-surveyed. However, in relation to the first notification the defendants were clearly unaware that this property contained non-Bay Lane fill. Furthermore, until July 2008 there was no indication from the plaintiffs that it did, and the defendants were led to believe the contrary by the January 2008 Replies. The plaintiffs told the homeowner by letter of 30th June 2008 that his property appeared not to contain Bay Lane fill but no communication was made to the defendants along these lines. In this light it is very difficult to accept the criticism that the defendants' experts did not inspect this property in September 2008. When this invitation was offered the defendants could not have known that this property contained non-Bay Lane fill, nor were they aware that it was manifesting damage as recorded in the report.

Mr. O'Byrne suggests newly discovered DBFL structural certificates for 10 Stapolin Avenue contain information which was in the DBFL report. This is incorrect. A certificate refers to the foundations in these houses being piled, which was not in the DBFL reports, although Mr. O'Byrne states that this appears to be mistaken.

He attempts to dilute the significance of the letter of 30th June 2008 in respect of this property, pointing to similar letters regarding

different properties which were discovered and stating that the defendants did not act on these letters. This argument is extremely artificial and fails to acknowledge that information available for each particular property was different. The defendants' action regarding each property differed depending on the information available to them at the relevant time.

Mr. O'Byrne attempts to argue that the defendants could have been aware of all relevant information regarding No. 10 from the December 2008 report of Dr. Strogen and a map attached to Mr. Forde's witness statement. The December 2008 report made no reference to 10 Stapolin Avenue. It is hard to see how the defendants could have deduced from that that it contained non-Bay Lane fill and that it was manifesting damage comparable to that in other properties. Secondly, the "?" for this property on the Paul Forde map cannot be equated to information along the lines of which the defendants are now aware. Moreover, this argument ignores the fact that by the end of December 2008 the defendants had already carried out all relevant inspections and examinations for the purpose of choosing properties for the basket. Even if this information could have led the defendants to the facts now known, which Mr. Lennon refutes, it was being provided at a time when they were not in a position to pursue these lines of enquiry because the deadline for furnishing their own witness reports was upon them.

Again, the defendants queried similar question marks on the map with respect to Drynam. The plaintiffs replied by letter of 28th January 2009 that there was not uncertainty as to source and that any uncertainty on the part of DBFL or Kavanagh Mansfield had been resolved. They admitted great uncertainty about the re-test houses in March 2009. When the defendants then raised particulars about the houses in Myrtle and Beaupark the plaintiffs responded only on foot of a motion to compel replies. Therefore, the allegation that the information in the witness statements would have led the defendants to what is now known appears incredulous when the plaintiffs refused to provide answers regarding this information until June 2009.

Mr. Lennon accepts that Mr. O'Byrne states that one of the structural certificates was erroneously issued and he has confirmed that these houses were not piled. However, Mr. Lennon rejects the suggestion that he failed to mention another certificate. He exhibited and referred to this certificate.

12 Stapolin Avenue

Mr. O'Byrne states that the fill in 12 Stapolin Avenue emanates from Bay Lane. Subject to confirmation from the defendants' experts, it appears that in this light the issues raised regarding this property are not relevant to this application.

6 Stapolin Avenue

In his previous affidavit Mr. Lennon made clear that the defendants already knew from the January 2008 Replies that 6 Stapolin Avenue contained non-Bay Lane fill. However, he went on to point out that newly discovered documents give a fuller picture of the issues regarding this property and, in particular, indicate that this house was manifesting damage comparable to that in other properties which did contain Bay Lane fill.

The report for No. 6 provides very important information regarding what the plaintiffs saw in September 2007 and whether any repair work was carried out. The report instructs that "all cracks are to be chased and filled". It is unclear whether this occurred but if it did the defendants' experts should have been aware at the time of their inspection. The report instructs that render and/or plaster be removed from the internal walls and elevations to have cracks locally inspected. It is again unclear whether this occurred but information of this type would have been very important for the defendants' experts when carrying out their inspections.

Mr. O'Byrne states that the DBFL/Golders report of 28th February 2008 was provided as part of Mr. Forde's witness statement and attempts to dilute the significance of the cracking in the report. Mr. Lennon believes this report shows cracking throughout the property and it is extensive to the extent that very similar patterns of cracking manifest in houses across the estates which are alleged to contain Bay Lane fill. To illustrate the point Mr. Lennon discusses the DBFL/Golder report for 111 Drynam Drive.

Mr. O'Byrne contends that the documentation Mr. Lennon referred to at para. 239 of his previous affidavit is of little significance. Mr. Lennon largely agrees in that Mr. O'Byrne has explained, (assuming he is correct), for example, that the reference to piled foundations was in error. However, the new discovery reveals that the foundations of this home were largely completed by May 2006, therefore the timing of complaints in a letter from Arthur Cox of May 2008 is of interest as it comes two years after the foundations were laid, which is very similar to the timing of complaints emanating from Bay Lane houses. Furthermore, despite Mr. O'Byrne's attempt to draw a parallel between the two, the information in this letter cannot be compared to the information in the report. Further, the report has important evidential value because it constitutes a record of cracking by the plaintiffs' own experts in respect of a non-Bay Lane property. As outlined above, this is highly significant in view of the dispute as to the classification of cracking.

Mr. O'Byrne criticises the defendants for a failure to take up the invitation to inspect this property. A representative of Bickerdike Allen was due to attend on 21st August 2008, but due to oversight the appointment was missed. The defendants should have had the DBFL report by the time they were notified of this inspection. Finally, again during this period until the selection of the basket houses the defendants' resources had to be prioritised with a view to focusing on the issues they felt were most pertinent based on the information available. In August 2008 they received a vast number of notifications for inspections of many properties. The defendants and their experts had to make decisions as to what to prioritise during a short period prior to the selection of the basket and were forced to make those decisions without all the relevant information.

4 Stapolin Avenue

Mr. Lennon referred previously to documents relating to this property which raised potential concerns about ground conditions there. The new discovery, taken together with the original information provided, makes it apparent that there was a significant issue which needed to be investigated regarding this property. Mr. O'Byrne is correct when he states that an email string in the old discovery contains a complaint from the homeowner regarding a hollow running the width of the garden. However, the new discovery goes a lot further, including a Menolly email regarding the presence of a public water course in this area. It is the combination of the email information and the new information that there was a public water course in this area which gave rise to concern on the part of the defendants' experts. This is not a matter which should require investigation now, but rather something the defendants' experts should have had the opportunity to investigate between July and November 2008.

16 Boyd House

Mr. O'Byrne argues that the new information regarding 16 Boyd House would not have made any difference based on an analogy with what the defendants did regarding 4 Stapolin House. He attempts to draw similar analogies throughout his affidavit to dilute the significance of the new information. However, his analogy is inappropriate as he does not take into account the context of the information available in July 2008 regarding each property.

Mr. O'Byrne points to a letter to the homeowners of 4 Stapolin House contained in the old discovery indicating that their infill did not appear to be from the same source as the problematic infill. He states that despite this letter no attempts were made to include No. 4 in the basket. Based on their visual inspection, which Mr. O'Byrne fails to mention, and the information available to them at the time, the defendants' experts decided not to pursue further investigation of No. 4 with a view to its inclusion in the basket. The defendants do not claim prejudice in respect of this property nor did Mr. Lennon make that claim previously.

Mr. O'Byrne argues that the spreadsheet indicating that 16 Boyd House contained Huntstown infill is privileged. However, the defendants never had the opportunity to challenge any such claim over this document as it was not previously discovered. Mr. Lennon doubts the claim of privilege because most of the information in the document clearly does not relate to any expert advice given to the plaintiffs and, as to information regarding source of infill, that information was being communicated to various homeowners. Mr. Lennon also disagrees with the suggestion that EM01184 is not an historical document and therefore fell outside the plaintiffs' previous assurances that documents evidencing the source of infill were not in the discovery.

It was not until April 2009 and thereafter until 16th June 2009 (when confirmed by the plaintiffs) that the defendants became aware that this property was in fact a non-Bay Lane property. Again Mr. O'Byrne misses the point that the defendants' window of opportunity for putting together their case regarding inspections and investigations and with respect to agreeing the basket closed at the end of November 2008. Mr. O'Byrne refers to other potential indicators that 16 Boyd House was not a Bay Lane property. These so-called indicators do not point to the fact that it contains non-Bay Lane fill and would not have led to the information the defendants now have, as is evidenced by the fact that the plaintiffs, when requested, did not provide this information until forced to do so by directions of the Court.

In Mr. Lennon's previous affidavit he stated that there were two DBFL/Golders reports regarding No. 16 and that there appeared to be a change of position once the plaintiffs had been made aware that the infill in this property was not from Bay Lane. Mr. Lennon accepts that in this matter he has confused the conclusion from the later report with that from the earlier report. He now accepts that once the plaintiffs became aware that this property contained Bay Lane material the conclusion changed to recommending replacement of the infill. However, the email of 5th June 2008 from Mr. O'Loughlin referring to the meeting with Dr. Strogen on that date is of great significance. This email and the fact that the plaintiffs had doubts as to the origin of fill at No. 16 provides a context to the clear change of position adopted by the plaintiffs regarding this property and would have been very relevant to the cross-examination of Dr. Strogen and Dr. Maher. This context was that, once the plaintiffs realised that a property contained Bay Lane fill, they decided that it required remediation, despite the fact that the two reports recorded precisely the same pyrite levels and precisely the same level of damage.

5 Stapolin House

Mr. O'Byrne again misses the point that the new information changes the context of the information originally discovered. He does not comment on the significance of a letter showing that homeowners were being informed that their fill did not appear to be from the same source as the problematic infill elsewhere. Again, this letter would have alerted the defendants to the fact that 5 Stapolin House was a non-Bay Lane property.

Again, Mr. O'Byrne claims that EM01184 was privileged, but it is hard to see how this information could be privileged because effectively the same information was being provided to the homeowners of that property. He criticises the defendants for failing to visually inspect this particular infill to assess its source, but all communications from the plaintiffs in this regard led the defendants to form the view that this was not a property which contained non-Bay Lane fill.

Mr. O'Byrne criticises the defendants for referring to a document containing a snag list for No. 5 issued in July 2008. Mr. Lennon agrees that the plaintiffs cannot be faulted for not discovering this document in that it appears the document was issued after the date of discovery. The issue date had been overlooked as the document records inspections in April and June 2008, which pre-date the cut-off point. Mr. O'Byrne also refers to an earlier snag list dated September 2007 detailing the exact same snags having been in the old discovery. However, the significance is that the cracking which appears to be recorded in this report is potentially comparable to the cracking which was recorded in other properties which do contain Bay Lane fill. The missing link is the information that No. 5 contains non-Bay Lane fill. The defendants could only have become aware of the significance of that snag list upon receipt of other documentation in the new discovery. Because they did not know this house contained non-Bay Lane fill, the defendants had no reason to request a full re-inspection of this property based on the September 2007 snag list or to put the snag list to Dr. Maher or Mr. Blanchette. The list could have been put to Dr. Strogen, but this must be seen in the context that the defendants were only informed in April 2009 that this house, along with many others, contained non-Bay Lane fill.

Mr. O'Byrne states that the defendants did not carry out investigations of other properties where discovery was made of letters to homeowners indicating that their property might not contain Bay Lane material. His argument by analogy here is flawed when for many of those houses inspections were carried out. Again any decisions made by the defendants must be viewed in light of the incomplete information then available. Mr. O'Byrne refers to the "?" for this property on the Paul Forde map, an argument addressed by Mr. Lennon above. Similarly, the fact that this property was not in the claim nor was it mentioned in Dr. Strogen's report received on 22nd December 2008 cannot be equated to the information in the new discovery.

14 Stapolin House

Mr. O'Byrne's analysis as to lack of prejudice in relation to this property suffers from the same flaws as with 5 Stapolin House. The plaintiffs told the homeowners that their infill did not appear to be from Bay Lane but did not tell the defendants, who did not know that 14 Stapolin House contained non-Bay Lane infill.

Mr. O'Byrne misses the point at paras. 233 and 234 of his affidavit. The line of enquiry Mr. Lennon was referring to related to the fact that this was a non-Bay Lane property and therefore all information with respect to cracking in this house became highly significant when that cracking was potentially comparable to cracking in Bay Lane properties elsewhere in the estates. The absence of this information precluded serious consideration of this property for inclusion in the basket. Since the plaintiffs have now indicated that

this house has been determined to require remediation, a property of this type may have been an ideal candidate for the basket from the defendants' perspective. Mr. O'Byrne argues that the defendants had evidence to suggest that 11, 18 and 19 Stapolin House have been determined to require remediation. In this regard he refers to an extract from a Bruce Shaw report. The defendants only became aware from the June 2009 Replies that No. 11 is a non-Bay Lane property and the plaintiffs have never stated that Nos. 18 and 19 contained non-Bay Lane fill. Therefore it is unclear why he is referring to these properties in this section of the affidavit which deals with 14 Stapolin House. The defendants could not have known from the Bruce Shaw report that No. 14 was due to be remediated.

9 Stapolin House

Mr. O'Byrne's attempt to undermine the significance of the homeowner letter as to source of fill in respect of 9 Stapolin House by reference to other similar letters regarding different properties is misplaced. Steps taken by the defendants with respect to those properties completely depended on information available at the time.

12 Stapolin House

The DBFL report on this property was one of those attached to Mr. Forde's witness statement. Even if the defendants were aware of this report's existence its significance would not have been clear in the absence of knowledge that this property contained non-Bay Lane fill. The inspection attended by O'Connor Sutton Cronin took place under the false impression that No. 12 was a Bay Lane property. Had the defendants known that this was a non-Bay Lane property consideration would have been given to its inclusion in the basket, which might have proved very significant to the defendants as they now know the plaintiffs had determined that this property should be remediated. This determination appears to be based solely on the presence of trace Bay Lane material in the property. Had full discovery been made the defendants would have known that damage potentially commensurate with damage in Bay Lane properties had been recorded on this premises in November 2007 and would have been in a position to examine before basket selection whether the damage was no worse than that found in November 2007. The defendants were precluded from exploring a line of enquiry which would potentially show up an inconsistency in the plaintiffs' approach where their experts recommended remediation of a house which contains non-Bay Lane fill and where no further damage is recorded. In addition, it was not until the motion to compel Replies that the plaintiffs, in June 2009, finally stated the position regarding the non-Bay Lane properties.

11 Stapolin House

Mr. Lennon contended and still contends that it was the comparison between the approach taken in the DBFL/Golders report for 11 Stapolin House and that taken in the report for 12 Stapolin House which was significant. Mr. O'Byrne is correct in stating that the report for No. 11 was in the old discovery, but the comparative analysis could not be carried out as the report for No. 12 had not been furnished.

Mr. O'Byrne criticises the assertion that the fact that No. 11 contained non-Bay Lane fill became apparent from the June 2009 Replies. He points in this regard to a statement in an appendix to Dr. Srogen's report indicating that around August 2008 he had recorded that the infill for No. 11 was "BL2" and that there was also "crushed gravel or mixture?". Dr. Strogen did not give evidence regarding this property nor is it mentioned in the spreadsheets put before the Court outlining his evolving position on the source of fill. Notwithstanding that no evidence was presented as to the make-up of the fill at No. 11 the plaintiffs communicated on 16th June 2009 that it contained non-Bay Lane fill.

10 Stapolin House

The essential point about the DBFL/Golders report for this property is that the plaintiffs' own experts were diagnosing damage in a non-Bay Lane property as being indicative of pyritic induced heave. Mr. O'Byrne avers that a letter indicating that the fill did not appear to be from the same source as the problematic fill was discovered. However, Mr. Lennon's contentions regarding this property do not arise from that letter but from the report indicating that the plaintiffs' experts saw possible signs of floor heave in this property. It has been agreed between the experts in this case that this property contains only a small amount of Bay Lane fill, and in the defendants' view, a trace amount. Mr. O'Byrne points to a letter from the homeowners' solicitors referring to cracking, but the information in this letter pales in comparison to the information in the report. The report was one of those appended to Mr. Forde's witness statement, but again no notification was given that documents not previously discovered which ought to have been discovered were included with this statement. If they knew of this the plaintiffs were in breach of their obligations by failing to disclose this and by failing to swear an affidavit. A representative of Bickerdike Allen was present at this property on 22nd August 2008 but he did not know then the issues as outlined in the report. It would have been very useful had he known this at the time and this would have further assisted the defendants in cross-examination. The report instructs that "cracks are to be chased and filled". It is unclear whether this was done but if it was this is a matter of which the defendants' experts should have been aware at the time of their August 2008 inspection. In addition, the report recorded cracking and damage from September 2007 which the defendants could have examined to see if there had been any progression. Progression of damage in a property containing non-Bay Lane fill would have been very significant as the plaintiffs contend this is usually indicative of pyritic heave.

13 Stapolin House

Mr. Lennon acknowledges that he was mistaken in stating that the defendants only learned from the June 2009 Replies that this property contained non-Bay Lane fill. The defendants were on notice from July 2008 onwards that the plaintiffs had indicated to the homeowners that their fill appeared not to be from the same source as the problematic fill. However, Mr. Lennon's complaint relates not to this letter but to a DBFL/Golders report. The defendants were unaware of the extent of the cracking as recorded by the plaintiffs' own experts. The information in a snag list in the old discovery referring to two instances of cracks pales in comparison to the information in the report. Between August and late November 2008 the defendants were making decisions on which lines of enquiry to pursue without a full report detailing a full structural and visual survey by the plaintiffs' own experts and which notes cracking throughout the property which is comparable to cracking in other Bay Lane properties. The defendants did not have all the information necessary to decide whether to attend at the survey in September 2008. Had their experts had the report, the defendants would have ensured that an inspection of the property would have taken place either then or later but before the selection of the basket.

For the reasons explained earlier, in view of the dispute as to the classification of cracking the report has important evidential value because it constitutes a record of cracking by the plaintiffs' own experts in respect of a non-Bay Lane property. This report records

damage very similar to the damage recorded for 25 Drynam View. The later addendum report for No. 25 recommends remediation on the basis that the defects have progressed but Mr. Lennon is advised that even with this progression the defects are not in a greater category than those at No. 13. The report notes that "observed cracks are to be chased and filled" and cracks in a bedroom should have plaster removed "locally for re-inspection by Engineer". It is unclear whether this was done. The report was one of those attached to Mr. Forde's witness statement, in relation to which the defendants' position has been set out above.

The Documents in relation to Parker House

Mr. O'Byrne is correct in stating that the defendants had documentation which should have alerted them to the fact that three of these houses (out of 13 in Parker House) contained non-Bay Lane fill, a fact Mr. Lennon acknowledged previously. However, the plaintiffs confirmed in the June 2009 Replies that 13 units in Parker House contained non-Bay Lane infill. Had full discovery been made the defendants would have been aware of 11 of these properties. The plaintiffs specifically assured the defendants in August 2007 that information in respect of the source of infill from Myrtle and Beaupark would be furnished to the defendants when to hand.

35, 38 and 39 Parker House

Mr. O'Byrne conducts a critique of the defendants' actions regarding these three properties (in respect of which the defendants had letters to homeowners indicating their fill might not be from Bay Lane) to discredit Mr. Lennon's claims as to other properties in Parker House where similar letters were not discovered. Mr. O'Byrne's argument by analogy is incorrect. Firstly, Mr. O'Byrne says the defendants did not undertake a detailed examination of these three houses, but this is not the case because, as Mr. O'Byrne acknowledges, O'Connor Sutton Cronin and Bickerdike Allen inspected all three in 2008. Furthermore, the defendants' experts did not have the reports which showed that the plaintiffs considered some of the damage in these properties to be indicative of pyritic heave.

Mr. O'Byrne notes that O'Connor Sutton Cronin prepared no visual structural inspection report for these three houses. However, the damage the defendants' experts saw in these properties was not considered significant by them and certainly not indicative of pyritic heave. The reports for these three indicate that all observed cracks are to be chased and filled and that plaster and/or external render was to be removed locally for inspection. The report for No. 35 stated that "lifting floor boards" were to be lifted, examined and re-laid. This information clearly would have been of significance for the defendants' experts' inspection, particularly if defects had been repaired.

Mr. O'Byrne notes that the letter of 30th June 2008 as to source of infill for No. 35 was not referred to even though No. 35 was discussed at trial. However, No. 35 was referred to in the context of a number of properties from which test results were provided with respect to concrete cores. It is unclear why the letter of 30th June 2008 would have been relevant to that exchange. Mr. O'Byrne attempts to show that the letter of the same date regarding No. 38 should have been put to Dr. Strogen, but Dr. Strogen agreed that No. 38 contains no Bay Lane material and is therefore a pure non-Bay Lane property. It would therefore have been unnecessary to put the letter to him. In contrast, the reason Mr. Lennon chose the letter relating to 7 Parker House as an example was because there was a disagreement as to the make-up of the fill in that property.

7, 8, 9, 10, 29 and 37 Parker House

Mr. O'Byrne attempts to set out why the defendants were on notice that the other Parker House properties contained no Bay Lane fill. In this regard he points to Nos. 7, 9, 10, 29 and 37 Parker House (he does not refer to No. 8). Letters as to source of infill were sent to the owners of these houses but not previously discovered. The plaintiffs knew these properties contained non-Bay Lane fill and shared this information with the homeowners but not with the defendants.

Mr. O'Byrne states that 7, 9, 10, 29 and 37 Parker House were not listed at reply 10.1 in the January 2008 Replies, as a result of which the defendants were "on notice" that they contained non-Bay Lane fill. However, at particular 10.1 the defendants were asking which houses had been tested and surveyed arising out of para. 22 of the Statement of Claim. These houses were listed at reply 10.1. Having regard to this and to particulars 3.11.3, 3.11.4 and 9.8 and their corresponding replies, Mr. Lennon does not understand how Mr. O'Byrne can say that the defendants were on notice that properties at Parker House contained non-Bay Lane fill when specific representations to the contrary were made to the defendants. Mr. O'Byrne also argues that the defendants could have known that the houses in Parker House contained non-Bay Lane fill on the basis of the report of Bruce Shaw. Mr. Lennon does not see how the listing of the houses in that report could have led to the conclusion that the houses in Parker House contained non-Bay Lane fill. There were potentially many reasons why various Myrtle houses did not come within the claim, for example because they were not manifesting damage or because they did not contain fill at all.

Mr. O'Byrne suggests the defendants should have deduced that these properties contained non-Bay Lane fill from the fact that Dr. Strogen did not refer to them in his December 2008 report. If the defendants knew when this report was furnished that these properties contained non-Bay Lane fill it is remarkable that this fact was not stated in Dr. Strogen's report. No indication is given in that report that there are a number of houses which contain non-Bay Lane fill. Rather, with respect to those houses not appearing in the list he appears to be suggesting that there was further testing going on in these houses. Furthermore, the defendants now know that a number of properties appearing on the list in December 2008 as containing Bay Lane fill actually contain non-Bay Lane fill. In addition, by the time Dr. Strogen's report arrived the window of opportunity and the period used for inspections and examinations for the purpose of including properties in the basket had closed and the defendants were preparing their expert witness reports. Even if queries had been raised arising from Dr. Strogen's report it is very likely the plaintiffs would not have clarified the situation as similar queries arising from the maps culminated in the defendants having to apply to the Court.

Mr. O'Byrne repeats that the defendants could have inspected the infill themselves. This course of action certainly would have been taken had the defendants been given correct information at the outset and had they been in possession of the range of documents relating to the source of fill now discovered.

Mr. O'Byrne is correct in suggesting that M-52-031 was included in Mr. Lennon's previous affidavit in error. Therefore Mr. Lennon does not assert that there was a letter to the owners of 31 Parker House which indicated that their fill was not from Bay Lane and which was discoverable.

9, 24 and 31 Parker House – Common Area snag lists

These properties are the ground floor units of three apartment blocks in Parker House. Mr. Lennon's comments relating to the common area snag lists must be seen in the light that at the time these snag lists would have been reviewed and when any inspections of these properties would have been carried out, the defendants were unaware that these properties contained non-Bay Lane fill.

Mr. Lennon accepts that it appears that one of the snag lists appears to have been created after the cut-off point for discovery and agrees that he cannot take issue with the plaintiffs for failing to discover it. He had referred to it because the document notes inspections which took place in April and June 2008. Another of the snag lists was discoverable and Mr. Lennon accepts it was discovered in 2008. This was not realised given the plaintiffs' assurances concerning duplication in the new discovery. However, when these properties were examined the defendants did not know they contained non-Bay Lane fill. When the defendants were under the impression these were standard Bay Lane properties evidence of damage would not have taken on the same significance. However, with regard to 31 Parker House there appears to be no newly discovered document indicating that it contained non-Bay Lane fill. Mr. Lennon's comments in this regard were based on the above mistaken impression as to a letter to the homeowners of 31 Parker House. He therefore limits his comments at paras. 281-285 of his previous affidavit to 9 and 24 Parker House. If the snag lists refer to these properties, and it appears they may well do, they are of significance but that significance has only become apparent due to the fact that 9 and 24 Parker House are non-Bay Lane houses.

Mr. O'Byrne attacks Mr. Lennon's credibility on the basis that the defendants' experts have already viewed most of the ground floor units at Parker House. However, he again fails to perceive the problem that with respect to Nos. 7, 8, 9, 10 and 37 the defendants were carrying out inspections without knowing that these houses contained non-Bay Lane fill. Had they been aware that these were non-Bay Lane houses (or potential non-Bay Lane houses) their inspections would have taken on a different significance. Mr. O'Byrne also refers to listings appended to Mr. Forde's witness statement of homes where the homeowners had informed Menolly of cracking. These houses do not relate in any way to Parker House. However, Mr. O'Byrne appears to be suggesting that because information here shows evidence of early cracking and because the defendants did not request to re-test any of these houses Mr. Lennon's comments regarding specific properties in Parker House cannot have any credibility. Mr. O'Byrne has missed the significance of Mr. Lennon's points. The houses Mr. O'Byrne appears to be referring to are Bay Lane properties. Before the delivery of this statement none of the properties mentioned in the appendices he refers to as exhibiting early cracking was known to the defendants as containing non-Bay Lane fill. Therefore, Mr. Lennon does not know why the defendants would have sought to re-test these properties. The DBFL report Mr. O'Byrne refers to regarding 24 Parker House would have been viewed in light of the fact that this was a non-Bay Lane property.

Nos. 35, 38 and 39 Parker House

Mr. O'Byrne criticises Mr. Lennon's reliance on three reports regarding these properties not furnished in the July 2008 discovery. Mr. Lennon entirely rejects his comments in this regard. These reports record the fact that the plaintiffs' experts were noticing that floors were off level at points and that there was possible floor heave in Nos. 38 and 39. These reports would have disclosed that the plaintiffs had previously diagnosed defects in a property with non-Bay Lane fill as being associated with pyritic induced heave. The inspections of these properties carried out by the defendants' experts would have been informed by the plaintiffs' experts' previous views. In addition, the defendants' experts would have been able to examine the progression of the cracking and damage (as recorded in the DBFL reports) to see whether that progression was commensurate with the progression in cracks which the plaintiffs rely on as indicative of pyritic heave. These statements were furnished with Mr. Forde's witness statement, a matter dealt with above.

The Properties at Talavera House

The defendants are only aware since the June 2009 Replies that 21, 22 and 23 Talavera House contain non-Bay Lane fill. This information "changes the context" of two DBFL/Golders reports on Nos. 21 and 22. These reports recorded surveys where the plaintiffs' experts diagnosed cracks which they stated were indicative of pyritic induced heave. In particular the plaintiffs were focusing on cracks which appeared across the floor slab in front of the patio doors, a feature upon which much reliance has been placed by the plaintiffs' experts in diagnosing pyritic heave. Mr. Lennon accepts that the two reports were in the old discovery. However, the importance of these reports is that they record damage which the plaintiffs' experts considered to be indicative of pyritic induced heave in a property which contains non-Bay Lane fill. The defendants were unaware until June 2009 that these properties contained non-Bay Lane fill.

Mr. O'Byrne suggests the defendants should have known this at a far earlier stage, firstly because none of the properties was listed as containing Bay Lane fill in Dr. Strogen's December 2008 report. This report does not disclose what the position is as to these properties other than indicating that samples from some houses are still being assessed. One surmises from this that Dr. Strogen was not yet aware of whether Nos. 21, 22 and 23 contained non-Bay Lane fill. Had he been aware they contained non-Bay Lane fill he should have reported this in his December 2008 report. Mr. O'Byrne refers to Dr. Strogen's earlier diagnoses for these properties contained in appendices to his April 2009 report and dating from April and August 2008, but no reference is made to these diagnoses in Dr. Strogen's December 2008 report. Dr. Strogen made no reference to these properties in his evidence as to infill source, which is why Mr. Lennon stated that it had only been finally confirmed that these three contained non-Bay Lane fill in the June 2009 Replies. Furthermore, these three appear to have been remediated around April 2008. It is unclear why Dr. Strogen failed to refer to these properties in his December 2008 report when he stated therein that once the floor has been lifted to expose the fill there is no problem in identifying its source unequivocally. Mr. O'Byrne also suggests the defendants could have been aware of the uncertainty as to source for this property by reference to the map attached to Mr. Forde's witness statement. This argument has been addressed above.

Mr. O'Byrne avers that O'Connor Sutton Cronin had inspected many of the so-called "doubtful properties" and therefore the defendants did not lack information they required to address the matters referred to by Mr. Lennon. This averment strains logic when one considers that the information the defendants lacked was of the most fundamental kind, namely that these properties contained non-Bay Lane fill.

Mr. Lennon previously made the point that the defendants now have a newly discovered document indicating the pour dates for 30 Talavera House. Mr. Lennon accepts Mr. O'Byrne's clarification that the document refers to pour dates after remediation and clarifies that the date to which Mr. Lennon was referring relates to the date of sale. Mr. Lennon takes no further issue with the recent discovery of this document.

The Units at Sweetman House

It has become clear from the plaintiffs' approach in this trial that an attempt is being made to distinguish Bay Lane material on the basis of geological description rather than pyrite content. It is not hard to see why the plaintiffs would seek to argue that Bay Lane material is unique from a geological perspective because this enables them to explain why other rock from different quarries with equivalent pyrite content would not present a problem. In this regard the plaintiffs' case is weakened if it is shown that their experts have carried out much of their diagnosis based purely on pyrite levels because in those circumstances the levels found in the Bay Lane material can be compared with levels in many other places where similar rock has never led to the problems now alleged. Mr. O'Byrne says that the plaintiffs have never applied a threshold for pyrite levels. However, newly discovered documents disclose a different approach inconsistent with Mr. O'Byrne's case. A letter dated 16th April 2008 relating to 9 Sweetman House states that Golders tested a sample by way of total sulphur and sulphur present as sulphates. It states that the results indicate very low levels of sulphur and therefore also of pyrite. The level of pyrite is stated as 0.73%. The letter then concludes that based on this testing (which implies no other testing) the sample is not susceptible to swelling and is suitable as underfloor infill.

Mr. O'Byrne says that no pyrite benchmark was adopted by the plaintiffs and that in any event the contents of the letter in relation to No. 9 were available from other documentation. He refers in this regard to a letter of 6th May 2008. However, this letter is fundamentally different. It states that the infill in Nos. 9 and 10 has been "sampled and tested". It does not state whether these tests were visual, petrographic or purely based on pyrite content. Given the holistic approach asserted by Mr. O'Byrne one suspects the plaintiffs' experts would indicate that the tests referred to must include some form of rock quality analysis. Even if Mr. Lennon's interpretation of the April 2008 letter is disputed, the defendants did not have the opportunity to explore the plaintiffs' approach as evidenced in this letter in the trial.

In relation to the implications of this letter, Mr. Lennon referred in his previous affidavit to a report for 59 Grange Lodge Avenue. Mr. O'Byrne's summary of Mr. Lennon's position regarding this report misses the point. Mr. Lennon's complaint is that the defendants have only become aware that Golders were declaring this infill to be safe from swelling purely on the basis of a pyrite reading of 0.73%. This is what the April 2008 letter strongly suggests. This new information changes the context of the report on 59 Grange Lodge Avenue where the pyrite reading for that property was less than that for 9 Sweetman House. Mr. O'Byrne argues that the inconsistencies alleged between the approach of DBFL/Golders regarding No. 59 and No. 9 are not present. This would have been a matter for evidence where the parties have different perspectives. However, the defendants have not had an opportunity to explore this issue.

The Sweetman House spreadsheets

Mr. Lennon accepts that although spreadsheet EM06505 had not been previously discovered, the results therein had been furnished to the defendants. However, the point Mr. Lennon was making with respect to these results is the inconsistency they reveal in the light of the benchmark which the plaintiffs appear to be applying. That a benchmark was applied is further evidenced by a Sweetman House spreadsheet which indicated that remedial works were not required on properties with less than 1.2% pyrite. As an example Mr. Lennon previously pointed to a document which indicated that results for properties from 55 to 60 Sweetman House showed an average pyrite level above 1.2%. Mr. O'Byrne responds that this result relates to the entrance to apartments 55 to 60. This does not detract from the fact that if the plaintiffs were adopting a benchmark of approximately 1.2% above which remedial work was to be considered then this calls into question the Golder confirmation in the old discovery that the fill below these units was not susceptible to swelling and was therefore suitable as underfloor fill. This is also relevant to the approach taken to the retail unit at Sweetman House. Mr. O'Byrne averred that it was "entirely disingenuous" for Mr. Lennon to suggest that the basis for this unit's remediation is still unclear. However, the defendants are still unsure whether this unit was remediated solely because it contains some Bay Lane fill or because of an analysis that the fill (whatever its source) had expanded causing damage.

Snagging at Sweetman House

Mr. Lennon previously pointed to newly discovered snag lists which evidenced damage and cracking potentially comparable to cracking in other Bay Lane properties. Mr. O'Byrne queries the meaning of "potentially comparable". In this regard, the cracking in these snag lists was comparable in the sense that it resembled cracking in properties containing Bay Lane fill. Mr. O'Byrne has been advised that the cracks as disclosed in the snag lists are not structurally significant. The defendants contend that much of the damage in the properties which contain Bay Lane fill is equally not structurally significant. Thus, one finds similar cracks in Bay Lane and non-Bay Lane properties which are characterised by the plaintiffs' experts as structurally significant in the former case and as non-structural in the latter.

The implications of the newly discovered Sweetman House documentation

The April 2008 letter appears to suggest that the plaintiffs' experts are saying that a 0.73% pyrite level is safe regardless of rock quality. It is on this basis that Mr. Lennon says this document had implications for other properties with equivalent or lower pyrite levels. Therefore, a document of this kind would lead to a line of enquiry which would enable the defendants to examine those houses with equivalent or lower levels and to see whether the plaintiffs were alleging that there was damage in these homes indicative of pyritic heave. If such an analysis was carried out (and it could not have been without the April 2008 letter) it would change the context of information already available for a number of properties which coincidentally turn out to be the houses the defendants now know contain non-Bay Lane fill. Mr. O'Byrne attempts to show that the defendants could have known that these properties contained non-Bay Lane fill at an earlier stage. Mr. Lennon entirely rejects the grounds he puts forward for this contention. This can be seen from the following.

4 Boyd House

Mr. O'Byrne states that Mr. Lennon's comment with respect to No. 4 containing non-Bay Lane infill was misleading in that it had not been determined that this property contained non-Bay Lane fill. Mr. Lennon's basis for the statement was the experts' agreement that the fill here had various sources including Bay Lane. Mr. O'Byrne accepts that No. 4 is a property where the experts agreed on the composition but differed as to the proportions of the various components. In any event, Mr. Lennon's point was that No. 4 contains a level of pyrite equivalent to that of 9 Sweetman House and, according to the April 2008 letter, the fill therein should not be susceptible to swelling. Therefore, any damage in this house would clearly be significant to the defendants. Mr. O'Byrne suggests the defendants could have known the infill was potentially non-Bay Lane due to the question mark on the Paul Forde map. This argument is addressed above. In addition, the defendants did not have all the information regarding No. 4 and the April 2008 letter is pivotal in this regard. Mr. O'Byrne notes that spreadsheet EM01184 records the infill for No. 4 as concrete but contends that litigation privilege would have been claimed over this document. As noted above, Mr. Lennon does not accept this.

Mr. O'Byrne suggests that a letter in the old discovery would have tipped the defendants off that the infill in this property was of a source uncertain. However, this letter only indicates that test results had proved inconclusive. The term "test results" could have referred to any range of test results and Mr. Lennon does not think the defendants could be criticised for failing to realise that these referred to Dr. Strogen's visual inspection conclusions. Furthermore, as Mr. O'Byrne is now saying that Dr. Strogen's visual inspections are tests (whose results were inconclusive) those results should have been furnished to the defendants pursuant to the agreed protocol. Mr. O'Byrne says that because the defendants knew the pyrite levels for No. 4 were less than that of 9 Sweetman House this should have alerted them to the fact that the results indicated the infill was not susceptible to swelling. However, the defendants were not aware from the July 2008 discovery that Golders had determined the fill in No. 9 was safe from swelling by virtue only of the pyrite reading. Mr. O'Byrne points out that the defendants had an opportunity to inspect their own samples for No. 4. Again, the defendants had no reason to think this property contained anything other than Bay Lane fill due to the plaintiffs' representations.

45 Morrow House

Mr. O'Byrne avers that Mr. Lennon's statement that the defendants now know this property to contain non-Bay Lane infill is "misleading" because the plaintiffs' and the defendants' experts have confirmed that one of the samples from this property is Bay Lane infill. However, Mr. Lennon's statement was based on the fact that it has been agreed between the experts that this property contains a mixture of Bay Lane and non-Bay Lane material. The statement is therefore correct.

Mr. Lennon referred to a DBFL/Golders report. It had not been appreciated that this document was also in the old discovery. In any event, the significance of the report was that any damage in this property took on a new light where the pyrite level was lower than the level which Golders assert to be safe from swelling by virtue of the April 2008 letter. This property has a lower pyrite level than 9 Sweetman House yet Golders are of the view that it needs to be re-assessed because pyrite is present. It is this inconsistency which has come to light in the new discovery.

Mr. O'Byrne points out that the snag list Mr. Lennon previously referred to post-dated the cut-off point. Mr. Lennon accepts this. Again the fact that it was issued on 10th July 2008 was overlooked in circumstances where the snag list records inspections which took place before the cut-off point. The damage identified in another almost identical snag list referred to by Mr. O'Byrne would have been of considerable interest to the defendants had they known that the plaintiffs' experts had formed the view that with respect to 9 Sweetman House a pyrite level of 0.64% (as recorded for 45 Morrow House) was deemed safe. In light of this information damage in this property would have been of considerable interest in that that damage could not be indicative of pyritic heave. Therefore if that damage was comparable to damage in other properties alleged to be suffering from heave this could have been employed in the defence. When Mr. O'Byrne notes that the presence of this snag list did not prompt further investigation, he overlooks the point that the defendants' experts would have no reason to be prompted by the snag list given that they did not know of the benchmark approach.

O'Connor Sutton Cronin have advised that from their visual inspection of No. 45 it does display incidents of damage comparable to other properties alleged to be affected by heave and in those circumstances would have been a property of significance to the defendants had they known it contained non-Bay Lane material or that the pyrite reading fell below the benchmark. Also, it appears from a letter in the old discovery that at some point remediation was recommended. The significance of this letter has only become apparent because this property is below the benchmark.

30 Myrtle House

The first indication from the plaintiffs that this property contained non-Bay Lane fill was in the June 2009 Replies. Had full discovery been made, No. 30 would have taken on a particular significance given that the level of pyrite in this property was below that which Golders considered safe regarding 9 Sweetman House. No. 30 was remediated and Mr. Lennon is advised that this property exhibited cracking of a kind comparable to cracking in pure Bay Lane properties. Again, the significance of this damage would not have been appreciated when it was not known that the property contained non-Bay Lane fill or fill below the threshold. This information could have been usefully employed in the defence.

Mr. O'Byrne notes the defendants were already aware the pyrite content for No. 30 was 0.54%. Mr. Lennon never suggested otherwise. He was making the point that the significance of these results has changed due to the new discovery.

7 Hoey Close

The results for this property reveal 0.75% pyrite, of which 0.17% had oxidised. This equates with the threshold levels which Golders deemed safe. Mr. Lennon's line of argument regarding this property is the same and in that context the damage recorded in the DBFL/Golders report takes on a new significance.

The Non-Bay Lane Properties in Beaupark

Mr. Lennon notes Mr. O'Byrne's averments under this heading in that these houses (16 Beaupark Close and 7 Beaupark Square) are agreed as containing a mix, albeit the proportions are different. It is the defendants' contention that the Bay Lane element is not significant. The significance of No. 16 is that it is only now known from Dr. Strogen's April 2009 report that it contained non-Bay Lane fill and the most recent Replies reveal that the plaintiffs had determined that it required remediation. Mr. Lennon pointed to a DBFL re-appraisal report recommending infill removal, but this report post-dates the cut-off point. Although the date of inspection referred to pre-dates that point, this document was not discoverable before now. Regarding 7 Beaupark Square, the defendants did not realise it contained non-Bay Lane fill until Dr. Strogen's April 2009 report. A DBFL/Golders report was not discovered in July 2008 and recorded the fact that there was little damage. What is most significant is that this property has been determined to require remediation, but there was no discoverable document which would have pointed to this.

Mr. O'Byrne points out that the report for No. 7 was annexed to Mr. Forde's witness statement. He is correct in stating that the defendants cannot point to a document which would have specifically indicated that No. 7 contained non-Bay Lane fill. However, the new discovery shows serious uncertainty regarding a vast amount of properties of which the defendants were not previously made aware. Therefore if full discovery had been made in July 2008 far more extensive examinations would have occurred as to source and therefore information as to infill source for properties such as No. 7 would have been likely to reach the defendants much sooner.

The current uncertainty as to the source of fill

At paras. 346 to 356 of his previous affidavit Mr. Lennon set out the defendants' attempts to get information from the plaintiffs as to what documents they had regarding infill source. Mr. Lennon noted that despite repeated requests the plaintiffs obfuscated, refused to answer and ultimately agreed to swear an averment to the effect that no such documents existed. Mr. O'Byrne has not attempted to respond to this section of the affidavit between paras. 350 to 356.

Documentation demonstrating the Plaintiffs' uncertainty regarding source of infill

Mr. Lennon accepts Mr. O'Byrne's averments regarding paras. 386 and 387. In particular in relation to the emails he has referred to at para. 387 it had not been realised (and was unclear) that the email in question referred to that part of Beaupark which is the subject of different proceedings. Mr. Lennon also accepts that the minutes of the meeting to which he referred actually show that reference to phase two is to Red Arches and as the defendants had already known that no Bay Lane fill was used in Red Arches the non-discovery of this document does not give rise to that particular prejudice.

Mr. O'Byrne points out that a map referred to by Mr. Lennon at para. 359 of his previous affidavit was a working draft. When this draft is looked at in light of various other documents it forms a piece of the picture indicating that the plaintiffs were unsure of infill source for many Drynam properties. Mr. O'Byrne states that a reference in a document to Moyglare supplying stone in July 2003 was incorrect. However, the plaintiffs stated in their January 2008 Replies that Moyglare delivered five loads of infill in July 2003. Mr. O'Byrne notes that a "version" of this spreadsheet was discovered in 2008 and a claim of privilege was asserted over it. It is hard to understand how the information in this document could be privileged as it is all historical information which occurred during construction. No indication is given as to when this document was prepared and whether litigation was in contemplation at the time. Furthermore, it is clear that the plaintiffs were communicating the results of some of this spreadsheet analysis but not all the results.

A further spreadsheet is said to have been compiled for the purpose of litigation. It was not previously discovered and Mr. O'Byrne does not state if privilege would have been claimed over it. This document indicates again that there was much confusion as to infill source for Drynam. The defendants were assured that the only houses in Drynam which did not contain Bay Lane material were the original Moyglare houses. When the plaintiffs learned from Dr. Strogen that the analysis was incorrect, they failed to rectify the inaccurate and incomplete information previously furnished.

Spreadsheet EM01184, providing details as to particular properties at Myrtle, is discussed above. Again it was not previously discovered, although the plaintiffs have stated that a claim of privilege would have been maintained over it. Again, it is hard to see how a claim of privilege could have been maintained over this document where it simply records details as to various houses. These details had (by and large) already been disclosed to third parties in some form. In addition, it is clear from Mr. O'Byrne's affidavit that the plaintiffs consider that a letter in the old discovery regarding 4 Boyd House indicates uncertainty as to source of fill for that property. No privilege was claimed over this letter and Mr. Lennon therefore fails to see how other documents indicating that fill source for various properties was uncertain could equally be the subject of a claim of privilege.

A further spreadsheet apparently discovered previously but over which privilege was claimed has now been disclosed and Mr. Lennon sees no basis for the claim of privilege over it.

5 Concrete Documentation

Mr. O'Byrne states that the dockets recording the addition of sand do not suggest that it was added on site. The defendants' experts agree that the adding of sand would normally occur at the readymix plant. However, the fact that sand was being added on such a regular basis indicates it was being provided for in the mix to increase its workability and the introduction of sand into that mix increases the potential shrinkage for the concrete. This new information provides a very important insight into the constituent elements which made up the mix of concrete in the slabs. The absence of such information was referred to by the plaintiffs' experts in undermining the assumptions made by the defendants' experts as to water/cement ratio. Therefore, the provision of this documentation would have assisted the defendants' experts in responding to the plaintiffs' assertions that unreliable assumptions were being made regarding water/cement ratio.

Mr. O'Byrne calculates that only 7.16% of the delivery dockets refer to water being added. He says, therefore, that one would expect to be finding evidence of damage in no more than 7.16% of the houses. This is clearly a gross over-simplification. One must presume that water was added to increase workability and, therefore, Mr. Lennon is advised that it would be very unusual for water to be added where the concrete is being used purely in foundation construction. Rather, the addition of water and sand will occur, for the most part, where it has been used to pour the floor slabs. Given this presumption, which Mr. Lennon is advised is highly probable, the actual statistics which the delivery dockets reveal are as follows. 50% of the houses in Drynam and Beaupark (in the claim) potentially had water added on site to the concrete, while 35% of the Myrtle houses potentially had water added on site to the concrete. It can also be surmised that 31% of houses in Drynam, 21% in Beaupark and 11% in Myrtle all had sand added to their slabs. O'Connor Sutton Cronin advise that these figures show that a large proportion of the properties the defendants now know of had water added on site. Had this been available at the beginning, the defendants' experts' approach would have been very different as to the testing regime carried out.

Contrary to the plaintiffs' view, it is the defendants' experts' view that the addition of water on site is an unusual feature and should only be permitted under very strict quality control procedures. What is so remarkable about the newly discovered documentation is that so much water has been added with respect to so many slabs across the estates. What makes this such an unusual practice in the present case is that there is no evidence of any quality control measures to ensure that if water is added on site the integrity of the mix is not undermined. The instances of the addition of water in conjunction with the absence of any documentation relating to quality control makes this a major issue for the likely cause of the damage which has been recorded for some of the slabs.

The defendants contend that the newly furnished delivery documentation provides clear evidence that the practices which were adopted by the plaintiffs with respect to the pouring of the slabs constitutes a major deviation from the applicable Building Regulations and standards which has led to the damage now manifesting in many floor slabs. The defendants' experts advise that the Building Regulations 2000, applicable during construction, set down specific guidelines which sharply contrast with the practices adopted by the plaintiffs. Mr. Lennon discusses Irish and British standards in this regard. He states that in the present case there is no evidence to indicate that the required quality certification was sought from concrete suppliers which in turn makes the absence of quality control measures on site all the more alarming. Furthermore, he is instructed that if the suppliers of the concrete did not have certification then this increases the onus on the contractor to ensure that the concrete as supplied is in accordance with that specified and a quality control regime must be implemented, which would include proper supervision of any additions to the mix (including water) and a proper system of testing including concrete cube tests which would be required under the relevant Building

Regulations.

It is in light of these standards that the addition of water on site with no apparent supervision and the fact that there was very little testing carried out after the pouring of concrete raises very serious issues with respect to the integrity of the concrete and the likelihood for shrinkage being a major factor in the cause of the damage manifesting in slabs. Mr. Lennon notes Mr. O'Byrne's comments that Dr. Maher indicated it was his view that the testing undertaken by and on behalf of Golder indicated that because the slabs were of adequate strength the water/cement ratios were not excessive. However, the defendants' experts contend that the plaintiffs had not undertaken an adequate regime of testing to characterise the concrete used. In particular, they advise that the plaintiffs' conclusion as to the adequacy of concrete was based solely on the determination of compressive strength from a small number of cores taken from slabs. The defendants contend that the compressive strength testing did not reveal the true position as to water/cement ratio and, even in the event of excessive water being added, the strength of the core would only be reduced by a relatively small amount.

Extracts from evidence of Dr. Michael Maher

The defendants' experts completely refute the suggestion that the water/cement ratio testing was inaccurate in that it complied fully with the published British Standard methods for which STATS hold UKAS accreditation. However, Mr. O'Byrne's reference to Dr. Maher's criticism of "assumptions" in circumstances where there was "absence of actual data relating to the individual components" of the concrete mix is revealing where the defendants have only now been furnished with significant additional data relating to the components in the mix. In particular, the extensive documentation relating to the addition of sand in addition to the information as to the addition of water would have provided a strong rebuttal to Dr. Maher's criticisms.

Argument that the Defendants "always knew" about addition of water

Mr. O'Byrne argues that the defendants had always proceeded on the basis that they believed there was likelihood that water was being added to the ready mix concrete when delivered to sites. Effectively, he argues that because the defendants knew this may be a possibility they had every opportunity to pursue this line of enquiry. In this regard he refers to extracts from the STATS report, but Mr. Lennon believes he completely mischaracterises the nature of the investigation as evidenced in the STATS report itself. It is clear from the report that STATS were examining a wide range of factors with a view to investigating the source of the problems. The addition of water on site was considered amongst a number of factors where there was no documentary evidence suggesting that this was the central issue which required to be pursued. The high water/cement ratio was a major factor in the analysis of the cause of the damage but it was looked at in the context of a range of factors. Therefore, the defendants' experts were not focused on the addition of water as being a major contributing factor from the outset but rather this was the conclusion which was arrived at through detailed study and investigation concluding in late 2008. Had the defendants been given the material to which they were entitled they would have had direct evidence which would have shaped their investigations and would have enabled them to focus on and conclude at an early stage that the likely single major cause for the cracking in the slabs related to shrinkage due to the addition of water.

Had the documentation been furnished in July 2008, there would have been sufficient time for an extensive sampling and core analysis on a scale which would disprove the contention that these delivery dockets were not indicative of a pervasive practice. As it stands, the defendants have to disprove this contention when the window for investigations, sampling and testing is now effectively closed thereby irretrievably prejudicing the defendants.

Mr. O'Byrne refers to Appendix M to the STATS Report which confirms that samples of slabs were taken from 46 houses and concrete cores from four houses. Water/cement ratios were carried out on some but not all of these slabs in circumstances where the focus had turned to the basket. However, the defendants did not have the information now provided regarding concrete when the basket was chosen. O'Connor Sutton Cronin advise that a more detailed survey of the concrete would have been carried out across the estates not only on the slabs from which cores and samples were taken but also from a far greater number of houses to demonstrate through water/cement ratio testing that what was revealed in the documentation was corroborated by laboratory analysis. The protocol for concrete testing only refers to the remediated houses which Mr. Lennon is advised does not give the full picture as evidenced by the delivery dockets, which clearly indicate the addition of water to mixes across the estates. For example, efforts would have been made to access concrete samples from houses which were not being remediated but which were the subject of sampling or re-sampling by the plaintiffs' experts, for example when cores were taken through slabs to access further fill samples. This would have been in addition to extra samples which the defendants could have requested from the remediated properties.

Mr. O'Byrne refers to the evidence of Mr. Pearse Sutton of O'Connor Sutton Cronin but the extracts here only serve to underscore the importance of the dockets. Mr. Lennon is advised that had these documents been provided in July 2008, Mr. Sutton would have been in a position to report to the Court what they suggested and whether subsequent investigations conducted on foot of those dockets corroborated the suggestion that the adding of water was a pervasive practice. Mr. O'Byrne's reference to the Queformat report is another illustration of how that report could have been bolstered by the additional information and the further investigations which would have been carried out. Had the defendants been given all the information it would have changed a potential line of enquiry to a major one. In litigation of this scale practical decisions have to be made regarding allocation of resources and in terms of focus for investigations. It is insufficient for Mr. O'Byrne to claim the defendants suffered no prejudice because they got there in the end. They would have arrived at their conclusion far earlier which would have enabled them to bolster their case during the period when this opportunity was open to them and to carry out the further investigations Mr. Lennon referred to previously.

Mr. O'Byrne states that a quote from counsel for the defendants indicated that, from their perspective, what was important was not who added the water to the mix but the results of the tests showing too much water had been used in the slabs. This only serves to highlight the difficulty in which the plaintiffs have placed the defendants where cross-examinations have to be carried out without proper discovery having been made. Mr. O'Byrne's assertion of non-prejudice in the cross-examination of Dr. Maher ignores first the characterisation by Dr. Maher of the defendants' concrete test results as unreliable and secondly the fact that water was intentionally added to the mix on site to the knowledge of all involved, thus weakening the strength of the concrete as ordered and increasing the potential for, and extent of, shrinkage. Counsel for the defendants was significantly hampered in his cross-examination of Dr. Maher. This is highlighted when one considers the point that the correspondence with Goode Concrete showed that a good quality control system was in place, thereby by inference suggesting that water could not have been added to the mix on site without being detected. The new documentation utterly undermines this point.

Mr. O'Byrne states that it is clear from Mr. Sutton's evidence that the defendants were always proceeding on the basis that in all probability water had been added. The defendants initially proceeded on the basis that the addition of water was a possibility. This

became a distinct probability by the end of 2008 when STATS had produced their results. However, the defendants did not know that it was a certainty as the new documents reveal. Given the extent to which this matter has been aired at trial, it is fundamentally unfair that this issue was heard and that evidence was presented to the Court in circumstances where the full picture had not been disclosed.

Mr. O'Byrne's response to the averment that O'Connor Sutton Cronin would have recommended the construction of a model floor slab, and that models created would have been monitored to assess for shrinkage, is not sufficient. First, it is not the case that all the slabs in the estates have been the subject of extensive testing and inspection. Only the slabs in the 50 remediated properties have had any significant examination on them. Secondly, inspections on the slabs in the remediated homes could only have been carried out a number of years after the slab was poured. Therefore, it was not possible to monitor the development of shrinkage cracking. In addition, contrary to Mr. Forde's assertions, the conditions on site can be very easily simulated in terms of climate, environment and construction. Thirdly, Mr. Lennon disagrees that such a simulation would give rise to confusion. It is the view of O'Connor Sutton Cronin that the rising wall acts as a restraint which exacerbates the shrinkage cracking and a model floor test would clearly show how that mechanism operates and would not lead to confusion. Fourthly, Mr. Lennon rejects Mr. O'Byrne's characterisation of such a test as something akin to new research in the area of shrinkage. This is a very specific test to deal with very specific issues arising in this case. It is only now that the defendants have the necessary data to conduct such a test.

Mr. O'Byrne states that it does not matter whether the water was added on site or at the plant. However, this is fundamentally to misunderstand the detrimental effect which the addition of water can have after it has left the plant. When it leaves the plant, the product is supposed to be in a condition whereby the mix has been properly monitored and controlled in line with the quality control systems and specifications and it is the interference with that mix after it leaves the plant that creates the problem. If the claim is not dismissed a test of this nature would have to be carried out to replicate what the likely conditions of the concrete product was when it arrived on site and the precise amount of water which was then added. Contrary to Mr. O'Byrne's averments, it is only now that such a model test can be carried out given the new information regarding the delivery of concrete. By virtue of delivery dockets concerning a number of mixes at Drynam, it is only now that the defendants can examine the approximate makeup of the product as it left the plant, the date of delivery, the time the material was batched, the precise quantity of concrete which was delivered, the precise mix which was delivered, in some circumstances the time on site and, most importantly, the precise amount of water which was added on site. A very similar analysis could be carried out regarding deliveries to Beaupark. Even if the parties disagree as to the reliability of any such model, the opportunity for conducting such modelling has now been lost, a loss entirely caused by the plaintiffs' discovery failings.

Concrete Mixes

Mr. Lennon pointed out previously that the new documentation disclosing the range of concrete mixes demonstrates how, on the plaintiffs' own evidence, the absence of the information that there were potentially 51 different mixes was prejudicial. In this regard he referred to his interpretation of Dr. Maher's evidence. Mr. O'Byrne offers a different interpretation of that evidence, but even if his interpretation is correct his statement that STATS did not take into account information available in July 2008 is misguided. This is because there was virtually no information regarding deliveries to Drynam and Beaupark. When STATS were testing the concrete the delivery dockets which had been discovered related primarily to Myrtle. When only three dockets relating to Drynam were in the old discovery, it is unsurprising that STATS (who carried out a number of water/cement ratio tests on six separate addresses in Drynam) did not specifically incorporate mix designs for the concrete into their analysis. Mr. Lennon does not see how Dr. Maher could say that the test undertaken by STATS did not take account of the fact that within each supplier's product there would be specific aggregate and specific amounts. Save for the three dockets, there was no information as to which mixes were used. A similar problem existed with Beaupark, in respect of which there were only two dockets in the old discovery. It is again unfair of Dr. Maher to argue that even based on the 2008 information available STATS did not take into account the specific components which would have gone into each supplier's mixes. This information was not available.

Mr. O'Byrne says that Dr. Maher's contention was that one needed to have samples of the original specific aggregates of cement used by the various suppliers in their mixes to allow better assessment of the water/cement ratios. Mr. O'Byrne states that the interpretation of the results of the test method employed by STATS to establish the water/cement ratios of the mixes is critically dependent on knowledge of the characteristics of the original aggregate and cement used, information which cannot be obtained at this stage. The defendants do not accept this. However, what Mr. O'Byrne's comments demonstrate is that the plaintiffs are in effect criticising results obtained by the defendants on the basis of a lack of knowledge of characteristics when the information regarding those characteristics was unavailable due to the failure to make proper discovery. Mr. O'Byrne goes on to say that information in the newly discovered dockets has no impact on the magnitude of this unreliability. He also states that "[t]he critical issues is that there were multiple suppliers not multiple mixes", but Dr. Maher indicated in his evidence that it was the multiplicity of "mixes" which made the tests unreliable. If the plaintiffs' criticism of the test results emanates from the multiplicity of suppliers, then again the defendants were greatly prejudiced by not being provided with all relevant information in relation to who the suppliers were. In relation to Myrtle a relatively large number of documents were discovered relating to concrete supplies. However, Mr. O'Byrne has now attempted to use this fact to undermine the assumptions made by STATS in relation to the water/cement ratio results based on the information obtained in June 2008. This completely overlooks the fact that STATS conducted no water/cement ratio testing on any properties in Myrtle. Again, it is the defendants' position that the water/cement testing was absolutely reliable based on the standards followed by STATS. However, the defendants never had the opportunity to rebut the plaintiffs' criticism in circumstances where that could only be done when all the relevant information was to hand. Finally, Mr. O'Byrne appears to characterise Dr. Maher's evidence by saying that when Dr. Maher used the word "mixes" he meant to refer to suppliers. Mr. Lennon does not accept this. Dr. Maher was clearly referring to the possibility that it would be difficult to assess the water/cement ratio without knowing the mix of the components in the concrete.

Mr. O'Byrne argues that even on the old discovery there were 50 mix designs, which he collates in a table, so the identification of 51 makes little difference. The analysis here is fundamentally misleading. The table is largely based on the range of mixes which are indicated in the delivery notes for Myrtle. In relation to Beaupark and Drynam there are only two mixes from the Drynam delivery dockets from Keegan Quarries and there are no apparent mixes in the Beaupark dockets from Kilsaran Concrete. Again, the evidence presented by STATS related to water/cement ratios regarding these estates and not Myrtle. Ultimately, Mr. O'Byrne appears to assert that one can never carry out a water/cement ratio without being able specifically to test the original aggregates and cement which were used in the mix. If that is so then all water/cement ratio tests conducted long after the slab has been poured will never hold any value. If this is the plaintiffs' contention, and given the averments of Mr. O'Byrne, it would appear that the model floor replication test would be the only method of determining whether or not shrinkage is the underlying cause of the damage in various slabs.

Delivery Docket for 12 Drynam Walk

Mr. O'Byrne refers to this docket, which Mr. Lennon had noted revealed the addition of water, and states that it is clear from this docket that the concrete in question was being used for the foundations and therefore this addition of water would not have any bearing on the slab. Mr. Lennon is advised that this is not conclusive evidence that the concrete was used in foundations only. Mr. O'Byrne is advised that because the specified strength of the concrete as revealed in the docket is 25N/mm² there was considerable scope to add water and this would not be detrimental to the mix. Mr. Lennon is advised that this demonstrates a fundamental misunderstanding of the relationship between concrete and shrinkage. The fact that concrete strength of 15N/mm² may be sufficient for the foundations does not allow scope to add water because, regardless of the strength, the addition of water specifically gives rise to a serious risk of concrete shrinkage. Whilst adding water may reduce compressive strength, it will definitely increase the drying shrinkage and therefore, as a practice, it cannot be tolerated. The defendants' experts advise that the statement that the adding of water in this way would not make the "mix unsuitable" is fundamentally wrong and raises further doubts as to the system of quality control relating to the addition of water that was occurring.

Mr. Lennon accepts that a sample was taken from the slab of 12 Drynam Walk but Appendix M of the STATS report notes that no water/cement testing was carried out on this in circumstances where no information had been given regarding the pouring of the concrete at No. 12.

Mr. Lennon is advised that there is a distinct possibility that concrete of this type would also have been used in the slab. In any event, the addition of 400 litres of water to a property is a very significant addition and would have a detrimental effect on a mix. Had this information reached the defendants' experts sooner, an investigation of the precise make up of the concrete in this property would have been carried out.

Extra Sand

The defendants' experts are firmly of the view that the addition of sand can and will cause shrinkage if there is not a significant increase of cement content to cater for the extra sand. Mr. O'Byrne also produces mix designs. It is quite remarkable how he has managed with such ease to produce such mix designs and in circumstances where the defendants were specifically looking for these and repeated queries as to their absence were raised after the old discovery was reviewed. The plaintiffs indicated they had written to Keegan Quarries regarding the documentation the defendants had sought but had failed to procure such documentation. The ease with which the plaintiffs have now obtained that documentation/information calls into question the extent of the efforts previously made.

Cross Referencing

Mr. O'Byrne avers that a cross-referencing exercise cannot be performed. Whilst Mr. Lennon disagrees given that many of the dockets include specific addresses, he says that Mr. O'Byrne's averments therein emphasise the importance of establishing by a wide scale testing regime the extent of the practice of adding water as evidenced in those dockets and the prejudice suffered by the defendants. Mr. O'Byrne does not address Mr. Lennon's averments noting that a cross-referencing exercise can be done between specific dockets where extra sand has been added and which refer to specific addresses where DBFL/Golders have diagnosed signs of pyritic heave in the floors.

Unusual Mixes

Mr. O'Byrne asserts that, due to the testing regime conducted by the defendants, they have had ample opportunity to analyse the concrete mixes they examined and to identify the components within them. However, on one hand he is arguing that testing for water/cement ratios makes no difference in circumstances where one cannot know the components that go into the mix. On the other hand he is arguing that the defendants have had sufficient opportunity to assess what the components were in the mix. This contradiction arises from his failure to acknowledge that the defendants now have documentation providing an insight into the mix of the components as they left the plant and what happened to that material on site. When one adds to this the knowledge that there was no evidence of any quality control in relation to the addition of water and very limited testing on the concrete, it can be seen that whatever investigations have been carried out to date have been done in circumstances where all the relevant facts were not available to the defendants. It is now quite evident that there was a multitude of mix designs being used in the estates. Obviously the availability of contemporaneous documentation evidencing what was happening on site when the concrete was poured would have a major impact in shaping the defendants' investigations and in providing context to their analysis and to their conclusions.

Concrete Cube Tests

Mr. O'Byrne notes that there are no concrete cube tests for any houses at Drynam and Beaupark and indicates that it would not be usual to carry out such testing. Mr. Lennon is advised that the comparison to the practice regarding testing by the builder of blocks, insulation or timber, etc., is spurious as these are finished products whereas concrete is potentially subject to change between batching and placing. Mr. Lennon is advised that the very absence of these results makes the information in the delivery document more pertinent to the issues of the case.

Even if a builder can rely on the supplier as to the design, there appears to be nothing in the discovery to indicate that the plaintiffs sought to procure assurance by way of certification from the supplier. If, as appears to be the case, no quality control procedure is put in place to monitor the addition of water on site, Mr. O'Byrne's reliance on reputable suppliers becomes irrelevant as the design and mix they supply can be detrimentally altered due to the actions on site. These comments only highlight that the new information is profoundly important to the issues at the heart of this case. References to concrete cube testing in a report of Mr. Monaghan and a DBFL letter show that the practice being adopted at Drynam and Beaupark was not standard. In these circumstances, the practice of adding water on site becomes even more significant.

Mr. O'Byrne appears to suggest that because the defendants knew of a high water/cement ratio in one property before the basket was chosen this shows that they did not consider high water/cement ratios as being relevant in choosing which properties go into the basket. In fact his reference to this property shows the implications of the defendants having to make decisions when the full picture was unavailable to them.

The selection of the basket took place while STATS investigations were ongoing and then the investigation narrowed the focus on the basket. The defendants were forced to take the long way around and reach the conclusion with respect to high water/cement ratio

after the basket had been chosen. To say that one high water/cement ratio result in one particular property is equivalent to hundreds of delivery dockets indicating addition of water is to stretch logic to its breaking point. Given the emphasis on high water/cement ratios in Mr. Sutton's evidence and the emphasis on the probability of shrinkage in the STATS report, it defies common sense to suggest that had the defendants known in July 2008 what they know now this would not have had a bearing on their approach to the basket. It certainly would have.

The defendants were not privy to the construction practices of this estate and had to embark on investigations starting from first principles to find the true causes of the damage. When one considers that these investigations had to be carried out within tight time frames over a multitude of properties and co-ordinated between a range of experts from around the world, the absence of background information providing clues as to where to focus enquiries can be detrimental. It is unacceptable for Mr. O'Byrne to say that the defendants by their enquiries already had an indication of the information only now discovered. The defendants could have come to their conclusions a lot sooner and would have been in a position to bolster these conclusions, conducting investigations which would show that the dockets were indicative of the problem the defendants suspected.

6 Ground Conditions

Mr. O'Byrne is wrong in suggesting that having access to the estates by way of inspections is sufficient to cure any deficiency in information discovered. Documentation of the type that has now come to light was sought because the defendants believed these documents were relevant and necessary for the defence. The plaintiffs agreed to this request and no issue was taken with the necessity to discover these documents. It is not sufficient for Mr. O'Byrne now to assert that they were never necessary. This is not a simple case where one inspection of a particular property might provide all the information an expert would need to give an opinion. There are hundreds of houses built over varying ground conditions and containing constructional detail underground to which the defendants would not be privy. In addition, the plaintiffs have a natural advantage as they and their experts were involved in the construction of the estates. It is wrong for Mr. O'Byrne to claim that one would not need documents to formulate an approach to investigation where, for example, that documentation reveals important underground drainage detail which the defendants could not be expected to know.

Mr. Lennon referred previously to a document pointing to a drainage system which was put in place under the rear gardens where lime stabilisation occurred in Drynam. Mr. O'Byrne contends these concerns are "a red herring" as lime stabilisation and drainage detail of this type only apply to Drynam, so this cannot be a factor in explaining the problems in all three estates. However, from the defendants' perspective, the problems observed on the estates are not due to one single cause. They arise from a number of causes peculiar to the separate estates.

Mr. O'Byrne states that there is no more severe damage in the northern area of Drynam, where lime stabilisation occurred, than elsewhere in the estate. However, the drainage detail in the new discovery would indicate that the surcharge in the drains would occur not specifically beside the homes where that detail was in place but towards the north east section towards which the flow of water would be directed. Mr. Lennon is advised that the recent excavation of 22 Drynam View (one of the 'Judge's houses') flooded during remediation following a heavy storm and that such flooding would indicate a drainage problem in the area. He notes the cases of five houses in Drynam View in the north east section of Drynam. In this regard there is a specific link between the installation of the system and the existence of damage in the houses in Drynam View.

Mr. O'Byrne argues that the drainage detail in question would not cause "a significant increase in surface run off". However, since the plaintiffs made the soil impermeable through lime stabilisation they have increased the amount of water entering the system and thus increased the likelihood of surcharging the storm water drainage system. When Mr. O'Byrne states that the detail does not affect the quantity of the surface water run off, he misunderstands the point made by the defendants' experts.

Mr. O'Byrne distinguishes between a 300mm land drain referred to in one document and a 150mm land drain mentioned in another. Mr. Lennon accepts Mr. O'Byrne's clarification in this regard, but the relevance of this document is that it revealed the length of the run of the 150mm drain. The point remains that the drainage system installed at the rear of the gardens where lime stabilisation was used gives rise to a significant risk of surcharging down stream which could lead to flooding in the north east section of Drynam. The newly discovered documents reveal this and their absence has seriously prejudiced the defendants. Mr. O'Byrne denies that the 150mm land drain runs through a large area of the estate. However, a fax dated July 2003 indicates the specification instruction that the surface water drainage system in all of the rear gardens where lime stabilisation has been employed should be replaced with this detail. This is a significant and large area of the estate. Mr. O'Byrne also says that this part of Drynam Drive drains directly into a 1,200mm pipe and not into the attenuation tank. This is not at all clear from the document to which he refers. Further, even if it is true that it drains into a pipe and not into the tank, this is likely to lead to an overload of the down stream drainage system unless that system was designed to cater for this.

Mr. O'Byrne clarifies that a fax attaching a sketch indicating drainage detail beside 109 Drynam Drive does not refer to the 150mm land drain. Mr. Lennon therefore accepts that this document does not add to his contentions. However, he is advised that the basic concerns that the structural integrity of the foundations will be affected in areas where there is flooding created by the down stream surcharging of this land drain system still remain. With respect to Mr. O'Byrne's comments that Doc ID 07583 provided the same information regarding the land drain system that is now in the new discovery, this is incorrect when the documents are compared.

The indications of drainage problems in the north east section of Drynam as disclosed in the new discovery or in the old discovery all take on a new significance in light of the information that there was a specific land drain system in place for the northern section of Drynam where lime stabilisation occurred. Mr. O'Byrne refers to a letter noting drainage and subsidence issues at the rear of 47 Drynam View as having been previously discovered. However, the point is that the comments in this letter take on a far greater significance in the context of the information the defendants now have.

The property at the rear of 47 Drynam View is noted in the letter as having serious drainage problems in the garden. This property is in a neighbouring estate and this suggests that a homeowner in that estate had been having "drainage problems" since the construction of Drynam. This supports the view that the land drain system, of which the defendants are now aware, could be contributing to these issues.

An email which post-dates the cut-off point provides further evidence of a problem in the area which could well be linked to the land drain system in Drynam's northern section. Mr. O'Byrne states that this flooding was due to excessive rainfall. However, the defendants' experts advise that this assertion is insufficient. Clearly, a drainage system needs to be sufficient to accommodate excess rainfall and this further points to drainage problems. Mr. O'Byrne has not addressed two further issues. The first relates to the fact that the letter referred to above refers to the fact that the homeowners had "observed that this drain was blocked" and was

"full of rubbish". The second is that an email refers to the fact that there was flooding in the Russell Court apartment block in the car park section.

Mr. O'Byrne attributes flooding at 49 Drynam View to excessive rainfall over the weekend of 9th and 10th August 2008. However, again a drainage system must be designed to accommodate excessive rainfall. During the remediation of 22 Drynam View the excavation of the sub-base material was flooded and it was noted that water was entering this to a height in excess of 1 metre above foundation level. The attempts to pump this water to reduce its level failed. The defendants' experts advise that this is a clear indication that there are surface water drainage issues in this area. Furthermore, the attenuation systems should be designed so that the system can cater for a one in 30 year return storm with the site being designed to withstand flooding for a one in 100 year storm event.

Mr. Lennon previously referred to a letter from Moylans. His point was that in light of the newly discovered information as to possible drainage problems leading to flooding in the north east section of Drynam, the statement in that letter that the original site investigation was only intended to be preliminary and was not "intended to represent a comprehensive investigation of the site as a whole" takes on a new significance. It takes on major significance when one considers that the preliminary site investigation report of SIL failed to identify soft soils to the north east of Drynam. Mr. Lennon accepts that the letter from Moylans was in the old discovery. His omission to mention this was due to the plaintiffs' assurances concerning duplication. In any event the importance of the fact that the original investigation was not "comprehensive" takes on a special significance where the defendants now have information which raises serious issues as to the ground conditions in the north east corner of the estate. It also calls into question the reliance placed by the plaintiffs' experts on the site investigations carried out at Drynam.

Mr. Lennon refers to an extract from Dr. Maher's evidence regarding site investigations. Given what is now known as to serious drainage problems resulting in flooding in the north east corner, this evidence and the reliance on a site investigation which was not comprehensive becomes very significant. The plaintiffs have maintained that the site investigation was adequate. The knowledge of serious drainage issues undermines this contention, particularly where the investigation was not intended to be comprehensive.

Mr. O'Byrne refers to a letter of 18th January 2008 noting that only a stand pipe was installed at the higher part of the site. However, it was never contended that AGEC were unaware that there was only one stand pipe. This matter was commented on in their expert report. The letter is significant however in light of what is now known. It states that "only" one stand pipe at the "higher part" of the site was installed and that this suggested some de-watering would be necessary. This implies that Moylans were concerned about the absence of a standpipe in the low-lying north eastern part of the site. Considering the information now known regarding this corner the significance of Moylans' implicit concern becomes apparent in that they become aware of the potential for flooding in this area.

Mr. O'Byrne asserts that AGEC should have been familiar with the Ordnance Survey maps for Drynam and the relevant drains and water courses which ran through the estate. AGEC were aware of the locations of all drains and water courses but this is not relevant in relation to the flooding problem in the north east corner. The familiarity with the maps does not put the defendants' experts on notice that the plaintiffs have installed an inadequate drainage system.

Mr. O'Byrne responds to the contention of the defendants' experts that a number of measures would have been taken had they been aware of the matters in the new discovery. Mr. Lennon replies to Mr. O'Byrne's response as follows. Mr. O'Byrne states that AGEC knew the ground water levels in Drynam. AGEC did know of the high water table, but it was not until the new discovery that it learned of the extent of the problem in Drynam's north east section. Mr. O'Byrne notes a number of instances where AGEC noted water egress for a number of properties visited during remediation. However, Mr. Lennon is advised that there is a significant difference between water ingress at the foundation level and the serious problems which appear to be manifesting at Drynam View. Even if the defendants' experts had noticed unusual water level movements in the north east section (which they were not aware of) the significance of this can only be truly appreciated in light of the information as to the drainage system which leads into this section and which only emerged in the new discovery.

Mr. O'Byrne points out that the defendants were granted permission to access previous wells installed by the plaintiffs in Drynam for their own monitoring. However, the bore holes installed by Golders were not in the part of Drynam which appeared to be prone to flooding. In addition, Mr. Lennon is advised that, given what is now known regarding the north east section, weekly readings would be insufficient and a data logger taking more frequent readings would have been required. Mr. Lennon is advised that had AGEC been aware of this issue they would have in addition insisted on a water monitoring well to be installed in the north east section of Drynam or just outside. Mr. O'Byrne refers to further ground investigations carried out by the defendants' experts as evidence that they were in a position to acquire all the information they needed. However, the point is that the plaintiffs failed to provide all relevant information to the defendants' experts to enable them to make informed decisions which would have guided their investigation. Mr. O'Byrne's comment that it is difficult to understand why AGEC would not have carried out all appropriate tests in the wells, bore holes and probe holes taken by them disregards the specific nature of the issue identified in a different part of the estate.

Mr. O'Byrne refers to an extract from the cross-examination of Dr. Maher where ground water conditions were discussed but again this only underlines that serious drainage issues potentially affecting the north east section were unknown. This would have been highly relevant to the cross-examination of Dr. Maher. Mr. O'Byrne refers to the fact that the defendants' experts have witnessed actual ground conditions in every remediated house they have visited. In this regard he refers to an extract from Mr. Sutton's evidence. Again this only highlights the importance of what the defendants experts did not know. Had he known then what has now been disclosed Mr. Sutton could have informed the Court and advised it that following detailed investigations the defendants had (or had not as the case might be) established the link between ground conditions in the north east section and the drainage system. Finally, Mr. O'Byrne refers to photographs from an AGEC visit to 23 Drynam Crescent showing water accumulating at the bottom of an excavation. Mr. O'Byrne misses the point being made. First, No. 23 is in a different section of the estate to that in which the defendants' experts have now identified a potentially serious drainage problem. Secondly, even if the property had been in the north east section the defendants would still not know from the photographs the source of the problem.

Mr. O'Byrne criticises the recommendation to install extra stand pipes across the site to determine the ground water profile. This recommendation is based on a necessary comparison with what is occurring in the north east section of Drynam. The existing testing by AGEC for monitoring ground water levels was done when there was no specific focus on the north east section and, therefore, the new testing would be for the purposes of establishing a comprehensive comparison. In addition, Mr. Lennon believes the criticism aimed at the defendants for recommending a high quality benchmark to rock in accordance with BRE 386 is misguided. AGEC have recommended this because it would provide a benchmark less prone to vandalism and traffic in an urbanised environment. The request for such a benchmark is not necessarily a reflection of the precision necessary to measure ground water levels. In this regard Mr. Lennon rejects the comments made that the precise level of slabs by Coastway are unreliable. Mr. O'Byrne refers to the fact that

AGEC had previously indicated that they were considering employing geophysics as part of their investigation. Mr. Lennon is informed that at the time they ultimately decided not to employ this method and based that decision on the information then available. This situation changes in light of the new information which has come to light regarding this land drain system. Mr. O'Byrne comments that there is no valid technical basis to perform such sophisticated testing in relation to the existence of the land drain, but this would have been a matter for the defendants to decide had they known of its existence.

New information concerning foundations over lime stabilised areas

Mr. Lennon previously referred to a fax dated 15th October 2004 which contained the constructional detail for particular foundations built on lime stabilised soil. Mr. O'Byrne indicates that this document was discovered but Mr. Lennon takes serious issue with the averment that it was discovered as Mr. O'Byrne said. The cover sheet to this document was provided and it appeared to be an important document. The defendants specifically requested the attachments to this document. The plaintiffs' initial response was that the defendants could use the Doc ID numbers to find them. The defendants then conducted an exercise along these lines but the two sequential Doc IDs appeared not to have any connection to the fax cover sheet. The missing link was approximately 3,000 documents away from the cover sheet, had a different date and no author field. Mr. Lennon therefore believes it was impossible for the defendants to know that this was the second page of a four page document appearing in full in the new discovery. Considering that the plaintiffs, who authored this document and would be the only people who could know where these attachments were, stated on affidavit that pages 2, 3 and 4 of this document were missing, it would have been difficult for the defendants to work out that these four pages were part of the same document. Had the document been discovered as a whole its import would have been clear.

Mr. O'Byrne notes Mr. Lennon's averment that until now it was unclear whether foundations were built at a level above or below the stabilised soil. Mr. O'Byrne avers that the plaintiffs' expert reports make clear that houses were built on lime stabilised ground. However, while the old discovery contained general instructions on how to build over lime stabilised ground, the defendants did not have specific information as to where this actually occurred and which houses were built upon lime stabilised soil itself and which were sunk down to the virgin soil. The clear distinction between the information in Mr. Duckenfield's report and the information in Doc ID D-01-412 (the four page document) is that the latter specifically identifies those properties which were founded in stabilised soil and the precise mechanism which was employed when founded in stabilised soil. Similarly, the comments in the appendix to Dr. Maher's report and in paras. 2.14 and 2.15 of Mr. Forde's witness statement do not shed any further light as to this precise detail. It was unclear which homes were placed in or on the soil fill. All the defendants knew was that houses were built in the lime stabilised areas. They had no specific list indicating the constructional detail of how each home was founded in that area. The four page document (when taken together) is a comprehensive list of all the properties on Drynam Drive which were built on lime stabilised ground. For each property it indicates specifically whether the property was built on top of the lime stabilised soil or whether it was sunk down to the virgin ground. It also provides further details for these houses.

This information would have been of particular use in specific inspections of these individual properties, particularly where the houses were built on and not in the soil itself. Mr. O'Byrne fails to identify documents which provide the same information except to the extent that he can point to varying comments as to which houses were in the lime stabilised areas and to a general engineer's instruction as to how houses were to be treated when built over the lime stabilised areas. The significance of properties being built on top of rather than in lime stabilised soil is that the lime stabilisation may only have a short-term effect in actually stabilising the boulder clay. Mr. O'Byrne rejects this, pointing to a Paul Quigley paper indicating that stabilisation techniques are suitable for typical Dublin ground boulder clay where the plasticity indices are in the range of 10% to 20%. The defendants' experts advise that Mr. O'Byrne vastly over-simplifies the position and that the Quigley paper does not address the long-term effect of lime stabilisation on boulder clay. Regardless of the competing scientific arguments, this new information as to which properties were built on top of rather than in lime stabilised soil would have enabled the defendants' experts to carry out specific examinations on each of these properties with a view to assessing whether any damage therein could be attributable to settlement arising from a deterioration of the stabilised soil.

The defendants' experts advise that contrary to Mr. O'Byrne's averments many of the samples collected by the defendants from the remediated homes showed plasticity levels below 10%. Other samples were found to have such low clay contents that they were considered "non plastic". A document published by the Highway Agency in the UK in 1997 referring to the 10% plasticity figure is referred to.

Mr. O'Byrne refers to section 4.1 of the Golder report which notes that the foundation soils from the three estates had plasticity indices ranging from 9% to 18%. However, AGEC advise that Dr. Maher's report in relation to the plasticity range is not representative in that the majority of lime stabilisation occurred in Drynam and the plasticity range reported emanates from testing carried out on the three estates.

The essential point is that the defendants now have specific information as to which houses were built on top of lime stabilised soil as opposed to those houses which were sunk down to the virgin ground. Furthermore, there are specific constructional details including the type of concrete used and the form of reinforcing mesh used in those properties. This information would have enabled the defendants' experts specifically to examine those properties listed at Doc ID D-01-412 to investigate whether any damage manifesting in those properties can be attributable to settlement due to weakening stabilised soil.

New discovery concerning problems with surface and ground water at Beaupark

At paras. 100-105 of his previous affidavit Mr. Lennon noted a number of issues which emerged from the new discovery relating to surface and ground water conditions at Beaupark. At para. 101 he noted a series of issues all of which are of concern. They indicate that at a preliminary stage during construction there were problems with the surface and ground water. Mr. O'Byrne indicates that these issues are commonplace in many building sites. However, the defendants' experts are of the view that they do provide early indicators of poor ground conditions and drainage problems of which the defendants were not previously aware. At para. 102 Mr. Lennon referred to comments made by Mr. Kevin Kelly Junior recording water ingress at two properties. Mr. Lennon accepts Mr. O'Byrne's corrections as to the addresses. Mr. O'Byrne's response is that the defendants' experts had access to these particular properties and will have noticed themselves water ingress occurring. However, the defendants' experts' inspections were on different days to those recorded in Mr. Kelly's diary and they would not have been in a position at that point from a visual inspection to determine whether the water was due to a recent rainfall or a high water table. Mr. O'Byrne does not acknowledge that whilst the defendants had access to the homes during remediation their access was much more limited than that enjoyed by the plaintiffs' experts who were carrying out the remediation. Therefore, the plaintiffs' experts' commentary as to what they were witnessing in these properties is of obvious significance and importance.

Whilst AGEC identified water in most of the houses in Hoey Court and Hoey Close during remediation, their examination would have been based on a one-off visit whereas a confirmation by the plaintiffs' experts that water ingress in this area related to a high water table was something of significance. Mr. O'Byrne gives details of AGEC's testing at Beaupark. Again, it is insufficient for Mr. O'Byrne to contend that in his view the defendants' testing was adequate for their purposes. The defendants were entitled to all relevant information which was discoverable in July 2008 and given the natural disadvantage of not having full access to the properties under remediation and not having an intimate knowledge of the construction of this estate, all information as to what was occurring on site whether during construction or remediation which was discoverable would have been used by the defendants to provide direction to their testing and investigations.

New discovery relating to ground conditions in Myrtle

Mr. Lennon previously referred to two emails from a homeowner at 4 Stapolin Avenue indicating potential subsidence and a hollow through the garden. Mr. O'Byrne notes that this information was accessible through discovered documents. However, as Mr. Lennon previously made clear, the significance of the information in the emails was that they took on particular importance due to the newly discovered document suggesting that there was a public watercourse terminating in this area. He is advised that given the major hollow in the back garden it is quite reasonable to speculate that the depression of No. 4 could be related to the watercourse at the rear of 58 and 59 Stapolin Lawns. This is something the defendants' experts should have had an opportunity to examine between July and November 2008.

Mr. Lennon previously referred to a structural certificate relating to units at Stapolin Avenue indicating that these units had piled foundations. Mr. O'Byrne has clarified that these structural certificates were later corrected. Mr. Lennon notes his averment that no piling of foundations was carried out in Myrtle. Assuming he is correct, Mr. Lennon does not think any further issue arises as to this new documentation.

Mr. Lennon previously referred to a document relating to lime stabilisation works which appeared to be conducted in Myrtle. Mr. O'Byrne says that this document was discovered in error in that it relates to 'Road 19' which is not in any of the estates. Mr. O'Byrne does not indicate where this road is and Mr. Lennon reserves the defendants' position on this.

Excerpt of cross-examination of Dr. Maher day 8

Mr. O'Byrne refers to an excerpt from the cross-examination of Dr. Maher referred to in Mr. Lennon's affidavit and states that there is nothing new in the additional discovery, therefore he does not believe it impacts on Dr. Maher's evidence. Mr. Lennon disagrees. The additional documentation raises new and significant issues. These issues would have been put to Dr. Maher and the defendants would have carried out investigations regarding those issues, would have reported on those investigations and would have been able to put to Dr. Maher the results of their investigations.

Correspondence from Frank Motherway & Associates

Mr. Lennon pointed to a number of new documents relating to stabilisation work which appeared to be carried out at Myrtle and which noted serious concerns as to the lime stabilisation programme carried out in that estate. Mr. O'Byrne says that no lime stabilisation was carried out anywhere in Myrtle. However, Mr. Lennon refers in this regard to a number of documents which he contends seem to suggest that lime stabilisation was being carried out at Myrtle.

Absence of lime stabilisation information regarding Drynam

Mr. Lennon pointed out previously that new documentation as to lime stabilisation at Baldoyle (Myrtle and Red Arches) showed testing and monitoring which was being conducted on a level which appeared not to exist during the lime stabilisation at Drynam. Regardless of where these works occurred, the new documentation regarding these works demonstrates, in the defendants' experts' view, a more rigorous monitoring regime than what appeared from a perusal of the documentation relating to Drynam. Mr. O'Byrne refers to a letter from Barry & Partners Consulting Engineers dated 2nd October 2009 which states that soil stabilisation works in respect of road construction were carried out at Red Arches and not at Myrtle. However, again other documents indicate or suggest that some form of lime stabilisation work was carried out at Myrtle. Furthermore, the affidavit of Mr. Butler dated 10th November 2008 states that lime stabilisation was employed in relation to some road works in Beaupark and Myrtle.

7 Documents relating to Quality Control and Workmanship

The Helsingor Minutes

Mr. Lennon previously pointed to a set of documents which demonstrated an exchange between Helsingor and the plaintiffs which established that issues were raised as to the standard of workmanship on site in Myrtle and which resulted in the commissioning of a report by Mr. Monaghan. Mr. O'Byrne states that there were only five sets of minutes mentioning quality issues and 10 meetings per year of the Helsingor Board. In fact quality issues were raised at seven meetings in the space of a year. This indicates the seriousness of the issues which were being raised. The issues which were raised would normally be something which might be raised at a site meeting or a meeting between engineers and professionals. The fact that it went to the Board level shows the seriousness of the issues. The characterisation of these minutes and concerns would be a matter for evidence. However, the defendants' experts are of the view that the issues raised are highly significant in that much of the damage they have observed on these estates is not structurally significant but arises from poor workmanship and quality control and these were exactly the issues raised at the board meetings and in the Peadar Monaghan reports – phases 1 and 2.

Mr. O'Byrne states that no concerns about quality were raised at the meeting on 19th June 2006. However, the minutes record that a discussion as to the general quality of work did take place and it appears concerns must have been raised on the Helsingor side because Matt Carroll had to confirm that there were no "major quality or structural issues" on the project. Given discussions at subsequent meetings it appears clear that the issue of quality was raised because of a concern of Brian Clarke of Helsingor. Mr. O'Byrne comments that no site visit was undertaken as a result of the June 2006 meeting, but it appears some form of inspection must have been carried out to enable Mr. Clarke to make certain comments he made. Mr. O'Byrne comments that the quality issues appear only to relate to "finishes", which are generally matters of a superficial or aesthetic nature. However, Mr. Lennon believes the concerns raised appear to go beyond this. However, even if not, it is the defendants' case that much of the damage in these estates is of a superficial or aesthetic nature and that a lot of the cracking which has been recorded in fact arises from poor finishing.

Mr. O'Byrne says that the appointment of a clerk of works was only indicative of the fact that Helsingor wanted to put quality control in place. However, Mr. Lennon believes the appointment of someone to this position raises serious questions where this has been recommended by an independent party and it shows that Helsingor's concerns were more than trivial. Mr. O'Byrne refers to the minutes dated 23rd January 2007 and presents the picture of these minutes as raising insignificant or trivial matters. However, when one looks at the minutes and when one takes into context that these were issues discussed at the highest levels of both companies, it is clear that the concerns raised were significant. At the January 2007 meeting a specific issue was raised as to the "quality of the engineering" and "quality of the construction" in addition to the quality of the "finishes". The minutes note that even with respect to the show houses the finishing had left a lot to be desired and there were a number of examples of poor workmanship and poor quality control. This is demonstrative of exactly what the defendants have maintained is the cause of much of the damage. Mr. Lennon is advised that this damage is largely within the realm of the aesthetic or superficial and, for the most part, can be put down to poor standards in hastily built housing developments.

The Peadar Monaghan reports

Following the delivery of these reports it appears Gerard Leech of Menolly Homes prepared a document in response. Menolly Homes prepared a further document based on Mr. Leech's document. This further document effectively contained the formal response to the report for Phases 1 and 2. Mr. O'Byrne has clarified that the DBFL letter of 1st May 2007 which is addressed to Ciarán Lee of Menolly was, according to Mr. O'Byrne, a DBFL response to the Phase 2 (Red Arches) report.

To the extent that these documents refer to Red Arches, they are highly relevant. They give an insight into the general construction standards and practices which were being adopted by the plaintiffs and have relevance to the approach they adopted in other estates, including Myrtle, Drynam and Beaupark. For example, Mr. O'Byrne has averred that no concrete cube tests were carried out in Drynam and Beaupark, but Mr. Monaghan comments in his report on Phase 2 that he presumes there are concrete cube tests. The DBFL response to this report states that all concrete cube test results are to be submitted to DBFL.

Mr. O'Byrne refers to a snag list dated 20th August 2008 for Sector 18, which includes Myrtle House. He states that it is essentially a mid-construction stage snag list and that it lists many finishes issues not relevant to the issues in the case. However, from the defendants' perspective these issues are highly relevant. Issues concerning finishes can directly lead to some of the damage in the estates. Furthermore, 30 Myrtle House contains non-Bay Lane material and has been remediated. Mr. Lennon is advised that from the defendants' inspections of this property it did exhibit cracking of a kind comparable to cracking in properties containing all Bay Lane material. Mr. O'Byrne rejects the defendants' experts' characterisation of the documentation arising from the Peadar Monaghan trail of reports and correspondence. He notes that in Myrtle DBFL carried out inspections of structures and were satisfied as to the adequacy of construction of all the buildings in these estates. However, Mr. Lennon believes there is a dearth of documentation regarding Myrtle authored by DBFL relating to inspections which were carried out. Furthermore, Mr. O'Byrne states that the plaintiffs were satisfied that there were no structural issues regarding the construction of Myrtle. Again, the defendants' case is that the majority of the damage at issue, and in particular in Myrtle, is not structural damage.

Mr. O'Byrne states that because the defendants can now cross-examine Mr. Forde on these issues they are not prejudiced. This ignores the fundamental point that the information would have enabled the defendants to conduct inspections and examinations which were informed by the contemporaneous evidence documenting what was occurring on site. Furthermore, the Phase 1 report contains very specific details regarding specific areas of Myrtle. Of particular significance is that at Appendix A Mr. Monaghan gives detailed descriptions of poor workmanship and finishings which he noticed in the various sectors of the estate and provides photographs of what he saw. For example, there is a comprehensive review of Sector 18. Mr. Monaghan also cites examples of poor workmanship in Talavera House. Three properties in Talavera House, and a fourth in the defendants' view, contain non-Bay Lane material. He also makes criticisms regarding Boyd House. 2 Boyd House is one of the basket houses and three properties in Boyd House contain non-Bay Lane fill. Mr. O'Byrne is quite wrong in stating that the non-discovery of this documentation has caused the defendants no prejudice. The report provides an excellent insight into what was occurring on the ground during the construction of Myrtle. Again, the defendants are at a natural disadvantage as they are not privy to what occurred during construction. Therefore, the provision of all documentation recording what happened on site is of vital importance to them.

Mr. O'Byrne points to Dr. Maher's view that the examples of poor workmanship put to him in cross-examination did not give rise to the cracks in the slabs and the other defects. This only highlights the disadvantage under which the defendants were placed by not having all relevant information to enable them to contradict Dr. Maher's position in this regard. For example, had full discovery been made in July 2008, the defendants would have been able to cross-reference the new documentation relating to poor workmanship with new information relating to homes that contain non-Bay Lane fill. Dr. Maher's evidence could have been tested to explain the apparent similarity in damage in Bay Lane and non-Bay Lane properties in circumstances where there was other evidence to suggest the damage in the non-Bay Lane properties arose from poor workmanship and poor quality control.

Mr. O'Byrne mischaracterises Mr. Lennon's previous averments as to the issue of poor mortar. Mr. Lennon stated that a letter he referred to would have been relevant to the investigation and enquiries which the defendants would have carried out. He did not say it would have triggered an investigation into quality of block work and mortar in estates, as this is an investigation which had been carried out by the defendants. However, the document provides a specific context to a particular incident which could have been explored further and indicates a concern regarding the quality of the mortar being supplied and the testing of that mortar. Mr. Lennon believes the letter indicates a serious concern as to the quality of the mortar and would have provided a context to investigations already carried out. In addition, it provides evidence of the poor quality control on site.

Minutes of meeting noting poor workmanship and lack of quality control

In his previous affidavit Mr. Lennon referred to minutes of meetings noting matters of significance for the defendants. For example he pointed to three site meeting minutes of 22nd March 2006 which recorded inconsistent concrete cube tests. Mr. Lennon accepts that this document was discovered. Again, he points in this regard to the assurance given by the plaintiffs as to duplication in the new discovery. Mr. Lennon also referred previously to minutes of meetings dated 22nd August 2005 which referred to roof defects. Mr. O'Byrne refers to these as remedial works to roofs rather than being "roof defects". Mr. Lennon is advised that the distinction here is marginal and in any event it is further evidence of problems arising during construction.

Mr. O'Byrne refers to a meeting note dated 22nd January 2008 and clarifies that the issue regarding this matter occurred opposite Block 20 and was near but not in Beaupark. He also notes that this was the responsibility of Liffey Developments. Mr. Lennon accepts his clarification in that regard, although he maintains that the reference in the document to "ponding" due to "pavement settlement" would have been of considerable interest to the defendants given that it potentially indicates poor ground in that area which is close

to Beaupark.

Mr. Lennon previously referred to minutes dated 6th October 2004 which indicated that there was contamination of ground water and an increase in the pH levels caused by developers during the wash down process. Mr. O'Byrne points out that there was a similar document which would have flagged this issue to the defendants. This document is in the old discovery. However, this handwritten file note is not specific evidence that this was a major issue on site. The alarm expressed in the minutes is not reflected with anything like the same emphasis in the file note.

Mr. Lennon previously averred that had the new information relating to workmanship and quality control come to light in July 2008 the defendants' expert engineers would have insisted on far greater access to the remediated properties. Mr. O'Byrne says the defendants' experts have had full access to the houses as part of the testing, sampling and remediation process since July 2007. This is untrue. The access they had was limited and involved periodic inspections based on a strict agreed protocol. This access was deemed to be sufficient when the protocol was entered into. Information relating to site practices during construction could have been specifically investigated and specific requests could have been made to be present during opening up works on particular properties or requests could have been made to direct certain opening up processes based on specific issues arising in the documentation. Furthermore, a full time presence during the remediation of these properties would have enabled the defendants' experts to identify issues which would corroborate what was being suggested in the discovery documentation. Mr. O'Byrne is correct in saying that the defendants' experts have had special access to the 'Judge's houses'. Mr. Lennon believes the analogy drawn by Mr. O'Byrne with the access the plaintiffs had requested for 3 Drynam Square is inappropriate. He believes the plaintiffs have at all times had full access to every property they were remediating and at no stage were their inspections limited to specific stages during that process. 3 Drynam Square is one of the few properties the defendants have had in their possession. Mr. Lennon fails to see why the plaintiffs would need to deconstruct this property when they have been deconstructing 50 properties during which they have had full time access. Furthermore, No. 3 has not been deconstructed in circumstances where a strict monitoring regime has been and remains in place.

Workmanship and Pour Dates

Mr. Lennon previously referred to a new spreadsheet indicating foundation pour dates. He adverted to potential discrepancies between this document and inspection records for foundations. He notes Mr. O'Byrne's clarification regarding the apparent discrepancy with respect to the inspections of the properties at Drynam Green, Drynam Grove and Drynam Glen. However, Mr. Lennon is advised that the spreadsheet is significant in that it points to a number of discrepancies between the approximate pour date map and the pour dates recorded therein. These discrepancies are important. They relate to issues of quality control on site. The exact position with respect to pour dates appears to be totally confused and there is evidence in the new discovery strongly indicating that the pour dates map was incorrect in places and other evidence indicating that where this map is correct the inspections for the foundations may have taken place a number of days before the foundations were poured. In some instances it appears there was a significant period before the foundations were poured which is not in accordance with best practice.

Attempts made by the Defendants to obtain documentation in relation to ground conditions and workmanship

In his previous affidavit Mr. Lennon referred to a printout relating to, first, architects' and engineers' instructions which refer to approximately 664 documents in the new discovery which could be classified as architects' and engineers' instructions. In response Mr. O'Byrne ignores the point Mr. Lennon made regarding the amount of engineers' instructions in the new discovery and fails to explain why the plaintiffs ignored the fact that there were obvious gaps with respect to the volume of engineers' instructions which had not been discovered and made specific averments to the effect that such documents do not exist. Instead he says that of the list of documents Mr. Lennon referred to the majority appear to be engineers' instructions as opposed to architects' instructions per se. In this regard Mr. Lennon omitted to include in his previous affidavit the list of architects' instructions which appeared in the new discovery. Adding these to the 664 engineers' instructions, there are 818 documents which would be classified as architects' and engineers' instructions in the new discovery.

Mr. O'Byrne repeats Mr. Butler's averment in his affidavit of 10th November 2008 where he stated that that all relevant architects' instructions had been discovered and that this was "not raised again by the Defendants, whether in correspondence or on Affidavit". It is not the case that all architects' instructions were discovered. The defendants did not pursue the matter after Mr. Butler swore on affidavit that there were no further such instructions relevant to the categories of discovery. Mr. O'Byrne points out that 125 of the 664 engineers' instructions were also in the old discovery. Again, the plaintiffs had given an assurance regarding duplication in the new discovery.

Mr. O'Byrne says that for a number of the engineers' instructions the same information was contained elsewhere. It has not been possible in the time available to cross-check each single document with the document to which he refers. In addition, it appears that for many of the documents the information was spread over a whole range of documents compared with being contained in a single document. While Mr. Lennon reserves his position regarding Mr. O'Byrne's averments as to whether all this information is in all these other documents, the specific documents he has referred to in this affidavit which he says give rise to prejudice were not previously discovered and constitute new information, the absence of which has prejudiced the defendants. In any event, the review carried out at Tab 11B of Book 6 of Mr. O'Byrne's affidavit is extremely artificial when it is suggested that the information in the newly discovered document was also discernible from other documents. This ignores the context, meaning and other information which the new document can bring to the old one. Mr. Lennon discusses examples in this regard. The plaintiffs had not given all the relevant and necessary information to the defendants. The plaintiffs' view as to whether other documents contain this information is clearly one-sided and (as has been shown throughout this affidavit) often issues which the plaintiffs do not consider relevant are highly relevant to the defence of the case.

Requests for Minutes of site meetings

Mr. Lennon pointed out in his previous affidavit that specific queries were raised by way of motion and correspondence in 2008. Those queries identified that there appeared to be serious gaps in the discovery relating to site minutes. The plaintiffs replied on affidavit that they had no further site minutes. Mr. O'Byrne does not explain this but exhibits an analysis whereby he claims that approximately 239 of the 350 minutes were previously discovered in some form. However, it is clear from Mr. Lennon's previous affidavit that the specific minutes he has raised as containing new information of significance to the defendants' case had not been discovered. It is these minutes which he says give rise to prejudice.

Specific instances of newly discovered documents which were previously requested

Mr. Lennon previously referred to an engineers' instruction from DBFL relating to extensive earthworks adjacent to 109 Drynam Drive. Mr. O'Byrne says there is no evidence of settlement of this property. However, these instructions contained information of significance as to the earthworks detail in No. 109. Given the cracking pattern visible on the external front side and rear elevations of this property, information of this kind should have been made available in July 2008. It would have been extremely informative for the inspections carried out on this property.

Mr. Lennon referred in his previous affidavit to a letter from Moylans to Menolly stressing the importance of not undermining the foundations of houses when excavating the basement to Block 21, Beaupark. In response Mr. O'Byrne states that the letter was in the old discovery. Again, Mr. Lennon did not note this before because of the assurance relating to duplication. In any event, it is not this letter in itself which gives rise to concern but rather a subsequent minute of a site meeting which potentially shows that the concerns and instructions from Moylans were not taken on board. The letter only outlines the potential of the excavation in Block 21 having an effect on the adjacent houses whereas the subsequent minute indicates that the excavation in question and the design of the basement was incorrect and was leading to flooding.

Shop units at Drynam

Mr. O'Byrne referred previously to a fax dated 11th May 2004 from DBFL relating to soil stabilisation. Mr. O'Byrne points out that this document was previously discovered. The fax cover sheet was discovered but not with the attachment included. When the defendants told the plaintiffs that there appeared to be no attachment in sequential order to the cover sheet, the plaintiffs stated on affidavit that the attachment was missing. In fact the attachment was in the old discovery approximately 5,000 documents away from its parent. Where the plaintiffs themselves indicated it did not exist, Mr. Lennon fails to see how the defendants could have known that this document, 04472, was the attachment of document 09576. Page 2 was missing from the previously discovered document.

Mr. Lennon previously referred to a document which showed that Moylans had concerns about the suitability of ground conditions to support adequately the loading imposed by traffic in Block 1 of Grange South, Beaupark. Mr. Lennon accepts that this document was in the old discovery and therefore takes no further issue with respect to it. Mr. O'Byrne attempts to use the fact that Mr. Lennon inadvertently referred to one document (of a series of documents in this section) which had been discovered as evidence that his contention that the defendants have been prejudiced by the discovery of other documentation is unsustainable. Again, given the assurance about duplication, it is remarkable that the plaintiffs have only identified one specific instance of this in this section. It is indicative of the plaintiffs' approach that they would provide an assurance that the new discovery did not contain duplication and then seek to rely on their own broken assurances to undermine Mr. Lennon's *bona fides*.

DBFL report detailing poor construction detail at 158 Grange Lodge Avenue

Mr. Lennon previously referred to a DBFL report stating that the constructional detail at 158 Grange Lodge Avenue could not be deemed acceptable. The report should have been discovered in July 2008 and available to O'Connor Sutton Cronin when they conducted a visual inspection of this property. Mr. O'Byrne avers that this report was attached to Mr. Forde's witness statement but does not acknowledge that the report in question constituted an appendix to the remedial works report which in itself was contained in a separate appendix to the witness statement. The defendants were not aware the plaintiffs were including discoverable documentation not previously discovered in an appendix to one of those reports. Had the plaintiffs themselves been aware that they were doing so, they would surely have notified the defendants. The defendants had presumed they had all discoverable documents (and in particular all discoverable reports) which pre-dated July 2008. The volume of documentation exchanged between the parties necessitates a system whereby the defendants can rely on assurances given by the plaintiffs that they had received all discoverable documentation and furthermore that they can rely on the plaintiffs, when they come across a document not previously discovered which should have been discovered, notifying the defendants of this fact and swearing an affidavit as is appropriate.

In those circumstances Mr. Lennon finds it astonishing that Mr. O'Byrne would suggest that the defendants did not "give sufficient attention" to the contents of Mr. Forde's witness statement. Mr. O'Byrne's comments also fail to acknowledge that No. 158 is a remediated property and therefore would have been a candidate for the basket. Had information of this kind relating to the plaintiffs' own experts' view as to the unacceptable nature of the constructional detail been available, serious consideration would have been given to the inclusion of such a property in the basket. The report contains an important assessment of the plaintiffs' perspective on this constructional detail (the detail which the defendants' experts have remarked upon as contributing to some of the damage observed in similar properties).

Site Diaries

Despite specific assurances on affidavit that no further site diaries existed, it now appears that there are approximately 400 documents in the new discovery which could constitute site diaries or extracts from site diaries. Mr. Lennon referred to the site diary of Mr. Kearney. Mr. O'Byrne's response is that the defendants have had "full access" to these houses and could therefore make their own observations. Again, the defendants did not have full access but limited access based on periodic inspections. The defendants were entitled to discoverable documentation which recorded the state of the properties during remediation by one of the plaintiffs' experts or other witnesses who would have had access to the remediated properties at all times. In addition, with respect to the issues raised by Mr. Lennon at para. 180 of his previous affidavit, it is clear that what Mr. Kearney is reporting on here are not issues with specific remediated properties but with faults and links identified during the inspection of manholes, gullies and water mains in Drynam. Comments were also made regarding drainage systems in Myrtle. These are not matters to which the defendants' experts would have had access during remediation.

As regards the diary entry referring to a rock breaker being required to break up the hardcore at 37 Beaupark Square, Mr. O'Byrne responds that representatives of the defendants' experts were at the property on 16th July 2008. However, the defendants' experts did not have specific access to that property on that day during the removal of the fill. As Mr. O'Byrne must know, they are not allowed into the property during the removal of the fill. While samples may have been taken before the fill was removed, the defendants' experts would not have been present during the breaking and removal of the fill. Therefore the rock breaker and the fact the fill was difficult to break up would not have been witnessed by them. However, Mr. Lennon acknowledges that this diary entry is dated July 2008 and was not discoverable in the original discovery. Finally, as to whether the fill was "fused" or "over compacted", issues with respect to how the fill may have been directly compacted would have been relevant to the discussion which took place regarding No. 37 as to the likely cause of the fracturing in the aggregate.

Mr. Lennon referred to a site diary entry relating to the fact that the fill appeared not to be tightly compacted. Mr. O'Byrne states that this should be no news to the defendants because their experts attended on the day. Mr. Lennon is informed that the property in question is 7 Beaupark Place and Bickerdike Allen inspected this house on 27th June 2008. Mr. Lennon is informed that this inspection was only permitted when the trial pits had begun and only a small amount of the fill for one pit had been removed before the defendants' experts had to leave for another inspection.

Mr. Lennon referred to an entry in the site diary of Mr. O'Toole. There is a difference of interpretation between Mr. Lennon and Mr. O'Byrne as to whether this document evidences poor standards on site or good quality control. This need not be resolved in the current application. However, the properties in question were 14 and 16 Drynam Rise, which are both non-Bay Lane properties (re-test houses) and, therefore, specific issues regarding block work at this property would have been of very considerable interest to the defendants when carrying out inspections of these properties had they been aware that they contained non-Bay Lane fill, which they were not until April 2009.

Mr. Lennon and Mr. O'Byrne also differ as to their interpretation of the site diary of Mr. Barry O'Sullivan which records a number of potentially poor work practices at the retail unit in Myrtle. Had the defendants' experts had information of this kind, it would have given an insight into construction at the retail unit and, therefore, would have assisted in informing inspections which took place at the property.

Mr. Lennon referred previously to another diary, which contained entries relating to 30 Drynam Crescent. Mr. Lennon accepts this is not a non-Bay Lane property and he confused it with 31 Drynam Crescent. Mr. O'Byrne says the defendants have had all the information they need regarding No. 30. However, clearly not all documents relevant to this property have been discovered as is evidenced by this diary. Mr. Lennon also referred to a site diary referring to poor concrete. Mr. O'Byrne responds that there were other documents which indicated Menolly's concerns about concrete and he refers to two letters. These letters were produced before the Court and the Court raised a question relating to the volume of documentation concerning complaints as to concrete. In these circumstances the suggestion that the defendants have suffered no prejudice where they received some but not all of the documents which suggest concerns on site relating to concrete is unfounded. Again, the diary entry must also be seen in light of the new information regarding the delivery of concrete and the addition of water on site.

Mr. O'Byrne refers to the diary entry note of Moylans discussing poor construction at Myrtle. Once again he takes a different view as to the characterisation of this diary entry to the defendants' experts. However, he does not acknowledge that information of this kind should have been made available to the defendants to allow them to examine and explore the extent to which the issues raised in this diary entry were revealed in their investigations. As to the employees drinking during a breakfast break in a local pub, Mr. Lennon would take issue with the view that only giving a warning to such employees reflects professional standards. The defendants should have been aware of this and it would have been relevant to issues which emerged to date in the trial relating to quality control. Mr. O'Byrne states that problems with drainage, ground conditions and high water table in certain parts of Beaupark have already been dealt with in the Golder report furnished in December 2008. He fails to acknowledge that the documentation referred to should have been furnished in July 2008 which would have provided context and direction to the defendants' investigations.

Mr. O'Byrne disputes the significance Mr. Butler attaches to a number of site diary entries relating to flooding issues at Block 21, Beaupark, and to further issues with leaking at Block 1. The difference of interpretation need not be resolved in this application. However, the defendants were entitled to information of this kind with a view to investigating further. Mr. O'Byrne comments that the houses in Beaupark are on a different contour to Block 21, but again, if there was flooding in one section of Beaupark or near the estate, the defendants' experts were entitled to examine and investigate this with a view to establishing whether this had an effect on the surrounding area.

Mr. O'Byrne states that the site diary of Mr. Paul McCarthy dated 2005 was discovered in 2008. This fact was overlooked due to reliance on the plaintiffs' assurances regarding duplication. Mr. O'Byrne goes to great lengths to take advantage of the fact that Mr. Lennon mistakenly referred to a document discovered in June 2008. Given the vast volume of documentation which exists between the original discovery and the new discovery and the numbers of people involved in reviewing various documents, it is unsurprising that reference was made to a previously discovered document, particularly when the plaintiffs led the defendants to believe no such documents existed. Again the plaintiffs seek to rely on their own incorrect and misleading assurances to undermine the *bona fides* of Mr. Lennon's averments.

Mr. O'Byrne does not address the issues Mr. Lennon raised where he noted that the defendants, on innumerable occasions, asked the plaintiffs to furnish all site diaries where there was evidence to suggest that not all diaries had been furnished. Mr. O'Byrne says this issue has been responded to in Mr. Butler's affidavit of 25th May 2009. However, no response has yet been given to Mr. Lennon's reply sworn on 28th May 2009.

Mr. O'Byrne says that the figure of "50,000 documents" is inflated. As can be seen at para. 203 of Mr. Lennon's previous affidavit, he stated that this is the total figure of documents contained in the new discovery. This is correct. Mr. O'Byrne also pointed out that documents under Categories 112 and 113 are not documents which should have been discovered previously. These are new categories, but it appears that many of the documents in these categories, in particular Category 112, fall under other categories and should have been discovered in July 2008.

8 Documents relating to Red Arches

The extent to which Red Arches might be considered to be part of Myrtle for the purpose of interpreting the categories of discovery appears to be a question of controversy. The new discovery includes approximately 442 documents relating to Red Arches. These documents were of considerable interest to the defendants in circumstances where they have known that this development does not contain Bay Lane fill but where there is evidence of damage to these properties comparable to damage observed across the three estates. Furthermore, there is evidence that 13,000 tonnes of stone from the first named defendant were used in the construction of temporary haul roads (para. 371 of Mr. Lennon's previous affidavit) and this fact has not been denied by Mr. O'Byrne.

The plaintiffs now say that these documents were discovered in error. However, the new documentation makes clear that the Red Arches development was merely Phase 2 of the construction programme of which Myrtle was Phase 1. The Peadar Monaghan report refers to both phases and throughout it appears there was no specific distinction made between these two developments in that both form part of the same lands owned by Helsingor and developed by Menolly. Furthermore, the Monaghan report recorded poor workmanship and substructure issues during the Phase 2 development. The controversy as to whether the discovery categories encompass Red Arches can only be advanced by way of submission. However, it is of note that the plaintiffs have discovered

numerous documents relating to Red Arches and on their own interpretation of these categories these documents were marked relevant and were discovered. The plaintiffs' change of heart is difficult to comprehend.

Mr. O'Byrne states that there is no comparison between what he calls snagging items in Red Arches and the damage recorded throughout the three estates. He says that the items recorded therein are merely snagging items and that the record of cracking as identified in some of the documents Mr. Lennon referred to merely amounted to maintenance calls which were resolved. However, documents of this nature appear throughout with respect to the three estates and there are thousands of maintenance calls in the old discovery which are very similar in nature to the maintenance calls in the new discovery regarding Red Arches.

It is clear from Mr. O'Byrne's averments that there was some confusion amongst the plaintiffs' legal team as to whether documents relating to Red Arches were or were not discoverable. In this regard, it is very likely that there are many more documents evidencing similar maintenance calls with respect to this development. Mr. Lennon also referred to snag lists with respect to Red Arches noting cracking. Mr. O'Byrne notes that all these documents post-dated the cut-off point. Mr. Lennon does not claim the plaintiffs are in default in relation to these documents. However, it is of interest to note that the Red Arches development appears to record incidents of damage which are certainly comparable to much of what has been observed by the defendants' experts in the other three estates.

Mr. Lennon also noted delivery dockets which indicate that water had been added on site in Red Arches. He also observed that a lime stabilisation process was conducted in Red Arches, although he notes Mr. O'Byrne's averments that no houses were founded on the lime stabilised area in Red Arches. That said, Mr. Lennon maintains his position that the factors indicated in his previous affidavit show a coincidence of construction practices in circumstances where this estate is part of the same development in which Myrtle is situated and was constructed by the same builder, owned by the same company and employed similar construction techniques.

Finally, Mr. Lennon notes Mr. O'Byrne's averment that there is no lime stabilisation anywhere in Beaupark or Myrtle. Again, this position appears to differ from positions previously adopted by the plaintiffs and the position adopted by Mr. Butler, who stated in his affidavit of 10th November 2008 that lime stabilisation was employed in relation to some road works at Beaupark and Myrtle.

9 Documents relating to the Development of Cracking across the three Estates

Mr. Lennon referred in his previous affidavit to a number of documents in the new discovery which would have provided significant background information from which the development of cracking in properties in the estates could be traced. He did not contend that the plaintiffs had no information on this topic from the original discovery, but the new discovery provided further significant information.

Mr. O'Byrne attempts to impugn the *bona fides* of the defendants' objection on the basis that Mr. Lennon stated that the new discovery contains almost 1,000 documents from homeowners which could be classified as legal correspondence or pleadings. In response to queries from the defendants, the plaintiffs stated in October 2008 that the defendants had been furnished with all legal correspondence including pleadings received from solicitors who act on behalf of homeowners. The defendants now know that this statement was manifestly incorrect given the volume of letters from homeowners to the plaintiffs contained in the new discovery. Mr. Lennon referred to all the letters of this type which appeared in the new discovery to demonstrate that point. Mr. O'Byrne now seeks to take advantage of the fact that many of the documents referred to in this list were also in the original discovery. However, this list was not created by the defendants but is taken from the schedule of discovery provided by the plaintiffs in June 2009. Mr. Lennon also notes in this regard the plaintiffs' assurance concerning duplication. It was the plaintiffs who indicated that all the documents on this list were new and the defendants proceeded on that basis.

Mr. O'Byrne states that 27 of these documents related to new Categories 112 and 113. However, all but one of these documents pre-dates the cut-off point and they all fall within other categories of discovery (mostly Category 109 which relates to legal correspondence) and were required to be discovered in the original discovery.

Mr. Lennon accepts that a letter he referred to which reveals that the owners of 25 Beaupark Square were experiencing problems with the property approximately six months after they moved in post-dates the cut-off point. This was overlooked in the preparation of Mr. Lennon's previous affidavit. Mr. O'Byrne also refers to a snag list referred to by Mr. Lennon and points out that a preliminary snag list was discovered in July 2008. However, this preliminary snag list was also in the new discovery. Mr. Lennon notes in this regard the plaintiffs' assurance concerning duplication. In any event, there are important differences between the preliminary snag list and the snag list referred to by Mr. Lennon which was not previously discovered. There is also a letter from the homeowners complaining of the condition of the property.

Mr. O'Byrne states that, of the approximately 106 snag lists and other reports commissioned by homeowners in the new discovery, 25 were previously discovered. Again, the defendants were working on the basis of the plaintiffs' assurances regarding duplication. In addition, Mr. O'Byrne states that four of these documents related to Category 112. This might be so, but they clearly fell under other categories of documents required to be discovered in June 2008 and no explanation is given as to why these documents were not previously discovered.

Mr. Lennon referred in his previous affidavit to a snag list for 71 Sweetman House which was a non-Bay Lane property which contained cracks, gaps in floor tiles and doors which were not closing. This report is dated June 2008. Mr. O'Byrne says it was not discoverable because it was an attachment to an email dated 24th July 2008. Mr. O'Byrne is wrong. It is irrelevant that the document may have been received after the cut-off point. The document came into existence before that date. It is of grave concern to the defendants that Mr. O'Byrne would rely on this.

Mr. Lennon previously pointed to a snag list for 1 Hoey Close, a remediated property. Mr. O'Byrne contends that there was no information deficit due to another snag list and a visual inspection report. These two documents contain nowhere near the same detail as the new snag list and neither refers to damaged brickwork, which is referred to in the new snag list. Mr. O'Byrne further contends that the defendants have had access to this property and therefore no prejudice arises. However, the defendants' experts were not there in 2005 and this snag list would have provided very important information to assess whether the matters listed therein could be linked to the damage recorded for this property thereby demonstrating the prejudice suffered.

Mr. Lennon previously referred to the fact that 219 DBFL/Golders inspection reports appeared in the new discovery. Mr. O'Byrne says the defendants have not been prejudiced because 122 of these were discovered previously. Leaving aside the plaintiffs' assurances as to duplication, it is astonishing that Mr. O'Byrne can say the defendants could not have suffered prejudice where they received

only approximately 60% of the reports they were entitled to. Mr. Lennon also rejects the explanation that six of these reports fell within Category 112. These all fell to be discovered under Category 47.

Mr. Lennon believes the failure to discover reports of this kind is remarkable. Their importance with respect to the non-Bay Lane properties has been outlined earlier in the affidavit. Mr. Lennon also referred to other reports for various properties at para. 399 of his previous affidavit purely for the purpose of illustration. Mr. O'Byrne's response is that no prejudice arises because other documents were discovered with respect to these properties and the defendants have had the opportunity to access these properties for inspection. He gives the impression that full access was granted to the properties mentioned at para. 399 (20 Boyd House and 16 Talavera House) but access to these properties was in 2007 when no protocol was in place. In this regard Mr. Lennon refers to a letter outlining difficulties the defendants were experiencing before December 2007 and which ultimately led to the application to Court which resulted in the January 2008 protocol. It is therefore wrong to suggest that the discovery of the DBFL report for these properties would not have made a difference. In addition, Mr. O'Byrne's averment that any prejudice caused was cured by the fact that these reports were appended to Mr. Forde's witness statement is equally unsatisfactory for the reasons noted above. If the plaintiffs were unaware that they were including discoverable reports with Mr. Forde's witness statement, Mr. Lennon fails to see how the defendants could have been expected to know that there were "extra" DBFL reports contained amongst the 716 DBFL inspection reports and remedial reports which pre-dated the cut-off point and were not previously discovered.

The failure to furnish the report for 31 Drynam Crescent is also striking when the absence of such reports was queried by the defendants. Furthermore, the defendants now know that this property is a property which contains non-Bay Lane fill. Had full discovery been made in July 2008 the plaintiffs would have had this report at the time of the planned inspection for this property and would have known that there were serious doubts about the origin of the infill in Drynam – particularly addresses at Drynam Crescent. In this regard Mr. Lennon refers to a spreadsheet noted earlier. In light of the foregoing (and in light of the averments earlier in this affidavit regarding the DBFL/Golders reports for the non-Bay Lane houses) it is astonishing that Mr. O'Byrne would state that "no prejudice has been caused…in respect of the DBFL inspection reports, first discovered in 2009". The defendants have clearly been prejudiced and it is not possible to cure that prejudice now.

Conclusion

In light of the foregoing, Mr. Lennon repeats his conclusions from his previous affidavit and requests the reliefs sought.

Affidavit of Gerard W. Butler
4th November 2009

Mr. Butler has read in final draft form the second affidavit of Mr. O'Byrne, agrees with its contents and endorses as correct the matters to be deposed to therein by Mr. O'Byrne and in particular his averments concerning the actions of BCM and/or junior counsel retained for discovery purposes (collectively termed 'the Discovery Review Team').

Contrary to Mr. Lennon's assertions, BCM gave Lennon Heather no assurance regarding the absence of duplication as between the 2008 discovery and the 2009 discovery. Mr. Lennon's recourse to correspondence is selective. He quotes from his firm's letter dated 29th June 2009 at para. 8b of his fourth affidavit, but Mr. Butler refers to a portion of the letter which he omits. Mr. Butler avers that in the light of this correspondence it is clear that Lennon Heather did not agree to the suggestion in BCM's letter of 4th June 2009 that previously discovered documents should not be discovered again in respect of the new categories. In any event, BCM's statement that "[we] have carried out a major duplication exercise to ensure that where possible there is no duplication of documents" was not an assurance that the 2009 discovery did not contain any documents discovered in 2008.

Mr. Lennon is also incorrect in stating that the defendants' request for Category 112 arose as a result of new information about non-Bay Lane material that was used on the three estates. The genesis of Category 112 is in the Revised List of Matters agreed between the parties in relation to the case management which was handed in to Court on 3rd December 2008. A footnote in the agreement states "the parties agree that the plaintiffs [this should read defendants] shall be entitled to seek discovery of all documents evidencing communications passing between the plaintiffs and the local authorities and/or residents associations in respect of the common areas on the estates, and the alleged use of the first named defendant's quarry products in the said footpaths and boundary walls." This was acknowledged by the defendants before this Court on 8th September 2009 and in this regard Mr. Butler refers to an extract from the transcript from that date.

Affidavit of Brendan O'Byrne
4th November 2009
I Introduction

Throughout his affidavit Mr. Lennon quotes (often selectively and/or repetitively) or paraphrases (to a large extent inaccurately and/or or unfairly) statements in Mr. O'Byrne's first affidavit and/or the affidavit of Mr. Butler. Mr. O'Byrne's second affidavit should not be construed as an acceptance of the validity of statements in Mr. Lennon's affidavit which it does not address. Mr. O'Byrne rejects Mr. Lennon's attempts to posit, without detail or substantiation, supposed continuing shortcomings in the discovery.

Mr. O'Byrne refers to the need to swear a further supplemental affidavit arising from certain issues raised by Mr. Lennon for the first time in his fourth affidavit. Mr. O'Byrne refers to a number of documents in this regard but states that none of these were omitted from his affidavits of discovery dated 25th June 2009 and 7th August 2009 due to an error on the part of the plaintiffs. Subject to the discovery of these documents, Mr. O'Byrne stands over the confirmatory averments in those two affidavits.

II The Discovery Process and the Discovery Review Process

There was no deliberate withholding, omission or suppression of documents during the discovery process by or on behalf of the plaintiffs as Mr. Lennon asserts. Mr. O'Byrne also rejects the alternative averment that it is "suggest[ed]" that, "if not deliberate concealment" there was "a reckless disregard on the part of the Plaintiffs" as to the discharge of their discovery obligations. The assertion of deliberate withholding in respect of the Monaghan Report is without foundation. Mr. Lennon states that the six-page extract from the report was considered by the plaintiffs and marked 'relevant not requested'. However, as indicated previously, this classification was assigned not by the plaintiffs but by the discovery review team.

The assertion that there was a "…deliberate and premeditated decision by the Plaintiffs to pay lip service to their discovery obligations…" is without foundation. A direction that everything be handed over for review is proof itself of the seriousness with which the plaintiffs took their discovery obligations.

There is no basis for the contention that there was a causal connection between the plaintiffs' desire for an early hearing date and the manner in which they sought to discharge their discovery obligations in 2008. The assertion that the plaintiffs' employees controlled "the actual process of completing discovery" is wrong. It did not centre on employees identifying documents they thought relevant, as Mr. Lennon suggests. Their role was concerned with the gathering of all documents pertaining to the estates, and not just those relating to pyrite, for transmission to BCM where the review was taking place. The process was overseen and controlled by BCM.

In his comments regarding Mr. Blain at paras. 32 and 33 of his affidavit Mr. Lennon disregards the statement in Mr. O'Byrne's previous affidavit that it was never part of Mr. Blain's or Mr. Clonan's function to decide on what should be discovered and that "all" documents sent to BCM were reviewed by it and junior counsel. No-one within the plaintiffs was assigned the task of determining what was relevant.

Mr. Lennon is correct in that, contrary to what Mr. O'Byrne previously stated, there is no explanation in Mr. Butler's affidavit of 25th May 2009 for the failure to discover a site diary of Mr. Kearney. The explanation for this error is as follows. Mr. Lennon refers to three site diaries of Mr. Kearney. One of these post-dates the cut-off point. Another is a loose bundle of notes which was not submitted for review. Mr. Kearney advises that he did not provide these loose notes because he had transcribed them into two diaries. These were deemed 'not relevant' by the discovery review team. These diaries were discovered in Mr. O'Byrne's affidavit of 25th June 2009. Mr. Butler advises that these diaries fell outside the review of diaries conducted in late 2008 and again in May 2009, and that he was unaware of their existence when he swore his affidavit of 25th May 2009.

The list of 12 search terms was handed into Court in June rather than May 2009. The word "pyrite" was added to these, which is why Mr. O'Byrne averred in his previous affidavit that Waterford Technologies was provided with 13 search terms on 31st January 2008. The list of 12 terms was given to the Court in error. A further 24 search terms were added on 6th June 2009. Further search terms were added later in June 2009, resulting in a total of 51, a number of which were designed to accommodate spelling variations. At the beginning of the 2008 discovery process, the use of search terms had been raised and BCM had adverted to it as a means of checking whether all relevant documents had been retrieved, but there was a breakdown in communication and Menolly did not revert to BCM to confirm that retrieval could be effected through search words and, if so, whether the search terms envisaged would be sufficient. The fact that search terms had been used to locate electronic documents, and the identity of those terms, was first brought to BCM's attention on 29th May 2009.

Mr. Lennon attempts to cast doubt on discovery of emails by reference to the absence of many or any such communications in the case of the persons listed in paras. 83-95 of his affidavit. However, certain individuals had nothing to do with the estates. Others who had some involvement with the estates did not use computers in the ordinary course of their work for Menolly. As regards so-called personal email accounts, as with any other business these belong to their holders and are not within Menolly's control. Any communication to or from Menolly through such accounts would have been captured by the searches deposed to in Mr. O'Byrne's previous affidavit.

At paras. 113-116 Mr. Lennon raises an issue not adverted to in any of the affidavits he previously swore for this motion. The defendants have had the documents in respect of which these queries have been raised since early July 2009.

In Book 2 Tab 1 Mr. Lennon exhibits a list of 81 documents which he states either attach a document (which does not appear in sequential order) or which refer to another document or documents which does not appear to be in the discovery. He adds that, while he accepts that these documents might possibly have been discovered in some form, a search by the defendants had yielded no results. To locate these attachments, the plaintiffs searched all Summation databases in BCM. If that search was unsuccessful, the hard copy files given to BCM were searched. If a supposed attachment was still missing, the plaintiffs endeavoured to contact the authors or recipients of the parent documents. If a document is specifically referred to in another document or is attached/sent with another document, the plaintiffs accept that the document referred to or attached should be discovered. However, as to the first list of 81 documents, the defendants have raised many queries which cannot properly be deemed attachment queries, but are more in the nature of an interrogation as to the existence or otherwise of unspecified documents. In any event, the full response to each query raised in Book 2 Tab 1 is set out in a Summation schedule entitled "missing documents". Attachments incorporated by reference into discovered documents which the plaintiffs have not yet discovered form part of an affidavit of discovery of 4th November 2009.

The alleged attachment queries raised in the list in Book 3 Tab 3 are of a minor nature and Mr. O'Byrne believes that this, coupled with the low number of queries (96 out of more than 50,000 documents) speaks for itself. A Summation schedule entitled "missing attachments" contains the plaintiffs' responses to these queries. Attachments incorporated by reference into discovered documents which the plaintiffs have not yet discovered form part of an affidavit of discovery of 4th November 2009.

Book 4 Tab 1 contains a list of 32 queries as to apparent gaps in correspondence in respect of non-Bay Lane properties. Mr. O'Byrne summarises the plainitiffs' replies to these queries as follows: 25 of these queries relate to letters that have been discovered or do not fall to be discovered. Four relate to letters previously marked "not relevant" which it is accepted should have been discovered due to incorporation by reference. Three concern letters which remain missing despite full Summation and hard copy searches. As noted above, the documents which should have been discovered will be listed in a further affidavit of discovery.

Book 4 Tab 2 contains a list of 23 queries as to apparent gaps in correspondence relating to 17 remediated properties. Following searches 19 of the documents were accounted for and four were found to be missing. Five documents have been discovered and/or do not fall to be discovered. Nine were marked "not relevant" as they did not come within the discovery categories, but they should have been discovered due to incorporation by reference. Two were not discovered in error (one of which is referred to three times). Four are missing. One email refers to instructions given by telephone not followed by any written document. Again, the documents which should have been discovered will be listed in a further affidavit of discovery of 4th November 2009.

III Non-Bay Lane Houses

A substantial part of Mr. Lennon's fourth affidavit addresses Mr. O'Byrne's response to Part 6 of his third affidavit. Much of what appears here is comment and assertion and will be addressed in oral submissions. Furthermore, a great deal of this part of his affidavit is repetitious.

Mr. O'Byrne did accuse Mr. Lennon of positing contrived evidence of prejudice but did not accuse him of lying. The phrase "gives the lie to" in Mr. O'Byrne's previous affidavit implies that a matter is being shown to be incorrect. In circumstances where a dramatic edifice of prejudice was asserted in his third affidavit based on late discovery, and Mr. Lennon had the central documents which comprised the building blocks of that alleged prejudice for some time before the 2009 discovery, Mr. O'Byrne believes this was a

reasonable proposition to advance.

A great deal of the prejudice alleged in this part of Mr. Lennon's affidavit is not due to late discovery but arises from the fact that it became apparent, as the preparation for this case proceeded, that not all of the properties in the estates contained infill, all of which was from Bay Lane. Apart from the Moyglare and Sweetman House properties which the defendants have known about since January 2008, there are only 18 houses which sampling to date has suggested contain no Bay Lane infill. In these circumstances, the contention throughout this part of Mr. Lennon's affidavit that Replies to Particulars provided by the plaintiffs were inaccurate is misplaced.

The number of properties with no Bay Lane fill is very few; the exact number of properties which contain no Bay Lane fill only became apparent earlier in 2009; and it was always open to the defendants to conduct any desired research to ascertain the source of the fill. Apart from all this, there is very little in the new discovery which relates to this issue. It appears from Mr. Lennon's averments that any difficulties the defendants encounter on this aspect (and Mr. O'Byrne does not accept that there are any such difficulties) derive not from the late discovery but from what appears to have been a deliberate decision by the defendants' advisors not to satisfy themselves as to source. This appears to have been exacerbated by a failure to act on the information in documents such as the letters to homeowners discovered in July 2008 and the DBFL reports furnished in December 2008.

The plaintiffs did not mislead the defendants. The letter of 2nd August 2007 referred to by Mr. Lennon at para. 136 and the Replies to Particulars dated 10th January 2008 are based on the plaintiffs' state of knowledge at the time. Dr. Strogen had not by then furnished any preliminary findings based on his visual inspections of samples from properties. The new documents to which Mr. Lennon refers at para. 137 do not reveal great confusion on the plaintiffs' part as to infill source for a whole range of units at Drynam. The documents show the ongoing review. When it was finalised, this information was furnished to the defendants. EM03325 and a version of M-47-0020 were discovered in 2008. Privilege was claimed over these documents.

The question mark as to the retest houses arose solely due to the preliminary findings of Dr. Strogen based on his visual inspections of samples. It did not arise from a further consideration of the review carried out by the plaintiffs of their own documentation. The fact remains that the defendants supplied the majority of infill used underneath the properties in the estates. The defendants have never accepted the plaintiffs' position as to the properties where their infill was used, so it is difficult to see how Mr. Lennon's statement that the defendants "acted upon the assertions and assurances given by the Plaintiffs" can be correct. The spreadsheet analysis of the delivery of infill was provided to the defendants with the Replies to Particulars dated 10th January 2008.

The work the plaintiffs had to undertake in addressing infill source was, as Mr. Lennon describes it, a massive operation, which involved testing and retesting. The plaintiffs were not "fully aware", as Mr. Lennon asserts, in spring 2008 that houses contained non-Bay Lane infill. Confirmation of source depended to some extent on the exercise of Dr. Strogen's professional judgment, and that was throughout 2008, an ongoing process. The critical point is that, while an affirmative finding of Bay Lane infill in a sample or samples confirms that a house has some Bay Lane material, the determination that a sample was not from Bay Lane did not of itself confirm that the house contains no Bay Lane infill. Where such samples were identified, it was necessary to take more samples, which took time. Also, the plaintiffs could not understand how Huntstown material could have ended up in samples when they did not purchase any Huntstown material for the non-Moyglare houses. Re-testing had to be undertaken.

In any event, these complaints have nothing to do with discovery. Mr. Lennon's complaint that the information exhibited in Dr. Strogen's April report should have been disclosed under the 11th January 2008 agreement is presumably an attempt to relate these complaints to discovery obligations. Had Mr. Lennon seriously believed that this type of product was captured by that agreement he would have sought the results of that work long ago and would not have waited for his fourth affidavit before making that point.

There was no legal obligation on the plaintiffs to furnish the results of those researches as they were ongoing; they were privileged and were not tests envisaged by the agreement. Mr. Lennon's complaint that no reference was made in affidavits sworn by Mr. O'Byrne in December 2008 to these privileged documents is remarkable. The defendants knew the plaintiffs proposed to call evidence from a geologist as to source. It is hard to understand how they could have believed such an expert would give that evidence without preparing documents relevant to the identification exercise at the time he was conducting it. All relevant information was provided shortly after the final conclusions were reached, in the reports delivered to the Court in April 2009, and all chemical data generated from the re-testing furnished by Golder to BCM has been given to the defendants in accordance with the Terms of Settlement. In addition, not infrequently the defendants have failed to provide the plaintiffs with test results timeously.

It is unclear why Mr. Lennon believed re-testing was taking place or why he never asked if he did not understand the reason. The purpose was to better understand what was happening in the houses and to obtain additional information about the nature of the infill, its susceptibility to heave and whether the anomalous houses would require remediation. It must have been obvious to the defendants that the source was important in assessing susceptibility to heave. It was, however, only one part of the re-testing work which also included testing and examination to establish susceptibility. The letters to homeowners about this process were to that extent entirely accurate. The primary purpose of the re-testing was not source identification.

Mr. Lennon suggests the plaintiffs were in default in not flagging those properties which their ongoing investigations were suggesting might contain non-Bay Lane infill. These comments ignore the fact that the infill identification process was ongoing, and that the plaintiffs were not prepared to provide the defendants with conclusions which were provisional. Had information been provided in this way it would have led to further criticism from Mr. Lennon. Where the plaintiffs were clear in concluding that infill was from Bay Lane, this was stated. The property was only then included in the list of properties in the Bruce Shaw reports. The point about Dr. Strogen's December report and the maps attached to Mr. Forde's witness statement is that they indicated a lack of clarity regarding some properties. Mr. O'Byrne never said that any of that information was a "statement to the effect that every house not included in the list must have contained non Baylane infill". As to the correspondence Mr. Lennon refers to at paras. 190-196, the Lennon Heather queries in relation to the DBFL maps related to Drynam only. A letter from BCM accepted that the letter of 2nd February 2009 expressed the position regarding the Drynam re-test properties with excessive confidence. It was made clear in that letter that Dr. Strogen had not completed his analysis.

Mr. Lennon refers to 32 Beaupark Square. It appears he is referring to 34 Beaupark Square. The original sample from this property was found to be from Bay Lane. Some non-Bay Lane infill was found arising from remediation. 12 Stapolin House is Bay Lane/CG mixture but it was never listed in Dr. Strogen's December report. For 61 Grange Lodge Avenue, Appendix 4 of Dr. Strogen's December report shows that the property is identified as "Bay Lane" but the detailed description of the infill beside this column refers to a small percentage of Keegan's type limestone. Appendix 4 identifies 11 Stapolin House as "BL2" but beside this is written "odd piece of slate, coarse greywacke. Crushed gravel or mixture?". Based on these descriptions the properties were listed in the June 2009 Replies to

Particulars as properties which contained non-Bay Lane fill. 30 Myrtle House was originally identified as Bay Lane but a sample tested subsequently was found to contain some crushed gravel. This only became apparent in January 2009.

As to the DBFL reports furnished with Mr. Forde's statement dated December 2008, it would seem that, although these reports were referenced on pp. 86 and 87 of the statement, and although they were described in terms that made it clear they were concerned with cracking, no-one on Mr. Lennon's team believed this was significant enough to justify consulting the reports themselves. These reports have become important because Mr. Lennon believed they would allow him to create a claim of prejudice. Mr. O'Byrne believes properties such as 6 Stapolin Avenue, which the defendants knew from January 2008 was a house which contained non-Bay Lane fill, are particularly significant; it is obvious that the defendants were not even on the lookout for reports on such houses and that, even where this address was indicated in the text of Mr. Forde's statement, nothing was done to examine the report and ascertain what it said. In addition, the reports Mr. Lennon complains of were properly privileged. Had they appeared in the 2008 discovery, he would have had no right to view them. Privilege was waived over a large number of such reports that were the subject of such a claim, in October/November 2008.

In Myrtle and Beaupark it has always been clear that infill was obtained from sources other than the defendants, and the 11 letters to homeowners that were discovered should have left the defendants in no doubt that there were potentially issues as to source in some properties. Furthermore, any concerns the defendants have regarding these reports can be put to Mr. Forde. The pyrite benchmark issue has been put to Dr. Maher and can be put to Mr. Forde. The defendants had the same information in the 2008 discovery which now leads them to suggest that this benchmark was used.

The fact that the basket was chosen from remediated properties only highlights the fact that the defendants did not seek to include in the basket any of the properties they knew contained non-Bay Lane infill or in respect of which they knew there was a doubt as to source. If the defendants were interested in a proper diagnostic comparison of the kind now alleged they would have sought to include one of the Moyglare properties in the basket. Mr. Lennon refers to 77 properties as containing non-Bay Lane infill. The correct figure, excluding the 25 Moyglare and 29 Sweetman House units, is 75, three of which the defendants knew about from the January 2008 Replies to Particulars. Accordingly, the defendants now know of 72 properties, 57 of which contain some Bay Lane infill.

Mr. Lennon had DBFL reports relating to three Moyglare houses since July 2008. These reports outline the type of damage which he says, in the context of other houses containing non-Bay Lane infill, is similar to the damage manifesting in Bay Lane properties. Mr. Lennon knew that these were not Bay Lane properties. He never asked to put a Moyglare house into the basket and it is not apparent that he ever carried out any major investigation into those houses.

Mr. O'Byrne refers to some of the specific examples given by Mr. Lennon. In respect of 8 Stapolin Avenue, the defendants' experts attended at the property in August 2008 and it was open to them to attend the inspection in November 2007 which gave rise to the DBFL report. If the defendants' experts advised Mr. Lennon that the property was showing damage, it is notable (since there was an issue as to source) that this was never seemingly remarked on. The plaintiffs did not know in November 2007 that this property contained non-Bay Lane infill. 10 Stapolin Avenue contains some Bay Lane infill. This, Mr. O'Byrne believes, underscores the fact that the alleged prejudice in the context of this and other houses in respect of the DBFL reports is very difficult to accept. The defendants appear to dispute the findings of DBFL as to the damage seen in Bay Lane and non-Bay Lane houses. It is hard to believe that if they were aware the property contained non-Bay Lane infill they would want to inspect it but if it contained Bay Lane infill they were happy to accept DBFL's findings as to the damage. This, however, is the implication of Mr. Lennon's averments.

The repair work referred to in the DBFL report for 6 Stapolin Avenue was not carried out. To that extent, there is no issue as to the information available to the defendants at the time of their inspection in August 2008. Moreover, even though the defendants knew this property was a mix since the January 2008 Replies to Particulars, they appear to have conducted little or no analysis of it, and having not inspected the house due to an oversight never appear to have sought any other appointment for inspection. Golder records show a representative from the defendants was at this house in September 2007. In addition, the defendants knew from the 2008 discovery that this house was completed in August 2006 as there is a snag list in the discovery from that month. With regard to 16 Boyd House, EM01884 clearly relates to expert advice given to the plaintiffs. It does not solely relate to infill source. The spreadsheet used to compile this document was discovered in 2008, when a claim of privilege was made over it.

The January 2008 Replies did not state that the only properties where the defendants' infill was mixed with other infill were 2, 4 and 6 Stapolin Avenue; they made clear that "in so far as evidence is available to date" this was the case. The defendants knew from these Replies that there were some houses in Myrtle in which mixing had occurred. Mr. O'Byrne previously referred to a lack of "extensive investigations" of properties in respect of which letters had been discovered indicating that those properties may have contained non-Bay Lane infill. Mr. Lennon says that inspections were carried out for many of those houses, but the plaintiffs have seen no evidence of "extensive investigations" of these properties which make any reference to the non-Bay Lane content of their infill. 14 Stapolin House is another property which contains some Bay Lane infill and this is why it has been determined to require remediation.

Mr. Lennon persists in misquoting the conclusion of the DBFL/Golder report on 12 Stapolin House despite the correction in Mr. O'Byrne's first affidavit. That affidavit pointed out that because Bay Lane infill was found in the further samples from this house and because the plaintiffs' experts have concluded that Bay Lane infill is not fit for purpose, the stone must be removed. Furthermore, Mr. Lennon contradicts himself at para. 384 with reference to the reasoning for remediating houses because they contain Bay Lane infill. It is difficult to correlate his comments in this paragraph with the comment at para. 322.

Mr. Lennon asserts that, had full discovery been made, he would have known that the property contained non-Bay Lane infill and that the plaintiffs' experts had recorded damage on the premises in November 2007 and would have been able to examine, in the period leading to basket selection, whether the damage was no worse than as recorded in the DBFL report recording a November 2007 inspection. He asserts this examination could have taken place in August 2008 when his experts attended the premises. He asserts that no such analysis was carried out because the defendants did not have the report. However, this property does contain Bay Lane infill and this report was in draft and was privileged. The plaintiffs have clearly stated that the DBFL report for this house (and for nine other houses) was in draft in July 2008 and, even if it had been correctly listed in the first schedule second part, Mr. Lennon would never have seen it before basket selection.

Mr. O'Byrne refers to seven houses in respect of which Mr. Lennon knew that the plaintiffs had stated appeared to contain non-Bay Lane infill in the homeowner letter discovered in July 2008 and in respect of which the defendants' own engineers had assessed the damage to the houses. The defendants' engineers attended at these houses between August 2007 and November 2008. By the date of all of the re-test appointments in 2008, the defendants had the letters in relation to all of these houses stating that it appeared that they had non-Bay Lane infill in them. Thus, they had that knowledge and their own engineers' account of the damage visible in

the properties. However, the defendants did not seek to put any of these houses in the basket. They did not cross-examine the plaintiffs' witnesses on the damage to these houses in the context that they have non-Bay Lane infill in them. They did not, to the plaintiffs' knowledge, pursue "lines of enquiry" regarding these houses. They did not seek a "full re-inspection" of the houses. The defendants' engineers' visual inspection reports on two of these houses do not even mention the presence of non-Bay Lane infill in these houses.

A similar refusal to acknowledge the evidence is evident from the discussion of 11 Stapolin House. This property contains Bay Lane infill. Mr. Lennon knows this is why it was ultimately identified for remediation. 10 Stapolin House also contains Bay Lane infill, but the quantity is unknown. The defendants knew the plaintiffs believed this property appeared to contain non-Bay Lane fill and their experts examined it, but they do not appear to have undertaken any report on the house. As to 13 Stapolin House, Mr. Lennon knew, in ample time for the case, that the plaintiffs believed there appeared to be non-Bay Lane infill in the property, and the opportunity for a full inspection.

Mr. Lennon addresses the properties at Parker House and places some emphasis on the fact that his experts found no damage indicative of pyritic heave in an (unidentified) property in that area, but the defendants' experts have found none of the damage they have encountered in any of the houses in the estates consistent with such heave. If this was why no visual inspection reports were prepared for these houses it is hard to know why any such reports were prepared for any of the properties. Also, Mr. Lennon conspicuously declines to reveal what his experts encountered when they inspected 35, 38 and 39 Parker House.

Mr. Lennon (in the context of the information evident from the Bruce Shaw reports) states that the listing of the houses in Parker House could not have led the defendants to conclude that they contained non-Bay Lane infill. He asserts that some of the reasons could have included that the houses were not manifesting damage, or did not contain infill at all, or were constructed by another party. However, the defendants were aware on receipt of the Bruce Shaw report in October 2008 or within a month thereafter whether or not there was damage manifesting in these houses. Reports listing cracking have been furnished by the defendants in respect of two of these houses, so they would have been aware that these two at least were not excluded because they did not manifest damage. As to the second possible reason advanced, DBFL advise that houses cannot be built using ground bearing slabs without stone infill if they are to comply with HomeBond and building regulations. As to the third reason, it is not clear what Mr. Lennon means in this regard.

21, 22 and 23 Talavera House contain Bay Lane infill. It was evident from Dr. Strogen's April 2009 report that these properties also contained non-Bay Lane infill, and this information was thus available when Dr. Strogen gave evidence. He was never cross-examined regarding these properties. Mr. Lennon says they appear to have been remediated in April 2008, but they were remediated in October 2007 and the defendants were advised of that fact at the time.

The January 2008 Replies stated that infill in Sweetman House was not supplied by the defendants, and the defendants knew from the 2008 discovery the approach being adopted in the analysis of these properties. In this regard Mr. O'Byrne points to a letter from Golder referring to a number of units at Sweetman House which was discovered in 2008. The defendants accordingly had the opportunity to explore the plaintiffs' approach as evidenced in the letter dated 16th April 2008; the same approach is evidenced in the letter of 13th June 2008 discovered in 2008.

It has always been the plaintiffs' position that Bay Lane infill is fundamentally different, its mineralogy, its pyrite content and its chemical instability. Questions were put to Dr. Maher regarding the similar pyrite levels in the new infill in 31 Talavera House and in the original infill in 3 Drynam Square.

Mr. Lennon points to the Golders letter of 16th April 2008. This letter does not show that Golder said that 0.73% pyrite level is safe regardless of rock quality. A number of letters discovered in 2008 all contain the same information which seems to lead Mr. Lennon to his incorrect conclusion in respect of the analysis carried out by Golder. The test results for Sweetman House and the letter from Golder confirming that based on the testing at 9 Sweetman House the results indicated that this stone infill material was not susceptible to swelling and was therefore suitable were discovered. The comments at paras. 406 et seq. concerning 4 Boyd House are similarly misplaced. The plaintiffs' experts have never said the infill in this property was not susceptible to swelling. The first sample taken from this house was concrete but this was probably from lean mix around pipes. The further sample has been identified by the plaintiffs' experts as being Bay Lane. The plaintiffs' and defendants' experts agree in general with the composition of samples from this property but differ as to the proportions.

A similar position pertains in respect of 45 Morrow House. The plaintiffs' and defendants' experts agree there is Bay Lane infill in this house. 16 Beaupark Close is not properly described as non-Bay Lane; the samples for it contain Bay Lane infill with some pea gravel.

Mr. Lennon refers to what he terms documentation demonstrating the plaintiffs' uncertainty regarding source of fill. Mr. O'Byrne notes that he does not contend that the working draft map discovered in 2009 would have put the defendants on notice "per se" that there was an issue with infill for these properties. In addition, the Replies state that from 19th February 2003 to the completion of the site in August 2005 the first defendant was the only supplier of infill to Drynam save for five loads from Moyglare and one from Keegan. The five Moyglare loads were used not as infill beneath houses but in the external drainage. The document is not a record of various pour dates and various deliveries from different suppliers. It is the work product of the plaintiffs' review for the purposes of preparing for this litigation. The spreadsheets referred to at para. 444 are privileged. This is not an historical document evidencing which supplier supplied which property. Mr. Lennon is incorrect in his averment at para. 351 that the response to his letter of 17th October 2008 failed to address this issue.

IV Concrete Documentation

The purpose of extra sand mixes is to ensure that a smooth finish of the floor can be obtained. The extra sand mixes are specified and batched by the readymix concrete supplier. Extra sand mixes are standard mixes used in house construction in Ireland. 20 of the 265 delivery dockets discovered in 2008 were "extra sand" mixes. In each of the "extra sand" mixes, the readymix supplier used additional cement to compensate for the sand.

Mr. O'Byrne does not believe there is any basis for the figures set out in paras. 447-449 of Mr. Lennon's affidavit. His figures are clearly based on "surmise" and "presumption". One of his assumptions is that the only elements in a housing development where concrete is used are ground floor slabs and foundations. Mr. O'Byrne points to a number of other uses for concrete. In addition, the percentages in Mr. Lennon's affidavit have been artificially increased by the use of the number of ground floor units in the proceedings rather than the actual number of ground floor units in each estate. Again, only 7.16% of the concrete delivery dockets show water added.

The addition of water to concrete is not at all unusual. There are many reasons why readymix suppliers decide not to add all the water designed for at the time of batching with the consequence that the concrete arriving on site is too dry. IS 326 and BS 5328-3:1990 identify that water may need to be added to produce the specified workability. The mixes used were not "designated" mixes but rather "designed" mixes. Mr. Lennon is accusing Menolly of not conforming to a concrete specification that does not exist in Ireland. Mr. O'Byrne believes the relevant standard is that laid down by HomeBond in the "Housebuilding Manual" and Irish Building Regulations Technical Guidance Document C, both of which specify concrete for ground bearing floor slabs as 20N concrete with a minimum cement content of 200kg/m³ and a maximum water/cement ratio of 0.85. In the circumstances Mr. O'Byrne believes the matters addressed by Mr. Lennon at paras. 451-458 are irrelevant, and inapplicable to the supply of concrete mixes for house construction in Ireland. Moreover, the plaintiffs' experts advise that if cracks continue to grow or propagate significantly after more than 12 months following placement, they cannot be the result of plastic shrinkage and are unlikely to be drying shrinkage. If the concrete is placed on inherently unstable and expansive stone infill, it is obvious that it is the infill, and not the concrete, which is the cause of the crack propagation. This conclusion is reinforced by the timing and geometry of the cracks.

The water added on site was controlled and measured and recorded on the delivery dockets. It was added from the water drum on the concrete delivery truck by the truck driver. Contrary to an assertion of Mr. Lennon's, Mr. O'Byrne has been advised that the concrete strength is almost wholly controlled by the water/cement ratio. The achieved strength of concrete mixes is significantly dependent on this ratio and this is why the strength of the concrete can be relied on as a control of the quality of the mix. For this reason, it is absurd to suggest (as STATS does in some instances) that they estimated original water/cement ratios as high as 1.1. Petrographic examination by STATS of concrete cores from 22 Drynam View, where they had estimated an original ratio of 1.1, found that the ratio determined by that method was within the normal range (0.35 to 0.65). The plaintiffs' experts advise that the test for quality and for conformance to specification for concrete in Ireland and internationally has always been the compressive strength test. The test to estimate original water/cement ratio relied on by the defendants' experts is rarely used and is never used as the sole basis for assessing concrete quality. BS5328 clearly states that "strength compliance" is deemed to confirm that the water/cement ratio is also in compliance. The plaintiffs' experts advise that the defendants are incorrect to suggest that one can have ratios of 0.9 and 1.1 and still get compressive strengths of 30 and 40 N/mm².

The defendants now say that the documentation discovered in 2009 would have assisted them in dealing with Dr. Maher's criticisms of the defendants' water/cement results. However, his basic criticism is that the defendants' experts never sought to test the specific ingredients of the mix used. They knew there were a number of different suppliers and therefore knew that these suppliers were likely to have used different ingredients in each of their mixes. The defendants now have more delivery dockets than they had in 2008, but they had dockets in 2008 and did not undertake any enquiries about individual components of the mixes at that time and in the absence of such vital information made numerous assumptions that resulted in unreliable and exaggerated estimates for the original water/cement ratios of the mixes. Mr. O'Byrne believes Dr. Maher's criticisms are as valid now as they were during his evidence.

Mr. O'Byrne does not believe there is any basis for the defendants' contention that they have been prejudiced because they have been unable to carry out sampling and core analysis on a sufficiently large scale. In his previous affidavit Mr. O'Byrne set out the extent of the sampling of the concrete floors already undertaken by the defendants and summarised the extent of the testing carried out. It is open to the defendants to carry out such testing on the remainder of the untested core/samples. In addition, since September 2008 a number of cores were taken through slabs to access infill samples.

Mr. O'Byrne believes the contentions regarding the proposed construction of a "model floor slab" are contrived. The defendants have already had the ability to carry out extensive testing of all 57 of the remediated houses. In addition, the defendants have previously identified tests which they said were essential but which they subsequently abandoned. Also, in early 2009 the defendants sought to core through cracks in slabs on the basis that they expected to find voids beneath the insulation. No such voids were found. Additionally, it would be impossible now to replicate the products actually used in the mixes supplied to the estates four to five years ago. The cement, sand and aggregate used in the mixes will have changed in the intervening period. There is also a contradiction in what the defendants contend. Mr. Lennon has criticised the plaintiffs for the supposed absence of specifications for the mixes used in the construction of the slabs but now asserts that the delivery dockets from Keegan and Goode Concrete contain all the information necessary to allow the defendants to construct their model test. The contention that it is the documents made available in 2009 that have prompted the suggestion for this test is unfounded. The defendants had evidence from the 2008 discovery of multiple suppliers and multiple mix designs (particularly regarding Myrtle) but did not carry out the testing regime they now assert they need to conduct arising from the 2009 discovery. Finally, notwithstanding the documentation discovered in 2008 regarding Myrtle, the defendants performed only two water/cement ratio tests in that estate.

Mr. O'Byrne does not believe there is any basis for the contentions regarding basket selection. At the time of selection the defendants had already carried out extensive water/cement ratio testing and did not seek to include in the basket the one property which indicated a range which was "well in excess" of what STATS considered acceptable. Furthermore, although the defendants had documents in 2008 relating to Myrtle (akin to the documents in the 2009 discovery relating to Drynam and Beaupark), they initially resisted the suggestion that a house from Myrtle should be included in the basket. They ultimately agreed to the inclusion of 2 Boyd House.

V Ground Conditions

Mr. O'Byrne believes there is no substance to Mr. Lennon's contentions in relation to ground conditions. His contentions regarding an alleged "drainage problem" at Drynam are without merit. There has been only one incident of localised flooding in Drynam, which occurred after exceptionally heavy rainfall in North County Dublin. A report on summer rainfall for 2008 by the Meteorological Office indicates that the rain which fell in Dublin Airport at this time (which is not very far from the estates) was a once in 237 years event. There was localised flooding in many parts of North County Dublin on those days. Accordingly, the contentions as to flooding affecting the structural integrity of foundations are misplaced. Moreover, the cracking and other problems which have been observed in Drynam were apparent before the flooding of August 2008.

Mr. O'Byrne believes the water observed at 22 Drynam View was a mix of groundwater and surface water. During remedial works at this property additional water flowed into the house from outside due to local drains and downpipes serving the house having been cut off as part of the excavation works. There is no link between the installation of the drainage system and the existence of the damage in the houses in Drynam View. The surface water drainage system serving Drynam View is not linked to that serving Drynam Drive (which is the location of the drain highlighted by Mr. Lennon as the source of flooding in Drynam View). What Mr. Lennon says at para. 521 is therefore wrong. As regards para. 530, it is manifest that the complaint made by the homeowner's solicitors in their letter of 21st November 2007 arises not from any flooding problem arising from the design or positioning of the drains but from a blocked drain which was "full of rubbish". House drains may well overflow due to localised blockages from time to time, but this is not

peculiar to these estates. Finally, the surface water drainage system in Drynam was designed not only to cater for Drynam but also to accommodate an adjoining site which it is anticipated will comprise more than 210 units.

The purpose of a site investigation of a housing estate is to obtain a general idea of the ground conditions. No site investigation, however comprehensive, will remove the necessity that each individual house foundation excavation must be inspected and passed as suitable. This is standard procedure in residential development and was followed in these estates. Mr. Lennon confuses "drainage issues" with an alleged lack of adequate site investigation. The assertion that there are "serious issues" with drainage on the sites is without substance. Mr. Lennon confuses surface water with groundwater. The site investigation identifies where the groundwater is. Groundwater levels will fluctuate throughout the year. Surface water is related to rainfall and surface drainage provisions. The issues raised by Mr. Lennon in previous paragraphs of his affidavit are related to surface water and storm water. This is what potentially leads to flooding. The need for the land drain was not related to groundwater or to problematic soils encountered during construction of the site. It was a design feature included in conjunction with the lime stabilisation design. The issues Mr. Lennon purports to raise about the alleged drainage problems and flooding are therefore not in any way related to the site investigation. A site investigation of this kind is carried out to apprise the builder of the conditions likely to be encountered on site so that he can form a view as to whether the site in general is suitable for house construction. What he needs to know in advance is whether there will be unforeseen conditions that could lead to additional costs. Such an investigation has no impact on the individual performance of any houses which are constructed. In practice, Drynam, Beaupark and Myrtle were not difficult sites and were straightforward to develop.

Mr. O'Byrne does not believe there is any substance to Mr. Lennon's complaints as to the construction of foundations over lime stabilised areas. Even if it is accepted that the defendants could not link the four pages of the document discovered in 2008, it is clear from the second page (Doc ID 09118) alone that the defendants were on notice about the foundation detail on stabilised soil. In addition, 09118 and 12371 clearly identified those houses where reinforcing of this kind was used. The contention that the defendants were not aware of the precise nature of how houses were founded over the stabilised area is also without merit. Again, 09118 clearly put them on notice of the "precise nature" of how foundations were founded on stabilised soil. In addition the DBFL foundation certificates issued in respect of the houses built on lime stabilised soil clearly identified whether or not specialist foundations were used. Mr. Forde's witness statement makes clear that DBFL issued foundation certificates in respect of the foundation excavations for all houses on lime stabilised ground only. Doc ID 09120 and 12371, both discovered in 2008, identify the houses which were founded on the lime stabilised soil.

Mr. O'Byrne believes the report of NTL Environmental is not within the possession or power of the plaintiffs. There is no basis for Mr. Lennon's suggestion that the defendants had limited access to houses. They had access at every stage of the remediation process for inspection, sampling, testing or otherwise. In Beaupark alone the defendants' experts have inspected 31 houses. As to the two properties referred to by Mr. Lennon at paras. 567 and 568, the defendants attended at both of these properties on a number of occasions in 2008. It is therefore entirely disingenuous for the defendants to suggest that any assessment which their experts have to make on the ground conditions or otherwise are restricted to "a one-off visit".

In January 2008 the parties agreed a joint protocol of works which has provided extensive access to the defendants' experts. Since then, the defendants have had a large number of local and international experts present on site who are well capable of making their own observations. In the circumstances, it is difficult to understand how some occasional observations noted in the site diary of one of the plaintiffs' site personnel could be said to represent vital information for the defendants' experts' investigations.

Mr. O'Byrne believes Mr. Lennon is mistaken in his references to "wash down water". This has nothing to do with poor ground conditions or drainage problems. It is water used to wash down concrete delivery trucks. It is therefore a temporary drainage issue which occurs quite normally during construction.

Again, no lime stabilisation was carried out anywhere in Myrtle. This has been confirmed by J.B. Barry & Partners, who acted as civil engineering consultants for Myrtle and Red Arches.

In his previous affidavit Mr. O'Byrne addressed other aspects of the ground conditions in Myrtle. He does not believe that Mr. Lennon's fourth affidavit takes the matter any further than his third.

Mr. Lennon refers to an affidavit of Mr. Butler containing a reference to lime stabilisation in relation to some road works at Myrtle. Mr. O'Byrne believes Mr. Butler was incorrect in his understanding. His affidavit should have been amended before it was sworn but this appears to have been overlooked. Mr. O'Byrne rejects Mr. Lennon's assertion regarding the alleged "absence" of lime stabilisation information for Drynam. The relevant documentation as to lime stabilisation carried out at Drynam by Conform and Powerbetter was discovered in 2008. Again, documents discovered in 2008 showed the foundation detail for the construction of foundations over lime stabilised soil, and documents discovered in 2008 identified the houses in Drynam which were built on lime stabilised soil.

VI Miscellaneous

In attempting to promote the supposed significance of the Monaghan Reports Mr. Lennon misunderstood and/or misdescribed averments in Mr. O'Byrne's first affidavit. For example, Mr. Lennon says that Mr. O'Byrne averred to the fact that no concrete cube tests were carried out in Drynam and Beaupark which would have been standard practice in accordance with all relevant regulations. In fact Mr. O'Byrne stated in his first affidavit that there are no such results for any houses in Drynam or Beaupark because no such tests were undertaken in relation to the houses. He also states that he is advised by the plaintiffs' experts that it would not be usual to carry out cube testing of concrete for houses.

Mr. Lennon refers to issues of workmanship in various parts of Myrtle recited in the Monaghan Report (Sector 18 (including Myrtle House), Talavera House in Sector 19 and Boyd House in Sector 23) for the purpose of ascribing significance to that document. However, 69 snag lists relating to Myrtle House, Talavera House and Boyd House were discovered in 2008. They collectively comprise 269 pages listing supposed defects or complaints.

Mr. O'Byrne believes Mr. Lennon's complaints at para. 607 regarding the extent to which the defendants have had access to houses are nothing more than an exercise in semantics whereby he tries to diminish the quality of that access because it was pursuant to a protocol. Whatever facilities the defendants wanted were granted.

Mr. Lennon's attempt to suggest that it is the plaintiffs who require the deconstruction of 3 Drynam Square is unconvincing and at odds with earlier statements by the defendants.

Mr. Lennon exhibits a list of architects' instructions which he says he omitted from his previous affidavit. A review of the documents in this list has been conducted for the plaintiffs and a schedule has been prepared showing the extent to which those documents were already discovered in 2008 or contain information similar to that contained in documents discovered in 2008.

Mr. O'Byrne previously indicated that 27 of the letters Mr. Lennon says should have been discovered in 2008 related to Category 112. Mr. Lennon says that all but one of these pre-date the cut-off point and all fall within other discovery categories (mostly, Category 109 which relates to legal correspondence). However, two of the documents post-date the cut-off point (the data entry for one of these is incorrect as this letter is dated October 2008). Seven of the letters were sent by a firm who are not solicitors for homeowners and accordingly did not fall within Category 109. Another one was sent by BCM to Lennon Heather while a further letter appears to have been received by BCM in August 2008. A further seven are all in fact the same letter. Finally, the four Statements of Claim listed in this schedule were sent to the defendants' solicitors under cover of letters dated June 2008.

Mr. Lennon is correct as to the discoverability of the snag list for 71 Sweetman House, but the explanation as to why it was not reviewed for the 2008 discovery is inextricably linked to the date it was received by email as deposed to in Mr. O'Byrne's first affidavit.

Mr. Lennon refers to a list of 219 documents. This list comprises many documents that are not in fact DBFL/Golder reports, and Mr. Lennon's calculation of "approximately 60%" appears to be based on the supposed figure of 219 "newly discovered" DBFL/Golder reports. In any event, this is not an accurate representation of the situation as it does not take account of the approximately 709 reports discovered in 2008 and the 636 reports appended to Mr. Forde's witness statement.

As to the six documents referable to Categories 112/113 to which Mr. Lennon refers at para. 673 of his fourth affidavit, five are draft agreements relating to remediation which all appear to have been created after the cut-off date. The assertion in para. 677 of his affidavit is remarkable. All DBFL/Golder reports appended to Mr. Forde's witness statement in December 2008 were itemised in the Appendices Index. The defendants knew or ought to have known which properties they had received DBFL/Golder reports for and those for which they had not. In addition, contrary to Mr. Lennon's suggestion, there were no "extra" remedial reports attached to Mr. Forde's statement; all remedial reports were completed by DBFL after the cut-off date.

The shifting of position manifested in para. 678 vividly demonstrates exactly how easily created and adaptable the defendants' claims of prejudice happen to be. In his third affidavit Mr. Lennon appeared to be stating that the prejudice in respect of the DBFL/Golder report for 31 Drynam Crescent was that it noted that, while the amount of pyrite in the sample was relatively high, the defects in question were generally of a minor nature. In reply, Mr. O'Byrne pointed out that the defendants had the test results for this property and had the opportunity to observe the damage therein at an inspection in July 2008. An O'Connor Sutton Cronin report shows that they carried out a visual inspection in February 2009. Mr. Lennon appears to be changing his argument regarding prejudice to a spreadsheet document. This document was an early attempt by the plaintiffs, based on the review of their documents, to ascertain which supplier supplied infill to each property. Some of the information in this spreadsheet was incorrect and was later corrected. This spreadsheet was prepared before the January 2008 Replies were furnished. These Replies set out the position correctly on the basis of the review carried out by the plaintiffs of their documents as at 10th January 2008. At that time Dr. Strogen had not advised of any preliminary findings as to infill source based on his visual inspections.

Affidavit of Peter Lennon
8th November 2009

In view of the time constraints, to the extent that Mr. Lennon has not specifically addressed matters arising in Mr. O'Byrne's second affidavit, this should not be taken as an acceptance of the accuracy or validity of those matters.

Newly Discovered Documentation

2009 Missing Attachments

In his second affidavit Mr. O'Byrne notes that new documents have now been discovered, despite the fact that a confirmatory affidavit of 7th August 2009 stated that there are no further documents. Mr. O'Byrne states that "none of the foregoing documents were omitted from the Affidavits of Discovery that I swore on the 25th of June 2009 and on the 7th of August 2009 by reason of an error on the part of the Plaintiffs". The plaintiffs have given no explanation as to why these additional documents were not discovered, save to say that in certain circumstances they were not discovered in error. It has not been possible to conduct a full review of these documents, but it is clear that they fell within existing categories of discovery and that a number of them are of significance. Many of these documents have been furnished arising out of specific queries raised by the defendants.

Mr. O'Byrne states that these documents are attachments which are incorporated by reference into discovered documents. However, no explanation has been provided as to why these particular attachments have not been provided before now.

The plaintiffs have now discovered a preliminary safety and health plan authored by DBFL. This document is clearly significant and in particular it contains an important section which refers to "the redundant Gaybrook stream" which runs from the north towards the north east of Drynam. DBFL note that this stream "could be an area of ground water accumulation and care should be taken when installing services in this area". The fact that the plaintiffs' engineers were identifying this stream as a potential area of groundwater accumulation is very significant. Having regard to flooding incidents in the north east section of Drynam and a significant ground water accumulation during the excavation of 22 Drynam View, Mr. Lennon is advised that it is highly significant that DBFL were indicating to the plaintiffs in 2002 that this stream was a potential source for ground water accumulation in the north east section.

This document also notes that the plaintiffs will need to explain proposals for a number of issues which would, Mr. Lennon is advised, be out of the ordinary for a development of this nature. These issues included "construction of retaining walls and dewatering/water control to same" and "control of extreme flows during construction of land drain and stream diversion". These matters directly relate to issues raised by the defendants emerging from the new discovery particularly relating to the newly discovered land drain and the issues regarding drainage of Drynam's north east section.

Another of the most recently discovered documents appears to contain significant information as to proposed constructional detail for a floating slab at 25 to 35 Drynam View (it relates to Block 61 which appears to relate to these properties). The defendants' experts advise that this is a very significant document. They advise that the detail sketched out therein would be appropriate where foundations went to the depths envisaged. The detail involves a suspended floor slab 170mm thick with a mesh top and bottom centred over a rising wall. The defendants' experts have not encountered this detail in Drynam. This is significant as the defendants

contend that suspended slabs should have been used where the foundations went beyond certain depths. The plaintiffs have not explained why this clearly relevant and clearly discoverable document was not previously furnished.

There are also five snag lists for 2 to 6 Sweetman House which were referred to in a Menolly email. No explanation has been provided as to why they were not previously discovered. There is also a fax containing details of works carried out through boundary walls at Stapolin Lawns. The detail appears to relate to a water course already referred to in the affidavits of Mr. O'Byrne and Mr. Lennon. The detail appears to relate to the piping of an existing ditch. No specific explanation has been provided as to why it was not previously discovered. There is also a remedial works programme setting out the progress of such works in Myrtle. This document was clearly discoverable under Category 111 and has only been furnished due to the defendants' specific query. No explanation has been provided as to why it was not previously discovered. There is also a document indicating works carried out by FS Developments in Myrtle dated December 2004 and a draft agreement between Helsingor and Menolly. There is no proper explanation as to why these documents were not previously discovered.

Barry Donovan Documents

Mr. O'Byrne refers to a number of documents which were apparently recently furnished to the plaintiffs by an independent Health and Safety Contractor, Mr. Barry Donovan. The defendants raised previous queries regarding the lack of email communication concerning him. Mr. O'Byrne now confirms that Mr. Donovan gave BCM a number of documents between 23rd and 29th October. However, while Mr. O'Byrne states that the plaintiffs only recently acquired them, it is unclear how they were not discovered as many of them appear to have been sent directly to the plaintiffs previously or were authored by them or their agents. For example one of the documents is a letter from DBFL relating to a method statement for forming an embankment to a basement wall in two sectors of Myrtle. It is unclear why the plaintiffs did not previously discover this document. There are also minutes of site co-ordination meetings regarding Beaupark. Importantly, these meetings refer further to issues on site including quality control matters and it is clear that these minutes were circulated not only to Mr. Donovan but also to Mr. McLoughlin of Menolly and in some cases Mr. McElroy of Menolly. These is no explanation as to why these documents were not furnished before. There is also a method statement from Alcrete relating to an apartment building in Beaupark. It states that it is for Menolly, so it is unclear why the plaintiffs did not furnish it previously.

Gaps in Correspondence

There is also a range of letters between the plaintiffs and homeowners or between their agents and homeowners. No specific explanation has been given as to why they were not previously discovered except to note that in some cases they were marked "not relevant" or were not discovered in error.

New Helsingor Documentation

The plaintiffs still have not made full discovery. The defendants recently received non-party discovery from Helsingor. While a full review of these documents has not been possible, it is clear from the review carried out that a number of these documents must be in the plaintiffs' possession but have not been discovered. A number of emails, letters and records of minutes of meetings in the Helsingor non-party discovery relate to the issues which emerged by virtue of the Peadar Monaghan Reports. The defendants have identified approximately 29 documents relating to the Peadar Monaghan issues which have not been discovered by the plaintiffs to date. They concern the issues and events surrounding his reports and the appointment of a Clerk of Works arising out of his review. Some of these documents evidence other related discussion regarding quality control in Myrtle.

The defendants have carried out a check and so far as they can tell it appears these documents have not been discovered. For example there is a letter from Ballymore to Mr. Seamus Ross stating that there "remains to be resolved a number of quality issues which were identified in recent reports". It goes on to state "the recently discovered issue in connection with the potential Pyrite infill floor slabs have yet to be resolved". A further letter appears to be a preliminary response to the Monaghan Report. This letter notes that a courtesy copy was sent to Mr. Ross Sr., Mr. Ross Jr. and Mr. O'Byrne, so it is hard to know why the plaintiffs did not discover it. There are also letters from Mr. Monaghan to Mr. Ross Jr. setting out the remit of his brief. This included fortnightly meetings relating to "quality of workmanship", "materials" and properties being built "within the correct building regulations". There are also file notes regarding meetings at Menolly's site office in Baldoyle in 2007. It appears that all these meetings were attended by Mr. Ross Jr. and Mr. Ciarán Lee of Menolly. It is unclear who authored this document but it appears to be the first record discovered regarding these particular meetings. It is unclear why no record of these meetings was previously furnished by the plaintiffs. These meetings show that Mr. Monaghan was experiencing difficulties and was recording apparent hostility directed towards him on site, as is apparent from the file note for the meeting held on 11th July 2007. At this meeting Mr. Monaghan outlined a number of issues as to health and safety including "cracks in the basement floor" and "no improvement in the quality of mechanical and electrical installation". A file note for a meeting on 14th August 2007 also reveals that Mr. Monaghan still had concerns. A walk around was conducted where it was noted that for Sectors 22 and 23 the standard of general work (including glazing, joinery, painting, plastering etc.) was not acceptable. It was recorded at this meeting that Mr. Brian Clarke had advised Mr. Ross Jr. that the general standard of work was not acceptable in terms of cleaning, access, fire safety, etc.

The Helsingor documentation also contains legal correspondence from homeowners to BCM and from BCM or the plaintiffs to homeowners.

There appears to be no reason why these particular documents could not have been furnished by the plaintiffs in their discovery, but from the defendants' searches it appears they were not discovered. These letters are of some significance. There is a solicitor's letter dated 20th July 2006 concerning 21 Myrtle House. The date is significant as the letter pre-dates awareness of the alleged pyrite problem. Furthermore, it states on the homeowner's behalf that "there is a very serious problem with her apartment involving among other things the problem with the concrete used in the construction of same". It should also be noted that two of these letters relate to properties which contain non-Bay Lane fill.

There are also 21 documents in the Helsingor documentation emanating or exchanged between Project Architects and the plaintiffs. Such documents would have been specifically discoverable pursuant to Category 64 of the letter of voluntary discovery. The wording of this category was then limited by the plaintiffs.

In the Helsingor documents there are approximately 21 documents which would fall into this category. From the defendants' searches it appears that the plaintiffs have not discovered these documents.

There are also approximately 38 documents relating to the ownership and/or the status of the sale, possession or occupation of the units in Myrtle. They appear not to have been previously discovered by the plaintiffs. These documents would have been discoverable pursuant to Category 42 of the agreed discovery categories.

There are other miscellaneous documents which were previously discoverable and which have not been discovered by the plaintiffs. For example, there is a draft construction contract relating to the construction of residential and commercial properties in Myrtle. There are also a number of works programmes charting the progress of the construction of Talavera House, Boyd House and Morrow House.

The defendants have not yet had the opportunity to fully analyse all of the documents in the Helsingor non-party discovery. However, it is clear that with respect to some of the documents therein these documents must have been or are in the plaintiffs' possession (and are certainly in their procurement) but they have not discovered these documents.

The Discovery Process and review undertaken by the Plaintiffs

Mr. O'Byrne states that the employees did not control the actual process of completing discovery. While he states that "the process was overseen and controlled by BCM", his own averments confirm that this was manifestly not the case. He states that by virtue of a breakdown in communication, Menolly did not revert to BCM to confirm that retrieval of electronically stored documents would be effected through the use of search terms. No attempt was made to determine whether the use of search terms would be sufficient for that purpose. It has now been confirmed that this was not brought to the attention of BCM until 29th May 2009. This shows the plaintiffs' solicitors were not in a position to overview the retrieval process. It is of grave concern to the defendants that a decision was taken as to the selection of keywords without any reference to the categories of discovery, or without reference to the issues ventilated in the Defence. Furthermore, this remains a serious concern given the limitation of the keywords used.

In his second affidavit Mr. O'Byrne confirms for the first time that two diaries of Mr. Alan Kearney referred to in Mr. Lennon's September 2009 affidavit were provided to BCM in June 2008 but deemed "not relevant". Mr. Butler specifically stated in November 2008 (both on affidavit and in correspondence) that "the Plaintiffs do not know of the existence of any other site diary in relation to the development of Drynam, Beaupark or Myrtle Estates". Furthermore, it appears from Mr. Butler's May 2009 affidavit that diaries were uploaded onto summation for review by the plaintiffs' discovery team. Therefore, while Mr. O'Byrne now states that these notebooks/diaries were returned to Mr. Kearney, it is likely that such diaries would have been on the plaintiffs' summation system, and therefore, the plaintiffs (and their solicitors) must have known of the existence of these diaries when these averments were made as to their non-existence in November 2008.

In his second affidavit Mr. O'Byrne states for the first time that the plaintiffs have used 51 search terms, rather than the 37 terms indicated to the Court on 18th June 2009. It is of concern that these terms were not previously furnished. A full list of these terms has now only been furnished following a specific request. The defendants are of the view that the search term method employed is fundamentally flawed and that they cannot be satisfied that full discovery has been made.

Employees - inadequacy of discovery

Mr. O'Byrne states that the reason there are so few emails is because the people mentioned at paras. 83 to 95 of Mr. Lennon's October 2009 affidavit were either not involved in the construction of the estates or did not use computers in the ordinary course of works. However, there is clear evidence to suggest that many of these people were involved in these estates and emails (and other correspondence) they have sent or received have not been discovered. In this regard, Mr. Lennon repeats the averments in his previous affidavit.

The defendants consider that emails with respect to Mr. Lee, for example, have not all been discovered. He was head of construction for Menolly. It is unclear when he left but there appear to be a small number of emails authored or received by him in the discovery. That not all discoverable emails have been furnished can be confirmed by recent documents that have come to light as a result of the non-party Helsingor discovery. In this regard Mr. Lennon refers to an email relating to the appointment of a Clerk of Works arising out of the Monaghan reports. Mr. Lee was sent a courtesy copy of this email but it was not previously discovered. A further example involves Ms. Kim Ankers. There is an email (and fax) from Project Architects to her attaching a health and safety plan. These emails, faxes and attachments were not previously discovered.

The explanation that many of these persons would not have been involved in the estates or would not have used computers is unconvincing with respect to many employees. For example, there was only one email in the discovery relating to Mr. Paul McCarthy. A document recently discovered by the plaintiffs shows that Mr. McCarthy was project engineer for Myrtle, phase 1. It is inconceivable that he (as an engineer) would not have generated more email correspondence as to Myrtle. Similarly, Mr. David Downes appears to have been senior engineer on Myrtle, phase 1, but only 23 emails relating to him were discovered, only four of which he sent. Similarly, Mr. David Murphy is described as the quantity surveyor for Myrtle, phase 1, but there are no emails sent by him discovered by the plaintiffs. New documents emanating from Mr. Donovan have only now been provided but no emails sent by him have been discovered, which is remarkable given his involvement in Myrtle. There are also remarkably few documents for Mr. Ronan McManus, a former employee who appeared to be involved in matters relating to Drynam. Aside from one email the plaintiffs have discovered no other correspondence relating to him.

It is also remarkable that there are no emails sent by Mr. McLoughlin in the plaintiffs' discovery. He appears to be a contracts manager for Menolly and was involved in the development of Drynam. The plaintiffs discovered a fax asking Mr. McLoughlin to provide information regarding the preparation of a Preliminary Health and Safety Plan for the Kinsealy Project. Nothing discovered by the plaintiffs addresses this request. The plaintiffs also discovered a fax asking Mr. McLoughlin to supply a list of documents. However, there is no record discovered of him complying with this request. Mr. Kearney is a site engineer and appears to be involved in the remediation process. There are numerous site diaries of his in the June 2009 discovery but the plaintiffs have only discovered three emails sent by him.

Mr. O'Byrne avers that if these people referred to above (and in Mr. Lennon's previous affidavit) had sent emails to Menolly they would have been retrieved in the search of the Menolly server. However, this presumes that the keyword search would be adequate to retrieve them. Furthermore, if they sent emails to other agents of the plaintiffs these would not have been picked up on the Menolly server. The above should not be accepted as limiting the generality of the queries Mr. Lennon raised at paras. 83 to 95 of his October 2009 affidavit.

Missing Attachments – 2008 and 2009

The plaintiffs have now furnished new documents arising out of queries raised regarding missing attachments from the 2009 discovery (these have already been referred to). The plaintiffs state that they carried out a thorough search for these attachments which, in some instances, involved contacting the original author or recipient. The plaintiffs now state that some of these attachments appear to be missing and cannot be retrieved.

However, the position remains completely unclear as to the attachments which were missing from the 2008 discovery. The plaintiffs now accept that they did not contact the original authors or recipients of these documents and limited their search for these attachments to their existing database of documents. Given that fact, the defendants sought clarity as to whether the 2008 attachments were still "missing" or whether that averment was being withdrawn. The plaintiffs have not engaged with the defendants on this matter. The defendants undertook a further exercise and there appear to be approximately 100 documents whose attachments are still unaccounted for.

The Non-Bay Lane Houses

Mr. O'Byrne states that the number of houses which contain no Bay Lane infill at all is very few; seven in Drynam, two in Beaupark and nine in Myrtle. However, on the defendants' case (leaving aside the 25 Moyglare houses) there are at least 14 in Drynam, seven in Beaupark and 10 in Myrtle and there may be more. Furthermore, the defendants contend that many of the others contain trace Bay Lane elements and may well prove to contain an insignificant amount of Bay Lane material.

Mr. O'Byrne states that the plaintiffs were not aware that the houses contained non-Bay Lane fill in spring 2008. On this basis he states that "the determination that a sample from a house was not from Bay Lane did not of itself confirm that the house contains no Bay Lane infill". On this basis he states that the Replies were not inaccurate nor should they have been corrected. However, this ignores the fact that the defendants specifically sought particulars as to whether the material supplied to the first defendant was mixed with materials from other suppliers.

Mr. O'Byrne confirms that 34 Beaupark Square, a property in the basket, contains some non-Bay Lane infill. He states that this was found by Dr. Strogen on a review of a sample taken during remediation. However, Dr. Strogen's April 2009 report states "34 Beaupark Square has been remediated and proved to have Bay Lane infill throughout". The fact he found non-Bay Lane infill was not adverted to in his December 2008 or April 2009 report or in his evidence.

Mr. O'Byrne states that the DBFL Reports appended to Mr. Forde's statement had privilege waived over them in October/November 2008. It is notable that even when privilege was waived the plaintiffs did not attempt to disclose these reports to the defendants. While Mr. Lennon rejects the claim of privilege, even on the plaintiffs' case these reports could have been made available much earlier and during the period when both parties were deciding which houses should be admitted to the basket.

Mr. Lennon agrees with Mr. O'Byrne's calculations that there are now 75 properties which contain non-Bay Lane fill as referred to in the June 2009 Replies. He also agrees that the defendants knew about 2, 4 and 6 Stapolin Avenue from the January 2008 Replies. However, Mr. O'Byrne does not take into account that 4 and 14 Boyd House and 45 Morrow House also contain non-Bay Lane material and are agreed to be a mixture of concrete and Bay Lane fill.

Mr. O'Byrne points to DBFL reports for three of the Moyglare houses, which were discovered in July 2008. His reference to these reports shows why they would not assist the defendants in comparison to the newly discovered DBFL reports to which Mr. Lennon previously referred. Firstly, the defects recorded in these particular properties are relatively minimal. However, the most important thing about these reports is that each concludes that "much of the defects noted throughout the property can be attributed to shrinkage movements of the building materials". This conclusion does not appear in any of the DBFL reports to which Mr. Lennon previously referred. Furthermore, some reports (for example those for 38 and 39 Parker House) state that there are early signs of pyritic heave. Therefore, it is quite clear from a comparison of the reports that DBFL/Golders were, in effect, ruling out pyrite as being the cause of any damage in the Moyglare properties, but were suggesting it could be the cause of the damage for properties in Myrtle, even though they contain non-Bay Lane material.

Mr. O'Byrne notes that the defendants' experts inspected many of the properties and could therefore see for themselves whether the damage in them was comparable to that in pure Bay Lane houses. However, his averments make clear that he does not accept that the damage in these properties was comparable. This is why the DBFL/Golders reports for these properties are of such importance because they are records by the plaintiffs' own experts of damage so that an objective assessment can be made as to whether their records are comparable to other assessments carried out by them on Bay Lane properties. This becomes all the more significant when the reports suggest that the damage recorded is indicative of pyritic heave or constitutes possible signs of pyritic heave in properties which contain non-Bay Lane material.

Mr. O'Byrne states that the defendants' experts would not have benefited from the DBFL/Golders report for 12 Stapolin House as it was privileged. He notes that the plaintiffs have clearly stated that the DBFL report for this house and for nine others was in draft form at the time of the original discovery and, even if it had been correctly listed in the first schedule second part, Mr. Lennon would never have seen it before basket selection. However, even if the privilege claim (which Mr. Lennon rejects) were valid, Mr. O'Byrne had already stated that privilege was waived over these documents in October/November 2008. He does not state a basis for this waiver but it is clear that even on his case these documents should have been disclosed by November 2008 at the latest, before basket selection.

Mr. O'Byrne refers to seven properties (3, 4, 10 and 20 Stapolin House and 35, 38 and 39 Parker House) which were inspected by O'Connor Sutton Cronin for which letters of 30th June 2008 regarding infill source were previously discovered. He criticises the defendants for not seeking a full re-inspection of these houses. However, for four of these the defendants did not have DBFL reports indicating the plaintiffs' assessment that they manifested damage which in their view was indicative or potentially indicative of pyritic heave and which could be objectively compared to other reports for pure Bay Lane properties. As to the other three properties, the defendants are unaware of any suggestion that the plaintiffs were contending that any damage therein was due to pyritic heave. Mr. Lennon repeats the averments in his previous affidavit that the defendants do not claim prejudice regarding these properties.

Mr. O'Byrne refers to the approach of the defendants' experts regarding 10 and 13 Stapolin House and 35, 38 and 39 Parker House. The significant new information as to these properties is the fact that the plaintiffs carried out a review of them which suggested that the damage that they had recorded therein was potentially indicative of pyritic heave. This is most evident from the reports on

Nos. 38 and 39, and the parties have now agreed that No. 38 contains no Bay Lane material, despite the reference in the report to damage which, according to the plaintiffs' experts, is potentially indicative of pyritic heave. The defendants' experts' visual inspection of No. 38 recorded insignificant damage and nothing that could be attributable to heave. Given that fact and given that the defendants' experts were unaware of the diagnosis of potential heave in No. 38 (in circumstances where the property contained no Bay Lane fill), it is unsurprising that no further action was taken with this property. The defendants' experts carried out a similar assessment on Nos. 35 and 39. Again, from the defendants' perspective these houses contained minimal levels of cracking which, in their view, could not be related to pyritic heave. The defendants' experts did not know that the plaintiffs were of the view that this amounted to pyritic heave. If these houses are ultimately found to contain very little or no Bay Lane material, the plaintiffs' analysis that the damage recorded constitutes potential signs of pyritic heave will be shown to be flawed.

It is the defendants' experts' view that none of the damage in these properties was indicative of pyritic heave and was largely aesthetic damage. However, when the properties contain non-Bay Lane material, the plaintiffs' record and diagnosis of the damage therein is highly significant. Their record and diagnosis of damage in non-Bay Lane properties is very important to the defence. This links into Mr. O'Byrne's assertion that the defendants should have known that if a property was not in the claim this must indicate that this was because it did not contain Bay Lane fill. However, it is the defendants' position that none of the damage manifesting across the estates is due to pyritic heave. Mr. O'Byrne contends that if a property showed any level of damage and was not in the claim the defendants should have known that the reason for its absence was because it did not contain Bay Lane material. However, this is to see the matter from the plaintiffs' perspective. From the defendants' perspective it was quite reasonable to assume the plaintiffs had decided not to put a property in the claim because the damage therein was not indicative of pyritic heave. It is now clear that the plaintiffs are determining that houses require remediation even where the damage was very minimal solely on the basis that they contain Bay Lane material. It is now clear that the plaintiffs were determining that the properties (not listed in the Bruce Shaw reports) required remediation solely on this basis.

Mr. O'Byrne refers to letters relating to testing carried out at 41, 42 and 43 Sweetman House. The pyrite levels for these properties were considerably lower than that for 9 Sweetman House. These low pyrite contents would not have induced the same line of enquiry which the letter regarding No. 9 would have led to. The pyrite level at No. 9 can be equated to a number of other properties. The same cross referencing exercise cannot be done with the levels for Nos. 41 to 43.

Concrete Documentation

Mr. O'Byrne notes that there were 20 "extra sand" delivery dockets in the old discovery and that in each of the "extra sand" mixes additional cement was added by the readymix supplier to compensate for the sand. However, it is unclear how he knows this as there are no documents specifying whether additional cement would be added to compensate. He rejects the statistical analysis outlined at para. 447 of Mr. Lennon's previous affidavit, pointing out that concrete would have been used for various purposes. However, water would have been added to the mix to increase its workability and, therefore, it is far more likely that it will be added when used in the pouring of floor slabs. In addition, Mr. O'Byrne has already asserted that the addition of sand was to ensure a smooth finish of the floor surface. Therefore, Mr. Lennon is advised that it is almost certain that delivery dockets which refer to the addition of sand were used in the pouring of floor slabs.

Mr. O'Byrne points out that the figures in Mr. Lennon's previous affidavit had been artificially increased by relying only on the actual ground floor units which are in the claim. However, when the total number of ground floor units in both estates is included the difference is not significant (in Drynam, 340 out of 365 are in the claim, with 174 out of 186 in Beaupark). Mr. O'Byrne states that the adding of water on site is not at all unusual. The defendants' experts fundamentally disagree. He also suggests that the decision to add the water would have been taken by the readymix supplier as opposed to personnel on behalf of the plaintiffs on site. The defendants' experts also fundamentally disagree with this proposition, which is completely unwarranted. It is the practice of the readymix supplier to record the addition of water to protect himself from a later complaint as to the integrity of the concrete. For this reason the delivery driver will record the additional water to show that if the mix or concrete turns out to be problematic this was due to something which occurred on site rather than at the readymix plant. It is clear from the terms and conditions attached to many of the recently discovered delivery dockets that the supplier takes no responsibility for the addition of water on site. For example, the Keegan invoices state that the seller is not responsible for the slump, strength or quality of any concrete to which additional water or any other materials have been added by or at the request of the purchaser. Dr. Maher also acknowledged in cross-examination that when water is added it is usually documented on the docket, basically in the interests of protecting the supplier, who could be held responsible if the concrete does not meet strength.
It is very surprising that the plaintiffs are now describing the mixes used as being "designed". The HomeBond manual states "design mixes are supplied on the understanding that the concrete will be sampled and tested quite frequently by the purchaser on site". It goes on to say that "concrete cube tests are the basis of the most important quality control there is for checking on hardened concrete…the main purpose of the test is to verify that the concrete is above the minimum "characteristic" strength specified. The cube test provides a useful check on the production control of concrete". Mr. O'Byrne states that there are no cube test results for Drynam or Beaupark because no tests were undertaken for these houses. The plaintiffs' experts advise that it would not be usual to carry out cube testing of concrete for houses. Furthermore, the defendants have seen very little evidence of any specifications provided by the plaintiffs, which should have been given to the readymix supplier to comply with a "design mix" pursuant to IS326. Section 3 of this standard states "the purchaser shall provide the producer with all pertinent information on the use of the concrete and the specified requirements". In addition, section 4 states that the purchaser should specify a number of items including the grade of concrete and the limiting of mixed parameters to satisfy the strength and durability requirements of the work. It also states "the purchaser shall also select the constituent materials taking into account the guidance given at IS326 part 2 point 1 including any limits on mix proportions, particularly for durability". Section 5 states that the purchaser shall specify a number of items including the grade of strength, the required size of aggregate, the permitted types of aggregate, the permitted types of cement, the minimum cement content, the maximum water/cement ratio, the workability and any quality assurance requirements. Furthermore, the purchaser should inform the producer of the method of placing the concrete and the rate of sampling by the purchaser. It is clear from the discovery to date that information of this nature was not provided by the plaintiffs to the supplier.

Mr. O'Byrne is advised that drying shrinkage occurs between six weeks and 12 months after placement. Mr. Lennon is advised that this is incorrect and that it is well established that concrete shrinkage can continue well after 12 months.

Mr. O'Byrne appears to correlate the strength of the concrete with the water/cement ratio. The plaintiffs have confused the relationship between strength and water/cement ratios in their attempt to argue that there is no problem with the latter. Mr. Lennon is advised that there is fundamental disagreement between the defendants' and plaintiffs' experts on this point. Mr. O'Byrne states that the STATS result for a water/cement ratio of 1.1 could not be correct as concrete with this type result could not be placed without aggregate segregation. Mr. Lennon is advised that this statement is incorrect and that it is very conceivable that a mix of this kind would have been poured and used. With such a high ratio it is likely to have been extremely workable. The plaintiffs' experts advise that the test for quality and conformance is compressed strength. Mr. O'Byrne says that water/cement ratio testing is rarely

used. Mr. Lennon is advised that such testing is frequently used for many reasons. However, Mr. O'Byrne appears to be eliding the distinction between testing carried out on site during construction and the testing which has been carried out for the purpose of investigating the quality of the concrete for the purpose of this trial.

Mr. O'Byrne goes on to rely on "equivalent strength" grades as referred to in the British standards. He states that "equivalent strength" grades can be employed so that strength compliance can be used to confirm whether the water/cement ratio is compliant. However, these grades are calibrated with a maximum water/cement ratio already. If water is added on site, the equivalent strength testing is completely unreliable. Such testing is only reliable where the strength of the concrete matches exactly the strength specified. It is insufficient to say that the strength complies with the HomeBond standard in circumstances where the strength of the concrete purchased has been reduced by the addition of water. For example, if the supplier provides concrete with a strength of 35N/mm², the equivalent strength testing will only be valid where the concrete is later tested and equates to 35N/mm². If the concrete only equates to 25N/mm², whilst this complies with HomeBond regulations, it means that the strength has been reduced (likely through the addition of water) which completely throws out the original ratio which has been calibrated by the supplier based on a strength of 35N/mm².

Mr. O'Byrne states that the defendants' experts never sought to check the ingredients of the mix used. However, even if they had been given in July 2008 the list of different ingredients for the mixes (which they were not) this information is useless without the detail as discovered in the delivery documentation. Again, the delivery dockets provide crucial information as to which specific mixes were purchased. Therefore, even if the defendants had had the various mix designs supplied by the readymix suppliers, they would not have known which specific mix designs were purchased by the plaintiffs from those suppliers. Given the virtual absence of delivery documentation for Drynam and Beaupark, it is not surprising that the defendants were not able to "undertake any enquiries by the individual components of the concrete mixes at that time."

Mr. O'Byrne notes that a number of concrete cores taken by Golders through floor slabs since September 2008 are still available. However, testing on these particular cores would be unsatisfactory unless the defendants could vouch as to the integrity of the sample and stand over the method of extraction of these cores.

Mr. O'Byrne refers to the "model floor slab" proposal and states that the defendants have already had the ability to carry out extensive testing and inspection of the remedial houses. Mr. Lennon had addressed this in his previous affidavits but reiterates that had the defendants been made aware of the significant issues regarding additional water on site they would have insisted on taking extra cores from all the remedial properties with a view to establishing the precise extent to which water was being added to mixes. Furthermore, the defendants have not had ease of access as to taking concrete core samples. The comments at para. 98 of Mr. O'Byrne's second affidavit relating to Drynam Square are completely irrelevant to the model floor slab question.

Mr. Lennon is advised that Mr. O'Byrne is incorrect when he states that "it will be impossible to replicate the products actually used in the concrete mixes". The readymix suppliers involved would still be using the same aggregates from the same suppliers and the cement would also be the same particularly given that standards relating to cement are quite specific and would not have changed over the years. Mr. Lennon fails to see how the sand and water would have changed in the intervening periods. The basic constituent elements could easily be replicated.

It is incorrect to say that the defendants had all the information necessary to perform this model floor test in 2008. The defendants only now know the extent to which water has been added on site and only now have documents relating to delivery of concrete and the precise mixes delivered to both Drynam and Beaupark.

Ground Conditions

Mr. O'Byrne indicates that there is no drainage problem in Drynam. However, Mr. Lennon has clearly indicated that there are a number of incidents revealed in the documents newly disclosed (and events which have occurred) that show that there is an abnormal level of problems relating to flooding and the gathering of water in the north east section of Drynam. The defendants' experts' view is that these incidents are all indicative of a drainage problem in this section. Again, considering the damage manifesting in some of this section, the possibility of a drainage problem in this area is of great significance. Mr. O'Byrne states that the surface water drainage system which serves Drynam View is not linked to the surface water system that serves Drynam Drive. However, it is clear that the land drain system is constructed as going towards the north east section. Furthermore, the precise relation between this surface water drainage system and the existing drainage system in this section is not clear.

Mr. O'Byrne refers to the additional water which flowed into 22 Drynam View. He states that this was due to local drains and down pipes serving the drains which had been cut off as part of the excavation works. The defendants' experts' view is that the accumulation of this water was indicative of a groundwater accumulation. Furthermore, among the documents discovered on 4th November 2009 is a preliminary health and safety plan by DBFL dated November 2002 which notes potential problems as to groundwater accumulation in the north and the north east section of Drynam. It states "the redundant Gaybrook stream could be an area of ground water accumulation and care should be taken when installing services in this area". Mr. Lennon is advised that this stream runs to the north east section of Drynam and there may be a specific link between what DBFL had noted in November 2002 and the drainage problems which the defendants say exist in this section.

Mr. O'Byrne refers to the relation between the potential drainage issues which exist in the north east section and the preliminary site investigation carried out by the plaintiffs. Whilst Mr. Lennon accepts that the preliminary investigation would not have specifically dealt with the surface water issue which arose from the drainage works, there is no doubt that the site investigation itself failed to examine the potential problems which might exist in the north east of Drynam. For example, had this investigation recognised that the low lying part of the north east section contained soft soils that had potential drainage problems, the implementation of a land drain system which ran into the north east section might have been reconsidered. Furthermore, the recent discovery of the DBFL preliminary safety and health plan of November 2002 shows that there was a potential groundwater problem in this area by virtue of the redundant Gaybrook Stream. This is not adverted to in the preliminary site investigation. In this respect the new documentation shows the potential inadequacies of the original site investigation. Therefore, the site investigation should have revealed what the plaintiffs needed to know in advance in order to ensure problems of this nature could be avoided.

Mr. O'Byrne refers to the DBFL certificates relating to the houses which were founded in the stabilised area. It is clear from these certificates that they give no indication as to the fact that specialised foundations were used. The only distinguishing factor of these certificates is that the ground itself was tested to DBFL's satisfaction. Furthermore, the certificates in relation to those properties which were sunk down to the virgin ground do not mention that these houses were built in a lime stabilised area. Again, this document was discovered inadequately as it was split into four sections that could not be linked. The fax cover sheet indicates that material in

this document was sent to Mr. Forde in October 2004 from Menolly. Therefore, the detail as to the works carried out on these foundations is being described by Menolly and, on foot of this, DBFL have issued certificates indicating that the foundations were built in substantial accordance with the Building Regulations. While the foundation certificates indicate there were "intermittent" inspections of the works, it is clear from the information provided in the fax that it is Menolly who are providing a description of the works which took place. There is no evidence that specific inspections of the works took place by DBFL.

Mr. O'Byrne notes that the defendants attended 49 Grange Lodge Avenue and 1 Hyde Close. This does not mean that they had full access to these properties. On each occasion the defendants were entitled to attend at a different stage of the remediation process. Therefore, for example, the defendants would only have had a once-off view of any water accumulation in the ground in these properties, because the defendants would have been entitled to attend at a stage when the infill was removed. On the next visit the infill would have been replaced, therefore the defendants would only have had a snapshot of what was going on in these properties on these individual occasions.

Mr. O'Byrne argues that as the plaintiffs had discovered snag lists regarding Myrtle House, Talavera House and Boyd House in 2008, the defendants had all the necessary information which they required which was in the Monaghan report. However, the plaintiffs do not specifically point to how the information therein correlates to the same information in the Monaghan report. They have simply pointed to the existence of these snag lists. The Monaghan report for phase 1 of Myrtle is dated February/March 2007 and gives an excellent contemporaneous insight into the works which were taking place at that time. The snag lists in question would only give an indication of the condition of the properties when they were effectively completed. Furthermore, while Mr. O'Byrne states that there are 231 previously discovered snag lists for Myrtle, there appear to be a further 106 newly discovered snag lists for Myrtle. In addition, the defendants have come across further documents furnished by Helsingor which show the Peadar Monaghan concerns were very serious.

Mr. O'Byrne states that Mr. Lennon points to the minutes of a Helsingor Board meeting of June 2006 in claiming that Mr. Clarke first raised concerns about the quality of workmanship in summer 2006. Mr. O'Byrne avers that there is no such statement in the document. He also states that as is clear from minutes dated 26th September 2006, Mr. Clarke did not comment until that September on quality and his comments relate to "finishes" which are generally superficial and aesthetic matters. The new Helsingor non-party discovery contains a file note by Mr. Clarke dated April 2006. Importantly, this notes "Concrete poured in foundation was not completed", "No cover to reinforcement in bases", "Standard of blockwork (i.e. structural blockwork) extremely poor", "Self finished structural slabs in basements have been finished to a very poor standard", and "The quality of finished work is a major cause for concern and will result in on-going problems for Helsingor if it is not rectified".

Mr. O'Byrne states that the reference to "serious concerns" being raised by Helsingor was a misdescription. The new Helsingor documentation shows that concerns were so serious that it was thought that a larger firm of engineers should have been asked to carry out the review. For example, there is a file note from Helsingor dated 20th March 2007 (after the Monaghan report) which appeared to suggest that, given the serious nature of the problems, a larger firm of engineers should have been commissioned to draw up the report.

A further file note of July 2007 records difficulties Mr. Monaghan was facing on site. This confirms the level of seriousness of the issues which had been raised by his reports. The note records Mr. Clarke as stating "I am attending this meeting on the clear understanding that progress on resolving the very serious issues raised over many months...as described in the Peadar Monaghan Reports...was to be made".

Mr. O'Byrne states that whatever facilities the defendants wanted were granted. This was not the case.

Affidavit of Brendan O'Byrne
11th November 2009
Introduction

This response to Mr. Lennon's fifth affidavit should not be understood as an acceptance of the merit, accuracy or validity of statements in that affidavit which are not addressed herein.

Documentation Discovered on 4th November 2009

Mr. Lennon refers to the additional discovery of 4th November 2009 and asserts that the plaintiffs have given no explanation as to why these documents were not discovered, save that in certain circumstances they were not discovered in error. This assertion is incorrect. Each of the queries the defendants raised in tab 1 books 2, 3 and 4 and tab 2 book 4 of the books of exhibits to Mr. Lennon's fourth affidavit were responded to in the documents at tabs 6 to 9 of book 1 of the books of exhibits to Mr. O'Byrne's second affidavit. Where additional documents were discovered arising from queries raised, the plaintiffs gave explanations in the schedules exhibited at tabs 6 to 9.

Mr. Lennon points to a preliminary safety and health plan concerning a redundant stream which DBFL advised could be an area of groundwater accumulation, as a result of which care should be taken when installing services. This is one of the documents Mr. Lennon deems "very significant". The line of this redundant stream follows the northern boundary of the site and was piped with the 300mm diameter land drain shown on a drainage map discovered in June 2008. Moreover, no accumulation of groundwater along the line of the redundant stream occurred during the construction of the works and Mr. Lennon's concerns in this regard are misplaced. DBFL advise that the contents of section 4.2 of the plan are standard and that the issues raised are certainly not "out of the ordinary" for such a development. Mr. Lennon also misquotes section 4.2 and his reference to the "newly discovered land drain" is misplaced. That land drain is apparent from the drainage maps furnished in June 2008.

Mr. Lennon points to a fax dated 30th April 2003 from Mr. Blain of Menolly to Jonathan Lennon of DBFL regarding a "suspended slab at Kettles Lane". The fax contained a sketch prepared by Mr. Blain showing the proposed details for suspended floor slabs in Drynam. This fax was responded to by Jonathan Lennon on 2nd May 2003. This fax contained DBFL's engineers' drawing showing the recommended detail for the construction of suspended floor slabs. This is merely a drawing produced on foot of Mr. Blain's sketch and was discovered in 2008. In addition, the DBFL site layout drawing shows the location of houses with suspended floor slabs in Drynam. The key to this drawing was discovered in 2008 and the defendants have inspected and were furnished with a copy of the drawing.

As to the snag lists referred to at para. 10 of Mr. Lennon's fifth affidavit, the snag items all refer to "finishes" matters and have no structural relevance. Moreover, Sweetman House is not the subject of these proceedings.

Mr. Lennon refers to a letter of 25th January 2006 from Jonathan Lennon to Barry Donovan. This document was previously discovered. The other Barry Donovan documents were not in the plaintiffs' possession at the time of the 2008 discovery process, the plaintiffs were not then aware of their existence and they only came into the plaintiffs' possession when they were received from Mr. Donovan between 23rd and 29th October 2009.

Helsingor Documentation

Mr. Lennon addresses various documents which the defendants obtained by way of non-party discovery from Helsingor. The documents exhibited at tabs 10-15 of the first book of exhibits to Mr. Lennon's fifth affidavit are addressed in Appendices 1 to 5, which are exhibited to the present affidavit.

The Electronic Search Terms

The electronic search terms used in 2009 were compiled by the plaintiffs with input from BCM and Price Waterhouse Coopers.

Employees

Mr. Lee was appointed Head of Construction at the end of December 2006. He became involved with the pyrite problem and remediation in February/March 2007 and remained with this project until the end of December 2007. He had no further active involvement with the matters the subject of these proceedings. The email dated 11th May 2007 with the subject "Helsingor/Sherman Oaks" copied to Mr. Lee was not retrieved because it was not caught by the search terms used by the plaintiffs.

The plaintiffs have been unable to locate the documentation concerning Ms. Ankers to which Mr. Lennon refers. Mr. O'Byrne believes the discoverable documentation concerning her has been discovered. He believes the discoverable emails of Paul McCarthy, David Downes and David Murphy have been discovered, and that the discoverable emails of Barry Donovan were discovered in June 2009. Ronan McManus was employed for six months in Drynam. He was not involved in the construction of the estates. His principal activity was the taking of photographs of remedial works. Mr. O'Byrne believes Mr. McManus did not communicate by email during the period relevant to discovery. Tom McLoughlin was not a computer user and Mr. O'Byrne believes all discoverable documents to or from him have been discovered. Mr. O'Byrne believes Alan Kearney did not frequently communicate by email during the relevant period.

Non-Bay Lane Houses

34 Beaupark Square was listed in the June 2009 Replies as containing non-Bay Lane infill in circumstances where, at the time of their preparation, it was noted that Dr. Strogen had referred to a sample for this house as containing CG/BL in his review of remediation samples in January 2009. Dr. Strogen considers that the reference to CG for this sample is a recording error on his part. Both samples (one initial, one remedial) from this house are recorded as Bay Lane in origin. When Dr. Strogen returns to Ireland he can examine the sample(s) for this property in conjunction with the defendants' experts.

Mr. Lennon is incorrect in saying that Mr. O'Byrne stated at para. 46 of his second affidavit that the privilege over all DBFL reports furnished with Mr. Forde's statement in December 2008 was waived in October/November 2008. Those draft reports were privileged until released with Mr. Forde's statement. The reference to privilege being waived over a large number of DBFL reports in October/November 2008 did not encompass those draft reports.

The relevance of the presence of concrete in a sample of infill is addressed at para. 75 of Mr. O'Byrne's second affidavit. Again, this is not evidence of non-Bay Lane infill. Rather it was accidentally incorporated into the sample during sampling. Mr. O'Byrne believes that, contrary to Mr. Lennon's assertion, the parties have not agreed that 38 Parker House contains no Bay Lane material. It is agreed that the samples examined by the experts to date show no Bay Lane material.

Ground Conditions

The defendants have been aware of the extent of the lime stabilised area in Drynam Drive since 10th January 2008 and, thus, the houses which were built within this area. Furthermore, the fax from Mr. Carroll to Mr. Forde dated 15th October 2004 records on the second page: "Inspections by Jonathan Lennon". This reflects the fact that Jonathan Lennon of DBFL inspected the excavations. It was on foot of those inspections that DBFL issued the certificates for houses referred to in that document.

Affidavit of Peter Lennon
26th November 2009
The "Non-Bay Lane" Reports for Myrtle

Mr. Lennon lists the reports for 6, 8 and 10 Stapolin Avenue, 10, 12 and 13 Stapolin House and 35, 38 and 39 Parker House. These nine reports were discovered in June 2009 and not in July 2008, but were appended to Mr. Forde's statement in December 2008. Mr. Lennon was not personally aware (nor was the legal team on behalf of the defendants) that these reports were appended to Mr. Forde's statement until this was adverted to in Mr. O'Byrne's affidavit of 6th October 2009.

When the statement was furnished in December 2008 it was not suspected that it contained DBFL/Golders reports which were discoverable and which were not previously discovered. No cross check was carried out to see whether it contained DBFL/Golders reports which should have been discovered in July 2008 but were not. While Mr. Lennon accepts the reports were listed in the appendix, it was not evident that any of these reports which predated the cut-off date had not previously been discovered without a specific cross check against the existing discovery. This was not done at the time as there was no specific reason to do so.

The first indication that the plaintiffs had furnished discoverable DBFL/Golders reports in Mr. Forde's statement which had not previously been discovered was on 20th March 2009 through a letter. In this letter the plaintiffs furnished new information regarding the Moyglare and retest properties in Drynam. In particular this letter enclosed a range of DBFL/Golders reports for the Moyglare properties not previously discovered. The plaintiffs indicated that one of these reports was appended to Mr. Forde's statement. This letter also referred to reports for the retest properties in Drynam. It stated that all but three of these reports were discovered and that these three were appended to Mr. Forde's statement.

This letter made no reference to the position regarding properties in Myrtle. The letter (which was the subject of a hearing on 25th March 2009) triggered a limited cross check to determine whether there were discoverable DBFL reports for Drynam and Beaupark appended to Mr. Forde's statement, but no attempt was made to check if the same position applied regarding the reports in Myrtle. The defendants' focus at that time related to the properties at Drynam which were, of course, the subject matter of the letter. The cross check, however, extended to Beaupark.

This cross check (conducted in mid-April 2009) showed that, outside of the reports adverted to in the letter, there were a further six

DBFL/Golders reports not previously discovered. A cross check also revealed that the report for a seventh property was not previously discovered. This was noted in April 2009 but was innocently overlooked and not referred to in Mr. Lennon's affidavit of 27th October 2009. These properties are not Moyglare properties or retest properties, nor are they what the defendants have termed "non-Bay Lane" properties. At this stage, the defendants' legal team were still focusing on the potential problems with the non-discovery of DBFL/Golders reports for the Moyglare houses and other material which the plaintiffs appeared not to have discovered regarding the Moyglare properties which had come to light by virtue of the letter of 20th March 2009. This concern coincided with a letter from BCM of 24th April 2009 where the plaintiffs discovered further delivery documentation relating to supply of non-Bay Lane material.

Arising from this the defendants indicated to the plaintiffs by letter dated 6th May 2009 that they had concerns that not all discoverable documentation relating to the Moyglare properties had been discovered. In particular, the defendants highlighted the fact that there was no reason why the DBFL/Golders reports for Moyglare (which were furnished on 20th March 2009) should not have been discovered in July 2008. The response to this letter came on 18th May 2009 and caused alarm for the defendants because it indicated that DBFL/Golders reports for properties which were "not in the claim" were not discoverable at all. Mr. Lennon has already averred to this matter in his affidavit of 20th May 2009.

Arising from this response (and coinciding with the disclosure of the Kevin Kelly diaries in May 2009) Lennon Heather issued a motion to dismiss for failure to make discovery and seeking further and better discovery. Given BCM's statement in the letter of 18th May 2009, the defendants pointed out that it appeared that for many of the "Non-Bay Lane Properties" in Myrtle (as identified in the report and evidence of Dr. Strogen) there appeared to be no DBFL reports discovered. The defendants were concerned that this might have been due to an erroneous interpretation on behalf of the plaintiffs to the effect that such reports were not discoverable as they were not the subject of any claim.

In his affidavit of 20th May 2009 Mr. Lennon noted the absence of 29 Myrtle reports and stated that for these properties it "appears that no DBFL/Golders reports were provided". These 29 include the nine referred to above. At the time Mr. Lennon believed this averment to be true. The response in Mr. Butler's affidavit of 25th May 2009 only confirmed Mr. Lennon's mistaken view that these reports had not been furnished. Mr. Butler's affidavit stated in relation to the 29 properties that "The reason that no DBFL/Golder reports have been discovered for those properties is because completed reports in respect of those houses have not been issued by DBFL to BCM". From this averment, Mr. Lennon had understood the plaintiffs to say that these reports had not been completed. Therefore they were not discovered nor had they been furnished in any form to the defendants. It appears from this averment that Mr. Butler himself did not realise that these reports were appended to Mr. Forde's statement.

Mr. Butler stated in the affidavit:

> "eleven incomplete draft reports in respect of such houses were furnished to Damian O'Brien of the Plaintiffs in March/April 2008. Due to an oversight on his part, those draft reports (which are still in draft form/incomplete), were not furnished to BCM Hanby Wallace and, accordingly, they were not discovered. As regards the other houses, I am advised by DBFL and believe that they have some raw unprocessed draft reports for these houses. Those draft reports were not sent to BCM Hanby Wallace as part of the discovery process because they were in a raw, unprocessed state. It is also appropriate to note that those draft reports are clearly privileged."

Arising from this the defendants (and their legal team) did not suspect that these reports were in fact complete and appended to Mr. Forde's statement. In fact, Mr. Butler's averments suggested they had never been issued at all.

During the discovery review in July/August 2009, the legal team were asked to pull together all information in the new discovery regarding non-Bay Lane properties. One of the issues spotted was that there were a number of DBFL reports for non-Bay Lane properties in Myrtle not previously discovered (the nine reports referred to above). Neither Mr. Lennon nor the discovery team was aware that these reports were appended to Mr. Forde's statement. As Mr. Butler had indicated in his affidavit of 25th May 2009 that these reports had not been furnished, it did not occur to Mr. Lennon or the legal team that these reports might be appended to Mr. Forde's statement. The first time Mr. Lennon became aware that these reports were appended to that statement was on the furnishing of Mr. O'Byrne's replying affidavit on 6th October 2009.

Knowledge of the Defendants' Experts

From consultation with the defendants' experts, Mr. Lennon believes the following to be the position. As general background, he notes that before December 2008, all DBFL/Golders reports which had been discovered were sent to the defendants' experts – O'Connor Sutton Cronin and Bickerdike Allen.

All of the plaintiffs' expert reports (including all appendices attached thereto) were uploaded onto an FTP site on 24th December 2008, but due to technical limitations the defendants' experts had no real access to this site until 5th January 2009. They were made aware of this site and the mechanism for accessing it and were specifically guided as to the expert reports which appeared relevant to the particular area of expertise. For Mr. Forde's statement, this was O'Connor Sutton Cronin and Bickerdike Allen.

Mr. Lennon understands that Bickerdike Allen uploaded the appendices to Mr. Forde's statement on 11th January 2009 and this did not leave sufficient time to conduct a detailed review of all the appendices as well as the time to complete their own report which was due on 2nd February 2009. Their attention was not specifically drawn to these nine reports by the legal team (who did not known they had not been previously discovered). Bickerdike Allen did not focus on the nine reports, nor were they aware that these were extra reports not previously furnished to them through the discovery process. No link was made by Bickerdike Allen that these were reports of properties which contained non-Bay Lane material.

Mr. Lennon understands that when these reports were uploaded onto the FTP site, O'Connor Sutton Cronin arranged for all 641 DBFL reports to be printed out and looked at. This would have been around January 2009. Given the *proforma* nature of the documents, O'Connor Sutton Cronin cannot specifically recollect whether they focused in any detail on these reports and they certainly did not realise the nine reports in question were not previously discovered. When they were reviewing these reports they did not draw a link between these particular reports as being reports for non-Bay Lane properties.

At no stage after Mr. Forde's statement was furnished did the defendants' experts communicate to the defendants' legal team that these specific reports were attached to that statement.

Mr. Lennon believes the true position is that the defendants' experts and legal team were not aware that there were nine Myrtle DBFL/Golders reports appended to Mr. Forde's statement which were not previously discovered until October 2009.

Report 158 Grange Lodge Avenue

The DBFL report of 11th April 2008 examining the construction details encountered at 158 Grange Lodge Avenue was appended to Mr. Forde's statement. However, this report was not specifically listed in the appendix to that statement. Rather, this report formed an appendix to a separate remedial report. While the remedial report was listed (amongst 52 other remedial reports), the report of 11th April 2008 was not listed (or separately flagged) in the appendix to the statement.

The defendants' legal team did not know this report was attached to a remedial report which was itself appended to the statement until Mr. O'Byrne noted this in his affidavit of 6th October 2009. Furthermore, none of the defendants' experts indicated to Mr. Lennon that they were aware this report was appended to the statement. Insofar as Mr. Lennon is aware, the defendants and their experts only became aware of the existence of this report arising from the July 2009 discovery.

SCHEDULE
PART I

II. OUTLINE WRITTEN SUBMISSIONS ON BEHALF OF THE FIRST AND FIFTH NAMED DEFENDANTS IN SUPPORT OF APPLICATION TO DISMISS CLAIM / DECLARE RE-TRIAL DUE TO FAILURE TO MAKE PROPER DISCOVERY

THE HIGH COURT
COMMERCIAL
Record No: 2007/4691P

BETWEEN:

HANSFIELD DEVELOPMENTS, VIKING CONSTRUCTION, MENOLLY PROPERTIES AND MENOLLY HOMES

Plaintiffs

And

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

Defendants

outline written submissions on behalf of the first and fifth named Defendants in support of application to dismiss claim / declare re-trial due to failure to make proper discovery

Lennon Heather
Solicitors for the First and Fifth Named Defendants
24-26 City Quay
Dublin 2.

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Introduction

1. These Outline Written Submissions are filed on behalf of the First and Fifth Named Defendants (referred to for convenience in these Submissions as the "Defendants") in support of their application to dismiss the Plaintiffs' claim by reason of the Plaintiff's failure to make proper discovery. In the alternative, the Defendants ask the Court declare a mistrial by reason of the discovery by the Plaintiffs of thousands of documents after these proceedings were at hearing for 52 days and after a number of witnesses have already given evidence and been cross-examined.

Factual background

2. These proceedings were commenced by a Plenary Summons issued on 22nd June 2007, pursuant to which the Plaintiffs sought, inter alia, a declaration that the Defendants were obliged to indemnify the Plaintiffs in respect of costs, expenses, loses, liabilities and claims, arising from the construction of residential units within the Drynam, Myrtle and Beaupark Estates of aggregate infill susceptible to swelling and allegedly containing unacceptable excessive levels of pyrite, damages for breach of contract and damages for negligence.

3. A Statement of Claim was delivered on the 22nd November 2007, pursuant to which it was alleged that the aggregate infill supplied by the first named Defendant from its Bay Lane quarry was causing heaving within and through the floors of the residential units in the three Estates. It was alleged that

"this pressure result[ed] in the bulging and cracking of floors and/or the cracking of partition walls and door frames as a consequence of upward pressure from the floors on which the said walls and door frames are constructed". (paragraph 17 of the Statement of Claim)

4. At Paragraph 21 of the original Statement of Claim the Plaintiffs pleaded that

"investigations conducted by the Plaintiffs (which said investigations are continuing) reveal a substantial number of the units within the Estates were constructed using the Defendants infill."

5. The proceedings were entered into the Commercial List in November 2007 and were subject to extensive case management up to the trial of the action. The proceedings were assigned to Mr. Justice Gilligan for the purpose of case management and ultimately for the trial itself. In total the matter appeared approximately 16 times 31 July 2008, 14 October 2008, 21 October 2008, 22 October 2008, 23 October 2008, 4 November 2008, 13 November 2008, 3 December 2008, 11 December 2008, 16 Jan 2009, 20 Jan 2009 , 27 Jan 2009, 30 Jan 2009, 4 Feb 2009, 11 Feb 2009, 20 Feb 2009
for the purpose of dealing with a wide variety of pre-trial issues including the amendment of pleadings, delivery of particulars, the exchange of discovery, motions, further and better discovery, the settlement of an agreement with respect to a "basket of houses" which were to be representative of the houses throughout the three Estates, the exchange of witness statements, the appointment of two expert assessors, the arrangement for site visits and other ancillary matters necessary for the preparation of this case for trial.

6. Plaintiffs allegation was that the fill material which had been supplied by the first named Defendant had been used under the ground floor units throughout the three Estates and that this infill material contained pyrite which had undergone a chemical process resulting in the production of gypsum and the expansion of the fill material which in turn was causing heave with resulting damage to the properties in the three Estates.

7. In one sense the Plaintiffs' allegation was straight forward in that it was based on a contention that there was a singular cause to the problems which were manifesting across the three Estates. The Defendants, however, were (and are) making a very different case. In their Defence, delivered on the 31st January 2008, the Defendants denied the contention that the damage which was manifesting in these Estates (where it existed) could not be attributed to pyritic induced heave (a term applied by the parties during the trial, and continued in these submissions, to the expansive process caused by certain chemical reactions which results in pressure being exerted on adjoining structures) and, in fact, was caused by a number of contributing factors, which broadly speaking included, *inter alia*, defective design and construction, poor workmanship, , inadequate ground conditions and deficient quality control during the construction of the three Estates.

8. In particular, it was pleaded by the Defendants that pyritic swelling was not occurring in the manner alleged by the Plaintiffs, that no expansion of the infill resulting in heave was taking place underneath the ground floor slabs in the units in the three Estates, and that the damage which was manifesting (where it did manifest) was largely insignificant, was not of a structural nature and was attributable to relatively common defective construction practices. Furthermore, where the defects in question were more significant, the damage was more isolated in nature and was explainable by specific problems in the construction of the property in question.

9. From the outset the Defendants have been at a distinct disadvantage in that they were not involved in the construction of these three Estates and, therefore, had no access to contemporaneous information or knowledge relating to what actually occurred between 2003 and 2007 (the time during which the three Estates were built). On this basis a large scale information gathering exercise had to be implemented which involved a combination of specific queries (by way of particulars), investigations on site and, of course, a discovery process which sought to obtain all relevant material which would assist the Defendants in demonstrating that any damage which arose was not a result of heave arising from pyrite expansion but was in fact attributable to other causes.

10. At all times the Plaintiffs were fully aware of the extensive nature of the Defendants' defence which was clearly pleaded from the outset.

11. A notice for particulars was delivered on behalf of the Defendants (through their previous solicitors) on the 10th December 2007. This notice sought extensive particulars relating to a huge range of issues concerning how the Plaintiffs constructed the properties in the three Estates and, in particular, the extent to which and the locations in which it was being alleged the Plaintiffs used the Defendants' infill during the construction of the properties in the Estates.

12. In particular, and as has been outlined in the Affidavits of Mr. Peter Lennon sworn in connection with this application, specific queries were raised concerning the use of infill under particular properties and information was sought relating to the location of where the infill was placed, the precise houses which contained the first named Defendant's infill, the precise houses which did not contain the first named Defendant's infill and the precise houses where the first named Defendant's infill was mixed with infill from other suppliers.

13. Replies to these Particulars were furnished on the 10th January 2008, following which the Defendants delivered their Defence on the 31st January 2008. A Reply to the Defence was delivered on the 14th February 2008. The Defendants sought

voluntary discovery by way of a letter dated 10th March 2008. The letter seeking voluntary discovery was of necessity extensive and sought discovery of 111 different categories of documents. There followed an exchange of correspondence between the solicitors for the Plaintiffs and the Defendants relating to that letter, which ultimately culminated in an agreement by the Plaintiffs to discover 102 categories of discovery, covering a very broad range of issues relating to both the construction of the Estates and the development of the allegation of pyritic induced heave since the Estates were constructed and the homes sold.

14. Ultimately, the Plaintiffs made discovery in an Affidavit sworn by Mr. Brendan O'Byrne on the 30th June 2008 . There followed a Supplemental Affidavit sworn by Mr. O'Byrne on the 15th July 2008. Pursuant to these Affidavits the Plaintiffs discovered 56,070 non-privileged documents and 20,990 in respect of which privilege was asserted. A review of these documents was conducted between July and September 2008 and following this review a letter was sent by the Defendants' solicitors to the Plaintiffs solicitors on the 6th October 2008 which raised a range of queries to which I will return later. Ultimately, and on foot of directions issued by this Court, these queries led to an application to dismiss or strike out the Plaintiffs' case for failing to make proper Discovery, or, in the alternative, for an order for further and better discovery. An exchange of Affidavits took place which continued up to the 10th December 2008, following which the motion was compromised. Pursuant to that compromise, a Supplemental Affidavit of Discovery was sworn by Mr. Brendan O'Byrne on 23rd December 2008. I will return to this exchange and to the Affidavits sworn in the course of it later in these Submissions.

15. It should also be noted that throughout the period during which these exchanges relating to the Plaintiffs' discovery took place, the proceedings were under regular case management by this Court. In particular, in addition to the discovery issues, this Court had suggested with the agreement of the parties, that a selection of houses be chosen which would be representative of the issues arising in the trial. Ultimately, after intense negotiation between the parties the selection or "basket" of houses, was chosen and it culminated in a "Case Management Agreement", which was agreed by the parties and which was reported to the Court on the 3rd December 2008.

16. Thereafter, directions were given with respect to the exchange of witness statements and whereby the Plaintiffs were to furnish their witness statements on or by the 22nd December 2008 and the Defendants to furnish their Witness Statements on or by the 2nd February 2009. A trial date was also set for the 23rd February 2009.

17. The Plaintiffs furnished their witness statements on the 22/23nd December 2008 [That included 9 expert reports with hundreds of appendices and approximately 100 Witness Statements of Fact, culminating in well over 1,000 documents being furnished. In response the Defendants furnished their witness statements on the 2/3rd February 2009, which included 13 statements of expert witnesses and approximately 130 witnesses of fact. (It should be noted that the Fact Witness Statements of both sides included evidentiary Statements relating to evidential proofs.) In addition to the foregoing the Plaintiffs also served a re-amended Statement of Claim prior to Christmas 2008 and a second re-amended Statement of Claim on the 30th January 2009.

18. Further motions relating to discovery and a challenge to privilege arose following on from the Affidavit of Brendan O'Byrne dated 23rd December 2008, which challenge was heard by Mr. Justice McGovern. Ultimately the trial commenced on the 23rd February 2009, and ran for 52 days of hearing.

19. Evidence relating to the nature and process of pyritic induced heave has been heard during the course of the trial. In that regard the following persons have given evidence on behalf of the Plaintiffs. These are, Michael Maher (days 3-13), Alan Bromley (days 13-15), Michael Maher (day 16), Alan Bromley (day 17), Fred Shrimer (days 18-20), Alain Blanchette (days 21-25), Robert Donnelly (days 29-31), Brian Hawkins (days 33-38), Kieran Butterly and Gareth Healy (day 39), Peter Strogen (days 41-43), Robbie Goodhue (days 44-45), Marc-Andre Berube (days 45-46), Trevor Orr (day 47), Peter Strogen (days 48-49). In addition to the foregoing there has been a number of site visits during the course of the trial at which Paul Forde (on behalf of the Plaintiffs) and Pearse Sutton (on behalf of the Defendants) have given evidence. These site visits took place on day 26, 27 and day 32. In addition, there was a further site visit on day 40.

20. A vast amount of issues have been examined, canvassed and heard in evidence in the trial to date. In addition to this, a huge volume of reports and documentation have been prepared for the trial, including, two substantial written Opening Statements (one furnished by each side) and an oral opening submission by each side which took up the first two days of hearing.

The Discovery Process

21. As already stated the Defendants' solicitors, Lennon Heather, wrote to the Plaintiffs' Solicitors on the 6th October 2008 raising a series of queries arising from the Plaintiffs' discovery. It should be noted that most of the queries which arose out of the discovery review between July and September 2008, pointed to the absence of specific categories of documents some of which have since been disclosed in the new discovery furnished in late June and August 2009. As has been made clear in the Affidavits of Peter Lennon grounding this motion, the queries themselves demonstrated that the Plaintiffs knew of the Defendants concerns with respect to the absence of documentation at least 8 months prior to the new discovery being furnished in late June and August 2009.

22. In response to the letter dated 6th October 2008, the Plaintiffs' solicitors responded on the 9th October 2009 stating that the Plaintiffs were reviewing the queries and would respond by the 31st October 2008. However, on the 14th October 2008, it was indicated on behalf of the Plaintiff to the Court that a response would be forthcoming by the 20th October 2009. Given the vast volume of queries raised the Defendants were surprised that the Plaintiffs would have the ability to respond to those queries within such a short period of time. It is the Defendants' contention that when the response was furnished on the 20th October 2009 it exhibited a lack of willingness on the Plaintiffs' part to engage with the Defendants. This response is exhibited at book 3, tab 5 of Peter Lennon's Affidavit dated 15th September 2008.

23. As stated a very large number of queries was raised. The queries divided into very specific queries relating to what can be classified now as the "missing attachments" and the original queries on this issue [**confirm**] ran to approximately 3,000. There was also a large number of general queries pointing to specific gaps which were apparent in the Plaintiffs' discovery. In a letter dated 20th October 2008 the Plaintiffs gave a repetitive stock answer to the these general queries, which was in the following

terms

"you have listed types of documents you would have expected to see in this category… we have reviewed over 268,000 documents and provided you with the documents relevant with the agreed category of relevant Discovery as agreed inter party. If any of the above….types of documents were adequately requested in an agreed category of voluntary Discovery, such documents that are in the Plaintiff's power, possession or procurement have been discovered".

24. This responses did not satisfy the Defendants. Arising out of this response a motion was issued to strike out or dismiss the claim. This motion was grounded upon an Affidavit sworn by Peter Lennon on 30th October 2008. Exhibited at book 3, tab 6 of Peter Lennon's Affidavit dated 15th September 2008.
There then followed a series of Affidavits and exchanges which are all exhibited in book 3, tab 7 through to 16 of Mr. Lennon's Affidavit sworn on 15th September 2008.

25. The Plaintiffs' initial response was set out in an Affidavit of Mr. Butler, sworn on 10th November 2008, followed by another Affidavit of Mr. Butler, sworn on 12th November 2008. Again, averments were made in these Affidavits specifically stating that certain types of documentation were not in the possession, power or procurement of the Plaintiffs. Lennon Heather then wrote to BCM Hanby Wallace (17th November 2008), which probed further the averments and issues which the Plaintiffs had ventilated in the Affidavits of the 10th and 12th November and identify the Defendants' continuing concerns. That letter was responded on behalf of the Plaintiffs to on the 24th November 2008. However, it did not provide the answers with respect to obvious gaps to which the Plaintiffs were pointed.

26. Thus, further Affidavits were sworn by Mr. Lennon on the 1st and 2nd December 2008. Mr. Butler then swore a further Affidavit on the 5th December 2008, which, once more, specifically stated that certain of the documents which the Defendants complained were absent, were not in the Plaintiffs' power, possession or procurement. There then followed a further Replying Affidavit of Mr. Lennon sworn on behalf of the Defendants on the 8th December 2008 and a further Replying Affidavit of Mr. Butler sworn 10th December 2008. As the Affidavits themselves demonstrated the Defendants' queries were extensive and gave clear warning to the Plaintiffs that the Defendants were maintaining their discovery was deficient. Notwithstanding this, the Plaintiffs maintained the position on affidavit that they had furnished all relevant documentation in their power, possession and procurement and a compromise was reached with respect to the motion for further and better discovery on the basis of a Supplemental Affidavit of Discovery being sworn by Brendan O'Byrne dated 23rd December 2008. It is the Defendants' contention that the averments in Mr. O'Byrne's Affidavit have now been demonstrated as being manifestly deficient.

27. It should also be noted that a number of further issues arose after Christmas 2008, which should have alerted the Plaintiffs to the fact that the Defendants were maintaining there were serious deficiencies in the Plaintiffs' discovery. Most notably the site diaries of Mr. Colin Maleady were disclosed by the Plaintiffs in January 2009, despite repeated assurances by the Plaintiffs in correspondence and on affidavit that no further site diaries existed. The Maleady diaries totalled 8 in number. Given the averments of Mr. O'Byrne in his most recent Affidavit sworn on 6th October 2009 (which clearly illustrate a failure to contact personnel working for the Plaintiffs) this event surely should have triggered a review by the Plaintiffs of the extent to which they had not received relevant documents from various persons. However, despite this development, the Plaintiffs made no attempt to review their position with respect to either site diaries or other documents.

28. During the course of the cross-examination of Dr Maher on 10 March 2009 an issue arose as to the nature and extent of complaints received from homeowners of non Bay Lane houses culminating in the Court indicating that it would like such matters clarified. The next day Lennon Heather wrote to BCM seeking this information and information on the identity of houses in which the non Bay Lane material had been used. This latter issue had already been the subject of correspondence. The Plaintiffs responded on the 20th March 2009 identifying the non Bay Lane houses in respect of which proceedings had been issued and furnishing copies of those proceedings some of which had not previously been discovered despite being dated prior to 30 June 2008. The Plaintiffs also furnished a number of additional DBFL Reports which should have been discovered, but were not. Again, no attempt was made on that date to conduct a review of their Discovery despite the shortcoming which must have been obvious to the Plaintiffs. Letter of 20th March 2009 exhibited in the Affidavit of Peter Lennon dated 20th May 2009

29. In addition to this, on the 24th April 2009 the Plaintiffs wrote to the Defendants indicating that they had failed to discover invoices relating to the supply of infill by other suppliers, other than the first named Defendant in respect of the Drynam Estate. Letter exhibited in the Affidavit of Peter Lennon dated 20th May 2009.
Again, notwithstanding this oversight, the Plaintiffs failed to conduct a review of their discovery.

30. In addition to the foregoing and before the evidence of Dr. Strogen concluded on 12th May 2009, the Defendants wrote to the Plaintiffs seeking confirmation that all relevant documentation in relation to all houses which contained Non-Baylane material had been discovered. Letter exhibited in the Affidavit of Peter Lennon dated 20th May 2009. The response to this on the 15th May 2009 was that *"there is no further documentation discoverable or otherwise required to be produced under the various protocols and Court Directions in relation to this matter".* Letter exhibited in the Affidavit of Peter Lennon dated 20th May 2009.
Again, this statement was manifestly incorrect.

31. Ultimately, on the 18th May 2009, the Defendants' Solicitors received a letter from the Plaintiffs' Solicitors enclosing:

· Site Diary of Mr. Kevin Kelly dated 2008.
· Site Diary of Mr. Kevin Kelly dated 2006.
· Notebook of Mr. Kevin Kelly and Niall O'Toole.
· Site Diary of Mr. Kevin Kelly Junior dated 2007.

32. This was a remarkable development and given the specific assurances which were made with respect to all site diaries the failure of the Plaintiffs to disclose these at an earlier stage it was of grave concern to the Defendants.

33. The furnishing of the Kevin Kelly diaries (and other complaints about the inadequacy of the discovery made by the Plaintiffs) precipitated the bringing of this motion to dismiss or strike out the Plaintiff's claim for failure to make proper discovery. This motion resulted in a response from the Plaintiffs by way of a Replying Affidavit of Mr. Butler, sworn on 25th May 2009, which in turn generated a further response from the Defendants by way of an Affidavit sworn by Mr. Lennon on 27th May 2009. This

motion was then made returnable for hearing on day 51 of the Trial (28th May 2009) during which it was indicated on behalf of the Plaintiffs that there were further documents (at that stage approximately 400), which had not been discovered by the Plaintiffs. Various reasons were advanced for the deficiencies in the discovery at that stage.

34. On the 18th June 2009, the Plaintiffs informed the Court that the running total of non discovered documents was significantly higher and the fact that the total was then estimated to be in the region of many thousands. On the 25th June 2009, the Plaintiffs served an Affidavit of Discovery of Brendan O'Byrne. The *Schedule* of the Affidavit of Discovery ran to approximately 12 lever arch folders. Once the documentation was uploaded onto CT Summation it then became clear that the running total as of the 29th June 2009 was 47,433 documents filing 90 bankers boxes. Whilst some of these documents fell into new categories of Discovery (for which the Plaintiffs were not in default) these were insignificant in comparison to the total number of documents which were previously discoverable and for which the Plaintiffs were in default. This issue is canvassed in detail in the affidavits sworn in connection with the application.

35. On the 14th July 2009, the Defendants received a further letter indicating that further documents had been omitted from the Affidavit of Discovery of Mr. Brendan O'Byrne of 25th June 2009. These documents consisted of invoices, a further site diary, extracts from DBFL files, drawings and surveys and test results.

36. On the 15th July 2009, the Defendants received a further letter from BCM Hanby Wallace indicating that further extracts of notebooks of Niall O'Toole and a further site diary of Cathal O'Neill had been obtained and that these would now be discovered in conjunction with the other documents already received.

In addition to the foregoing, the Defendants wrote to the Plaintiffs on the 12th July 2009 in relation to a claim of privilege which was being maintained over thousands of documents discovered in the Affidavit of 25th June 2009. The response to this letter came on the 20th July 2009. Privilege was waived by the Plaintiffs over a number of these documents. On the 23rd July 2009 the Defendants received a letter from the Plaintiffs stating that there were further problems with the Affidavit of Discovery dated 25th June 2009 and that through a further electronic search a further "pool" of documents had been discovered. On the 24th July 2009, the Plaintiffs confirmed that this pool amounted to approximately 8,000 documents. Ultimately when these documents had been reviewed by the Plaintiffs the pool in question amounted to over 2,000 further documents not previously discovered.

37. In total, therefore the Plaintiffs have sworn the following affidavit of discovery

1. Affidavit of Discovery of Brendan O'Byrne 30/06/2008
2. Supplemental Affidavit of Discovery of Brendan O'Byrne 15/07/2008
3. Supplemental Affidavit of Discovery of Brendan O'Byrne 31/10/2008
4. Third Supplemental Affidavit of Discovery of Brendan O'Byrne 24/11/2008
5. Supplemental Affidavit of Discovery of Brendan O'Byrne 05/12/2008
6. Supplemental Affidavit of Brendan O'Byrne 10/12/2008
7. Supplemental Affidavit of Discovery of Brendan O'Byrne 23/12/2008
8. Supplemental Affidavit of Discovery of Brendan O'Byrne 19/01/2009
9. Affidavit of Discovery of Brendan O'Byrne 26/01/2009
10. Supplemental Affidavit of Discovery of Brendan O'Byrne 23/02/2009
11. Supplemental Affidavit of Discovery of Brendan O'Byrne 26/02/2009
12. Supplemental Affidavit of Discovery of Brendan O'Byrne 25/06/2009
13. Supplemental Affidavit of Discovery of Brendan O'Byrne 07/08/2009
14. Confirmatory Affidavit of Discovery of Brendan O'Byrne 07/08/2009

Summary of the Current Position

38. In total the new Discovery contains 51,937 documents. The Plaintiffs maintain that 12,488 of these documents were caught under category 112, and that 3,464 of these documents were caught under category 313 (categories which contained documents of the Plaintiffs claim which were not previously discoverable). However, the extent to which these documents themselves which are classified under these categories were not previously discoverable is a matter in dispute between the parties. The Defendants are of the view that a significant number of these did fall under other categories of discovery which ought to have been discovered back in July 2008.

39. After a review of these documents was conducted throughout July and August 2009 the Defendants served a further affidavit (sworn by Mr. Lennon on 15th September 2009) in support of the motion to dismiss the Plaintiffs' claim for failure to make proper discovery or, alternatively, to seek a mistrial. That Affidavit outlined in detail that the new documentation contained highly significant information which had a direct impact on the Defendants' defence of the proceedings and illustrated that the trial had been conducted in circumstances where the Defendants and the Court had not been apprised of all of the facts. It is the Defendants' contention that the new documentation has a direct bearing on a range of issues which go to the heart of the question of liability in this case. In particular ,it is the Defendants' contention that the vast quantity of documents now furnished have a direct bearing on:

(a) Investigations and lines of enquiry which the Defendants would have pursued.
(b) The selection by the Defendants of the basket of properties.
(c) The allocation of resources which the Defendants employed to inspect and examine the basket which was decided without the full facts being made available.
(d) The content and focus of the Defendants' expert reports and indeed the Plaintiffs' expert reports.
(e) The conduct of the defence from a tactical perspective.
(f) The cross-examination of witnesses called by the Plaintiffs to date (13 in total).
(g) The evidence presented to this Court by the Defendants and by the Plaintiffs during the site visits which took place on days 26, 27, 32 and 40 of this trial.

40. On the basis of the above and has been outlined to the Affidavits of Mr. Lennon grounding and supporting this application,

the Defendants contend that they have been prejudiced to an irretrievable extent and that the Plaintiffs' failure to discover documents, and to conduct a proper review of their own processes and methods in light of clear warning signals that their discovery was insufficient, requires that the claim be dismissed. In the alternative, the Defendants' contend that the proceedings to date be declared a mistrial in circumstances where the prejudice suffered by the Defendants can only be cured by being put in the position they would have been in had full and proper discovery been made in July 2008.

41. In this regard, the Defendants contend that due to the unique nature of these proceedings the Defendants have been required to undertake a full scale investigation of the three Estates which is a massive and onerous undertaking. An investigation of this type can only be properly conducted in light of all relevant information which provides context and direction to those investigations. This particularly applies in circumstances where the Defendants were not party to or involved in any way to what occurred during the construction of these Estates and are examining the position a number of years after the Estates have been completed. In circumstances where the Defendants contend that the seeds from which the damage now manifesting have grown were sown during the construction period (2003-2007), and where the Defendants are required to begin to investigate the origins of this damage many years after the fact it was absolutely vital that they are were possession of all relevant factual material relating to how these sites were constructed and the issues which arose at the time.

42. In those circumstances the Defendants would be gravely prejudiced by this trial proceeding where documentation has only now come to light which would have substantially altered and redirected many of the investigations, inspections and examinations which were conducted by the Defendants in the period leading up to the choice of the basket of houses and the final preparation of the Defendants' expert reports and witness statements. Furthermore, given that the Defendants have presented their case through cross-examination and given that the approach to cross-examination would have been substantially reconsidered in light of the new information. The Defendants' prejudice can not be cured and the proceedings should be dismissed or, alternatively, a mistrial should be declared.

43. The following Submissions will outline some of the legal principles which are relevant in support of this Application.

44. Section 1 deals with the duties of both a Solicitor and Litigant in making Discovery and outlines how those duties were manifestly broken in the original Discovery process conducted by the Plaintiffs prior to the 1st July 2008. The second Section outlines the legal principles involved with respect to the necessity of parties to engage in the Discovery process, particularly in circumstances where specific queries have been raised indicating absence of documentation and in circumstances where the parties have been afforded the benefit of substantial priority with respect to judicial resources and special case management. The third Section outlines the law on dismissing proceedings for failing to make proper discovery. The fourth Section outlines the legal principles and the jurisdiction of the Court to declare a mistrial.

1. DUTIES AND DEFICIENCIES IN RELATION TO DISCOVERY MADE
I APPLICABLE LEGAL PRINCIPLES
45. It may be of assistance to the court briefly to outline the sequence in which these legal principles are considered below: Section (A) examines the general duties of a solicitor in the discovery process; section (B) considers the duties which are imposed on actual litigants and to what extent a litigant can defer those responsibilities to its legal representatives; Section (C) outlines the legal principles relating to e-discovery both in this jurisdiction and in England, the United States and Australia.
46. The legal principles are then applied (Section II) to the circumstances arising in this Motion seeking to dismiss or strike out the Plaintiffs' claim for failure to make discovery and / or a mistrial.
A General Duties of a Solicitor in Discovery Process
47. It is well established that a heavy onus lies on solicitors acting on behalf of parties to conduct a full investigation and to take such other positive steps as may be necessary so as to ensure, so far as is possible, that disclosure of all relevant documents is fully and properly made.
48. The starting point for a review of the legal principles applicable to the duties of a solicitor in the discovery process is the House of Lords decision in ***Myers v Elman.*** [1940] A.C. 282. Lord Wright described the duty as follows:
"The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to." Ibid, at 322.
49. Viscount Maugham considered the obligation of a solicitor who subsequently realises that the affidavit of discovery provided by his client was untrue and omitted relevant documents:
"The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter; and if the client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon the file.
….. But suppose that, before the action comes on for trial, facts come to the knowledge of the solicitor which show clearly that the original affidavit by his client as defendant was untrue and that important documents were omitted from it, what then is the duty of the solicitor? I cannot doubt that his duty to the plaintiff, and to the Court, is to inform his client that he, the solicitor, must inform the plaintiff's solicitor of the omitted documents, and if this course is not assented to he must cease to act for the client. He cannot honestly contemplate the plaintiff failing in the action owing to his client's false affidavit. That would, in effect, be to connive in a fraud and to defeat the ends of justice. A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false <u>owes it to the Court to put the matter right at the earliest date</u> if he continues to act as solicitor upon the record." Ibid at 293. (emphasis added)
50. The duty to the court has therefore been recognised in England as:
"one on which the administration of justice very greatly [depends], and there [is] no question on which solicitors in the exercise of their duty to assist the court, ought to search their consciences more." English Practice Note [1944] W.N. 49.

a. In recent years, the role of solicitors in relation to the discovery process has also been considered by the Irish courts. In ***Murphy v J. Donohoe Limited*** [1996] 1 I.R. 123. applications were made to the High Court to strike out the Defences of the second and fifth Defendants on the basis that they had failed to comply with orders to make discovery. Although the Supreme Court allowed the appeal of the Defendants who had their Defences struck out, it expressly endorsed the learned trial judge's statement of the law on the obligations of solicitors in relation to discovery. In the High Court, Johnson J (as he then was) quoted from paragraphs 39 and 45 of ***Halsbury's Laws of England*** (4th ed.), Vol. 13 in relation to the obligation to search and the duty of solicitors in this regard:

"Careful search must be made for all relevant documents in the party's own possession and proper inquiries and efforts made with regard to those which are not. His solicitor is under a special duty to advise him as to what documents should be included in the list … A client cannot be expected to realise the whole scope of his obligation, regarding discovery without the aid and advice of his solicitor and the latter has a particular duty, as an officer of the court, carefully to investigate the position and, as far as possible, to see that full and proper disclosure of all relevant documents is made. The solicitor cannot simply allow the client to make whatever list of documents the client thinks fit nor can the solicitor escape the responsibility of careful investigation or supervision. It is his duty to take positive steps to ensure that the client appreciates the duty of discovery and the importance of not destroying documents which might have to be disclosed, and in the case of a corporate client to ensure that knowledge of this burden is passed on to anyone who may be affected by it. Indeed, the solicitor owes a duty to the court carefully to go through the documents disclosed by his client to make sure, as far as possible, that no relevant document has been withheld from disclosure. If the client will not give him the information he is entitled to require, or if the client insists on making a list of documents or swearing an affidavit verifying the list which the solicitor knows to be imperfect, it is the solicitor's duty to withdraw from the case. If the solicitor is guilty of misconduct in this respect, he may be ordered personally to pay or to contribute to the costs of the action. In this matter a solicitor must search his conscience." (emphasis added)

51. Johnson J noted the submission of counsel in the case that the failure to make proper discovery was not deliberate but due to *"a combination of inefficiency, stupidity, confusion or incompetence."* [1996] 1 I.R. 123 at 131. However, Johnson J took the view that if this were an excuse defendants could continuously hide behind employees who demonstrated such attributes. He concluded that he could not rely on them to honestly fulfil the requirements imposed upon them by the orders of the court and made orders striking out their Defences.

52. As alluded to above, the Supreme Court expressly endorsed the High Court's statement of the law. However, the Supreme Court ultimately concluded that the law had been incorrectly applied to the facts of the case. Giving the judgment of the court, Barrington J. identified three matters to which the learned trial judge did not have appear to have attached sufficient weight as follows:

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

53. Barrington J. noted that the Defendants had filed a further affidavit of discovery and indicated that the proper course would be for the parties, or one or more of them, to apply in the High Court for directions and for such further order for discovery as might be necessary or appropriate.

54. In ***Irish Nationwide Building Society v Charleton***, Unreported, Supreme Court, 5th March, 1997. Murphy J. (in the Supreme Court) commented on the respective roles of solicitor and client in preparing an affidavit of discovery:

"There may be very real difficulty … in applying [the definition of relevance] to the circumstances of any particular action. Frequently the deponent will be familiar with the documents in his possession, power or procurement but have little understanding of the manner in which the contents of any such document might advance or damage the case of either party. It is this problem which imposes on the solicitor to the party making discovery the duty to take positive steps to ensure that his client appreciates the extent of the obligation imposed by an order for discovery. The solicitor owes a duty to the Court carefully to go through the documents disclosed by the client to make sure, as far as possible, that no relevant document has been withheld from disclosure. However the deponent cannot abdicate his duty in relation to disclosure to his legal advisors nor could the lawyers accept the responsibility of inspecting all of the documents in the possession of his clients. Careful consultation between the solicitor and the client should enable the deponent to extract all documents in his possession or procurement which are relevant - in the wide sense to which that word is used in relation to discovery - to matters in issue in the proceedings and to obtain the advice of his lawyers, if necessary, in relation to any particular document the discoverability of which might be in doubt." (emphasis added)

55. In the ***Irish Nationwide*** case above, Murphy J also referred to the decision of the English High Court in ***Woods v. Martins Bank Limited***. [1959] 1 Q.B. 55. In that case Salmon J. discussed the extent of a solicitor's duty in relation to discovery:

"No doubt the defendants' solicitors explained to their clients that they must disclose all relevant documents which were or had been in their possession. The solicitors' duty, however, does not stop there. It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their clients to make sure, as far as possible, that no relevant documents have been omitted from their clients' affidavit." (emphasis added)

56. Having regard to the errors made, the Supreme Court directed the Plaintiffs to review the totality of their discovery and deliver a further affidavit in substitution for the earlier affidavits delivered.

57. In ***W. v. W.*** Unreported, Supreme Court, 25th November, 1999., a matrimonial case, the Supreme Court took the further opportunity to address the issues of failure to make discovery and the role of solicitors in the discovery process. Barron J. stated:

"When the failure to make proper discovery is deliberate, this is perjury. The courts have the remedy to strike out the pleading of the perjuring party. Unfortunately, this remedy is seldom granted because, in my view, too great a leniency is given to persons in default. It is one thing to indulge in a bona fide legal dispute as to whether or not any particular document is relevant and should therefore be discovered. It is a totally different thing to delay deliberately in furnishing discovery or in concealing deliberately documents which are known to be relevant. It is this latter behaviour for which there should be an adequate sanction.

…..

Solicitors should advise their clients as to their obligations in relation to making full disclosure and, if necessary, the Court should not be slow to make a solicitor personally liable for costs thrown away by unnecessary and unreasonable recalcitrant behaviour apparently on behalf of their clients. This applies equally to the solicitor whose client is seeking the information as to the solicitor whose client is refusing it."

58. In ***Atlantic Shellfish Limited v. Cork County Council*** Unreported, High Court (Budd J.), 15th August, 2006. Budd J. also addressed the duty of a solicitor in relation to discovery:

"… there is imposed on the solicitor for the party making discovery the duty to take positive steps to ensure that the clients appreciate the extent of their obligation imposed by an order for discovery. The solicitor owes a duty to the court carefully to explain the extent of the duty to the client and to go through the documents disclosed by the client to make sure, as far as possible, that no relevant document has been withheld from discovery and to ensure that the schedule should include those documents and material which it is reasonable to suppose contain information which might enable the Plaintiffs' advisers to advance their case or to damage that of the Defendants. For example, in the present case this would include the manner in which the Defendants conducted their business and correspondence between each other relevant to the matters in issue in the case and also the correspondence with experts and assessors and producers of reports and recommendations as to the peril of pollution and contamination of the oyster beds and disease and the methods for prevention thereof. The First and Second Named Defendants and each of their officials and agents and each of their solicitors are likely to be peculiarly in the position of having the vital reports, records and informative materials in their possession or procurement and must be conscious of the onus on them to be careful to make a full and proper discovery. I would expect that in respect of the aspect of damages and quantum of damages the boot may be on the other foot in the sense that the Plaintiffs should have the basic information reports and accounts in their procurement. It is to be hoped that a comprehensive report from an appropriately expert accountant may reduce the quantity of documentation at least on this part of the case." (emphasis added)

59. In a recent Commercial Court case, ***Balla Lease Developments v. Keeling***, Unreported, High Court (Kelly J.), 21st December, 2006. Kelly J. held that the court is entitled to look to solicitors to ensure that the discovery process is conducted honestly, ethically and is not abused. The solicitor acting for the Plaintiff had not created contemporaneous notes of various meetings at issue in the dispute. In advance of the request for discovery, which was a number of years after the meetings took place, very detailed attendance notes were created by the solicitor from his diary, telephone records and from memory. These attendance notes were dated as of the date of the meeting rather than the date of their creation and the misleading impression was given that they were made contemporaneously. Although the proceedings had been compromised, Kelly J. decided to deal with the solicitor's conduct under the supervisory jurisdiction of the High Court and commented in relation to the obligation of solicitors as follows:

"The court is entitled to expect the highest standards of probity and ethical behaviour on the part of solicitors. That is particularly so in the conduct of litigation.

Discovery of documents is a most useful process in the conduct of litigation. The making of accurate and correct discovery relies to a very great extent upon solicitors who advise clients on the topic. It is to solicitors that the obligation primarily falls to ensure that discovery is made in accordance with both the letter and spirit of the agreement made for such discovery or the court order which directs it. There is a considerable element of trust involved in the whole discovery process. The court must be entitled to look to its officers to ensure that the process is conducted honestly, ethically and is not abused." (emphasis added)

60. Kelly J. concluded that the hearing into the solicitor's conduct was not a sufficient mark of disapproval by the court and accepted the offer by the solicitor to make a contribution of €10,000 to charity.

(B) Duty of the litigant and the extent to which a litigant can be absolved of fault by reason of the errors of its legal advisors:

61. Some of the preceding cases have acknowledged that a litigant cannot be expected to realise the whole scope of his obligations with regard to discovery without the aid and advice of his solicitor and, accordingly, it is crucial that the solicitor properly fulfils his duty to explain those obligations. However, the order for discovery is directed to the client rather than the solicitor and, while the solicitor bears a heavy responsibility to ensure compliance, it is ultimately the duty of the client to comply with the order.

62. In the recent case of ***Dunnes Stores (ILAC Centre) Limited v. O'Reilly*** Unreported, High Court (Clarke J.), 23rd April, 2008. Clarke J. confirmed that, while litigants might not fully understand the scope of their obligations or how they must be fulfilled, they are ultimately charged with swearing the affidavit of discovery and have duty to take and follow proper legal advice in such circumstances:

"Discovery orders are made by the court (or an agreement is reached by the parties which has a similar effect) on the basis of defining the obligations of the parties concerning disclosure of documents. The book then passes to those charged with swearing the affidavit of discovery, upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. It is, of course, the case that mistakes can and do happen. Such mistakes can range from the entirely innocent and understandable to those which might be characterised as blameworthy to a greater or lesser extent. At the other extreme are cases where there has been a deliberate failure to disclose material information. At a minimum it is manifestly clear, on all of the evidence, that those involved in making discovery on behalf of the landlords in this case did not take and act upon proper legal advice as to their obligations in relation to discovery. It is, of course, the case that individuals themselves may not fully understand either their overall obligations in relation to discovery, may not be able to properly address questions of relevance which may arise as to whether documents should properly be included, and most certainly may not be able to deal with legal issues, such as privilege, which may arise. However, the obligation on such parties, in those circumstances, is to take proper legal advice and to act upon it."

63. Here, Clarke J. took the view that as the landlords, who had ample resources available to them and had access to the best of legal advice, failed to take the elementary step of ensuring that they knew what their obligations were and of taking advice in respect of any questions of difficulty that might arise, they failed to comply with their disclosure obligations and were in significant breach of the trust that was placed on them to deal with discovery in a fair and proper manner. Here it emerged during the course of the hearing that a significant volume of documentation relevant to the issue had not been discovered by the landlords even though the adequacy of discovery had been queried pre-trial by the Plaintiff. Clarke J held that, in the circumstances of that case, since it was still possible to have a fair trial, the trial should take place and *"the consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned."*

64. The extent to which a litigant will be allowed progress a claim despite a breach of the duties of its legal representative in the discovery process has been the subject of judicial scrutiny. The decision of ***Geaney v Elan Corporation plc.*** [2005] IEHC 111.Unreported, High Court (Kelly J.), 13th April, 2005. is authority for the proposition that acting on incorrect legal advice may not excuse a party from fulfilling his discovery obligations. Here the defendant failed to make discovery of relevant documents due to, *inter alia,* incorrect legal advice regarding the documents that were captured by the order for discovery. Kelly J. was extremely dissatisfied with the manner in which the defendant's discovery obligations had been discharged and described the defendant's approach as being "*seriously sub-standard*". He ordered further and better discovery and indicated the court's displeasure by way of an adverse costs order. He lifted a stay on the enforcement of an earlier costs award which had been made on the hearing of the original motion for discovery and also ordered the defendant to pay the costs of the application to strike out (to include all reserved costs) with such costs being paid on a solicitor and client basis. Kelly J. appeared to make no allowance for the fact the defendant had acted on legal advice in making his order. However, it should be noted that the court's displeasure stemmed from a series of deficiencies with the discovery that had been made, including some for which the Defendant bore responsibility. For example, notes of the Secretary of the Defendant's Board of Directors were missing and oral testimony on this issue was deemed not to have been satisfactory.

65. By way of analogy, it is instructive to consider that while a party seeking an extension of the time limited for bringing an

appeal must show the existence of something like mistake, mistake of counsel or solicitor as to the meaning of the relevant rule is not sufficient. This principle was set out in ***Eire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.*** [1955] I.R. 170. and confirmed more recently by the Supreme Court in ***Brewer v Commissioners for Public Works.*** [2003] 3 I.R. 539. Accordingly, a court in exercising its discretion may, in an appropriate case, refuse to extend the time for appeal where there had been an error in interpreting the relevant rule, not by the litigant, but by its legal representatives.

66. Similarly, Peart J.'s *obiter dicta* comments in ***Moynihan v. Dairygold Co-operative Society Limited*** Unreported, High Court (Peart J.) 13th October, 2006. suggest that a solicitor's mistake or inadvertence in failing to serve a summons within time might not always amount to a good reason for permitting the summons to be renewed:

"… in many cases coming before me, and no doubt other judges who may hear such ex parte applications for renewal of summonses, the basis for seeking renewal is that the question of serving the summons within one year following its issue was simply overlooked by the solicitor. In other words a mistake or inadvertence occurred on the part of the solicitor.

In many such cases, it is pleaded that the defendant has already been notified of the accident and is therefore on notice at least of the risk that proceedings may issue. In such circumstances, depending on the length of the delay which has occurred, it may be a difficult task for a defendant to plead that it is really prejudiced in the defence of the proceedings. In such circumstances the prejudice to the plaintiff by being deprived of the opportunity of pursuing his/her claim against the named defendant may seem greater than the prejudice, such as it may be, to the defendant who is expected to defend proceedings which have not been served, but of the possibility of which the defendant was made aware. In such circumstances the Court, having a wide discretion in the matter, may well come to the view that the mistake or inadvertence of the solicitor is a "good reason" for renewing the summons, even where to do so is to deprive the defendant of the opportunity of availing of the defence under the Statute of Limitations.

But I caution solicitors about any presumption that a mistake of that kind will continue to be regarded with the sort of benignity to which I earlier referred. A plaintiff in such a case may enjoy another possible remedy against a solicitor who makes a mistake which results in the lapse of the summons. That claim would involve establishing that the solicitor's negligence has resulted in loss, and the Court on hearing the application to renew may be entitled to take into account, in weighing the competing interests, the fact that the plaintiff may not be necessarily be deprived of any remedy if the summons is not renewed.

> *I make reference to these matters, because in the past year especially I have noticed a marked increase in the number of applications for renewal of summonses where the only reason for the failure to serve within the allowed period of twelve months is such an oversight on the part of the solicitor. Where a defendant comes before the Court to set aside an order of renewal in such circumstances, and the Court is considering the competing interests, it is hard to see that much weight in the basket of interests to be weighed should be given to the solicitor's mistake."*

67. Therefore, although the consequence for the litigant might be harsh, a court may decide that renewal is not allowed and the fact that the litigant might have a remedy against the solicitor could be a factor in the court's decision.

68. It is respectfully submitted that the approach suggested by Peart J. in ***Moynihan v. Dairygold Co-operative Society Limited*** is the appropriate approach to be applied when assessing breach of duty for failure to comply with discovery, *i.e.* that where the court is considering the competing interests, the fact that the mistake is a solicitor's mistake is but one factor, which arguably should not be given much weight in the basket of interests to be weighed. While in the absence of prejudice a court might understandably be slow to actually punish a client for the mistake of his solicitor, where competing interests must be balanced in the exercise of a judicial discretion, the fact that the mistake is one of a solicitor should not necessarily amount to an excuse or even weigh too heavily in the balance.

69. Similarly, in the context of applications to dismiss proceedings on the grounds of inordinate and inexcusable delay, the Supreme Court has signalled that it may not be sufficient for a litigant to rely on the fault of his advisor. In ***Gilroy v Flynn*** Hardiman J observed: [2005] 1 I.L.R.M. 290.

"These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one." (emphasis added)

70. In ***Desmond v MGN Ltd,*** the Supreme Court again referred to the above proposition, Geoghegan J observing:

"If a plaintiff in defamation proceedings has decided, even, as here without any suggestion of mala fides, although the appellant suggests it was a wholly tactical decision, and even on the recommendation or advice of his legal advisors, not to progress his proceedings at least within the normal time limits prescribed, the delay thereby caused may not be excusable." [2008] IESC 56

71. It has also been acknowledged by the English courts that a party will not always be able to blame his legal advisors where there has been a failure to comply with an order. Matthews and Malek, *Disclosure* (3rd ed.) para 13.10, p. 423. In ***Hytec Information Systems Limited v Coventry City Council*** [1997] 1 W.L.R. 1666. the defendant failed to comply with an 'unless' order for further and better particulars of defence and counterclaim and Ward L.J. stated as follows:

"Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent … were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. In my judgment, on the facts of this case, the defendant cannot escape the quite manifest failings of counsel who was instructed on its behalf." Ibid, at 1675-6.

72. The courts in this jurisdiction also have an inherent power to control their own procedure *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. and, there is no reason why clients should not be fixed with the consequences of errors made by their legal representatives in the manner envisaged by the court in ***Hytec Information Systems Limited v Coventry City Council (***and in the US decision of ***Link v. Wabash*** *discussed below)*.

73. In the United States, there is a consistent line of case law on the inherent power of the court to dismiss an action for disobedience of a court order, even where that disobedience stems from the actions of counsel. In ***Link v. Wabash Railroad Co.*** 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) a majority of the United States Supreme Court upheld the striking out of a personal injuries claim where the plaintiff's counsel failed to appear at the pre-trial. Delivering the opinion of the court, Harlon J. confirmed that a client is ordinarily bound by the acts of his attorney:

"There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-

agent, and is considered to have "notice of all facts, notice of which can be charged upon the attorney." Ibid., 633-34.
74. In ***United States of America v. Reyes*** 307 F3d 451 (6th Cir. 2002). the claimant appealed from an order of forfeiture from the order denying his motion to set aside judgment under Rule 60(1)(b) of the Federal Rules of Civil Procedure, which allows a district court to vacate a final judgment because of *"mistake, inadvertence, surprise, or excusable neglect"*. Here, the claimant's counsel was dilatory in providing initial discovery three months after it was due, failing to provide further requested discovery, and in failing to respond to the motion to strike, even after the district court *sua sponte* granted an extension of time.
75. Although in considering the issue of excusable neglect, the court noted that the performance of the client's attorney must also be taken into account, it stated that the Supreme Court had expressly rejected the suggestion that it would be inappropriate to penalise clients for the omissions of their attorney and, on the contrary, held, clients must *"be held accountable for the acts and omissions of their chosen counsel." Ibid.*, quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*,507 U.S. at 396-97, 113 S.Ct. 1489. The court therefore held that the District Court did not abuse its discretion when it denied Rule 60(b) relief based on the claimant's failure to demonstrate excusable neglect.
The actions of the Plaintiffs in light of these principles.
76. It should be pointed out at this juncture that the seeds which led to the Plaintiffs' failure to make proper discovery were sown by a number of culpable acts and omissions by both the Plaintiffs themselves and their solicitors. It appears (according to Mr Brendan O'Byrne) that the Plaintiffs' solicitors wrote to Menolly Homes in early 2008 advising them of their discovery obligations. This letter is not exhibited in the affidavit of Mr O'Byrne and then therefore the precise extent of this advice is unclear.

77. As is acknowledged by Mr O'Bryne in his affidavit of 7th October 2009 the "*Plaintiffs' obligations related to a vast range of document*". It was clear to the Plaintiffs that they were bringing litigation on an extraordinary scale relating to damage to properties over three separate housing estates and that there were documents in the possession of a huge number of people over a very extensive period of time which would need to be retrieved. What is apparent from the explanations of Mr O'Byrne in his affidavit of 7th October 2009 is that given the awareness of the scale of the task which faced him there was no corresponding willingness to meet the challenge involved by reason of implementing a proper system for documentary retrieval. In those circumstances and given what we know now it is very difficult to understand how Mr O'Byrne can state that "*there was no doubt that when I swore the Affidavit of Discovery on behalf of the Plaintiffs I honestly believed the Plaintiffs had complied with their discovery obligations in full*".

78. It is very difficult to understand how Mr O'Byrne can say this while at the same time he acknowledges that the systems in place in Menolly with respect to document archiving and storage were so fundamentally haphazard. In fact Mr O'Bryne himself agrees that it is now "*painfully evident how certain documents held at locations held at the farm, the plant yard and the site offices were missed during the process leading to the 2008 discovery*". The Defendants contend that if it is painfully evident now it should have been equally painfully evident in early 2008 (and thereafter when queries were raised) Given the obvious nature of the difficulties which the Plaintiffs would have had in ensuring all relevant documents were retrieved the statement that Mr O'Byrne honestly believed everything had been furnished lacks credibility. Indeed, the evidence suggests the reason that the Plaintiffs may not have known of the existence of very significant numbers of additional documents was because the Plaintiffs did not want to know.

79. There are a number of indicators in Mr O'Byrne's affidavit which demonstrate that the Plaintiffs effectively shut their eyes to the manifest problems in their documentary retrieval system. There was clearly a lack of understanding as to the issues in the proceedings and the relevant documentation with respect to those issues. This was acknowledged at paragraph 21 of Mr O'Byrne's affidavit (7th October 2009) where he states that the allegations with respect to workmanship, design, ground conditions and other issues were never fully particularised. However, when one looks at the letter which Mr Pat Dalton, Chief Financial Officer of Menolly Homes sent on 28th January 2008 (paragraph 24 of Mr O'Byrne's affidavit 7th October 2009) it is clear that no reference whatsoever is made to the general particulars which were alleged in the defence of the Defendant. There is no mention of documentation relating to workmanship, design, ground conditions or other issues which were very adequately set out in the defence.

80. In addition, the extent to which Menolly Homes sought out advice and guidance with respect to the interpretation of the categories of discovery and with respect to the range of documents which they were obliged to discovery is very unclear. Whilst Mr O'Byrne has argued that various advices were received during 2008 from BCM Hanby Wallace11 Paragraph 19 of the Affidavit of Brendan O'Byrne dated 7th October 2009., the nature and extent of those advices is not clear and certainly Mr O'Byrne appears not to have been himself aware of the issues arising in this case which were manifestly clear from the defence delivered by the Defendants.

81. Given the scale of the task which faced the Plaintiff it is also surprising that the Plaintiffs decided, in large part, to delegate the responsibility of document retrieval, to so few people. Mr Charlie Blaine was asked "*to work solely on the discovery process*"22 Paragraph 29 of the Affidavit of Brendan O'Byrne dated 7th October 2009 . Furthermore given the scale of the operation it is astonishing that one man (who is not a trained lawyer nor was he necessarily privy to the archiving and filing systems in Menolly Homes) would be assigned the task of retrieving every single document for the purpose of discovery. Mr O'Byrne argues that Mr Blaine had general experience in the construction industry but this does not render him in any way qualified to retrieve all necessary documents and in particular such experience hardly qualifies him to know where all the documents would be. Ultimately this led to a shockingly under-resourced mechanism for retrieval of documentation where, for example, it is stated that "*Mr Blaine on occasion visited locations where he believed documents of a specific nature that ought to exist may be held*" and "*on one occasion, he went to the house of a Menolly employee in order to collect documents*". It must have been patently obvious to the Plaintiffs and their advisers that this was simply not sufficient. One may pose the question, how were the Plaintiffs to retrieve all relevant documents from so many people over such a long period of time in relation to so many homes with this form of operation in place?

82. The Plaintiffs state that Mr Blaine was assisted by a Mr David Clonan but it appears that Mr Clonan was only involved in the identification and collation of documents which "*dealt with or were generated by the quantity surveyors*" in respect of three estates "*and he was specifically assigned to search for such documentation at the Lucan office*33 Paragraph 32 of the Affidavit of Brendan O'Byrne dated 7th October 2009 . Furthermore it appears that Mr Blaine was assisted by a Mr Joe Sweeney of DBFL but this was only for the purpose of reviewing documentation in BCM Hanby Wallace. It is manifest that the documentary retrieval process was left in the hands of very few people and whilst Charlie Blain was familiar with what happened on the Drynam and Myrtle estates (as he was site foreman) he would not necessarily have had the requisite knowledge to know about document retrieval.

83. Whilst Mr O'Byrne has argued in his affidavit that the discovery issue was discussed on a regular basis within Menolly, it is unclear how the Plaintiffs overlooked so many documents which appeared to be located in so many obvious locations. The Plaintiffs must have been recognised that they faced a large scale task in ensuring proper document retrieval yet the steps taken were, as the Plaintiffs acknowledge, manifestly deficient. For example, the Plaintiffs have pointed out that the documents were not organised from a central source and that various documents were held in various different locations for example, in Lucan, the plant yard and the farm and, furthermore, that diaries and papers were in the possession of Menolly personnel who would need to be contacted.

84. Given that this was the case and given that the Plaintiffs were fully aware of this in early 2008 it is amazing that no system was put in place to ensure retrieval of documentation from these people. Furthermore, there is no evidence of the extent of or nature of the discussions between the Plaintiffs and their legal advisors as to the methods which would be adopted to ensure retrieval of these documents. The haphazard and wholly unreliable manner in which the discovery process was carried out by the Plaintiffs was evident from their failure to discover the Peadar Monaghan reports. This documentation was, on the Plaintiff's admission, on the shelves in an office in Menolly headquarters in Lucan. How this was missed is not explained . It is inconceivable that when the defence in these proceedings was delivered (and when issues such as workmanship were raised) that the Plaintiffs did not recall or identify the manner in which the report exposed serious issues with respect to workmanship.

85. Another example of the failure of the Plaintiffs properly to understand the breadth of their discovery obligations is the fact that Mr O'Byrne has stated in his affidavit that "*some Menolly personnel appear to have been of the mistaken view that only documents pertaining to the few estates relating to pyrite had to be produce*d". It should be noted that this was a specific issue which was raised by the Defendants. In the grounding affidavit of Peter Lennon to this motion (dated 20th May 2009) the point was raised that it appeared that the Plaintiffs had interpreted the categories of discovery so that only documents relating to properties allegedly affected by "pyritic heave" had been discovered. This has now been confirmed by Mr O'Byrne. However, it is clear that this was not the position adopted by Mr Butler in his affidavit dated 25th May 2009. In this regard Mr Butler clearly stated (in response to this concern raised by the Defendants) "*accordingly, it is not the case the Plaintiffs made a conscious decision not to include certain material in relation to homes and properties which are not included in the claim but which are highly relevant to the proceedings*". Whilst this may have been the view of the Plaintiffs legal advisors, it was not a held by the employees of Menolly Homes.

86. Furthermore, the inadequacy of the Plaintiffs understanding of their discovery is also manifest from the fact that Mr Albert O'Loughlin thought that privileged documents did not have to be sent to BCM Hanby Wallace for the purpose of the review. In effect this means that Mr O'Loughlin was deciding what was and what was not privileged. It points to the absolute domination of the discovery process at its earliest stage by the Plaintiffs and their personnel44 Paragraph 54 of the Affidavit of Brendan O'Byrne dated 7th October 2009 .

87. Other problems faced the Plaintiffs which only heighten the duties which they had to this Court and the Defendants to ensure that these problems were overcome. For example it was clear that Mr Blaine was not prepared to assist the Plaintiffs from mid-May 2008. His knowledge about what documentation was missing remains a matter for considerable concern for the Defendants. Given his departure it is not clear what steps were implemented to overcome this problem (see paragraph 64 of Affidavit of Brendan O'Byrne dated 7th October 2009).

88. Again the massive oversight with respect to site diaries and notebooks was based on an "*erroneous understanding"* of the specific categories of documentation which points to the fact that the site personnel were not apprised of the breadth of the discovery obligations and it also brings into question the scope of the advice which the Plaintiffs received.

89. No proper explanation has been furnished as to the failure of the Plaintiffs to disclose site diaries. It is said that some of these site diaries were not furnished because the personnel who held these diaries did not realize that diaries concerning matters not relating to "pyrite" were relevant. However, this does not explain how approximately 180 site diaries (or extracts from site diaries) exhibited at book 11, tab 23 of the affidavit of Peter Lennon dated 15 September 2009 predated 2007 – before pyrite became an issue. In this regard it appears that the explanation provided in the affidavit of Mr Butler dated 25th May 2009 appears to be somewhat different to the explanation provided by Mr O'Byrne in his affidavit dated 7th October 2009.

90. It should also have been obvious to the Plaintiffs that given their poor storage and historical records there was an added burden on them to ensure that all documents which may not have been adequately stored could be retrieved. Mr O'Byrne66 Paragraph 67 of the Affidavit of Brendan O'Byrne dated 6th October 2009 states "*with hindsight, it seems clear that searches of the farm carried out in 2008 were hindered, and ultimately proved to be incomplete, because it did not have an organised archiving system*". However, the Defendants do not accept this only became apparent with hindsight. It must have been clearly apparent that there was no organised archiving in system in early 2008 and therefore efforts should have been taken at that stage to address this. In particular, the fact that "*Menolly did not have any record of what documents had been sent to the farm for storage or what might have been removed, and access to the farm (or indeed any other locations where files were held) was not consigned to any particular personnel. There was no signing in and signing out requirements and no record was kept of documents that might have been removed by Menolly personnel for temporary review*". All of these factors were apparent in early 2008 and therefore there is no particular reason why the Defendants could not have realised the deficiencies and the discovery at an earlier stage.

(C) E-Discovery

91. The discovery process has changed in recent years as a result of the development of information technology and the prevalence of email. Notwithstanding this technological development, it is still incumbent upon a litigant to examine each document for the purpose of determining its relevance for discovery. The search of documents in an electronic form carried out the by the Plaintiffs should never have proceeded in the manner it did. This issue should have been brought back to the Court before any decision was made by the Plaintiffs to base the discovery of electronic documents on a format that did not require them to review individually each document.

92. Moreover, and very worryingly, the senior management of the Plaintiffs appear to have directed this process and the process appears not to have been controlled properly overseen by the Plaintiffs' solicitors. It appears that the decision that documents in an electronic form would be searched based on the use of "*12 search terms*" was reached between Mr Ronan Quinn of Menolly Homes and a Mr Brian Murphy of Waterford Technologies Limited. Deficiencies in these search terms were as manifest then as they are now and again what is crucial is that the search terms were in no way informed or guided by the

issues in these proceedings as outlined in the categories of discovery and as outlined by the Defendants in their defence. Furthermore, what is of particular ongoing concern to the Defendants is the fact that the current discovery documentation in an electronic form has been affected based on a simple widening of the search terms to 37. There is no specific mandate for the incorporation or employment of such a method. This process was again done without consultation without the Defendants and without approval of this Court and as the Defendants contend it is a method which is not permissible in Irish law.

93. It is important to point out that the Plaintiffs had indicated to this Honourable Court (line 18 page 4) that the Menolly archive ran to "*well over a million documents, possibly millions of electronically stored documents*". Furthermore, it was specifically stated by the Plaintiffs in their response letter dated 31st October 2008 (see tab 5, book 3, Affidavit of Peter Lennon, 15th September 2009) that there were 268,000 documents which were reviewed. Clearly these 268,000 were retrieved by virtue of hard copy and soft copy retrieval using 12 key search terms. We are now told that 37 key search terms had been used. However, even those search terms could not with certainty enable the Plaintiffs to retrieve all relevant documentation. It appears the process adopted was and is fundamentally flawed and leads to a position where the Defendants cannot have confidence that they are in receipt of all relevant documentation. As the following exposition of the principles in relation to discovery will demonstrate, the approach of the Plaintiffs had been manifestly flawed and put in jeopardy the fairness of these proceedings.

94. It can be observed from the principles set out below that the rules governing electronic discovery in this jurisdiction differ in some respects to the equivalent systems in place in the United States, England and Wales, and Australia. In the United States, the Federal Rules of Civil Procedure have been revised to take account of the nuances of electronic disclosure and the modifications confirm that electronically stored information ("ESI") stands on an equal footing with discovery of paper documents. Federal Rules of Civil Procedure, Rule 34, amended as of 1st December, 2006. See Matthews and Malek *Disclosure* (3rd ed.),. para.7.01. Similarly, in England electronic disclosure is now expressly dealt with in a new Practice Direction and in the standard form of disclosure statement. CPR Pt 31, Practice Direction – Disclosure and Inspection, para. 2A and Annex, Disclosure Statement; *Admiralty and Commercial Courts Guide* (7th ed. 2006), para. 3.11. It is important to note that both jurisdictions require parties to co-operate and agree, where possible, search terms to be used to retrieve documents by way of e-discovery. However, as will be seen below, the Irish discovery rules structure the process differently and are notably less flexible with regard to the extent of discovery to be made.

Irish law on e-discovery

95. In 1999 the Rules of the Superior Courts 1986 were amended by the introduction of S.I. 233 of 1999, Rules of the Superior Courts (No.2) (Discovery) 1999. This amendment brought an end to general requests for discovery by requiring discovery requests to be framed precisely stating the category of documents being sought and the reason why it is considered that such documents are material to the issues to be considered. Each category of document contained in a discovery request is judged on relevance to the matters in question in the action and on necessity. The Rules of the Superior Courts oblige a party seeking discovery to convince the judge hearing the case that discovery is necessary, either for disposing fairly of the case or for saving costs. Although the Court will be familiar with the general principles governing discovery, as these principles are also applicable in this jurisdiction to the discovery of electronically stored information it may be of assistance to outline briefly the development of these principles below.

96. Order 31, r. 12(1) and (2) of the Rules of the Superior Courts, 1986, provide:

"12. (1) Any party may apply to the Court by the way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his or her possession or power, relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall: (a) verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs; (b) furnish the reasons why each category of documents is required to be discovered..."

97. 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. The 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."

98. That statement was considered by Murray J. (as he then was) in ***Aqua Technolgie v. NSAI*** Unreported, 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."

99. In ***Framus v. CRH Plc***, [2004] 2 I.L.RM. 439. the Supreme Court approved of the approach of McCracken J. in ***Hannon v. Commissioner of Public Works*** Unreported, High Court (McCracken J.) 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."

100. 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. As observed in ***Ryanair Plc v Aer Rianta Cpt***, this is not *"a mere formalistic requirement"*. [2003] 4 I.R. 264.

101. In ***Ryanair***, Fennelly J. dealt with the issue as to what is meant by this concept of necessity by reference to the decision in ***Cooper Flynn v. Radio Telefís Éireann*** [2000] 3 I.R. 344. where the Court 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."

102. 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."

103. Also on the issue of 'necessity', 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. <u>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</u>." (emphasis added)

104. In light of the legal principles set out above, it seems clear that the Plaintiffs ought to have raised any difficulties with regard to reviewing all documentation and the necessity for using automated searches in the course of the discovery process. In this jurisdiction, the voluntary letter process gives a party an opportunity to argue the issue of proportionality, under the general heading of necessity, before discovery is agreed or ordered. In contrast, as will be demonstrated below, the English rules incorporate a reasonableness test for searches of relevant documents and specify that reasonableness may be judged by factors including the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval of any particular document and the significance of any document that is likely to be located during the search. Similarly the US Federal rules permit a party to limit discovery of ESI by showing that the information is not reasonably accessible because of undue burden or cost.

105. It is important to note that Irish law can be distinguished from the position in the United States and England and Wales analysed below on the basis that the obligation under current Irish law is to give discovery of all documents within an agreed or ordered category whereas, for example, the English Civil Procedure Rules only require proportionate searches to be carried out in most instances (but require the party giving disclosure also to set out brief details of the searches carried out). Once the categories or boundaries of discovery in a case are agreed, the Irish obligation is clear-cut. Discovery is to be made on affidavit in the Form No.10 in Appendix C of the Rules of the Superior Courts and paragraph 8 of which contains the averment:

"I understand that the obligation on a party giving discovery is to discover all documents and electronically stored information within his/her/its possession, power or procurement within the categories agreed or ordered to be delivered that contain information which may enable the party receiving the discovery to advance its own case or to damage the case of the party giving discovery or which may fairly lead to a train of inquiry which may have either of those consequences."

106. In October, 2007 the Law Society of Ireland in their "*Report on Discovery in the Electronic Age: Proposals for Change"* stated that a party responding in correspondence to a request for discovery should raise in such correspondence any concerns that they may have about the extent of ESI that may be included expressly or implicitly in the discovery sought, and set out any proposed limitations in the discovery of ESI and reasons to justify such limitations. <u>Such party should also set out any proposed limitations on searches, or proposed use of key word searches for ESI, or proposed non-disclosure of duplicative documents</u>. By doing this, the party seeking discovery can assess the reasonableness of the proposed limitation(s) on the discovery that may be given and, if necessary, the court can adjudicate on the issue. Despite this observation of the Law Society, the Plaintiffs failed to set out the key word searches they were proposing to use, depriving the Defendants of the opportunity to raise any challenge to the reasonableness of the key words.

107. The Committee of the Law Society considered in their Report in 2007 whether the rules should be amended to give a party making discovery a discretion (not requiring the other side's agreement or a court order) not to discover ESI otherwise discoverable, which that party identifies in the affidavit of discovery as not reasonably accessible because of undue burden or cost. In such circumstances, the deponent would be required to set out in the affidavit of discovery any limitation on the search for, and discovery of, possibly relevant ESI and set out the reasons why, in the deponent's opinion, such ESI was not reasonably accessible because of undue burden or cost and thus was not discovered. The Committee concluded however that the difficulty with such a provision would be that it would make it easier, and probably routine, to give narrower discovery than was agreed or ordered, and the practical onus would then be on the party seeking discovery to persuade the court that the wider (*i.e.* previously agreed or ordered) discovery should be made. It took the view that it would be an unfair burden on the party entitled to the discovery. In complex cases with difficult discovery issues, the use of case management conferences under the inherent jurisdiction of the court, or in the Commercial List under Order 63A rules 14 and 15 RSC, could help the efficient resolution of many of these issues. The use of technical evidence, on affidavit or otherwise, to address technical issues relevant to access to ESI and discovery might also assist the court.

108. The Rules of the Superior Courts (Discovery) 2009 SI 93 of 2009 came into operation on the 16th April 2009 and amended Order 31 of the Rules of the Superior Courts 1986 by substituting a new rule 12, which introduced the concept of Electronically Stored Information or ESI. Usefully, the new rules now provide that where an order for discovery includes ESI the party seeking the order must specify whether they require the information in searchable format and, if so, whether they require inspection and search facilities using the IT systems owned or operated by the party controlling the ESI.

109. However the new rule 12 preserves the obligation give discovery of <u>all</u> documents within an agreed or ordered category and, despite its centrality under United States and English discovery law, did not introduce the concept of reasonable search. Given that the Law Society had expressly considered the issue of reasonableness in its report in 2007, it seems likely that the obligation to give discovery of all documents was very deliberately preserved.

E-discovery in England and Wales

110. In England and Wales, there has been a recent amendment to the Practice Direction 31 PD 2A. in relation to disclosure and

to the terms of the disclosure statement which reflected the findings of the "*Report on Electronic Disclosure"* (6th October, 2004) a working group chaired by Cresswell J. Before the amendment, the existing English civil procedure rules gave a party a certain degree of latitude as to the extent to which he carried out a search for documents. Disclosure statements tended to be rather brief and often did not state the extent to which documents holding information held in electronic form had been searched. However, it was also possible, prior to the service of the list providing standard disclosure, for the Court to rule on the extent of the search (*e.g.* at the case management conference in the Commercial Court) The Admiralty & Commercial Courts Guide (6th ed., 2002), para.E2.1. or on an application for specific disclosure under CPR r.31.12. In an appropriate case, the Court could make an order requiring disclosure of electronic information containing specified words or strings and thus define the extent of an electronic search. See for example the Australian case of *Sony Music Entertainment (Australia) Ltd v. University of Tasmania* [2003] FCA 532, discussed in more detail below.

111. The revisions recommended by the working group were adopted, by way of new paragraphs E3.1A and E4.2A in Section E of the *'Admiralty and Commercial Courts Guide'*. The provisions relevant to the issue of searching read as follows:

"E3.1A All parties should have regard to issues which may specifically arise concerning electronic data and documents:
(1) ……
(2)The parties should, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first Case Management Conference.
(3) …….
(4)The existence of electronic documents impacts upon the extent of the reasonable search required by Rule 31.7 for the purposes of standard disclosure. The factors that may be relevant in deciding the reasonableness of a search for electronic documents include (but are not limited to) the following:-
(a) The number of documents involved;
(b) The nature and complexity of the proceedings.
(c) The ease and expense of retrieval of any particular document. This includes:
(i) The accessibility of electronic documents or data including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents.
(ii) The location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.
(iii) The likelihood of locating relevant data.
(iv) The cost of recovering any electronic documents.
(v) The cost of disclosing and providing inspection of any relevant electronic documents.
(vi) The likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.
(d) The significance of any document which is likely to be located during the search.
It may be reasonable to search some or all of the parties' electronic storage systems. <u>In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of each and every document would be unreasonable.</u> There may be other forms of electronic search that may be appropriate in particular circumstances.
E4.2A Where an application is made for specific disclosure the party from whom disclosure is sought should provide to the applicant and to the Court information as to the factors listed in E3.1A(4) above and its documents retention policy, to the extent such information is relevant to the application. At the hearing of the application, the Court may take into account the factors listed in E3.1A(4) as well as the width of the request and the conduct of the parties." (emphasis added)

112. In respect of the English Civil Procedure Rules Practice Direction, a new paragraph 2A was added to that Practice Direction, with corresponding amendments to the form of disclosure statement for standard disclosure set out in the annex to the practice direction and reflected in the amended practice form (N265):

"Practice Direction 31
THE SEARCH
2 The extent of the search which must be made will depend upon the circumstances of the case including, in particular, the factors referred to in rule 31.7(2). The parties should bear in mind the overriding principle of proportionality (see rule 1.1(2)(c)). It may, for example, be reasonable to decide not to search for documents coming into existence before some particular date, or to limit the search to documents in some particular place or places, or to documents falling into particular categories.
ELECTRONIC DISCLOSURE
2A.1 Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been 'deleted'. It also extends to additional information stored and associated with electronic documents known as metadata.
2A.2 The parties should, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first Case Management Conference.
2A.3 The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. In the case of difficulty or disagreement, the matter should be referred to a Judge for directions at the earliest practical date, if possible at the first Case Management Conference.
2A.4 The existence of electronic documents impacts upon the extent of the reasonable search required by Rule 31.7 for the purposes of standard disclosure. The factors that may be relevant in deciding the reasonableness of a search for electronic documents include (but are not limited to) the following:–
(a) The number of documents involved.
(b) The nature and complexity of the proceedings.
(c) The ease and expense of retrieval of any particular document. This includes:
(i) The accessibility of electronic documents or data including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents.

(ii) The location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.
(iii) The likelihood of locating relevant data.
(iv) The cost of recovering any electronic documents.
(v) The cost of disclosing and providing inspection of any relevant electronic documents.
(vi) The likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.
(d) The significance of any document which is likely to be located during the search.
2A.5 It may be reasonable to search some or all of the parties' electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of each and every document would be unreasonable. There may be other forms of electronic search that may be appropriate in particular circumstances." (emphasis added).
113. Paragraph 2A.4 acknowledges the existence of electronic documents' impact upon the extent of the reasonable search required by r 31.7. It sets out the four familiar criteria determining the reasonableness of a search which are set out in r 31.7(2), but criterion (c) - the ease and expense of retrieval of any particular document - is significantly expanded by a series of sub-criteria.
114. Paragraph 2A.5 expressly recognises that it may be reasonable to search for electronic documents by means of key word searches agreed as far as possible between the parties, even where it would not be reasonable to conduct a full review of each and every document on a particular database. In practice, key word searches are often the means by which electronic records, in particular e-mails, are located or filtered. The nature and extent of such key word searches are likely to be part of the disclosure statement.
115. The form of disclosure statement, in an annex to the Practice Direction, was amended by the addition of a new paragraph 4. These amendments are reflected in the practice form N265. The new section deals specifically with electronic documents and, in respect of searches that were made, requires the following statement: *"I carried out a search for electronic documents contained in or created by the following: [list what was searched and extent of search]."* Accordingly it is for the disclosing party to identify the types of record and locations that were the subject of the search.
116. In addition, a rather more specific statement is now required as to the searches that had not been made for electronic documents. As with paper records, there is a statement that documents created before a particular date were not searched for. The statement then goes on to set out two lists of documents and media upon which electronic documents are stored, and in form N265 each item listed has a box to be marked as appropriate, indicating whether searches were or were not made in respect of that particular type of document. The overall effect is to oblige the disclosing party to indicate the records and locations on that detailed list in respect of which searches were not undertaken.
117. Finally, the disclosure statement now also requires a statement that searches were not undertaken other than by reference to *"the following key word(s)/concepts"*. This part can be deleted if the search was not confined to specific key words or concepts.
118. Therefore, the position in England is that the Civil Procedure Rules expressly provide for a specific duty of search with a test of reasonableness. Whether a search is reasonable will often be decided by the court, either in advance of the search being done, or with hindsight, where a search had been carried out and its extent was challenged by the other party.
119. Of critical importance to the facts of the present case, Mathews and Malek observe: Matthews and Malek *Disclosure* (3rd ed.) para. 7.11.
"In cases where there is a large amount of electronic documents, parties will often make use of key word searches for the purposes of identifying relevant documents to be reviewed. Simply handing over to the other side or providing access to the computer hard drive is usually not a viable option, particularly as the hard drive will often contain a mass of irrelevant material, some of which may be confidential or privileged. Moreover, the use of key word searches alone will rarely be sufficient to ensure that disclosure is given of all documents which fall within standard disclosure; it will usually be necessary for the email accounts of the persons most closely involved to be searched visually by a member of the legal team."
(emphasis added)
120. The learned commentators continue to observe:
"The volume of information stored electronically can be overwhelming and thus parties are expected to be sensible both in the searches that they undertake and the demands being made on the opposing party. The parties should, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, their computer systems and software, electronic devices and media in and on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies. Where key word searches are to be used, it is likely to be important for the parties to discuss not only the key words to be used, but also which types of data should be searched (such as whether back-up data and deleted data should be searched or whether documents created by certain types of software should be included or excluded), which email accounts or document holders' folders should be searched and the time periods within which the search should be made – the benefits of a key word search may be reduced if the search is carried out across too many categories of documents, as the search will identify quantities of irrelevant documents as well as relevant documents. In some cases it may be cost-effective to adopt a staged approach, modifying the search terms and date ranges after the initial results have been reviewed. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first Case Management Conference." (emphasis added)
121. By way of a general observation, Mathews and Malek note: *Ibid.* 7.15.
"Inspection of electronically held documents, databases and other types of data has its own problems. The parties should cooperate at an early stage as to the format in which electronic copy documents and other data are to be provided on inspection. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first Case Management Conference." (emphasis added)
122. There is little case law addressing the issue of a reasonable search in the context of electronic discovery however the recent case of ***Digicel (St Lucia) Ltd v Cable and Wireless plc*** did consider the issue. [2008] EWHC 2522 (Ch), [2008] All E.R. (D) 226 (Oct), Chancery Division, Morgan J., 23rd October, 2008. See Hollander, *Documentary Evidence,* (10th ed.), para. 8-24. Here the plaintiffs made an application for specific disclosure of certain classes of document, more specifically for the restoration of back-up tapes for the purpose of searching the email accounts of former employees and also for a further search across all documents identified for additional keywords or phrases. The disclosure exercise that had already been carried out by the defendants' solicitors had reduced over 1.1 million documents to about 5,000 for disclosure at a cost of £2 million in fees and 6,700 man hours.
123. The defendants challenged the disclosure with respect to the number and nature of the keywords used. The defendants had used just 10 keywords however the plaintiffs identified another 19 keywords. It appeared the problem was compounded by the fact that some of the 10 words that had been used had a common stem, *e.g.* "run", running", "runs", the examples in this case were: "interconnect and interconnection" "liberalise and liberalisation" and "competing, competitor and competition". Thus the 10 words amounted to only 6 stem words.
124. The plaintiffs argued that the search was inadequate and requested that back-up tapes for the e-mail accounts of key

former employees be restored and that various electronic searches then be performed. The court identified the issues before it as: (1) whether the defendants had performed a reasonable search for electronic documents; and (2) whether the defendants should be required to take additional steps to comply with e-discovery obligations. The court found that the search had not been reasonable because it had not included a search of the e-mail accounts of the specified employees and because an adequate keyword search had not been performed.
125. Based on this challenge and the fact that the first keyword search had not been agreed "*as far as possible between parties*", Morgan J. ruled that the defendants had ignored the CPR Practice Direction. Morgan J rejected as inconsistent with the Practice Direction a submission that, once a solicitor had taken a decision as to the extent of searches the court should adopt a process analogous to judicial review in determining whether to require further searches. The plaintiffs were successful in its application for specific disclosure and for further searches and the court required very significant further disclosure exercises to be undertaken. The court also took the opportunity to set out guidelines, including the following:
• Parties must (and had here failed to) comply with the requirement in the Practice Direction to Part 31 that prior to the first Case Management Conference they should discuss any issues which may arise regarding searches for and the preservation of electronic documents. Keyword searches should also as far as possible be agreed between the parties.
• Ultimately, the decision of what amounts to a reasonable search rests with the court not the solicitor in charge of the disclosure exercise.
• Steps taken by other parties in the litigation cannot of themselves identify the relevant yard stick with which to measure performance.
• Where the adequacy of a search is challenged, the question for the court is what should have been done in the first place and not whether a second search is reasonable.
126. Digicel was soon followed by ***Abela v. Hammond Suddards*** (2nd December, 2008) 2008 WL 5130206 (Ch)., which involved a corporate acquisition dispute and related claims of negligence and breach of fiduciary duty. A request was made for disclosure of certain e-mails and electronic records. Citing ***Digicel***, the court found that recognition had to be given to the potential value of electronic searches in identifying important documents which might otherwise be missed. The court explained that while no requirement existed that "no stone should be left unturned," a reasonable search was necessary. The court invited counsel to make further submissions addressing how electronic disclosure was to be approached.
E-discovery in the United States
127. On the 1st December, 2006, new rules came into effect amending the Federal Rules of Civil Procedure in respect of discovery, to take into account electronically stored information.
128. The Federal Rules of Civil Procedure also provided for the concept of a reasonable search. Rule 26 (b)(2)(B) effectively creates a two-tiered approach:
"A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of the undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery". The Federal Rules allow a similar narrowing down of discovery in respect of non-electronic matter or documents on similar grounds (see last sentence of Rule 26 (b)(1)).
129. The federal courts evaluate whether the burden of searching can be justified on a range of grounds namely: (a) the specificity of the discovery request (b) the quantity of information from other and more easily accessed sources (c) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources (d) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources (e) predictions as to the importance and usefulness of the further information (f) the importance of the issues at stake in the litigation and (g) the parties' resources.
130. This approach distinguishes between data that is reasonably accessible and data that is not, favouring the production of relevant information from sources which are easier to access (where possible). If parties are unable to reach agreement regarding necessity of discovery from sources that are difficult to access, a motion to compel discovery may be brought.
131. In August 2007 the Sedona Conference in the United States published its ***Sedona Conference Cooperation Proclamation*** (the "Sedona Report"). Available at
http://www.thesedonaconference.org/content/tsc_cooperation_proclamation The Sedona Report has received widespread judicial recognition and has been cited in a number of decisions discussed below. The Sedona Report recognised that traditional approaches to searching for relevant evidence are often no longer practical or financially feasible and considered the use of alternative automated search methods.
132. Principle 11 of the Sedona Report deals with the issue of searching for relevant material:
A responding party may satisfy its good faith obligation to preserve and produce potentially responsive data and documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data most likely to contain responsive information."
133. The Working Group commented on the issue of searching as follows:
"Comment 11.a. Search Methodology
*In many cases, electronic data are found in broadly categorized folders such as an e-mail "inbox" or "outbox", or are otherwise not archived in a manner that can be used to readily identify responsive information. For example, selective use of key "concept" or word searches is a reasonable approach when dealing with large amounts of electronic data. Indeed, a principal advantage of electronic information is that high-speed methods exist to determine the existence of patterns of words, thereby allowing the narrowing of searches for relevant information. See Lombardo v. Broadway Stores, Inc., 2002 WL 86810, at *8 (Cal. App. Jan. 22, 2002).*
In appropriate circumstances, litigants may find it useful to discuss specific selection criteria, including search terms, to be used in searches of electronic data for production. Parties may be able to begin a dialogue on search methodologies as early as their Rule 26(f) conference.
*Courts should encourage and promote the use of such techniques in appropriate circumstances. See Tulip Computers Int'l B.V. v. Dell Computer Corp., No. Civ. A. 00-981, 2002 WL 818061, at *4 (D. Del. Apr. 30, 2002) ("Tulip's consultant will search the CD ROM on certain mutually agreed upon search terms that relate to the infringing products or to this case. Such terms may involve 'Tulip' or code words for the allegedly infringing models such as 'STINGER,' 'MASH,' or 'HONEYCUT.' If the search terms generate hits, Dell will review the documents and produce them to Tulip subject to the privilege and confidentiality designations provided under the protective order.").*
Courts can allow sampling techniques to refine the accuracy of searches and to reduce the cost of discovery. See McPeek v. Ashcroft, 202 F.R.D. 31, 34-35 (D.D.C. 2001). For example, sampling might determine that a low percentage of files (such as e-mails and attachments) on a data tape contain terms that are responsive to "key" terms. This may weigh heavily against any need to further search that source, or it may be a factor in a cost shifting analysis. Sampling may also reveal substantial redundancy between sources (i.e., duplicate data is found in both locations) such that it is reasonable for the organization to preserve and produce data from only one of the sources.
The scope of terms employed must be reasonably calculated to return relevant data. If not, courts may order additional

*searches, which will increase the cost and burden of discovery. For example, in In re Amsted Industries, Inc. "Erisa" Litig., 2002 WL 31844956, at *2 (N.D. Ill. Dec. 18, 2002), the court found that the defendants' document production efforts, which involved word searches on 25 backup tapes of e-mail and the questioning of individuals regarding e-mails on their computers, were insufficient, and that additional searches not limited by defendants' relevancy objections were required.*
Illustration i. The active e-mail accounts of the individuals likely to have information relevant to litigation contain 10,000 individual e-mails from the relevant time period. Rather than read each one, the producing party uses a series of search terms that capture the key concepts in the allegations of the complaint. The producing party has satisfied its search obligations."
134. The Sedona working group acknowledged that by far the most commonly used search methodology today is the use of "keyword searches" of full text and metadata as a means of filtering data for producing responsive documents in discovery. However, the working group also acknowledged that the keyword search method is not without its difficulties. While basic keyword searching techniques have been widely accepted both by courts and parties as sufficient to define the scope of their obligation to perform a search for responsive documents (under the discovery rules of the United States), the working group reported that the experience of many litigators was that simple keyword searching alone was inadequate in at least some discovery contexts. This is because simple keyword searches end up being both over-, and under-, inclusive in light of the inherent malleability and ambiguity of spoken and written language. Some case law has held that keyword searches were either incomplete or over inclusive, see *U.S. ex rel. Tyson v. Amerigroup Ill., Inc.,* 2005 WL 3111972 (N.D. Ill. Oct. 21, 2005) (referencing agreement by parties to search terms); *Medtronic Sofamor Danek, Inc., v. Michelson,* 229 F.R.D. 550 (W.D. Tenn. 2003) (court orders defendant to conduct searches using the keyword search terms provided by plaintiff).
135. The Sedona Report acknowledged that keyword searches identify all documents containing a specified term regardless of context, and so they can possibly capture many documents irrelevant to the user's query. They also have the potential to miss documents that contain a word that has the same meaning as the term used in the query, but is not specified. For example, a user making queries about labour actions might miss an email referring to a "boycott" if that particular word was not included as a keyword (illustrating "synonymy" or variation in the use of language). And of course, if authors of records are inventing words as they go along, as they have done through history, and now are doing with increasing frequency in electronic communications, such problems are compounded. There are also more advanced keyword searches using "Boolean" operators and techniques borrowed from "fuzzy logic" that may increase the number of relevant documents and decrease the number of irrelevant documents retrieved. However, at the present time, it would appear that the majority of automated litigation support providers and software continue to rely on keyword searching. Such methods are limited by their dependence on matching a specific, sometimes arbitrary choice of language to describe the targeted topic of interest. The issue of whether there is room for improvement in the rate of "recall" of relevant documents in a given collection is something lawyers must consider when relying on simple and traditional input of keywords alone.
136. In the recent case of ***William A. Gross Constr. Assocs., Inc. v. American Mfrs. Mut. Ins. Co*** No. 07 Civ. 10639, 2009 WL 724954 (S.D.N.Y. March 19, 2009). U.S. Magistrate Judge Andrew J. Peck recently issued what he described as a *"wake-up call"* to members of the bar in the Southern District. Instead of attorneys designing keywords without adequate information *"by the seat of their pants,"* Peck appealed for keyword formulations based on careful thought, quality control, testing and cooperation. The case involved multiple parties and multimillion dollar claims concerning alleged defects and delays in the construction of the Bronx County Hall of Justice.
137. The Dormitory Authority of the State of New York, a public benefit corporation that acts as the developer of courthouses, directed the project. At the time of the discovery dispute, non-party Hill International served as DASNY's construction manager. DASNY consented to produce Hill's project-related documents and ESI to the other parties in the action. As they were obviously relevant ESI, Hill's e-mails presented a classic challenge of devising a proper search methodology for production. Hill understandably did not want to produce e-mails unrelated to the Bronx courthouse project, but combing through the e-mails one by one to cull unrelated e-mails would have been time consuming and uneconomical.
138. DASNY proposed the following search terms to collect the relevant e-mails: "DASNY," "Dormitory Authority," "Authority" and the names of the other parties in the action. In addition, DASNY suggested "Court! in connection with Bronx," "Hall of Justice" and "Bronx but not Zoo" -- to distinguish e-mails relating to Hill's work on a Bronx Zoo project. The other parties sought a litany of additional search terms, running into the thousands. Their terms corresponded to the construction issues involved in the courthouse project, such as "sidewalk," "delay," "budget," "elevator," "claim" and the like, which, when applied to a construction management business such as Hill, threatened to require production or manual review of Hill's entire e-mail database.
139. Describing this case as *"just the latest example of lawyers designing keyword searches in the dark,"* without adequate discussion with those who wrote the e-mails, Magistrate Judge Peck took the opportunity to reiterate prior warnings about this problem from judges. The Court emphasised in a footnote that what is required is more than a lawyer's guesses, without any quality control testing to ensure the search results are minimally over-inclusive or under-inclusive for responsive e-mails.
140. Accordingly, it would seem that if a disclosing party is to satisfy the test of reasonableness that applies under the discovery rules in the United States, care should be taken from the outset of disclosure to ensure proper selection and execution of a search methodology. Without appropriate care, a court cannot be confident that the producing party has disclosed all the required responsive material.
141. Peck J's opinion stressed four requirements for the production of ESI. Foremost, there must be cooperation between opposing counsel. In his decision the Judge strongly endorsed the *Sedona Conference Cooperation Proclamation*. The Court held that, second, attorneys must carefully design the appropriate keywords. Third, these keywords should be selected with the input from the ESI's custodians. Finally, the proposed technique should be validated to ensure it is not substantially over-, or under-, inclusive. Peck J concluded with the following admonition:
"It is time that the Bar - even those lawyers who did not come of age in the computer era - understand the importance of properly crafted electronic searches."
142. While there does not appear to be any case analogous to the present case in terms of the volume of discovery being produced following 51 days of trial, there are two cases from the United States which involved a failure to make discovery of a large volume of documents but neither of them involved a failure that came to light during the trial requiring consideration of whether to strike out.
143. In ***Qualcomm Inc. v. Broadcom Corp****.* 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), it was revealed that over 46,000 records had not been disclosed when a witness for the plaintiff in a patent dispute admitted that she had received e-mails from a mailing list which was evidence of the plaintiff's participation in a standards setting body before a specific point in time. The plaintiff's assertion that it had not participated in the body was vital to its success in defeating the defendant's waiver argument, and two days after the admission was made a jury returned an advisory verdict that claimed two of the plaintiff's patents were unenforceable because of waiver.
144. After the trial, the defendant took the unusual step of asking the plaintiff to conduct additional searches to determine the scope of its discovery violation, and eventually, when threatened with court intervention, the plaintiff agreed to search the current and archived e-mails of its five witnesses based on a number of key terms. Subsequently the plaintiff's general counsel and the lead counsel at trial wrote the trial judge to apologise for failing to produce relevant documents. The plaintiff eventually located over 46,000 responsive and undisclosed records by searching the e-mail archives of 21 employees and the defendant filed a motion for sanctions.
145. The Magistrate Judge found that "there was clear and convincing evidence that the plaintiff had *"intentionally withheld*

tens of thousands of decisive documents from its opponent in effort to win the case." She held that both the plaintiff and six of its attorneys committed misconduct, focusing on the failure to conduct an e-mail search on obvious custodians on obvious terms on an issue that was obviously central to the case. She ordered the plaintiff to pay over $8.5 million for the defendant's attorneys' fees and other litigation costs (less costs ordered to be paid earlier), referred six lawyers on the plaintiff's litigation team to the State Bar of California for investigation and ordered these lawyers and some of the plaintiff's in-house lawyers to participate in a program to craft a model case management protocol to prevent similar events in the future.
146. In relation to the lawyers involved, the Magistrate Judge stated that there was *"an affirmative duty upon lawyers to engage in discovery in a responsible manner and to conduct a "reasonable inquiry" to determine whether discovery responses are sufficient and proper".* She also found that the plaintiff's attorneys assisted the Plaintiff in committing this incredible discovery violation by "intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that [the plaintiff's] document search was inadequate, and blindly accepting [the plaintiff's] unsupported assurances that its document search was adequate."

147. In ***Phoenix Four, Inc. v. Strategic Res. Corp***. 2006 WL 1409413 (S.D.N.Y. May 23, 2006)., the existence of about 25 gigabytes of data (as much as 2,500 boxes) was discovered in a server hard drive around the time of the deadline for making discovery. The plaintiff was notified of the recently discovered documents and advised that it would be informed of the nature of the documents as soon as the defendant knew more about them. In the following weeks counsel for the parties met almost daily at depositions being taken in the case and discussed the status of the production and also corresponded about the production. Approximately a month after being initially informed of the existence of the documents, the Plaintiff filed a motion for sanctions. Ruling on the motion, the court faulted the defendants' abandonment of computers and their late production of electronic documents. The court also criticised the lawyers representing the defendants, finding that counsel's failure to locate and timely produce the evidence stored in the server constituted gross negligence.
148. The court then proceeded to reject the other sanctions requested, with the exception of the plaintiff's request for monetary sanctions. The court observed:
"The discovery delinquencies of the SRC Defendants and their counsel had resulted in the late production of 200-300 boxes of documents - at least four times as much as the fifty boxes originally produced - which has severely disrupted the progress of this litigation in the last two months before trial, a trial date, by the way, to which all parties agreed at the pre-trial conference."
149. The court found that monetary sanctions would most appropriately serve the prophylactic, punitive, and remedial purposes of discovery sanctions. Accordingly, it ordered the defendants and their attorneys to reimburse the plaintiff equally for any statutory costs and attorneys' fees associated with bringing the motion, and to pay $10,000 each for a number of re-depositions for the limited purpose of inquiring into issues raised by the documents recovered from the server. The court directed that the sanctions were to be borne by the defendants and the attorneys equally, and were not to be covered by the defendants' insurance carriers. The court determined that the plaintiff was not entitled to reimbursement for converting the documents into a searchable format, since it chose to receive the documents in hard copy instead of the searchable format offered by the attorneys, and because it chose to review the documents under time constraints instead of requesting an adjournment of the trial.
150. This is consistent with the recent U.S. decision of ***R & R Sails, Inc. v. Insurance Company of the State of Pennsylvania*** Case No. 07-cv-0998-H (POR) (S.D.Cal., Apr. 18, 2008.). where the court held that the overlooking of e-discovery information due to honest mistake may result in the imposition of sanctions, upon the party claiming to have omitted production due to honest mistake when a reasonable inquiry might have prevented the mistake from occurring.
151. In ***R & R Sails*** the plaintiff requested several documents from the defendant in the course of litigation. The plaintiff defined "document" as including every other means of recording any tangible thing and form of communication or representation, including letters, words, pictures, sounds, or symbols or combinations thereof. Upon the plaintiff's notification that electronic and handwritten daily activity records were missing from defendant's response, the defendant explained that it did not maintain daily logs or telephone records. Subsequently, the defendant realised that the requested records existed in a computerised database and sent the electronic notes to the plaintiff, conceding that his previous declaration was incorrect and was an honest mistake, and that a claim log was maintained electronically.
152. The court ordered the defendant to show cause to avoid sanctions for failure to timely produce electronically-stored information. Furthermore, the plaintiff sought attorneys' fees and costs associated with the defendant's untimely production of electronically-stored information. The plaintiff also requested non-monetary sanctions that would preclude the defendant from entering or relying upon any evidence which had not been produced to date, as well as precluding any further changes to deposition transcripts. In issuing its decision in the plaintiff's favour, the court noted that although an honest mistake would excuse a party's neglect to produce requested documents, in this particular case, the defendant could have taken steps to prevent its omission, and therefore an award of sanctions was warranted.
153. It has also been held in the United States that a party is charged with knowledge of what documents it possesses and cannot simply react to the opposing party's:
"fortuitous discovery of the existence of relevant documents by making disjointed searches, each time coming up with a few more documents, and each time representing that was all they had. … the burden does not fall on plaintiff to learn whether, how and where defendant keeps relevant documents." Tarlton v. Cumberland County Correctional Facility 192 F.R.D. 165, 170 (D.N.J.2000).
154. In the recent U.S. decision of ***Green v. McClendon*** 2009 U.S. Dist. (S.D.N.Y. Aug. 13, 2009). counsel for the defendant waited until the plaintiff specifically demanded additional information before searching files that were already in her possession and providing additional discovery. Consequently, the defendant was sanctioned for a violation of the obligation to supplement discovery under the Rule 26(e) of the Federal Civil Procedure Rules. The foregoing decision seems particularly apposite in the circumstances of this application as notwithstanding the fact that the absence of the documentation was adverted to by the Defendant in October 2008, there was a continuing and culpable failure on the part of the Defendants to supplement discovery.

E-Discovery in Australia

155. The Australian rules on basic discovery have also embraced the concept of a reasonable search in the context of making discovery, in contrast to the Irish obligation to discover all documents within a category that has satisfied the dual criteria of relevance and necessity. Order 15 rule 2(3) of the Federal Court Rules states:
"Without limiting rule 3 or 7, the documents required to be disclosed are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given:
(a) documents on which the party relies; and
(b) documents that adversely affect the party's own case; and
(c) documents that adversely affect another party's case; and
(d) documents that support another party's case."
156. The rules further elaborate on the nature of a reasonable search, Order 15 rule 2(5) and 6 providing:
"(5) For subrule (3), in making a reasonable search, a party may take into account:
(a) the nature and complexity of the proceedings; and
(b) the number of documents involved; and

(c) the ease and cost of retrieving a document; and
(d) the significance of any document likely to be found; and
(e) any other relevant matter.
(6) If the party does not search for a category or class of document, the party must include in the list of documents a statement of the category or class of document not searched for and the reason why."
157. The Federal Court of Australia's revised Practice Note 17 on the 29 January, 2009 ("Practice Note") supplements the Court's existing procedural rules for discovery contained in Order 15 of the Federal Court Rules. The Practice Note also conveys the Court's preferred practice in relation to the *"use of technology in the management of discovery and the conduct of litigation"*. The Practice Note applies, subject to the Court's discretion, to discovery in all legal proceedings where there is likely to be over 200 discoverable electronic documents. The Practice Note was not intended to impose a new set of discovery obligations. Rather, it was designed as a framework to provide guidance and flexibility in the use of technology, with accompanying checklists, sample protocols and a glossary. The Practice Note sets a clear expectation for parties, and their representatives, to proactively cooperate with and assist the Court, by *"identifying documents relevant to the dispute as early as possible and dealing with those documents in the most efficient way practicable"*. This expectation is followed by seven 'efficient document management' observations made by the Court, and contained in the Practice Note.
158. The Practice Note provides that before the Court makes an order for discovery of electronic documents, it will expect the parties to have discussed and agreed upon a *"practical and cost-effective discovery plan".* To achieve this, the Court has the discretion to order parties to attend a Pre-Discovery Conference ("PDC"), as early as possible in the proceeding, to agree upon a practical and cost-effective discovery plan. The PDC may be seen as the equivalent of the United States' Federal Rules of Civil Procedure, rule 26(f) "meet and confer" process.
159. The Practice Note is accompanied by a Pre-Discovery Conference Checklist ("PDCC"). The PDCC sets out matters that the parties are expected to consider at the PDC, including, *inter alia*, reasonable search strategies. Once potentially discoverable documents are identified, each party must be in a position to promptly identify those locations, which will be searched for potentially discoverable documents. This requires legal counsel and the organisation's information professionals to confer as to the organisation's information management practices; and devise an efficient methodology for performing a reasonable search in accordance with Order 15, rule 2(5) of the Federal Court Rules.
160. Each party must also be in a position to highlight, and importantly, justify all locations that will not be searched due to their reasonable inaccessibility. Legal counsel may require the information professional to provide supporting documents, for example, a copy of the organisation's document retention policy ("DRP"). Further, the information professional may be required to describe any proposed search strategies. For example, if keywords are proposed as a filtering method – being able to address what technology will be used to perform the keyword searches, the use of sampling techniques and provision for search validation and audit.
161. In June 2009 the Australian Federal Court issued new fast track directions applicable to cases admitted to the Fast Track List. Paragraph 7.2 of the Practice Note elaborates on the nature of a reasonable search and describes it as a good faith, proportionate search:
"7.2 Discovery must be provided in accordance with the following:
(a) Parties must provide discovery of any document within the limited discovery categories mentioned in paragraph 7.1 that a party knows of at the time of the Scheduling Conference, or that the party becomes aware of at a later point in the pre-trial or trial process, or that the party discovers in the course of a good-faith proportionate search of the party's documents and records.
(b) A 'good-faith proportionate search' is a search undertaken by a party in which the party makes a good-faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive having regard to the nature and complexity of issues raised by the case, including the type of relief sought and the quantum of the claim.
(c) A party giving discovery must, if requested to do so by another party, provide a brief description of the steps the party has taken to conduct a good faith proportionate search to locate discoverable documents."
162. On the specific issue of the use of key word searches, a decision of the Federal Court of Australia, Tamberlin J, ***Sony Music Entertainment (Australia) Ltd v University of Tasmania*** which pre-dates the practice direction amendment is interesting. The Court accepted the evidence of the expert on behalf of the applicant set out below:
"Mr Thackray is an experienced computer forensic investigator retained by the applicants. In his affidavit sworn on 9 April 2003, he refers to the search tools and methods proposed to be used by the Universities to disclose documents for the purposes of O 15A. He says that whilst some of the search methods proposed by the Universities differ, the techniques appear to be generally very similar and involve searching material for files with either an ".MP3" or ".jpeg" extension or files containing one or more of the following words or strings: "music", "download", "MP3", "jpeg" or "song". In his view the search methods proposed by the Universities are inadequate to properly investigate the suspected infringements and he would not use such techniques because they would not be a means of forensic analysis of the data that has been copied. He says that none of the respondents has described any method that would involve the use of forensic techniques. Specific deficiencies in the methods proposed by the respondents were identified as follows:
** The search is unlikely to identify some of the most relevant files in the investigation;*
** There are other digital file extensions to those proposed by the respondents that would need to be searched to identify digital music files and he specifies these;*
** The proposed process does not compare the file extensions with the file header so that a file with an otherwise apparently general file extension, such as ".doc", will not be identified as a digital music file even though the file header contains information that would readily identify the file as a music file. He refers to the practice of embedding a file in another file, known as steganography;*
** A text search for words such as "song" and "music" fails to take into account the terminology or slang used;*
** Words such as "music", "download" and "song" are insufficient to locate all relevant material;*
** The process will not identify any base 64 encoded information, that is, information associated with an e-mail attachment that frequently provides, in his experience, important information about a user activity even if other information has been lost;*
** There is difficulty with the techniques proposed by the respondents in identifying compressed music files;*
** Preparatory processes suggested in some cases by the respondents may interfere with analysis. Examples are given."*
163. The Court observed:
"On the other hand, I am satisfied that if the narrow search tools and methods proposed by the Universities in their evidence are used, then it is likely that there will be insufficient discovery. On this aspect I prefer and accept the evidence of Mr Thackray in relation to the shortcomings in the search methods proposed by the Universities, as to the appropriate reach of the discovery."
164. In summary, it is respectfully submitted that from an analysis of the legal principles discussed above and emanating from the different jurisdictions, several propositions can be deduced:
There is a heavy onus on a solicitor to ensure that his client complies fully with orders for discovery and to take all reasonable steps to investigate where he is concerned that the client may not have included all relevant documents;
If discrepancies in discovery made appear then a solicitor owes a duty to the court to put matters right at the earliest date;

A solicitor must take positive steps to ensure his client appreciates the duty of discovery;
There should be careful consultation between a solicitor and client to extract all relevant documents;
A litigant cannot hide behind its employees who for, whatever reason, fail to make proper discovery;
The fact that some proportion of the errors in the discovery process is attributable to the Plaintiffs' legal advisors does not preclude the court from dismissing the claim nor absolve the Plaintiffs from their own obligations and responsibilities in the discovery process.
The general principles of discovery and the relevance and necessity criteria apply *mutatis mutandis* to discovery of electronically stored information;
In contrast to the other jurisdictions considered above, the Irish courts do not allow for a reasonable search in respect of agreed or ordered discovery but require the production of all documents which are relevant and necessary;
· Those jurisdictions that have introduced the concept of the reasonable search have incorporated in their discovery procedures protective mechanisms to ensure that proper or adequate discovery will be made;
· The Plaintiffs, without consultation with the Defendants or court approval, unilaterally chose to adopt the concept of the reasonable search in their retrieval of ESI;
· Despite the unilateral adoption of the concept of the reasonable search from the law of other jurisdictions, the Plaintiffs failed to adopt any of the protective mechanisms that have been incorporated in the discovery process in those jurisdictions;
It was incumbent on the Plaintiffs to engage in a consultative process with the Defendants on the methods of retrieval of ESI;
In particular, the Plaintiffs should have informed the Defendants of their intention to rely on key word searches and should have discussed with the Defendants the specific key words proposed;
The Plaintiffs should have raised any anticipated difficulties with retrieving ESI during the voluntary discovery letter process;
The Plaintiffs should have, at the earliest date, informed the Court of the failures of the ESI discovery process.

II APPLICATION OF PRINCIPLES

165. It is respectfully submitted that it is evident from a consideration of the case law and commentary above, that the Plaintiffs and their legal advisors have failed abjectly to comply with their duties in the discovery process both to this Court and to the Defendants. What is remarkable is that although the Plaintiffs apologise on the one hand for the indisputable deficiencies in the discovery made, on the other hand, they attempt to excuse, and in some cases justify, said deficiencies by reasons which, simply put, do not stand up to even the most cursory scrutiny.
166. In this section of these outline written submissions, the Defendants examine the principal purported reasons for the inadequacy of the discovery made. With respect, it is difficult to see how it can be asserted that the shortcomings identified below are in anyway excusable, or are other than the most basic abdication of the duties outlined above. At the core of the Defendants' submissions is the proposition that although large volumes of documentation and electronically stored information raise novel difficulties, these difficulties are surmountable if the Plaintiffs and their legal advisors adhere to the well established principles of discovery such as ensuring that the litigant understands fully the rigours of the discovery process, taking reasonable steps to investigate when it appears there may be deficiencies in the discovery furnished, consulting with the other party to the litigation whether it be through the voluntary discovery process or in a case management conference, alerting the Court at the earliest opportunity of any apprehended difficulties and ensuring that documents are preserved whether they be in the hands of employees or ex-employees.
167. It is, of course, important to recall that the Defendants raised a large number of queries in respect of the discovery furnished in October 2008 when it became readily apparent that there were acute defects in the discovery. Despite this clear prompting from the Defendants, the Plaintiffs ultimately proceeded to trial and we are now in a situation where many tens of thousands of documents have been discovered after 51 days of hearing. The Defendants submit that it is demonstrably not the case, as the Plaintiffs assert, that they *sua sponte* noted the defects in the discovery and set about remedying same.
168. An analysis of the primary excuses offered by the Plaintiffs has been touched on above. However, there are further specific concerns with respect to these excuses which must be examined in light of the relevant legal principles.

***A* Use of key words in discovery retrieval**

169. As discussed in the section above in these submissions, the rules on discovery require the production of all documents which satisfy the criteria of relevance and necessity. There is no *prima facie* bar on using automated search methods and key search words to retrieve relevant documents provided, of course, said searches successfully retrieve all relevant documents. However, it is respectfully submitted that the methods used by the Plaintiffs inexorably led to an under-inclusive retrieval of documents and were inherently deficient.
170. The most stark and readily apparent defect in the retrieval of ESI has to be the actual key search words used by Waterford Technologies on the Plaintiffs' instructions. The list of search words used was first handed to the Defendants in court on 18 June 2009, day 54 of the trial. The words used were:
Drynam;
Myrtle;
Beaupark;
Lagan;
Irish Asphalt;
Bay Lane;
A & L Goodbody;
Lennon Heather;
Lavelle Coleman;
Arthur Cox;
Remedial works;
Information leaflet.
171. Needless to say there are obvious omissions. It is simply inconceivable that in the context of this litigation "pyrite" would not be a search term, or indeed "crack", "cracking", "concrete", "infill", the names of other infill suppliers, and many more pertinent terms than the ones selected. In addition, the words submitted by the Plaintiffs make no allowance for common misspellings of key phrases or other words with the key words as their stem.
172. In paragraphs 71 to 89 of the Affidavit of Brendan O'Byrne, the Plaintiffs attempt to explain the serious shortcomings in the discovery of electronic documents. Of note, in paragraph 72 it is stated *"On 31 January 2008, Mr Quinn provided Mr Murphy with 13 search terms."* As is now well known to this Court, the search terms selected proved to be wholly inadequate. At this juncture, it must also be emphasised that these search terms were provided without any consultation whatsoever with the Defendants. In fact, the Plaintiffs did not even inform the Defendants that they were relying on key word searches to retrieve electronic documents, let alone consult with the Defendants as to what those words should be. Not only is this behaviour non-compliant with Irish discovery rules, it is also manifestly inconsistent with the practice of retrieving electronic information in other jurisdictions and that endorsed by the Law Society of Ireland in its 2007 report.
173. In paragraphs 73 to 75 of the Affidavit of Brendan O'Byrne, the Plaintiffs identify three of the principal difficulties which arose from the inadequate e-discovery method:

(i) The range of search terms was too narrow and therefore was under-inclusive. The search terms were widened to 37 words in June 2009;
(ii) Waterford Technologies only searched emails and attachments that its particular software could read. It would not have picked up documents that were separately created and stored on the system but had not been attachments to an email;
(iii) Waterford Technologies did not identify the limitations of the search of emails that had attachments that comprised encrypted files accessible by password or certain types of PDF documents which were incapable of being scanned by the software.

174. Even the current search terms as they now are, are manifestly deficient. The use of these 37 words cannot ensure that all relevant documents with respect to the category of discovery have been furnished. The breadth of the search terms used is not sufficient to retrieve all those documents which fall into the categories of discovery.

175. It is apparent that one of the major failings which originally rose was the fact that the electronic documentation search was limited to email and then even with respect to email the attachments to the emails were not read or searched. It appears now that Price Waterhouse Coopers had been employed to carry out a search of hard drives and that the Menolly central server has been interrogated using an expanded range of search terms. However, the precise extent of how this search was carried out and the extent to which the use of search terms would have identified words on documents which were scanned or which would not have occasioned optical recognition is completely unclear. The explanation once again provided by Mr Byrne in his affidavit is very light in detail. The Defendants are still unclear as to the precise nature of the search carried out on the hard drive.

176. In addition with respect to the search of emails it appears that a tool called "*Mail Meter Investigate*" was used and this software interrogated the entire email database from Menolly which consisted of 438,233 emails and 154,190 attachments. However, even with the PWC review in 2009 and the Mail Meter Investigate review which was carried out by Waterford Technologies in 2009, there is a stark lack of detail as to how the searches were carried out and how effective the process is, apart altogether from any issue of the adequacy of keywords or search terms chosen. This is particularly so in circumstances where it is unclear as to whether the use of the keyword would have detected words in documents which were in scanned version or PDF version which were not capable of being searched. This includes handwritten documents and typed documents containing manuscript notations.

177. Further obvious flaws in the e-discovery process conducted by the Plaintiffs were revealed in paragraph 79 of the Affidavit of Brendan O'Byrne namely: that where Menolly personnel had used personal email addresses these communications were not discovered; and that the hard drives of desktop computers and laptops of Menolly personnel had not been subject to any form of technological interrogation
178. In respect of the personal email accounts of Charlie Blain, we learn from paragraph 84 of the Affidavit of Brendan O'Byrne that, prompted by a letter from the Solicitors for the Defendants, the Solicitors for the Plaintiffs asked Waterford Technologies to investigate a number of email accounts of Mr. Blain. On 17 July 2009, Waterford Technologies informed the Solicitors for the Plaintiffs that they had found 141 emails. Following further questioning, Waterford Technologies revealed that 11,000 emails had not been discovered due to the fact that the email attachments were not searched during any of the earlier searches for the relevant search items. It is also evident from paragraph 88 of the Affidavit of Brendan O'Byrne that documents on a home computer owned by ex-employee Matt Carroll, and emails from personal emails from Neil Scott and Ben Curtin had not been disclosed.
179. Crucially, it is admitted in paragraph 47 of the Affidavit of Brendan O'Byrne that the Peadar Monaghan Report was discovered electronically:
"...when an expanded range of search terms was used."
180. It is respectfully submitted that the cumulative effect of these errors on the part of the Plaintiffs' solicitors and the Plaintiffs in retrieving electronically stored information are of the most egregious nature. It would be simply inconceivable in jurisdictions such as the United States, England and Australia that the Plaintiffs would embark on this aspect of the discovery without any form of consultation with the Defendants or even seeking guidance from this Court at a case management conference or at a similarly opportune moment.
B Failure to retain the records of their employees
181. The Plaintiffs have now made clear that there was insufficient central control over the process by which documents were retained and retrieved from Menolly employees. Furthermore it has also been explained that no system was put in place for contacting employees or ex-employees and obtaining confirmation that all documents pertained to the three estates had been handed over. As a result the Plaintiffs have admitted that the process was exposed to the possibility of personnel either partially or entirely failing to hand over relevant documents. In addition to this it is clear the Plaintiffs have now admitted with the downturn in the economy and in tandem with the substantial reorganisation within the Menolly Group, many employees left or were made redundant, ranging from site foreman and engineers to office personnel. It is also acknowledged that due to a sense of grievance or otherwise these employees did not accede to Menolly's request for co-operation. They had been let go and often left papers behind in their office and it is clear that the Plaintiffs did not ensure they were passed on to somebody who would be responsible for the matters in question.

182. These are alarming facts when one considers the possibility if these departures occurred at the time of the downturn in the construction industry, then this was during the period when litigation was either apprehended or in fact commenced. Given that fact, it was incumbent on the Plaintiffs to make extra efforts to ensure that those documents had been properly preserved, collated, recorded and filed in such a manner as they would not have been lost. This raises the alarming possibility that vital documentation relevant to the Defendants' defence has been irretrievably destroyed or lost.

183. As will be well known to the Court, Order 31 Rule 12 RSC provides for discovery of documents *"which are or have been in the possession or power"* of the deponent. The *pro forma* affidavit of discovery provides that the deponent should aver that there are no other relevant documents in his *"possession, custody or power."* It has been observed that in this jurisdiction there are four separate concepts of possession, power, procurement and custody. Abrahamson, Dwyer & Fitzpatrick *Discovery & Disclosure* para. 4-03.
184. While there appears to have been no specific instance of judicial scrutiny of the term 'possession' alone in this jurisdiction, in England and Wales it has been identified as signifying *"a right and power to deal with [the document]"* rather than its physical presence within the custody of the deponent. *Reid v Langois* (1849) 1 M & G 627 at 636. In respect of the criterion of 'power' the Supreme Court, O'Flaherty J, in ***Bula v Tara Mines (No. 5)*** held:
"A document is within the power of a party if he has an enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else." Bula v Tara Mines (No. 5) [1994] 1 I.L.R.M.

111.
185. In ***Bula v Tara Mines (No. 5)*** discovery was sought of documents in the possession of former professional advisors to the Minister for Energy (who was a party to the proceedings). The application was refused in the High Court on the grounds that they should have been sought by way of non-party discovery. In allowing the appeal, the Supreme Court held that the documents were in the power of the Minister.
186. The criteria of *'power and possession'* were considered recently by Clarke J in ***Linfen Ltd v Rocca*** [2009] IEHC 292. wherein the High Court Judge stated:
"At the outset of this consideration it is necessary to explain in some detail the applicable law on the words "possession or power" as they apply. As a matter of principle there is of course, a distinction between the relationship of client and professional adviser and that of principal and agent. In the latter circumstance, if an agent brings documents into existence, these belong to the principal. However documents prepared by professional advisers for their own assistance in carrying out expert work cannot be said to be the property of the principal. Therefore these documents should lie outside the power of such principal for the purposes of discovery."
187. There is an unequivocal obligation on a solicitor to ensure the preservation of documents and prevent their loss or destruction. In ***Rockwell Machine Tool Co Ltd v E P Barrus (Concessionaries) Ltd*** Megarry J addressed this duty as follows: [1986] 1 W.L.R.
"...it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after the writ issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it."
188. In paragraph 24 of the Affidavit of Brendan O'Byrne, the Plaintiffs describe how prior to the receipt of a letter seeking voluntary discovery on 10 March 2008:
"...the Plaintiffs were advised by their solicitors, BCM Hanby Wallace, both at meetings and in writing, as to the function and importance of discovery...Menolly personnel were told to gather together and hand over all documents in their possession that related to the Beaupark, Myrtle and Drynam Estates in preparation for the inevitable discovery process."
189. In paragraph 40, Mr. O'Byrne avers:
"The discovery process within Menolly relied on each person taking responsibility for identifying their documents relating to each of the three estates and sending those documents to BCM Hanby Wallace. In retrospect, I can see now that there was insufficient central control over this process within Menolly and that, as a consequence, some documents were overlooked – in particular where employees had left by the time the process was undertaken. Unfortunately, no record was maintained at the time in relation to whether a particular employee had produced any documents and, if so, what documents had been produced. Likewise, no system was put in place for contacting employees or ex-employees and obtaining confirmation that all documents pertaining to the three Estates had been handed over. As a result, the process was exposed to the possibility of personnel either partially or entirely failing to hand over relevant documents, and in the case of ex-employees being unaware of the need to hand over documents that they had retained and furthermore such omissions going undetected." (emphasis added)
190. The particular significance of the failure to discover the Monaghan report is explained by Mr O'Byrne in paragraph 41 of the Affidavit and is attributed to the failure of a former employee, Ciaran Lee, to discover four boxes of his office files. Similarly, the site logs of Niall O'Toole, a former employee, were not discovered in the 2008 discovery but Mr O'Toole was subsequently contacted and he located the records and attended to explain them to the Plaintiffs' solicitors. Affidavit of Brendan O'Byrne, paragraph 63.
191. Similarly, the fact that employees had not been sufficiently briefed on the discovery process is evidenced in paragraph 65 of the Affidavit of Brendan O'Byrne in which he states that:
"As a consequence of the erroneous understanding of certain Menolly site personnel, some persons only provided site diaries which dealt with pyrite matters and accordingly failed to provide all of their prior year diaries due possibly to their erroneous understanding."
192. It is beyond dispute that as former employees were agents of the Plaintiffs, the Plaintiffs have an enforceable legal right to obtain documents that are in their former employees' possession. Of note, the Rules of the Superior Courts provide for the deponent making discovery of documents *"which are or have been in his possession or power".* (emphasis added)
193. Further, at paragraph 52 of the Affidavit of Brendan O'Byrne he describes how:
"...a small number of employees (Neil Scott, Barry O'Sullivan and Kevin Kelly Snr), handed over to BCM Hanby Wallace only those documents within their possession relating to the three estates which referred to matters dealing with pyrite issues. Thus, some Menolly personnel appear to have been of the mistaken view that only documents pertaining to the three Estates relating to pyrite had to be produced. It was also the case that Menolly staff generally were of the view that properties unaffected by pyrite, although located in one of the three Estates and not the subject of the claim, were not relevant (e.g. Sweetman House – Myrtle estate and Block 1 and Block 21 Beaupark estate.... As a consequence of these misunderstandings, certain files belonging to Michael O'Donohue (an ex-employee who left Menolly in 2007) relating to quantity surveying in each of the three sites and the retention of subcontractors were not sent to BCM Hanby Wallace for review. Coincidentally, it also appears that DBFL seems to have had a similar misunderstanding with respect to the need to discover documentation relating to Block 21 in the Beaupark Estate. This erroneous understanding of a number of Menolly personnel in 2008 does explain why there were newly discovered documents of this type, furnished to BCM Hanby Wallace as part of the 2009 discovery process..." (emphasis added)
194. In paragraph 53, Mr. O'Byrne alludes to the missing files of Matt Carroll, another ex-employee, which were not furnished to BCM Hanby Wallace for discovery in 2008.
195. It is also apparent from paragraph 54 of the Affidavit of Brendan O'Byrne that Albert O'Loughlin, who seems to have been Menolly's key employee directing the furnishing of discovery:
"..appears to have thought that privileged documents did not have to be sent to BCM Hanby Wallace for the purposes of the discovery review..."
196. The departure of employees is addressed in more detail n paragraphs 61 and 62 of the Affidavit of Brendan O'Byrne. Paragraph 61 states:
"In some cases, possibly due to a sense of grievance or otherwise, former employees did not accede to Menolly's requests for co-operation in respect of the discovery process. The employees who had been let go often left papers behind in their offices without ensuring that they were passed on to someone who would be responsible for the matters in question. In some cases the offices were left unoccupied and thus paperwork went unnoticed, while in other the next occupant of the office did not always seek to ascertain what should become of the documentation."
197. Moreover, the Defendants respectfully submit that it is an alarming revelation in paragraph 58 of the Affidavit of Brendan O'Byrne that the Solicitors for the Plaintiff did not organise a further meeting with Menolly personnel on receipt of the Defendants' letter seeking voluntary discovery of 10 March 2008. Mr O'Byrne avers:
"While senior management directly involved in the conduct of litigation were aware of that letter and discussed it in detail with BCM Hanby Wallace, including the very wide parameters of the discovery sought and to a very large extent agreed with the Defendants, the ultimate parameters were not communicated to Menolly personnel generally, who were, in any event,

supposed to be handing over everything in their possession relevant to the three Estates. In particular, no further information meeting was arranged by Menolly senior management and/pr BCM Hanby Wallace with Menolly site staff or Menolly office staff to inform them of the actual parameters of the agreed discovery categories. I have to accept that, if a reminder meeting regarding discovery, linked to the wide range of categories that had been agreed, had been issued it might have disabused site and other personnel as their misconceptions regarding the breadth of what had to be handed over." (emphasis added)

198. In the circumstances of these proceedings it is manifest from the Affidavits of Brendan O'Byrne and Gerard Butler that the solicitors for the Plaintiffs did not discharge their duty to advise their clients of *"the letter and spirit of the agreement"* when they received the letter of voluntary discovery. Per Kelly J in *Balla Lease Developments v. Keeling op. cit.* It is beyond dispute that the directions given to employees at that time were clearly insufficient to ensure that the personnel were fully apprised of the extent to which documents had to be preserved and sent to the Solicitors for the Plaintiffs. It is respectfully submitted that there was a clear duty on the Solicitors for the Plaintiffs to take positive steps to ensure that the Plaintiffs, its employees and ex-employees, appreciated the extent of the obligations imposed on them by the discovery process.

C Failure by legal representatives correctly to assess relevancy

199. It is respectfully submitted that the onerous duties of a solicitor to ensure the effectiveness and propriety of the discovery process apply *mutatis mutandis* to Junior Counsel who may be retained to assist in the assessment of the relevance or otherwise of documents. The Affidavit of Brendan O'Byrne is littered with references to documents which were reviewed by Junior Counsel in 2008 and marked as *"not relevant"* and then subsequently reviewed in 2009 and marked *"relevant".* See for example: Docid M01563 – Affidavit para. 155, Docid EM 00677, Affidavit para. 185, Docid M-35-011, Affidavit para. 388, Docid M01239, Affidavit para. 476, Docid M-85-003/55, Affidavit para. 514, seven documents containing minutes of meetings with Helsingor M-35-001 to M-35-007, Affidavit para. 536.

200. In respect of a six page extract from the Peadar Monaghan Report, Mr O'Byrne sets out, in paragraph 48 of his Affidavit: *"It appears that this six-page extract was marked 'relevant not requested' by the Discovery Review Team assembled for the purposes of the 2008 discovery review process and it was not discovered....A number of the emails which refer to the Peadar Monaghan Report were given by Menolly to BCM Hanby Wallace in 2008 ...These emails were marked 'not relevant' by the Discovery Review Team assembled for the purposes of the 2008 discovery review process and they were not discovered."*

201. A more striking example of this is an email, docid EM 05773, relating to cracking at 24 Parker House. In paragraph 298 of the Affidavit of Brendan O'Byrne he avers:

"That email merely states that "DBFL has recommended a re-assessment for 6 months. He is anxious as the cracks are quiet (sic) evident and wants this situation rectified immediately as he is very concerned" ... the reason this email was not discovered is because it was deemed not relevant by the team of Junior Counsel engaged by the Plaintiffs to review the Plaintiffs' documentation for discovery in 2008."

202. The Defendants submit that it is, with respect, difficult to understand how an email expressly averting to cracking was deemed to be not relevant by legal advisors who were presumably briefed adequately on the matters at issue in the proceedings and made aware of the categories of discovery sought. The explanation offered by the Plaintiffs in this regard is unsustainable.

203. Equally, it is hard to envisage how a map prepared by Menolly in September 2007 seeking to identify the source of infill in various properties was marked not relevant. Docid M01683, Affidavit para. 389. Similarly, a handwritten note by Charlie Blain regarding drainage problems at 18 Drynam Green is described as having been marked not relevant by the discovery review team in 2008. Docid M00123, para. 487.

204. While there will, of course, be occasions where by reason of human error or oversight a document is marked not relevant when it is clearly so, the number of times where this occurred in the 2008 discovery is alarming and seems to indicate an endemic misunderstanding of the relevance criterion and its application by those reviewing the documents.

D Systemic deficiencies: Inadequate procedure for discovering attachments

205. It is evident from the Affidavit of Gerard W. Butler that the approach of the Plaintiffs to discovering attachments to electronic documents was chaotic, ineffective and ultimately deficient.

206. Of note, in paragraph 10 of the Affidavit of Gerard W. Butler he states:

"(iii) Covering letters and/or parent emails were assigned a document identification number and the attachments and/or disclosures were also assigned separate document identification numbers....(v) A team of Junior Counsel and a solicitor then reviewed those documents on computer screens in a dedicated Discovery Room in BCM Hanby Wallace."

207. Paragraph 11 acknowledges:

"The issue with the steps set out at (i) to (vii) above is that, because parent documents and attachments were scanned individually and reviewed on a document-by-document basis, attachments could be separated from the parent documents where an attachment was adjudged to be 'not relevant' or 'privileged'."

208. It is respectfully submitted that the Plaintiffs should have apprehended that the decision to separate attachments from their parents would unavoidably lead to difficulties in linking parent documents with the appropriate attachments. Further, following the queries raised by the Defendants in October of 2008, Mr. Butler avers in paragraph 18 that when attempting to remedy the situation: *"The physical files were not consulted as part [of] the Plaintiffs' efforts to locate the missing attachments."* It is simple astounding that the Plaintiffs did not revert to hard copies of the documents in order to ensure that the remaining difficulties were resolved. The Plaintiffs instead relied unquestioningly on the assurances of Adeo Technologies: *"It is however, accepted that the Plaintiffs could have contacted the source or author or recipient of each document where an attachment was missing and asked each one of them to search for the attachments amongst their files. However, contacting the original source of the documents was not considered as it was believed that all relevant documentation had been made available and had been scanned onto the Summation system."* Affidavit of Brendan O'Byrne, para. 18.

209. Further, the Plaintiffs accept, as it could not reasonably have been disputed, that the:

"...systems adopted by Adeo in scanning parent documents and attachments / enclosures separately and the document by document system of review adopted by the Plaintiffs created confusion for the Defendants in respect of the 1214 attachments queried by the Defendants.

210. It is respectfully submitted that the approach adopted by the Plaintiffs towards the discovery of documents was highly unsatisfactory. The Defendants do not accept the Plaintiffs' attempts to attribute culpability to Waterford Technologies, the expert firm retained by the Plaintiffs. The practice of splitting parent documents from their attachments and then assessing them for relevance was fundamentally flawed and has contributed to the immense expense of the discovery review process.

2. THE CONTINUING BREACH OF DISCOVERY OBLIGATIONS IN RESPECT OF E-DOCUMENT MATERIAL

211. The Defendants believe, and reasonably believe, that significant deficiencies persist in the electronic discovery now furnished by the Plaintiffs.

212. It is important to clarify that the Plaintiffs have to this day never consulted with the Defendants as to what search terms should be used to retrieve documents. It is stated in paragraph 80 of the Affidavit of Brendan O'Byrne that in June 2009, PriceWaterhouseCoopers carried out a search of hard drives on the Menolly server using an expanded range of search terms. Needless to say, the Defendants were given no input as to what those search terms should be.

213. The Defendants are also concerned by the matters averred to in paragraph 87 of the Affidavit of Brendan O'Byrne which provides:

"PWC was instructed not to include e-mails held within the Microsoft Exchange Server application or email held within the Microsoft Outlook data files on Menolly's desktop and laptop computers because they had been the subject matter of the

separate electronic discovery exercise carried out by Waterford Technologies. Up to the events described in the preceding paragraphs above, Menolly believed that the search conducted by Waterford Technologies had captured all pertinent e-mails that had passed through the Menolly e-mail server."
214. The Defendants cannot reasonably be confident that, in particular, all relevant ESI has now been disclosed. The Defendants are still concerned that the key words used in June 2009 may be insufficient and produce under-inclusive results. Moreover, the Defendants can draw no comfort from the Affidavits of Brendan O'Byrne and Gerard W. Butler that relevant records from former employees have not been retrieved, whether they are in hard copy or electronic format. It is respectfully submitted, therefore, that significant deficiencies persist in the discovery furnished.
215. Furthermore, it is not clear from the evidence given by Mr O'Byrne in his affidavit dated 6th October 2009 that the technology employed to search for documents with these keywords would have been sufficient to capture all documentation. For example, no description is given of whether the search would capture or identify a word in the body of a document which had been scanned and uploaded onto a digital file, such as a PDF document. With respect to scanned documentation the only mechanism which one could use to ensure the keyword in question is captured is to employ some form of optical recognition system which would enable the search to pick up printed text which had been scanned on the document.

216. Furthermore, it is not clear how the keyword search would enable the Plaintiffs to retrieve documents in handwritten form which have been scanned onto computer archives. This is particularly of concern in this particular case given that a huge volume of the documentation which is relevant to these proceedings does appear in handwritten form for example on site diaries, notes of meetings, entry records regarding inspections of foundations etc. If these documents have been scanned onto a computer system there is no way a keyword search would be able to put these documents up except to the extent that the keyword is actually contained in the title of a document which is by no means certain. Therefore, there is a serious problem in relation to the system which has been employed by the Plaintiffs to retrieve documents in an electronic format. Considering the statements which were made to this Court that there are over one million (perhaps well into the millions) of documents existing in an electronic form and considering the Plaintiffs have now only disclosed approximately 120,000 documents in discovery it is highly likely that not all relevant documents have been discovered.

3. THE FAILURE OF THE PLAINTIFFS TO ENGAGE
217. So far in the submissions the Defendants have contended that the review and retrieval process carried out by Plaintiffs was deficient in the extreme and that the Plaintiffs were manifestly in breach of their obligations pursuant to the applicable legal principles in relation to discovery.

218. However, the breach of the obligations do not stop there. In reality even if the initial retrieval process was substandard (which it clearly was) the Plaintiffs had ample opportunity to mend their hand in the period between October and December 2008 where the gaps in the discovery were clearly brought to their attention. In those circumstances it is impossible for the Plaintiffs to say they could not have known of the serious deficiencies in the discovery.

219. The Defendants contend that the failure of the Plaintiffs properly to engage with the Defendants and to conduct a proper review of their own discovery during this period of time was fatal and presented the opportunity to avoid the position in which the parties finds themselves. In the affidavits exchanged, it is clear that a large proportion of documents now discovered fell within specific queries which were raised by the Defendants and had the Plaintiffs engaged with the Defendants with respect of these queries it would prompted a review by the Plaintiffs of the adequacy their discovery.
220. It is respectfully submitted that there has been a clear failure by the Plaintiffs to engage with the Defendants in the course of the trial process. Section (I) sets out a number of matters which illustrate the Plaintiffs failure in this regard while section (II) sets out the duties that should be fulfilled by litigants and their legal representatives, in particular where their cases have been granted entry to the list of the Commercial Court.
I MATTERS ILLUSTRATING THE PLAINTIFFS' FAILURE TO ENGAGE WITH THE DEFENDANTS

221. The failure of the Plaintiffs to engage with the Defendants is exemplified by four key factors

(1) The failure of the Plaintiffs to respond fully and openly to a vast range of queries raised by the Defendants between October and December 2008.
(2) The failure by the Plaintiffs to communicate that a decision had been taken to interpret categories of discovery in such a manner that no indication was given the Defendants that they were in possession of relevant documentation which the Defendants were seeking.
(3) The decision to embark on an inappropriate and incomplete discovery retrieval process using key words without any reference to the Court or any form of collaboration with the Defendants.
(4) The refusal to conduct a review of their own discovery in circumstances where the Defendants had clearly signalled that such a review was required due to inadequacies disclosed in the original discovery which were persistently highlighted by the Defendants.

This can be seen from the following.

222. The lengthy query process which took place after between October and December 2008 outlined below. The Defendants contend that during this process it was specifically flagged to the Plaintiffs that there were serious deficiencies in their discovery. This presented the opportunity to the Plaintiffs to conduct a full review of that discovery.
Defendants queries 6 October 2008

223. Having conducted an initial review of the discovery furnished, general queries were raised by the Defendants, by letter dated 6th October 2008. Many of these queries related to missing documents that the Defendants' experts would have, in the normal course of events, expected to be furnished with. Initially these queries were broad in nature and pointed out deficiencies in the following range of documents.

a. Ground work sub-contracts;
b. Site development sub-contracts;

c. Carpentry sub-contracts;
d. Plumbing sub-contracts;
e. Foundation construction contracts;
f; Electrical sub-contracts;
g. Site investigation/geotechnical reports
h; Risk assessments;
i. Contractual documentation;
j. Documentation relating to lime modification and soil testing;
k. Specifications/scope of works/method statements;
l. Masonry and blockwork specifications and details;
m. Architects instructions;
n. Engineer instructions;
o. Concrete data;
p. Architects certification;
q. Minutes of site meetings;
r. Progress reports;
s.Safety file;
t. Testing procedures and test results;
u. Redacted information and commercially sensitive material;
v. Homebond certificates and open house foundation certificates issued by Homebond;
w. Documentation relating to trail pits/bore holes drilled;
x. Diary entries and photographs referred to in Replies to particulars;
y. Project architects' architectural drawings;
z. Structural engineering drawings; aa. Home bond requests;
bb. Correspondence and interim reports issued by the Plaintiffs to homeowners;
cc; Correspondence received from homeowners in respect of damage;
dd. Correspondence received from solicitors regarding homeowner complaints, together with pleadings issued in relation to these complaints;
ee. Documents evidencing defective workmanship or complaints re workmanship;
ff. Documents relating to repair or remediation instructions;

224. These queries, were further narrowed (following a response from BCM Hanby Wallace) and for ease of reference these queries were later classified into thirteen headings including, inter alia,

i. Site investigation/Geotechnical Reports
ii. Risk Assessments
iii. Contractual Documentation
iv. Documentation relation to lime modification and soil testing
v. Specifications/Scope of works/Method Statements
vi. Masonry and Blockwork
vii. Architect's Instructions
viii. Engineer's Instructions
ix. Concrete Data
x. Architect's Certification
xi. Minutes of Site Meetings
xii. Progress Reports
xiii. Safety File

225. Specific queries were also raised in the same letter of 6th October 2009 comprising of:

(i) Documents with missing pages or attachments – some 2000 documents contained separate attachments which could not be located, no indication was given as to where the missing pages or schedules could be located, no sequential Doc ID was given to facilitate location of documents;
(ii) Documents which were redacted;
(iii) Documents which were illegible;
(iv) Documents where information or context is missing;
(v) Documents which refer to other documents without are not discovered;

Response of Plaintiffs dated 20 October 2008

226. As already stated the Plaintiffs' response to this was inadequate, it is submitted, and amounted to obfuscation of the issues. The response came on the 20th October 2008 (14 days after the initial queries were raised). In it the Plaintiffs responded as follows:

"You have listed ...types of documents which you would have expected to see in this category...We have reviewed over 268,000 documents and provided you with the documents relevant to this agreed Category of Voluntary Discovery as agreed inter partes. If any of the above....types of documents were adequately requested in an agreed Category of Voluntary Discovery such documents that are in the Plaintiffs' power, possession or procurement have not been discovered."

227. In light of the total failure by the Plaintiffs properly to address the queries raised the Defendants issued a motion to dismiss the Plaintiffs' claim for failure to make discovery or, alternatively, requiring that further and better discovery be made. The Plaintiffs were insistent that the queries raised by the Defendants were without substance and that they had gone to extraordinary lengths with respect to their discovery obligations. Indeed, the Plaintiffs went so far to say that they had *"provided discovery on a silver platter"* (p. 21 of letter dated 20th October 2008).

228. In the affidavit grounding that motion, it was necessary to set out in detail the queries initially raised and the background to both the general and specific queries.

229. The Plaintiffs had initially indicated that a response to the queries raised would be forthcoming by 31st October 2008. This date was later revised to 20th October 2008, with any necessary supplemental affidavits to be sworn by 31st October 2008.

230. The response received from the Plaintiffs on 20th October 2008 was wholly deficient. The Plaintiffs made no attempt to answer the "*general queries*" raised. Instead, the Plaintiffs asserted in what was to become its "standard form response" to queries raised that, "*if any of the above (…) types of documents were adequately requested in an agreed category of voluntary discovery such documents that are in the Plaintiffs' power, possession or procurement have been discovered*". No attempt was made to identify which if any of the documents sought were not adequately requested or not relevant to an agreed category or which were not in the Plaintiffs' power, possession or procurement. Accordingly, the Defendants were left in a position whereby if a query had been raised as to a type of document, they still had no idea whether or not this document had been furnished or not.

Motion for further and better discovery – exchange of affidavits

231. Given that the Plaintiffs' response left the Defendants without any conclusive response to the queries raised and in an attempt to clarify matters further, the Defendants further refined their initial queries raised, in both general and specific categories.

232. A motion was brought dated 31st October 2008 and there then followed a sequence of affidavits and exchanges between the parties in relation to the deficit of documentation which the Defendants had identified in the Discovery. These are all exhibited in the affidavit of Peter Lennon dated 15th September 2009 (Book 3). However, it is important to summarize the exchanges which took place. In the following section the queries which were raised and responses are summarized.

Specific Queries

1. Attachments

233. One of the most self-evident difficulties that has arisen is as a result of the manner in which the Plaintiffs uploaded documents onto the CT Summation system. In so doing, parent and attachment documents were uploaded with different document id numbers (hereinafter Docid nos). Of the 55,000 documents originally discovered over 2,000 documents had an attachment, which had been separated from the Parent and could therefore not be located by the Defendants. The failure of the Plaintiffs to engage is well illustrated by the exchange which took place between the Defendants and the Plaintiffs in relation to missing attachments. In the letter dated the 6th of October 2008 the Defendants drew the Plaintiffs' attention to the fact that there were many hundreds of documents whose attachment appeared to have been separated from the parent document and which appeared to be missing in the discovery furnished. In this regard the Defendants set out comprehensive queries seeking documents with either pages missing or attachments missing. It was pointed out that whilst we could find the parent document, the attachment could not be found. In addition the Defendants identified to the Plaintiffs exactly which parent document to which they were referring. It is apparent from the recent documents disclosed that the Plaintiffs materially failed properly to engage with the Defendants. It is important to note, that throughout this exchange the Plaintiffs did not make contact with the authors of the "parent" documents where those attachments were missing – rather, the Plaintiffs were satisfied to only search within the pool of documents already in their possession and, even at that, this search was not adequate.

234. The initial response which the Plaintiffs gave in their reply of the 20th of October 2008 was opaque and unhelpful. This letter is previously exhibited at Book 3, Tab 5 of Peter Lennon's Affidavit dated 15th September 2009. At page 22 of that letter the Plaintiffs was simply stated that the attachments should exist beside the Doc ID number of the parent. This was manifestly not the case for many attachments and the Defendants averred to this fact in their affidavit grounding the motion for discovery.

"The Defendants, at great expense, conducted a further review to see whether the attachment was, as stated by the Plaintiffs, in sequence with the "parent". This was done by identifying the document ID of each parent and search the three preceding documents and the three subsequent documents. I am informed that the result of this exercise was that there were only 380 attachments which could be found out of approximately 2,000. The remaining attachments were not there."

235. In response to these specific queries, the Plaintiffs stated in the Affidavit of Mr. Butler dated the 10th of November 2008 (exhibited at Book 3, Tab 7) that an attempt had been made to locate these attachments and that whilst some of these attachments were found, the remaining attachments were missing. However, the Plaintiffs chose not to disclose that no contact had been made with the authors of these documents. Mr. Butler went on to state that the Plaintiffs had conducted an extremely thorough review of the attachment issue querying the main CT Summation data base of 268,000 documents to produce all possible attachments to the queries which had been raised by the Defendants. He went on to say that this review included expert assistance from their licensors of the CT Summation's computer programme. Mr Butler concluded in his affidavit that:

"the Plaintiffs are not in a position to progress the attachments issue any further and I say and believe that the Plaintiffs have done all in their power to locate the missing attachments".

236. Mr. Butler said at paragraph 6 of that Affidavit that:

"the Plaintiffs have conducted a detailed review of the full database of approximately 268,000 in an attempt to locate the attachments listed by Mr. Lennon. Following the review, some of the attachments are still missing. For the sake of clarity I say that where an attachment is now missing, the document was missing from the original paper file. The Plaintiffs have made discovery of all attachments in their power, possession or procurement whether an attachment is relevant to the agreed categories of voluntary discovery or are incorporated by reference".

237. The Defendants were not satisfied with this response. In this regard, in a further Affidavit dated the 1st of December 2008 (exhibited at Book 3, Tab 11 of affidavit of Mr Lennon dated 15th September 2009) it was pointed out that no real explanation had been attempted by the Plaintiffs in relation to these missing attachments. Furthermore, if these were missing then this fact should be sworn in a second schedule of the affidavit of discovery.

238. In response to this, in an Affidavit of the 5th of December 2008 it was stated:

"at this stage it is not proposed to swear another Affidavit of Discovery listing the missing attachments in the second schedule. If the Plaintiffs were in a position to say when the attachments were last in their power, possession and procurement, what became of them and who has them now, as the Defendants have specifically requested, the said attachments could be located."

239. It is remarkable that the Plaintiffs did not conduct a proper review as to the location of these attachments, given the repeated complaints which were being made by the Defendants as to the fact that these documents could not be found.

240. In a further Affidavit sworn on behalf of the Defendants dated the 8th of December 2008 it was pointed out that it was not unreasonable or overly onerous to expect the Plaintiffs to aver as to the missing attachments and to the location of same. In response to this, Mr. Butler in an Affidavit dated the 10th of December 2008 stated that the Plaintiffs had gone to great lengths to locate the attachments listed by the Defendants and that the attachments which could not be found were missing from the original paper files which were scanned into Summation (at paragraph 8 of the said Affidavit).

241. Before the motion for further and better discovery was heard, the parties agreed to compromise the motion on the basis of a further Affidavit which would be sworn by Mr. Brendan O'Byrne and which was duly done on the 23rd of December 2008. In this Affidavit the Plaintiffs reiterated and surmounted their position in relation to attachments stating that where an attachment did not appear in sequence beside a parent document then the attachment did not appear beside the parent in the paper file. Mr O'Byrne further averred that in relation to the attachments, 689 attachments could not be located. Finally, at paragraph 6 of Mr. O'Byrne's Affidavit he averred to the fact that the documents were now listed in a second schedule of his Affidavit and were therefore missing.

General Queries

242. In addition to the specific queries raised, a large number of "general queries" were specifically raised. No attempt was made by the Plaintiffs to clarify whether or not the queries raised in relation to a lack of documentation pertaining to categories set out above were in their power, possession or procurement.

243. The Defendants were, therefore, forced to reiterate on numerous occasions their concerns in relation to each of the thirteen identified categories of general queries. A number of these are of note for this application.

Concrete Data

244. The failure of the Plaintiffs to provide this documentation in accordance with their discovery obligations must be seen in the context of the fact that the Defendants consistently queried the absence of such documentation. This can be seen from the application which the Defendants brought in October 2008.

245. A query in relation to concrete data was first raised by way of the letter dated the 6th of October 2008. At page 23 of that letter the document were general queries raised by the Defendants pointing out that *"the lack of documentation in these categories in relation to <u>the concrete supplied</u> is very surprising".*

246. In this regard the Defendants pointed out that in relation to Drynam there appeared to be only approximately 42 dockets relating to delivery of concrete. The Defendants also pointed out that there also appeared to be remarkably few dockets relating to Myrtle. In addition to the foregoing the Defendants raised a number of queries in respect of concrete data generally and in particular refer to the absence of concrete cube tests, supplier data, supplier delivery data and supplier test data in relation to concrete. The Plaintiffs responded in the letter dated the 20th of October 2008 where they stated at page 14 that:

"Where the types of documents you would have expected to see are not present, the Plaintiffs are not obliged to provide explanations for the absence of same..... if any of the types of documents identified by you were adequately requested in an agreed category of voluntary discovery such documents that are in the Plaintiffs power, possession or procurement have been discovered".

247. This response was clearly unsatisfactory. In the Grounding Affidavit to the Motion for further and better discovery issued in October 2008 the Defendants pointed out again at paragraph 80 and 81 of that Affidavit that the absence of information in relation to both concrete and the supply of concrete was very surprising and that the Defendants were entitled to a proper explanation as to why such little information was forthcoming. In response to these queries the Plaintiffs stated in the Affidavit of Gerard Butler dated the 10th of November 2008 at paragraph 47 that the Defendants' assertions in relation to the lack of documentation and the alleged failure to furnish documentation were without foundation.

248. Again, the Defendants were not satisfied with this response and wrote to the Plaintiffs on 17th November 2008 enquiring further about the absence of concrete related information. Once again the Plaintiffs response was unhelpful and this was pointed out in a further Replying Affidavit sworn the 1st of December 2008 (previously exhibited at Book 3 Tab 11) that whilst the Plaintiffs had confirmed that they had requested documentation from *"the suppliers of concrete"* no indication had been given by the Plaintiffs as to what responses they had received. In a further affidavit made on 5th December 2008 Mr. Butler pointed out that the Defendants were not entitled to the information which thay were seeking.

249. Ultimately the Defendants compromised this Motion on the basis already outlined. In Mr. O'Byrne's Affidavit of 23rd December 2008 it was confirmed that the Plaintiffs had written to Goode Concrete, Halton Concrete Limited, Keegan Quarries Concrete Limited, Kilsaran Concrete; Kingscourt Bricks and Hudson Brothers Limited. Mr. O'Byrne stated that the Plaintiffs had not received documentation from these parties. Notwithstanding this it now appears that there were approximately:

i. 2,600 documents in the new discovery authored by Goode Concrete Limited;

ii. 1,000 in the new discovery authored by Halton Concrete;
iii. 600 documents in the new discovery which are authored by Keegan Quarries;
iv. 1,700 documents in the new discovery authored by Kilsaran Concrete Limited;
v. 306 documents authored by Kingscourt Bricks Limited in the new discovery and
vi. 700 documents in the new discovery authored by Hudson Brothers Limited.

250. At paragraphs 5-9 of Mr. Butler's Affidavit of 6 October 2009 an explanation was provided as to why the delivery dockets, invoices and order forms were not discovered in 2008. It must be stated, however, that had this application not been brought by the Defendants the inconsistency at the heart of the Plaintiffs' approach to category 68 would not have become apparent to the Defendants or indeed to the Court. The effect of the failure to communicate this inconsistency to the Defendants is that the Defendants were knowingly being put by the Plaintiffs in a grossly disadvantageous litigious position.

Lime Modification and soil testing documentation

251. In the original discovery furnished, only seven documents appeared to relate to soil stabilising methods used in the Drynam estate. It was unclear to the Defendants from the original discovery whether tests relating to settlement prediction were disclosed to the Defendants. Furthermore, very little documentation relating to soil stabilization works or testing works was disclosed for Beaupark and Myrtle. The Plaintiffs now claim that no stabilization works were carried out at all on the estates of Beaupark and Myrtle, and that the new documentation which has emerged on discovery solely relates to the estate of Red Arches. However, this was not the response given by the Plaintiffs on 10 November 2008.

252. The Plaintiffs stated that no ground improvements or lime stabilisation was carried out in Beaupark or Myrtle specifically for house foundations. However, it was stated lime stabilisation was used, as the Plaintiffs maintain is common-place, in road works to facilitate the re-use of site excavated materials on some road works in Beaupark and Myrtle. Paragraph 38 of Gerard Butler's Affidavit dated 10th November 2008 Whilst it appears to be case that the lime stabilisation was certainly carried in Red Arches, it appears some of the new documentation which has emerged in the new discovery relates to the Myrtle estate. (See for example paragraph 578 affidavit of Peter Lennon dated 27 October 2009.)

253. It should be pointed out that the Defendants specifically pressed the Plaintiffs to furnish further information with respect to documentation in this category. An inadequate response was furnished wherein the Plaintiffs failed to confirm whether they requested this information from all contractors engaged in Lime Modification and Soil Testing. Page 6 of the Plaintiffs 24th November 2008 letter The Plaintiffs stated only that they requested documents relevant to category 53 and did not indicate what responses it received from the contractors to whom they did write. The position was not advanced any further by the response of Mr Butler dated 5th December 2008 where it was stated the Plaintiffs' position is that the 24th November 2008 letter comprehensively addresses the Defendants' queries. It stated that all of the appropriate parties engaged in lime modification and soil testing were written to and all relevant documents received pursuant to these requests have been discovered. Paragraph 14 of Gerard Butler's Affidavit of 5th December 2008 It went on to state that the Defendants were not entitled to information over and above that already provided, specifically in relation to what responses were received from which contractors. *ibid*

254. Given the persistent queries raised by the Defendants it is remarkable that the Plaintiffs did not indicate that it has further documentation in its possession relating to lime stabilization and that there was strong evidence to suggest that these documents related to Myrtle – the phase 1 section. (See paragraph 578 of affidavit of Peter Lennon dated 15th September 2009.)

Requests for Architects' and Engineers' instructions

255. During the exchanges which took place between October and December 2008 the Defendants specifically pointed to the absence of architects' and engineers' instructions in the documentation which had been furnished by the Plaintiffs. It was pointed out that in developments of this nature there would be a vast amount of engineers' instructions and usually a file would be kept running to hundreds of pages. In response to this, the Plaintiffs maintained that the Defendants' assertions as to the lack of documentation in this category did not:

"Accurately reflect the accepted building practices in residential house building in Ireland and that the said opinions and averments demonstrate a profound misconception of the normal role of engineers in the construction of residential developments such as Drynam, Beaupark and Myrtle."

256. Mr. Butler went on to say in his Affidavit sworn the 10th of November 2008 that for the sake of clarity:

"I say that all documents relating to 'engineers instructions' relevant to the categories of voluntary discovery and in the Plaintiffs power, possession and procurement have been discovered to the Defendants."

257. Indeed it is remarkable that the Plaintiffs could have adopted such a position when it is now clear that there are hundreds of engineers' instructions disclosed in the new documentation. (On the Defendants' count there are 524 such instructions in the new discovery.) A similar situation pertains with respect to Architects' instructions (although the number of instructions in the new discovery is 154 the extent to which these are duplicates is not clear).

258. Once more, a clear signal went out to the Plaintiffs that their discovery was deficient and, once more, the Plaintiffs failed to conduct any review of their own processes to ensure that proper discovery has been made in accordance with their clear obligations.

259. It should be pointed out that the documents which could be classified as "engineers" instructions are specifically relied upon by the Defendants as having great significance for their defence, particularly in relation to ground conditions, as pointed out at paragraphs 87 and 97 of the affidavit of Peter Lennon dated 15th September 2009.

Requests for minutes of site meetings

260. A similar position pertained with respect to minutes of site meetings. By way of the motion for further and better discovery issued in October 2008 the Defendants pointed out that there were very few minutes of site meetings furnished on discovery which was highly unusual in the circumstances. In his reply on behalf of the Plaintiffs Mr. Butler stated at paragraph 49 of his Affidavit of 10th of November 2008 that the Plaintiffs had made discovery of all site minutes in their power, possession or procurement. The new discovery now reveals that there are approximately 350 minutes in the new discovery and, on the Plaintiffs case, 111 of these were not previously discovered. Again, it is very difficult to understand how these documents were overlooked and/or how a review of the discovery process was not undertaken in circumstances where the Defendants were specifically seeking them.

Documents relating to the Location of infill

261. The issue with respect to source of infill has been well ventilated in the affidavits in supporting and resisting this application. However, one of the key issues which has emerged relates to the documentation which was employed by the Plaintiffs to provide the particulars in relation to location of infill in January 2008.

262. At paragraphs 346 *et seq* of his affidavit dated15th September 2009 Mr Lennon pointed out that, following from an indication given by the Plaintiffs to the Court (on the 31st July 2008) that the documentary records for the location of infill were quite complete and demonstrated that the location of fill material was an easy issue to identify, queries were raised with the Plaintiffs regarding such records.

263. On 17th October 2008, the Defendants' solicitors wrote and suggested that from a review of the documents discovered, the records were not in any way complete and that whilst there were delivery dockets which gave a vague indication as to which estate the infill was supplied to, it did not indicate in which house the infill was used. That letter then requested the relevant documentation be provided.

264. The response to that letter came on the 20th of October 2008 but failed to address this particular issue. A motion then issued for further and better discovery in October 2008 which was grounded upon an Affidavit sworn by Peter Lennon on the 30th of October 2008. At paragraph 137 of that Affidavit it was pointed out that there was no clear documentation provided in relation to evidence of the location of the Defendants' infill in the estates.

265. At paragraph 141 of that Affidavit it was made clear that the impression which was conveyed to the Court was that there were documents specifically demonstrating what infill went where during the course of the construction of these three estates. It was pointed out that this documentation had not been provided and that it was incumbent upon the Plaintiffs to identify these documents if they did exist. The Plaintiffs' response was set out in the Affidavit of Gerard Butler dated the 10th of November 2008. He stated at paragraph 56 that:

> *"I say and believe that the information contained in the thousands of documents provided in the Plaintiffs discovery make it a relatively easy task to identify what infill was placed under the ground floor slab of each individual house on the Drynam, Beaupark and Myrtle estates".*

266. By way of response it was pointed out that this was an unhelpful position to adopt and that if the Plaintiffs had documents which recorded or identified where the Defendants' infill was used they were asked to identify these in the discovery. It was also pointed out that it seemed a complete waste of time to require the Defendants to extrapolate this information if the Plaintiffs already possessed it. On the other hand it was pointed out that if there were no specific documents which provided this information then this should be clarified.

267. A further exchange of affidavits took place wherein the Plaintiffs adopted the position that the Defendants were on a *"fishing expedition".*

268. At paragraph 16 of the Affidavit sworn by Mr. O'Byrne on 23rd December 2008 by way of compromise of the motion, the Plaintiffs averred there were no specific documents or discreet categories of documents in the Plaintiffs' discovery already provided identifying where the Defendants infill was used by the Plaintiffs. Mr. O'Byrne went on to state in the same paragraph that this evidence would be adduced at trial using all evidence, expert evidence, diary entries, delivery dockets, pour dates, dated photographs and/or any combination of the above. It is now clear that whilst this averment was correct and there were no specific documents identifying the location of the fill in the discovery then *provided,* the Plaintiffs did have at that time documentation of that nature which they had not discovered or provided to the Defendants – particularly spreadsheet documentation evidencing the fact that the original replies to particulars given in January 2008 were clearly in doubt from an a very early stage

Site Diaries

269. The failure of the Plaintiffs to engage can, perhaps, be best illustrated by the Plaintiffs' refusal to look further into the issue of site diaries.

270. After inspection of discovery was completed in October 2008, the First Named Defendant raised a number of queries in relation to the absence of documentation. In particular, in the letter dated the 6th of October 2008, the First Named Defendant raised a complaint about the absence of site diaries. The response of the Plaintiffs in the letter dated the 20th of October 2008 was that the Plaintiffs *had no further site diaries* and that *any other diaries which may exist were either missing or*, if they were in the Plaintiffs' power, possession or procurement they were *not relevant* to any of the categories of voluntary discovery as agreed between the parties.

271. This statement, however, was manifestly incorrect. In fact, the Defendants have identified a large number of documents (474 on the Plaintiffs calculation) which can be described as "site diaries or extract from site diaries" in the new discovery.

272. In the motion issued on the 30th of October 2008 the Defendants raised complaints about the non discovery of site diaries. In his replying affidavit dated the 10th of November 2008, Mr. Butler made the following comments. He stated at

paragraph 64

> *"I say and believe that the Plaintiffs have made discovery of all diaries relevant to the category of voluntary discovery that are in the Plaintiffs power, possession or procurement. The Plaintiffs only know of the existence of two other diaries which are not relevant to the category of voluntary discovery. However despite their prosaic and relevant content, these diaries are available for inspection by the Defendants."*

273. In the next paragraph he stated

"I say and believe that the Plaintiffs do not know of the existence of any other site diary relating to the development of Drynam, Beaupark or Myrtle Estates."

274. In response to this averment the Defendants wrote on the 17th of November 2008 asking the Plaintiffs to clarify a number of issues in respect of the site diaries.

275. On the 24th of November 2008, the Plaintiffs revealed that they had a further *seven diaries* which they claimed were not relevant to the categories of voluntary discovery but which they had in their possession. This was a very surprising revelation considering Mr. Butler's averment in his previous affidavit that the Plaintiffs did not know of the existence *of any other diaries* relating to the three estates.

276. In a subsequent replying affidavit dated 1st December 2008, further queries were raised by the Defendant in respect of site diaries. In a response affidavit dated the 11th of December 2008 Mr. Butler stated in clear terms

> *"I say that the Plaintiffs have gone further than can be reasonably expected of them in trying to address the issues and/or complaints raised by the Defendants regarding site diaries".*

277. Then, on the 28th of January 2009 a letter was received from BCM Hanby Wallace stating that the Plaintiffs were serving a supplemental Affidavit of Discovery of Brendan O'Byrne. They stated that in that Affidavit it included *eight* site diaries of Colin Maleady and C&M Groundworks Limited. It also stated these diaries were not previously in the Plaintiffs' possession and the Plaintiffs only became aware of their existence in discussions with Colin Maleady with a view to obtaining a witness statement.

278. On the 18th May 2009, the Defendants received a further 3 diaries of Kevin Kelly Senior and Junior and a note book of a Mr Niall O'Toole.

279. This led to the motion herein. In a replying affidavit dated 25th May 2009 Mr Butler stated that it appeared that there were a further 9 site diaries not previously discovered. Again, the explanations provided by Mr Butler were difficult to follow, but, it is submitted, they demonstrate that no real efforts were made to re-review the discovery made in July 2008.

These 9 site diaries were as follows.

· Sean Martin – 2003, 2004 and 2008.
· Niall Scott – 2005, 2006 and 2008.
· Charlie Blain – 2003 and 2007.
· Ronan McManus – 2007

280. In respect of Sean Martin and Niall Scott no explanation is given as to where these diaries came from and why they were not furnished sooner. The explanation was simply that:
"On the 21st May the Plaintiffs carried out a further search for site diaries after the issue in relation to the 2008 site diary of Kevin Kelly Senior arose. In the light of that search, the following further diaries have been located: the 2003, 2004 and 2008 diaries of Sean Martin and the 2005, 2006 and 2008 diaries of Niall Scott."

281. The diaries of Sean Martin were not part of the original 16 diaries referred to at paragraph 18 of Mr. Butler's affidavit. In respect of Niall Scott the 2005, 2006 and 2008 diaries were not part of the original 16. The explanation in Mr O'Byrne's affidavit of the 6th October 2009 for the failure to discovery these was that these persons only thought that "pyrite" related matters were relevant so did not disclose original diaries. However, this does not explain how the 2008 diaries of Sean Martin and Niall Scott were not provided. Furthermore, after extensive queries were raised with respect to the site diaries it appears no attempts were made to go back and enquire of personnel on site as whether *all* diaries had been given over.

282. Charlie Blain's 2003 and 2007 diaries were provided to the Plaintiffs' solicitors in June 2008, as was the Ronan McManus 2007 diary. In the circumstances, it is the Defendants' contention that the explanation for failing to discover these is simply not plausable. These diaries are in the same category as the 2007 and 2008 Kevin Kelly Diaries. These have all been in the Plaintiffs' possession since June 2008 yet, on a number of distinct occasions the Plaintiffs' solicitors have intimated that they did not exist.

283. In respect of the diaries of Ronan McManus and Kevin Kelly it appears from paragraph 27 of the affidavit of Mr Butler dated 25th May 2009 that the Plaintiffs were aware these were in existence. However, on the 24th November 2008, the Plaintiffs stated that they were aware of only 7 further diaries and two diary extracts. (9 diaries in total.) None of these 9 diaries were the diaries of Ronan McManus and Kevin Kelly. Therefore it is unclear as why the existence of these diaries was not mentioned. This is a matter which was addressed at paragraph 15 of the affidavit of Peter Lennon sworn 28th May 2009, but it has not been addressed in the replying affidavits of Mr O'Byrne or Mr Butler dated 7th October 2009.

284. Ultimately, there was no meaningful attempt whatsoever to engage with the Plaintiffs with respect to any of these queries. Not only that, it was clear that the Plaintiffs were embarking on a unilateral course in being their own judge and jury as to what was discoverable, what the interpretation of the categories of discovery were and whether the method it undertook in retrieving electronically stored information was permissible in law let alone effective in practice.

II DUTY TO ENGAGE OR COOPERATE

285. It is respectfully submitted that the Plaintiffs are under a duty to cooperate with the Defendants in the running of these proceedings. The Defendants submit that the duty to cooperate exists in the context of all litigation but is particularly

heightened in the context of the Commercial Court.
286. Both the rules governing the professional conduct of solicitors and the case law in relation the duties owed by parties and their legal representatives to the court support the identification of the duty to cooperate in the running of proceedings.
287. Rule 5.1 the Law Society's Guide to Professional Conduct of Solicitors in Ireland provides:
"A solicitor not only acts for his client and owes a duty to do his best for that client but he also owes a duty to the court. The proper administration of justice requires that the court be able to rely upon each lawyer who appears before it or who has dealings with it. A solicitor:
….
(c) has an overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved and should assist the court in the administration of justice and should not deceive or knowingly or recklessly mislead the court."
288. In ***Law Society v. Walker*** [2007] 3 I.R. 581. an appeal of the decision of the Law Society Disciplinary Tribunal that a *prima facie* case of misconduct was not disclosed, the then President of the High Court considered the duty of solicitors to the court at length. Finnegan P. referred to apprehended the duties to be the same to the Court as counsel. He said of a solicitor . " *He has a duty to the Court which is paramount.*"" *Ibid*, at p. 502.

289. In ***Unioil International Pty Ltd. v. Deloitte Touche Tohmatsu (No. 2)*** (1997) 18 W.A.R. 190., the plaintiff argued that the defendant should pay the plaintiff's costs on the basis that the plaintiff had been forced to prove many allegations (including the incorporation of the plaintiff) and many other allegations which were not genuinely in dispute had been denied where they should have been admitted. At p. 193 Ipp J. said:
"Traditionally, lawyers owe a duty of honesty and candour to the court … Further, in modern times, there is an overriding duty on lawyers to assist in the prompt and economical disposal of litigation: see Giannarelli v. Wraith [1988] 165 C.L.R. 543 at p. 556; Ashmore v. Corporation of Lloyds [1992] 1 W.L.R. 446 at p. 453; [1992] 2 All E.R. 486 at pp. 491 to 492. In my view, the traditional requirement of honesty and candour on the part of lawyers and the modern duty to reduce unnecessary issues and costs, are inimical to the practice of denying or putting parties to the proof of facts which, according to the instructions in the lawyer's possession, should be admitted."
290. In ***R. v. Wilson and Grimwade*** [1995] 1 VR 163 the Supreme Court of Victoria described a general responsibility of lawyers to cooperate in the trial process as follows saying it was the lawyers responsibility to
"to cooperate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed: if the present adversary system of litigation is to survive, it demands no less …"
291. It has also been confirmed in the United States that lawyers have a duty to cooperate in the judicial process. In ***Gentile v. State Bar of Nevada*** (89-1836), 501 U.S. 1030 (1991) the United States Supreme Court stated:
"… an attorney's duty to cooperate in the judicial process may prevent him or her from taking actions with an intent to frustrate that process. The role of attorneys in the criminal justice system subjects them to fiduciary obligations to the court and the parties."
292. In ***Azalea Garden Board*** the motion for sanctions primarily centred on the plaintiff's conduct in relation to the discovery process. In giving judgment Tennille J. quoted extensively from Magistrate Judge Grimm's opinion in ***Mancia v. Mayflower Textile Serv. Co.*** 253 F.R.D. 354, 358 (D. Md. 2008)., observing that the entire opinion should be read by all trial lawyers:
"[Rule 26(g)] is intended to impose an "affirmative duty"..... to behave responsibly during discovery, and to ensure that it is conducted in a way that is consistent "with the spirit and purposes" of the discovery rules, which are contained in Rules 26 through 37. It cannot seriously be disputed that compliance with the "spirit and purposes" of these discovery rules requires cooperation.... to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionally large to what is at stake in the litigation.
He went to state that lawyers
" cannot "behave responsively" during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.
….
The apparent ineffectiveness of Rule 26(g) in changing the way discovery is in fact practiced often is excused by arguing that the cooperation that judges expect during discovery is unrealistic because it is at odds with the demands of the adversary system, within which the discovery process operates. But this is just not so.
However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends.
293. Tennille J. therefore concluded that:
"Judges and lawyers should resurrect the original intention of the discovery rules, which was to make discovery a more cooperative and less adversarial system designed to reduce, not increase, the cost of litigation. …. Our system of civil justice cannot function effectively and economically unless lawyers and judges return to the original intention of the discovery rules and make cooperation, communication, and transparency the cornerstones of the discovery process."
294. The Defendant submits that above cases clearly identify two principal duties owed by lawyers to the court, firstly, the traditional duty of honesty and candour and secondly, the modern duty to assist in the prompt and economical disposal of litigation.
295. The duty to assist in facilitating the proper and speedy administration of justice must be heightened in the context of the Commercial Court. There is no automatic right of entry to the list and those who are granted the privilege of entry to the Commercial List must strictly abide by the rules of that list. The privilege of being afforded the time and resources of the Commercial Court must come with a price. Those who want their cases disposed of more quickly must be obliged to work even harder to promote speed and expedition themselves. It is not in the interests of justice that a party granted entry to the Commercial List should be permitted to delay the quick disposal of cases and cause prejudice and inconvenience to its opponent and to the court. Practice note HC50, which requires the Solicitor's Certificate grounding an application to enter a case in the Commercial List to be signed by an individual solicitor who will be responsible for the conduct of the case confirms this emphasis on heightened obligations in the context of the Commercial Court.
296. It is therefore respectfully submitted that there is a heightened obligation on parties granted entry to the Commercial List to cooperate with their opponents. Once the Judge of the Commercial List exercises his or her discretion to order entry, it is implicit that the parties are under a duty to conduct their litigation in a manner which facilitates the objectives of the Commercial Court.
297. The objectives of the Commercial Court are reflected throughout the rules of Order 63A of the Rules of the Superior Courts 1986. Order 63A, rule 5 states:
"A Judge, may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings."
298. Order 63A, rule 6 specifically provides that directions that can be given at the initial directions hearing should facilitate the

determination of the proceedings in the manner envisaged by rule 5. Furthermore, the express purpose of the case management conference is *"to ensure that the proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings".*

299. Therefore, along with constitutional imperative to ensure a just trial, Judges of the Commercial Court are expressly required to exercise their powers in a manner that will promote an expeditious resolution of proceedings and the minimising of costs.

300. It is widely accepted that case management cannot work without the cooperation of the parties, both with the court and with each other. As the recent *Report of the Working Group on a Court of Appeal Report of the Working Group on a Court of Appeal* (May, 2009). stated in relation to case management in the Commercial Court:

"Successful case management requires the co-operation of the parties both with the Court and with each other. The Commercial Court judge has a number of powers at his disposal to encourage such co-operation. For example, he has the power to strike out or limit a party's case, to make conditional orders, to require explanations for default and to make costs orders. All of the powers are designed to make case management more effective and ultimately to reduce costs." Ibid, at p. 63.

301. In England the duty of parties to cooperate with each other has been given express consideration by the rule makers. In *Hertsmere Primary Care Trust v. Rabindra-Anandh* [2005] EWHC 320, [2005] C.P. Rep. 41. Lightman J. took the view that parties were duty bound to cooperate with each other and a defendant who deliberately withheld the identification of an issue of technical non-compliance could not reap any benefit from such conduct. Lightman J. rejected the argument of the defendants that there was no duty upon them to identify the error so that it might be rectified by the claimant. He referred to the duty of the court under the Civil Procedure Rules to actively manage cases and to *"encourage the parties to cooperate with each other in the conduct of the proceedings".* In Lightman J.'s view the defendant was duty bound to cooperate with the claimants and this duty obliged the defendant to provide the information requested.

302. In England the overriding objective of the Civil Procedure Rules is expressly set out in Rule 1:

"These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly."

303. The Rules set out in further detail the factors incorporated in a just management of litigation in Rule 1.1(2):

> *"(2) Dealing with a case justly includes, so far as is practicable –*
> *(a) ensuring that the parties are on an equal footing;*
> *(b) saving expense;*
> *(c) dealing with the case in ways which are proportionate –*
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case;*
> *(iii) to the complexity of the issues; and*
> *(iv) to the financial position of each party;*
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*

304. It is therefore evident that the English Civil Procedure Rules and the Irish Commercial Court Rules have precisely the same objectives. This has been expressly acknowledged by Kelly J. in ***Re Norton Healthcare Limited*** [2005] IEHC 411 [2006] 3 I.R. 321. *:*

"Order 63A of the Rules of the Superior Courts which govern cases in the commercial list seek to achieve precisely the same object as the relevant provisions of the CPR in England; they seek to bring about a just and expeditious trial whilst seeking to minimise cost". Ibid, at p. 331.

305. Accordingly, in ***Re Norton Health Care Limited***, Kelly J. was prepared to rely upon the precise reasoning set out in a similar case by the English Court of Appeal, which had been guided by the overriding objective of the Civil Procedure Rules and, to use the words of Jacob L.J. of the English court, the "further detail" into which they descend. *Nikken Kosakusho Works v. Pioneer Trading Co.* [2005] EWCA Civ 906, [2006] F.S.R. 4.

306. The "further detail" to which Jacob L.J. referred is set out in Rule 1.4 of the Civil Procedure Rules, which confirms that the court has a duty to further the overriding objective by actively managing cases and elaborates on what is involved in "active case management":

"Active case management includes –
(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;....."

307. Re Norton Healthcare Limited involved an application for leave to amend a patent. Kelly J. referred to the English decision of ***Nikken Kosakusho Works v. Pioneer Trading Co.*** [2005] EWCA Civ 906 (29th June, 2005) in which the Court of Appeal in England had to consider the exercise of the discretion given by s. 75 of The Patents Act 1977, which is the same as that conferred on the court in this jurisdiction by s. 38(2) of the Patents Act 1992. The English Court of Appeal refused the application for a post-trial amendment for a number of reasons, *inter alia*, a consideration of the Civil Procedure Rules 1998. As Jacob L.J said:

> *"…. the CPR are dead against the kind of procedure which Mr. Baldwin seeks to invoke. The whole code is governed by the overriding objective contained in part 1.1.1.*
> *1.1.2 specifies some examples of cases dealing with a case justly. 2(b) is 'saving expense'. Plainly a second trial would cause increased expense. 2(d) is ensuring that it is 'dealt with expeditiously and fairly'. Having two bites at the cherry is doing neither of those things.*
> *The rules descend into more detail. Under the courts duty to manage cases, 1.4 requires the court actively to manage cases and 1.4.2 says that active case management includes 'identifying the issues at an early stage and dealing with as many aspects of the case as it can on the same occasion'."*

308. Kelly J took the view that the Commercial Court Rules in this jurisdiction seek to achieve precisely the same object and accordingly held that the precise reasoning of Jacob L.J. would also apply in this jurisdiction. Therefore, while the English rules "descend into more detail", it has been established that both sets of rules share the same objectives. Consequently, while the English rules elaborate that case management should include *"encouraging the parties to co-operate with each other in the conduct of the proceedings"* it is submitted that the objectives of the Commercial Court in this jurisdiction also require that parties work with the court and each other to facilitate their achievement.

309. The procedures of the Commercial Court clearly require cooperation in practice and while its Rules expressly provide guidance to Judges, it could not possibly be argued that the parties have no obligation to promote their objectives. To suggest that parties do not have to cooperate with each other would be tantamount to licensing the frustration of the courts in their endeavour to manage cases and bring about expeditious and efficient justice. Accordingly, parties must be under an implicit duty to operate with the same spirit of inter party cooperation in this jurisdiction as is expressly stipulated in England.

310. It is further submitted that since Commercial Court Judges are under a duty to work towards just, expeditious and cost-efficient trials, the duty owed by parties and their legal representatives to the court must incorporate the duty to facilitate these goals through cooperation.

311. It is therefore submitted that given the objectives and imperatives of the Commercial Court and the duties owed by parties to the court and to each other, cooperation must be, in the words of Tennille J. in ***Azalea Garden Board***, a cornerstone of the trial process in this jurisdiction. While litigation is inherently adversarial and hostile, this should not affect the case management

and trial process during which parties should strive to be as harmonious as possible. The parties, through their legal representatives, should communicate with each other and fully cooperate with each other and with the court in the process to achieve the objectives of the court. It is regretfully submitted that in this case there has been a clear and obvious failure on the part of the Plaintiffs to communicate and fully cooperate with the Defendants.

4. dismissial and/or STRIKING OUT proceedings FOR FAILURE TO MAKe DISCOVERY
Introduction
312. It is the Defendants' contention that they have been irretrievably prejudiced by the late discovery of so many documents which go to the heart of so many issues in this trial. In particular as has been set out in the Affidavits of Mr. Peter Lennon the documents cover a wide range of issues which are directly relevant to the case which the Defendants are mounting that the damage and defects which are manifested across these three estates are not in fact attributable to pyritic induced heave but are directly related to standard and more mundane causes such as poor workmanship, bad quality control, poor constructional detail and design and inadequate ground conditions.

313. The new documentation raises significant lines of enquiry which go the heart of the Defendants' defence and which would have been carried out between the period of July and December 2008 and prior to the selection of the basket of houses. As the trial has now progressed without the benefit of such investigations the Defendants find themselves in a position conducting a case where the selection of the houses which are the focus of this trial are not representative of the issues which are raised by the new discovery documentation. Furthermore, specific lines of enquiry which would have been carried out during that period are now rendered redundant or very difficult in circumstances where properties (which were the subject of investigation) have now been fully remediated without the opportunity properly to examine these in the light of what the discovery documentation reveals. The Affidavits of Mr. Lennon highlight the prejudice which has emerged in a number of key areas. These are:-
· The Non-Baylane Houses.
· New information concerning concrete.
· New information concerning ground conditions.
· New information concerning poor workmanship and quality control.
· New information concerning Red Arches.
· New information in relation to the development of cracking.

314. In relation to all of these matters the new documentation would have specifically informed, guided and provided context to the investigations which were carried out and which would have directly had an impact on the decision to include houses in the basket.

315. This prejudice can be specifically seen, for example, with respect to the section on the Non-Baylane properties as outlined in the previous Affidavit of Mr. Lennon. There now appear to be in total 77 homes which contain Non-Baylane fill (some of which were mixed and some of which were pure Non-Baylane) and which would have and should have provided an opportunity for the Defendants and for the Court to engage in a proper diagnostic comparison between damage in Baylane properties and damage in Non-Baylane properties. It is clear from the discovery documentation that had full discovery been made the Defendants would have been led onto a very definite line of enquiry which would have revealed the true position relating to the non-Baylane houses. Furthermore, as has been outlined in the Affidavit of Peter Lennon dated the 27th of October 2009 the Defendants were very specifically diverted from that line of enquiry by virtue of assurances given by the Plaintiffs as to which properties contained non-Baylane material. Had full discovery been made the nature of the basket of homes would have been very different. Furthermore, considering the fact that the Plaintiffs have now stated that 57 of these properties require remediation there was scope for allowing or directing opening up works with respect to a number of properties which contain Non-Baylane material. This would have provided significant material which the Defendants could have used in their defence.

316. In addition to the foregoing the Defendants specifically contend that the new information in relation to concrete delivery and the pervasive practice of adding water on site with respect to the poring of floor slabs has a central bearing on explaining specific instances of damage which have manifested in some of the properties in the Estates. This relates to the instance of cracks appearing on floor slabs which the Defendants (after painstaking investigation) concluded was due to a range of factors including an above average water cement ratio which was apparent in the concrete mix. However, it is very clear that had the documentation which has now been provided have been provided in July 2008, the Defendants would have been alerted to this problem at a far earlier stage and a rigorous and extensive regime of testing would have been put in place to facilitate proving to this Court that there can be no doubt the cracking in the floor slabs (where this does exist) is due to poor workmanship and practices.

317. The Plaintiffs have attempted to argue that the Defendants always knew that the problem with the floor slab was due to too much water. However, this was to completely mischaracterise the method by which the Defendants arrived at their conclusions which are set out clearly in the reports by the Defendants concrete experts Stats. These show that investigations began from first principles where all causes were examined. It was not until the basket of houses was chosen and a further attempt at testing was carried out, that it became very clear towards the end of 2008 that there was a very clear link between high water cement ratios and cracking which appeared. However, by that stage the basket of homes had been chosen and the Defendants were limited in the range of evidence and testing they could have produced to this Court to support and corroborate their opinion that the cracking related to shrinkage and not to pyritic induced heave. Furthermore, as has been amply demonstrated in the Affidavit of Mr. Peter Lennon dated 27th October 2009, the failure of the Plaintiffs to furnish this documentation at an earlier stage has enabled the Plaintiffs to mount a rebuttal which contends that the testing carried out by the Defendants is not reliable because it is not based on specific information concerning the make up of the concrete but rather on assumed values. Whilst the Defendants deny this is a valid rebuttal the reality is that the Defendants are exposed to this only because of the deficit in documentation provided by the Plaintiffs.

318. In addition the Defendants have pointed to new documentation in relation to ground conditions which would have opened up very specific lines of enquiry concerning issues such as drainage, flooding and high water tables in certain sections of the Drynam and Beaupark Estates. New documentation relating to ground conditions specifically demonstrates the natural disadvantage on which the Defendants are placed. As has already been stated the Defendants are not privy to the construction of these Estates, nor did the Defendants have any inside knowledge with respect to how these Estates where developed from a green field site through to completion. On the other hand the Plaintiffs have a natural advantage in that they hold all the cards in this respect. They were involved in the construction of these Estates from inception and their experts (notably DBFL/Golders

who are also expert witnesses in this Trial) were intimately involved throughout this period. To that pack of cards the Plaintiffs have added another ace in not disclosing a vast array of highly relevant documentation.

319. A vital factor which must be considered in determining the prejudice suffered is that the Defendants' investigations are greatly influenced and guided by available information in respect of these three estates. The source of the information emerges from the Plaintiffs and it is that information then which enables the Defendants to investigate issues over a very large area and in relation to a very large number of houses. This can be amply demonstrated, for example, by the revelation of the new land drain which was specifically used under the lime stabilised area in the Drynam Estate with a view to facilitating drainage due to the impermeable nature of the lime stabilised soil.

320. Furthermore, specific information that has now arisen identifying which particular houses were founded on top of lime stabilised soil in comparison to houses which were founded through or sunk down to virgin ground in the lime stabilised area. The specific information in this regard which has emerged from the Discovery is of vital importance; something which would have provided context and direction to the Defendants Experts when conducting their Defence.

321. Similar issues arise with respect to the new documentation relating to poor workmanship and quality control. The quality control issue was already exemplified by virtue of the newly discovered documents relating to adding water on site. However, there are other issues which have arisen. For example the Peadar Monaghan Reports, which demonstrate a damning picture of the quality of workmanship in the Myrtle Estate would have provided context and meaning to many investigations carried out by the Defendant's Experts on these Estates and would have also highlighted unacceptable building practices which the Defendants believed existed in both the Drynam and Beaupark Estates.

322. Furthermore, throughout the Affidavits of Peter Lennon is demonstrated many of the issues which have arisen through the Discovery documentation would have been relevant to the cross-examination of witnesses and the Defendants cross-examination has been significantly undermined as a result.

323. The above is a non-exhaustive summary of the instances of prejudice which have arisen. The details of this are set out far more extensively in the affidavits of Peter Lennon and the Defendants will refer to these matters in detail during the hearing of the application herein.

THE LEGAL PRINCIPLES

324. This section addresses the legal principles applicable to applications to dismiss or strike out claims (or defences) in circumstances where there has been a failure by the plaintiff (or defendant as the case may be) to make proper discovery. Reference is made to the position in Ireland and in other jurisdictions, specifically England, Australia and the United States.

Traditional irish approach

325. Order 31, rule 21 of the Rules of the Superior Courts provides that if a plaintiff fails to comply with an order for discovery, the action may be dismissed for want of prosecution and that if a defendant fails to comply with such an order, the defence may be struck out.

326. Most of the reported cases in Ireland to date have concerned the failure by a defendant to make discovery and have considered the principles applicable to the striking out of a defence in those circumstances. Order 31, rule 21 has been described as a "*drastic remedy*" *Phonographic Performance (Ireland) Limited v Cody* [1998] 4 I.R. 504, *per* Keane J. at 510. and the power it provides is one that the courts will not lightly invoke. However, it is respectfully submitted that the relief is appropriate in this case in light of the unique and complex nature of these proceedings where so much information has come to light at such a late stage.

327. The Supreme Court has in a number of cases considered the rule entitling the Court to strike out a defence in circumstances where the defendant has failed to comply with an order for discovery.

328. In ***Mercantile Credit v Heelan*** [1998] 1 I.R. 81., the Supreme Court allowed an appeal from an order of the High Court which struck out a defence for failure to comply with an order for discovery. The Supreme Court confirmed that the power given to the court pursuant to Order 31, rule 21 was discretionary and not obligatory. The court further held that the power should not be exercised unless the court was satisfied that the defendant was endeavouring to avoid giving the discovery by wilful default or negligence and, as a corollary, should not be exercised where the omission or neglect to comply with the order was not a culpable one. The Court further held that the powers of the court to secure compliance with its rules and orders should not be used to punish a party for failure to comply with an order for discovery within a time limit.

329. In delivering the judgment of the Supreme Court in ***Mercantile Credit*** Hamilton C.J. noted that an order striking out a defence is a "*serious matter*" and that the court's power should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order. Hamilton C.J. further stated:

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

It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the Court for an order to that effect.

The powers of the Court to secure compliance with the rules and orders of the Court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order." Per Hamilton C.J. at 86.

330. The Supreme Court concluded that although the relevant defendant had been in delay in complying with various orders for discovery and in prolonging the proceedings, the "*interests of justice appear to require that he be afforded an opportunity of raising the defences available to him to controvert the Plaintiffs' claim in these proceedings*". *Per* Hamilton C.J. at 87. In those circumstances, the Supreme Court concluded that the order striking out the defence should not have been made and allowed the appeal.

331. It is respectfully submitted on behalf of the Defendants that the *ratio* of ***Mercantile*** is to be limited to the principle that a party should not be punished (by having its defence struck out) simply for its failure to comply with an order for discovery within the time limited. It is respectfully submitted that it cannot be countenanced that the absence of culpability in all circumstances (even if it were found to be the case) would preclude the exercise of the court's discretion. It has been confirmed on numerous occasions that the paramount duty of the court is to ensure that justice is administered. See, for example: *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 458 where Hamilton C.J. stated at p. 475 "*the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so.*" Where the default in discovery obligations prevents the party seeking discovery from obtaining a fair trial (as in the present case), the interests of justice may require the claim of the defaulting party to be dismissed even where its default has not been

deliberate or culpable.
332. The relevant principles were further considered by the Supreme Court in ***Murphy (a minor) v J. Donohoe Limited and Others (No. 2)*** [1996] 1 I.R. 123. . The facts of that case are well known. The plaintiffs were minors who claimed to have suffered severe personal injuries when the Fiat motor car owned by their father exploded. They sued Fiat (among other defendants). One of the other defendants (the plaintiffs' father) obtained an order for discovery against Fiat directing Fiat to make discovery of all complaints received by Fiat in relation to fires which occurred in the particular Fiat model for the relevant period. That defendant ultimately sought to have Fiat's defence struck out for failure to comply with the orders for discovery. Another application to that effect was also brought by the plaintiffs. Fiat admitted that they had not made full discovery and also that the necessary steps had not been taken for the purpose of enquiring what documents were in its possession or power. However, they contended that their defences should not be struck out on the grounds that the failures were attributable to the shortcomings of their employees and the legal advice which they had received as to the effect of the orders for discovery. They also undertook to make further and better discovery. Fiat's defences were struck out by the High Court. Fiat appealed and prior to the hearing of the appeal, filed a further affidavit of discovery. Fiat's appeal was allowed by the Supreme Court. The Supreme Court held that Order 31, rule 21 existed to ensure compliance with orders for discovery rather than to punish those who defaulted. The Court further held that while cases might exist where a defence should be struck out because one party might not be able to get a fair trial as a result of the other party's wilful refusal to comply with an order for discovery, such cases would be extreme. In that regard, the Supreme Court applied ***Mercantile Credit***. The Supreme Court held that the High Court had not attached sufficient weight to a number of matters including the fact that the meaning of the original order for discovery was not clear, the fact that Fiat was acting on advice from independent legal advisors who were prepared to stand over that advice in Court (even if the advice was found to be wrong) and the willingness of Fiat to make further and better discovery. The Court concluded that this should have saved Fiat from the ultimate fate of having their defences struck out.
333. In the course of his judgment in the High Court in that case Johnson J. (as he then was) held as a matter of fact that Fiat had failed to disclose the existence of a number of cases about which it was impossible to believe they could not have known. It further held that no steps were taken whatsoever to circularise dealers or agents of Fiat in Ireland and worldwide.
334. In the Supreme Court, Barrington J. (who delivered the judgment of the Court) noted that:
"The Courts have repeatedly stated that rules of procedure exist to serve the administration of justice and must never be allowed to defeat it". Per Barrington J at 141.
335. Referring to Order 31, rule 21, he stated that this provision exists to ensure the parties to litigation comply with orders for discovery and that:
"It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the Court."
Barrington J. continued:
"Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases, it may be necessary to dismiss the Plaintiff's claim or to strike out the defendant's defence. But such cases will be extreme cases ..
Undoubtedly the trial judge took the view that the present was an extreme case ...
... there are, however, three matters to which the learned judge does not appear to have attached sufficient weight ..." Per Barrington J. at 141.
336. The Supreme Court concluded that under the circumstances the proper course would be for the parties to apply to the High Court for directions including the bringing of an application for a further order for discovery, if necessary. Those factors do not exist in the present case.
337. In ***Johnston v. Church of Scientology*** *Johnston v Church of Scientology* Unreported, Supreme Court, 7th November, 2001., the Supreme Court reiterated the view that the Courts have jurisdiction to dismiss or strike out a claim or a defence where satisfied that the extent of non compliance with the order is such that it is not possible to have a fair trial. The Supreme Court has also pointed out that this may happen "*where it appears that some particular documents have in fact been destroyed by the party concerned, whether innocently or whether deliberately in order to interfere with the further conduct of the case*". *Ibid, per* Keane C.J.
338. It is respectfully submitted on behalf of the Defendants that ***Johnston*** supports the submission made earlier that, where the default in discovery obligations has prevented the party seeking discovery from obtaining a fair trial, the interests of justice may demand the dismissal of a claim even in the absence of bad faith or negligence
339. In ***Geaney v Elan Corporation plc.*** Unreported, High Court (Kelly J.),13th April, 2005. Kelly J., sitting as judge of the Commercial Court, was dissatisfied with the manner in which the defendant's discovery obligations had been discharged and described the defendant's approach as being "*seriously sub-standard*". However, he felt it would not be appropriate to strike out the defendant's defence at that time and instead ordered further and better discovery and indicated the court's displeasure by way of an adverse costs order. Kelly J. lifted a stay on the enforcement of an earlier costs award which had been made on the hearing of the original motion for discovery and also ordered the defendant to pay the costs of the application to strike out (to include all reserved costs) with such costs being paid on a solicitor and client basis.
340. The application of these principles in a Commercial Court case can also be seen in ***Dunnes Stores (Ilac Centre) Limited v Irish Life Assurance plc and Joseph O'Reilly***. [2008] IEHC 114, Unreported, High Court (Clarke J.) 23rd April, 2008. That case did not involve an application to dismiss a claim or to strike out a defence. No such application appears to have been made. Rather the Court comments on the failure to make proper discovery in the course of its judgment in the case following the trial.
341. The plaintiffs (Dunnes) were seeking declarations that the landlords of their premises in the Ilac Centre had unreasonably withheld their consent to a change of use of the premises. Dunnes contended that the reason put forward by the landlords for refusing consent to the change of user was not in fact the real reason and that the true reason was that the landlords wanted Dunnes to give up possession of part of the property. During the course of the hearing it emerged that a significant volume of documentation relevant to the issue had not been discovered by the landlords. The hearing was adjourned for a number of months while the additional discovery was made. A significant volume of additional documentation was then made available on foot of that further discovery process. In its judgment following the conclusion of the trial, the Court had to consider how that development should properly impact upon the ultimate decision in the case. Clarke J. comments on this issue in some detail and it is worthwhile examining what he says. It will be seen from the passages from the judgment set out below that the Court was satisfied that the failure to make proper discovery was not accidental but was rather due to the deliberate suppression of documents for the purpose of minimising the extent to which Dunnes would be able to provide a factual basis for their claim. The Court was also satisfied that the failure to make discovery and the making of late discovery led to the proceedings being significantly lengthened. However, as can be seen, the Court stressed that it had to consider the consequences for the case itself (as opposed to issues relating to the costs of the proceedings) which could properly flow from the failure to make proper discovery. On that issue, Clarke J. held that once it was still possible to have a fair trial, (and, unlike the present case, it was possible to have a fair trial in that case) that trial should take place and the Court should come to a conclusion on the evidence and on the law with the consequences of the failure to make proper discovery resting in costs "*or other matters directly flowing from the failure concerned*". The case is distinguishable from the present case on that basis. Here, for the various reasons advanced in Mr. Lennon's Affidavits it is not possible to have a fir trial at this stage.

342. The additional discovery arose in the following circumstances as described by Clarke J:
"3.1 There had been a significant exchange of correspondence in advance of the commencement of the hearing before me in which, it is fair to say, Dunnes made complaint of the discovery furnished on behalf of the landlords was inadequate. It was, of course, clear that Dunnes had sought, in the proceedings, to question the true motive for the refusal of consent. In the course of the hearing and in particular during the cross-examination of witnesses called on behalf of the landlords, it became clear that there seemed to be a significant volume of additional documentation which was relevant to the issues which had arisen between the parties (i.e. the landlords "vision and image") and which had not been discovered. In those circumstances the case was adjourned, with the landlords being given a further opportunity to make proper discovery. A significant volume of additional documentation was revealed by that further discovery process.
There can be little doubt that at least some of the documentation concerned is of significance for the issues which I have to try. It does have to be recorded that it is very regrettable indeed that a major public company of the standing of Irish Life, and a significant business man such as Mr. O'Reilly should have been guilty of a very significant failure to deal properly with their obligations to the Court in respect of discovery".
343. Clarke J. continued:
"3.3 It has often been said that discovery relies to a large degree on trust. This is true. Discovery orders are made by the court (or an agreement is reached by the parties which has a similar effect) on the basis of defining the obligations of the parties concerning disclosure of documents. The book then passes to those charged with swearing the affidavit of discovery, upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. It is, of course, the case that mistakes can and do happen. Such mistakes can range from the entirely innocent and understandable to those which might be characterised as blameworthy to a greater or lesser extent. At the other extreme are cases where there has been a deliberate failure to disclose material information. At a minimum it is manifestly clear, on all of the evidence, that those involved in making discovery on behalf of the landlords in this case did not take and act upon proper legal advice as to their obligations in relation to discovery. It is, of course, the case that individuals themselves may not fully understand either their overall obligations in relation to discovery, may not be able to properly address questions of relevance which may arise as to whether documents should properly be included, and most certainly may not be able to deal with legal issues, such as privilege, which may arise. However, the obligation on such parties, in those circumstances, is to take proper legal advice and to act upon it. It is again particularly regrettable that major organisations such as the landlords, who have ample resources available to them and had also access to the best of legal advice, should have failed to take the elementary step of ensuring that they knew what their obligations were and of taking advice in respect of any questions of difficulty that might arise.
3.4 *I must, therefore, conclude that, at a minimum, there was a very serious failure on the part both of Irish Life and of Mr. O'Reilly to comply with their disclosure obligations to the court. Both were in significant breach of the trust that was placed on them to deal with discovery in a fair and proper manner. <u>There is no doubt but that amongst the consequences of that failure was that these proceedings were significantly lengthened. However for the purposes of this judgment it is important that I emphasise what, if any, consequences for the case itself (as opposed to issues relating to the costs of the proceedings) can properly flow from the failure to make proper discovery</u>.*
3.5 I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned.
3.6 It is only if it is proper and appropriate to conclude or infer from the failure to make proper discovery in the first place that the failure concerned was designed for the purposes of not giving access to the other side to relevant information and where it would be appropriate to infer, in turn, from such a finding, a particular view on the issues to which that information refers, that it would be appropriate to allow a failure to make proper discovery to influence the Courts decision on the merits of the case. I should point out that Dunnes invite me to draw such an inference in this case. It is said that I should conclude that there was an attempt to prevent certain information becoming available to Dunnes. It is said that an appropriate inference to draw from that fact (if it be so found) is that the landlords were attempting to disguise their true motivation. On that basis it is suggested that I should reach certain conclusions about the true reasons for refusal of consent to which it will be necessary to refer in due course.
3.7 I do, however, wish to emphasise that I fully accept the submission made by counsel on behalf of the landlords to the effect that it would not be proper for me to allow the discovery issues to influence the decision on the case unless I were satisfied (which he strongly urged I should not be) that it was appropriate to draw inferences of the type suggested on behalf of Dunnes. As counsel put it, his clients 'had not helped themselves' by the way in which discovery had been dealt with. However, it was urged that I should conclude that the failure to deal properly with discovery was due to a failure to understand what was required in discovery (admittedly a culpable failure deriving from not having taken and acted upon proper legal advice) which should not give rise to any proper inference in relation to the underlying facts. This is an issue to which I will have to return in the context of the disputed facts. However having identified the discovery issues which arose, it is appropriate to now turn to the legal basis for the challenge mounted by Dunnes to the refusal of consent."
344. Having made those observations, the Court went on to hold that on a proper interpretation of the relevant provision of the lease, Dunnes were entitled to a declaration that the refusal of consent was unreasonably withheld. That would have been sufficient to conclude the case. However, in the event that he was wrong in his conclusion on that point, the judge went on to consider some of the other issues (including the inferences which it was open to him to draw from the failure by the landlords to discover certain of the documentation).
345. Having considered that documentation, and its relevance to the case which Dunnes wished to make, Clarke J. continued as follows:
"9.4 ... Having considered all of the evidence I have come to the conclusion that the failure to make adequate discovery cannot be put down to inadvertence or even negligence. The documents not discovered are too recent and too important to have been accidentally overlooked. While the explanation given by Mr. Martin under cross examination concerning the difficulty of locating all of relevant email strings may go some way towards placing a small number of the omissions into the inadvertent category, that explanation falls far short of providing a full explanation, even in respect of emails, but most particularly in respect of other documentation. It is also clear that much of the documentation which was omitted from the original discovery would, at a minimum, have at least afforded ammunition to the Dunnes side to suggest that at least part of the true reason for the refusal of consent was interlinked with a desire on the part of Mr. O'Reilly's organisation to obtain possession of some or all of [the Dunnes' property].
9.5 In those circumstances I am driven to the conclusion that the relevant documents were deliberately suppressed with a view to minimising the extent to which Dunnes would be able to provide a factual basis for the suggestion that a desire to obtain possession of [the Dunnes property] was at least a significant element of the consideration given to the user question by those involved in Mr. O'Reilly's organisation. In those circumstances it also seems to me that I should infer that the reason why this documentation was suppressed was, at least in part, because the possession issue did actually form part of Mr. O'Reilly's consideration. A number of other factors also point to the same conclusion..."

346. It can, therefore, be seen that Clarke J. again emphasised (as was done in the earlier cases) that the court must consider whether a fair trial can take place. The court stated that it is not the function of the Court to punish a party who has failed to make proper discovery by interfering with what would otherwise be the "*proper and fair result*" of the proceedings (provided, of course, that a fair trial was possible). It was further stressed that when failure to make proper discovery emerges the Court must determine the appropriate consequences for the case itself which flow from the failure to make proper discovery (as opposed to issues concerning the costs of the proceedings).
347. In that this case the Court was satisfied that there was a deliberate suppression of documents designed to deprive Dunnes of material to support their claim that the landlords were not acting bona fide and had not advanced the real reason for their refusal to give consent to the change of user. The Court, therefore, used the fact that documents were deliberately suppressed in support of its conclusion that at least part of the purpose behind the refusal to give consent was an improper purpose, giving an additional entitlement to Dunnes to declarations that the consent was unreasonably withheld. The Court, therefore, in effect, penalised the defendants by drawing an adverse inference from the suppression of documents in support of its decision to find in favour of the plaintiffs. The Court had, implicitly at least, to have formed the view (unlike the present case) that a fair trial could nonetheless be held (indeed it does not appear that the Plaintiffs had contended otherwise in that case).

Position in England and Wales

348. As can be seen from the discussion of the principles in England and Wales, the law has traditionally been similar in that jurisdiction. However, it is respectfully submitted that, through the making of "unless" orders and observations made on the traditional approach to striking out, the English courts have indicated a greater degree of willingness to strike out pleadings in recent years.
349. The English courts are given express power to strike out proceedings for breach of any rule, practice direction or court order in the CPR. CPR, Rule 3.4(2)(c). However, it has also traditionally been the case in England and Wales that an action will be dismissed or a defence struck out only in the most exceptional circumstances once the outstanding disclosure has been provided and if it has been provided, a claim will only be struck out where there is a real risk that justice cannot be done. Furthermore, the English cases also show that the absence of prejudice of the opposing party will be an important factor in the exercise of the discretion to strike out a case for non compliance. See, for example, *Cepheus Shipping Corporation v Guardian Royal Exchange Assurance plc* [1995] 1 Lloyd's Rep. 622. In that case, the absence of the relevant documentation did not prejudice the opposing party. It is also the case that where a party is in default through no fault of his own, the English Courts will generally not strike out proceedings although the Courts will ordinarily not distinguish between the litigant and his advisors for that purpose. Matthews and Malek *Disclosure* (3rd ed.) para 13.15, page 425; *Hytec Information Systems Limited v Coventry City Council* [1997]1 W.L.R. 1666.
350. In line with the dicta of the Irish Supreme Court in ***Johnston v. Church of Scientology*** discussed above, Matthews and Malek note that the breach of discovery obligations need not be wilful or deliberate for the striking out of proceedings to be ordered by the English courts:
"In an extreme case, the Court may dismiss a claim or strike out a defence where the failure to provide the disclosure has not been wilful or deliberate, where the failure has the result of making a fair trial of the action impossible". Ibid, Para 13.13, page 425.
351. A number of decisions of the English Court of Appeal also demonstrate the application of this approach. For example, in ***Landauer Ltd. v. Comins & Co. (A Firm)*** The Times, 7th August, 1991 C.A. That case was distinguished in *GMTC Tools v Yuasa Warwick Machinery* [1994] 73 BLR 102, C.A. where customers orders were destroyed but this caused no prejudice. the plaintiff's claim had been struck out at first instance for breach of a discovery obligation. Although the plaintiff's destruction of documents was held to have been inadvertent, the Court of Appeal held that the trial judge was *"fully entitled to find that there was a serious risk that essential documents may have been destroyed in this case, as a result of which a fair trial is no longer possible*".
352. Similarly, in ***Coleman v. Dunlop Limited (No. 2)*** Unreported, 20th October,1999, C.A. it became clear during a re-trial before a judge sitting alone that the defendant had failed to discovery all documents relevant to the case. The trial judge heard evidence in purported explanation and concluded that relevant documents had not been discovered, some of which had later been destroyed in an accidental fire. The Court of Appeal upheld the striking out of the defence, noting that the order could not have been justified merely by way of punishment but that the trial judge was entitled to conclude that the denial of the documents meant the plaintiff could not receive a fair trial.
353. Like the Irish courts, the courts in England and Wales have traditionally demonstrated a reluctance to strike out pleadings simply as a mark of punishment to defaulting parties or deterrence to potential defaulting parties.
354. The main case cited by Matthews and Malek for this proposition in England is ***Logicrose Limited v Southend United Football Club Limited.*** [1998] 1 W.L.R. 1256 – see Matthews and Malek at para 13.13, page 425. However, the authors note that the approach was doubted by Roseall J. in *Artisan Scaffolding Co. v The Antique Hypermarket Limited* Unreported 10 February 1993 C.A. but further note that the principle was referred to without criticism by Stuart-Smith L.J. in *Lonhroe v Fayed (No. 3)* The Times 24 June 1993 C.A. In ***Logicrose***, Millet J. had commented in similar terms to the Irish Supreme Court in ***Mercantile***:
Deliberate disobedience of a peremptory order for discovery is no doubt a contempt, and if proved in accordance with the criminal standard of proof, may in theory at least, be visited with a fine or imprisonment. But to debar the offender from all further part in the proceedings and to give judgment against him accordingly is not an appropriate response by the Court to contempt. It may, however, be an appropriate response to a failure to comply with the rules relating to discovery, even in the absence of a specific order of the Court, and so in the absence of any contempt, not because that conduct is deserving of punishment but because the failure has rendered it impossible to conduct a fair trial or would make any judgment in favour of the offender unsafe. In my view a litigant is not to be deprived of his right to a proper trial as a penalty for his contempt or his defiance of the Court, but only if his conduct had amounted to an abuse of the process of the Court which would render any further proceedings unsatisfactory and prevent the Court from doing justice. Before the Court takes that serious step, it needs to be satisfied that there is a real risk of this happening."
355. However, it is submitted that, through its making of "unless" orders and recent judicial observations, the English courts have indicated a more robust approach to default in compliance with discovery obligations in recent years.
356. Firstly, under the CPR the court may make "*unless*" orders striking out statements of case for failure to comply with disclosure obligations. By making an "*unless*" order, the court has signalled its intention to strike out the action or defence unless the order is complied with. The "*unless*" order is an order which provides that the striking out of a whole of a statement of case will take place unless the party concerned complies with the order and if the party does not so comply, then the other party may obtain judgment. See Hollander "Documentary Evidence" (9th Edition) para 10-02, pages 196-197. In principle, the court will often grant relief from sanctions in an appropriate case if the defaulting party is able to show that it *bona fide* intends to comply with its disclosure obligations and, that notwithstanding the default, it is still possible to have a fair trial of the action. Matthews and Malek, para. 13.07, page 422; *Keith v CPM Field Marketing Limited* The Times, 29th August, 2000 (CA); *Cank v Broadyard Associates Limited* Unreported, 11th July, 2000 (CA). However, Matthews and Malek state that where a party is guilty of conduct which puts the fairness of the trial in jeopardy or which rendered further proceedings unsatisfactory, such as were to prevent the court from doing justice, the court would be bound to refuse to allow that party to take further part in

the proceedings and (where appropriate) to determine the proceedings against him. Matthews and Malek para. 13.07, page 422; *Arrow Nominees Inc v Blackledge* [2000] All E.R. (D) 854, The Times, 7th July, 2000 (CA); *Commission for New Towns v Edwards* Unreported, 10th July, 2000 (Smith J.); *Raja v Van Hoogstraten* (No. 8) (2006) EWHC 1315.

357. Matthew and Malek further explain:

"In modern times, the party ordered to give disclosure will be given every opportunity to comply with his disclosure obligations, but if he fails to comply with an 'unless' order, usually made after serious failure to comply with earlier orders, striking out a party's statement of case is automatic, and applications for relief against the consequences are generally unsympathetically received. However, where failure to comply with an 'unless' order has not been deliberate, particularly where the defaulting party can provide a reasonable excuse, the court may in its discretion be willing to grant him relief against the consequences of such an 'unless' order. Thus, where the failure to comply is due to a party's solicitors' incompetence, rather than an intentional failure by the defendant himself, the court has been willing to grant relief from the consequences of an 'unless' order albeit on the strictest terms as to compliance with the original disclosure order." Matthews and Malek para 13.10, pages 423; *Beeforth v Beeforth* The Times, 17th September, 1998 (CA).

358. It is submitted, therefore, that, once an "unless" order has been made, the emphasis for the court considering whether to relieve a defaulting party from its consequences will be as much on the nature of the default as the consequences for the opposing party

359. According to Matthews and Malek, in considering whether to give relief from the consequences of an 'unless' order, the English courts will look at all the circumstances including whether or not the failure was deliberate or contumelious, the reasons given for non-compliance, the extent of non-compliance and the prejudice caused to the other party. Matthews and Malek para 13.12, page 424; *Caribbean General Insurance Limited v Firzzell Insurance Brokers Limited* [1994] 1 Lloyd's Rep.. 32; *Keith v CPM Field Marketing Limited* The Times, 29th August, 2000 (C.A.) It is again submitted that the learned authors therefore indicate that the court will take into consider a broader range of factors than the singular issue of whether there has been sufficient prejudice caused to warrant the striking out of pleadings.

360. As discussed above the Court of Appeal in ***Landauer Ltd. v. Comins & Co. (A Firm)*** The Times,7th August, 1991 (C.A.) upheld the striking out of the plaintiff's claim where there had been an inadvertent destruction of documents as the trial judge had been fully entitled to find that there was a serious risk that a fair trial was no longer possible. In that judgment, Lloyd J., speaking for the Court had also interestingly added that the position might be different if the original default was intentional or contumelious:

"While it was accepted that the normal prerequisite for the striking out of an action under Order 24, rule 16 of the Rules of the Supreme Court for failure to comply with the requirement of discovery of documents was the existence of a real or substantial or serious risk that a fair trial was no longer possible, it might be that cases of contumacious conduct such as the deliberate suppression of a document, would justify striking out even if a fair trial were still possible." Ibid, at 382.

361. In ***Arrow Nominees Inc. v. Blackledge*** [2000] 1 B.C.L.C 709. the respondent to a petition for relief under the Companies Act sought to have the petition struck out on the basis that its opponent had discovered documents which it knew to be false, thus rendering a fair trial impossible. The trial judge rejected the application but indicated that he would be prepared to consider a further application after he had heard evidence at trial. On appeal, the Court of Appeal held that the trial judge was wrong to allow the petition to proceed once he had reached the conclusion there was a substantial risk that the allegations were incapable of a fair trial. Chadwick L.J. indicated the appeal should also be allowed on an additional ground:

"[W]here a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render the further proceeding unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceeding and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.

Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows processes to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself." [2002] V.S.C. 73, *Per* Eames J, at para. 350.

362. It is submitted on behalf of the Defendants that, although the observations of Millett J. in ***Logicrose v. Southend United Football Club***, were adopted as a general principle, the observations of Chadwick L.J. reflect a more robust approach to litigants whose conduct is liable to subvert the overall fairness of the proceedings.

363. In the recent case of ***Marcan Shipping (London) Ltd v. Kefalas*** [2007] 1 W.L.R. 1864. the Court of Appeal also appeared to express some doubt as to whether the factors decisive in influencing Millett J. in ***Logicrose*** would carry the same weight nowadays in light of the court's duty to further the overriding objective under the Civil Procedure Rules. Moore-Bick L.J. referred to the application to dismiss the action for failure to comply with the rules relating to discovery made in ***Logicrose*** and stated:

"On an application of that kind the court will inevitably have to consider the circumstances in which the default occurred and its consequences both for the future of the proceedings and more generally. In the event the judge dismissed the application because he was not satisfied that there had been a deliberate attempt to suppress the document in question, but it is fair to say that he would have dismissed it in any event once the document had been produced because he considered that there could still be a fair trial. It is unnecessary for present purposes to consider whether the factors that were decisive in influencing the judge in that case would necessarily carry the same weight today in light of the court's duty to further the overriding objective and the range of matters to which it must have regard for that purpose. The observations of Chadwick and Ward LJJ in Arrow Nominees Inc v. Blackledge [2000] 2 BCLD 167 suggest that they might not."

364. As the Court of Appeal in ***Marcan*** was considering a different issue arising in a different application, the consequences of failing to comply with a conditional order, it left open the question of whether the factors decisive in influencing Millett J. in ***Logicrose*** would necessarily carry the same weight today. Nevertheless, it is respectfully submitted the court expressed doubt on the matter.

365. The recent case of ***Blerim Ethemi -v- Robert Shiels*** [2008] EWHC 291 (QB) demonstrates the more robust and less tolerant approach that the English courts now appear to be prepared to take to non-compliance with court orders. In this case the claimant had been directed to produce various documents but had failed to comply with an "unless" Order that provided that such a failure would lead to the claim being struck out. The claimant acknowledged that he was in breach of the order, but sought relief from sanction under CPR 3.9. This was refused however as it was held that the failure to comply with the directions was not minimal, the trial would have to be adjourned and the judge did not consider that an order for costs against the Claimant would be effective, as the Claimant was unlikely to be able to meet same.

366. Given that there were relatively few documents which were not disclosed and they were all documents which the defendant could apparently have obtained by other means, it was argued on appeal that this was disproportionately harsh on the claimant who had lost the opportunity to have his claim heard at all. This was acknowledged by the appellate court but

nonetheless it also found that there had been a proper exercise of discretion and was not prepared to interfere with the trial judge's decision.
367. The consensus amongst commentators in England and Wales is that cases such as ***Blerim*** are now sending a strong warning to litigants and their lawyers regarding the importance of complying with orders of the court.

Position in Australia

368. The issue of striking out pleadings for failure to make discovery was considered at length in the Australian case of ***McCabe v. British American Tobacco Australia Services Limited.*** [2002] V.S.C. 73, Eames J., 22nd March, 2002. Less than two months before the trial of her personal injuries action, the plaintiff brought an action to strike out the Defendant's defence. The plaintiff alleged that that the defendant had destroyed relevant documents, had through its counsel and solicitors misled the plaintiff and the court as to the true situation concerning relevant documents, and had thereby caused severe prejudice to the plaintiff and deprived her of the possibility of a fair trial.
369. The strike out application was heard over 16 days with Eames J. agreeing that the prejudice caused to the plaintiff by the destruction of documents was considerable. The court considered a number of decisions of the English Court of Appeal including ***Coleman v. Dunlop Limited (No. 2)*** Unreported, 20th October,1999, (C.A.), ***Landauer Ltd. v. Comins & Co. (A Firm)*** The Times, 7th August 1991 (C.A.)and ***Arrow Nominees Inc v. Blackledge*** The Times, 7th July, 2000, (C.A.), which have been discussed above.
370. Eames J. noted the paramount principle that the courts should seek to ensure a fair trial and endorsed the comments of Chadwick L.J. in Arrow Nominees Inc. v. Blackledge, which have been set out above but are repeated here for the court's convenience:
"[W]here a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render the further proceeding unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceeding and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.
Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows processes to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself." [2002] V.S.C. 73, *Per* Eames J, at para. 350.
371. On the facts of the case however, Eames J., found that the defendant's actions had caused prejudice to the plaintiff and denied her a fair trial. The court did consider whether the appropriate course might be not to strike out the defence but to permit the trial to proceed, after appropriate orders had been made for further discovery and interrogatories, and such other directions as may be appropriate. However it concluded that permitting the trial to proceed in those circumstances could not remove the prejudice suffered by the plaintiff:
"Once it is concluded, as I have concluded, that the plaintiff has been denied a fair trial, in circumstances which cannot be adequately redressed, then in my opinion there is no point in attempting to quantify the extent of the unfairness. A trial is either fair or it is not. Unless all unfairness which the defendant has created can now be removed then a verdict by the jury in favour of the plaintiff would not demonstrate that the unfairness in the trial had been eliminated, but merely that the plaintiff had succeeded despite the unfairness of her trial. If it is necessary for me to be satisfied that there would remain a substantial risk of injustice to the plaintiff if trial proceeds, even after further orders are made in an attempt to alleviate her disadvantage, then I am so satisfied.
I do not consider that prejudice could have been removed entirely were the trial to proceed and were I to make attempts, as discussed above, to ameliorate the prejudice suffered by the plaintiff. That being so, I have concluded that it would be an inappropriate course to adopt, to permit the trial to proceed, whether or not such a trial was by jury or by judge alone." Ibid, at paras. 377-378.
Accordingly, Eames J. took the view that the only appropriate order was that the defence be struck out and judgment entered for the plaintiff.
372. On appeal the Court of Appeal found that the trial judge had assessed prejudice under two headings, prejudice by reason of non-compliance with an order for discovery and prejudice through the deliberate destruction by the defendant over many years for the purpose of prejudicing those who might commence litigation alleging personal injury through smoking.
373. As the Court of Appeal found that the defendant was not in breach of any existing obligation in destroying documents before the commencement of the proceedings It is interesting to note that new civil procedure legislation, in the form of the Evidence (Document Unavailability) Act 2006 (Vic)has since been introduced in Victoria giving trial judges the power to exercise their discretion to make rulings against parties who destroy documents before litigation is commenced, Evidence (Document Unavailability) Act 2006 (Vic). Furthermore the Crimes (Document Destruction) Act 2006 (Vic) creates a new criminal offence in relation to the destruction of a document or other thing that is, or is reasonably likely to be, required as evidence in a legal proceeding., it held that any assessment of prejudice must be limited to the consequences of non-compliance with the order for discovery. As the trial judge had found no significant prejudice arising from the defendant's defaults in complying with the order for discovery, the Court of Appeal found there was not sufficient ground for striking out the defence. It should be noted that the Court of Appeal did not express any criticism with the trial judge's statement of the law on striking out pleadings for failure to make discovery. The Court simply found that the trial judge had erred in concluding that the destruction of documents prior to the commencement of proceedings was in breach of the rules of discovery and in concluding that a sanction might be imposed for consequences stemming from the destruction. That is clearly distinguishable from the present case.

Position in the United States

374. Although not directly applicable, it is of interest to note how this same issue is addressed in the Federal Courts of the United States. In the United States, the courts are prepared to take a robust approach to litigants who have defaulted in their discovery obligations than has traditionally been the position in other common law jurisdictions.
375. The courts in the United States have a wide range of sanctions available and it is interesting to note that the most pronounced discovery sanctions generally occur when a party has failed to comply with a court order regarding electronic information.
376. Rule 37(b)(2) of the Federal Rules of Civil Procedure provides that the court may enter such orders "as are just" if a party fails to obey an order to provide or permit discovery. The rule further provides a non-exhaustive list of potential sanctions for such failure:
(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(b) An order refusing to allow the disobedient party to support or oppose designated claims or defences, or prohibiting that party from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination....
377. Rule 37(b)(2) further permits the court to awarded costs resulting from the failure to comply with a discovery ordered, and specifically permits the court to require that the award be paid by the disobedient party or that party's counsel.
378. Courts in the United States take a slightly different approach to the imposition of sanctions. The appellate courts have made it clear that a finding of bad faith is not required to impose discovery sanctions. Where, notwithstanding the absence of bad faith, there is no effective way to cure the prejudice caused, a court may dismiss the claims or grant a default judgment in favour of the prejudiced party. For example, in ***Playball at Hauppage Inc. v. Narotzky*** 745 N.Y.S. 2d 70 (N.Y. Ct. App. 2002), the appellate court affirmed the dismissal of the plaintiff's claim for breach of fiduciary duty because the deletion of electronic information by the plaintiff's son left the defendant without the ability to properly defend the claim. Therefore, in weighing the level of culpability against the extent of the harm caused to the party seeking discovery, the court may exercise its discretion to protect the prejudiced party even where there has been no intention to default on discovery obligations.
379. Conversely, where faced with wilful or conscious breaches of discovery obligations, the courts in the United States have been less concerned with proof of prejudice when considering appropriate sanctions. In particular, where the conduct is particularly egregious, the courts have been prepared to grant the ultimate sanction of dismissal or default behaviour in order to deter obstructionist behaviour. A number of examples of this approach are set out below.
380. In ***Carlucci v. Piper*** 102 F.R.D. 472 (1984). default judgment was entered against the defendant in circumstances where there was a history of misconduct, including the destruction of documents. On that issue alone District Judge Campbell held it was appropriate to enter a default judgment saying:
"Having determined that [the defendant] intentionally destroyed documents to prevent their production, the entry of a default is the appropriate sanction. Deliberate, wilful and contumacious disregard of the judicial process and the rights of opposing parties justifies the most severe sanction … The policy of resolving lawsuits on their merits must yield when a party has intentionally prevented the fair adjudication of the case."
381. In ***Metropolitan Opera Association v. Local 100*** 212 F.R.D. 178 (S.D.N.Y. 2003)., a case in which the plaintiff alleged that the defendant had distributed false, misleading and defamatory materials in an attempt to unionise its workers, there was a high degree of wilfulness and the court was less concerned with prejudice. Almost from the outset, the plaintiff had questioned the adequacy of the defendant's document production and it subsequently became clear that at least some electronic documents had been destroyed as the union had not understood their obligation to retain and furnish emails. The court found that the defence counsel's behaviour during discovery was in no way consistent with the spirit and purposes of Rules 26 and 37 of the Federal Rules of Civil Procedure and the examples of discovery abuses that were given included the following: defence counsel's repeated misrepresentations to the court that all responsive documents had been produced, when, in fact, a thorough search had never been made and counsel had no basis for making such representations; the defendant delegated document production responsibilities to a non-lawyer, yet failed to explain that a document included a draft or other non-identical copy and included documents in electronic format; the non-lawyer failed to speak to all persons who might have had relevant documents, never followed up with people he did speak to, and failed to contact all of the defendant's internet service providers to retrieve deleted e-mails as counsel represented he would. Judge Preska granted the motion for sanctions and entered a default judgment against the defendant:
"in order to (1) remedy the effect of the discovery abuses, viz., prejudicing the Met's ability to plan and prepare its case, (2) punish the parties responsible, and (3) deter similar conduct by others." Ibid, at 224.
382. Similarly, in ***Mariner Health Care Inc. v. PricewaterhouseCoopers LLP*** No. 02VS037631-F, slip op. (Ga. Fulton Cty. Nov. 9, 2004) , the court dismissed the plaintiff's complaint with prejudice because of its failure to comply with court orders during discovery. The plaintiff had repeatedly ignored the court's orders and consistently produced large volumes of documents late while insisting that the defendant adhere to the discovery schedule. While the plaintiff claimed that the late productions were due to vendor error, it provided no evidence to that effect and the judge doubted its veracity given it had failed to raise any difficulties on any of the numerous occasions it had been before the court. Judge Forsling considered lesser sanctions but stated the following:
"There comes a point when the Court, to protect the integrity of its Orders and the purposes of [state law], must take action which sends the message: "Enough is enough." This Court is at the point in this case. Therefore, no sanction less severe than the dismissal of Mariner's complaint with prejudice would be appropriate under these circumstances." Ibid, at 5.
383. The judge also explicitly rejected the plaintiff's argument that prejudice was a pre-requisite for the imposition of sanctions, stating that a requirement of prejudice:
"would essentially allow a party that has violated the Court's orders to defeat a motion for sanctions by belatedly complying with the Court's orders and then arguing that its non-compliance has not caused prejudice to the opposing party. In other words, the integrity of the Court's orders and the ability of the Court to control the proceedings would be secondary to the prejudice to the movant, a proposition that this Court is not willing to adopt." Ibid, at 66.
384. The decision of the court in ***Krumwiede v. Brighton Associates L.L.C.*** No. 05 3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006). also demonstrates the willingness of the courts in the United States to place a greater emphasis on punishment and deterrence. Here the plaintiff failed to comply with a court order for the return of a laptop computer to the defendant, his former employer and deleted, altered and modified documents after being put on notice that the contents of the laptop were the subject of litigation. The court found that there was clear and convincing evidence that the plaintiff acted wilfully and in bad faith and further found that the defendant was prejudiced by actions. On this basis, the court entered default judgment on the defendant's counterclaim concluding that no lesser sanction would adequately address the plaintiff's misconduct nor cure the prejudiced suffered by the defendant. The court stated that it was also its intention to "send a strong message to other litigants, who scheme to abuse the discovery process and lie to the Court, that this behaviour will not be tolerated and will be severely sanctioned." *Ibid*, at 11.
385. Another case from the United States, ***Tracinda Corporation v. DaimlerChrysler A.G*** 364 F. Supp. 2d 362, 366-388 (D. Del. 2005). bears striking a striking resemblance to the present case in terms of its procedural history and, although the plaintiff did not seek to have the defence struck out, it demonstrates (1) that even where the omission is honest or inadvertent, sanctions may be appropriate; and (2) that where the disclosure is made in the course of the trial, a large sanction may be warranted.
386. The plaintiff (Tracinda) sued the defendants (DaimlerChrysler) for more than $1 billion alleging violations of securities law and fraud. Pursuant to the District Court's pre-trial scheduling order, discovery closed on the 15th January, 2003. Nearly a year later, on the 16th December, 2003, the eve of the last day of trial, the DaimlerChrysler informed the District Court that it had failed to produce 61 pages of documents responsive to Tracinda's earlier discovery requests. DaimlerChrysler had just discovered that these documents had not been produced as required. Because the District Court found that these documents were *"highly relevant to issues raised throughout this litigation," the District Court recessed trial*. See *Tracinda Corp. v. DaimlerChrysler AG*, No. 00-CV-993-JFF, 2005 WL 927187, at *2 (D. Del. April 20, 2005).
387. DaimlerChrysler provided copies of the 61 pages to Tracinda and, after further investigation, produced 6 more pages a few days later. The 67 pages of documents consisted primarily of handwritten notes taken during the merger negotiations. After

considering the various requests of the parties and reviewing the notes, the District Court referred the matter to a special master for an evidentiary hearing and determination of the reasons for DaimlerChrysler's delayed production. The Special Master had been responsible for managing discovery throughout the course of this complex litigation and was very familiar with the case.
388. The Special Master conducted a full-day hearing at which live testimony and exhibits were presented regarding the circumstances giving rise to the production delay and on the 12th January, 2004, he issued a 22-page written report making detailed factual findings and concluding that a coincidental copying error by two separate copy vendors was "the most likely explanation for the late production" of the 67 pages of notes. The Special Master concluded that, while there was "no definitive answer why the complete set of bindwere not produced" and "no explanation for the coincidence" noted above, there was nevertheless no evidence that the missing documents were withheld from production to the Plaintiffs intentionally or in bad faith. The Special Master did not clearly address the issue of negligence.
389. Tracinda filed objections to the Special Master's report to the extent it found coincidental copying error to have caused DaimlerChrysler's late production. Tracinda also filed a motion for sanctions requesting that: (1) the writer of the notes be barred from testifying at trial about the subject matter of his notes, except in response to questions about the notes by Tracinda and the Court; (2) Witnesses be recalled to testify at trial; and (3) DaimlerChrysler be ordered to pay Tracinda all of its fees and costs incurred from the 16th December, 2003 (the date of the documents were produced), through the conclusion of trial.
390. The District Court denied Tracinda's request to limit the testimony of the writer of the notes. The District Court did not need to rule on Tracinda's second request because DaimlerChrysler agreed to have the witnesses recalled. The District Court indicated that it would grant Tracinda's request for costs and fees, with the precise amount to be determined after trial. Consequently, the District Court postponed ruling on Tracinda's objections to the Special Master's report.
391. The trial resumed on the 9th February, 2004, and concluded two days later. On the 7th April, 2005, the District Court issued its post-trial opinion and order, entering final judgment for DaimlerChrysler on all remaining counts. Shortly thereafter, the District Court overruled Tracinda's objections to the Special Master's report, adopted its findings and awarded Tracinda $556,061 for the costs and fees it expended as a result of DaimlerChrysler's late production. Even though the Special Master found no bad faith or intentional misconduct, a finding the District Court accepted, the District Court concluded that the imposition of monetary sanctions was permitted and warranted in this case. In so concluding, the District Court cited the inconvenience and expense DaimlerChrysler caused Tracinda and the court, the particular relevance of the tardily produced notes, and, in light of the advanced stage of the litigation, the irremediable prejudice suffered by Tracinda. The District Court also concluded that the sanction amount awarded was reasonable.
392. On appeal, DaimlerChrysler contended that the District Court abused its discretion by imposing sanctions absent a finding of bad faith or intent. DaimlerChrysler argued that Rule 16(f) sanctions were not designed to punish or deter blameless conduct and therefore the Court's decision was "unjust" under the rule. In the alternative, DaimlerChrysler argued that such a sanction required at least a finding of negligence and as the Special Master and the District Court found no negligence on the part of DaimlerChrysler or its lawyers, only negligence on the part of the outside copy vendors, the sanction awarded was "unjust".
393. The Court of Appeal considered the issue of whether the sanction awarded was unjust as follows:
""Unjust" can be variously defined as "unfair," "unreasonable," "inequitable," or "harsh." These definitions do not, in and of themselves, contain a requirement of intent or negligence. Instead, "unfair," "unreasonable," "inequitable" and "harsh" invite a consideration of the degree of the sanction in light of the severity of the transgression which brought about the failure to produce. Certainly, whether a failure to produce is intentional, negligent, or inadvertent is a significant factor in assessing the severity of the transgression. On the other hand, a failure to produce documents that is rectified many months before trial causes less prejudice and is less expensive to rectify than a failure to produce relevant documents that is discovered on the eve of the last day of a long and complicated trial. Thus, the circumstances and timing of the eventual production of the documents is a correlative factor for the district court to consider, along with the nature of the failure to produce, in determining the nature and severity of the sanction. A $500,000 assessment of costs for an inadvertent failure to product documents would be unjust if the documents were produced two months after the close of discovery but six months before trial is to begin. The failure to produce here, however, occurred eleven months after the close of discovery and, even more significantly, on the eve of the last day of a long trial. This case was extraordinarily complex and the preparations for trial, particularly in light of the huge number of documents produced, had been immensely time consuming. Nevertheless, on the eve of the last day of trial, Tracinda was required, through no fault of its own, to reexamine its trial strategy, reevaluate its examination of various witnesses, prepare for re-examination of several witnesses, and redevelop its cross-examination of Valade. In addition, as noted by the District Court, "the late production prejudiced Tracinda's whole trial preparation strategy by its effect on Tracinda's ability to develop its case, including most particularly its impact on Tracinda's decision of who to depose, the order of depositions and the substance and conduct of the trial prior to the revelation of the documents". Even though the Special Master's report found that "[t]here was no evidence in the record … that the Skadden attorneys had any part in [the copying] mix-up," the obligation to produce the documents was DaimlerChrysler's and Skadden's. As between DaimlerChrysler and Tracinda, if anyone is to be charged with the significant expenses that Tracinda incurred because of the late and prejudicial production, it does not seem unjust that DaimlerChrysler should bear the expense. Indeed, the District Court noted in its sanctions opinion that, "regardless of the reason for the failure to produce these documents, the fault for this production failure and the related delays and proceedings which followed, lies with Defendants." Tracinda Corp. v. Daimler Chrysler AG, 05-2363, 05-2482 (3d Cir. 2007), at pp. 58- 59.
394. The Court of Appeal concluded that, under the extreme circumstances of the case, the District Court acted within its discretion in awarding the Plaintiff expense sanctions. The Court stated:
"DaimlerChrysler was wholly responsible for the late document production that caused Tracinda to incur substantial expenses. Despite the efforts of DaimlerChrysler and the District Court, the late production of Valade's notes irremediably prejudiced Tracinda's case. Valade's notes, which were not produced until the eve of the last day of trial, were highly relevant and would have had an impact on Tracinda's strategy and actions prior to that point, throughout discovery and during trial." Ibid., at p. 61.
395. The Defendants argued that such an expense sanction would open the door to a *"flood of satellite litigation"* over expenses every time a document production error is unearthed after the close of discovery, which can be a common occurrence in complex litigation. However, the Court did not agree with this assessment of the results of its decision and made the following comments:
"Production errors discovered at the pre-trial stage of litigation will result in little, if any, expense or prejudice to the opposing party and therefore are not likely to warrant the imposition of sanctions under Rule 16(f). On the other hand, if a litigant knows that even inadvertent failure to produce relevant documents may result in a sanction when the existence of the documents is discovered during trial, the litigant may exercise more care in ensuring that all relevant documents are produced."
396. The Defendants also argued that the sanction would have the effect of deterring future litigants from admitting and rectifying discovery errors. However, the Court also rejected this argument and stated:
"… the obligation on parties and counsel to come forward with relevant documents not produced during discovery is "absolute." Indeed, the failure to do so can result in penalties more severe than monetary sanctions, including dismissal of the

case. We are not concerned about chilling conduct that is compulsory and required by law." Ibid., at 62.
397. Finally the recent case of ***1100 West LLC v. Red Spot Paint & Varnish Inc.*** 2009 U.S. Dist. 1:05-cv-1670-LJM-JMS (S.D. Ind. June 5, 2009). confirms that the courts in the United States consider a broad range of factors when considering whether to impose a sanction on a defaulting party.
*Generally, courts consider four factors when determining an appropriate sanction: the prejudice to the moving party, the prejudice to the judicial system, the need to punish the disobedient party, and the need to deter similar conduct in the future. See United States v. Reyes, 307 F.3d 451, 458 (6th Cir. 2002); Krumwiede v. Brighton Assoc., LLC, No. 05 C 3003, 2006 WL 1308629, at *9, *11 (N.D. Ill. May 8, 2006). No one factor is dispositive. See Reyes, 307 F.3d at 458. Any sanction under Rule 37 "'must be proportionate to the circumstances surrounding the failure to comply with discovery.'" Langley ex rel. Langley v. Union Elec. Co., 107 F.3d 510, 514 (7th Cir. 2003) (quoting Crown Life Ins. v. Craig, 995 F.2d 1376, 1382 (7th Cir. 1993), citing Newman v. Metro. Pier & Expo. Auth., 962 F.2d 589, 591 (7th Cir. 1992)).*"
398. In ***1100 West*** the plaintiffs alleged environmental contamination related to the operation of a Red Spot facility. After significant discovery which did not show the chemicals in question in use at the facility, plaintiff filed a Freedom of Information Act request with the Environmental Protection Agency ("EPA"). The file provided by the EPA pursuant to the request contained many items which supported plaintiff's suit, which had not been disclosed by Red Spot or its legal counsel. Further investigation by the plaintiff revealed that Red Spot's attorneys had submitted a similar FOIA request more than one year prior to plaintiff's, and that EPA had similarly provided the file to Red Spot's counsel.
399. Despite initial claims of ignorance by Red Spot's counsel, upon notice from 1100 West of the discovery, the file in question was found, missing certain documents. Further investigation revealed the existence of not only the missing documents, but over 70,000 responsive documents.
400. As the missing information came to light, the relationship between Red Spot and its lawyers disintegrated. Red Spot claimed that *"it relied on its attorneys…for advice in discovery; therefore, any error or failure to produce documents is [the attorney's] responsibility." Ibid.*, at 1. Counsel, on the other hand, argued that their client *"…admits that [the lawyers] relied upon Red Spot to provide accurate, truthful and complete information, but Red Spot did not do so…." Ibid,* at 2. Given the dispute, the court advised Red Spot to retain different counsel to respond to the motion for sanctions, "…because it appeared to the Court that allegations in the motion set its interests at odds with…" the interests of their original counsel. *Ibid*, at 16.
401. Subsequent testimony and documentary evidence demonstrated that Red Spot's counsel had been aware of some of the missing information at least three years before the date of the motion. After noting that sanctions for abuse of discovery are supported by the Federal Rules of Civil Procedure and the inherent authority of the court the court granted 1100 West's motion for *"the most draconian of sanctions: default judgment, striking of experts, and an award of attorneys' fees and costs." Ibid*, at 1.
402. The court found that "Red Spot's conduct was contumacious, willful, and egregious…" *Ibid*, at 52. Red Spot's lawyers were also culpable, because they had failed to note red flags indicating lack of accuracy in the testimony of Red Spot's witnesses. Rather than pressing their client for more detail, however, the lawyers permitted the litigation strategy to go forward, and did not supplement discovery responses when additional information was obtained. The court stated:
"Being a zealous lawyer does not mean zealously believing your client in light of evidence to the contrary….it may be unusual to sanction a law firm for conduct that violates the Federal Rules of Civil Procedure. However, in this case, where three partners of the firm had knowledge of its client's apparent disregard for those rules and failed to properly supervise an associated and a paralegal who had knowledge of adverse facts that remained undisclosed to the opposing party, the Court can only conclude that the firm must be held accountable under its inherent authority to deter such conduct in the future." Ibid, at 62.
403. The court stated the following:
"Under the circumstances of this case, where the "tip of the iceberg," … documents were disclosed ten days before trial, where the documents and testimony …. came to light only after a motion for sanctions had been filed, and where the Court is still not sure if the truth has been revealed, the Court is compelled to find that Red Spot's conduct was contumacious, wilful, and egregious" Ibid, at 52.
404. The court was therefore satisfied that *"…Red Spot's conduct can only be described as contumacious, willful, and egregious [and that Red Spot's attorneys] compounded the problem by, like a chameleon, becoming indistinguishable from its client and allowing Red Spot…to evade the truth…"* Because of the flagrant disregard for the legal process, the court ruled that *"…Red Spot has forfeited the right to have the issues determined on the merits…"* and held Red Spot *"liable for taking all necessary action to abate and otherwise respond to the aromatic contamination…"* affecting plaintiffs' property. *Ibid*, at 63.
The court concluded therefore:
"…. that only the most onerous sanction, default, can remedy Red Spot's violation of the rules of discovery, Fed. R. Civil P. 37(b)(2)(A)(vi); 37(c)(1), or can remedy Red Spot's complete disregard of the legal process as protected by the inherent authority of the Court. Greviskes, 417 F.3d at 758-59."
Attorneys' fees were levied equally against both Red Spot and its counsel. *Ibid*, at 63.
405. It is interesting to note that how Red Spot's argument regarding lack of prejudice was treated by the court:
"Red Spot continues to insist that this is a simple science case, that the newly discovered evidence makes no difference and that the delay caused by the discovery for 1100 West's Motion for Sanctions should not be laid at its door. The Court cannot agree. While there may have been some legitimate objections to some of 1100 West's discovery requests, the crux of the requests—that is, where and when and whether certain chemicals, including TCE or PCE, were ever used or stored or were part of the waste stream of Red Spot—was never responded to with candor. Both Henry and Storms assigned themselves the task of determining the credibility of witnesses and were able to keep 1100 West and the Court from addressing those issues of credibility and their effect on the merits of the case as required by law. Given Red Spot's current position that this case is nothing more than a simple matter of an expert with facts (Red Spot's expert, Dr. Feenstra) versus an expert with conjecture and supposition (1100 West's expert, Dr. Keramida), there seems to be no apparent motive for Red Spot to have played such an evasive game.
But, the Court is not even sure if all the facts have actually been revealed because neither Henry nor Storms has yet to be candid about the use, storage, or disposal of raw materials, products, wash-up solvent, degreaser, or waste that contained either TCE or PCE on Red Spot's property. After all the time and money that has been spent to uncover the truth, there is still no clear answer from Red Spot. Red Spot has made a mockery of the discovery process and has subjected the truth to ridicule. In the face of these findings, it seems inappropriate to argue that 1100 West has not been prejudiced."
406. Therefore, while identifying no specific prejudice to 1100 West, the court was satisfied that prejudice did arise from the time and money that had been expended on uncovering the discovery violations, the inability of the court to be satisfied that all facts had now been revealed and the mockery that was made of the discovery process and the truth as a whole.
407. It is respectfully submitted that the case law from the United States clearly demonstrate that the courts in that jurisdiction will take a broad range of factors into consideration when considering whether to strike out pleadings. The case law also clearly demonstrates a sliding scale between the elements of prejudice and culpability. The greater the degree of culpability that is found, the less prejudice that will be required before sanctions are imposed on a party for violations of their discovery obligations. It is respectfully submitted that this approach has had a dramatic effect in terms of deterrence and that there is now a widespread consciousness about the importance of adhering to discovery obligations amongst lawyers and litigants. It is

respectfully submitted that the approach demonstrated by the courts in the United States has much with which to commend itself.

RECENT DEVELOPMENTS IN IRELAND

408. Recent case law has identified a more stringent approach by the Irish courts on applications to dismiss a claim or strike out proceedings influenced by matters such as the European Convention on Human Rights.

409. ***Gilroy v. Flynn*** [2005] 1 I.L.R.M. 290.concerned an application to strike out for want of prosecution/delay. Hardiman J. noted significant recent developments in the area, such as the amendment of Order 27 of the Rules of the Superior Courts requiring the court to strike out proceedings on a second application to dismiss a case or to grant judgment in default of defence regardless of whether there could still be a fair trial and the obligation of the courts under the European Convention on Human Rights Act 2003 to ensure that rights and liabilities are determined within a reasonable time. Hardiman J. went on to say: "*These changes, and others, mean that comfortable assumption on the part of a minority of litigants of almost endless indulgence must end. [The earlier] [c]ases …. will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case."*

410. More recently, Clarke J. in the High Court expressly recognised that the imperative of expeditious resolution may require less weight to be attached to the presence or absence of prejudice. In ***Stephens v. Paul Flynn Limited*** Unreported, High Court (Clarke J.), 28th April, 2005., he stated:

"… it seems to me that for the reasons set out by the Supreme Court in Gilroy the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."

411. These comments were echoed and endorsed by the Supreme Court in that case. Unreported Supreme Court 25 February 2008 [2008] IESC 4. In delivering the judgment of the Court in that case, Kearns J. expressly cited with approval the passage in the judgment of Hardiman J. in ***Gilroy v Flynn*** (quoted above).

412. It is respectfully submitted that, in light of the broader recognition in the Irish courts that there should be less tolerance towards non-compliance and delay, a similar approach may be appropriate in the context of striking out proceedings for failure to comply with court orders for discovery. It is submitted that the Courts should be less tolerant to non-compliance and more willing to strike out a party's case, particularly where there is culpable or reckless non-compliance which has led to delay and increased cost.

413. It is further submitted that such an approach is particularly apposite in the context of proceedings which have been entered into in the Commercial Court. There is a clear emphasis throughout Order 63A on expedition and cost reduction and the Commercial Court judge will be very conscious of the harmful effects which protracted litigation can have on parties and on the system as a whole. Furthermore, it is not in the interests of justice that a party granted entry to the Commercial List should be permitted unreasonably to delay the determination of a case and cause prejudice and inconvenience to its opponent and to the court. Finally, in view of the objectives of Order 63A, the Commercial Court may look at matters beyond prejudice, such as the effect of default on other litigants and the proper use of the Court's resources. In some circumstances, it is respectfully submitted that these broader considerations might warrant the striking out of a party's case, even where a fair trial may still be possible (which it is submitted is not the case here).

414. It is respectfully submitted therefore that, given the more robust approach that has been suggested or adopted in other jurisdictions and recognised in this jurisdiction in the "delay" cases, the concept of a fair trial in modern litigation now dictates that a of a broad range of factors such as whether or not the failure was deliberate, reckless or contumelious, the reasons given for non-compliance, the extent of non-compliance and the prejudice caused to the other party all need to be taken into account with greater emphasis on factors which delay and hinder the prosecution of the litigation. While in the majority of cases an alternative to the sanction of striking out or dismissing proceedings will be suitable, it is submitted that a court taking a broader range of factors into consideration should be less tolerant to delay, default and non-compliance and more prepared to exercise its discretion in favour of granting an application to dismiss. This is particularly so on the facts of the present case.

Application of Legal Principles:Conduct of the Plaintiffs and Prejudice to the Defendants

415. It is submitted that the conduct of the Plaintiffs and the prejudice which the Defendants have suffered must not be viewed in isolation in the context of this application. The Plaintiffs have mounted a major legal action against the Defendants alleging the latter's infill is the cause of the damage which is manifesting in the estates which the Plaintiffs built. The Plaintiffs have always been aware of the nature of the defence which contends that the causes of the damage relate to the manner in which the Plaintiffs constructed the three estates. The Defendants have investigated and invested huge resources into demonstrating that the theory of pyritic expansion cannot apply with respect to the present proceedings. However, the Defendants have also been required specifically to investigate the nature of the damage manifesting so as to demonstrate that, where it exists, it is due to other factors. Therefore, the Plaintiffs conduct and the Defendants' prejudice are inextricably linked. In this case, it is contended that the Plaintiffs, knowing the case which the Defendants were making, manifestly and recklessly failed to retrieve and disclose all relevant documentation which they knew or ought to have known this would be irretrievably and fundamentally damaging to the case which the Defendants were making. Furthermore, the Plaintiffs, when faced with obvious warning signs that their discovery was deficient in very many ways (primarily during the period between October and December 2008) chose to ignore those warnings signs – and specifically countenanced the risk that the Defendants would have to defend the claims against it without the full facts.

416. Furthermore, the prejudice suffered by the Defendants is very specific in these proceedings given their technical and scientific complexity and also given their vast scope. The information which was not made available would not only assist for the purpose of the Defendants' defence, it was manifestly relevant to allow the Court draw correct conclusions based on all the facts.

417. It is also contended that the prejudice suffered by the Defendants is heightened in circumstances where the information not disclosed is material to examinations and investigations which are necessary for the proper preparation for trial. This trial is a unique example of this. Not only was the information necessary for the purpose of preparing expert reports and conducting cross examinations, it was vital for the purpose of selecting the basket of houses. The basket of houses, by definition, must be representative of the technical issues arising in these proceedings. However, if all those issues have not come to light through usual pre-trial procedural processes then the choice of the basket itself must be called into question.

418. The affidavits in these proceedings submitted on behalf of the Defendants detail at great length the effect and implications of the newly discovered documentation. However, it is contended that the Court must examine the conduct of the Plaintiffs in failing to adhere to its discovery obligations in tandem with the prejudice suffered by the Defendants – these are not

necessarily mutually exclusive. By way of example, it has now become clear that the Plaintiffs realized the Defendants were specifically seeking delivery dockets relating to delivery of concrete. Specific queries were raised by the Defendants when they did not appear in the documentation. Nevertheless, the Plaintiffs determined that these documents were not discoverable under the categories of discovery. However, the impression created, as the Plaintiffs concede, was that no such delivery dockets existed. The result of this is that the Defendants have been deprived of vital and relevant information relating to the concrete delivery, the types of mixes which were delivered, information as to who the suppliers were and the fact that water was been added on site. Furthermore, one must bear in mind that when Dr Maher gave his evidence to this Court and stated that there were only "three or four" instances of water being added on site, the Plaintiffs must have realized that the evidence which Dr Maher was giving was based on inaccurate information – and there were documents which demonstrated that what Dr Maher was stating was incorrect.

419. Furthermore, it is the Defendants' contention that the very criticism which the Plaintiffs have levelled at the testing carried out by the Defendants' experts was solely due to the deficit in information provided by the Plaintiffs. Whilst the Defendants reject that criticism as not being valid the reality is that the Plaintiffs have targeted the approach of the Defendants in relation to assumed values in water cement ratios. However, the Defendants would have been in a better position to deal with this issue had the Plaintiffs complied with those discovery obligations.

420. It is worth highlighting another example of the consequence of not possessing all the relevant information at the appropriate juncture. In particular, this is manifest with respect to those properties which we now know to contain non Bay Lane material.

421. As has been outlined in the affidavits of Mr Peter Lennon, had full discovery been made it is likely the Defendants would have been aware (or would have been led on a line of enquiry to discover that) there were, in fact, 56 houses in addition to those mentioned in the replies to particulars in January 2008 which contained Non Bay Lane fill. (24 re-test houses, 32 houses in Myrtle.) Given this number, it is also likely that this would have led onto enquiries where they would have ascertained the full picture of 77 houses well in advance of Christmas 2008. In contrast, given the July 2008 discovery, all the Defendants could have known (and all the Plaintiffs can point to) was that there were 10 houses in Myrtle which possibly contained Non Bay Lane fill. Furthermore, in respect of 7 of those 10 houses the Defendants were unaware that the Plaintiffs had recorded cracking therein comparable to cracking in pure Bay Lane properties. (In respect of the remaining three, there appears to no DBFL report and no new discoverable information of significance.)

422. The prejudice suffered by the Defendants in this regard, must also be placed in a context of the conduct of the Plaintiffs. It is the Defendants contention that the Plaintiffs had specifically mounted a case that only properties which contained Bay Lane material were exhibiting damage. In this regard, the Plaintiffs specifically particularized that 25 houses in Drynam – the "Moyglare" Houses – did not contain Bay Lane material and did not exhibit signs of cracking due to pyritic heave. Furthermore, in response to specific queries raised by the Defendants the Plaintiffs particularized the extent to which other properties contained Non Bay Lane material or a mix of Non Bay Lane with Bay Lane. In addition to this, the clear impression was given that the documentary records established this definitively.

423. What we now know this was not the case. We also know that the Plaintiffs were aware from March 2008 that there were serious doubts over their original analysis as to where infill was placed, by virtue of expert analysis been carried out. We also know that no attempt was made by the Plaintiffs to rectify the inaccurate and misleading position as set out in those replies to particulars. In addition, had full discovery been made in July 2008, the Defendants would have been in a position to ascertain that the replies to particulars were seriously inaccurate. In light of that, the prejudice to the Defendants must be marked against the failure of the Plaintiffs to not only correct their replies to particulars, but also their failure to make full discovery in circumstances where the Defendants repeatedly queried the assertion that there were records in the Discovery which would back up the specific plea made by the Plaintiffs as to which houses contained Non Baylane material.

424. In this regard it is important, at this juncture to assess the duty on the Plaintiffs to ensure that their replies to particulars were accurate and – in addition – to ensure that when they learnt of their inaccuracy that they ensure they be corrected.

425. Delany and McGrath state that a party is required to furnish particulars on the basis of the facts as they are known at the time of the pleadings and is not under a general or continuing obligation to provide updated or supplementary particulars. Delany and McGrath *Civil Procedure in the Superior Courts* (2nd ed., Thomson Round Hall 2005) at 153. However, it would seem that in light of (a) the purpose of the procedure for seeking and providing particulars, (b) the obligation to provide truthful and accurate particulars in the first instance and (c) the duty to correct errors made in the course of litigation, the Plaintiffs were certainly under an obligation to inform the Defendants of the position regarding their inaccurate replies.

The Purpose of Particulars

426. As was pointed out in ***Fahy v. Pullen*** (1968) 102 I.L.T.R. 81., the procedure of seeking and providing particulars is designed to ensure that a party shall not be taken by surprise by finding out for the first time at the trial the nature of the case which he has to meet. Therefore, as Lavery J. stated:

"… if a new and unexpected type of damage were to emerge the plaintiff should give notice—appropriately, but not necessarily in a formal manner—by giving further particulars".

427. Similarly in ***O'Driscoll v. Irish Shell and BP Ltd*** [1968] I.R. 215. it was held that where an additional injury to a plaintiff becomes apparent after the pleadings have been delivered and it is intended to rely on that injury at the trial of his action, the defendant should be informed of the additional injury as soon as that intention has been formed.

428. Delany and McGrath refer to the decision of ***O'Driscoll v. Irish Shell and BP Ltd*** to support the proposition that if new information comes to light in relation to matters of which particulars have been provided and which could cause surprise if relied upon, then the party should furnish supplemental particulars or otherwise put the opposing party on notice. Delany and McGrath *Civil Procedure in the Superior Courts* (2nd ed., Thomson Round Hall 2005) at 153.

429. If there is a duty to put the opposing party on notice of fresh information that has come to light (as there is) there must be an analogous duty to put the opposing party on notice of information that has come to light showing that the original information provided was inaccurate.

Obligation to give truthful and accurate replies

430. It is well established that there is an obligation to give truthful and accurate replies to particulars and the courts may be prepared to penalise a plaintiff who fails to do so. In ***Shelley-Morris v. Bus Atha Cliath*** Unreported, Supreme Court, 11th December, 2002.the court found that the plaintiff's evidence was lacking in credibility and that the plaintiff had, *inter alia*, given false particulars of special damage. The following comments of Hardiman J. set out the lengths to which the court might be

prepared to go where it is satisfied the plaintiff has not been truthful:
"… the onus of proof in these cases lies on the plaintiff who is, of course, obliged to discharge it in a truthful and straightforward manner. Where this has not been done "a court is not obliged, or entitled, to speculate in the absence of credible evidence" To do so would be unfair to the defendant. Moreover, a plaintiff who engages in falsehoods may expose himself or herself to adverse orders on costs. Furthermore, as I observed in Vesey v. Bus Éireann at p. 202 "there is plainly a point where dishonesty in the prosecution of a claim can amount to an abuse of the judicial process as well as an attempt to impose on the other party".
This last proposition is well established but has been little considered in the context of personal injuries claims. It is, perhaps, appropriate to comment on the court's power to prevent, or remedy, abuse of process at greater length than was done in Vesey v. Bus Éireann.
In Goldsmith v Sperrings Ltd. [1977] 1 W.L.R. 478, Lord Denning, at p. 489, had this to say:-
"In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer."
In Arrow Nominees v. Blackledge [2000] 2 B.C.L.C. 167, the English Court of Appeal said at p. 194:-
"It is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as the means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."
I have no doubt that these principles are equally applicable in this jurisdiction. It must not be thought that a falsehood in respect of one aspect of a claim will, at worst, lead to that particular part of the claim being reduced or disallowed. The courts have a power and duty to protect their own processes from being made the vehicle of unjustified recovery. In a proper case, this will be done by staying or striking out the plaintiff's proceedings."
431. In the recent case of ***Carmello v. Casey*** [2008] 3 I.R. 524. Peart J. found that the plaintiff had failed to disclose a previous injury in his replies to particulars and was "satisfied that he knew that some of what was contained therein in respect of the facial injury was false or misleading". In that case the plaintiff had also sworn an affidavit of verification for the purpose of s. 14 of the Civil Liability and Courts Act 2004 verifying the assertions of fact contained in his statement of claim and his replies to particulars and Peart J. was prepared to apply s. 26 of the Act by dismissing his case. See also the recent judgment of Hanna J. in ***Gammell v. William Doyle*** [2009] IEHC 416, Unreported. High Court 28 July 2009.
432. It is therefore clear that there is an obligation to give truthful replies to particulars and, in dealing with a breach of this obligation, the courts can rely on the statutory mechanism provided by s. 26 of the Civil Liability and Courts Act 2004 in a personal injuries case or on its inherent jurisdiction to protect their procedures in any action.
433. The obligation to give truthful and accurate replies to particulars is rightly taken very seriously by the courts. It is axiomatic that this serious obligation implies and carries with it an obligation to correct replies to particulars where they are found to be in error. It would render the obligation to provide truthful and accurate particulars meaningless if a party did not have a continuing obligation to ensure their truthfulness and accuracy.
Duty to the court and opponent
434. The duty is owed to the court and to opponents to ensure inaccuracies are corrected – and it is submitted this equally applies in the context of ensuring particulars given are correct or if not, that they are corrected. This duty has been widely recognised. This has already been outlined above in section 3, but it is submitted the principles outlined equally apply with respect to ensuring the information which is given to the other party and the Court is accurate and not misleading.
435. In ***Unioil International Pty Ltd. v. Deloitte Touche Tohmatsu (No. 2)*** (1997) 18 W.A.R. 190., the plaintiff argued that the defendant should pay the plaintiff's costs on the basis that the plaintiff had been forced to prove many allegations (including the incorporation of the plaintiff) and many other allegations which were not genuinely in dispute had been denied where they should have been admitted. At p. 193 Ipp J. said:
"In my view, the traditional requirement of honesty and candour on the part of lawyers and the modern duty to reduce unnecessary issues and costs, are inimical to the practice of denying or putting parties to the proof of facts which, according to the instructions in the lawyer's possession, should be admitted.
Pleadings perform an important function, apart from defining and crystallising the issues. They should be a mechanism for the purpose of arriving at the true issues in dispute.
436. Finnegan P. in ***Law Society v. Walker*** referred to ***Myers v. Elman*** [1940] 1 A.C. 282.. This case concerned the duty of solicitors in relation to discovery and the headnote deals with the duty as follows:
"An order for discovery requires the client to give information in writing and on oath of all documents which are or have been in his possession or power, whether he is bound to produce them or not, but as a client cannot be expected to realise the whole scope of that obligation without the aid and advice of a solicitor, the latter has a peculiar duty as an officer of the Court carefully to investigate the position, and, as far as possible, see that the order is complied with. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit, nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information which he is entitled to acquire, or if the client insists on swearing an affidavit which the solicitor knows to be imperfect, the solicitor's duty is to withdraw from the case. A solicitor who is innocently put upon to file an affidavit by his client which he subsequently discovers to be false, owes a duty to the Court to put the matter right at the earliest moment if he continues to act as solicitor on the record."
437. Viscount Maugham also referred to the judgment of Hatherley L.C. in ***In re Jones*** (1870) 6 L.R. Ch. App. 497. in which the Lord Chancellor said at p. 449:
"I think it the duty of the Court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned."
438. Viscount Maugham went on to say at pp. 293 to 294:
"However guilty they [the defendants] may be, an honourable solicitor is perfectly justified in acting for them and doing his very best in their interests, with, however, this important qualification, that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings. The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter; and if his client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon the file.
A further observation should be made here. Suppose that in such a case the client swears an affidavit of documents which discloses nothing relating to the frauds alleged in the statement of claim and suppose that the solicitor has previously given his client full and proper advice in the matter but has no good reason to suppose that the affidavit is untrue, it may be asked what else ought the most punctilious solicitor to do? My answer is nothing at that time. But suppose that, before the action comes on for trial, facts come to the knowledge of the solicitor which show clearly that the original affidavit by his client as

defendant was untrue and that important documents were omitted from it, what then is the duty of the solicitor? I cannot doubt that his duty to the plaintiff, and to the court, is to inform his client that he, the solicitor, must inform the plaintiff's solicitor of the omitted documents, and if this course is not assented to he must cease to act for the client. He cannot honestly contemplate the plaintiff failing in the action owing to his client's false affidavit. That would, in effect, be to connive in a fraud and to defeat the ends of justice. A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act as solicitor upon the record."

439. In ***Law Society v. Walker*** Finnegan P. also referred the duty of a litigant to his opponent at p. 596 and confirmed that it is founded on his duty to the court:

"It is the duty of every litigant not to mislead his opponent...

"I cannot find that the proposition laid down by Lord Hatherley has ever been doubted and the cases cited in Halsbury certainly tend to support it. It is hardly necessary to point out that Lord Hatherley's phrase implying the solicitor's duty to parties for whom he is not acting is founded on his duty to the Court."

440. Finnegan P. concluded that in the circumstances of the particular case it was appropriate a disciplinary inquiry be held:

"The duty in issue in the application is of such vital importance to the administration of justice and to the confidence of the public in the courts and in the solicitors' profession and to the well deserved reputation of the profession for honesty and integrity that it is in the public interest that an inquiry be held." [2007] 3 I.R. 581, at 602.

441. As ***Law Society v. Walker*** clearly confirms that both parties and their legal advisors have a duty to ensure that the court is provided with truthful and accurate information, that that duty is owed to both the court and to their opponents and that the duty incorporates the duty to immediately correct errors in information already provided when these come to light.

Prejudice caused by deprivation of effective cross-examination

442. A further illustration of the prejudice suffered by the Defendant as a consequence of the Plaintiffs' failure to make proper discovery arises on this basis. The Defendants' have been irredeemably prejudiced by being deprived of the opportunity to effectively cross examine the Plaintiffs' witnesses on key issues which have crystallised in the wake of the new discovery. In particular, the Defendants have been required, in the context of this application, to show how they have been prejudiced by not being able to put certain issues of fact to particular witnesses. As a result, even if those witnesses were recalled at this juncture, the element of surprise would be lost from any cross examination. In short, the Defendants submit that their constitutionally guaranteed entitlement to cross examine has been gravely hampered by the necessity to outline in very great detail to the Court the issues which the Defendants would have raised or pursued had they had the documentation when cross examining the witnesses to date. It is respectfully submitted that the value of future cross-examination of witnesses has been eroded and that there is no readily apparent means of curing this prejudice.

443. There are, of course, two predominant objectives to cross examination: (i) to elicit evidence from the witness in relation to the facts in issue which is favourable to the cross-examining party; and (ii) to cast doubt upon the veracity, accuracy or reliability of the evidence given by the witness. The usefulness of cross-examination as a tool for extracting the truth needs hardly to be stated. Wigmore has described cross examination as:

> "the greatest legal engine ever invented for the discovery of truth". Wigmore *Evidence* (3rd ed,, 1940), Vol V, 1367, p. 29, cited in McGrath *Evidence* at para. 3-51.

444. The seminal decision in this jurisdiction on the importance of cross-examination is ***In Re Haughey.*** [1971] I.R. 217 The facts are well known and need only to be briefly stated. The case concerned the procedures before the Public Accounts Committee of Dáil Éireann. The Committee had certified Mr Pádraic Haughey to the High Court for contempt in failing to answer its questions and relied, for the purposes of the prosecution of Mr Haughey before the High Court, on an affidavit of the chairman of the Committee. The High Court declined to permit cross-examination, ruling that the matters on which he wished to cross-examine were inadmissible on the issue of his guilt. Mr. Haughey's claim to the procedural rights he considered necessary, including a right cross-examine, was resisted by the State on the ground that Mr. Haughey was a witness only and that a witness in civil proceedings was not entitled to these rights. In dealing with this submission, the Court went behind the form and surface of Mr. Haughey's status and considered the reality. Mr. Haughey was found to be a person against whom allegations were being made. Accordingly, he was more than a mere witness: the true analogy was not that of a witness but a party. Ó Dálaigh C.J. said in the oft-cited passage:

> "… In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his personal property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State either by its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights."

445. On that basis, the Court found that a person in that position was entitled to the following "minimum protection":

> *"(a) That he should be furnished with a copy of the evidence which reflected on his good name;*
> *(b) That he should be allowed to cross- examine, by counsel, his accuser or accusers;*
> *(c) That he should be allowed to give rebutting evidence;*
> (d) That he should be permitted to address, again by counsel, the committee in his own defence."

446. Ó Dálaigh C.J. continued to conclude that without these rights:

"… No accused - and I speak in the context of the terms of the inquiry - could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of clocha ceangailte agus madraí scaoilte. Article 40, s.3 of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness and it is the duty of the Court to underline that the words of Article 40 s.3 are not political shibboleths but provide a positive protection for the citizen and his good name."

447. In re Haughey was the principal authority cited in another celebrated and frequently approved decision, that of Gannon J in ***State (Healy) v Donoghue*** [1976] I.R. 325.. The learned judge identified the principal rights guaranteed by Article 38.1 of the Constitution in respect of a criminal trial:

"Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence. The rights I have mentioned are such as would necessarily have a bearing on the result of a trial. In my view, they are rights which are anterior to and do not merely derive from the Constitution, but the duty to protect them is cast upon the Courts by the Constitution." [1976] I.R. 325 at 335. (emphasis added)

448. In ***Donnelly v Ireland and others*** at issue was whether the giving of evidence via video link in certain sexual offences deprived the accused of a right of physical confrontation of the accuser. [1998] 1 I.R. 321. The Supreme Court cited a number of decisions of the Supreme Court of the United States, which had had to consider the very point before the Court. The sixth

amendment to the US Constitution specifically includes a *"right to be confronted with the witnesses against him"* (the accused). The Supreme Court observed:

> *"Though the Constitution of Ireland, 1937, contains no specific right such as that guaranteed in the confrontation clause, the central concern of the requirements of due process and fair procedures is the same, that is to ensure the fairness of the trial of an accused person. This undoubtedly involves the rigorous testing by cross-examination of the evidence against him or her."*

449. In ***Maguire v Ardagh*** the Supreme Court considered the meaning of the word "findings" in the context of a challenge to the procedures adopted in the Abbeylara Inquiry. [2002] 1 IR 385. The Supreme Court rejected the argument that the findings should be regarded as nothing more than an expression of opinion and ultimately held, on the issue of cross-examination, that a cross-examination so limited in time, postponed and following an application for leave to cross-examine could not adequately meet the standards set by ***In re Haughey***.

450. Hardiman J observed:

> *"It follows from the foregoing that the right of cross-examination may not be unreasonably confined or hampered in terms of the time allowed or otherwise. A person is, of course, entitled to cross- examine himself but equally entitled to do so by counsel. Cross-examination is a special skill and usually an acquired one, of which a thorough knowledge of the facts of a particular case is merely the foundation. A person without experience of the art is very unlikely to be able to conduct an effective cross-examination.*
>
> ....
>
> *In a case where there are many witnesses, cross-examination of the first may very significantly alter the tone and emphasis and even the content, of succeeding testimony.*
>
> ....
>
> *Cross-examination adds considerably to the length of time which proceedings will take. But it is an essential, constitutionally guaranteed, right which has been the means of the vindication of innocent people."* (emphasis added)

451. In ***O'Callaghan v Mahon*** [2005] IESC 9. the Supreme Court heard an appeal by the Mahon Tribunal against the decision of the High Court which granted a declaration that the refusal by the respondents to permit the applicant through his legal representatives access to relevant documents recording prior oral and written statements by Mr. Tom Gilmartin to the tribunal, for the purpose of cross-examining Mr. Tom Gilmartin, amounted to a failure by the Tribunal to observe and protect the applicant's rights to fair procedure and to natural and constitutional justice.

452. In his powerful judgment in that case, Hardiman J observed:

> *"The cross-examination of a witness on the basis of comparing what he has said on oath with an account given on another occasion is one of the longest established of the conventional methods of contradiction. It has been recognised for centuries. Sections 23 and 24 of the Common Law Procedure Act, 1854 provide as follows:*

"S.23. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such statement.

.24. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause without such writing being shown to him; but if it is intended to contradict such witness by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always that it shall be competent for the judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he think shall fit."

Similar provisions occur in the Criminal Law Procedure Act, 1865."

453. Hardiman J also referred to a previous decision in which he had cited a dictum of Lord Atkin. In ***JO'C v. DPP*** he said [2000] 3 I.R. 478, at 508.:

"I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts is worth pounds of demeanour."

454. Hardiman J ultimately concluded:

> *"The tribunal, like the learned trial judge in the Taylor case, cannot simply come to a subjective decision of trust or the lack of it in Mr. Gilmartin: it must give rational reasons for either giving or withholding belief in respect of the allegations which he made. Where the witness himself has admitted inconsistencies and omissions, it seems impossible to see how this can be done unless it is in a position to deal with those matters. And if it is to deal with them fairly, it must clearly hear the submissions of the lawyers for those impugned. These submissions, in turn, cannot be made unless the lawyers are aware of the inconsistencies, and able to cross- examine on them. It is difficult to see what anyone whose concern is with the truth has to fear from their revelation.*
>
> *It therefore appears to me that, in the context of Mr. Gilmartin's evidence, there is clearly a significant and proper potential use for his previous statements, in cross-examination. To deprive him of this potential would be to hamper and possibly to subvert his ability to cross- examine. There is nothing in the constitution of a tribunal of inquiry, at which cross-examination must be permitted, to restrict the scope or methods of cross-examination beyond those restrictions which apply in other fora. Subject to the tribunal's arguments based on confidentiality, which will be considered below, there is nothing which excludes the use of documentary records of previous statements which are in the possession of the tribunal from the scope of documents which may be used to contradict a witness. In this particular context, there is also the fact that very serious allegations have been "sprung" on Mr. O'Callaghan (and perhaps on the tribunal as well) without notice, but I do not regard this fact as a necessary ground of the decision."* (emphasis added)

455. In ***Murray v Commission to Inquire into Child Abuse*** [2004] 2 I.R. 222. the issue in the proceedings was whether the Committee was empowered to make a finding of serious sexual abuse by one person in a particular institution of another, within that institution, within a period many years ago in circumstances where that first person is either dead, under a disability, unplaced or disadvantaged in the inquiry by reason of being hampered or hindered from rebutting the allegations, due to prejudice caused by the lapse of time since the alleged incidents took place. The Plaintiffs submitted that where a respondent is dead there is, of course, no possibility whatsoever of that person's case being presented in the manner consistent with the requirements described ***In Re Haughey*** because *inter alia* the accuser cannot be meaningfully cross-examined in the absence of information and instructions from the dead person.

456. On the specific issue of cross-examination, Abbott J. held as follows:

> *"In view of the importance of cross-examination for the purpose of insuring fair procedures and constitutional justice set out in Maguire v. Ardagh, I consider that the submissions on behalf of the plaintiffs that the representatives of the dead and the plaintiffs' congregation seeking to defend their derivative interest under the*

dead and the incapacitated and untraceable, were under a serious disadvantage in relation to the procedures suggested by the Final Ruling and procedures of the Committee by requiring a statement from the respondent as a precondition for the right to cross-examine. I am not certain that the submissions of the defendant accepted that this was so and certainly counsel for the Commission gave examples of what might happened in relation to cross-examination by the representative of the congregation in relation to a complaint against a deceased or incapacitated member to show how the Final Ruling and its procedures would work in practice. However, I accept that there is at least ambiguity in relation to the right of the representatives (however defined) of the deceased and incapacitated to cross-examine by reason of the redirects of the final ruling of a narrative statement from a narrative statement respondent. In considering this question I accept that a tribunal of inquiry such as the Committee has a right to arrange its business so that there is not the multiplicity of representatives seeking to cross-examine every witness on purpose, these representatives seeking to cross-examine may be required to show the intended scope of the cross-examination. I consider that the right of the representative of the deceased and incapacitated to cross-examine (notwithstanding difficulties in obtaining the fullest instructions for such cross-examination) is vitally important for insuring the operation of fair procedures and constitutional justice in the context of inquiries by the Committee. The issue is dealt with in Fennell's The Law of Evidence in Ireland, 1st Ed., at p. 74 as follows:-

"The strength of the entitlement and basis for cross-examination, and its centrality to our process of legal adjudication, is illustrated by the decision of Declan O'Broin v. District Justice Jarlath Ruane and the Attorney General [1989] I.L.R.M. 732. The applicant herein was arrested under section 21 of the Road Traffic (Amendments) Act, 1978, which provides that it shall be presumed, until the contrary is proven, that the statutory procedure has been complied with.

The applicant's solicitor cross-examined the prosecuting Garda Sergeant in regard to compliance with section 21. Objection by the prosecution to the effect that such a general question was not permissible having regard to subsection 4, was upheld by the District Justice.

Lynch J. in the High Court however, held that although cross-examination was 'a fishing cross-examination' in the sense that the solicitor for the applicant was not in the position to show any particular non-compliance with section 21 unless something should be elicited in the course of same; it should be allowable. Lynch J. was of the opinion that:

'it seems to me…that the defending solicitor entitled to inquire in a general way as to what happened to his client form the time he was brought to the Garda Station in relation to the taking of specimens and the treatment of such specimens in order to see whether compliance with section 21 was observed. I think he may do this in a general way…of course on the other hand the District Justice must be entitled to control cross-examination and keep it within reasonable bounds. If, for example, the general sort of cross-examination seem to go on repetitively, the District Justice, would clearly be entitled to say: that's enough of that. You have made your point. But he must allow some reasonable general inquiry as to what procedures were in fact done and followed in the Garda station so that the defending solicitor, even in the absence of any specific allegation of a contravention of the requirements of section 21, made sure that these requirements were complied with'."

I consider that this passage is equally applicable to cross-examination on behalf of the representatives (however defined) of the deceased and incapacitated in Phase I of the Inquiry and in view of the importance of the matter in ensuring fair procedures, I consider that it is appropriate to make a declaration in that regard." (emphasis added)

457. The Court ultimately held in ***Murray*** that the guarantees of the Constitution of Ireland under Article 40.3.1 and 40.3.2 to basic fairness of procedures had not been breached by the alleged disadvantage of the plaintiffs in the attempted investigation of the dead, the disabled, the unlocated and the disadvantaged, or the alleged right of cross-examination being further circumscribed, apart altogether from the impossibility of taking instructions, for the reasons that fairness of basic procedures were guaranteed by: (a) statutory requirement of corroboration as appropriate, (b) the commitment of the Committee to test the evidence as appropriate, (c) the acknowledged right and inability of the Committee to stop the inquiry either exceptionally at the outset, or at a concluding stage of the inquiries, by reason of prejudice arising from delay, death or disability using the standards of jurisprudence evolved by the Courts in civil and criminal litigation.

458. The importance of cross-examination was also highlighted by Fennelly J. in ***The People (Director of Public Prosecutions) v. Kelly***. [2006] 3 I.R. 115. In ***DPP v Kelly*** the Supreme Court delivered a judgment on a certified point of law from the Court of Criminal Appeal, namely whether the requirements of Article 38 of the Constitution satisfied where an accused is precluded from enquiring into the basis of the evidence of belief given against him at his trial pursuant to the provisions of the Offences against the State Act, 1939, as amended, on a charge of membership of an unlawful organisation before the Special Criminal Court. The Court was not concerned with any matter other than the question of whether the appellant was deprived of a fair trial by reason of that limitation on cross-examination. The Court observed that there was an inherent limitation on cross examination in section 3(2) of the Offences against the State (Amendment) Act, 1972 which provides that where an officer of an Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.

459. Fennelly J. in his judgment observed:

"It is a proposition so obvious as scarcely to need no authority that the right to cross-examine one's accusers is fundamental to our criminal procedures. It is axiomatic that every witness must submit himself to the rigours of cross-examination, to having his evidence questioned, tested, challenged and contradicted and his credit impeached. Cross-examination plays a pivotal role in all adversarial proceedings under the common-law system.... The essential question to be answered in this case is whether the undisputed restriction on the right of the accused to cross-examine his accusers and to have access to the materials relied upon by the prosecution has been unduly restricted so as to render his trial unfair and his conviction unsafe. I believe that all of the authorities cited from all relevant jurisdictions demonstrate that there is an inescapable obligation on the courts to guarantee the overall fairness of a trial. I also believe that, in our legal system, the right to cross-examine one's accusers is an essential element in a fair trial. This is not to say that restrictions may not be imposed in the interests of overall balance and the efficiency of the criminal justice system. While there may be derogations for overriding reasons of public interests from normal procedural rights of the defence, these must not go beyond what is strictly necessary and must, in no circumstances, to use the language of Lord Bingham, "imperil the overall fairness of the trial." I believe that the claim of privilege made by the Chief Superintendent constituted an undoubted infringement of the normal right of the accused to have access to the material which underlay the belief expressed. To that extent, it constituted a restriction on the effectiveness of the right of the appellant to cross-examine his true accusers and it had, for that reason, the potential for unfairness."

460. The Court held, however, in ***DPP v Kelly*** that in the circumstances of that case the overall fairness of the trial had not been jeopardised. It would appear that there was sufficient evidence other than that of the Chief Superintendent to convict the accused and that that the undoubted restriction on the rights of the accused went further than was strictly necessary to protect other potential witnesses or informants.

461. In ***Anh v District Judge Brown*** at issue was s. 4B (3) of the Criminal Procedure Act of 1967 which requires that evidence

be given to enable the District Judge to make a determination under s. 4B (3) as to whether there is good reason for extending time for service of the book of evidence and whether it would be in the interests of justice to do so in a case where the application to for an extension of time is opposed. [2009] IEHC 29. The Court, O'Neill J, stated:

> *"Where an accused person enjoys a constitutional right to an expeditious trial, which is, in practical terms, protected in s.4B (1) of the Act of 1967, by the imposition of a statutory time limit for the service of the book of evidence, I am of opinion, that if an application is made to extend that statutory period and it is opposed, it is incumbent on the prosecution to provide evidence, as to the reasons for the extension to enable the accused person to cross-examine and to call evidence in rebuttal, if appropriate, rather than simply relying upon the assertion of those facts from the well of the Court... It would be strange indeed, in this context, where a complaint arose concerning breaches of either of the above two rights, in a contested application for an extension of the 42 day time limit, that it would not be necessary for the District Judge hearing such objection to adhere to the most basic and fundamental requirement, in the judicial determination of disputed facts, namely, to ascertain the true facts through the time honoured process of hearing evidence on oath or statutory declaration, this evidence being tested by cross examination."*

462. The Court in ***Anh*** held that in a contested application for an extension of this time limit, unless the there is no dispute as to relevant facts, there is an obligation on a District Judge to determine the matter in dispute on the basis of evidence given on oath or upon the making of the prescribed statutory declaration.

463. A number of United States authorities were cited with approval by Fennelly J in ***DPP v Kelly*** referred to above. In ***Greene v McElroy***, 360 U.S. 474 (1959). Warren C.J. reviewed what he called *"[c]ertain principles* [which] *have remained relatively immutable in our jurisprudence"* and which *"have ancient roots."* In respect of the right of cross-examination, having referred to a number of authorities, he cited with approval from Wigmore on Evidence: 3rd ed. 1940, 1367.

"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

464. In ***Pointer v Texas***, a statement of a witness not present at the trial, though he had testified at a preliminary hearing, was introduced in evidence. Black J, delivering the judgment of the court stated:

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." 380 U.S. 400 (1965).

465. It is respectfully submitted on behalf of the Defendants that the vital importance of cross-examination in the administration of justice is not diminished to any significant degree by the exchange of witness statements required by the rules of the commercial court. Witness statements are provided for in 2.22(1) of Order 63 A of the Rules of the Superior Courts. While witness statements put the other party on notice of the salient parts of the evidence a proposed witness will be given, they by no means obviate the need for oral testimony nor do they undermine the importance and effectiveness of cross examination. Order 63A r.22 states that the witness statement must contain an outline of the essential elements of the proposed testimony. Therefore what is envisaged is more akin to a précis of the evidence than a full statement detailing verbatim what the witness will say. The disclosure obligation in Order 63A r. 22 does not extend to information that may be elicited in cross examination as the information which is required in a witness statement is information which a party is intending to rely upon.

466. In conclusion, it is respectfully submitted that case law and authorities relied on above illustrate definitively that the entitlement to cross-examine is a fundamental and integral feature of the constitutional guarantee to fair procedures in criminal and civil cases. A critical feature of any cross examination is the ability to ask a witness questions which he was not expecting. This, it is submitted, is a crucial tool for eliciting truthful answers from a witness. Given that the issues which the Defendants would have liked to cross examine the Plaintiffs' witnesses about, and the weight that the Defendants place on particular pieces of information, have been revealed to the Plaintiffs, the effectiveness and value of any cross-examination has been irrevocably eroded by having to outline in very great detail in this application the issues and evidence which they would have instead to explore with witnesses who have already given evidence.

5. MISTRIAL

I Introduction

467. In the alternative to dismissing the claim for failure to make discovery, the Defendants seek an order for a mistrial in light of the Plaintiffs' failure to make discovery. Simply put, it is submitted that the threat of injustice to the Defendants if this trial is to proceed is so acute that the only means by which such injustice can be avoided is to order a mistrial. For reasons outlined in detail in the Affidavit sworn on behalf of the Defendants grounding this application, if this trial were to proceed, the evidential infirmity caused by the Plaintiffs' failure to make discovery could not be cured by a costs order or by recalling the witnesses already tendered by the Plaintiffs. Equally, it is submitted that in order to prevent a further injustice being suffered by the Defendants, it is necessary for this Court as a court of first Instance to order a mistrial at this stage rather than permitting the action to proceed to its lengthy conclusion and then have the issue of a mistrial canvassed at the appellate stage should the need arise. It falls squarely within the jurisdiction of this Court to make such an order at this juncture and, in the event that (contrary to the Defendants' primary contention) the Court does not dismiss the Plaintiffs' claim, the Defendants respectfully urge the Court to declare a mistrial to remedy the injustice arising from the discovery process.

468. By way of a preliminary observation, it is worthwhile to note that there are two possible meanings of the term 'mistrial': first, the term can be used to describe the scenario wherein an appellate court recognises that a completed trial must be set aside so that the issues can be tried again in a "retrial"; second, the term is also deployed to describe a trial that is terminated prior to its normal conclusion and has no legal effect and is considered an invalid or nugatory trial. It is submitted that it is in this latter context that the Defendants seek an order for a mistrial in these proceedings. The test is the same in each case, namely, whether it would lead to an injustice to permit the trial to continue or to stand.

469. This section of these outline written submissions is structured as follows: section (II) examines the genesis of the court's power to order a mistrial in this jurisdiction and provides examples of judicial recognition of the power; section (III) outlines instances of the Irish Courts' use of its power to order mistrials in both a criminal (A) and civil (B) context; finally, section (IV) has regard to the jurisdiction to order a mistrial in the United States (A) and England (B).

II The jurisdiction of Irish courts to order a mistrial

470. While there is no express provision in the Rules of the Superior Courts for the High Court to declare a mistrial (unlike the position in the Supreme Court where Order 58 rules 7 and 9 apply) , the Defendants submit that the High Court is endowed with an inherent jurisdiction to order a mistrial and that the Irish courts have displayed a readiness to grant such an order where it is required to prevent injustice occurring. In addition, the submission that the courts have an inherent jurisdiction to make such an order is amplified by the Constitutional case law discussed below to the effect that the Courts have an inherent power to design a remedy to cure an infringement of a constitutional right in the absence of express legislative provision for an appropriate remedy.

471. There are a number of judicial pronouncements in the Irish Courts supporting the proposition that the Courts have an inherent power to make orders and grant relief, notwithstanding the absence of any express provision of the Rules entitling an applicant to such relief.

472. In ***Slattery v. An Taoiseach*** [1993] 1 I.R. 286., McCarthy J. in the Supreme Court commented that:

> *"Rules of Court are the servants not the masters of the litigation process." Per* McCarthy J. at 302.

473. In ***Murphy v. J. Donohoe Limited*** [1996] 1 I.R. 123., Barrington J. in the Supreme Court stated that:

> *"The Courts have repeatedly stated that rules of procedure exist to serve the administration of justice and must never be allowed to defeat it." Per* Barrington J. at 141.

474. In ***Primor v. Stokes Kennedy Crowley*** [1996] 2 I.R. 459., Hamilton C.J. observed that:

"*The Courts have an inherent jurisdiction to control their own procedure…" Per* Hamilton C.J. at 475; See also: Jacob "*The Inherent Jurisdiction of the Court*" (1970) Current Legal Problems, 23.

475. In the same case, O'Flaherty J. put the matter as follows:

> *"If I might paraphrase a citation that I used in my judgment in Murphy v. Minister for Defence* [1991] 2 IR 161. *… Courts do not exist for the sake of discipline but rather to deal with the essential justice of the case before them. It is only proper that regard should always be had to the rules of Court but it must be remembered that the rules are there to help in the administration of justice.""* ***Primor plc v Stokes Kennedy Crowley*** [1996] 2 I.R. 459, per O'Flaherty J. at 516.

476. The High Court frequently makes orders, including orders of grave consequence in the conduct of litigation, in the exercise of its inherent jurisdiction and notwithstanding the absence of any express provision in the Rules of the Superior Courts conferring jurisdiction to make such orders. The following examples discussed below are illustrative of the Courts inherent power to make such orders, and apply by way of analogy, to the power to order a mistrial.

477. As will be well known to this Court, the High Court has an inherent jurisdiction to dismiss a claim when the interests of justice requires it to do so where there has been inordinate and inexcusable delay in the commencement and prosecution of proceedings. See, for example: ***Primor plc v Stokes Kennedy Crowley*** [1996] 2 I.R. 459. See the application of the jurisdiction by this Court in ***Shanahan v. P.J. Carroll*** [2007] IEHC 229. The High Court has also developed and, in appropriate cases exercises, an inherent jurisdiction to dismiss a claim where that claim has no reasonable prospect of success or is bound to fail. See, for example: ***Barry v. Buckley*** [1981] I.R. 306; ***Sun Fat Chan v. Osseous Limited*** [1992] 1 I.R. 425.

478. In ***Doyle v Hearne*** [1987] I.R. 601. Finlay C.J., delivering the majority judgment in the Supreme Court, describes another inherent jurisdiction possessed by the Court:

> *"It is clear that every Court has an inherent jurisdiction in order to secure the due administration of justice to adjourn any part of the hearing of a case before it". Per* Finlay C.J. at 607-608.

479. The High Court also has an inherent jurisdiction to stay proceedings notwithstanding that there is no express provision in the Rules of the Superior Courts empowering the Court to do so. That jurisdiction has been exercised on the grounds of "*forum non conveniens*" where the Courts of some other state are more appropriate to conduct the litigation at issue. See, for example: ***Doe v. Armour Pharmaceutical Co. Inc.*** [1994] 3 I.R. 78; ***Intermetal Group Limited v. Worslade Trading Limited*** [1998] 2 I.R. 1. The High Court's inherent jurisdiction to stay proceedings has also been exercised in personal injury litigation where the plaintiff withheld his consent to allow the defendant's medical advisors consult with his advisors. In ***McGrory v. ESB*** [2003] 3 I.R. 407. Keane C.J. stated that he had *"no doubt that the courts enjoy an inherent jurisdiction to stay proceedings where justice so requires". Per* Keane C.J. at 415.

480. Another example can be seen in ***Campus and Stadium Ireland Development Limited v. Dublin Waterworld Limited*** [2006] 2 I.. 181. where Kelly J. stated that the court's inherent jurisdiction could be exercised:

> *"to grant a stay in respect of an action brought in breach of an agreed method of resolving disputes by some method other than litigation." Ibid*, at 187.

481. Another example of the Court's inherent jurisdiction to make orders notwithstanding the absence of an expression provision within the Rules is in relation to *Anton Piller* orders. See: ***Anton Piller K.G. v. Manufacturing Processes Limited*** [1976] Ch. 55; ***Microsoft v. Brightpoint*** [2001] 1 I.L.R.M. 540. In ***Holloway v. Belenos Publications (No. 2)*** [1988] I.R. 494. Barron J. held, in a case which concerned non-party discovery, that a rule relating to orders for discovery is a rule regulating the exercise of the inherent jurisdiction of the Court and that the power to order discovery is part of that inherent jurisdiction. He stated that Order 31, rule 29 (which deals with non-party discovery) gives *"altered effect to that inherent jurisdiction". Per* Barron J. at 498.

482. In ***Church & General Insurance Plc v. Moore*** [1996] I.L.R.M. 202., Hamilton C.J. addressed the issue of whether the court had jurisdiction to strike out a defence where replies to particulars were not furnished notwithstanding the absence of a provision to that effect in the Rules. He stated:

> *"I am satisfied that a court has an inherent jurisdiction to enforce orders made by it and if there is a failure to comply with an order, then in certain circumstances an order can be made dismissing a claim for want of*

prosecution or striking out a defence." Ibid, at 208.

483. In a more recent decision in the Commercial Court, ***P.J. Carroll v. Minister for Health and Children*** Kelly J. stated:

> *"There is a jurisdiction in the court which enables it to exercise control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process. It is a residual source of power which the court may draw upon as necessary wherever it is just and equitable to do so."* ***P.J. Carroll & Co. Ltd. v. Minister for Health and Children***, Unreported, High Court (Kelly J.), 22nd July, 2005.

484. Similarly, in the recent case of ***Coffey v. Tara Mines Limited*** [2008] 1 I.R. 436. Ó Neill J. reiterated that the court possessed an inherent jurisdiction to manage and control its own proceedings and held that, in rare and exceptional cases, the inherent jurisdiction could be exercised to permit an unqualified advocate to represent another litigant.

485. Moreover, importantly, it is an established principle of constitutional law that the Superior Courts can craft a remedy for the infringement of a right if there is a legislative vacuum for the provision of that remedy. Although the Constitution does not prescribe any particular procedure as appropriate for remedying a breach of constitutional rights, it seems that the courts have *"extensive powers to fashion new remedies for the protection of constitutional rights"*. See Kelly ***The Irish Constitution*** 4th ed. para. 7.1.127. If the continuation of the trial would be unjust or, if a fair trial can not now take place as the Defendants submit is the case here (for the reasons outlined in the Affidavits) then the Court must have power to prevent such an injustice or to refuse to continue with what would be an unfair trial.

486. In ***The State (Quinn) v Ryan*** [1965] IR 70. While the above passage should be read in the context of a frustration of the operation of a habeas corpus order (see ***Sinnott v Minister for Education*** [2001] 2 IR 545*),* it is respectfully submitted that the foregoing does not detract from the legitimacy of the rationale underpinning O Dalaigh CJ's dictum. O Dalaigh CJ held:

> *"It was not the intention of the Constitution, in guaranteeing the fundamental rights of the citizens that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the courts were the custodians of these rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and that the courts' powers in this regard are as ample as the defence of the Constitution requires."*

487. Indeed, the principle that a right must have a corresponding remedy was approved in ***Byrne v Ireland*** wherein Walsh J observed:

> *"In several parts of the Constitution, duties to make certain provisions for the benefit of citizens are imposed on the State in terms which bestow rights upon the citizens, and unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights."* [1972] 2 IR 241 at 264

488. Walsh J also commented in ***Meskell v CIE*** that:

> *"[A] right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and ... the constitutional right carries within it its own right to a remedy or for the enforcement of it."* [1973] IR 21.This pronouncement was approved by Hamilton CJ in ***Hanafin v Minister for the Environment*** [1996] 2 IR 321.

489. In ***The State (Trimbole) v Governor of Mountjoy Prison****,* Finlay CJ held: [1972] 2 IR 241 at 264.

> *"I am satisfied that from these decisions certain general principles can be deduced. They are:—*
> *The Courts have not only an inherent jurisdiction but a positive duty: (i) to protect persons against the invasion of their constitutional rights; (ii) if invasion has occurred, to restore as far as possible the person so damaged to the position in which he would be if his rights had not been invaded; and (iii) to ensure as far as possible that persons acting on behalf of the Executive who consciously and deliberately violate the constitutional right of citizens do not for themselves or their superiors obtain the planned results of that invasion.*
> *Notwithstanding the fact, therefore, that of the four cases to which I have referred, three are concerned with the admissibility of evidence in criminal trials and the fourth was concerned with the punishment of persons acting in breach of the Constitution where neither protection nor reparation to the party injured was practical, I am satisfied that this principle of our law is of wider application than merely to either the question of the admissibility of evidence or to the question of the punishment of persons for contempt of court by unconstitutional action. This jurisdiction and direct duty arising from the Constitution and the position of the courts created by it is in some ways similar to, though more ample and dominant than, what I am satisfied was an inherent jurisdiction recognised by the common law in courts to prevent an abuse of their own processes."*

490. More recently, in ***SS (A Minor) v HSE*** [2008] 1 IR 594. the High Court affirmed its inherent jurisdiction to detain a minor in the absence of specific legislative provisions permitting it to make such an order. McMenamin J commented on the inherent jurisdiction of the High Court as follows.

> *"65 Sixth, the inherent jurisdiction of the High Court does not refer to its general jurisdiction. The special jurisdiction is a part of, or an aspect of, the general jurisdiction of the court. The general jurisdiction of the High Court (subject to the Constitution itself) is unrestricted in nature and unlimited in matters of substantive law, whether civil or criminal, with the exception of limited circumstances where by statute and in unequivocal terms there has been a removal of an area of jurisdiction from the High Court. Constitutional rights and issues are at stake. No such analogous inherent power resides in courts other then the superior courts as defined under the Constitution of Ireland 1937, nor is there any other recognised jurisdiction to exercise such power or make orders to the same effect.*
> *66 Seventh, the source of the inherent jurisdiction of the High Court derives from the nature of that court as established under the Constitution. Its inherent jurisdiction is exercisable only as part of the process of the administration of justice. The jurisdiction is procedural in content and is not part of the substantive law of the State.*
> *67 Eighth, the inherent jurisdiction is a flexible process that arises in ad interim or interlocutory proceedings. That inherent jurisdiction may be invoked by the court not only in relation to parties in proceedings before the court but in relation also to a person, whether a party or not, subject to fair procedures.*
> *68 Finally, but vitally in this context, such power may be exercised only upon the basis of regular review of the balance of rights as an integral part of the procedure itself. These rights must include an adequate opportunity for*

the views of the minor to be made known to the court in the fulfillment of his or her "natural and imprescriptible rights".

...

81 No precise parameters as to the inherent jurisdiction of the superior courts can be fully delineated. The power is as ample as the Constitution requires but always subject to the other provisions of the Constitution, including the separation of powers."

491. It is evident from the authorities set out above that in an appropriate case the Court has an inherent jurisdiction to grant relief notwithstanding the absence of an express provision in the Rules providing for that jurisdiction. This is particularly so where the granting of such relief is necessary to prevent an injustice or an unfair trial. It is respectfully submitted that for the reasons already explained and set out at length in the Affidavits sworn on behalf of the Defendants, this is an appropriate case in which to exercise such inherent jurisdiction.

(III) Exercise of the jurisdiction to order a mistrial

492. The above submission that there is an inherent jurisdiction to order a mistrial is buttressed by specific instances in this jurisdiction where the Irish Courts have made such an order. While it is accepted that it is often within the sphere of criminal law that such issues arise, there are also several instances of orders being made in the context of civil proceedings.

(A) Mistrial in criminal proceedings

493. Although the term mistrial is not always used, the courts in this jurisdiction have also shown a willingness to terminate a trial prior to its conclusion where it is required in the interests of justice. This most commonly occurs in the context of jury trials. It is well established that a jury can be discharged if they cannot agree and fail to reach a verdict ***DPP v. Nasralla*** [1967] 2 A.C. 238/ or if such prejudice has been caused that there is a real and substantial risk of an unfair trial that cannot be cured by directions to the jury. This test was laid down by Keane C.J. in the context of a civil case, ***Murtagh v. Ireland***, unreported, Supreme Court, 5th February, 2004.

494. In ***State v. M'Mullen*** [1925] 2 I.R. 9. the Court of Criminal Appeal considered whether a mistrial had occurred where the trial Judge had told the jury that they could not find a verdict of manslaughter and did not permit counsel for the accused to address the jury on the question of manslaughter. The Court held that the trial judge was entitled, in a proper case, to direct the jury that the crime must amount to murder and that the verdict, being a valid and legal verdict, must stand. The Court held that it is a matter in the discretion of the trial judge to determine when it is appropriate to discharge the jury before they have returned their verdict:

"The rule stated in sweeping terms by Coke (Co. Litt. 227 b), qualified by Blackstone (4 Bl. Com. 360), and stated by Foster to be exploded (Kinloch's Case : Foster's Crown Cases, at p. 31), has now given place to the established rule and practice that it is lawful for the Judge at the trial to discharge the jury before verdict when necessity, in the sense of a high degree of need, for such discharge is made evident to his mind from facts ascertained by him. The existence of such necessity or high degree of need is a matter for the determination of the Judge at the trial, and for him alone, and his decision is not open to review. It is a matter depending upon the exercise of a judicial discretion both as to the facts relevant to be considered in the particular case and as to the effect of those facts. The statement of the result upon the record suffices to establish that the particular order for discharge was lawfully made, see per Erle C.J. in Winsor v. The Queen (2) .If the Judge is satisfied that the jury have had full time for deliberation and that they cannot agree, or that unanimity can only be obtained by coercing some jurors by detention and physical discomforts to sacrifice conscientious convictions, no one would say that, were it open to review, the Judge's discretion and authority has been improperly exercised by discharging the jury." Ibid., at 19.

495. In ***The People (Attorney General) v. Heffernan*** [1951] 1 I.R. 206, the Court of Criminal Appeal considered whether a mistrial had occurred where jury members had mixed with other occupants of a hotel in the course of a murder trial. In considering whether a mistrial had occurred, the Court considered whether the trial judge would have discharged the jury had he been aware of the situation:

"This Court has little doubt that if the attention of the trial Judge had been drawn to what occurred on the 12th November, last year, he would have felt obliged to discharge the jury. In the opinion of this Court for the jury to mingle with members of the public, over such a length of time and in the circumstances disclosed in this case, was a grave irregularity. It was a departure from the recognised procedure in any criminal case where the jury is not allowed to separate. … The Court is of opinion that this ground of appeal has been established and that the conviction must be quashed." Per Maguire C.J. at 214.

496. In the ***People (D.P.P.) v. J.E.M***. [2001] 4. I.R. 385. the Court of Criminal Appeal referred to the section of *Judicial Discretion and Criminal Litigation* by Dr. Rosemary Pattenden where the author discusses the reasons why a jury may be discharged and endorses the proposition that the interests of justice are paramount. The relevant section states as follows:

"The grounds for discharging the entire jury cannot be stated exhaustively, and it is not always known why a jury was discharged because the judge is not bound to make the reasons public. Only a selection of reasons are given here. A hung jury must obviously be discharged at some stage. …
Amongst the many grounds for discharging the jury is prejudice to a party. This may be caused inter alia by a prejudicial comment by the judge, by press disclosure of threats to participants in the trial, by the introduction of inadmissible evidence, and by a revised ruling that evidence initially held admissible by the judge is in fact inadmissible. Discharge of a jury which has improperly learned of the accused's bad character, whether through the media or other means, is often considered. ….
At one time the defence could practically demand the discharge of the jury if the accused's record inadvertently became known, but in more recent cases the Court of Appeal has emphasised the discretion of the judge: '[T]he question in every case …. must come back to an evaluation of the particular evidence that came before the jury – a matter which can ordinarily be best evaluated by the presiding Judge himself.' When deciding how to exercise his discretion the judge should bear in mind not only that the law 'for very good reasons protects an accused person against the disclosure of his … bad character, subject to clearly defined and limited exceptions', but also the nature and degree of prejudice to the defence, the effectiveness of a warning to the jury to ignore the inadmissible evidence, the presence or absence to a timely objection to the evidence by the defence, and the possibility of a deliberate attempt to abort the trial. How far the trial has advanced and the effect of a retrial on witnesses are subsidiary considerations: '[T]he interests of justice should be paramount, and neither the

inconvenience of a second trial nor the necessity which would have been involved in calling again as witnesses the victims of the alleged assaults, possibly to their detriment, should have outweighed the necessity of the accused receiving and being seen to receive, a fair trial.' As the interests of justice override all others, the judge may dismiss the jury even though the accused does not want this." Ibid, at p. 161-163. (emphasis added)

(B) Mistrial in civil proceedings

497. In ***Dunne v. National Maternity Hospital*** [1989] 1 I.R. 91. the Supreme Court considered whether the trial judge's charge to the jury in a medical negligence action was adequate. The Court held that there had been a failure to specifically to draw to the attention of the jury the legal principles applicable to the determination of cases of medical negligence and the standards by which they must judge them. Finlay C.J. stated that the next question was:

> *"… whether this omission from the charge constituted a mistrial which could have led to a miscarriage of justice. I am neither unaware of nor insensitive to the massive burden, both emotional and practical, which these proceedings have imposed upon the parties, both the parents of the infant plaintiff and the medical practitioners whose conduct has been impugned. I am driven, however, to the conclusion that the omissions from this charge which I have identified were such that had a jury been given what I am satisfied were the appropriate directions it might have reached a different conclusion on this vitally important issue. In so deciding I express, of course, no opinion whatsoever as to what its finding, if so directed, should have been. Having reached this decision the only manner in which justice between the parties can be done in this case would be to direct a new trial of the issue of liability against both defendants. I would therefore allow the appeal of each defendant on the issue of liability and direct a new trial on that issue." Per* Finlay C.J. at 117. (emphasis added)

498. In ***Mapp v. Gilhooley*** [1991] 2 I.R. 253 the Supreme Court considered whether the trial judge erred in law in permitting the minor plaintiff to give evidence when he was unsworn and incompetent as a witness. The Court held that as it was a fundamental rule that for the purpose of trials *viva voce* evidence must be given on oath or affirmation, acting on unsworn *viva voce* evidence would inevitably lead to a mistrial. Finlay C.J. considered whether by his conduct at the trial was prevented from relying on the existence of a mistrial:

> *"An appellant seeking to rely on the admission of unsworn viva voce evidence as constituting a mistrial could only be prevented from so doing:—*

1. by estoppel arising from an express or unambiguously implied representation that he was waiving his right to challenge the admission of such evidence by reason of the absence of an oath or affirmation, on which the opposing party has acted to his detriment in a manner which would make the finding of a mistrial an injustice, or
2. by reason of a finding that for the party concerned to challenge the validity of the trial on appeal on this ground of want of oath or affirmation would constitute a virtual fraud or abuse of the processes of the court." Per Finlay C.J. at 262.

499. Finlay C.J. concluded that, having regard to the fundamental nature of the requirement that the evidence of witnesses given *viva voce* must be sworn or affirmed, it would not be in the interests of justice to prohibit the defendant from relying on the want of validity in the trial that had occurred.

500. In ***Leahy v. Rawson*** [2004] 3 I.R. 1. the plaintiff sought damages against her builder and her engineers for demolishing and rebuilding an allegedly defective extension. In the course of the trial the plaintiff's counsel had confirmed that the plaintiff was not interested in damages based on the cost of remedial works. At the conclusion of the case the plaintiff tried to resile from this position but the trial judge refused to allow such a tactic as the position taken by the plaintiff:

> *"…. was acted upon as something unusual by the defendants who tailored their handling of at least one witness accordingly. To accede to a revisiting of this tactic at the end of the case would not only be incorrect, but would, in my opinion, have amounted to a mistrial ripe to be set aside for the asking." Per* Finlay C.J. at 16.

501. In ***Rafferty v. CA Parsons Limited*** Unreported, Supreme Court, 11th March, 1986. the action had been withdrawn from the jury at the end of the defendant's evidence on the basis that a *prima facie* case of negligence had not been established. The Supreme Court held that the trial judge had properly withdrawn the case and confirmed that failure to withdraw case from jury would have amounted to a mistrial.

502. The ***Rafferty*** case shows that the test of whether a mistrial arises should be the same irrespective of whether the question is raised at the appellate stage or in the course of the trial itself. ***Rafferty*** suggests the test to be applied at first instance is whether continuing would amount to mistrial on appeal. It is submitted, therefore, that test to be applied where the question of a mistrial arises should be the same whether it is to be viewed prospectively or retrospectively, *i.e.* whether proceeding with the trial would give rise to or gave rise to a risk of injustice.

503. In ***Barrett v. Independent Newspapers Limited*** [1986] 1 I.R. 13., a defamation action, the Supreme Court considered whether the trial judge had produced a mistrial by directing the jury that the words complained of were defamatory. The court held that in ruling as a matter of law that the words were defamatory the trial judge had usurped the jury's function and accordingly allowed an appeal on that ground and directed a new trial.

504. In ***Dawson v. Irish Broker's Association*** Unreported, Supreme Court, 6th November, 1998***,*** a defamation action, the Supreme Court considered the circumstances in which a jury should be discharged:

> *"Once again, it is necessary to reiterate, as this Court is doing with increasing frequency, that the question of having a jury discharged because something is said in opening a case or some inadmissible evidence gets in should be a remedy of the very last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge's ruling that something is irrelevant, or should not have been given before them..."* Unreported, Supreme Court, 6th November, 1998.

505. It is accepted that the instances of a court ordering a mistrial are more frequent in criminal and civil jury trials than non jury civil proceedings. However, it is respectfully submitted that there is an equally logical basis, rooted in the inherent jurisdiction of the court, for ordering a mistrial in civil cases where permitting a trial to proceed would lead inexorably to an irreparable injustice to a litigant.

(IV) THE CONCEPT OF MISTRIAL THE UNITED STATES AND ENGLAND

506. The jurisprudence of the United States and English courts is of assistance in assessing the circumstances in which a court

should order a mistrial and the level of injustice which warrants this relief.

(A) United States

507. As the power to terminate a trial prior to its normal conclusion by ordering a mistrial is particularly entrenched in the United States, it may be of assistance to the Court to consider the principles that can be discerned from the case law of that jurisdiction.

508. The power to order a mistrial in the first instance arises in both civil and criminal proceedings, however it is most commonly invoked in criminal proceedings. A trial judge has a broad discretion to declare a mistrial, as emphasised by the United States Supreme Court in ***Gori v. United States*** 367 U. S. 364 (1961).:

> *"Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." Ibid*, 368.

509. Accordingly, a mistrial can be declared for many reasons, such as where there is a hung jury or where a fundamental error occurs that is so prejudicial to the defendant that it cannot be cured by appropriate instructions to the jury. This was confirmed by the United States Supreme Court in ***Illinois v. Somerville*** 410 U.S. 458 (1973) when it stated:

"A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court."

510. Therefore, in determining whether to declare a mistrial, the court must take into consideration whether the error is so prejudicial and fundamental that expenditure of further time and expense would be wasteful, if not futile.

511. A mistrial in a criminal prosecution may prevent retrial under the double jeopardy provision of the Fifth Amendment, which prohibits an individual from being tried twice for the same offence, unless the mistrial was manifestly required by the interests of justice. As McDermott states *Res Judicata and Double Jeopardy*:

> *"If the mistrial meets a "manifest necessity" requirement, in that the trial judge could have reasonably concluded that the ends of public justice would be defeated by having allowed the trial to continue, the double jeopardy principle will not bar a new trial".* McDermott, ***Res Judicata and Double Jeopardy*** (Butterworths, 1999), p. 236.

512. The "manifest necessity" standard was coined and explained by Justice Storey in ***United States v. Perez United States v. Perez***, 22 U.S. (9 Wheat.) 579, 580 (1824)/:

> *"[I]n all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all of the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office." Ibid.*, at 580.

513. It should be noted that the Federal Rules of Criminal Procedure contain a number of rules relating to mistrials. Rule 26.3.states:

> *"Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives."*

514. Rule 26.2 governs the production of witness statements and Rule 26.2(e) provides for sanctions for failure to do so:

> *"If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires."*

515. Rule 31(b)(3) covers hung juries and provides that:

> *"If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree".*

516. Although the Federal Rules on Civil Procedure do not mention mistrials the case law confirms that a motion for a mistrial is also available in civil cases in the United States.

517. In ***Vilar v. Fenton*** 181 W.Va. 299, 382 S.E.2d 352 (1989)., the plaintiffs brought proceedings challenging the validity of a will and a power of attorney executed by a deceased person. Following a two day trial, the jury found the will invalid. The defendant filed a motion for new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, which provided that "a new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law".

518. During a post-trial hearing, the plaintiffs' counsel advised the court that plaintiffs were related to a person who, several years earlier, had filed an ethics complaint against the trial judge while he was a practicing attorney. Thereafter, the trial judge, *sua sponte*, declared a mistrial, recused himself from the case, and transferred further proceedings in the case to another judge. On appeal, the Supreme Court determined, *inter alia*, that the trial judge erred as he had declared a mistrial after the jury had reached a verdict. However the court confirmed that "[p]rior to the entry of the verdict by a jury, a mistrial is procedurally possible…" The court stated:

"[a] motion for a mistrial is a procedural tool whetted and honed for use during the trial to cut it short for legal reasons which preclude a verdict and entering a judgment that cannot possibly stand. It can therefore be utilized only as a pre-verdict motion and not a post-verdict or post-trial motion." Ibid, at 353 quoting ***Williams v. Deasel***, 311 N.E.2d 414, 415 (Ill. Ct. App. 1974) ("[T]he commonly accepted concept of the mechanics of a mistrial is that when a mistrial is declared and the jury is discharged, the trial is terminated and is begun again over on another day. Its mechanical and its legal performance is impossible after verdict, judgment, and discharge of the jury").

519. In the recent case of ***Phelan v. State of New York*** #2004-032-073, Claim No. 105128, Motion Nos. M-68236, M-68372, Motion refused September 27, 2004. in the United States, the court in a non-jury trial of wrongful death proceedings discussed the discretion to grant a mistrial. The claimants had moved for a mistrial and the appointment of a new judge due to the alleged perjury of a state police trooper and a defence expert. On the facts of the case, the court refused the motion for a mistrial taking the view that it was in a position to decide on the issue of credibility however it discussed the discretion to grant or deny a mistrial and did not distinguish between jury trials and non-jury trials:

"The decision to grant or deny a mistrial rests within the sound discretion of the trial court, and such drastic relief is warranted only where the misconduct has permeated the trial and destroyed the moving party's ability to obtain a fair trial (CPLR 4404[b]; Torres v City of New York, 306 AD2d 191 [1st Dept 2003]), citing to DiMichel v South Buffalo Ry. Co., 80 NY2d 184, 198 [1992]; McNamara v Hittner, 2 AD3d 417 [2d Dept 2003])." (emphasis added)

520. There is also authority for a *sua sponte* declaration of a mistrial in a non-jury trial. In ***Cornish v. State*** 272 Md. 312, 315, 322 (1974).it was confirmed that a judge in a jury waived trial may conclude that knowledge of an anticipated guilty plea would prejudice his view of the case warranting the declaration of a mistrial.

(B) MISTRIALS: THE POSITION IN ENGLAND

521. Some examples of English case law dealing with the court's jurisdiction to order a mistrial are set out below.

522. In ***Portland Managements Ltd v. Harte*** [1976] 2 W.L.R. 174. the defendant in an action for trespass to land elected to call no evidence. The English Court of Appeal held that as the election to call no evidence had been heavily influenced by an erroneous view of the law strongly and prematurely expressed by the trial judge, the trial thereafter merited the description 'mistrial'. Accordingly the Court ordered a new trial to be held before a different judge.

523. In ***Clements v. Carpenter*** Unreported, Court of Appeal, 8th October, 1984. On the facts of the particular case the court was not persuaded that it was dealing with a mistrial. an order for possession was appealed on the basis firstly, that the judge had predetermined the issues in the plaintiff's favour before hearing the evidence and secondly, that the conduct of the trial was such as to render the hearing a breach of the rules of natural justice. The English Court of Appeal stated that:

"…the court must be persuaded that in the result a substantial injustice has been occasioned such as to justify the exercise of the court's discretion to order a new trial." Ibid, per Oliver L.J. at 3.

524. In ***Linnett v. Coles*** [1987] Q.B. 555. Lawton L.J. commented upon the consequences of a mistrial in the context of criminal proceedings:

"If [an accused] does not get a fair trial because of the way the judge has behaved or because of material irregularities in the proceedings themselves, then there has been a mistrial, which is no trial at all. In such cases, in my judgment, an unlawful sentence cannot stand and must be quashed. It will depends on the facts of each case whether justice requires a new one to be substituted." Ibid, *per* Lawton L.J. at 562.

525. In ***Verrilli v. Idigoras*** Unreported, Court of Appeal, 19th January, 1990. the Court of Appeal stated that the refusal of an application by a defendant for an adjournment might amount to a mistrial warranting the ordering of a new trial:

"If this court were to hold that the ground of appeal had made out, the relief that this court would grant would not be to enter judgment for the defendant, but only to order a new trial on the ground that the trial which has taken place was a mistrial in that it was flawed by a fundamental miscarriage of justice." Ibid, per Sir Roualeyn Cumming-Bruce.

(V) concluding comments on mistrial

526. In summary, it is respectfully submitted that from an analysis of the legal principles discussed above and emanating from the different jurisdictions, several propositions can be deduced:

· The court has an inherent power to make orders and grant relief notwithstanding the absence of any notwithstanding the absence of any express provision of the Rules entitling an applicant to such relief;
· The court possesses an inherent jurisdiction to manage and control its own proceedings;
· The court has an inherent jurisdiction to remedy an infringement of the Defendants' constitutional entitlement to a fair trial;
· The court has an inherent jurisdiction to terminate a trial prior to conclusion where there is a manifest necessity for it to be so terminated or it is required in the interests of justice;
· The decision to grant or deny a mistrial rests within the exclusive discretion of the trial court and is warranted where errors or misconduct have permeated the trial and destroyed the moving party's ability to obtain a fair trial;
· Where the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial should be declared;
· On an application for a mistrial at first instance, the trial judge should taken into consideration whether continuing would amount to mistrial on appeal;
· In determining whether to declare a mistrial, one factor for consideration is whether the error is so prejudicial and fundamental that expenditure of further time and expense would be wasteful, if not futile;
· The interests of justice should be paramount and the inconvenience of a second trial should not outweigh the necessity of the Defendants receiving and being seen to receive, a fair trial;

527. On the facts of this case for the reasons outlined in the affidavits sworn on behalf of the Defendants in support of this application it is submitted that the Court should declare a mistrial in the event that it is not prepared to dismiss the Plaintiffs' claim.

CONCLUSIONS

528. The revelations from the recent discovery have a number of very serious consequences for the Defendants. In the first

instance, as indicated above, the approach of the Defendants' experts to this case has been dictated to a large extent by their knowledge of the construction history as gleaned from the documentation originally discovered. Had the Defendants been aware of the information contained in the new discovery their approach and that of their experts would have been quite different. Having regard to the information now available in relation to ground conditions and the addition of water (and sand) to the concrete mix, much more extensive testing would have been carried out. This is no longer possible in the case of remediated houses. All of the basket houses bar one (3, Drynam Square) have of course been remediated. Furthermore, even where limited further examination/testing is still possible, it is neither practicable nor feasible to carry out that testing during the currency of a trial. The Defendants' resources are at this stage rightly directed towards the defence of the action and that defence would be seriously prejudiced and jeopardised by the diversion of resources for the purpose of carrying out such testing and examination. In any event, such testing and examination takes time and would not be completed in time to allow the Defendants rely upon the same in the trial.

529. The selection of the properties comprised in the basket of houses was carefully considered by the Defendants in light of the knowledge then available to them and on the basis that all relevant documentation had been disclosed. As has been outlined in the affidavits sworn by Mr Lennon in support of this application, in light of the information now available the Defendants would not have agreed the current list of houses comprised in the basket and would have insisted that houses in which non-Bay Lane material was used would have been included, particularly as it is now clear that those houses are manifesting cracks and other damage similar to those found in the houses in which Bay Lane infill was used.

530. The Defendants' experts have prepared their reports (and undertaken their examinations forming the basis of those reports) on the basis of the information and documents made available to them and by way of response to the Plaintiffs' witness statements/reports. Had the Defendants known what they now know (and what they learnt from the recent discovery) the contents of those reports would be significantly different and would highlight many of the issues arising from the recent discovery. It is neither satisfactory nor fair to the Defendants to put them in a position where they have to revisit their reports with a view to delivering supplemental reports. The Defendants were entitled to access to the documentation relevant to the construction of the properties as is reflected in the discovery which the Plaintiffs were required to make.

531. The approach of the Defendants to the cross examination of the Plaintiffs witnesses is grounded in large part on the documentation available from discovery. As is instanced above, the cross examination of a large number of witnesses has been significantly hampered by the failure to discover documentation in accordance with their obligations. That undoubted prejudice suffered by the Defendants is not met by the recalling of the relevant witnesses for further cross examination. Part of the impetus of cross examination arises from being able to undermine a witness in one area which can then carry over into other areas. That potential impetus has been irretrievably lost.

532. It is apparent from the foregoing that the prejudice suffered by the Defendants in this case as a result of the failure of the Plaintiffs to comply with their discovery obligations is gross and irremediable. Moreover, the approach of the Plaintiffs to their discovery obligations was, from the outset, fundamentally flawed and was, to put it at its lowest, cavalier and even now one cannot be confident that all relevant documentation has been discovered.

533. It is respectfully submitted on behalf of the Defendants that it is not now possible to have a fair trial of these proceedings and accordingly the Plaintiffs' action should be dismissed or in the alternative the Court should declare a mistrial of the proceedings.

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

Dated: 29 October 2009.

Filed by Lennon Heather, Solicitors for the First and Fifth Named Defendants, 24 – 26 City Quay, Dublin 2.

SCHEDULE
PART I

III. SUBMISSIONS OF THE PLAINTIFFS REGARDING DEFENDANTS MOTIONS FOR RE-TRIAL / TO STRIKE OUT THE PROCEEDINGS

THE HIGH COURT
COMMERCIAL
2007 / 4691P

BETWEEN

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

Plaintiffs

and

**IRISH ASPHALT LIMITED, LAGAN HOLDINGS LIMITED,
LAGAN CONSTRUCTION LIMITED and By Order
LAGAN CEMENT GROUP LIMITED (FORMERLY LAGAN HOLDINGS LIMITED) and
By Order LINSTOCK LIMITED**

Defendants

**SUBMISSIONS OF THE PLAINTIFFS REGARDING
DEFENDANTS' MOTIONS FOR RETRIAL/TO STRIKE OUT THE PROCEEDINGS**

1. These submissions outline the legal principles applicable to the motion of the Defendants for a retrial and/or to strike out the Plaintiffs' claims for failure to make discovery, and outline how (in the Plaintiffs' submissions) those principles should be applied to the applications the subject hereof. Where relevant, they respond to the 185 pages of "*outline*" submissions that have been received from the first and fifth named Defendants.

MOTION FOR A RETRIAL : LAW

Jurisdiction :

2. Notwithstanding the remarkable array of authorities surveyed in the Defendants' submissions, it is clear that there is no Irish authority which establishes that the Court has an inherent jurisdiction to grant the mistrial declaration which the Defendants seek. Without accepting that such a jurisdiction exists as a matter of Irish law, it is submitted that, in any event, there is no basis for granting the Defendants the relief sought for the reasons which are outlined below.
3. A useful consideration of the existence of such a jurisdiction, and grounds upon which it may be exercised, is afforded by the decision of the New South Wales Supreme Court in the case of Southern Cross Exploration NL v. Fire and All Risk Insurance Co. Ltd.. (1985) 2 NSWLR 340. There, on day ninety seven of a trial, the Plaintiffs applied to the Court to set aside proceedings in the trial wholly, and for orders that there be a new trial, the basis for the application being that documents which ought to have been discovered prior to the commencement of the trial were not in fact discovered until after the cross-examination of the Defendant who made the late discovery, had concluded. The Court decided that, by analogy with the inherent power of the Court to dismiss an action for want of prosecution where there was delay *and* a substantial risk that it is not possible to have a fair trial or it was such that there was likely to cause or have caused serious prejudice to the party seeking the relief, the jurisdiction prayed in aid by the Plaintiff existed.
4. Waddell J. in Southern Cross Exploration reasoned that the inherent jurisdiction to dismiss for want of prosecution was *comparable with that sought in the present application* (p. 345), and in that regard he stressed *the width of the ambit of the Court's inherent power to do what is necessary for the administration of justice'* (id).

5. A comprehensive review of the authorities on this question was conducted in Sawridge Band v. Canada, [2007] F.C.J. No. 895. a decision of the Federal Court of Alberta. There plaintiffs argued that the trial had become unfair and they could not adequately make their case because the Court had adopted a rule which excluded relevant evidence being given by a witness that had not been disclosed in a 'will-say' in accordance with the Court-ordered standards. From the judgment, a 'will-say' would appear to be a document similar to a witness statement in which a witness can be limited to the evidence which they have included in their 'will-say', the purpose being to avoid trial by ambush.
6. Russell J conducted an extensive analysis of the Canadian authorities, which will be returned to below, and concluded that the jurisprudence supports the conclusion that a court can consider a motion for a mistrial in a civil context. He described that jurisdiction in the following terms :

> *"Assuming that I have jurisdiction, it seems to me that, from the cases cited, the principles that should guide me on the mistrial issue are as follows:*
>
> *1. The decision to grant a mistrial in the present case is discretionary;*
>
> *2. In exercising that discretion, should I consider whether, in all of the circumstances of the case**, a mistrial is needed to prevent a miscarriage of justice** and whether the facts and arguments placed before me **disclose a real danger of prejudice or miscarriage of justice or, at the very least, a reasonable possibility of prejudice to the Plaintiffs**;*
>
> *3. I should bear in mind that a mistrial **is extraordinary relief** and that, even if I think that prejudice has occurred, before granting the remedy, I should **allow other options to be canvassed to see if the trial can be saved in a way that is just and fair** in the circumstances."* Emphasis added.

7. Thus, in the submission of the Plaintiffs, if the Court has in theory a jurisdiction to direct a retrial where there has been a default in discovery, that jurisdiction is constrained and exceptional. It has a number of particular features which are of relevance to these proceedings, some of which are identified in the quotation above from the judgment of Russell J. in Sawridge Band.

The threshold : Conduct of the party in default.

8. The decision in Southern Cross Exploration demonstrates the high threshold that must be established before the Court will

exercise its jurisdiction. The first relevant factor identified by the Court was the reason for the failure to make discovery. Thus, the Court explained (at p.357) :

> *"If it were to be established that the failure to give discovery was dishonest that, I think, might be taken to support a claim of prejudice upon the basis that non-disclosure by a person who was well aware of the consequences would support an inference that it was likely adversely to affect the presentation of the case of the opposite party."*

Test in the absence of dishonesty :

9. In the absence of dishonesty (the Court in Southern Cross Exploration found that the failure to make proper discovery had been caused by incompetence and negligence) the authorities make it clear that the critical question is whether there has been sustained such real and substantial prejudice that a fair trial cannot be achieved save by directing a re-trial. This is the threshold explained in a large number of the authorities considered by Russell J. in Sawridge Band. He concluded :

> *"Based upon these principles I am of the view that in all the circumstances of the case as set forth in my reasons, neither with regards to my rulings, the future impact of those rulings, the procedure followed so far in these proceedings, or as regards any particular witness (including the specific issues related to Elder Starlight) have the Plaintiffs demonstrated* ***any prejudice or unfairness to the Plaintiffs, or an imbalance in the process that would be unfair to the Plaintiffs or that might, reasonably speaking, prejudice the Plaintiffs' right to make their case before this Court****. The Plaintiffs have been given every opportunity to bring any relevant evidence they wish before the Court."* Emphasis added.

10. This was reflected in Southern Cross Exploration, where the Judge, having noted that it was not reasonable to expect the moving party to identify *in precise detail* all the prejudice they had suffered as a consequence of the failure to make discovery, nonetheless framed the test to be applied as follows (at p.359) :

> *"[t]wo considerations are paramount in the present case. They are whether if the trial is to continue,* ***steps cannot be taken to repair such detriment as has been caused to the plaintiffs*** *in the conduct and presentation of their case by not having had access to the discoverable documents in October 1983 and, secondly, whether, as a result of the plaintiffs not having had access to such documents,* ***the state of the trial is such that the plaintiffs cannot, in a practical sense, regain such advantageous position*** *as they might otherwise have achieved at this stage."* Emphasis added.

11. Thus, the party seeking to obtain a retrial must establish *both* a significant prejudice in the running of the trial consequent upon the fact that discovery was not available when it ought to have been *and* that that prejudice cannot be remedied in the course of a continuing trial. In short, the applicant for a re-trial must show irreparable prejudice.

Alternatives :

12. In relation to the latter of these issues, unsurprisingly, the case law requires that a mistrial only be ordered if there is no alternative means of securing justice. This is evident from a number of the cases cited in Sawridge Band. In Carey v. Ontario, Carswell Ont 3750. the appellant argued that the trial judge had erred in refusing to declare a mistrial in circumstances where the Government of Ontario had failed to produce documents at the time required by the rules and in a timely fashion. The Government had produced documents on a continuous basis during the trial proceedings as a result of an ongoing search. The Court of Appeal of Ontario, in refusing the appeal on this ground, held:-

> *"From the record it is clear that, after considering the submissions of the parties, the trial judge was sympathetic to the position of the appellant but was of the opinion that another order would both insure against prejudice or miscarriage of justice and preserve the trial."*

13. The trial judge had, at the time of the application, made an order that the trial be adjourned *sine die* on the following terms:-

> *"1. The evidence to date to be transcribed at the cost of the defendant.*
> *2. The plaintiff have leave to amend his statement of claim, if so advised.*
> *3. The plaintiff to have leave to hold examinations for discovery of Leo Bernier, who had been a cabinet minister in the Provincial Government for much of the relevant time on the new issues – or on the issues raised by the new documents.*
> *4. The plaintiff's counsel to add or to correct his opening remarks, if so advised.*
> *5. The plaintiff's counsel to be at liberty to recall the plaintiff, who was then under cross examination, to give further evidence in chief, if so advised.*
> *6. The plaintiff to have costs thrown away, fixed at three days counsel fee at trial, on a solicitor and client basis, to be payable forthwith after assessment, and to include the plaintiff's personal travelling expenses from California and return, and his living expenses for three days."*

14. The Court of Appeal noted that the trial was then adjourned, discovery was held and a better affidavit was completed. When the trial was resumed, the appellant's counsel was accorded all of the opportunities set out above. The Court of Appeal also considered it relevant that when further documents were produced by the respondent, the appellant's counsel declined the offer of the trial judge to adjourn once more and chose to proceed.

15. The Court of Appeal concluded:

> *"At the conclusion of the argument, we reserved our judgment to further consider the submissions and the numerous documents referred to and collected in the appeal books. Having done so, we are all of the opinion that the trial judge was right in refusing to hold that there had been a mistrial and that the order he made was both fair and just in the circumstances. There was no substantial wrong or miscarriage of justice. The appeal on this ground fails."*

16. In Tupper v. Van Rody (c.o.b. Past Reflection Antiques), [2006] O.J. No. 1419. the Ontario Superior Court had to consider an appeal of a decision to declare a mistrial where on the sixteenth day of a trial, after nearly all the evidence was completed, the defendants disclosed a lease document that had the effect of adding an undisclosed party as tenant/occupier of the premises in this slip and fall accident case. The trial judge accepted that the late non-disclosure caused substantial prejudice to the plaintiff. The Court upheld the decision of the trial judge finding that a correct approach had been taken. The Court commented on Carey as follows at paragraph 15:

> *"Carey confirms that if an issue arises in a judge alone civil trial that may result in a mistrial, options should be canvassed to see if the trial can be saved, so long as the continued trial and measures imposed are fair and just in the circumstances. If this test cannot be met, as in this case, the trial judge may have no alternative in his or her discretion but to order a mistrial"*

The discretionary nature of the jurisdiction :

17. One case from Northern Ireland in which a similar issue arose is Maguire v. Fermanagh District Council. [1996] NI 110. In that case, the plaintiff had brought an action for negligence against the Council arising out of an accident in a swimming pool operated by the Council. The High Court found in favour of the Council and the plaintiff appealed. On appeal, the decision was overturned by a majority of the Court, however Girvan J. who dissented, noted in his judgment that an alternative argument put forward by the plaintiff was that the Court of Appeal should order a retrial in view of the Council's failure to provide proper discovery prior to the commencement of the trial and in view of the fact that the appellant was prejudiced by the late production of documents during the course of the trial. Girvan J. stated at 156:-

> *"The council's failure to comply with its discovery obligations was quite unjustifiable and a serious breach of the rules of court. However, the judge in the exercise of his discretion decided that it was inappropriate to order a new trial and the appellant was given a full opportunity to deal with the additional information which emerged from the documents discovered late. The problems raised by the late discovery represent the type of problem on which a trial judge is best qualified to rule. There is nothing to indicate that the judge wrongly exercised his undoubted discretion on this aspect of the case."*

18. A similar conclusion emerges from the cases cited in Sawridge Band. In Dobranski v. Dobranski, [1998] Carswell BC 234. the Court of Appeal of British Columbia considered an appeal of a decision of the trial judge to refuse to declare a mistrial in a civil case because of a withdrawal of counsel. In dismissing the appeal, the Court of Appeal stated at para. 28:

> *"Whether to declare a mistrial in a civil case because of the withdrawal of counsel is a matter of discretion to be exercised by the trial judge. In this case, the trial judge refused to declare a mistrial because he concluded that any prejudice which might be occasioned to the appellant in having another counsel assume conduct of the trial was substantially outweighed by the cost to the parties of having a new trial. The prejudice, if there was prejudice, was offset by the substantial adjournment allowed for the purpose of enabling counsel to familiarize himself with the issues and the evidence.*
> *The refusal to declare a mistrial was within the discretion of the trial judge who exercised it after considering the potential prejudice to the parties. This Court is extremely reluctant to interfere with a decision of a trial judge on a discretionary matter such as this one. Generally it would be necessary to show that the trial judge failed to follow the settled principle that the interests of justice, as determined by a balancing of interests of the parties having regard to relevant factors, are paramount: Sidoroff v. Joe (1992) 76 BCLR (2d) 82 (BCCA). In this case, no basis has been shown to interfere with the order refusing a mistrial."*

19. As a power vested in the discretion of the Court and its power over its own proceedings, all of the relevant circumstances must be taken into account. Thus, in Southern Cross Exploration, the Court, in refusing the relief claimed, attached considerable significance to the consequences if the relief sought by the Plaintiff were granted. He said :

> *"It is also important to have regard to the circumstance that the trial has now taken ninety-seven days and the evidence was regarded as virtually concluded at the time when the discovery application was made. No doubt if the trial continues additional time will be taken up as a result of directions given for the purpose of preventing prejudice to the plaintiffs but nevertheless the amount of time which will be required to conclude the trial must be short in comparison to the time already taken. A number of counsel and solicitors have been engaged on both sides and clearly a great volume of work has been undertaken outside of court hours. It is unlikely I think that the total costs of the trial to date are much less than one million dollars while other very substantial costs have been incurred in applications concerning security for costs, the discovery application and this application.* ***A clear case of irreparable prejudice would, I think, be required to justify granting a new trial at this stage when to do so would largely waste the time and money which has so far been put into it.***"
> Emphasis added.

SUMMARY OF PRINCIPLES GOVERNING MOTION FOR A RETRIAL

20. It is respectfully submitted that a consideration of the above case law points to the following principles :

(i) Insofar as the Court has, as a feature of its inherent jurisdiction, the power to direct a retrial after a hearing has commenced, it can exercise that jurisdiction where documents which ought to have been discovered before the trial, are discovered in the course of the trial;
(ii) That jurisdiction is a discretionary one, to be exercised having regard to all of the circumstances including the effect of a retrial in terms of wasted costs and inconvenience to the parties and the Court;
(iii) The jurisdiction is nonetheless an extraordinary, and drastic one to be exercised only in exceptional circumstances which mandate its invocation;
(iv) The Court ought to be less reluctant to exercise that jurisdiction where it is established that the failure to make discovery was dishonest;
(v) Before exercising the jurisdiction in a case such as the present, the Court must be satisfied that real and appreciable prejudice has been caused to the party who was not in default;
(vi) Even if prejudice has been established, the Court must be satisfied that that prejudice cannot be remedied or addressed through the giving of appropriate directions in the course of the continued trial.
(vii) Finally, it is respectfully submitted that the jurisdiction should be exercised in the light of the description in one of the cases cited in Sawbridge Bands Skaggs v. Commonwealth Ky., 694 S.W. 2d 672 (1985) cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986). :

> *"It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained to must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way."*

APPLICATION OF RETRIAL PRINCIPLES

General :

21. The Court is well familiar with the background to these proceedings, and to that extent it is not proposed here to engage

with the description of the action as set forth at paragraphs 2-44 of the first and fifth named Defendants' submission. It has been accepted at all times by the Plaintiffs that the deficiencies which resulted in the making of late discovery ought not to have occurred. However, the failure to make discovery was not deliberate nor was it dishonest; the evidence makes it clear that those omissions which did occur were a consequence of a combination of human error and oversight, the complexity of the proceedings and issues therein, the volume of documentation which had to be (and was) discovered by the Plaintiffs, and the nature of and particular circumstances in which the Plaintiffs' business found itself at the relevant time. These are explanations, rather than excuses, for the failures. They occurred, however, in a context in which the Plaintiffs gave clear instructions that full discovery should be made, in which they had retained the services of experienced solicitors to that end, and in which those solicitors in turn retained a dedicated team of Junior Counsel to assist in discovery. It is, it is respectfully submitted, simply impossible to conclude that the failures were the product of dishonesty or deliberate suppression of documents.
22. That being so, three aspects of the principles referred to in the previous section of this submission are relevant to this application. They are first, the question of whether the Defendants have in fact sustained prejudice as a consequence of the matters of which they complain, second whether such prejudice as has been sustained can be remedied without a retrial and third whether there are circumstances which would suggest that the Court should in any event and in the exercise of its discretion, not accede to the relief of a retrial. The first two of these will be considered here, and the third addressed in the concluding part of this submission dealing with the motion to strike out.

Nature of the Alleged Prejudice :

23. The affidavit of Peter Lennon grounding the application of the Defendants for a retrial, identifies various documents which it is alleged have been made available for the first time in the new discovery. It is then said that had the information in those documents been available to the Defendants earlier there are various steps that would have been taken by the Defendants in connection with the case. It is suggested that because those steps would have been taken earlier, that the Defendants have been prejudiced to such an extent as to justify the Court in directing a retrial.
24. The documents so identified as *newly discovered* can be reduced to the following categories :
(i) Concrete delivery documentation. This documentation (it is said) was relevant to demonstrating a practice of adding water and extra sand to concrete mix, and to the fact that there were different mixes of concrete being delivered. Section 3 of the Affidavit of Peter Lennon sworn on 15 September 2009.
(ii) Documentation relating to ground conditions, demonstrating (it is alleged) new information in relation to drainage and ground conditions in Drynam, information concerning foundations over lime stabilized areas, and problems with surface and ground water at Beaupark, problematic ground conditions at Myrtle. Section 4 of the Affidavit of Peter Lennon sworn on 15 September 2009.
(iii) Documentation relating to quality control and workmanship, documents dealing with poor construction detail, and site diaries concerning ground conditions and workmanship. Section 5 of the Affidavit of Peter Lennon sworn on 15 September 2009.
(iv) Documentation relating to what are described as *Non Bay Lane Houses*. It is alleged that this documentation demonstrated that there were properties containing non-Bay Lane infill which were not previously understood as such, documents which show for the first time in respect of *non-Bay Lane* houses cracking and other similar damage, documents demonstrating that homeowners (but not the Defendants) were advised at various stages that their properties contained fill that was not from Bay Lane, documents which demonstrate an alleged *benchmark* level of pyrite against which the Plaintiffs were measuring properties. Section 6 of the Affidavit of Peter Lennon sworn on 15 September 2009.
(v) Documents relating to the *Red Arches* Estate, the infill used in which was not supplied by the Defendants, but which it is now claimed is shown by the discovery obtained to be presenting damage similar to that manifesting itself at the properties the subject of these proceedings Section 7 of the Affidavit of Peter Lennon sworn on 15 September 2009.;
(vi) Documents relating to cracking in the three estates, comprising legal correspondence from homeowners, snag lists, inspection reports, and documents detailing notification of cracking. Section 8 of the Affidavit of Peter Lennon sworn on 15 September 2009.

25. The *prejudice* alleged to have been suffered in consequence is referred to in the first instance in general terms of prejudice to *earlier investigations and conclusions reached,* of *fresh lines of enquiry or enquiries* that would have been undertaken had the information been made earlier available, it refers to *issues* that would have been raised with the Defendants' experts, to a *material effect* on the basket of houses, and to the impact on how witnesses who have given evidence to date would have been cross examined. Affidavit of Peter Lennon of 15 September 2009 paragraph 46. As more fully explained later, these general headings of prejudice are expanded upon within Mr. Lennon's affidavit in reference to specific categories of the documents to which he refers.

The evidence for the alleged prejudice :

26. While (as previously observed) unreservedly accepting that the fact of the late discovery which gives rise to this application should not have occurred, the Plaintiffs adopt the position, with some regret, that the Defendants have presented the Court with a contrived account of alleged prejudice consequent upon the late discovery. This has, the Plaintiffs submit, been done in an attempt by the Defendants to postpone the presentation of their evidence, and to preclude the Plaintiffs from bringing this case to conclusion. This is well demonstrated by the extent to which the information which Mr. Lennon has asserted in the affidavit grounding this application to be new or fresh evidence, was actually available to the Defendants prior to the trial.

27. In fact, many of the documents discovered by the Plaintiffs in 2009 were in substance discovered or otherwise provided to the Defendants before then, and where documents were not discovered or provided previously, much of the information disclosed by those documents was in fact available to the Defendants from other documents. In truth, as one looks closely at the material referenced by Mr. Lennon in his affidavit, very little of it produces new information, and there is less information again that could be reasonably regarded as germane to the prejudice alleged by him. Most significantly, even when possessed with this information, the various steps which the Defendants now say they would have taken had discovery been made earlier, were never taken.

Specific examples of alleged prejudice :

28. Thus, as the Plaintiffs analyse the complaints, most of the sections of Mr. Lennon's affidavits disclose little or no relevant information that was not already available to him. This is certainly the case in relation to sections three (no new information), six (fifteen documents with new information), seven (not relevant to the case and documents should not have been discovered), eight (no new information), and nine (no new information). The remaining two sections (four and five) contain little new information, and these were in any event concerned with construction and engineering matters which can still be fully explored at the trial.
29. Given the vast amount of the information that was available to the Defendants, it is hard to see how it can be credibly asserted that a demonstrable prejudice has been sustained as a consequence of the provision of the same information in the course of an admittedly belated discovery. Taking the specific examples of alleged prejudice as summarised above, the following

emerges from the Affidavits of Brendan O'Byrne:
(i) The case of alleged prejudice based upon the discovery of delivery documents and the alleged demonstration that water had been added to concrete is obviously without foundation. Apart from the fact that the documents do not have the effect asserted by Mr. Lennon, the Defendants have at all times operated on the basis that water was added to concrete, as evident from the reports delivered by their experts. First Affidavit of Brendan O'Byrne para. 425. Their ability to sample concrete floor slabs was not affected in any way by this information, First Affidavit of Brendan O'Byrne para. 430. nor have they been provided with any new information relevant to the testing required to address any concerns their experts may have had in that regard. First Affidavit of Brendan O'Byrne para. 446. Evidence has been given by the Defendants experts which makes it quite clear that they felt in a position to address the issue of water cement ratios. First Affidavit of Brendan O'Byrne para. 439.
(ii) The arguments advanced in relation to ground conditions are similarly artificial. A significant number of the documents alleged by Mr. Lennon to be such as would have prompted *further investigations* in the context of these complaints contained information already available to the Defendants. First Affidavit of Brendan O'Byrne para. 481, 486, 488, 489, 492, 496, 497, 499, 501, 505, 511, 516, 517, 533. Many of the documents referred to by Mr. Lennon in dealing with this issue appear to have been, to put it at its most neutral, misunderstood. First Affidavit of Brendan O'Byrne paras. 480-484, and 503.
(iii) Section 5 of Mr. Lennon's affidavit deals with allegedly poor construction practices and workmanship. Once again, it is the position of the Plaintiffs that the information contained in this section of Mr. Lennon's affidavit have been misunderstood. But most critically, the witnesses to whom the Defendants will wish to put the matters referred to in this section of Mr. Lennon's affidavit – the Plaintiffs' witnesses of fact and their construction and engineering witnesses – have yet to give evidence.
(iv) The section of Mr. Lennon's affidavit dealing with the non-Bay Lane houses affords the most graphic example of the scale of the exaggeration which characterises Mr. Lennon's affidavit. The information contained in all but fifteen of the seventy five documents referred to in this section which ought to have been discovered in 2008, was in fact available to the Defendants prior to the trial. Yet none of the steps identified in this affidavit such as seeking to include houses in the basket of houses, taking samples from properties, causing investigations to be undertaken in respect of properties or asking questions of witnesses, was actually undertaken.
(v) The *Red Arches* Estate has never formed part of this claim, and no documents relating to it ought ever to have been discovered and, in any event, do not on any version disclose damage similar to that which has manifested itself at the other developments which are the subject of the proceedings.
(vi) In relation to the information regarding cracking referred to in section 8 of Mr. Lennon's affidavit, there is simply no new information disclosed here.
30. The Defendants' written submissions (paragraph 312 *et seq* and paragraph 421 *et seq*) identify as a particular source of prejudice, the alleged failures to make discovery of documents relating to what are described as the Non-Bay Lane houses. While the issues raised in this regard are ventilated at some length in the affidavits grounding the motion, the approach adopted in the submission is telling. The 77 homes which contain Non-Baylane fill (there are actually 72 of which 57 contain some Bay Lane fill), are presented as providing the opportunity for *a proper diagnostic comparison between damage in Baylane properties and damage in Non-Baylane properties*. Apart of course from the information that the Defendants actually had about these houses, the control which they did indisputably have – the Moyglare houses – was never exploited in this way, notwithstanding the possession by the Defendants of the precise information which they say has now been provided to them for the first time.

Remedying any prejudice :

31. To a large extent, the evidence which has been given to date in these proceedings has been concerned with the geology. No stateable basis is disclosed in Mr. Lennon's affidavit for believing that any aspect of the geological evidence has been or requires to be re-opened to deal with the new discovery. The only possible new information disclosed by that discovery (and there is not a great deal of that) relates to construction issues, and the Plaintiffs' evidence on those issues has yet to be led. There is thus no basis for any application to retry these proceedings.

STRIKE OUT FOR FAILURE TO MAKE DISCOVERY : LAW

32. The jurisdiction to make an order striking out proceedings for failure to make discovery derives from the provisions of Order 31 Rule 21 of the Rules of the Superior Courts which states as follows:

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

33. The principles on the basis of which this jurisdiction may be exercised The Court will find useful summaries of the applicable principles in Delaney and McGrath *Civil Proceedings in the Superior Courts* (2nd Ed.) para. 10-99-10-105; Abrahamson and ors *Discovery and Disclosure* (2007) para. 11-08-11-13; Matthews and Malek *Disclosure* (3rd Ed.) paras. 13.07-13.18. are as follows:

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

34. These principles were stated in an English case as follows:

> *"The object of O.24, r.16 is not to punish the offender for his conduct but to secure the fair trial of the action in accordance with the due process of the Court […] The deliberate and successful suppression of a material document is a serious abuse of the process of the Court and may well merit the exclusion of the offender from all participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any Judgement in favour of the offender unsafe, but if the threat of such exclusion produces the missing document then the object of O.24, r.16 is achieved. In my judgement an action to be dismissed or the Defence struck out, as the case may be, only in the most exceptional circumstances once the missing document has been produced and then only if despite its production their remains a real risk that justice cannot be done."* Logicrose Ltd v. Southend United Football Club Ltd Unreported, Chancery Division, 5th March 1998. See the judgment of Johnson J. in Murphy v. Donohoe Ltd. in this context.

35. The extremity of the circumstance which must be established before an Order of this kind will or can be made, is evident from all of the Irish authorities. In this context, it is appropriate to refer to the decisions in Mercantile Credit Co. of Ireland v. Heelan, [1998] 1 IR 81. It should be noted that although this case is reported in [1998] 1 IR 81, the judgment of the Supreme Court was delivered on 14 February 1995. Murphy v. Donohoe Ltd., [1996] 1 IR 123. W. v. W., Unreported, Supreme Court, 25 November 1999. Johnston v. Church of Scientology [2001] 1 IR 682. and Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance plc. [2008] IEHC 114. All of these cases are considered in the submissions filed by the Plaintiffs in connection with their application to strike out the Defence of the Defendants for failure to make discovery and, indeed, in the Defendants submission,

and will not be repeated here. However, the propositions that emerge from those cases (which are also stated in the Plaintiffs' submission delivered in connection with their application) are as follows.

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

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

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

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

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

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

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

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

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

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

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

43. Fifthly, as the Court of Appeal stated in Triolacan v. Medway Power Drives Ltd., [1991] TLR 461. "*in approaching an application to dismiss an action on the ground of non-compliance with an order for specific discovery, the court must give the benefit of any doubt over the construction of the order to the party whose action it is sought to have dismissed."* Triolacan v. Medway Power Drives Ltd. [1991] TLR 461 (*per* Nourse L.J.) In that case, although it was "*perfectly clear*" that the various affidavits sworn on behalf of the plaintiff, "*neither singly nor cumulatively, constitute[d] due compliance with paragraph (d) of [the discovery order]*", the Court concluded that it should exercise its discretion in favour of the plaintiff. In "*all of the*

circumstances of the case" and "*in the expectation that [the Court would] to some extent be able to compensate the defendant in any order [that may be made] as to costs*", the Court allowed the appeal against the Order dismissing the plaintiff's claim for failure to comply with an Order for discovery and permitted the action to proceed subject to the plaintiff making and filing an affidavit which constitutes a due compliance with paragraph 1(d) of the discovery order. Similarly, in Murphy v. Donohoe Ltd, [1996] 1 IR 123. the Supreme Court had regard to, *inter alia*, the fact that "*the meaning of [the] first order [was] not altogether clear*" in reversing the decision of the High Court to strike out the Defence.

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

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

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

47. Ninthly, it is necessary to have regard to the extent to which the documents which a party omitted to discover were privileged documents. In dismissing the Defendants' application to strike out the action in Charlton v. Kenny, Unreported, High Court (Clarke J.), 2 April 2008. the High Court (Clarke J.) had regard to the fact that a number of the documents which the plaintiff failed to discover were documents over which privilege could have been claimed. Clarke J. reasoned as follows: "*It certainly seems to me again clear that there were a number of memoranda prepared, and it seems to be accepted, which ought to have been discovered, but it does have to be said that it seems almost certain that privilege could legitimately have been claimed and, therefore, while it was wrong not to discover those documents, the degree of seriousness with which it has to be approached has also to have regard to the fact that privilege could almost certainly have been properly claimed in respect of those documents, and therefore, they would not in fact have been disclosed, even though their existence would have been disclosed."*

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

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

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

STRIKE OUT FOR FAILURE TO MAKE DISCOVERY :
THE DEFENDANTS' SUBMISSIONS

50. It will be apparent from a consideration of these principles that there is much common ground between the parties as to the applicable law. Where, however, there is a difference between the Plaintiff and the Defendant in reference to the legal principles is the suggestion made by the Defendants that while the relief they seek is drastic, that there is in some sense a basis for applying different principles having regard to the *unique and complex nature of these proceedings where so much information has come to light at such a late stage.* Defendants submissions para. 326. However, the contention that a default in discovery obligations even if not culpable in the sense identified in Mercantile Credit v. Heelan, can give rise to a strike out where *a default in discovery obligations prevents the party .. from obtaining a fair trial*, is simply inapplicable to the circumstances of this case. The authority cited in support of that proposition (Johnson v. Church of Scientology Unreported

Supreme Court 17 November 2001.) comes in the form of a general observation of Keane CJ in the course of an *ex tempore* judgment. Even then, the remarks were qualified by reference to citation from the judgment of Barrington J. in Murphy v. Donoghue that the cases in which this could occur would be *extreme*. That extremity presents itself where documents are destroyed and unavailable, not where they are discovered late.

51. The latter proposition is clear from the authority cited by the Defendants at paragraph 351 of their submission, the decision of the English Court of Appeal in Landauer Ltd v. Comins and Co. *The Times*, 7 August 1991.. There, the reason the power to strike out was exercised was that documents had been destroyed; and, furthermore (as noted in the subsequent authority cited at footnote 104 to the Defendants' submissions) because the information in the destroyed documents (a) was crucial to the case and (b) could not be obtained from anywhere else. On no version of the facts of this case, could that be said to be the situation here. Furthermore, given that the Plaintiffs in these proceedings are not subject to an *unless order*, it is not apparent that the extensive reference to English cases that were, significantly advances the issues here.

APPLICATION OF PRINCIPLES

Explanations for the failures in discovery :

52. There is no basis on which it can be said that the failures in the Plaintiffs' discovery was other than inadvertent. The Plaintiffs have presented to the Court a comprehensive and detailed explanation for the omission to discover earlier the documents which give rise to these proceedings. That explanation falls to be considered in the light of the very significant extent of the discovery required of the Plaintiff, the huge volume of documents which had to be considered to identify those documents, the necessarily dislocated nature of business conducted by the Plaintiffs, and the fact that at the time discovery was made many former employees of the Plaintiffs were no longer employed by it. Importantly, it falls to be addressed in a context where the Plaintiffs engaged an extensive team of lawyers to review discovery, to advise on relevance, and to address queries raised by the Defendants when presented, and in which the Plaintiffs undertook the expense of obtaining a sophisticated IT based solution to assist in the efficient provision of discovery.

53. It is, in particular, clear from the Affidavits sworn by Mr. Brendan O'Byrne on behalf of the Plaintiffs that, even before a request had been received by the Defendants for discovery, advices were taken from the Plaintiffs' solicitors as to how discovery should be addressed, and that advices were then given to gather together and hand over all documents in their possession that related to the estates. Thereafter, weekly meetings took place between April and June 2008 to review, under the superintendence of the Plaintiffs' solicitors, the progress of discovery. First Affidavit of Brendan O'Byrne paragraph 34. It is clear from his Affidavits that each employee was required to hand over all documents which he or she had pertaining to the three estates, with the direction that if there was any doubt *the document should be sent to BCM Hanby Wallace to enable a decision to be made as to whether it was discoverable*. First Affidavit of Brendan O'Byrne paragraph 27. A number of members of Menolly staff were appointed to deal with the question of discovery. First Affidavit of Brendan O'Byrne paragraph 30 *et seq*.

54. The specific explanations for the failures fall into a number of categories, as follows :

(i) The fact that the Plaintiffs were acting on legal advice as to the meaning of the categories of agreed discovery. Category 68 of the agreed discovery; para 5 of the Affidavit of Gerard Butler, and following. Approximately 10,000 of the additional documents discovered are the result of a significant broadening of the interpretation of category 68 in 2009. See paragraph 9 of the Affidavit of Gerard Butler; First Affidavit of Brendan O'Byrne para. 56 *et seq*. Moreover, it is submitted that there is no basis upon which the Defendants can impugn the original interpretation of category 68 and that the said additional documents must be considered in this light also. In this context, it is also appropriate to note the view taken by the Plaintiffs' solicitors that certain documents belonged to Helsingor and were on that account not discoverable. First Affidavit of Brendan O'Byrne para. 57.

(ii) Difficulties which presented themselves in relation to the operation of the Adeo system and, in particular, the fact that the Plaintiffs' advisors operated on the assumption that all documents were scanned on to the Summation system as they appeared in the paper files. Paragraph 18-20 of the Affidavit of Gerard Butler.

(iii) The fact that documents were not in a centralised source, but were in a variety of different locations, Paragraph 39 of the First Affidavit of Brendan O'Byrne. with some staff not transferring documents centrally from site premises, and those documents accordingly ending up on entirely different sites. See paragraph 59 of the First Affidavit of Brendan O'Byrne. Similarly, the process was impeded by the absence of an organised archiving system. First Affidavit of Brendan O'Byrne para. 67.

(iv) The fact that a significant number of employees of the Plaintiffs had left their employment by the time discovery came to be made, Paragraph 40 of the First Affidavit of Brendan O'Byrne. and with some of those ex-employees not co-operating in the identification of documents, and others having left papers behind without notifying persons to be responsible for same thereafter. Paragraph 61 of the First Affidavit of Brendan O'Byrne.

(v) The misapprehension of some Menolly personnel that only documents which referred to pyrite were required to be discovered, and of some persons (including DBFL) that properties unaffected by pyrite were not captured by the discovery requests, based in turn upon an apparent misunderstanding of meetings which took place including BCM at the end of February 2008. First Affidavit of Brendan O'Byrne para. 52; Affidavit of Brendan O'Byrne para. 65 It is accepted that these misapprehensions were, at least in part, a consequence of the fact that documents were gathered before the categories of discovery were agreed, thus not all employees were aware of those precise categories. First Affidavit of Brendan O'Byrne para. 58.

(vi) The belief of one of the Menolly employees dealing with discovery that documents which were privileged did not have to be provided to BCM First Affidavit of Brendan O'Byrne para. 54.;

(vii) The fact that, unknown to the Plaintiffs, the IT experts who had been retained to undertake the review of electronic files did not pick up all documents, First Affidavit of Brendan O'Byrne para. 73. and that some Menolly employees had been using personal e-mail accounts and that not all Menolly employees' computers and laptops were interrogated. First Affidavit of Brendan O'Byrne para. 79. Documents were also missed because search terms (which are otherwise unobjectionable as a means of obtaining electronic documents for discovery See Digicel (St. Lucia) Ltd v. Cable and Wireless plc and ors [2008] EWHC 2522.) were not sufficiently broad.

(viii) There were particular difficulties with specific categories of documents such as the DBFL cracking reports, some of which were not discovered because these were in draft form at the time of the first discovery and were not furnished to BCM prior to that discovery First Affidavit of Brendan O'Byrne para. 121, some letters to homeowners which were sent directly by Menolly and which were sent at the edge of the discovery period and were not captured by a scan of documents in early July First Affidavit of Brendan O'Byrne para. 132. Further, miscellaneous incidents of papers gathered together by particular employees not being transferred or recorded as having been received, First Affidavit of Brendan O'Byrne para. 55. incidents where personnel reviewing documents failed to appreciate their relevance, First Affidavit of Brendan O'Byrne para. 63 one person who had been central to the discovery withdrew, First Affidavit of Brendan O'Byrne para. 64. the prospect that a completeness check of discovered documents was not possible, First Affidavit of Brendan O'Byrne para. 68. and the fact that some documents which were scheduled as missing in the original discovery were subsequently obtained from third parties. First Affidavit of Brendan O'Byrne para. 90.

55. In this regard it may of assistance to the Court to repeat the explanation set forth in the First Affidavit of Brendan O'Byrne (para. 90), where the impact of these various considerations on the 2008 discovery is detailed as follows :

> *"The explanation for the vast majority of the additional documents which were discovered in 2009 can be reduced to a number of core factors. Based on numbers provided by BCM Hanby Wallace, the total number of newly discovered documents in 2009, relating to the 102 agreed categories of the discovery, amounted to 36,452 documents and privilege was claimed over 5,739 of these documents amounting to 30,713 non-privileged additional documents discovered in 2009. Of the 30,713 documents 2,584 of these documents were provided by DBFL which arose partially due to DBFL's understanding that they did not need to discover documents in 2008 which related to Block 21 of the Beaupark estate and the request for discovery of documents relating to categories 112 and 113. 10,452 of the newly discovered non-privileged documents relate to the difference in the interpretation of category 68. 9,105 of the newly discovered non-privileged documents arose from the changes which were made to the Menolly electronic discovery as explained in Section III (iii) above and 2,218 arose from BCM emails. 3,882 of the newly discovered documents came from the Menolly reviews of its hard copy files, again as explained in Section III (ii) above. 2,435 documents arose out of the re-review of the 2008 discovery documents by BCM Hanby Wallace. Finally, 37 documents relate to invoices received from Goode Concrete and CPI which were scheduled as missing in this Affidavit sworn 26 June 2009 and which were subsequently furnished by Goode Concrete and CPI and discovered in this Affidavit of 7 August 2009."*

56. The circumstances which gave rise to these failures do not, on any version of the law, present a justification for the invocation of the Court's exceptional jurisdiction to grant the exceptional remedy of a strike out of the Plaintiffs proceedings. In this regard, there are a number of critical points.

Analysis :

57. First, the failures were not deliberate or dishonest. They were the product of a series of mistakes, and unfortunate circumstances. The Plaintiffs have explained comprehensively how each and every type of document produced for the first time in 2009 came to be omitted from the 2008 discovery. On no version could it be said that these omissions were a consequence of any deliberate failure; on the contrary it is clear from the affidavit evidence that the Plaintiffs invested immense resources in ensuring that discovery was conducted under the auspices of their solicitors, and in seeking to ensure that all documents were gathered by them from present and former employees of the Plaintiffs.

58. In their submissions, the first and fifth named Defendants seek to suggest that the averments of Mr. O'Byrne to the effect that at the time he swore his affidavit of discovery he believed that full discovery had indeed been made, are untrue (see paragraph 78 of the Defendants' submission). This proposition appears to be based on the claim that the difficulties which the Plaintiff encountered were *obvious*, and therefore were known or deliberately ignored. This claim is as ill founded as it is unfair. The whole point is that the Plaintiffs reasonably believed that they had put in place a system that would ensure that all documents were obtained from any party who had them. That did not happen, but it was not evident in July 2008 that it had not happened.

59. Second, while – as indeed noted in the analysis set forth above - it is certainly the case that there are dicta suggesting that *negligence* in connection with the discovery process is sufficient to trigger the Court's strike out jurisdiction, the circumstances which give rise to this application do not come within any of the circumstances contemplated by those dicta. Here, there were a large number of documents discovered by the Plaintiffs at a late stage in the process of discovery; however, the dramatic (and inaccurate) figures headlined by the Defendants in the affidavit grounding the within application have to be viewed in the context of the enormity of the claim, the range of different persons possessing documents within the discovery categories, and the specific circumstances identified as giving rise to the omission.

60. A glance at the summary of explanations set forth above suggests the following :

(i) It is not a basis for striking out proceedings that because a view was taken by a party's lawyers that a particular approach should be taken to discovery, irrespective of whether that approach was ultimately found to be mistaken;

(ii) The Plaintiff cannot be held responsible for misunderstandings as to the operation of, or extent of the documents uploaded on to, Summation;

(iii) Failures on the part of individual present or former employees to produce documents and the absence of centralised archiving systems, while most unfortunate, do not constitute culpable error by the Plaintiff such as to justify dismissal of their entire claim;

(iv) Similarly, in a discovery capturing documents likely to be held by a large number of persons and in the very unusual context where many of the Plaintiffs' employees have been made redundant, it is understandable that some difficulties present themselves in obtaining access to all relevant documents;

(v) It should not have happened that individual employees were under a misapprehension as to the types of documents which were to be discovered. However, the situations in which this occurred were isolated, and at one level, understandable;

(vi) A misunderstanding as to the obligation to provide privileged documents while, obviously, regrettable, is from the perspective of a non-lawyer not a culpable one;

(vii) The authorities support the practice of using search terms to identify relevant documents from electronic databases. Digicel (St. Lucia) Ltd v. Cable and Wireless plc and ors [2008] EWHC 2522. Clearly, the Plaintiffs cannot be held responsible for errors on the part of third party professionals retained by them to assist in the discovery process;

61. None of these causes constitute *negligence* as that term is employed in the context of dismissal of proceedings consequent upon failure to make discovery. The juxtaposition of that word by Hamilton CJ in his judgment in Mercantile Credit v. Heelan with the phrase ***wilful*** *default*, makes it clear that much more than *default* is required. This is why the authorities, as explained above, speak of actions that are *deliberate* giving rise to a basis for strike out. There was nothing *deliberate* about these events.

62. Third, taking these seven explanations it is of significance that four ((i), (ii), and (vii)) relate to the actions of professionals retained by the Plaintiffs, whose actions will not (as the cases cited above make clear) generally afford a basis for striking out. While the other circumstances which directly involve the Plaintiffs ought not to have occurred, they were a consequence of an unfortunate cocktail of circumstance which do not justify the draconian step of strike out.

63. Fourth, and most significantly there is simply no basis on which it can be said that the omissions in discovery have given rise to any prejudice that is incapable of being remedied in the course of the remainder of the trial.

64. Fifth, while a very significant part of the submissions of the first and fifth named Defendants are directed to the stance adopted in other common law jurisdictions to the appropriateness of key word searches in making discovery of electronic documents, the analysis as set forth there ignores a number of critical aspects of the issues here. Thus, the Plaintiffs accept that the initial key word search was not adequate. That is why the number of words used was increased to thirty seven and ultimately to fifty-one. The Defendants have been aware of the thirty seven words that were used for the 2009 discovery, since June of this year. They have never articulated any objection to the scope of the search undertaken by reference to those words, and cannot conscionably now attack that search. More importantly, insofar as the application to strike out these proceedings is concerned, the fact of the matter is that the Plaintiffs adopted the view that key word searches were a

reasonable method of approaching the otherwise impossible task of reviewing a vast bank of electronic documents. While it is certainly the case that English case law operates on the basis that the words to be used will be agreed between the parties, it is of some importance that that case law (and the first authoritative judicial consideration of the proper means of making electronic discovery) dates from October 2008.
65. The first and fifth named Defendant's submissions suggest that the provisions of the Rules of the Superior Courts preclude the use of search terms to obtain discovery. If this is in fact what the Defendants are submitting, they are emphatically wrong. While other jurisdictions have introduced specific provisions dealing with the making of reasonable searches for material, and while it is the case that a party is obliged to discover all documents captured by an agreement or order, all discovery (electronic or otherwise) requires a decision as to where to look for documents that, once identified, must then be discovered. The use of word searches in interrogating electronic discovery achieves that objective**.** Moreover, the use of search terms to retrieve potentially discoverable electronic documents is clearly a proportionate and reasonable approach to adopt having regard to the "*gargantuan task*" See *per* Fennelly J. in Dome Telecom Ltd. v. Eircom Ltd. [2008] 2 IR 726. and "*very unusual burden and heavy cost*" See *per* Kearns J. in Dome Telecom Ltd. v. Eircom Ltd. [2008] 2 IR 726**.** which electronic discovery can impose on a party. See also Digicel (St. Lucia) Ltd. v. Cable and Wireless plc [2008] All ER (D) 226.
66. Finally, there are some other aspects of the facts which, it is respectfully submitted, also bear on the question of whether the Court should, in its discretion, exercise its power to strike out the proceedings. Thus, the issues which give rise to this application are a consequence of the realisation by the Plaintiffs themselves that there had not been complete discovery made, a realisation which prompted an extensive review of all potential sources of documents. The mistakes which give rise to the application are mirrored by numerous defaults in the discovery which has been made by the Defendants themselves.

67. There is a further relevant consideration which overlays both of the applications which the Defendants seek to make. What will the Defendants achieve if they succeed in their application to either dismiss the proceedings, or to force a retrial ?
68. The Plaintiffs are being sued by a hundreds of homeowners whose houses contain in fill from the Bay Lane quarry. Those homeowners are free to proceed against the Defendants as well, and indeed a number of them have. It can hardly be suggested that in such proceedings where both the Plaintiffs and the Defendants are sued, that by reason of failures in the discovery process in *this* case, the Plaintiffs are precluded from claiming over against the Lagan companies. Similarly, an order dismissing the proceedings will not prevent the Plaintiffs from proceeding against the Lagan companies in third party applications in any of the Homeowners' cases. Strike out orders of the kind sought by the Defendants are not a determination on the merits and do not generate any bar on subsequent action, Pople v. Evans [1968] 3 WLR 97; Hart v. Hall [1969] 1 QB 405. So, what will be achieved by this application is not an avoidance of liability, not an avoidance of trial, but merely the postponement of a determination of these issues. That this will occur at the expense of a great deal of Court time and resources, and at the expense of the further delay of the ascertainment of liability to the homeowners causes pause, not merely for thought as to whether there is any basis in law or equity for the Defendants' application, but as to what precisely the strategic calculation that has provoked it, is.

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