THE HIGH COURT

[2023] IEHC 91

[Record No. 2014/691P]

BETWEEN

GAVIN TOBIN

PLAINTIFF

AND

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Mark Heslin delivered on the 28th day of February 2023.

Introduction

1. The case comes before this Court by way of a motion issued by the Plaintiff on 15th December, 2021 seeking the following relief:

- An order pursuant to O.31, rule 21 of the Rules of the Superior Courts striking out the Defence of the Defendants for failing to make discovery in accordance with the Supreme Court Order dated 15th July, 2019;
- In the alternative, an Order pursuant to Order 31 and/or the inherent jurisdiction of the court directing the Defendants to make further and better discovery in accordance with the Supreme Court Order dated 15 July, 2019.

2. At the outset I want to express my sincere thanks to Mr Counihan SC for the Plaintiff and to Ms Corcoran BL for the Defendants. Both made oral submissions with clarity and skill during the hearing, supplementing written submissions which I have carefully considered and which were of great assistance in dealing with the issues in the present application. The principal submissions and most relevant authorities will be referred to during the course of this judgment. For present purposes, however, it is appropriate to look at the nature of the underlying proceedings and to understand the history of the discovery process, to date, as well as the significance of same to the fair determination of the matters in dispute.

Personal Injuries Summons

3. By means of a Personal Injuries Summons issued on 21 January 2014 ("the Summons"), the Plaintiff sought damages from the Defendants for alleged negligence, nuisance, breach of duty, breach of statutory duty, and breach of contract. In summary, the Plaintiff claims the following.

He joined the Irish Army Air Corps as an apprentice aircraft mechanic in September 1989 and was trained at Casement Aerodrome Baldonnel, Co Dublin, where he was stationed until he left the service in September 1999. The Plaintiff claims that during the course of his employment as an aircraft mechanic at Casement Aerodrome, he was exposed to various dangerous chemicals and organic solvents on an ongoing basis, as a consequence of which he suffered severe personal injury loss damage inconvenience and expense. The Plaintiff pleads *inter alia* that when he commenced basic military training he was in very good health, was physically active and a keen cyclist and hillwalker. He pleads that following his posting to the "*engine shop"* in mid-1991, he subsequently experienced symptoms of fatigue, developed high levels of anxiety and inability to concentrate, suffered from a lack of confidence and became unwell. Among the pleas made by the Plaintiff is that the Defendants failed to provide him with a safe place of work, a safe system of work, safe and proper equipment, appropriate training, and safe and competent co-workers. Paras. 7 (a) to (aa) comprise "Particulars of Negligence, Nuisance, Breach of Duty and Breach of Contract" and these include the following:

"(l) failed to provide the Plaintiff and/or his fellow Air Corp personnel with appropriate training with regard to the safe handling of chemicals and solvents and the dangers associated therewith;

(m) failed to provide any or any appropriate supervision of the Plaintiff and his fellow Air Corp personnel insofar as the handling of chemicals and solvents was concerned;

(n) caused allowed or permitted the Plaintiff to be doused with chemicals by other Air Corp personnel while in the course of his duties;"

4. Particulars of personal injury are pleaded at para 9 of the Plaintiff's Summons which include inter-alia the following:

"Following an examination of the Plaintiff and an investigation into his occupational history and background by a medically qualified Toxico-Pathologist in December 2011 the Plaintiff was advised that his various medical complaints and conditions referred to above came about as a result of his chronic exposure to high levels of organic solvents in his workplace during his employment in the Irish Army Air Corps. The clinical picture provided by the Plaintiff was typical of an organic encephalopathy characterised by fatigue, poor concentration , sleep disturbance anxiety and depression. Further the Plaintiff's exposure to solvents and his subsequent diagnosis of oligo-spermia may well be associated with his exposure to solvents in the course of his employment but the same remains under investigation. The Plaintiff has been advised that he faces future additional risks to his health posed by the past exposure to organic solvents including the possible early onset of Alzheimer's disease and a variety of cancers."

Particulars

5. A notice for particulars was raised by the Defendants on 11 March 2014 and replied to on 16 July 2014. The Plaintiff's replies to particulars include *inter-alia* information in respect to issues including (i) the Plaintiff's position or *role* in the Defence Forces; (ii) when he says he was *exposed* to dangerous chemicals; (iii) their *uses* insofar as he is aware; (iv) the *chemicals* he

says he was exposed to; and (v) his pleas (*per* Paras. 7 (l), (m) and (n) of the Summons) including that he was "*doused with chemicals*". The following headings are mine, whereas the text comprises *verbatim* quotes from the Plaintiff's Replies to Particulars:-

Roles

"Basic military training for the initial 4 months.

Airport apprentice School training from January 1990 until July 1991.

Aircraft mechanic training - July 1991 in Engine Repair Flight ("ERF") for approximately 10 weeks before transferring to basic flight training school for approximately 10 weeks. The Plaintiff subsequently was attached to Light Strike Squadron for approximately 10 weeks and then a further 10 weeks in Transport and Training Squadron. He subsequently had a further approximately 10 weeks in Maritime Squadron before returning to ERF. In the Summer of 1993 he was sent to the airport training depot for approximately 3 months for further military training before returning to ERF. The Plaintiff ceased working as an aircraft mechanic in February 1994 and was transferred to Air Support Company Signals to work in IT." **(Para 7. c)**

Exposure

"The first exposure to dangerous chemicals – in September 1989 following a flood within the attic of an apprentice hospital, white asbestos lagging was washed down onto a floor area. After it dried, the Plaintiff was ordered to clean it up.

The first exposure to solvents and dangerous chemicals was in ERF in July 1991. **(Para 9.a)**

"The last exposure to chemicals as part of his day to day employment – February 1994.

The Plaintiff, however, continued to call to the ERF on a regular basis for tea and lunch breaks over the following two/3 years.

Further, during the time the Plaintiff was in the air support company signals, he was exposed to led solder fumes and also Genklene (1,1,1-Trichloroethane)." **(Para 9.b)**

Uses

"The Plaintiff did not receive any training in respect of the chemicals and therefore is unsure why some of them were in use. He is aware of the following:-

Fluorescent dye was used to detect cracks in components using UV flight (sic);
Ardrox 1074 was used to etch aluminium components;
Degreasing and cleaning solvents were used on engine parts and for paint removal;
Jet fuel and petrol was utilised in an attempt to remove residue from component parts;
Methyl Ethyl Ketone was used to remove residue;

The Plaintiff was further exposed to Aeroshell 500 Turbine Engine Oil and Aeroshell Grease 8 Graphite Grease - used as a lubricant for jet engine;
Cellulose Thinners and paint used for painting." **(Para 9. c)**

Chemicals
"1,1,1 – Trichloroethane;
Aeroshell 500;
Aeroshell Grease 8;
Ardrox 3691;
Ardrox 666;
Ardrox 667;
Ardrox 670;
Ardrox 1074;
Cellulose Thinners;
Trichloroethylene;
White Asbestos." **(Para 9.d)**

"Doused"
"This is a matter for evidence.
(a) Without prejudice to the foregoing, the Plaintiff was tied to a stretcher and Aeroshell 500 was poured over his hair, head, neck, upper torso and arms. Aeroshell Grease was placed over the Plaintiff's penis and testicles…

(d) the principal incident referred to at (a) above relating to the occasion when the Plaintiff was tied to a stretcher and had oil and grease poured upon him, occurred in spring 1992 at the Light Strike Squadron Hanger;

(e) the Plaintiff's immediate seniors were present and either participated in the event or witnessed it.

'Tubbings' and similar incidents were a regular occurrence within the Air Corp." **(Para 17)**

Defence

6. A Defence was delivered, dated 24 June 2015, wherein a preliminary plea was made to the effect that the Plaintiff's claim is 'statute barred'. Without prejudice to that plea - and other than not requiring proof (i) that the Defendants employed the Plaintiff as an aircraft mechanic at Casement Aerodrome, and (ii) that the Personal Injuries Assessment Board had issued the relevant authorisation - the Defence puts the Plaintiff on full proof of all matters and comprises a full denial of liability. For instance, Para. 3(a) of the Defence pleads that *"no admission is made that the Defendants exposed the Plaintiff to dangerous chemicals or solvents whether on an ongoing basis or at all*". There are also pleas of contributory negligence, including that the Plaintiff:

"(a) Failed to take any or any adequate care for his own safety;

(a) Exposed himself to risk of injury which he knew or ought to have known;

(b) Failed to make use of equipment that was available to him;

(c) Failed to follow his training;

(d) Failed to refer to or to rely upon his experience and knowledge…" **(Para. 4)**

Discovery sought

7. Against the backdrop of a full contest of liability and the Plaintiff being under the obligation to prove all facts relevant to liability, the Plaintiff sought voluntary discovery in August 2015 of 15 categories. In the absence of a response, a motion was issued in October 2015 pursuant to Order 31, rule 12 of the Rules of the Superior Courts ("the RSC"), which was grounded on an affidavit sworn, on 29 October 2015, by Mr Denis Boland, solicitor for the Plaintiff. In a replying affidavit sworn by a Captain Nic Caba, on 1 April 2016, the burden of making discovery in the terms sought was averred to as follows terms:-

"13. At current estimates on the basis of the categories of discovery which the Plaintiff has sought, I expect that it will take 10 members of staff (who may have other members of staff working under them) and approximately 220 man hours to review, locate and categorise the documents of which the Plaintiff has sought discovery…"

8. The Plaintiff took issue with the foregoing estimation and also opposed the Defendants' contention that discovery in respect of certain categories should be limited to the records of the ERF (as opposed to the entirety of Casement Aerodrome). On this issue, the Plaintiff made inter-alia the following averments at paragraph 8 of his 24 May 2016 affidavit:

"I say and believe that it is not sufficient for the Defendants to limit their discovery to documentation relating to the ERF workshop as this was only one area within Casement Aerodrome where your Deponent and my fellow Air Corp personnel were exposed regularly to dangerous chemicals. The following additional areas within Casement Aerodrome were regularly frequented by Air Corp personnel carrying out their duties:

- *i. The Engine Repair Flight building and adjoining workshops;*
  - *1. Engine Shop;*
  - *2. Non-Destructive Testing Shop;*
  - *3. Machine Shop;*
- *ii. the Basic Flight Training School Hangar;*
- *iii. the Light Strike Squadron Hangar;*
- *iv. Transport and Training (shared with Maritime) Hangar;*
- *v. Air Support Company Signals ("the top workshop");*
- *vi. the Engineering Wing hangar and adjoining workshops;*
  - *1. the Spray-Painting Shop;*
  - *2. the Hydraulic Shop;*
  - *3. the Sheet Metal Shop;*
  - *4. the Carpentry Shop;*
  - *5. the Welding Shop"*

9. The Plaintiff also took issue with the Defendants' suggestion that the Plaintiff should raise interrogatories requesting the Defendants to identify whether the chemicals listed in the Plaintiff's replies to particulars were in fact in use in the ERF during the relevant time period. On this issue the Plaintiff made inter-alia the following averments in his 24 May 2016 affidavit:

> *"I am advised and believe that the use of interrogatories would not be an appropriate or fair manner of dealing with the issues in the case. While I have identified to the best of my knowledge some of the chemicals to which I was exposed, I do not know and cannot be expected to know all of the chemicals which were in use within the workplace identified by the Defendants. In order to properly prepare the case and allow for a fair hearing of the claim by experts require a full list of all of the chemicals in use together with the full list of the safety date information relating to such chemicals. The quantities and dates of purchase of chemicals and mixtures form an important part of this data."* **(Para. 9)**

<u>High Court judgment</u>

10. This court (McDermott J) delivered a judgment on 7 October 2016 (*Tobin v The Minister for Defence* [2016] IEHC 547) granting much of the discovery sought by the Plaintiff, with amendments made in respect of certain categories. Among other things, the decision by McDermott J rejected the Defendants' contention that the breadth of discovery sought was too wide; rejected the Defendants' suggestion that the Plaintiff's claim was limited to one based on injuries sustained when exposed to chemicals while physically in the ERF (as opposed to while being assigned to the ERF); rejected the Defendants' proposal that interrogatories would be sufficient; and held that the discovery was proportionate and not unduly oppressive on the Defendants.

<u>Discovery Order – 14 October 2016</u>

11. This Court made a discovery order on 14 October 2016. By consent, it was ordered that the Defendants would, within 4 months, make discovery of categories (iii), (iv), (vii), (viii), (ix) and (xv) *"…together with all documents, notes, reports and records pertaining to special safety training and information in chemicals (including dangerous chemicals) provided to the Plaintiff in the course of his employment by or on behalf of the Defendants (in respect of categories (v) and (vi)) which are or have been in their possession or power."* The discovery order went on to require the Defendants make discovery of the documents at categories (i) and (ii) which are or have been in their possession or power, together with categories (x), (xi), (xii) and (xiii) in terms specified in the said order. For the sake of clarity, the following comprises the categories which the Defendants were ordered to make discovery of (and I will use roman numerals because this they were used at that point):-

> *(i) The Safety Data Registrar* (sic) *maintained by the Defendants in respect of Casement Aerodrome for the period between the 1st January 1990 and the 1st September 1999 to include each safety data sheet relating to each and every chemical being utilised at the said premises during the said period;* **[ordered]**

(ii) All documentation, notes, records, reports, etc., listing or identifying any chemicals which were utilised by the Plaintiff in the course of his duties during the said period together with any documentation identifying the quantities and dates of purchase of such materials; **[ordered]**

(iii) The material balance records maintained by the Defendants at the said premises for each chemical including details of issue, return, consumption, spillage and each type of loss; **[ordered, by consent]**

(iv) Any safety statement and or risk assessments relating to the duties which the Plaintiff was required to carry out in the course of his employment at Casement Aerodrome during the said period together with any documentation relating to any actions deemed necessary and/or remedial actions which were undertaken following upon the risk assessments having been carried out; **[ordered, by consent]**

(vii) All documents, notes records reports etc., pertaining to the provision of personal protective equipment to the Plaintiff to be utilised by him in the course of his duties at Casement Aerodrome during the said period together with any documents, records, reports, etc., pertaining to the instruction and/or training provided to the Plaintiff with regard to the use and operation of such personal equipment; **[ordered, by consent]**

(viii) All documents, notes, records, reports, plans, technical data, etc., pertaining to the provision of ventilation within the workshops at Casement Aerodrome where the Plaintiff was required to carry out his duties to include design, specification, certification, installation, inspection, maintenance and replacement documents; **[ordered, by consent]**

(ix) All reports, records, test results, etc., relating to any air monitoring and exposure monitoring or tests carried out by or on behalf of the Defendants in respect of the workshops where the Plaintiff was required to carry out his duties; **[ordered, by consent]**

(x) Any accident, incident or injury records pertaining to chemical exposure for the relevant period in relation to the alleged 'tubbing' incidents whereby the Plaintiff was allowed to be doused with chemicals by other Air Corp personnel while in the course of his duties to include reports of any such accidents or injuries to the Health and Safety Authority; **[ordered]**

(xi) all records, reports, incident reports, etc., pertaining to spillages of chemicals arising out of the alleged 'tubbing' incidents whereby the Plaintiff was allowed to be doused with chemicals by other Air Corp personnel to include any documentation relating to the procedure to be adopted on spillages and the treatment thereof; **[ordered]**

(xii) All Environmental Impact Reports, Environmental Protection Agency Emissions Licences, EPA Inspection Results, reports or correspondence relating to Casement

Aerodrome for the relevant period for the ERF workshop and the following locations: The Engine Repair Flight building and adjoining workshops, the Engine Shop, the Non-Destructive Testing Shop, the Machine Shop, the Basic Flight Training School Hangar, the Light Strike Squadron Hangar, the Transport and Training (shared with maritime) Hangar, the Air Support Company Signals (the Top Workshop), the Engineering Wing Hangar and adjoining workshops, the Spray Painting Shop, the Hydraulic Shop, the Sheet Metal Shop and the Welding Shop; **[ordered]**

(xiii) All records and documents relating to the Plaintiff's undertaking in tasks related to the emptying, cleaning and restocking of chemicals vats or baths; **[ordered]**

*(xv) The plans, specifications, etc., pertaining to the workshops at Casement Aerodrome where the Plaintiff was required to carry out his duties to include any documentation relating to the equipment, facilities and services to be used in such buildings and also the refreshment rooms and sanitary facilities available within and/or adjacent to the said buildings;***[ordered, by consent]**

"…together with all documents, notes, reports and records pertaining to special safety training and information in chemicals (including dangerous chemicals) provided to the Plaintiff in the course of his employment by or on behalf of the Defendants (in respect of categories (v) and (vi)) which are or have been in their possession or power. **[ordered by consent]**

Court of Appeal's decision

12. This court's decision was appealed to the Court of Appeal and a written judgment was handed down on 9 July 2018 (*Tobin v. Minister for Defence* [2018] IECA 230) wherein, at para 15, Hogan J. commented as follows in relation to the burdens of the discovery process, in the context of modern technology:

"15. Discovery practice was… transformed by modern technological changes. Accordingly, the advent of the photocopier from the late 1950s, email in the 1980s, and the World Wide Web in the 1990s have all wrought their own impact on the discovery process. One way or another, the burdens now imposed by the process now contribute significantly to legal costs and to delays within the legal system to the point where a process designed to assist the fair administration of justice now at times threatens to overwhelm it by imposing disproportionately onerous demands upon litigants."

13. As well as taking the view that, where the discovery sought is likely to be extensive, discovery should not be ordered unless all other avenues, such as interrogatories, have been exhausted and have been shown to be inadequate, the Court of Appeal held that the Plaintiff's claim was either expressly or impliedly confined to exposure at the ERF. The Court of Appeal allowed the Defendant's appeal in respect of a number of categories specifically (abandoning roman numerals) categories 2, 5, 6, 10, 11 and 14, on the grounds that the Plaintiff's application for

discovery was premature. A central theme in the Court of Appeal's decision was that the Plaintiff should first raise interrogatories and, if the information obtained in response was insufficient, the Plaintiff would be at liberty to renew his discovery application.

The Supreme Court's judgment

14. The Supreme Court's judgment on the subsequent appeal was handed down by the then Chief Justice on 15 July 2019. From para. 6.1 Clarke CJ examined relevant authorities, in particular, on the principle of proportionality. From para 7.1 onwards, the learned judge conducted an analysis of general principles, which, from para. 8.1 onwards, he applied to the present case. It is useful to quote paras 8.1 – 8.4 in which Clarke CJ makes observations about these proceedings – in particular what the Plaintiff will be required to prove, in light of the full Defence filed – which comments highlight the crucial role which discovery has to play and the reason why the scope of discovery ordered by the Supreme Court was so extensive:-

"8.1 Before addressing the detailed questions which arise in the context of this case, it is appropriate to make some observations about these proceedings. First, it should be recalled that the defence filed on behalf of the State places the onus on Mr. Tobin to establish all matters relevant to his claim other than the bare fact that he was employed by the Minister and worked at Casement Airdrome. No concessions of fact are made. There can be little doubt but that the potential scope of discovery which might properly be ordered in this case could, on any view, have been reduced if a more nuanced approach had been taken by the State in filing its defence. Any party is, of course, entitled to put its opponent on proof of their case. But relying on that entitlement may well extend the scope of documentation which can potentially be relevant to the issues in the case. As noted earlier, the fact that the State has not made any concessions in its pleadings and has thus potentially expanded the range of issues which may need to be explored at the trial is a factor which can properly be taken into account in the overall assessment of necessity.

8.2 It follows that Mr. Tobin will be required, amongst other things, to establish the following matters if his case is to succeed. Ultimately, as in all cases involving injury, three matters arise. First, was there negligence? Second, is there a causal connection between that negligence and an injury caused? Third, what injuries can be said to have been caused by any negligence established? In the context of this case, it follows that ***Mr. Tobin will have to establish that he did suffer injury because of exposure to chemicals, that exposing him to the chemicals in question was, in all the circumstances of the case, negligent and the extent of any injuries and other loss which can be attributed to that negligence.***

*8.3 Doubtless some of the evidence which would be needed if Mr. Tobin is to establish these matters will be expert evidence which, amongst other things****, may have to address the likelihood of any condition from which Mr. Tobin can be shown to be suffering being caused by exposure to a particular chemical or chemicals****, together with evidence which may support the view that exposing Mr. Tobin to such chemicals was negligent having*

regard to the state of knowledge at the relevant time. However, ***in order for that expert evidence to be of any probative value, it will need to be based on facts concerning the exposure of Mr. Tobin to chemicals*** *for, otherwise, any expert evidence will be purely hypothetical. The facts to which any expert opinion would have to relate must, of course, be established on the balance of probabilities. It follows, in turn, that it will be necessary for Mr. Tobin to establish that, as a matter of probability, he was exposed to chemicals in a manner which an expert is prepared to depose is likely to have caused his condition.*

8.4 It follows, in turn, that it is likely that ***a key question at the trial of this action will concern the chemicals to which Mr. Tobin was exposed and, potentially, the circumstances in which that occurred, including the extent of any relevant exposure.*** *At this stage of the proceedings, it is impossible to identify the precise issues on which the case may turn. However,* ***there can be little doubt but that it is potentially the case that the range of chemicals to which Mr. Tobin was exposed will be an issue at the trial. Thus, information concerning those chemicals has at least the potential to form an important part of this case. In those circumstances, it does not seem to me that it has been established that evidence concerning the chemicals which may have been used, in circumstances where that may establish on the balance of probabilities that Mr. Tobin was exposed to them, are tangential***." (emphasis added).

Category 1

15. Looking at the categories in sequence, Clarke CJ stated the following with respect to Category 1 (from para 8.6 onwards) of the Supreme Court's judgment:-

"8.6 Category 1 was described as 'The Safety Data Register maintained by the Defendants in respect of Casement Aerodrome for the period between 1st January 1990 and 1st September 1999 to include each safety data sheet relating to each and every chemical being utilised at the said premises during the said period.'

8.7 In the High Court, discovery of this category of documentation was ordered in full. In the Court of Appeal, Hogan J. recognised that Captain Nic Caba averred, on behalf of the Minister, that the phrase 'Safety Data Register' was not known to the State, and accepted the State's proposed amendment to the category to provide discovery of the 'Material Safety Data Sheets regarding the chemicals utilised...'. I did not understand that variation as being in controversy on this appeal.

8.8 Further, as recalled above, it was held in the Court of Appeal that the discovery should be properly confined to 'the chemicals utilised at the ERF...', as Hogan J. considered that the only alleged instances of exposure to chemicals or solvents referred to in the pleadings and particulars of Mr. Tobin were those which took place in the ERF and the ERF alone, and that the Court could not properly have regard to and order discovery in respect of the other locations frequented by Air Corps personnel, as averred to by Mr. Tobin in his affidavit.

8.9 It was submitted by Mr. Tobin that affidavit evidence can affect the relevance of categories of documents sought to be discovered, provided that the affidavit evidence relates back to the pleadings, in accordance with the principles set out by McCracken J. in Hannon v. Commissioners of Public Works [2001] IEHC 59. Counsel for the State, in response, stated that the relevant dictum is not authority for the proposition that a litigant may, for the purposes of an application for discovery, introduce an issue of fact which is not to be found in pleadings. In that context, it is appropriate to set out the relevant passage from the judgment of McCracken J.:

> *'Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forwards 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.'*

8.10 In my view, it is not apparent from the Indorsement of Claim, nor the replies to particulars provided by Mr. Tobin, that his claim is necessarily geographically confined to chemical exposure which actually took place in the ERF. Mr. Tobin's initial claim was stated to relate to exposure '[d]uring the course of his employment as an aircraft mechanic at Casement Aerodrome'. In their notice requiring further particulars of Mr. Tobin's claim, the State sought to ascertain the precise dates on which he alleges he was first and last exposed to such chemicals and solvents. Mr. Tobin, in reply, specifically referred to having been first exposed to solvents and dangerous chemicals in the ERF in July 1991 and then stated that his last exposure to chemicals 'as part of his day to day employment' took place in February 1994, with no specific location provided as to where this took place. Further, in the replies to the particulars sought, Mr. Tobin detailed his exposure to asbestos in 'the attic of an apprentice hospital' in September 1989 and to other specified chemicals while stationed in the Air Support Company Signals after 1994.

8.11 I am satisfied, therefore, that a proper reading of the pleadings does not confine Mr. Tobin's claim to exposure to chemicals while he was physically in the ERF but rather confines his claim to the period during which he was assigned to the ERF. For that reason, I am of the view that the Court of Appeal was in error to seek to confine the discovery sought to documents relevant to the exposure of Mr. Tobin to chemicals while physically in the ERF. However, Mr. Tobin was only assigned to the ERF between the January 1, 1990 and the end of February, 1994. The High Court order in respect of this category was made in respect of documents from the period of the January 1, 1990 to the September 1, 1999. As my reasoning in respect of extending this category beyond the ERF itself stems from my assessment of the pleadings as extending to the period during which Mr. Tobin was assigned to the ERF (and not confined to incidents which occurred in the ERF), I am satisfied that it would have been appropriate for the High Court judge to limit discovery in this category to the period between January 1, 1990 and February 28, 1994.

8.12 I should say that I fully agree with and endorse the principle identified in the judgment of McCracken J. in Hannon cited earlier. If, on a fair reading of the pleadings, Mr. Tobin had confined his claim to exposure to chemicals while physically in the ERF, the content of his affidavit could not have been used to expand the factual issues which form the context within which discovery is to be ordered. However, for the reasons which I have stated, the pleadings do not confine Mr. Tobin's claim in that way and it follows that the affidavit evidence can be considered to identify with greater precision the parameters of the claim by reference to which discovery should be ordered."

Category 2

16. Clarke CJ went on to look at the next category and began his analysis in the following terms:

"8.13 The next category which remains in dispute is Category 2 which reads as follows: 'All documentation, notes, records, reports, etc., listing or identifying any chemicals which were utilised by the Plaintiff in the course of his duties during the said period together with any documentation identifying the quantities and dates of purchase of such materials.'

8.14 This category of documentation sought by Mr. Tobin was stated to be relevant and necessary to allow Mr. Tobin's experts to consider in detail the specific chemicals and solvents involved, their individual characteristics and the manner in which they were stored, utilised and ultimately disposed of. Captain Nic Caba, on behalf of the State, averred that while it would not be possible to make discovery of documents which refer to chemicals actually utilised by the Plaintiff in the course of his duties, records are available which would make it possible to discover documents concerning chemicals 'which were purchased' for use in the ERF workshop at the times in question. However, full discovery in this category was estimated to impose a heavy burden on the Defendants, which was detailed by Captain Nic Caba, and it was suggested that interrogatories be served upon the State in relation to the documentation sought, in order to obviate the same.

8.15 In the High Court, this category of documentation was ordered in full. The State's appeal was allowed by the Court of Appeal in respect of this category, as it was held that full discovery would be 'obviously be very onerous and in all likelihood out of all proportion to the likely benefits which might otherwise accrue to the Plaintiff'. Hogan J. held that it would be more appropriate that, where Mr. Tobin is aware of the chemicals and solvents used by him, he should be permitted to serve interrogatories on the Minister requesting that he state whether such chemicals were in fact used during the course of the Plaintiff's employment at the ERF and, if so, to estimate the amount of the quantities that were so utilised in the ERF during the relevant period of the Plaintiff's employment there.

8.16 On appeal, counsel for Mr. Tobin submitted that, because Mr. Tobin is unaware of all the chemicals to which he was exposed, it would be unfair to fix him with knowledge of the same and that, in such a context, interrogatories cannot be effectively raised on his behalf.

Further, concern was raised regarding the feasibility of drafting an interrogatory that seeks an estimate of a quantity of a chemical. It is submitted by counsel on behalf of the State that it would not be required that interrogatories would be framed in the negative or that they follow any particular form."

17. Having proceeded to look at each of the remaining categories which were the subject of the appeal, Clarke CJ summarised the contours of the dispute as follows:

"8.38 In summary, therefore, it is clear from that analysis that the disputes in relation to Categories 1 and 12 related to the question of whether Mr. Tobin's claim, and therefore discovery, was confined to activity which occurred physically within the ERF. I have already indicated that I consider that the Court of Appeal was in error in its conclusions in that regard. It follows that, in respect of those two categories, the appeal should be allowed on that basis and the order made by the High Court in respect of those two categories should be restored.

8.39 The remaining disputed categories (being Categories 2, 5, 6, 10, 11 and 13) all really turn on the central issue on this appeal, being as to whether the discovery of all relevant documents is not necessary by virtue of the fact that an alternative procedure (in this case, interrogatories) would provide a more cost-effective means of enabling the just resolution of these proceedings. In order to assess that question, in the particular circumstances of this case, it seems to me to be appropriate to attempt to identify the sort of questions which could be asked by means of interrogatories, the information which it might reasonably be expected could be obtained by the use of that procedure and, importantly, the extent to which the use of that procedure might be expected to reduce the burden of compliance on the State."

18. Clarke CJ went on to look at the competing arguments made with respect to proportionality, stating *inter alia* (at para 9.1) that:

"9.1 It is not possible to ascertain the likely amount of work that would be required to comply with discovery on that scale with precision, although the estimate given in evidence on behalf of the State does not seem unreasonable. However, it is worth recording that, even on that scale, the discovery which would require to be made in this case would fall a long way short of the scale of discovery which is often ordered in commercial litigation where large teams of young lawyers are engaged for many months on the task."

19. Later, at para 9.2, the learned judge stated the following with respect to the burden on the Defendants:

"9.2 In my view, it is possible to say that making full discovery in this case would place a material burden on the State, but it should equally be emphasised that the burden in question is far from the upper end of the scale and is well removed from the type of case which has led to many judicial pronouncements about the very real problems which discovery can create for access to justice."

20. On the question of whether interrogatories might provide a suitable alternative means for the Plaintiff to achieve the same ends as might be achieved via discovery, Clarke CJ stated inter alia the following:

"[9.3]…Ultimately, the issues to which these disputed categories of discovery relate will have to be resolved on evidence at trial. There will have to be some evidence as to the chemicals to which Mr. Tobin was exposed and there will have to be some evidence as to the existence or otherwise of any incidents involving such chemicals and the training which Mr. Tobin was likely to have received. It seems to me that if those questions were to be raised in any meaningful way by means of interrogatories it would be necessary for the State to engage in significant research through its own documentation so as to enable it to answer the questions raised properly.

9.4 In that context, it should be emphasised that the State has chosen to put Mr. Tobin on proof of his entire claim. But if the State is to give meaningful information by means of interrogatories then it will have to know the answers. If it already has the information which would allow it to give answers, then it is hard to see why appropriate admissions could not have been made already. But if the State does not have the answers at this stage, then it seems almost inevitable that a significant amount of research will have to be carried out to enable proper answers to be given. Against that background, I am not convinced that the State has established that there will be a very great saving achieved in the circumstances of this case by using the procedural device of interrogatories as opposed to discovery..."

21. The Supreme Court's decision and the reasons for it can be seen from the following:-

"9.5 In the circumstances of this case, ***Mr. Tobin is entitled to use procedural measures to ascertain the full range of chemicals to which he may have been exposed and, insofar as it is possible, the circumstances in which that exposure took place, together with information concerning the training which he received****. It has not been demonstrated that such information could be given in an authoritative way without carrying out at least a significant amount of the research which would be needed to make discovery. Furthermore, these issues are central to Mr. Tobin's case and the discovery sought relates, therefore, to questions which are far from tangential or of only minor consequence.*

9.6 In all those circumstances, I am not satisfied that the State have discharged the onus which rests on it to demonstrate that alternative procedural measures could give all or most of the information to which Mr. Tobin is reasonably entitled but at the deployment of greatly reduced resources. On that basis, and in the circumstances of this case, I am not satisfied that the proportionality argument can succeed. I would, however, emphasise that the conclusion which I have reached is very much based on the circumstances of this case and I would like to make clear that there may well be many other cases where analysis of the type which I have just conducted might lead to a different conclusion.

9.7 On that basis, I consider that the High Court judge was correct and the Court of Appeal was in error in respect of the refusal of discovery of the categories with which I am dealing in this part of this judgment. On that basis, I would allow the appeal and restore the order of the High Court." (emphasis added)

Supreme Court Order

22. By order made on 15 July 2019 the Supreme Court set aside the Court of Appeal's order and restored the order made by the High Court in respect of those categories of discovery which had been the subject of the relevant appeal, confining those categories to a narrower time period of 4 years, "*being the time during which the Plaintiff was employed in the Engine Repair Flight (ERF) workshop*".

23. It is not in dispute that this covers the period from 1 January 1990 to 28 February 1994 (emphasis added). It is also common case that this narrowing of the time period was the only amendment made by the Supreme Court in respect of the discovery as previously ordered by this court.

Affidavits

24. I have carefully considered the evidence proffered with respect to the present Motion, which comprises the following affidavits and the exhibits thereto:

- The Defendants' affidavit of discovery sworn by Col. Michael Moran, on 9 October 2020 in purported compliance with the Supreme Court's order;
- The affidavit sworn by the Plaintiff, on 1 December 2021, to ground the present motion (together with exhibits "GT1" to "GT6", inclusive);
- The affidavit of Mr Joseph O'Neill, consulting forensic toxicologist, retained by the Plaintiff, sworn on 16 November 2021 (and exhibit "JON1" thereto);
- The replying affidavit sworn on 15th February 2022 by Col. Moran on behalf of the Defendants (and exhibit "CMM1" thereto).

The parties' positions summarised

25. In para.33 of his affidavit grounding the motion the Plaintiff avers inter alia the following: *"All I am seeking is to have a fair disposal of my proceedings.* ***At the very least, I must know what chemicals I was exposed to. If the Air Corps procures the safety data sheets of the chemicals that were present at the time, then I will be able to meaningfully advance my proceedings****…"* (emphasis added). It is fair to say that the position adopted by the Defendants (*per* Col. Moran's affidavits) is that (i) they have complied, in full, with their discovery obligations; (ii) the present motion is entirely without merit; and (iii) the Plaintiff is not entitled to either of the alternative reliefs sought.

Categories 1 and 2 as ordered by the Supreme Court

26. Categories 1 and 2 are the focus of the present Motion. For ease of reference, it is appropriate to set out these categories at this juncture, including the narrower (i.e. 4–year) time period ordered by the Supreme Court :-

> *1. The Safety Data Register maintained by the Defendants in respect of Casement Aerodrome from the period between 1 January 1990 and 28 February 1994 to include each safety data sheet in relation to each and every chemical being utilised at the same premises during the said period;*
>
> *2. All documentation, notes, records, reports, etc., listing or identifying any chemicals which were utilised by the Plaintiff in the course of his duties during the said period* [1 January 1990 to 28 February 1994] *together with any documentation identifying the quantities and dates of purchase of such materials".* (emphasis added).

Safety Data Sheets

27. Safety data sheets are specifically referred to in category 1. To better understand their significance, it is useful to refer to the averments made by Mr Joseph O'Neill, a consultant forensic toxicologist, retained by the Plaintiff. Exhibit "JON1" to his affidavit, sworn on 16 November 2021, comprises a copy of Mr O'Neill's Curriculum Vitae. It refers, *inter alia*, to Mr O'Neill being a graduate of UCD in Mechanical Engineering; a graduate of Trinity College in Toxicology; a Chartered Engineer (Engineers Ireland); a Fellow of the Institution of Engineers of Ireland; a European Registered Toxicologist listed in the Irish Register; a member of the European Society of Toxicologists & European Toxicological Societies; a member of the Irish Society of Toxicology; and a past President of the Association of Consulting Forensic Engineers. In his affidavit he averred that he is someone with 24 years' experience as a consultant forensic toxicologist and 41 years' experience working as a consulting engineer. No issue was taken by the Defendant with Mr. O'Neill's qualifications, expertise, and experience. With respect to safety data sheets, Mr O' Neill has made inter-alia, the following averments in his 16 November 2021 Affidavit which seem to me to be uncontroverted:-

> *"I have considered the affidavit of discovery filed and the documents that have been provided pursuant to it"* (para. 4);
>
> *"In any case concerning chemical exposure, speaking as an expert forensic toxicologist, it is necessary to know certain things. For example, at a bare minimum the Plaintiff must know the chemicals that he was exposed to, the dangerous properties of those chemicals and at least an estimate of how often exposure occurred…"* (para 5);
>
> ***"The compositions and identifies of chemicals are stated principally in safety data sheets. These are provided to a purchaser of a chemical solvent by the relevant supplier, whether that is directly from the manufacturer or a retailer**. In general, the safety data sheets must be retained by both users and by suppliers. **It would be highly***

unusual for a manufacturer or retailer to refuse to provide a safety data sheet upon request to a customer" (emphasis added) (para 6);

"The information contained within these documents is critical*: it sets out the dangerous properties of those chemicals and what precautions should be taken. This is clearly of high relevance in a claim such as this where the Plaintiff is asserting that the Air Corps failed to exercise reasonable care for his safety…*" (para 7);

"As I have worked professionally in toxicology, I am familiar with the ordinary practice in relation to both the exchange, use and retention of safety data sheets…" (para 8);

"…the Air Corps must have purchased chemicals from suppliers at the material time. ***In the ordinary course, a safety data sheet is provided with the purchased chemicals at the time of delivery****. As such, at the time when the Air Corps received the chemicals a safety data sheet would also have been provided"* (para 9).

Directive 91/155/EC

28. Directive 91/155/EC ("the Directive") defines and lays down arrangements for the provision of specific information relating to dangerous preparations. At my invitation, short submissions on the Directive were furnished by both sides after the hearing concluded. I have carefully considered these, from which the following appears to be particularly relevant.

29. Article 1(1) and (2) of Directive 91/155/EC states:

"Any person established within the Community who is responsible for placing a dangerous substance or preparation on the market, whether the manufacturer importer or distributor, ***shall supply the recipient who is an industry user of the substance or preparation with a safety data sheet containing the information set out in Article 3****.*

The information shall be provided free of charge at the latest when the substance or preparation is first supplied *and thereafter following any revision due to any significant new information regarding safety and protection of health and the environment."* (emphasis added)

30. The Directive, which is dated 5 March 1991, came into force on 8 June 1991 (i.e. it required Member States to adopt and publish provisions necessary to comply with the Directive by 30 May 1991, which provisions were to come into force by 8 June 1991). Pursuant to the Directive, the European Communities (Classification, Packaging and Labelling of Dangerous Preparations) Regulations, 1992 ("the 1992 Regulations") were commenced on 31 December 1992. Article 30 of the 1992 Regulations stated:

"(1) A person placing a dangerous preparation on the market ***shall have available, to provide when requested by any person, a safety data sheet*** *giving information on the properties and hazards of the preparation and on safety advice on the handling, storage and use of the preparation.*

(2) Without prejudice to the provisions of paragraph (1) and subject to paragraph (10), ***the person supplying the preparation shall provide the recipient with a safety data sheet*** *referred to in paragraph (1) when that recipient is an industrial user of the preparation."*

31. On 16 October 1995, the 1992 Regulations were repealed by the European Communities (Classification, Packaging and Labelling of Dangerous Preparations) Regulations, 1994 (the "Regulations") Article 30 of which stated:

"(1) A person placing a dangerous preparation on the market ***shall have available, to provide when requested by any person, a safety data sheet*** *giving information on the properties and hazards of the preparation and on safety advice on the handling, storage and use of the preparation.*

(2) without prejudice to the provisions of paragraph (1) and subject to paragraph (10) ***the person supplying the preparation shall provide the recipient with a safety data sheet*** *referred to in paragraph (1) when the recipient is an industrial user of the preparation"* (emphasis added)

32. I do not accept that the use of the words "*at the latest*" in Article 1 of the Directive prohibits the making of a request for a *copy* safety data sheet, thereafter, in the event of, for example, the original being mislaid by the purchaser of the relevant chemical. I am fortified in that view by the contents of Article 30 of the Regulations which mandate the making available of a safety data sheet "*when requested by any person*". The "*when*" is not stated to be a period which *ends* with the supply of the chemical in question (i.e. the obligation to provide a safety data sheet would certainly seem to persist *beyond* when a chemical was first supplied).

"Ardrox 666" Safety Data Sheet

33. One of the few data sheets, of which the Defendants have made discovery, can be seen at exhibit "GT3" to the Plaintiff's 1 December 2021 affidavit "GT3". It relates to the chemical described as "Ardrox 666" and the very first words of the documents are the following: *"SAFETY DATA SHEET according to EC directive 91/155/EC".* During the hearing, counsel for the Plaintiff submitted that, as and from 1991, every product containing potentially harmful properties was, upon sale, required by law to be accompanied by a safety data sheet. In light of the provisions of the Directive quoted earlier in this judgment, and the fact that the *"Ardrox 666*" safety data sheet which the Defendants have discovered specifically states that it was produced "*according to*" the said Directive, I accept that submission, which is also entirely consistent with the uncontroverted averments made by the Plaintiff's expert Mr O'Neill.

34. If one looks at the contents of the 7- page safety data sheet, one sees information under a range of headings including "*1. Identification of the substance/preparation and the Company/Undertaking*". The "*Commercial Product Name*" is given (i.e. "*Ardrox 666*") and the

"*Company*" ("*Chemetall plc*") is identified, with and address, telephone, "*telefax*" and "*emergency telephone number*" given for same. Under the heading "*Recommended Use*", the safety data sheet states: "*paint stripper, rust remover, decarbonising and decoking agent used for the elimination of burnt oils, fats, dry paints, oxides, rust and products resulting from corrosion".*

35. The said safety data sheet goes on to refer to "*2. Composition/Information on Ingredients"* including "*Hazardous components".* This is followed by "*3. Hazards Identification*" (which proceeds to state, inter alia, "*May cause cancer; May cause heritable genetic damage; May impair fertility; May cause harm to the unborn child; Also toxic by inhalation, in contact with skin and if swallowed; Causes burns; May cause sensitisation by inhalation and skin contact; Harmful to aquatic organisms, May cause long-term adverse effects in the aquatic environment"*).

36. The safety data sheet goes on to detail *"4. First Aid Measures"; "5. Fire-Fighting Measures"; "6. Accidental Release Measures"; "7. Handling and Storage"; "8. Exposure Controls/Personal Protection"; "9. Physical and Chemical Properties"; "10. Stability and Reactivity"; "11. Toxicological Information"; "12. Ecological Information"; "13. Disposal Considerations"; "14. Transport Information"; "15. Regulatory Information"; and "16. Other Information".*

37. I pause here to observe that the Defendants are plainly aware (i) that they purchased the specific chemical "*Ardrox 666*" and (ii) that "*Chemetall plc*" with an address in Milton Keynes, UK, provided the safety data sheet in respect of same, as the latter was legally obliged to do. It seems uncontroversial to say that the Defendants will know or have the means to find out whether they purchased *other* chemicals from "*Chemetall plc*" and, to the extent that they are missing any safety data sheets with respect to those other chemicals, they have the name, address and telephone in order to contact "*Chemetall plc*" to seek duplicates. This is a topic I will return to in circumstances where the Defendants have made no such contact, despite acknowledging that safety data sheets which the Defendants once had are now lost or missing**.** The stance adopted by the Defendants is that they are under no obligation to contact third party suppliers of chemicals with a view to obtaining any missing safety data sheets or purchase records. For the reasons set out in this decision, I do not believe that this is a legitimate stance for the defendants to adopt

38. In para. 11 of his grounding affidavit the Plaintiff makes inter alia the following averment: *"In June 2015, the Air Corps delivered its defence in these proceedings. In that document, the Air Corps specifically asserted that I must prove that I was exposed 'to dangerous chemicals or solvents, whether on an ongoing basis or at all". In the interests of full disclosure, I have compiled an up-to-date list which sets out the entirety of the overall classes of chemicals and solvents which I now believe I have been exposed to."* Exhibit "GT2" to the Plaintiff's affidavit comprises a copy of this list, which names 40 items (34 under the heading "*Chemicals I recall using directly during 1990 to 1994";* and 6 under the heading "*Chemicals I was aware were being used in proximity to me during this period*").

39. The affidavit sworn by Col Moran on 9 October 2020 is the sole affidavit said to constitute full compliance by the Defendants with their discovery obligations. It will be recalled that Category 1 relates to "*safety data sheets*" and there are just 5 entries, (a) to (e), in respect of Category 1 in the Affidavit of Discovery. These are as follows:-

"a. Material Safety Data sheet Ardrox 3961 dated 2/1/1991

b. Chemical Safety Data Sheet Ardrox 666 undated

c. Product Safety Advice for Ardrox 670 dated May 1990

d. Product Data Sheet Solvent Removable Red Penetrant dated 30/11/1993

e. Health and Safety Data Sheet Solvent Removable Red Penetrant (Bulk and Aerosol) dated 30/11/1993"

40. A principal criticism which the Plaintiff makes of the Defendants' discovery relates to the failure on the Defendants' part to furnish all relevant *safety data sheets.* In his grounding affidavit, the Plaintiff makes inter alia the following averment: *"In the affidavit of discovery provided, the Air Corps has referred to only 5 purported safety data sheets (i.e. Ardrox 3961; Ardrox 666; Ardrox 670; and 2 Red Penetrant Dye Data Sheets)"* (para. 16). The foregoing is factually correct and, without for a moment purporting to determine any issue of fact which is in dispute in the underlying proceedings, it is fair to say that there is an obvious contrast between, on the one hand, 5 safety data sheets and, on the other, 40 chemicals listed by the plaintiff in an exhibit to his sworn affidavit. I make this observation in the context of the Defendants making very clear that they once had, but no longer have, *more* than the 5 safety data sheets which they have discovered. The Plaintiff proceeds to makes inter alia the following averment "*…the Air Corps have not made discovery of all of the relevant safety data sheets in relation to the chemicals and solvents in use at the material time*" (para. 15). The foregoing is also undoubtedly correct.

41. The Plaintiff goes on, in para. 15, to aver as follows: "*The Air Corp have not set out whether any attempts have been made to obtain these safety data sheets*". This, too, is correct and, in my view, proper compliance with the Defendants' obligations required that (i) every reasonable attempt be made to obtain the missing safety data sheets; and that (ii) a detailed account be given on affidavit if these attempts proved unsuccessful with respect to any one or more missing safety data sheets (or, for that matter, any other documents which, according to the Defendants, once were but no longer are in their possession or power to procure).

Missing documents

42. The Plaintiff then goes on to make the following averments: *"…if the Air Corp no longer has safety data sheets which it would have likely had at the material time, then these safety data sheets must be listed in the second schedule to the affidavit of discovery*" (para. 15). I agree.

43. Col. Moran makes clear that the Defendants *did* have, but no longer have, documents covered by the Supreme Court's order and he makes the following averments at paragraph 6:

"Discovery is made at schedule two of any documents that can be identified by the Defendants falling within the categories outlined herein which did previously exist but no longer exist. I am advised the documentation of which discovery is made at schedule two is no longer available. I am advised that is not possible to be definitive as to its whereabouts or when it was last in the possession of the Defendants."

44. Before proceeding further, it is fair to say that it is entirely unclear (i) who advised Col Moran that this documentation is no longer available; (ii) the basis for that advice; (iii) why it is said to be impossible to be definitive as to its whereabouts; (iv) why it is said to be impossible to be definitive about when it was last in the Defendants' possession; and (v) whether, even if it is not possible to be definitive, some explanation can be given as to when the documents were last in the Defendants possession; (vi) the circumstances in which the documents were lost, or destroyed, or otherwise became unavailable; and (vii) what, to the best of the Defendants' information and belief, has become of them. In this regard, the provisions of Order 31 rule 20 (3) of the Rules of the Superior Courts seem to me to be particularly relevant.

Schedule Two

45. Schedule two of the Defendants' affidavit of discovery contains 7 entries (a) to (g). These include the following:-

"(f) Original Material Safety Data Sheets"

46. It is clear from the foregoing that the Defendants have made no effort to identify Safety Data Sheets which they know to have been in their possession with reference to the *different* chemicals purchased by them. Rather the 'catch–all' phrase "*Safety Data Sheets*" is used, which gives no indication of what chemicals were purchased and what documents are missing. This is despite the fact that the relevant *time period* is known (*per* the Supreme Court's order, being January 1990 to February 1994, inclusive). Furthermore, the Defendants must know or have the means of finding out (i) what chemicals they purchased and (ii) what safety data sheets related to those chemicals (the legal requirement, *per* the 1991 Directive, being that the latter accompany the former). I say the foregoing for several reasons.

47. First, nowhere in the Affidavit of discovery sworn by Col. Moran is it averred that the Defendants do *not* know what chemicals they purchased during the relevant period for use in Casement Aerodrome between January 1990 and February 1994, inclusive.

48. Second, the Defendants' affidavit of discovery includes *inter alia*, the following entry in the First Schedule (first part): "*b. Aircraft Maintenance Management Electronic Information System Chemical Inventory transaction record 1 January 1990 and 28 February 1994".* This comprises a 'spreadsheet' which certainly appears to show a range of chemicals purchased and provides *inter-alia* the name of each chemical and a date. Leaving aside the Plaintiff's contention that it does not cover all chemicals purchased, it is fair to say that even the first printed page of the

spreadsheet refers, by name, to what would appear to be numerous <u>different</u> chemical products purchased, including the following:

"*Ardrox 6012";*

"*Ardrox 3961";*

"*Grease Aeroshell 8 (3kg)";*

"*Ardrox 996P Penetrant";*

"*Ardrox 666 (litres);*

"*Ardrox 9PR3(T)(500ML)";*

"*Ardrox 985P3 (T) (500ML)";*

"*Ardrox 2526 Paint Rem(5L)";*

"*Ardrox 6025 Cleaner (25L)";*

"*Ardrox 230 Paint Rem (5L)";*

"*Ardrox 970-P10 (LTR)";*

"*Triklone N";*

"*Ardrox 3961 Aerosol";*

"*Ardrox 6012 Aerosol";*

"*Ardrox 3961 Aerosol";*

"*Ardrox 185 Rust Rem (kg)";* and

"*Ardrox 9D6CF Developer*".

49. This allows for a finding that the Defendants know what they purchased and, given the legal obligation that such purchases be accompanied by a safety data sheet for each chemical product, it underlines the Defendant's failure to specify, with reference to chemicals purchased (such as the foregoing examples), the various safety data sheets which they once had but no longer have in relation to chemicals used at Casement Aerodrome.

50. Third, Captain Caitriona Nic Caba swore an affidavit on behalf of the Defendants, on 1 April 2016, in which she made the following averment at para. 15:

"***<u>The Defendants are in a position to make discovery of the Material Safety Data Sheets in respect of the chemicals utilised at Casement Aerodrome</u>*** *during this period* [1st January, 1990 to 1st September, 1999] *and therefore offer to make discovery of: 'The*

Material Safety Data Sheets regarding the chemicals utilised at the ERF Work Shop between the period 1st January 1990 and the 1st September 1999'." (Emphasis added).

51. It will course be recalled that the relevant period (*per* the limitation imposed by the Supreme Court) is now 1 January 1990 to 28 February 1994, but that does not render the foregoing averment any less clear and unconditional.

52. In other words, irrespective of the fact that the aforesaid averment (i) was made in the context of the Defendants' attempt to *resist* making discovery in the terms sought by the Plaintiff and (ii) was very obviously made *prior* to the discovery process taking place, it was an explicit averment with an obvious and clear meaning. That being so, I cannot accept that it is open to the Defendants to ignore or attempt to 'row back' from the averment previously made on its behalf, to this Court, namely, that they: *"are in a position to make discovery of the Material Safety Data Sheets in respect of the chemicals utilised at Casement Aerodrome".* Thus, the acknowledged reality that the Defendants have not made discovery of all safety data sheets covered by the Supreme Court's order allows for a finding that the searches for same have, to date, been inadequate and that, with further and better searches, discoverable safety data sheets remain to be located.

53. In an apparent attempt to 'row back' from Captain Nic Caba's averment, para. 10 of Col. Moran's 15 February 2022 affidavit refers to the same two matters (i) and (ii) that I have cited in para.52, averring that Captain Nic Caba's "*affidavit was sworn in reply to the Plaintiff's application for discovery and therefore the averment must be placed in context*" and going on to aver that "*the averment of Captain Nic Caba must also be considered in the context of the fact that searches have yet to be conducted given no order of court had been made".*

54. It does not seem to me that the context in which Captain Nic Caba's averment was made, or the stage in the proceedings at which it was made, allows the Defendants to suggest, at this point, that it was an averment which *cannot* be relied upon (which seems to be what the Defendants are now suggesting). I say this for several reasons.

55. First, this court is entitled to assume that there was a factual *basis* upon which Captain Nic Caba swore that "*The Defendants are in a position to make discovery of the Material Safety Data Sheets in respect of the chemicals utilised at Casement Aerodrome*" during the period from 1 January 1990 onwards.

56. Second, Col. Moran's reference to the context and stage of the proceedings at which the averment was made does not undermine, or speak in any way to, the factual basis for the averment itself.

57. Third, Captain Nic Caba has not sworn any subsequent affidavit in which she avers that her averment was *incorrect* (and providing an explanation if one is said to exist).

58. In light of the foregoing - and emphasising that the court is making no criticism of any representative of the Defendant in a personal sense - I take the view that the Defendants have not complied properly with their discovery obligations.

59. During the course of submissions Counsel for the Plaintiff conceded that, if it were not possible to list missing documents individually, same could be identified in categories. He explained this by submitting that it would not be necessary to list documents, on a 'month by month' basis, in respect of the purchase of a particular chemical (e.g. "*Ardrox 666*"). Rather, documents concerning purchases of a specific chemical might well be referred to by *year.* However, his submission made clear that the Plaintiff did not concede that it was appropriate for the Defendants to make no distinction whatsoever between safety data sheets regarding *different* chemicals purchased by the Defendants for use at Casement Aerodrome during the relevant period (and references in this judgment to "relevant period" is to the period 1 January 1990 to 28 February 1994). This is a submission I agree with.

60. For the reasons set out above, I take the view that a reference in 'Schedule Two' merely to "*Original Material Safety Data Sheets"* was not adequate compliance with Order 31. Equally, if not more importantly, searches do not appear to have been adequate (otherwise the safety data sheets which this Court was told *were* available would have been included in the Defendants' discovery).

Third party searches

61. Mr O'Neill made inter-alia the following averments from Paras 10 to 12 inclusive of his 16 November 2021 affidavit.

> "…***even if the Air Corps no longer can locate specific safety data sheet in hardcopy, it is still in a position to request a copy of same from the relevant supplier or manufacturer****. It is clear that the Air Corps have failed to do so, and that no attempt has even been made to do so. In my professional experience, any supplier or manufacturer of chemicals such as this would be willing to provide a copy of a safety data sheet upon request without any difficulty…"* (emphasis added) (para 10);
>
> *"…it is not clear whether the Air Corps has even conducted a cursory internet search for any of the documents which they would have had in their possession, power or procurement. It appears from one of the documents furnished by the Air Corps that it may have been downloaded from the internet. It is watermarked as if it has been. If the Air Corps is in a position to obtain safety data sheets in this manner, there is no reason why it is not possible to obtain all of the other safety data sheets in respect of all of the chemicals in use at the material time. I would note that this would involve minimal effort and cost, yet no attempt has been made to do so. Additionally, I note that the Plaintiff has exhibited a list of all of the chemicals and solvents to which he believes he was exposed at the material time".* (para 11);

"As an employer of employees using dangerous chemicals in the course of employment, the Air Corps should have retained the safety data sheets pertaining to the chemicals being used. The Air Corps now assert that it did not do so and that it does not have all of the relevant safety data sheets. For the reasons set out above, ***the relevant safety data sheets are readily obtainable in a variety of different ways****."* (para 12).

62. The averments of fact which I have highlighted seem to me to be uncontroverted. In this context, a central theme in the present motion is that the Defendants could have made, but neglected to make, appropriate searches including via third parties. In his 15 February 2022 affidavit sworn in opposition to the present application, Col Moran does not aver that it is not possible, as a matter of fact, to obtain missing safety data sheets from third parties. Rather, the Defendants' objection is one of principle as the following averments make clear:

"…I am advised that no litigant which is the subject of an order for discovery is required to make contact with 3rd parties with which it had dealings several decades ago to enquire whether those 3rd parties hold documents that were once in the possession of the party making discovery" (para. 8).

63. I take a different view for the following reasons. It could hardly be unique to these proceedings that documents from "*several decades ago"* are relevant and necessary to a fair disposal of the matters at issue, given what the pleadings disclose, in the context of a Defence which puts the Plaintiff on 'full proof'.

64. There is no material dispute between the parties as to the relevant legal principles. Both sides agree that it is settled law that a party making discovery has an obligation to make discovery of documents which are in their possession, power, or procurement. As O'Flaherty J made clear in the 15 June 1993 decision in *Bula v Tara Mines Ltd* [1994] 1 ILRM 111:

"*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".*

65. In *Thema International Fund PLC v HSBC Institutional Trust Services* [2011] IEHC 496; [2013] 1 IR 274 Clarke J (as he then was) stated the following, with respect to the obligation to make discovery of documents within a party's power and procurement:

"The position adopted in most of the common law jurisprudence to which reference has been made and also adopted under the former rule in this jurisdiction under Johnston v Church of Scientology [[2001] 1 IR 682] has, in my view, the considerable merit of certainty. A party either has documents in its possession or has the legal entitlement to require possession. In those circumstances the document must be discovered."

66. There is no evidence before this court to suggest that purchases of chemicals by the Defendants were other than commercial transactions for value. In other words, the Defendant was making a purchase and, for present purposes, the effect of the Directive was to impose a legal obligation

that any chemical sold to the Defendants was accompanied by a safety data sheet. It will also be recalled that the duty to supply a safety data sheet was that it *"be provided free of charge".* Thus, the situation can be contrasted with, say, a voluntary donation of a product to the Defendants, accompanied by a voluntarily-donated information sheet or information which had to be paid for separately. In that context, it seems to me that the corollary of the legal *duty* on the part of the vendors to *supply* a safety data sheet (whether produced by the seller or the chemical manufacturer), was a *right* on the part of purchasers (namely, the Defendants) to *receive* a safety data sheet in respect of each chemical purchased. Given that the Directive came into force from 8 June 1991, the majority of the 4–year discovery period in this case (i.e. 1 January 1990 to 28 February 1994) is covered. However, nothing turns on the 'gap' between 1 January 1990 and the coming into force of the Directive in circumstances where Counsel for the Defendants confirmed in oral submissions that *"Col Moran confirms that in all likelihood each chemical purchased would have been accompanied by a safety data sheet".* In other words, for the purposes of deciding this motion, (i) the court can take it that each chemical purchased from 1 January 1990 was in fact accompanied by a safety data sheet; (ii) from 8 June 1991 there was a legal obligation that this happen; and (iii) these were transactions where value passed from the Defendant(s) to the vendor and it was in that context the safety data sheets were provided.

67. Earlier I referred to a safety data sheet concerning "*Ardrox 666*". At the risk of repetition, the evidence before this court allows for a finding that, when the Defendants purchased *"Ardrox 666*", it had a legal right to receive the safety data sheet in question. If that was the position at the time of the purchase, I can see no reason why the purchaser would have lost the right to request a duplicate or copy of the safety data sheet, notwithstanding the passage of time since the purchase. There was certainly no legal authority or legislation opened to me to the effect that, having had a right, as purchaser, to receive a safety data sheet, the Defendants, having mislaid same, also lost the right to request and receive a copy of the same document from the same vendor. On the contrary, the provisions in the Regulations (to which I referred in para. 30) suggest that a vendor of a chemical must have a safety data sheet available for supply, on request.

68. It also seems uncontroversial to suggest that vendors of potentially hazardous products are likely to have kept documentary records of sales. The definition of documents is of course a wide one and it includes all electronically stored information (see Order 31, rule 12 (13) of the Rules of the Superior Courts). There is certainly no evidence before this court that any third party from which the Defendants purchased chemical products during 1990–1994 did not maintain records or do not have records of sales in respect of the relevant period.

69. Where a product was ordered; an invoice was issued; and that invoice was *paid* by the purchaser in return for the product (i.e. value passed) it would seem uncontroversial to suggest that the purchaser is entitled to request a copy of the invoice (if, for example, same subsequently went missing). There was certainly no evidence or authority put before me which established the contrary. That being so, failing even to make a request of third parties for missing documents seems to me to constitute a failure to make adequate discovery and allows for a finding that

documents which are relevant and necessary for the fair disposal of matters at issue in these proceedings remain to be discovered, and that efforts by the Defendants to make discovery of same have been materially deficient.

70. For these reasons, I take the view that it is within the *power* of the Defendants to obtain copies of all documents (in particular, covered by Categories 1 and 2 of the Supreme Court's order) by means of appropriate enquiries with third parties.

71. This brings me back to the "*Ardrox 666"* safety data sheet, because its contents highlight what, in terms of factual data, the Defendants have ready access to insofar as searches, via third parties, is concerned. It will be recalled that this particular safety data sheet identifies "*Chemetall*" as the relevant company and provides an address, telephone number and emergency telephone number. This court is not aware of (i) how many different chemicals were purchased from "*Chemetall*"; (ii) what chemicals were purchased from other vendors; and (iii) when these purchases were made. However, the state of the evidence allows for a finding that the Defendants have, or can ascertain, this information with a view to making proper discovery once all necessary searches, in particular, *via* third party vendors of chemicals, have been made.

72. Even if the Defendants (in my view, wrongly) regard themselves as lacking the power to require a third party to provide them with, for example, a copy of a purchase document, or the accompanying safety data sheet in relation to previous purchase of a chemical product, it is clear that the Defendants have not even *asked* for same. Thus, the Defendants do not know whether missing documents could be made available to them, even voluntarily, by third parties. Nor is there any evidence to suggest that a request, if made, would be refused.

73. Counsel for the Defendant drew a distinction between the documents within the *power* of a party making discovery as opposed to documents within their *procurement*. Even though I am satisfied, that there are missing documents within the Defendants' *power* to obtain, it is appropriate to look at the question of *procurement* given the sophisticated submissions made by counsel for the Defendants who also submits that all documents which may be held by third parties are *outside* the Defendants' procurement (and if I am mistaken in the views expressed as regards the Defendants' *power* to obtain documents).

74. The headnote in respect of the Supreme Court's 25 January 2013 decision in *Thema International Fund PLC* states inter alia that "*…the inclusion of the word 'procurement' in the amendment to O. 31 r. 12 of the rules of the Superior Courts 1986 did not bring about a material difference in the scope of documents which could be ordered to be discovered and merely brought the phraseology into conformity with existing usage"*. However Clarke J (as he then was) stated inter alia the following at para 26:

> *"It does need to be emphasised that, at least so far as the existing jurisprudence is concerned, the only two cases in which the court has gone beyond requiring discovery of documents in respect of which a legal entitlement existed in the party required to make discovery cases were cases where* ***a single or small number of specified documents****,*

known to exist, were directed to be disclosed in circumstances where the court was satisfied that there was ***no reason to believe that any difficulty would be incurred in securing the document concerned****."* (emphasis added).

75. Lest I be entirely *wrong* in the view that the Defendants have a legal entitlement (i.e. the *power*) to seek missing documents from 3rd parties (e.g. each of the safety data sheets which vendors of chemicals supplied them in the context of a sale for value and which, from 8 June 1991, vendors were legally-obliged to supply), it seems to me that a safety data sheet concerning each purchase comprises a single discrete document. Given that the Defendants do not appear to have even asked, there is certainly no evidence before this court to the effect that any difficulty would be incurred in securing any given safety data sheet from any given vendor of chemicals, were same to be sought.

76. Thus, even if I am wrong in the view that the Defendants have the *power* to obtain missing documents, it seems to me that missing documents are within their *procurement* in the sense of coming within the exception identified in *Thema International Fund PLC* (see also *Yates v Ciba Geigy Agro Ltd* [Unreported, High Court, Barron J., 29 April 1986]) wherein the learned judge was satisfied that documents to which the relevant party did not have a legal right nonetheless came within their procurement, in circumstances where there was no reason to believe that a request made to the non-party would be refused).

77. The undoubted importance of documents, in particular the safety data sheets, to the fair determination of the issues in the present proceedings seems to me to allow for a finding that, even if the Defendants do not have the power to seek same from 3rd parties, this is one of the "*rare exceptions"* to the rule that a party need discover only documents in their possession, custody or power (see the decision of Denham J (as she then was) in *Johnston*).

78. Earlier in this judgment I explained, with reference to the explicit averment made by Captain Nic Caba, why this court is entitled to form the view that searches to date have been inadequate. I am fortified in the view that searches, to date, have been inadequate having regard to certain averments made on behalf of the Defendants. In the affidavit of discovery, Col. Moran makes *inter alia* the following averments:

"I make this affidavit following, and on foot of, widespread searches conducted in the Air Corps at my request, together with additional searches which I am advised were conducted by the Department of Defence."

79. Several comments seem to me to be appropriate, as follows:

(1) Is clear from the foregoing averment that the deponent did not conduct the searches personally;

(2) Nor does he aver that he supervised the searches which were carried out by others;

(3) Thus, he cannot speak 'first hand' to what searches were/were not carried out;

(4) There is no identification of the individual or individuals who conducted the searches within the Air Corps;

(5) Furthermore, it appears that a material element of the searches was conducted by unnamed others within the Department of Defence and the deponent is explicitly relying on what he has been "*advised*";

(6) However, what he is advised as regards the nature and extent of those searches is entirely unclear;

(7) The ability of a party to request the cross–examination of a deponent who swore an affidavit of discovery is an important feature of the discovery process. However, given this deponent's absence of 'first-hand' knowledge of searches, coupled with his reliance on advice from others, it seems that no useful purpose could have been served had the Plaintiff sought to cross-examine him;

(8) Although the term "*widespread searches"* is used, there is an absence of detail and a lack of clarity as to what this means;

(9) Without directing any criticism in a personal sense, Col. Moran cannot, by means of first-hand knowledge satisfy this court that *widespread* searches equates to full and *adequate* searches, having regard to the scope of the Supreme Court's order.

80. Later in the affidavit of discovery, Col. Moran makes inter-alia the following averments at paragraph 5:

"I am advised, and to the best of my knowledge and belief, records including safety statements for the relevant years, Standard Operating Procedures, Material Safety Data Sheets and documentation underpinning the information contained on the Aircraft Maintenance Management Electronic Information System (e.g. invoices or purchase order documentation) would have existed but cannot now be specifically identified with certainty or found."

81. Again, it is clear that the deponent is relying on what he is *advised* by unnamed others. Furthermore, given the acknowledgement that relevant documents are missing, the foregoing averments do not enlighten the Plaintiff as to precisely what searches have/have not been carried out. Nor is there any opportunity for the Plaintiff to seek to cross-examine the deponent.

82. Paragraph 6 of the affidavit of discovery begins in the following terms:

"I say, at this remove, it is not possible to be any more specific but to advise that such documentation would have existed but is no longer available. I say, in addition, it is equally not possible to say with certainty what happens to this documentation. It is possible such documentation no longer exists by reason of documentation control in that when such documents are updated it is routine to remove and destroy either earlier iterations of documents or documentation relating to old practices. In addition, I am advised that in the process of systems updates, and particularly electronic updates, records of outdated documentation were not retained. Discovery is made at schedule two of any documents that

can be identified by the Defendants falling within the categories outlined herein which did previously exist but no longer exist…"

83. As well as being based on what the deponent is advised by others, it seems to me that these averments are in such general terms as to be unsatisfactory and I am fortified in the view that an order pursuant to Order 31, rule 20 (3) is appropriate, in particular with respect to documents within Categories 1 and 2 (specifically, relevant records of chemical purchases and the safety data sheet which accompanied each purchase). Order 31, rule 20 (3) provides that:

"(3) The Court may, on the application of any party to a cause or matter at any time, and whether an affidavit or list of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, ***if not then in his possession, when he parted with the same, and what has become thereof****. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them."* (emphasis added).

84. At para. 7 of the affidavit of discovery, averments are made with respect to a "*Safety Statement, Engineering Wing, Welding Shop Zone 10, 1996".* It is averred that "*during searches*" an in-complete copy was found, however (i) the nature and extent of these searches is not explained; (ii) where they were conducted, what files or sources were searched is not specified or made clear; and (iii) whether the searches included a review of physical documentation and/or electronically held material is unclear.

85. Paragraph 10 of the affidavit of discovery begins in the following terms:

"With specific regard to categories 2 and 7, it is not possible at this remove to specifically identify the chemicals which the Plaintiff utilised in the course of his work or what personal protective equipment was utilised by him. Discovery is made, however, of the limited Aircraft Maintenance Management Electronic Information System record which contains details relating to chemicals and personal protective equipment which were purchased and therefore available for use at Baldonnel during the periods identified."

86. It is not clear from the foregoing whether searches were made beyond what the Defendants described as the "*limited Aircraft Maintenance Management Electronic Information System record".* In other words nothing is said in relation to any physical 'paper' records in this regard.

87. Paragraph 12 of the affidavit of discovery refers inter-alia to: "*(a.) Report into Ambient Air Monitoring for Health and Safety at Work, prepared by Environmental Consultant Conor Tonra, for Air Corps Group at Casement Aerodrome, dated 2/8/1995*;" and "*(b.) Report Monitoring Air Contaminants in the Work Shops – Forbairt Technology Service Environmental Services dated*

51 1997 of Baldonnel facility…" which have been discovered. Counsel for the Defendants submits that, insofar as relevant reports were produced in 1995 and 1997, the experts who produced same must have had access to relevant documents.

88. At para. 22, the Plaintiff makes the following averment: *"I can confirm (because I worked there personally) that the documents furnished by the Air Corps almost exclusively relate to only the ERF which was one location in which I worked."* He goes on to refer to a variety of different locations (including those which were listed in the Plaintiff's replies to particulars, to which I referred earlier in this judgment).

89. In his grounding affidavit the Plaintiff makes a range of criticisms in relation to the absence of documents (in particular, safety data sheets) as well as taking issue with certain documents furnished. I have carefully considered all these issues in the context of what is averred on behalf of the Defendants by Col Moran. In summary, they comprise the following.

90. A 'watermark' appears on the *"Ardrox 3961 data sheet"* document, referring to the University of California, and the Plaintiff's contends that if same was downloaded from the Internet for inclusion in the discovery *"there is no reason why the Air Corp should not have to download all of the safety data sheets for all of the chemicals to which I was exposed during the time of my employment".* The same issue was canvassed in the 11 December 2020 letter which was sent by the Plaintiff's solicitors to the Defendants'. In para. 2 of the latter's 5 January 2021 response the Defendants' solicitors stated: *"In respect of the Ardrox 3961 data sheet, in an effort to ensure the most complete possible compliance with the Order in respect of information available on chemicals in use during the relevant period this document was provided".* Both letters comprise part of exhibit "CMM1" to Col. Moran's affidavit of 15 February 2022. In para. 8 of that affidavit, Col. Moran avers that he is advised that the Defendants are under no obligation to either download documents from the internet or to seek relevant safety data sheets from third party suppliers. For the reasons already explained, I take a different view in respect of the Defendants' duties in respect of third party suppliers. However, and as an aside, it seems to me that where the Defendants know that a particular chemical was purchased at a particular point in time, they would appear to have an entitlement (no absence of a legal right or presence of any legal impediment has been suggested) to access the internet for the purposes of downloading the relevant safety data sheet (i.e. in precisely the same manner, and for precisely the same reasons referred to in the 5 January 2021 letter from the defendants' solicitors, regarding the "Ardrox 3961" safety data sheet).

91. At para. 18 the Plaintiff avers that the *"Ardrox 666 data sheet",* which is described as undated, is clearly dated 21 July 2006 and that: "*Critically page 7 of this data sheet was not included in the discovery".* The Plaintiff proceeds to aver that he managed to obtain a copy of page 7 himself which he describes as the most relevant page of the data sheet. He avers that *"it sets out the range of dangerous qualities of Ardrox 666"* and that *"if I had not managed to obtain this missing page myself, then I would not have known about the dangerous qualities of these chemicals".* When that issue was raised by the Plaintiff's solicitors in their 11 December 2020 letter, the

response, per the 5 January 2021 letter from the Defendants' solicitors was to say: "*Ardrox 666, in a bid to err on the side of caution to ensure no doubt as to compliance with the Order for discovery this document was uncovered in searches and was included in the discovery. We note you have a complete copy of this document. The Defendant is not obliged to provide you with anything other than an Affidavit of Discovery which was done. Both hard and soft copy documentation was provided to you in good faith in an effort to progress matters. There is absolutely no breach in respect of the Defendant's obligation to make discovery."*

92. At para. 19, the Plaintiff describes "*the Ardrox 670 data sheet*" as appearing to be "… *an amalgamation of various different documents, each of which are incomplete*" and he describes "*the relevant part of the data sheet"* as being "*largely illegible*". When the same issue was canvassed in correspondence, the Defendants' solicitors stated the following in their 5 January 2021 letter: *"Ardrox 670, this was the only information that was found and of which discovery is made".*

93. At para. 20 of his grounding affidavit, and with respect to "*the Red Penetrant Dye Data Sheets*", the Plaintiff avers that one of these is a product data sheet with irrelevant information, whereas the other is a valid safety data sheet. At para. 21, he goes on to aver that the "*most glaring omissions*" relate to the absence of any other safety data sheets. He avers that the Defendant should be in a position to procure same and makes reference to the averment by Captain Nic Caba which I have examined earlier in this judgment.

94. At para. 22, the Plaintiff makes inter alia the following averment: *"I can confirm (because I worked there personally) that the documents furnished by the Air Corps almost exclusively relate to <u>only</u> the ERF which was one location in which I worked."* He goes on to refer to a variety of different locations (including those which were listed in the Plaintiff's replies to particulars, to which I referred earlier in this judgment). The Defendants' response comprises the following averment at paras. 11 and 12 of Col. Moran's 15 February 2022 affidavit:

> *"11.The Plaintiff avers that paragraph 22 that an issue arises in respect of the geographical location of the documents which have been provided. This is fundamentally disputed.*
> *12. In so far as the Plaintiff raises this issue is it* (sic) *not even clear what issue the Plaintiff takes when he concedes the documentation is not exclusively limited to the ERF. For the avoidance of any doubt, I confirm the Defendant has made discovery in accordance with the order of the court".*

95. For the reasons set out in this judgment, I take the view that the Defendants have not made full and proper discovery, having regard to scope of the Supreme Court order and the Defendant obligations in that regard.

96. At para. 23 of the grounding affidavit, the Plaintiff avers that "*… in relation to the quantities of chemicals and solvents, it is quite apparent that an incomplete picture has been drawn too*." He goes on to aver that, due to his work in the relevant sections of the Air Corps at the material time, he is acquainted with the quantities of chemicals required in order to service the aircraft,

and he avers that: "*The documentation provided in this context clearly is incomplete and also relates solely to ERF again".* He proceeds to give an example with reference to a 'purchase spreadsheet' discovered by the Defendants which, he says, discloses the purchase of 50 litres of "*Ardrox 6025, an aircraft surface cleaner"* over a "*5-year period (e.g. the discovery period)*". The Plaintiff goes on to aver that "*If this were the case, then the entire Air Corps would have had only 1 litre per month to wash the entire fleet of approximately 50 aircraft. This is ridiculous and is not an accurate reflection of the quantity of chemicals and solvents purchased".* In response, Col Moran makes inter alia the following averments at para. 13 of his 15 February 2022 affidavit: "*The Plaintiff has been furnished with all relevant records from the Aircraft Maintenance Management Electronic Information System. There is no further documentation available to discover. It is not accepted the quantities gleaned from these records are ridiculous or do not accurately reflect the quantities of chemicals purchased. Chemicals such as Ardrox 6025 are used as and when needed for local cleaning and small applications. The contention that such chemicals would be required to 'wash an entire fleet' is a mischaracterisation of what this chemical is used for. The Plaintiff's contention regarding quantities of chemicals required to maintain the Air Corps fleet is disputed."*

97. This court is not in a position to resolve disputes of fact. Thus, this court cannot prefer what the Plaintiff has averred, over what is averred on behalf of the Defendants in respect of quantities or uses of a particular chemical. However, the averment that the plaintiff has been given "*all relevant records from the Aircraft Maintenance Management Electronic Information System"* says nothing about (i) searches of other potential sources, in particular, 'hard copy', as opposed to electronic sources and (ii) plainly ignores the potential availability of missing documents via third party sources.

98. Para. 25 of the grounding affidavit contains inter alia the averment that "… *during the course of these proceedings, certain documents have been located which are of relevance to these proceedings as well. One document contains some isolated pages that discuss certain chemicals in use in the Air Corps. It appears to have been a contemporaneous document to the events the subject matter of these proceedings. It is quite clear that someone was attempting, therefore, to analyse whether Air Corps personnel were being exposed to these chemicals and solvents were at risk. More importantly, the document confirms that these Air Corps personnel <u>were</u> at risk from chemical exposure yet adequate precaution was not taken. Similarly, another incomplete document has been located which similarly refers to various solvents and notes the toxic effects of same."* The Plaintiff exhibits copies of what he describes as these "*incomplete documents*" ("GT4") and proceeds to aver that the Defendants have neither made discovery of same, nor explained why this is so.

99. In response, the Defendants point out, not unfairly (*per* para. 15 of Col. Moran's affidavit) that it is entirely unclear how the Plaintiff reaches the conclusion that these documents are *"contemporaneous",* given that they are undated. It is also pointed out that the Plaintiff has not indicated where these documents "*came from or what they are".* Para. 25 of the grounding affidavit concluded with the following averments by the Plaintiff: "*It is not possible for me to*

know whether or not there are additional documents that the Air Corps are ***suppressing*** *from me which clearly have a direct and immediate impact on these proceedings. If the Air Corps commissioned or carried out investigations or reports to ascertain whether or not there was a danger to its employees (which they claim to know longer have) then an adequate explanation must be furnished"* (emphasis added).

100. Although I am satisfied that the Defendants have, to date, failed in their obligations to make discovery, it does not seem to me that the evidence goes as far as supporting a finding that the Defendants are suppressing documentation. One can well understand the Plaintiff's frustration, not least in circumstances where the initial request for voluntary discovery was made as long ago as 5 August 2015. However, having very carefully considered the entirety of the facts which emerge from the evidence, I cannot safely hold that there has been a wilful or deliberate failure to make discovery (as opposed to inadequate searches and a failure to seek documents from third parties).

101. At para. 26 of the grounding affidavit certain averments are made with respect to a Dr. Joe Kearney. During the hearing counsel for the Plaintiff indicated that this was no longer an issue in circumstances where non-party discovery had been obtained.

102. At para. 27 the Plaintiff makes reference to Tab 11 of Folder 1 of the discovery, as provided by the Defendants, which the Plaintiff describes as comprising *"the various safety standards pertaining to different areas of work at Baldonnel airfield".* The Plaintiff goes on to aver that there is a *"specific Defence Forces Safety Standard no. 6 in respect of 'Aircraft Workshops' ('DFSS6')"* and he avers that same is *"fundamental to the within proceedings*". At para. 28 of his affidavit, the Plaintiff avers that the cover sheet for DFSS6 is located at p.52 of 738 of the Defendants' discovery but, upon turning the page, "*it immediately skips to the following safety standard in respect of an irrelevant matter".* The Plaintiff proceeds to aver that approximately one year ago he received an envelope of health and safety documentation from *"a former Air Corps sergeant*", which included an intact version of DFSS6 and he exhibits a copy ("GT6") to contrast same with what has been discovered. At para 29, the Plaintiff avers that certain pages of DFSS6 *are* located within the discovery provided "*but located in entirely random locations in the middle of other safety standards"* and he proceeds to make the following averments: "*For example, at p. 68 of 738 of Tab 11, page 3 from DFSS6 is located. At p.69 of 738 of Tab 11, page 4, which relates to specific health and safety issues and chemicals used in relation to aircraft, is located. At p.72 of 738, page 5 is located which lists chemicals used which correspond to many of the chemicals that I believe I was exposed to. Of critical importance is the fact that sections 1 and 2 of DFSS6 do* <u>not</u> *appear to have been discovered, which are page 2 of the original DFSS6".* At para 30, the Plaintiff contends that there is no obvious explanation for why this happened, and he avers that he finds it *"suspicious"* that *"critical documents of high relevance to the proceedings appear to have been scattered and relocated in a different location to where they should have been".* The Defendants' response (per para 18 of Col. Moran's affidavit) is to say the following: *"In respect of the Defence Forces Safety Standard No 6. The Defendant fulfilled its obligation in making discovery. The Plaintiff takes issue with*

disorganisation of documentation furnished. This documentation was furnished to the Plaintiff in ease. I am advised this is not a requirement of discovery. I say by way of comment it is remarkable that, without identifying the individual concerned, that Plaintiff advises that a former Air Corps sergeant furnished him with a copy of this document".

103. Several comments seem appropriate to make with regard to the foregoing. First, although the Defendants are critical of the failure to identify the foregoing individual, it seems fair to say that the person or persons who carried out the searches which this court has found to be inadequate have never been identified. As I touched on earlier, this omission meant that the Plaintiff was never in a position to cross-examine a deponent with first-hand knowledge of what searches were and were not carried out. Going forward, this seems to me to be something which the Defendants must remedy. Second, although it causes obvious difficulties if parts of a single document appear at different places in a copy of discovery documentation, the obligation on the party making discovery is, having furnished the sworn affidavit, to facilitate inspection. Thus, any disorganisation of copies furnished to the Plaintiff does not seem to me to add any weight to his application. Third, insofar as the Defendants have made discovery of any incomplete document, it behoves them to provide, on affidavit, as fulsome an explanation as possible regarding why this is so.

104. I have referred to the various issues raised by the Plaintiff given that the first relief sought in the motion is to dismiss the Defendants defence. It is accepted by both sides that the jurisdiction to strike out a defence pursuant to O.31, r.21 is discretionary and a power to be exercised sparingly. It should be exercised only where wilful default or negligence has been established (see Hamilton CJ in *Mercantile Credit Company of Ireland Limited v Heelan* [1998] 1 I.R. 81, p.85; and *Murphy v J Donohoe Limited (No. 2)* [1996] 1 I.R.123 (p.142)). In *Murphy v. Donohoe* the Supreme Court made clear that: -

> "*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 order 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 strike out the Defendant's defence. But such cases will be extreme cases".*

105. In *Ward v An Post* [2021] IEHC 470, I summarised the position in the following terms (at para. 365):

> *"This court's power to strike out a defence is a discretionary one. It is not an obligatory power. At the risk of oversimplifying the principles which emerge from the relevant authorities, the following is a summary of the proper approach to the exercise by this Court of its power to strike out a Defence under O.31, r.21. It should not be exercised unless at least the following is established: firstly, the court must be satisfied that there has been a failure to comply with an order for discovery and, secondly, that such a failure is culpable in*

the sense of being deliberate and wilful having regard to all the circumstances and, thirdly, that the interests of justice require it." (para. 365).

106. Having carefully considered the evidence in respect of each of the issues raised by the Plaintiff, I am satisfied that there has been a failure to comply with the Supreme Court's order for discovery. However, I am not satisfied that this failure is culpable in the sense of being deliberate and wilful having regard to all the circumstances. In my view the facts which emerge from a careful consideration of all the evidence in the present motion does not allow for a finding that the Defendants are (to quote Hamilton C.J. in *Mercantile Credit Company of Ireland Ltd. v. Helehan* [1998] 1 IR 82; at p. 85) "*endeavouring to avoid giving the discovery*".

107. Later, in my judgment in *Ward v An Post* I stated the following (from paras. 370 to 372):

"370. To strike out a party's Defence for failure to make discovery is a measure which could only be taken in cases considered to be "extreme" or at the extreme end of the scale in terms of wilful and culpable refusal to make discovery was concerned and, even then, only if the court was satisfied that a Plaintiff would not be able to have a fair trial or where the evidence allowed the court to conclude that there was a realistic prospect of a fair trial being impossible, due to the other party's wilful refusal…

371. Even where a court found that a party failed, wilfully, to make discovery, natural justice requires that such a party be provided an opportunity to make further and better discovery, so as to remedy the failure, with appropriate costs orders being made in that context…

372. As Clarke J. (as he then was) put it in Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance Plc and Anor [2010] 4 I.R. 1, at paras. 20 and 21:

> *'20. 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 consequence of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned.'"*
>
> *21. 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 central relevant information, and where it will 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 court's decision on the merits of this case.' "*

108. The facts which emerge from the evidence in this case do not allow me to conclude that the Defendants' failure to comply with their discovery obligations amounted to a *deliberate* attempt to deprive the Plaintiff (and, as a consequence, a trial judge) of relevant documentation or information. Therefore, this court would not be justified in taking a particular view on the issues to which the information refers such as would allow the failure to make discovery to determine the *merits* of the underlying proceedings (something which would occur if the Defence was struck out). Even if I am *wrong* in the view that the Defendants' failure comply with its discovery obligations was *not* wilful, deliberate, or culpable, it seems to me that a fair trial remains possible and, therefore, it would not be appropriate to grant the first of the reliefs sought by the Plaintiff.

Further and Better Discovery

109. It is clear that, in correspondence, the Plaintiff's solicitors highlighted deficiencies in the Defendants' approach and these deficiencies were also averred to by the Plaintiff in his grounding affidavit. Despite this, (i) no further *searches* appear to have been carried out in response to the concerns (in particular searches via third parties); (ii) no further *documents* were furnished (despite the Plaintiff drawing the Defendants' attention to Captain Nic Caba's averment that "*The Defendants are in a position to make discovery of the material safety data sheets in respect of the chemicals utilised at Casement Aerodrome"* during the relevant period); and (iii) the replying affidavit sworn by Col. Moran in opposition to the present motion makes perfectly clear that no third parties had even been *contacted*. Therefore, I do not see that this Court can hold that there is no likelihood of the existence of other relevant, but as yet undisclosed, documents.

110. A careful consideration of the evidence in this motion does not support a finding that proper discovery will not be made *if* an opportunity is afforded to the Defendants to do so. To take a practical example, it seems clear that the Defendants' failure to make proper discovery stems from genuinely–held beliefs that (i) they are under no obligation even to contact third parties who may hold relevant documents coming within the categories which the Supreme Court has ordered them to discover; and (ii) that even if third party suppliers provided duplicates of what, according to the records of those suppliers, was furnished to the Defendants at the relevant time, the latter can exclude these documents from discovery on the basis that it is not possible for the Defendants to *verify* with *certainty* that these constitute copies of the documents the Defendants once held. For the reasons set out in this judgment, I regard these beliefs as mistaken, but there is no evidence which would allow for a finding that the Defendants would not comply, *bona fide,* with an order for further and better discovery, if made.

111. In other words, just as there is no evidential basis for a finding that there has been a deliberate attempt to avoid discovery obligations, this court cannot legitimately take the view that to order further and better discovery would be a futile exercise (i.e. could not render a fair trial possible). Not having found that there has been a wilful evasion of discovery obligations on the part of the Defendants, to *date* (as opposed to genuinely but mistakenly held views as to their obligations) I do not believe that this court can hold that there would be a wilful evasion in the *future* of discovery obligations.

112. In the Court of Appeal's decision in *Hireservices Ltd. v. An Post* [2020] IECA 120, Murray J stated the following with respect to the appropriate test concerning the making of an order for further and better discovery: -

> *"[13] The legal test in this regard is clear. Further and better discovery will only be directed where it has been shown that there are documents which the party that has made discovery was required to discover, but has not discovered, and/or that the person making the affidavit of discovery has misunderstood the issues in the action and/or that his view as to whether documents are outside his discovery obligation was wrong. (Sterling Winthorp Group Limited v. Farben Fabriken Bayer AG [1967] IR 97 at pp.100, 103 and 105; O'Leary v. Volkswagen Group Ireland Ltd. [2015] IESC 35 at para. 56)".*

113. The foregoing test is met in the present case, in my view (just as I am satisfied that the test *per* the decision in *Sterling Winthorp Group Limited v. Farben Fabriken Bayer AG* has been satisfied). The evidence establishes, on the balance of probabilities, that documents exist which the Defendants were required to discover, which have not been discovered (e.g. because (i) third parties have not been asked for same and (ii) because, having averred that the Defendants were in a position to make discovery of all safety data sheets, the latter have not been included and, thus, searches to date must have been inadequate – absent an averment from Captain Nic Caba that her prior confirmation to the court was not correct and absent a full explanation as to why the factual basis for the prior averment was lacking).

114. For the foregoing reasons, I am satisfied that the proper approach by the court to this motion is to make orders which address the consequences of the failure to make proper discovery to date, as well as to make an appropriate costs order which recognises the failure on the Defendants' part to make discovery, despite requests which were made in correspondence to comply with the relevant obligations (See *Mercantile Credit Company of Ireland Ltd v Heelan* [1998] 1 I.R. 81 , at p.85; *Murphy v J. Donohoe Ltd (No.2)* [1996] 1 I.R. 123, at p. 142; and *Go2CapeVerde Ltd v Paradise Beach Turistico Algodoeiro S.A*. [2014] IEHC 531, at para 27). This will be in the form of an order directing further and better discovery.

Relevant legal principles

115. Although their legal advisers will be very well aware of the principles, it seems important - given the Defendants' failure, thus far, to comply fully with its discovery obligations - to draw the attention of the Defendants to the well-known decision in *Compagnie Financiere du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55, wherein Brett L.J. made clear that a document relates to the matters in question in the action "*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".* The foregoing can be contrasted with averments made on behalf of the Defendants to the effect that safety data sheets which they once had cannot be ***"specifically identified with certainty".*** The aim of litigation is to deliver a just result. However, the civil standard is not one of certainty, but of the balance of probabilities. That is not to suggest that there is an obligation to search for

irrelevant material, but, to take a practical example, it seems to me to be illegitimate for a Defendant to say that it should not make discovery of a safety data sheet which, according to the records of a third party supplier, is a duplicate of what accompanied a given chemical sold to the Defendants in the relevant period (January 1990 – February 1994) on the basis that he Defendants cannot verify, with certainty, that this is the specific safety data sheet it once had but subsequently lost or destroyed. Yet that seems to be precisely the attitude of the Defendants in the present motion. I say this give the following averments made by Col Moran at para. 8 of his 15 February 2022 affidavit:

> *"…at this remove, namely 30 years after the period to which discovery relates it would not be possible to **verify** if documentation obtained in the manner suggested by the Plaintiff was documentation which was once held by the Defendant. For that reason, the obligation which the Plaintiff seeks to impose on the Defendant does not arise. The Defendant cannot make discovery of documents which it cannot say with any degree of **certainty** that it falls within the discovery ordered. What may be… furnished by historical suppliers may not be the documentation which was held by the Defendant."* (emphasis added).

116. Two comments seem appropriate with regard to the foregoing averments. First, the reason given in para. 8 for resisting the Plaintiff's suggestion that missing documents be sourced from third party suppliers is not because the Defendants assert that they have no entitlement to seek same. Rather, it is because, if missing documents are furnished by suppliers, the Defendants assert that they could not *verify* with sufficient *certainty* that these were in fact the documents they once had. Second, the logic of that proposition would apply to a wide range of situations. What the Defendants appear to be arguing is that even if a third party supplier were to furnish, say, a dated copy of their letter, invoice and safety data sheet, as sent during the period January 1990 to February 1994, with respect of the sale of particular chemical, purchased for use at Casement Aerodrome, Baldonnel, the Defendants could not verify with certainty that these comprised copies of the originals and, thus, they should not be discovered (presumably, runs the Defendants' logic, being of no probative value). I feel bound to reject that proposition which, if correct, would seem to undermine the very basis for the obligation to seek from third parties documents one has a right to obtain.

117. Again, for the benefit of the Defendants, not their legal advisers, their attention is also drawn to further statements of principle. The court, in *Marie Taylor v Clonmel Healthcare Ltd* [2004] 1 IR 169, observed that "*discovery is with a view to fighting the case. It is to provide a party with the necessary additional ammunition to enable him or her win his or her case*". The vital role played by discovery in the pursuit of justice was put in the following terms in *AIB Banks plc & Anor. v Ernst and Whinney* [1993] 1 IR 375 wherein Finlay CJ observed that discovery is:

> *"… to ensure as far as possible that the full facts concerning any matter in dispute before the court are capable of being presented to the court by the parties concerned, so that justice on full information, rather than limited or partial revelation of the facts arising in a particular action, may be done."*

118. The correspondence which preceded the present motion, and which I have referred to earlier, comprised (i) a letter of 11 December 2020 from the Plaintiff's solicitor in which issues were raised concerning the Defendants' affidavit of discovery; (ii) a response dated 5 January 2021 in which the Defendant solicitors did not accept that there were any deficiencies; and (iii) a further letter of 28 July 2021, repeating the Plaintiff's concerns and threatening the present motion. The said letter from the Plaintiff's solicitors, dated 28 July 2021, stated, inter alia, without prejudice to the Plaintiff's right to proceed by way of the present motion, that:

> *"… it would clearly facilitate the issues arising in this litigation if the State (and a deponent with the most appropriate means of knowledge) filed a supplemental affidavit in the following terms:*
>
> 1 *Verifying an exhaustive list of chemicals used at Casement Aerodrome at the material time and their dangerous properties;*
> 2 *Verifying the quantities of those chemicals in use at Casement Aerodrome at the material time…"*

119. As I observed earlier, there can be no criticism of the Defendants for putting the Plaintiff on 'full proof'. Nor can the Defendants be criticised for declining the aforesaid invitation to provide a list of all chemicals used at Casement Aerodrome at the relevant time. However, given that this has been the stance adopted by the Defendants, it was and is perfectly legitimate for the Plaintiff to insist that, in the context of making discovery, the Defendants discharge all obligations resting on them, in particular, with respect to (i) adequate searches, including (ii) searches *via* third parties and (iii) providing detail and transparency in relation to any missing documents as well as (iv) a deponent or deponents who can 'stand over' averments made on behalf of the Defendants based on first-hand knowledge, lest an application be made to cross examine them.

<u>In conclusion</u>

120. If, as is contended on behalf of the Defendants, the appropriate outcome to this motion is for the court to refuse all relief, what are the likely consequences? The answer to that question seems worthy of comment given that, even if one were to focus exclusively on missing safety data sheets, the *status quo* is that certain documents, which are acknowledged by the Defendants to be relevant and necessary to the fair determination of the matters at issue in these proceedings (i.e. safety data sheets) have not been furnished. That being so, it seems entirely possible, if not probable, that in the wake of a refusal of relief, the plaintiff would be required to seek the self-same category from a third party or third parties by way of an application or applications for non-party discovery. To do so, it seems entirely conceivable that the plaintiff would first seek particulars from the Defendants of the names and addresses of all third parties who supplied chemical products for use at Casement Aerodrome during the relevant period (January 1990 to February 1994, inclusive). Any delay or refusal to furnish such information could well give rise to a contested motion, involving delay and costs. Assuming the foregoing information was provided promptly and without objection, it would still involve further delay and costs to bring non-party discovery applications with respect to documents (in this

example the safety data sheets) held by each third-party supplier of chemical products. The foregoing is not to say that practical difficulties facing a plaintiff insofar as obtaining relevant documents from third parties create an obligation for a Defendant to make discovery of same where no such obligation previously existed. It is, however, to highlight the 'downstream' consequences of what I regard as an unreasonable stance being adopted by the Defendants. In other words, the relief I am granting today is not only consistent with the obligations imposed on the Defendants by reason of the Supreme Court's order, it also has the practical benefit of the potential to minimise a waste of time and resources, including scarce Court resources, given that it uncontroversial to say that what has not been furnished to the plaintiff, thus far, includes highly relevant documents.

121. As I stated in *McNally v Molex Ireland Ltd* [2022] IEHC 556 *"There are three 'moving parts' which a party subject to discovery obligations, and their solicitors, must keep ever in mind (i) the scope of the discovery order; (ii) the potential sources of documents and (iii) the adequacy of searches which must, of course, be extensive enough to reflect (i) and (ii)".* The foregoing seems worthy of repetition here. By the same token, the fact that a *large* volume of material has been furnished by way of discovery does not, of itself, prove that *adequate* searches have been undertaken.

122. In the present case, the court was provided with 3 folders of paginated discovery documents comprising a total of 1221 pages. However, *adequacy* can only be determined with reference to the specific *obligations* created by the Supreme Court's order and, quite apart from any other matter, it seems to me that the failure even to make enquires from third parties allows for a finding that inadequate searches have been made and the Defendants' discovery is inadequate. Without purporting to be an exhaustive summary of this court's findings, the following comprises certain important points which have been discussed in greater detail in this judgment.

123. The Supreme Court's order did not restrict in any way the searches to be carried out. It is not clear who carried out the searches; what instructions they were given; what searches were in fact carried out (i.e. whether they were of all physical, as well as electronically available, documents); and whether the searches were in respect of all relevant locations (i.e. of every 'shop' in which the Plaintiff worked within Casement Aerodrome). The evidence before this court allows for a finding that searches have been inadequate.

124. With reference to what Order 31 requires, there has been a failure to list in the Second Schedule, with reference to different chemicals purchased, those documents which the Defendants once had but no longer have (a prime example being product–specific safety search sheets). There has also been a failure to conduct searches via third parties for relevant documents.

125. The Plaintiff's solicitors wrote to the Defendants' solicitors highlighting their concerns, seeking explanations, and making clear that the present motion would issue if the concerns were not addressed. The Defendants did not address the concerns and, lacking any deponent whom the Plaintiff could meaningfully cross–examine, it was entirely understandable why the present

motion issued. It was appropriate for the Plaintiff's legal representatives to raise, in correspondence, the deficiencies with respect to the affidavits sworn, before issuing this motion. In response, the Defendants' contended in correspondence that there were no deficiencies in the discovery process and this was the basis upon which the present motion was opposed, but unsuccessfully, as regards the alternative (second) relief sought.

126. It is fair to say that during the hearing before me, the plaintiff did not lay particular emphasis on the first relief sought. On the contrary, Counsel for the Plaintiff submitted that if the Court were to accept that the Defendants' discovery had deficiencies, the plaintiff's position is that it would be appropriate for the Defendants to be afforded a final opportunity to make full and proper discovery. In circumstances where I take the view that a fair trial remains possible, it seems to me that the appropriate relief for this court to grant is the alternative relief which the Plaintiff has sought. This will require the Defendants to comply, in full, with the Supreme Court's order, by means of an order made by this court directing further and better discovery. Proper compliance with the Supreme Court's order by the Defendants must include addressing the deficiencies highlighted in this judgment. This is because the discovery ordered by the Supreme Court is critical to the fair disposal of the proceedings.

127. The court was also informed that there are other proceedings of a similar type brought by other members of the Air Corps. The fact that this was described as a 'test case' does not alter the approach taken by this court to the issues, but it does underline the importance of proper compliance with discovery obligations.

128. By way of a *non–exhaustive* list, it seem to me that, in light of the Supreme Court's judgment and order, the Plaintiff was entitled to expect at least the following in any affidavit of discovery furnished by the Defendants (and, similarly, the Plaintiff is entitled to expect at least the following, in the context of the order for further and better discovery which this court shall make):-

(i) confirmation that all relevant searches had been conducted for both physical and electronic-stored documents;

(ii) confirmation that the said searches had been conducted in respect of all locations within Casement Aerodrome;

(iii) the identification of the person(s) who carried out these searches and the instructions given to them;

(iv) details of precisely what those searches entailed;

(v) confirmation that all potentially relevant third parties were identified and that adequate searches, via enquiries with all third parties who may hold duplicates of missing documents (e.g. copy sale/purchase records of chemicals and copy safety data sheets regarding each sale/purchase) were carried out;

(vi) to the extent that (after all relevant searches had been properly conducted) documents were said to be missing, lost or unavailable, details of *what* documents were, but no longer are, in the Defendants' possession, *when* they ceased to be in the Defendants' possession, *why* they are no longer in the Defendants' possession,

what became of same, and an account of the efforts made to locate the original/source a copy;

(vii) details of all efforts to track down lost or missing documents via other means, in particular, from third parties;

(viii) an affidavit or affidavits sworn by deponent or deponents who can 'stand over' the foregoing.

129. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

130. The parties should correspond, forthwith, with regard to the precise terms of the order to be made, reflecting the findings in this judgment and should submit an agreed draft to the Registrar within fourteen days. Given that this court has found the Defendants' discovery to be deficient and is satisfied that an order should be made in terms of the relief sought at paragraph 2 of the Plaintiff's motion, this is an application in which the Plaintiff has been entirely successful and it seems to me that there are no facts or circumstances which would justify a departure from the 'normal rule' (which was given statutory expression in Section 169(1) of the Legal Services Regulation Act 2015) that 'costs' should 'follow the event'. In the event of any dispute between the parties as to the terms of a final order, short written submissions should be filed within a period of 21 days from the date of this judgment.