

**THE HIGH COURT
COMMERCIAL**

[2022] IEHC 34

[2020/2194P]

BETWEEN

**AVONCORE LIMITED AND CANMONT LIMITED t/a DOUGLAS SHOPPING
CENTRE**

PLAINTIFF

AND

**LESSON MOTORS LIMITED, ADAM OPEL GMBH, OPEL AUTOMOBILE GMBH
And VAUXHALL MOTORS LIMITED**

DEFENDANT

AND

NAGHAM MOHSEN

THIRD PARTY

AND

**THE HIGH COURT
COMMERCIAL**

[2020/5895P]

BETWEEN

**CALLISTOY LIMITED
AMARI SHOES LIMITED
SHEEHAN BROTHERS FAMILY BUTCHERS LIMITED
LAYERED APPROACH LIMITED
NEVILLE JEWELLERS LIMITED**

PLAINTIFF

AND

**OPEL AUTOMOBILE GMBH, ADAM OPEL GMBH, LESSON MOTORS LIMITED,
NAGHAM MOHSEN, CANMONT LIMITED AND AVONCORE LIMITED**

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 26th day of January, 2022

INTRODUCTION

1. This case involves a fire in the Douglas Village Shopping Centre (the “Shopping Centre”) in Cork on the 31st August, 2019, which received a lot of publicity at that time. It was alleged to be caused by a 2006 Opel Zafira B (“the Vehicle”) going on fire and in resulting in alleged losses of over €50 million.

2. While this judgment is in relation to two sets of proceedings arising from the fire, which are being heard together, this Court has been advised that there are in fact 15 sets of proceedings already in existence, with an estimated eight further sets of proceedings yet to be instituted.

3. In broad terms, the first of these two sets of proceedings is being taken by the owner/operator of the Shopping Centre for losses caused by the fire, while the second set of proceedings is being taken by the tenants of the Shopping Centre for the losses they suffered. The manufacturer/distributors of the Vehicle are defendants in both sets of proceedings, while the driver of the Vehicle is a third party in the first set of proceedings but a defendant in the second set of proceedings. The owner/operator of the Shopping Centre is also a defendant in the second set of proceedings.

4. It is alleged that the Vehicle was parked on the second floor of the multi-storey car park in the Shopping Centre by the driver of the Vehicle, Ms. Mohsen, (“the Driver”), when it went on fire. It is further alleged that the fire then spread to adjacent cars, causing significant damage. The heat from the fire then caused structural damage to the car park, leading to the closure of the Shopping Centre and its subsequent reconstruction and re-opening over a year later on the 12th November, 2020.

5. As noted hereunder, there is a dispute about who is responsible, firstly for the start of the fire and secondly its spread, whether that be the Driver, the plaintiffs in the first set of proceedings (together the “Owners”) who are the owners and operators of the Shopping Centre, or the defendants who are the manufacturer and distributors of the Vehicle, or indeed some other party.

6. Liability is hotly contested, with allegations by the Owners that the manufacturer/distributors of the Vehicle were reckless regarding the safety of others, while the manufacturer/distributors allege that the Owners failed, *inter alia*, to have sprinklers in the car park in breach of the relevant fire regulations. They say this omission is the difference between a fire which destroyed one car and a fire which destroyed the Shopping Centre. Added to all of this are claims that the Driver is in fact liable for the fire as she allegedly failed to return the

Vehicle for its recall inspection. On top of this is the fact that the manufacturer/distributors say that relevant to the cause of the fire is the fact that the Driver had the coolant engine system repaired in the Vehicle on the eve of the fire (which information was shared between the Driver and the Owners, who are insured by the same company, some 18 months before it was disclosed to the manufacturer/distributors).

7. A further peculiarity of this case arises from the fact that the two sets of proceedings are being heard together, combined with the fact that the insurer for the Owners is also the insurer for the Driver (i.e. AIG). Accordingly, as AIG is running the litigation on behalf of the Owners and the Driver, it could be regarded in some respects as, in effect, acting as plaintiff and defendant (since in the combined hearing the Owners will be plaintiffs and the Driver will be a third party and a defendant).

8. It is against this rather complex backdrop that the discovery applications fall to be considered.

BACKGROUND

9. Beginning on the 23rd November, 2021, this Court heard four discovery motions over a four day hearing in relation to the two sets of proceedings, which are being case managed together and are to be heard together, arising from this fire.

First motion for discovery

10. The first motion forms part of the proceedings (the “Owners’ Proceedings”) taken by the Owners against the first, third and fourth defendants, who are both the sellers of the Opel Zafira B model (“Zafiras”) and the parties allegedly involved in its recall (collectively referred to as the “Distributors”). The second defendant is the manufacturer of the Opel Zafira B (“the Manufacturer”). The Distributors and the Manufacturer are together referred to as the “Car Defendants”.

11. In this first motion, the Owners seek discovery from the Car Defendants.

12. In this regard, it is clear from the pleadings that the Manufacturer is alleged to have negligently designed and manufactured the Zafira and so it is claimed that the Manufacturer is responsible for the fire in the Shopping Centre.

13. The Distributors are alleged to have distributed the Zafira in Ireland and to have been involved in its negligent recall and so are also alleged to be responsible for the fire.

14. The Driver was joined by the Distributors as a third party to the Owners’ proceedings and Third Party Statements of Claim have been filed against the Driver by the Car Defendants alleging negligence regarding her failure to ensure that the Vehicle was free from defects as well as her failure to return the Vehicle for inspection as part of a recall of the Zafiras.

15. The interests of the Distributors and the Manufacturer are very much aligned, insofar as they both allege that the Owners, through alleged fire safety failings, and the Driver, through

her failure to return the Vehicle as part of the product recall, are the ones liable for the fire. The Distributors and the Manufacturer were previously under common ownership, however now the ultimate owner of the Distributor is PSA Groupe /Stellantis N.V (who also own Peugeot), while the ultimate owner of the Manufacturer is General Motors. Accordingly, these defendants are separately represented in these proceedings.

Second and fourth motion for discovery

16. The second motion for discovery also forms part of the Owners' Proceedings and is a discovery motion by the Manufacturer against the Owners.

17. The fourth motion is also part of the Owners' Proceedings and is one in which the Distributors seek discovery from the Driver.

Third motion for discovery

18. The third motion for discovery forms part of the second set of proceedings. These were instituted by a group of occupiers of retail units (the "Tenants") in the Shopping Centre. In these proceedings (the "Tenants' Proceedings"), the Tenants are suing the Manufacturer, the Distributors, the Owners and the Driver for the losses caused to them as a result of the fire.

19. This motion is one in which the Manufacturer seeks discovery from the Tenants.

Hearing on liability only

20. These four discovery applications deal only with liability issues, since they relate to a trial which is to be held on liability only. This is because it has been agreed that the question of liability for the fire will be dealt with first between all the parties, before considering, if necessary, quantum at a separate hearing.

21. The discovery motions are being brought, or resisted, by a lead party. However, McDonald J. (in *Avoncore Limited and Anor. v. Leeson Motors Limited and Anor* [2021] IEHC 163) has ordered that discovery is to be shared amongst all the relevant parties to the two sets of proceedings in the interests of saving on court time and costs.

The issue at stake: who is liable for (a) the start and (b) the spread of the fire?

22. Before considering each of the motions, it is important to bear in mind the respective claims of the parties as set out in the pleadings. In this regard, there are very different perspectives as regards the party that is responsible for the *start* of the fire in the Vehicle, whether that be the Driver or the Car Defendants, or the *spread* of the fire, whether that be the Car Defendants, the Driver or the Owners.

The start of the fire

23. As regards the *start* of the fire, on the one hand, the Owners point out that there was an issue with the heating and ventilation system ("HVAC") in Zafiras which led to their recall. For their part, the Car Defendants point out that on the eve of the fire, the Driver had the engine coolant system in the Vehicle repaired by Auto Mechanic, a repair garage in Cork, and her husband was told to check the coolant level in the Vehicle on the morning of the fire.

24. The Car Defendants also point out that the Driver did not return her Vehicle for inspection/repair as part of recalls carried out by the Car Defendants. For her part, the Driver claims that she did not receive the relevant recall notices and in this regard there is a claim in the proceedings that the Distributor negligently conducted the recall.

The spread of the fire

25. As regards the *spread* of the fire, the Manufacturer claims that the Owners of the Shopping Centre failed to comply with the relevant fire regulations by, *inter alia*, not having fire sprinklers in place. The Manufacturer claims that if there had been sprinklers, one would now be dealing simply with a case of a 13 year old car that went up in flames, not with a €50 million claim for damages.

26. In very general terms therefore, before considering the terms of the discovery being sought, it is clear that a complex and high value dispute arises concerning whether the Driver, the Owners or the Car Defendants, or a combination of some or all of those parties, or indeed some other party, is responsible for the damage which arose from the fire.

27. It is also relevant to note that in December 2019 a joint investigation (“Joint Investigation”) into the cause of the fire was initiated by AIG, the insurer of the Owners and the insurer of the Driver. This investigation involves experts on behalf of all relevant parties, including on behalf of the Car Defendants. This investigation has not yet been finalised. It is likely that the results of this Investigation (and the opinions of the experts involved therein), will be an important factor in the trial judge’s determination of the cause of the fire and perhaps its spread.

The Owners’ Proceedings

28. Before considering the categories of discovery, some reference should be made to the pleadings in the Owners’ Proceedings.

29. The pleadings in the Tenants’ Proceedings are not identical but in broad terms they make similar claims of negligence and breach of duty against the Car Defendants as are made by the Owners. In addition, the Tenants make claims of negligence against the Owners regarding fire sprinklers and fire safety, which are in similar terms to those claims of contributory negligence made by the Car Defendants against the Owners in the Owners’ Proceedings.

30. The Statement of Claim in the Owners’ Proceedings contains two main allegations. The first is that the Car Defendants manufactured the Vehicle in 2006 in a defective manner such as to create a fire risk. Paragraph 6 of the Statement of Claim states:

“The Zafira B (which for the avoidance of doubt included the Vehicle) was manufactured and **designed with a defective heating and ventilation system** (“the HVAC System”). The HVAC System comprises a number of components, including but not limited to (1) the heater blower motor (the “Blower Motor”) and (2) a resistor pack (the “Resistor Pack”). The Resistor Pack is comprised of three resistors and a thermal fuse (the “Thermal Fuse”). The Blower Motor can be operated on four different speeds. The Resistor Pack controls the speed of the fan in the Blower Motor when set

to speeds 1, 2, or 3. Therefore, when the Blower Motor is set to speeds 1, 2 or 3, the current to the Blower Motor flows via the Resistor Pack's Thermal Fuse. When set to speed 4, the maximum speed, the current to the Blower Motor flows via the Resistor Pack, but the Thermal Fuse is bypassed and protection provided by a 40amp fuse. If the fan stalls or is stiff due to corrosion, insufficient airflow across the Resistor Pack and increased current causes increased temperature in the Resistor Pack. Under certain conditions the Thermal Fuse in its original condition could fail to operate as expected thus resulting in fires. **The design of the Zafira B made the Blower Motor more particularly susceptible to corrosion creating a very serious fire risk in this model.**" (Emphasis added)

31. It is to be noted that the claim by the Owners is not just that the Vehicle driven by the Driver on the day of the fire was manufactured and designed negligently, but that the Zafira B model of car generally on sale at that time was negligently designed. This is because at para. 22 of the Statement of Claim, it is stated that:

"Further and in the alternative the [Car Defendants] were aware at all made material times that their initial investigation of the fires in the Zafira B vehicles did not identify all the failings that could cause a fire and that led to fires occurring in Zafira B vehicles that had been returned to their original equipment condition following the first recall. The [Car Defendants] failed to inform the Zafira B vehicle owners in Ireland and/or the regulatory/safety authorities of this. Further, the [Car Defendants] failed to inform the [Driver] of this. The [Car Defendants] continued to be aware that, despite the subsequent recalls, the Zafira B vehicles continued to be defective and dangerous and deliberately and/or recklessly failed to adequately address the problem or to adequately notify all owners."

32. Thus, the Owners claim that the Car Defendants showed reckless disregard for the safety of drivers of Zafiras in their handling of the recall.

33. At para. 7 of the Statement of Claim it is stated:

"Poor fitment of the scuttle panel cover against the windscreen/bulkhead allowed water/moisture ingress to the scuttle panel area, which is located in the vicinity of the air intake to the HVAC System. In addition water/moisture could also enter the scuttle panel area through the air vent in the scuttle panel cover. Water/moisture enters the scuttle panel area and in turn enters the blower motor air intake ducting and the water/moisture then enters the blower motor. The blower motor was mounted vertically with no escape route for the water/ moisture. **The water/moisture could corrode the blower motor bearing causing the motor to resist rotation which resulted in the overheating of the HVAC System's components and the potential for a fire.**" (Emphasis added)

34. This is one of the key claims in the case, namely that Zafiras were designed in a way that allowed moisture to infiltrate the scuttle panel area in the vicinity of the HVAC system in the cars. It is claimed that this moisture in the scuttle panel area then in turn entered the Blower Motor and it corroded the Blower Motor, thus making it resistant to rotation, which led to less air circulating and therefore overheating, which allegedly led to the fire in this case.

35. As is clear from para. 22, the second key claim is that the Car Defendants were aware of the fire risk attaching to the Vehicle, yet they negligently engaged in a series of product recalls which were insufficient to prevent the resulting fire in the Shopping Centre.

The first recall

36. At paras. 9 and 10 of the Statement of Claim, the Owners alleges that the Car Defendants were too quick to conclude that they had identified the root cause of the fires in Zafiras and to attribute the problem to improper and unauthorised repair of the Thermal Fuse in the Blower Motor resistor. The Owners claim that the Car Defendants were aware that problems with the Blower Motor could give rise to a fire but that they misleadingly attempted to blame third parties. The Owners therefore claim that the first recall in 2015 relating to the Vehicle misleadingly stated that it was for the *‘repair of the Blower Motor resistor and its Thermal Fuse that could lead to overheating of the HVAC system’* (para. 12), when allegedly it should have stated that it was for the *replacement* of the Blower Motor. The Owners claim that the repair was carried out in a negligent fashion as it *‘did not replace the Blower Motor’* (para. 13) or otherwise deal with the corrosion of the Blower Motor’s bearing.

The second and third recalls

37. The Statement of Claim claims that the second recall in 2016 was to replace the thermal fuse resistor pack and address moisture ingress into the Blower Motor. It also claims that the third recall in 2019, which recall was before the fire in the Shopping Centre, related to the HVAC system. The Statement of Claim states at para. 17 that the notice for this recall

“stated that until the vehicle had the product safety recall carried out owners should not leave the vehicle unattended with the engine running.”

38. In relation to the second and third recalls, it is alleged by the Owners that the Driver was not notified of those recalls and that the Car Defendants failed to adequately notify owners of Zafiras in Ireland and ensure that they were properly notified of the danger which led to those recalls.

Role of Vauxhall in Opel Zafira claim?

39. The fourth defendant is Vauxhall Motors Limited, a company incorporated in the UK, which is being sued for its alleged role in the recall. It is not disputed by the Car Defendants that the Zafira B model was sold under the Vauxhall brand in the UK. For this reason, reference herein to Zafira is a reference to the Zafira B model sold under the Opel *or* Vauxhall brand.

40. In this regard, in relation to the Zafira recalls, the Owners allege, at para. 20 of the Statement of Claim, that during a recall in November 2018 in the United Kingdom of the Zafira, the owners of those cars were informed that they should:

“park vehicles away from any property as an additional precaution pending completion of the rework.”

41. The Owners claim that owners of Zafiras in Ireland were not so advised and that the recall in Ireland was therefore negligently handled. In this regard, while the Owners allege, at para. 5 of the Statement of Claim, that Vauxhall Motors Limited was responsible for the conduct and management of the recall of Zafiras in the UK, the Owners also allege that Vauxhall Motors Limited provided direction to and/or liaised with the first named defendant, Leeson Motors Limited, with regard to the recall of Zafiras in Ireland.

42. The Owners have been put on full proof by the Car Defendants of the pleaded case. In particular it is pleaded that the root cause of the fire in the Vehicle has not yet been determined, and they deny that there is a defect in the HVAC system and that this has or can cause fires in Zafiras.

43. The Car Defendants further claim that the Owners are guilty of contributory negligence, breach of duty and breach of statutory duty in relation to, *inter alia*, the design, construction, supervision, and management of the Shopping Centre, which caused the spread of the fire.

LAW REGARDING DISCOVERY

44. There is no dispute between the parties regarding the general principles applicable to discovery and both parties rely on, *inter alia*, the Supreme Court judgement in *Tobin v. Minister for Defence* [2020] 1 I.R. 211.

45. Each of the four individuals motions will now be dealt with in the order in which they were heard over the four days of hearings.

MOTION 1 - DISCOVERY SOUGHT BY OWNERS FROM CAR DEFENDANTS

46. The individual categories of discovery sought by the Owners from the Car Defendants are set out hereunder. In a number of categories, there is some agreement between the parties, subject to a dispute about the extent of the discovery. In this regard, the underlined words in the category hereunder references those terms which are sought to be inserted by the Car Defendants in the category being sought by the Owners, but not agreed by the Owners. The deleted words are those terms sought to be excluded by the Car Defendants from those categories, which are not agreed by the Owners. Where a category proposed by the Owners is rejected in full by the Car Defendants, this category is set out in full, without amendment.

47. The Owners sought 23 categories of discovery from the Car Defendants. Eleven of these categories remain in dispute. Several categories in dispute are subject to the same arguments, i.e.

- (i) discovery of left-hand drive vehicles, and not just-right hand drive vehicles,
- (ii) discovery of documents relating to Zafiras manufactured in years other than 2006 (which is the year of manufacture of the Vehicle),
- (iii) the extent of the Car Defendant's internal documentation that the Owners should be entitled to discover, and
- (iv) discovery of documents relating to the UK recalls as well as the Irish recalls.

48. As these issues first arise, this Court will deal with them, but the resolution of the issue for one category will, in general, resolve the same issue for later categories.

Category 1

“Technical/ engineering specifications for the manufacture and/or design of the Heating and Ventilation System (the “HVAC”) system in right-hand drive Opel Zafira B vehicles manufactured in 2006, to include but not limited to: -

- (a) The original design specification for the Behr fan assembly.
- ~~(b) Accelerated aging/ salt spray tests/ weatherometer tests or similar on the motor/ complete fan assembly.~~
- ~~(c) Any testing or assessment of water ingress or splash for the final assembly as fitted.~~
- (d) Specification for the Bosch motor.
- (e) Specification for the circuit protection (body fuse and thermal fuse) for the HVAC blower to include any functional tests/ fault simulations.
- (f) Specification for the wiring harness to include maximum current assessment for connectors and conductors.
- (g) Failure Mode Effect Analysis conducted on the HVAC System.”

Left hand drive vehicles to be included?

49. As a general point in relation to the majority of the categories of documents in dispute, the Owners seeks not only documents relating to right-hand drive Zafiras (and it is not in

dispute that the Vehicle was a right-hand drive Zafira), but also documents relating to left-hand drive Zafiras.

50. In this regard, affidavit evidence has been provided on behalf of the Car Defendants that there have been 120 reported fires in right-hand drive Zafiras relating to the HVAC system, *albeit* with a variety of root causes. In contrast, affidavit evidence was also provided that, although there are three times as many left-hand drive Zafiras manufactured, there has been only one fire in those cars relating to the HVAC system, but that this fire was caused by an unauthorised manipulation of a fuse spring in the HVAC system. Affidavit evidence has also been provided on behalf of the Car Defendants referencing an enquiry by the UK Parliament House of Commons Transport Committee (published on 28th April, 2017) into Vauxhall Zafira fires. In that enquiry, it was confirmed that the issues, which were subject of the recall of Zafiras, did not affect left-hand drive models. Affidavit evidence was provided on behalf of the Car Defendants that this was because the location of the components in those left-hand drive models differs from that of right-hand drive models.

51. While the Car Defendants have sought to rely on this evidence to say that it is not necessary to consider documentation relating to left-hand drive Zafiras, since these did not go on fire, it seems to this Court that the difference in design between the right-hand drive Zafira and the left-hand drive Zafira could be relevant to determining the cause of the fire in right-hand drive vehicles.

52. However, more significantly, the Owners have provided expert evidence from Mr. Lee Masson (“Mr. Masson”) that documentation in relation to the left-hand drive Zafiras will assist with the identification of the mechanism and likelihood of the fire. He avers that the absence of a water trap in the right-hand drive Zafiras (in contrast to its presence in the left-hand drive Zafiras), might have prevented water ingress which allegedly corroded the blower motor bearings.

53. No expert evidence is provided on behalf of the Car Defendants to counter this averment. Rather, the Distributors’ solicitor (“Ms. Murphy-O’Connor) counters this averment by Mr. Masson by providing hearsay evidence in her second affidavit dated 12th October, 2021, that:

“[I] am advised that the reason left-hand drive vehicles were fitted with a water trap in the blower housing was because a water reservoir was not available”.

54. The furthest that the Distributors were prepared to go regarding countering Mr. Masson’s expert evidence was that they had one of their quality engineers (Mr. Thomas Rimasch) and a quality manager (Mr. Bernd Schuster) swear an affidavit dated 11th August, 2021 which states:

“With regards to Ms Murphy-O’Connor’s affidavit, **to the extent matters set out therein are within our knowledge**, we confirm them to be true and accurate, based on the best of our knowledge, expertise and the books and records of Opel Automobile GmbH.” (Emphasis added)

55. However, firstly it is to be noted that this ‘confirming’ affidavit by the engineer and quality manager is sworn on the 11th August, 2021 and so can have no relevance to Ms. Murphy-O’Connor’s second affidavit dated 12th October, 2021 in which she refers to the hearsay evidence. Secondly, the confirming affidavit is of limited relevance in the context of the various averments made by Ms. Murphy-O’Connor in her first affidavit, since it is subject to the major caveat of being ‘within our knowledge’. It is impossible to decipher which averments may or may not be within the knowledge of Mr. Rimasch and Mr. Schuster. Accordingly, it is not possible for this Court to treat the hearsay evidence of Ms. Murphy-O’Connor as being on a par with Mr. Masson’s expert evidence and thus as sufficient evidence for this Court to conclude that the discovery of these documents is not necessary.

56. In these circumstances, this Court concludes that discovery of the left-hand drive Zafira documentation, as well as right-hand drive documentation, is relevant to the dispute between the parties, namely whether, as claimed at para. 6 of the Statement of Claim, the Zafiras were manufactured with a defective HVAC system.

Restriction to 2006 vehicles?

57. As a second general point in relation to category one (and other categories of documents in dispute), the Owners seek documentation pertaining not just to vehicles manufactured in 2006, which is the year that the Vehicle was manufactured, but also documentation relating to the manufacture of all Zafira vehicles without limit, which period of manufacture was from 2005 to 2014.

58. It is first relevant to note that the argument, used by the Owners to support discovery of documents relating to left-hand drive vehicles (as well as right-hand drive vehicles), does not arise regarding discovery of the non-2006 documents (as well as the 2006 documents).

59. This is because there has been no evidence provided of a point of difference between a non-2006 manufactured car and a 2006 manufactured car, which might be relevant in order to assist with determining the cause of the fire in the Vehicle, as there is between left-hand drive vehicles (no fires) and right-hand drive vehicles (120 fires).

60. Indeed, the fact that there is no material difference, as regards the risk of fire, between a Zafira manufactured in 2006 and a Zafira manufactured in say 2005 or 2007 appears to be accepted by Mr. Masson, on behalf of the Owners, since he avers that

“I say and believe that the **design of the vehicles did not materially change during the period covered by the recall 2005 – 2014**..... My understanding that the design did not materially change is reinforced by the fact that the recalls implemented by Opel applied equally to Zafira Bs manufactured between 2005 and 2014 and not only to those manufactured in a particular year.” (Emphasis added)

61. For this reason, this Court concludes that for the Owners to pursue its claim, which is that a Zafira manufactured in 2006 was negligently manufactured, it is not necessary for it to obtain documentation regarding the manufacture of Zafiras in other years.

62. Furthermore, it is also the case that sworn evidence has been provided on behalf of the Car Defendants that extending the discovery in this manner would be disproportionate, since evidence was provided that seeking documentation relating to the technical design and specification for Zafiras would take a team of six people 5 to 7 weeks to complete the discovery for 2006, as it would involve a manual process, and that the addition of years outside 2006 would require a further two weeks by that team of six people to complete. In the context of this being just one category out of 37 categories of discovery sought by the Owners, a further period of two weeks for this change to one category alone, appears to this Court to be disproportionate.

63. As regards paragraphs (b) and (c) of Category 1, these are simply examples of a *general* category, which category is not limited in any way, of technical and engineering specifications which the Owner's expert says they require (and which *general* category is accepted by the Car Defendants as being relevant and necessary). These documents at sub-category (b) and (c) are not a stand-alone category. For this reason, and as the only response from the Car Defendants is a non-expert view of their solicitor to the effect that there is little to gain from this category, this Court will permit this category.

Category 3

“Design and manufacture specifications for all versions of heater blower motors fitted to right-hand drive Opel Zafira B vehicles.”

64. For the reasons set out in Category 1, this category should include right-hand drive vehicles.

Category 7

“Results of tests carried out in connection with the HVAC system of right-hand drive Opel Zafira B vehicles prior to 31 August 2019.”

65. For the reasons set out in Category 1, this category should include right-hand drive vehicles.

Category 9

“~~All documents evidencing, referring to or relating to investigations~~ Copies of reports of investigations into the occurrence of HVAC fires ~~and/or the cause or source of fires~~ in right-hand drive Zafira B vehicles in Ireland, the United Kingdom and any other jurisdictions including any reports which resulted in modifications to the HVAC system of right-hand drive Zafira B vehicles.”

66. For the reasons set out in Category 1, this category should include right-hand drive vehicles.

67. While accepting the relevance of documentation under this category, the Car Defendants have sought to restrict the breadth of the category by removing the ‘*all documents*’ reference and replacing it with ‘*[c]opies of reports of investigations*’ and also by restricting the reference to fires to ‘*HVAC fires*’.

Breadth of documents sought?

68. As a third general point in relation to some of the categories of documents in dispute, the Owners say that a broad category of documents is justified because of the claim of aggravated damages arising from the alleged reckless disregard for safety of the public by the Car Defendants. This plea, they say, makes relevant any documents which might show the mindset of the Car Defendants.

69. In this particular category, where the Owners seek all internal documents, and not just copies of reports of investigations, the Owners say this is relevant because the Owners have pleaded that the Car Defendants were too slow to carry out a full investigation into the fires and were too quick to attribute the problem to improper and unauthorised repairs. They also say this breadth of documents is relevant because they claim that the Car Defendants made public statements about the allegedly incorrect repairs and, despite knowing about the risk of fire from the HVAC system, they continued to misleadingly attempt to blame the issues on third parties.

70. In this regard, the Owners go so far as to claim that the Car Defendants were aware of the true issue about the cause of the fire (being the HVAC system) but they misled the owners of Zafiras, including the Driver, and for this alleged egregious wrong the Owners are claiming, in addition to general damages, aggravated and exemplary damages against the Car Defendants. As previously noted, the Car Defendants have put the Owners on full proof of these claims.

71. The Owners rely on the High Court judgment of Herbert J. in *Framus v. CRH* [2002] IEHC 113 at para. 2:

“This is litigation between a number of commercial entities. So far as breaches of Section 4 and Section 5 of the Competition Act, 1991, are alleged, this is an action for breach of statutory duty to which Section 6 of that Act applies. The Plaintiffs also plead the tort of conspiracy. ***Because exemplary damages are claimed the motives and intention of the parties alleged to be in default are relevant*** [*Donovan and others v. ESB and Another* [1997] 3 I.R. 573 at 583, per Barrington JJ].” (Emphasis added)

72. On this basis, the Owners claim that a broad category of documents is required, as such documents may advance the Owners’ claim or damage the Car Defendants’ denial of it.

73. The Car Defendants rely on the position adopted by Ryan P. in *O’Brien v. Red Flag Consulting Limited* [2017] IECA 258 at para. 85, that it is not enough to simply plead exemplary damages and then seek extensive discovery from a litigant. Ryan P states:

“**The nature of the case as pleaded here may give rise to greater or lesser vigilance by the court in scrutinising the discovery application** and its claims of relevance. It strikes me that **it is not sufficient simply to plead defamation and conspiracy and to refer to exemplary damages** and aggravated damages, which are a possibility, in order to justify the demand for identification of the client. I think that the circumstance of this case should make the court chary of the intentions and purposes behind the claims to relevance.”(Emphasis added)

74. This Court agrees with the sentiment expressed by Ryan P., and that it would be too easy a matter for a litigant who wished to get as extensive a discovery as possible, to simply make a baseless and unfounded claim for exemplary and/or aggravated damages to get such discovery.

75. However, this is a case where there is more than just a mere assertion, since there is some evidence, which *might* support a claim for aggravated damages, *albeit* that the Car Defendants challenge its admissibility and reliability.

76. This evidence is to be found at page 3 of the House of Commons Transport Committee report, where it is stated that:

“Vauxhall’s decision to continue to let people drive affected cars once it knew that cars that had already been successfully recalled still caught fire **amounts to a reckless disregard for safety.**” (Emphasis added)

77. It is, of course, important to note that, as the Car Defendants have pointed out, this report was part of a political, rather than a judicial, process and in particular that the Trading Standards Authority in the United Kingdom made no findings against Vauxhall in the United Kingdom.

78. It is also important to note that the Vehicle in question was 13 years old and it had its engine coolant system repaired by Auto Mechanic the day before the accident and the husband of the Driver had been asked by Auto Mechanic to check the level of the coolant on the morning of the fire.

79. It is also important to note that this is far from being a one-sided case, with the Car Defendants claiming that the Owners failed to ensure that the Shopping Centre complied with fire regulations, due to the absence of, *inter alia*, a fire sprinkler system, which, they say, was the cause of the spread of the fire to such devastating effect.

80. However, it is also important to bear in mind that this Court must take the Owners’ claim at its height in considering this discovery application (see *Murphy v. The Revenue Commissioners* [2020] IECA 36 at para. 20):

“[U]nless the discovery is based on speculation, **the case being made by the applicant for discovery should be taken at its height**, and should be assumed to be true, rather than accepting the case being made by of the party from whom discovery is sought even if it seems the more credible.”(Emphasis added)

81. In this case, the Owner’s claims regarding the alleged ‘reckless disregard’, while disputed by the Car Defendants, could not be said to be completely speculative or baseless allegations of wrongdoing and if those allegations were found to be true, it is possible that they might justify aggravated or exemplary damages.

82. On this basis therefore, this Court concludes that as exemplary damages are claimed on the basis not merely of assertions that it follows that the motives and intention of the Car Defendants are relevant. Therefore categories of documents, which might otherwise be regarded as too broad, but which might assist the Owners in establishing these motives or intentions, or damage the Car Defendants attempts to deny such motives or intentions, are relevant. On this basis, this Court concludes that all internal documents in this category should be discovered and not just copies of reports of investigations.

83. The Car Defendants have also argued that the term ‘HVAC fires’ should be inserted into this category, as it is otherwise too broad, including all documents relating to any investigations into any fires in Zafiras, even for example those caused by arson, and not just HVAC fires. This is a valid point.

84. However, on the other hand, as the term ‘HVAC fire’ is not defined, there is a risk that if this term were used, and where HVAC was just one of the causes of a fire in a Zafira, relevant documents might be excluded if this undefined term is used (i.e. if the HVAC system was not the *sole* cause of the fire). Accordingly, this Court concludes that the better way to deal with the Car Defendants’ legitimate concerns regarding the breadth of the category, is to amend the category to read as follows:

“All documents evidencing, referring to or relating to investigations into the occurrence of fires and/or the cause or source of fires, **excluding cases where the sole cause of the fire was arson**, in Zafira B vehicles in Ireland, the United Kingdom and any other jurisdictions including any reports which resulted in modifications to the HVAC system of Zafira B vehicles.”

Category 10

~~“All documents evidencing, referring to or relating to any consideration by the Defendants or any of them of the need or possible need for the Recalls including but not limited to Copies of fire investigation reports presented to and/or considered at meeting(s) at which the decisions to commence the Recalls were considered and/or made and internal minutes of those meetings.”~~

85. Again, the Car Defendants seek to restrict the category of documents sought to copies of fire investigation reports presented or considered at meetings.

86. For the reasons set out at Category 9 regarding the breadth of documents, this Court will order the discovery in the terms sought by the Owners.

Category 11

“Communications between the [Car] Defendants or any of them, their servants or agents and any regulator or statutory body in Ireland ~~and the United Kingdom~~ in relation to the Recalls and in relation to fire and/or risk of fire in Opel Zafira B vehicles.”

Expansion of categories to encompass UK recall?

87. As a fourth general point in relation to some of the categories of documents in dispute, the Owners say that the categories should extend to documents dealing with the recall of the Zafira, not just in Ireland, but also in the UK.

88. In this regard, the Owners claim that the fourth defendant, Vauxhall Motors Limited, which is a company incorporated in the UK, along with the other Car Defendants ‘*wrongfully and misleadingly attempted to put the blame on third parties*’ for the ‘*fires affecting the Zafira*’ (para. 9 of the Statement of Claim).

89. As previously noted, at para. 5 of the Statement of Claim, the role of the fourth defendant (Vauxhall Motors Limited) in the recall is claimed to be significant since it is alleged that it was responsible for the recall of the Zafiras in the UK and that it ‘*provided direction to and/or liaised with*’ the first defendant, Leeson Motors Limited, with regard to the recall of Zafiras in Ireland.

90. The Owners at para. 20 of the Statement of Claim then claim that:

“The [Car Defendants] were aware that during the recall in the United Kingdom in November 2018 owners were informed that they should “*park vehicles away from any property as an additional precaution pending completion of the rework*”. However the owners of the Zafira B vehicles in Ireland were not informed of this and in particular [the Driver] was not so informed.”

91. At para. 22 of the Statement of Claim, the Owners claim:

“Further and in the alternative the [Car] defendants were aware at all material times that their initial investigation of the fires in the Zafira B vehicles did not identify all the failings that could cause a fire and that led to fires occurring in the Zafira B vehicles that had been returned to their original equipment condition following the first recall. The [Car] defendants failed to inform Zafira B vehicle owners in Ireland and/or the regulatory/safety authorities of this. Further, the [Car] defendants failed to inform [the Driver]. The [Car] defendants continued to be aware that, despite the subsequent recalls, Zafira B vehicles continued to be defective and dangerous and deliberately or recklessly failed to adequately address the problem or to adequately notify all owners.”

92. It is also relevant to note that in Replies to Particulars regarding this claim, the Owners stated that the reference to ‘*regulatory authorities*’ in para. 22 included UK authorities. Accordingly, this is a claim in the pleadings of an alleged failure by the Car Defendants to inform regulatory authorities, not just in Ireland, but also in the UK of the alleged defects in the Zafira.

93. In addition, the Particulars of Negligence set out in the Statement of Claim make claims regarding Zafiras generally, without any geographical limitation (e.g. at (k) ‘failing to properly investigate fires involving the Zafira B’ etc). It is only in para (u) of the Particulars of Negligence that the claim is limited to owners of Zafira B models *in Ireland* (i.e. ‘failing to

inform owners of Zafira B models in Ireland of information given to owners of the same make of vehicles in the UK’).

94. At para. 23 of the Statement of Claim, the Owners claim that:

“The [Car Defendants] acted with reckless disregard for the safety of [the Driver] and Zafira B vehicle owners and the public generally and with reckless disregard for the risk of damage to property owners adjacent to parked Zafira Bs including the [Owners].”

95. Thus, it is clear that there are very serious allegations against all the Car Defendants, including Vauxhall Motors Limited, that they had exhibited reckless disregard for the safety of owners of Zafiras, in the manner in which the recall of Zafiras was conducted, which is alleged to be the responsibility of Vauxhall Motors Limited. It is also alleged that a different approach was taken to the recalls in Ireland and the UK.

96. While it is denied that Vauxhall Motors Limited was responsible for the recall in Ireland and the Owners are put on proof of same, there is no positive plea by the Car Defendants regarding who was responsible for or directing that recall.

97. Since it has been pleaded by the Owners that the recall in Ireland was reckless and that the same entity was involved in organising the recalls in Ireland and the UK, and that there was a relevant difference between the two recall campaigns, it is, in this Court’s view, relevant to obtain documents regarding the interaction between the Car Defendants and car dealers in the UK regarding that recall. This is because the state of knowledge of the Car Defendants is at issue, particularly as regards any differences in approach between Ireland and the UK.

98. Furthermore, counsel for the Owners submitted that his clients were concerned that if, as the Owners claim, the recall campaign in Ireland was directed from the UK, then in Ireland there would be very few documents available regarding the recall campaign.

99. Since this Court must take the Owners’ case at its height, this Court concludes that documents regarding the UK recall are therefore relevant for the purposes of this discovery application. On this basis, this Court will order the category be discovered as requested by the Owners.

Category 14

“Communications from the [Car] Defendants or any of them to any motor dealer in Ireland ~~and/or the UK~~ in relation to each recall and the repairs to be carried out on Opel Zafira B vehicles including but not limited to:

- (a) Technical service bulletins and associated documentation that accompanied each of the recalls in Ireland ~~and the UK~~; and
- (b) Technical service bulletins or documents for non-coded actions relating to the Zafira B blower motor/ HVAC System issued in Ireland ~~and the UK~~;
- ~~(c) Any other instructions provided to the motor dealers in Ireland or the UK;~~
- ~~(d) Records of parts used on the recalled vehicles as part of the recall repairs;~~

- ~~(e) Labour records for the recall repairs; and~~
~~(f) Bills of materials or similar for the recall actions for all affected vehicles in Ireland and the UK.”~~

100. For the reasons set out in Category 11, this category should include the reference to the UK.

101. The parties spent little time in oral or written submissions on sub-categories (c), (d), (e) and (f). There is expert evidence from Mr. Masson only in relation to sub-category (c) as being relevant to the Owners’ claims regarding the recall. In these circumstances, this Court will order discovery of that category, but not sub-categories (d), (e) and (f), on the grounds that documents covered by sub-category (c) might indicate the state of mind of the Car Defendants and therefore may be relevant, unlike say bills of materials etc. requested in the remainder of the sub-categories.

Category 17

“Publications informing vehicle owners in Ireland ~~and the UK~~ of the First, Second and Third Recalls and the reasons for the same; including, but not limited to website announcements, press releases, public advertisements and any information displayed in dealerships.”

102. For the reasons set out in Category 11, this category should include the reference to the UK.

Category 19

“Documents outlining the procedures undertaken and protocols adopted by Leeson Motors Ireland Limited, Opel Automobile GmbH, Vauxhall Motors Limited and/or Adam Opel GmbH to enact all relevant recalls in HVAC systems in Opel Zafira B vehicles in Ireland ~~and the UK~~.”

103. For the reasons set out in Category 11, this category should include the reference to the UK.

Category 21

“All documents evidencing, referring or relating to the UK House of Commons Select Committee hearings in relation to the Zafira B models and/ or the report of the UK House of Commons Select Committee in relation to Zafira B models and further and without prejudice to the foregoing category:

- i. All reports commissioned by the [Car] Defendants, its servants or agents for the purposes of the Select Committee hearings including a report which Vauxhall commissioned by TUV Hessen;
- ii. All documents and /or memoranda prepared by the [Car] Defendants, its servants or agents for the purposes of briefing the representatives of the [Car] Defendants who attended the House of Commons Select Committee hearings;
- iii. All documents, evidencing, referring or relating to communications with GBB Forensic Investigators and Engineers including any reports.”

104. This category is disputed in full by the Car Defendants.

The House of Commons Report on Zafira fires

105. The Owners appear to have relied on the report of the UK House of Commons Transport Committee on Vauxhall Zafira fires, as a number of the claims made in the Statement of Claim track, word for word, paragraphs in that Report. In addition, the Owners have made specific reference in the Statement of Claim to the concerns identified in that report e.g. see the claim, at para. 25, that the Car Defendants were notified that fires were being caused in Zafiras by corroded Blower Motors in or about April 2016 by GBB Forensic Investigators and Engineers, who had been commissioned by NewsCorp UK Limited to investigate the causes of fires in Zafiras (referenced at para. 24 of the House of Commons Report).

106. However, the Car Defendants claim that this House of Commons Report is not relevant to these proceedings as that process was a political, rather than a judicial, enquiry and from which there was no appeal. Accordingly, there is a dispute between the parties regarding the relevance of the House of Commons Report and the probative value of the material considered by the Transport Committee. However, at this interlocutory stage these disputes regarding the probative value of this evidence cannot be determined.

107. Yet it is the case that it is not disputed that the Report deals with fires which occurred in Zafiras, the subject matter of these proceedings. Furthermore, in these proceedings it is claimed that the Car Defendants had knowledge of the defective design of the Zafira which it failed to adequately act upon. In this regard, the Car Defendants' knowledge and motives are called into question in these proceedings, since it is claimed that they had reckless disregard for the safety of the owners of Zafiras (and other property owners who might be affected by fires).

108. In these circumstances, while this Court is obviously making no determination about the admissibility or probative value of the Report, this category, dealing, as it does, with the cause of the Zafira fires, seems to this Court to be relevant to the issues in dispute and so should be discovered.

Category 23

“All documents evidencing, referring or relating to the [Car] Defendants', their servants or agents' investigations into the cause of the fire the subject matter of the proceedings.”

109. This Category is disputed in full by the Car Defendants.

110. It is not disputed that the Joint Investigation into the cause of the fire was carried out by experts on behalf of, *inter alia*, the Car Defendants and the Owners and that this Joint Investigation is ongoing. The result of this Joint Investigation and the opinion of experts is likely to play an important role in the trial judge's determination of the cause of the fire and therefore the alleged liability of the Car Defendants, or the Driver, or any other party for the fire and perhaps the alleged contributory negligence of the Owners for the spread of the fire.

111. Considering the disputes between the parties regarding the cause of the fire and its spread, which is at the heart of this litigation, it is likely that a lot of the documents generated by this Joint Investigation, whether in the possession of the Car Defendants or the Owners, will be privileged. However, in the unusual circumstances of this case, this fact is not sufficient *per se* for this Court to conclude that discovery, although relevant, is not necessary. This is particularly so since a similar category of discovery (Category 20 in the second motion below) is being sought by the Car Defendants from the Owners, and for the reasons set out below, is being granted in favour of the Car Defendants.

112. In these circumstances, and to avoid any inequality of approaches to discovery, this Court concludes that it is appropriate that discovery of this category be granted in favour of the Owners.

MOTION 2 - DISCOVERY SOUGHT BY MANUFACTURER FROM OWNERS

113. As mentioned previously, it should be borne in mind that in the interests of court efficiency and savings on costs, while the discovery is being sought by a lead applicant, it is being sought for the benefit of all the parties to both sets of proceedings, and thus for the benefit of, as the case may be, the Owners, the Tenants, the Distributors, the Manufacturer and/or the Driver.

114. With this in mind, the categories in this motion sought by the Manufacturer from the Owners will be considered in turn. As before, the added underlined text is a suggested amendment to the category by the Owners (but not accepted by the Manufacturer) and the deleted text is suggested by the Owners (but not accepted by the Manufacturer). Where a category proposed by the Manufacturer is rejected in full by the Owners, this category is set out, without amendment.

Category 1 and 2

Category 1:

“All documents created on or before 19 March 2020 evidencing and/or recording that the [Car] Defendants (in the [Owner] Proceedings):

- (a) Manufactured, designed and/or distributed the Zafira-B Model bearing vehicle registration mark 06-C-17323 (“the Vehicle”) with a defective HVAC System in the manner alleged by Avoncore and Canmont [i.e. the Owners];
- (b) Failed to properly investigate or identify the cause of fires involving the Zafira-B Model in the manner alleged by Avoncore and Canmont;
- (c) Failed to properly carry out the recalls and repairs involving the Zafira-B Model in the manner alleged by Avoncore and Canmont; and/or
- (d) Failed to properly inform and notify owners of the Zafira-B Model about the recalls and the reasons for the recalls in the manner alleged by Avoncore and Canmont.”

Category 2:

“All documents created on or before 19 March 2020 which evidence and/or record that the [Car] Defendants (in the [Owners’] Proceedings) knowingly and/or recklessly exposed owners and/or drivers of Zafira-B Models, including of the Vehicle, and members of the public to a risk of fire and exposed property owners of adjacent property to the parked vehicle to a risk of fire and damage.”

A cut-off date for discoverable documents

115. These categories are agreed by the Owners save for the insertion of the underlined terms, namely that documents which are created after the Owners instituted the proceedings on the 19th March, 2020 should be excluded.

116. These categories relate to the claims by the Owners that the Car Defendants were negligent in the design and manufacture of the Zafiras and reckless regarding the conduct of the recall campaign. There can be little doubt that it is relevant to the dispute between the parties. Before considering the suggestion for a cut-off date, it is relevant to refer to a number of unusual circumstances peculiar to this litigation.

Complex, high value multi-party litigation

117. In a straight forward personal injuries claim, it is likely that documents which are created after the institution of proceedings relating to the cause of the accident will be privileged. In this instance, while it may be likely that a document which was created after the institution of proceedings will be privileged, it seems to this Court to be less likely than in a straight-forward personal injuries claim. This is because one is dealing with a very complex case regarding the cause of a fire *and* the cause of its spread, with numerous parties, and where that fire caused millions of euro in damages. However, there are further factors distinguishing this case from a straight-forward personal injuries action.

Information regarding repair of Vehicle not disclosed to experts

118. First, there is the added factor that, as considered in further detail below, information regarding what happened to the engine coolant system of the Vehicle on the eve, and on the morning of the fire, which could be relevant to the cause of the fire, was omitted from a summary prepared on 2nd December, 2019 by the Owners for the experts, including those engaged by the Car Defendants involved in the Joint Investigation as to the cause of the fire.

119. The existence of this information regarding what happened to the Vehicle on the eve/morning of the fire was only first discoverable by the Car Defendants when the solicitors for the Distributors and the solicitors for the Manufacturer were advised by letter dated 17th May, 2021, from the solicitors for the Driver, of the existence of the Driver's Replies to Particulars in the Tenants' Proceedings.

120. If the Car Defendants had obtained a copy of these Replies, they would have seen the reply by the Driver regarding the repair of the Vehicle on the eve of the fire. There is thus a period of over a year and a half between 2nd December, 2019 and 17th May, 2021, while the Joint Investigation was ongoing, when the Car Defendants' experts were in the dark about information regarding a possible cause of the fire (which, as noted below, could be relevant to a fire investigation, because it related to the engine coolant system).

Joined proceedings

121. A further factor distinguishing this case from a straight-forward personal injuries action is that there are two sets of proceedings which are being case managed together and the fact that '*all issues common to both sets of proceedings should also be heard and determined together*' per McDonald J. (*Avoncore Ltd. and Canmont Ltd. t/a Douglas Village Shopping Centre v. Leeson Motors Ltd, Adam Opel GmbH, Opel Automobile GmbH and Vauxhall Motors Ltd* [2021] IEHC 163 at para. 40).

122. Connected with this is the fact that AIG is the insurer for a plaintiff (in the Owners' Proceedings) and is the insurer for a third party in those proceedings (the Driver), which party is also a defendant in the Tenants' Proceedings. In effect therefore one could say that AIG is both plaintiff and defendant in these joined proceedings.

Alignment of interests of plaintiff and defendant from perspective of common insurer

123. This leads to an apparent alignment of the interests of the Owners and the Driver regarding the cause of the fire and its spread, from the perspective of their common insurer, AIG.

124. In this regard, in a run of the mill case, a plaintiff will not care which defendant (or third party) will pick up the tab for the damage caused by a fire, once the plaintiff succeeds. However, in this case it is not in AIG's financial interests for AIG/Owners to have AIG/Driver found liable for the start and spread of the fire. In contrast, there would appear to be no financial consequence for AIG if the Car Defendants, who are not insured by AIG, are found liable for the fire. To put the matter another way, if the Driver was insured say by Aviva or Zurich, then there would be no negative financial consequences for AIG to have the Driver found liable for the start and spread of the fire.

125. In these unusual circumstances, where a plaintiff/its insurer has a financial interest in having one defendant (the Car Defendants), but not another defendant/third party (the Driver), found liable for the start and spread of the fire, this Court should be alert to the risk of documents in this dispute not being discoverable to any of the parties to the two sets of proceedings (by means of a cut-off date or otherwise) for the benefit of a plaintiff (the Owners) and/or a defendant/third party (the Driver) who are in reality on the same side.

126. Bearing in mind all of the foregoing issues and factors which are peculiar to these proceedings, the Owners say that there should be a cut-off date of 19th March, 2020 for this and other categories of discovery, which is the date the Owners' Proceedings were instituted.

127. In relation to the possibility that a later date might be '*particularly burdensome*' (per Clarke C.J., as he then was, at p. 227 of *Tobin*), the Owners state that a later date will lead to them having to schedule, rather than disclose, privileged documentation (since they say most of the documents will be privileged).

128. However, in this regard this Court notes the agreement of all parties not to require the Owners to schedule documents which are obviously privileged, since at para. 43.1 of the Manufacturer's submissions, it is stated that:

“[T]o the extent that [the Owners' solicitors'] unsupported assertion about the volume of responsive documents which would be “*clearly privileged*” has any merit (which is denied), this concern has already been adequately addressed by the agreement made between all parties through correspondence that whenever claims of privilege are being made over the following types documents it will not be necessary for the party making discovery to schedule the document is concerned:

All correspondence with and advices, draft pleadings and opinions of Counsel in relation to the various matters the subject of the proceedings herein.

All correspondence and advices received from expert witnesses retained on behalf of a party to the proceedings and/or their insurers for the proceedings.”

129. This Court also notes the agreement of the Car Defendants that insofar as any document is responsive to more than one category of discovery, it need only be scheduled under one of the relevant categories, which will lessen the burden further.

130. In all of the foregoing circumstances, this Court concludes that this is an exceptional case where it is appropriate to have a cut-off date for the discovery which is not the date of the institution of the proceedings.

131. In support of this conclusion is the decision of Allen J. in *Comcast International Holdings Incorporated v. The Minister for Public Enterprise* [2019] IEHC 720. In that case, there was a dispute over the award of a mobile phone licence and an attempt was made to limit discovery to documents coming into existence before the date of the successful tenderer. That case was very far removed from a straight-forward negligence or personal injuries claim, like this case, since it was also a very complex and high value case. In these circumstances, Allen J., at para. 85 *et seq*, refused to insert the time-limit on the basis that:

“It seems to me that it is by no means unreasonable to suppose that there was further communication from the unsuccessful tenderers after the date of the announcement. Separately, I think that the plaintiffs’ objection to a cut-off date by reference to the coming into existence of documents, rather than the event, is also well founded. As counsel submitted, a cut-off date by reference to the date on which a document came into existence would exclude a record made on the following day of the events of the critical date.”

132. Similarly, in this complex and high value case, it seems to this Court that it is possible that documents may come into existence which are relevant to these proceedings after the date the proceedings commenced and so, as in *Comcast*, the date of creation of the document may not be the critical date in determining its relevance.

A line in the sand

133. While it is true that relevant documents (which are not privileged) in a complex case such as this one may be created after the institution of proceedings, this Court is also of the view that there should be a ‘line in the sand’ as regards discovery of documents so that discovery does not become a never-ending process. In this way, the ‘*investigation of the claim*’ stage of the proceedings can come to an end and instead the parties can concentrate on seeking to bring the matter to trial (or, better for all concerned, finalising matters sufficiently to enable mediation/settlement talks to commence).

134. The fire occurred on 31st August, 2019. The first set of proceedings were instituted very quickly thereafter, with the Owners’ Proceedings instituted on 19th March, 2020 and the Tenants’ Proceedings instituted on 21st August, 2020. The Driver was joined as a third party to the Owners’ Proceedings on 30th November, 2020. On 11th March, 2021 McDonald J. decided that both sets of proceedings should be case managed together and that all issues common to both sets of proceedings should be heard and determined together.

135. In all the circumstances, this Court believes that an appropriate cut-off date (for the creation of a document, after which it is not discoverable) is the 11th March, 2021, not just for the Owners’ Proceedings, but also for Tenants’ Proceedings, as noted below. Accordingly, that date will be used in this category.

Category 3

“The documents recording and/or evidencing communication between [the Owners], their servants or agents and Cork County Council and/or Cork City Council in respect of the Douglas Village Shopping Centre, between the dates:

(i) between 28 February 2007 to 31 August 2019 (inclusive) in relation to the application for and granting of a Fire Safety Certificate or Regularisation Certificate in respect of the Douglas Village Shopping Centre, including

(a) all documents submitted to or received from Cork County Council and/or Cork City Council in relation to application bearing reference 08/FSC/S/1404; and

(b) all documents submitted to or received from Cork County Council and/or Cork City Council in relation to application bearing reference 09/FSC/S/1224; and

~~(ii) between 31 August 2019 to 12 November 2020 (inclusive) in relation to any fire safety matters in respect of the reconstruction of the Douglas Village Shopping Centre, its car park or any part thereof.”~~

136. This category relates to the alleged contributory negligence for the spread of the fire on the part of the Owners arising from the construction and management of the Shopping Centre and, in particular, the fire safety system in the Shopping Centre. It is the Car Defendants’ case that if, *inter alia*, the Owners had complied with its alleged obligations under Fire Safety Regulations (BS:9999:2008 Fire Safety in Buildings BS5588 Part 10:1991: Fire Precaution in the Design, Construction and Use of Buildings – Part 10: Code of Practice for Shopping Complexes) and had sprinklers in the Shopping Centre, the fire would have stopped at the car and we would now be dealing with a car that went on fire, not a multi-million euro, multi-party litigation involving damage to an entire Shopping Centre.

137. The relevance of this category is not disputed by the Owners, but it disputes that any documentation should be provided for the period after the date of the fire on 31st August, 2019 in relation to the reconstruction of the Shopping Centre for a very specific reason, namely that evidence of a difference of approach by the Owners, between 2009 when the original Shopping Centre was built, and the reconstruction of the Shopping Centre after the fire, is not admissible to prove negligence (or contributory negligence) on the part of the Owners.

Post-fire safety documents

138. This is because the Owners submit that it is well established that evidence of a difference of approach is not admissible to prove negligence (see for example *University College Cork – National University of Ireland v. ESB* [2017] IECA 248).

139. However, we are not, at this interlocutory stage, dealing with the admissibility of evidence. Rather we are dealing with the question of whether documentation is discoverable and different principles apply to determining whether a document is discoverable than apply to determining whether it is admissible. Discoverability is determined by, *inter alia*, whether a document may fairly lead the applicant for discovery to a train of enquiry which may advance his own case or damage his opponent's case (see *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882) 11 Q.B.D 55 adopted in Ireland in *Ryanair plc v. Aer Rianta CPT* [2003] 4 I.R 264).

140. In this case it is alleged by the Car Defendants that, as the same or equivalent fire safety standards applied to the development of the Shopping Centre in 2009, as applied to its reconstruction after the fire in 2019/2020, and bearing in mind that the exact same property was being developed by the same developers with the same local authority and the same fire safety consultant, there are likely to be representations in documentation between the relevant parties regarding the fact that on one occasion in 2009 a conclusion was reached to not put in fire sprinklers, which is different from that reached in 2019.

141. It is important to note that it is not being suggested by this Court that any such documents showing changes from a previous practice will amount to evidence of negligence at the trial, since a change in approach does not amount to evidence of negligence since '*nothing is so perfect that it cannot be improved*' per *Salmond on Torts*, (1969) 15th edition at p. 300.

142. However, any such documents may be relevant to the reason *why* the Owners did not say, install sprinklers, which is alleged by the Car Defendants to amount to contributory negligence, and so could advance the case made by the Car Defendants or damage the case made by the Owners.

143. In relation to the difference between a left-hand and right-hand drive Zafira, this Court has, in the particular circumstances of this case, taken a broad approach to permitting the Owners to have access to documents which might assist it in claiming that the Car Defendants were negligent in their manufacture of the Zafiras.

144. While the situations are not directly comparable, since there was no alleged change in approach arising after the fire in relation to the Zafiras, this Court believes that a similar broad approach should be taken regarding the Car Defendants' access to documents which might assist it in claiming that the Owners were contributorily negligent regarding fire safety systems in the Shopping Centre in the context of the 'before the fire' and 'after the fire' approach to fire safety.

145. In these circumstances, this Court will order the discovery of this category.

Category 4

“All documents created ~~after~~ between 1 January 2006 and 19 March 2020 recording and/or evidencing communication between (i) [the Owners], their servants or agents and (ii) Michael Slattery & Associates in relation to the preparation and progression of

any interaction with Cork County Council and/or Cork City Council in respect of the Douglas Village Shopping Centre.”

146. Both parties describe the proposed amendment of this category as being subject to the same dispute as they have regarding Category 3, i.e. the issue of whether there should, or should not, be a ‘post-fire restriction’ to the discovery. However, here the drop-dead date proposed by the Owners is not the date of the fire of 31st August, 2019, but the date of the institution of proceedings of 19th March, 2020.

147. In Category 3, this Court decided that there should be no post-fire restriction on the documents being disclosed for the reasons set out. For the same reasons, and bearing in mind that these documents deal with similar fire safety issues, this Court will not insert the end date of 19th March, 2020.

148. However, for the same reasons set out in Categories 1 and 2, this Court will have a line in the sand date of 11th March, 2021.

Category 5

“The final issue plans, sections and elevations together with associated architectural, structural engineering, steel engineering, fire engineering, building service, sprinkler system, fire alarm system, public announcement system, CCTV specification documents, the manufacturer details of the aluminium louvres clad around the structure of the south elevation, i.e. the shopping centre side, of the car park, and all ‘For Construction’ and ‘As Built’ drawings relating to the car park

- (a) in respect of the redevelopment of the Douglas Village Shopping Centre in or around 2009;
- (b) in respect of the Douglas Village Shopping Centre as it stood on 31 August 2019 prior to the occurrence of the fire, such documents to have been created on or before 19 March 2020; and
- ~~(c) In respect of the reconstruction of the Douglas Village Shopping Centre since the fire on 31 August 2019.”~~

149. For the reasons already stated, this Court refuses to insert a drop-dead date, regarding the creation of documents, of 19th March, 2020, since relevant documents may have been created after the date the proceedings were issued which will not necessarily be privileged.

150. However, for the reasons previously stated, this Court will have a line in the sand date of 11th March, 2021 applying to such documents.

151. As regards the proposed deletion of sub-category (c), which would eliminate ‘post-fire’ documents, for the reasons set out under Category 3, this Court rejects the deletion of a category of documents regarding fire safety applying to the reconstruction of the Shopping Centre.

Category 6

“All documents recording and/or evidencing

- a. The design and/or specification of any sprinkler system in place at the Douglas Village Shopping Centre before the fire on 31 August 2019;
- ~~b. The design and/or specification of any sprinkler system in place at the Douglas Village Shopping Centre after the fire on 31 August 2019;~~
- c. Any proposal, consideration and/ or decision about whether to include or not to include a sprinkler system in the car park of the Douglas Village Shopping Centre before the fire on 31 August 2019; ~~and/or~~
- ~~d. Any proposal, consideration and/or decision about whether to include or not to include a sprinkler system in the car park of the Douglas Village Shopping Centre after the fire on 31 August 2019;~~

including but not limited to all documents recording and/or evidencing communication between (i) [the Owners], their servants or agents or any professional retained by them and (ii) any designer, supplier and/ or fitter of the sprinkler system at Douglas Village Shopping Centre or any part thereof in relation to matters (a) and/or, (b), (c) ~~and/or~~ (d).”

152. For the reasons set out under Category 3, this Court rejects the deletion of a category of documents regarding fire safety applying to the reconstruction of the Shopping Centre and so sub-category (b) and (d) are not deleted as suggested by the Owners.

Category 7

“All documents recording and/or evidencing

- (a) the design and/or specification and/or fire protection of the steel columns, beams, associated metal decking and/or in situ concrete slab in place in the car park of the Douglas Village Shopping Centre as designed and as built/as constructed before the fire on 31 August 2019;
- ~~(b) the design and/or specification and/or fire protection of the steel columns, beams, associated metal decking and/or in situ concrete slab in place in the car park of the Douglas Village Shopping Centre as designed and as built/ as constructed after the fire on 31 August 2019;~~
- (c) any proposals, consideration and/or decision about fire protection for the steel columns, beams, associated metal decking and/or in situ concrete slab in place in the car park of the Douglas Village Shopping Centre as designed and/or constructed before the fire on 31 August 2019; ~~and/or~~
- ~~(d) any proposal, consideration and/ or decision about fire protection for the steel columns, beams, associated metal decking and/or in situ concrete slab in place in the car park of the Douglas Village Shopping Centre as designed and/or constructed after the fire on 31 August 2019;~~

including but not limited to all documents recording and/or evidencing communication between (i) [the Owners], their servants or agents or any professional retained by them and (ii) any structural engineer and/or steel engineer and/or steel fabricator in relation to matters (a), ~~(b)~~, and/or (c) ~~and/ or~~ (d).”

153. For the reasons set out under Category 3, this Court rejects the deletion of a category of post-fire documents regarding fire safety applying to the reconstruction of the Shopping Centre and so sub-categories (b) and (d) are not deleted as suggested by the Owners.

Category 8

“All documents recording and/or evidencing:

- (a) The design and/or specification of the fire alarm system in place at the Douglas Village Shopping Centre on 31 August 2019; ~~and/or~~
~~(b) the design and/or specification of the fire alarm system in place at the Douglas Village Shopping Centre after 31 August 2019;~~

including but not limited to all documents recording and/or evidencing communication between (i) [the Owners], their servants or agents or any professional retained by them and (ii) any designer, supplier and/or fitter of the fire alarm system at Douglas Village Shopping Centre or any part thereof in relation to matters (a) ~~and (b).~~”

154. For the reasons set out under Category 3, this Court rejects the deletion of a category of post-fire documents regarding fire safety applying to the reconstruction of the Shopping Centre and so sub-category (b) is not deleted as suggested by the Owners.

Category 9

“All opinions referring to any aspect of fire safety from any (i) architect (ii) structural engineer (iii) fire safety consultant and/or (iv) any other professional or contractor whose opinion was relied on by any of those professionals listed at (i) to (iii), including certificates and/or opinions of compliance with Part B of the Second Schedule of the Building Regulations or any part thereof in respect of the Douglas Village Shopping Centre or any part thereof

- (a) as constructed before the fire on 31 August 2019 ~~and/or~~
~~(b) as constructed after the fire on 31 August 2019.”~~

155. For the reasons set out under Category 3, this Court rejects the deletion of a category of post-fire documents regarding fire safety applying to the reconstruction of the Shopping Centre and so sub-category (b) is not deleted as suggested by the Owners.

Categories 11, 12, 14, 15 & 18

Category 11:

“The written assessments of the fire risks to the safety, health and/or welfare of the employees of [the Owners] at the Property and/or visitors to the Property created by [the Owners], their servants or agents between the period on or after 28 February 2007 and 19 March 2020.”

Category 12:

“All documents created between the period on or after 28 February 2007 and 19 March 2020 recording and/or evidencing the identification by [the Owners] of the fire hazards in the Property and/or assessment by [the Owners] of the risks presented by those fire hazards.”

Category 14:

“All documents created between the period on or after 1 November 2007 and 19 March 2020 recording and/or evidencing compliance and/or non-compliance by [the Owners] with their obligations under Regulation 13(a) of the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I No. 299/2007).”

Category 15:

“All documents created between the period on or after 1 November 2007 and 19 March 2020 recording and/or evidencing compliance and/or non-compliance by [the Owners] with their obligations under Regulation 13(b) of the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I No. 299/2007).”

Category 18:

(a) All documents recording and/or evidencing any pre-incident plan prepared at any time between 28 February 2007 and 31 August 2019 (inclusive) by the local fire authority with respect to the Douglas Village Shopping Centre, such documents to have been created between 28 February 2007 and 19 March 2020;

(b) All documents recording and/or evidencing any testing by the local authority at any time between 28 February 2007 and 31 August 2019 (inclusive) of the fire main for the Douglas Village Shopping Centre in order to check water pressure and flow, such documents to have been created between 28 February 2007 and 19 March 2020;

(c) Any ‘during performance’ inspections carried out at any time on or before 31 August 2019 on or at the Douglas Village Shopping Centre by or on behalf of the local fire authority, such documents to have been created between 28 February 2007 and 19 March 2020;

(d) All documents recording and/or evidencing all versions of the Fire Safety Register maintained for the Douglas Village Shopping Centre in the two year period prior to 31 August 2019, such documents to have been created between 28 February 2007 and 19 March 2020;

(e) All documents recording and/or evidencing communications between (i) [the Owners], their servants or agents or any experts retained by them and (ii) the local fire authority in respect of the matters at (a), (b), (c) and/or (d), such documents to have been created between 28 February 2007 and 19 March 2020.”

156. For the reasons already stated, this Court refuses to insert an end date regarding the creation of documents on or prior to 19th March, 2020, since, *inter alia*, relevant documents may have been created after the date the proceedings were issued and these will not necessarily be privileged, particularly when one is dealing with such a complex, high value, multi-party case.

157. In these categories, it is also to be noted that the Owners have agreed that it is not disproportionate to the issues in dispute and the value of the dispute to require them to provide 13 years of written assessments of fire risks etc., since they propose such a time-period i.e. from 2007 to 2020.

158. However, insufficient evidence has been provided by the Owners to convince this Court (in relation to these and other categories) that it would be disproportionate to extend this time period for one year beyond 19th March, 2020.

159. Mr. Clayton Love’s affidavit, on behalf of the Owners, refers to the number of builders and subcontractors on the reconstruction of the Shopping Centre, but this does not detail why it would be *‘particularly burdensome’* (per Clarke C.J. at p. 227 of *Tobin*) and what would be involved in adding a year or so to the 13 year discovery, which the Owners have already agreed to provide. Thus, an end date of 19th March, 2020 is rejected.

160. For the reasons previously stated, this Court will have a ‘line in the sand’ date of 11th March, 2021 applying to such documents.

Category 19

“The documents at (a) to (g) below provided that they relate to the circumstances of the commencement of the Fire and/or its subsequent spread and created between 30 August 2019 and 19 March 2020 recording and/or evidencing:

- ~~(a) the circumstance in which the fire commenced in the Douglas Village Shopping Centre (“the Property”) on 31 August 2019 and/or the cause of the said fire,~~
- ~~(b) the subsequent spread of the said fire and/or the cause of the said spread,~~
- ~~(c) the response to the said fire by staff and/or by other persons at or about the Property and/or by the fire brigade and emergency services, and/or~~
- ~~(d) the operation of the communications and fire safety systems and equipment, the emergency plans, and the emergency procedure at the Property on 31 August 2019;~~
- ~~(e) the results of any engagement by [the Owners], their servants, agents or insurers with persons who were responsible for the management or operation of the Property and/or who were present at or about the Property on 31 August 2019~~

~~including but not limited to the following types of documents~~

- ~~i. (a) statements taken from persons who were responsible for the management or operation of the Property and/or who were present at or about the Property,~~
- ~~ii. (b) the CCTV recordings from the Property set out in the Schedule appended hereto,~~
- ~~iii. (c) any photographs or video recording,~~
- ~~iv. (d) the log file of and/or created by the fire alarm system,~~
- ~~v. (e) the log file of and/or created by the sprinkler system,~~
- ~~vi. (f) any health and safety log books or records, and~~
- ~~vii. (g) any staff training log books and records.”~~

161. The proposed insertion by the Owners of wording restricting discovery to the time of the creation of documents in the opening paragraph is rejected for the reasons already stated. Instead, for the reasons already stated, the term *‘created prior to 11th March, 2021’* will be inserted after the word documents on the first line in order to provide a ‘line in the sand’ regarding discovery and help focus the parties on getting this dispute to trial/mediation/settlement.

162. The documents in sub-categories (a) to (e) are clearly relevant since they deal primarily with the commencement and spread of the fire, which this litigation is all about. Therefore, the suggested deletion of these categories and their limitation to just examples of the main category (set out in i. to vii.), such as photographs etc., is not justified.

Category 20

“All documents created between 30 August 2019 and 19 March 2020 recording and/or evidencing the performance and results of any inspection, inquiry and/or investigation by or on behalf of [the Owners], their servant, agents or insurers in relation to

- (a) the circumstances in which the fire commenced in the Property on 31 August 2019 and/or the cause of the said fire,
- (b) the subsequent spread of the fire and/or the cause of the said spread,
- (c) the response to the fire by staff and/or by other persons at or about the Property and/or by the fire brigade and emergency services,
- (d) the operation of the communications and fire safety systems and equipment, the emergency plans, and the emergency procedures at the Property on 31 August 2019, and/or
- (e) the damage caused by the fire to the Property
- (f) ~~including all~~ any correspondence had with and documents received from the Third Party, her servants or agents in relation to (a)-(e).”

163. This category is clearly relevant insofar as it deals with factual evidence relevant to the claim that the Owners were contributorily negligent regarding their management of the fire and that the Driver was negligent in failing to ensure that the Vehicle was free from faults and that she failed to take adequate steps to prevent the spread of the fire.

164. For the reasons previously stated, the insertion of the time-limit suggested by the Owners is rejected and instead the term ‘*created prior to 11th March, 2021*’ will be inserted on the first line after the word ‘documents’.

Owners seek to restrict discovery of documents between Owner and Driver

165. The Owners also seek to restrict, by the proposed amendment of category (f), the disclosure of documentation between them and the Driver to documents relating to the start and extent of the fire.

166. In this regard, it is relevant to note that as of 14th November, 2019 potentially significant information was in the possession of AIG, which is the insurer for both the Owner and the Driver, namely that the Driver had the coolant system in the Vehicle repaired the night before the fire and that her husband was advised to check the level of the coolant in the Vehicle on the morning of the fire.

167. It was disclosed in the Tenants’ Proceedings in the Replies to Particulars of the Driver to the Tenant dated 21st November, 2020 that repairs were made to the Vehicle (the water coolant pipe was replaced). However, it was not until 17th May, 2021, some 6 months later (and

18 months after the Driver/Owners became aware of same), that the solicitors for the Driver wrote to the solicitors for the Car Defendants to inform them that the Driver had answered the Replies to Particulars in the Tenants' Proceedings, thereby alerting the Car Defendants to the fact that the Driver had provided information which may be relevant regarding the fire.

168. As noted further below, this time-lag in the provision of information to the Car Defendants arose against a background of regular and urgent requests from the Car Defendants' experts, who were investigating the fire, for details regarding the service/repair of the Vehicle.

169. This highlights the concern expressed by the Car Defendants, not just in this category, of ensuring discovery of all communication between the Owners and the Driver, who share a common insurer, AIG, which is effectively running this litigation on behalf of both the Owners and the Driver (as it stands to lose financially should either or both be found to be negligent or contributorily negligent).

Tenants have sued the Driver for the fire, but Owners have not

170. In this regard, it is also relevant to note that in the Tenants' Proceedings, the Tenants have sued, not only the Car Defendants (in respect of its alleged negligent manufacture and sale of the Vehicle) and the Owners (in respect of its alleged negligence in its fire safety systems in the Shopping Centre), but also the Driver for her alleged negligence and responsibility for the commencement and spread of the fire.

171. It is significant to note that the Tenants are not insured by the same insurer as used by the Owner and the Driver (AIG), but rather they are insured by different insurance companies, primarily Aviva.

172. Therefore, it remains to be observed that in the proceedings where the Owners (insured by AIG), rather than the Tenants, are the plaintiffs seeking damages for the fire, they chose not to sue the Driver (insured by AIG), even though she owned and operated the Vehicle and who had that Vehicle's coolant system repaired on the eve of the fire, and whose husband was asked to check the coolant level on the morning of the fire.

173. In all the foregoing circumstances, this Court would not propose to put any time limit or any other restriction on the discovery of documents which were exchanged between the Owners (insured by AIG) and the Driver (insured by AIG), in the interests of reaching a fair resolution of the dispute, and in light of the alignment of their interests (from the perspective of their insurer, AIG, where due to the proceedings being joined, the Owners and the Driver are in effect plaintiff and defendant).

Category 21

"Subject to a cut-off date of documents created on or before 19 March 2020, All documents recording or evidencing any statement or statements made by the Third Party to her insurer or to any other party after the fire on 31 August 2019 in relation to the purchase, maintenance, use of and any recall relating to the Zafira-B vehicle bearing registration mark 06-C-17323 ("the Vehicle") up to and including 31 August 2019 and

her recollection of the circumstances and events surrounding the fire at the Douglas Village Shopping Centre (“the Property”) on 31 August 2019 and her response to same.”

174. The proposed insertion by the Owners of wording restricting discovery to the time of the creation of documents in the opening paragraph is rejected for the reasons already stated. Instead the only change to the category is that the term ‘*created prior to 11th March, 2021*’ will be inserted after the word “documents” on the first line, for the reasons already stated.

Category 22

“All documents evidencing or recording

- (a) Photographic evidence/recording of the Vehicle on 31 August 2019 (including, without limitation, all mobile phone/ dash-com/ drone footage);
- (b) Photographic evidence/recordings of the fire at the Douglas Village Shopping Centre on 31 August 2019 (including, without limitation, all mobile phone/ dash-cam/ drone footage);
- (c) Audio recordings and/ or documents evidencing communications between the Car Park security guard and the security base immediately before, during and after the fire at the Douglas Village Shopping Centre in 31 August 2019 or other security personnel who came upon the fire and/or were involved in raising the alarm/evacuating the Douglas Village Shopping Centre;
- (d) Information or background detail provided to or obtained from the emergency services, in particular from the Fire Brigade and An Garda Síochána, in respect of the circumstances in which the fire commenced and spread and the measures that were taken in response to the fire on 31 August 2019.”

175. The Owners reject this category in its entirety, as they say it is covered by Category 19, which this Court has agreed to order, without any of the restrictions suggested by the Owners.

176. It does seem to this Court that this category is covered by Category 19, which deals with documents evidencing the circumstances of the fire and so does not require a separate category. Support for this view is provided by the fact that the Car Defendants have not sought to dispute the overlap between the categories, but rather to suggest that to the extent that the same documents might be discoverable under both categories, this would not require any additional searches and so no additional work would be involved. However, if a category is already covered by a previous category, then it should not be ordered. Hence this will not be ordered.

Category 23

“All documents evidencing or recording:

- (a) The alleged damage to the Douglas Village Shopping Centre (“the Property”) (including damage to individual units within the Property and to the Car Park) as a result of the fire on 31 August 2019;
- (b) The necessity for complete closure of the Property as a result of the fire on 31 August 2019

- (c) Correspondence with the fire services or any reports prepared by the fire services in respect of the Property as a result of the fire on 31 August 2019;
- (d) The necessity for the demolition of the affected section of the Car Park of the Property as a result of the fire on 31 August 2019;
- (e) Correspondence between [the Owners] and the tenants of the Property and/or any local authority in relation to the closure, damage and reinstatement works required as a result of the fire on 31 August 2019; and
- (f) The demolition, emergency, reinstatement and ancillary works required in respect of the Property as a result of the fire on 31 August 2019.”

177. The Owners reject this category in its entirety as they argue that, as this module of the trial, for which discovery is being ordered, is dealing with liability, and not quantum, this category, dealing with the damage caused by the fire, should not be discovered.

178. However, the liability module will deal with liability for the cause and the spread of the fire and before responsibility for the spread of the fire can be determined, it is necessary to establish the extent of the spread of the fire. Yet to do so, it is necessary to consider the nature and extent of the damage which was caused by the fire. Accordingly, while the liability module of the trial will, of course, not deal with the amount of damages which are claimed by the various parties, it is nonetheless necessary, in the liability module, to consider the extent of the losses suffered by the relevant parties in order to determine the spread and extent of the fire.

179. Therefore this category is permitted, even though some of those documents may also be relevant to the quantum of any damages.

Category 24

“(a) Documents provided by [the Owners] to their insurers on placement or renewal of insurance concerning fire safety at the Douglas Village Shopping Centre, including any inspection reports that were prepared in connection with the placement or renewal of insurance; and

(b) any correspondence or documents received by [the Owners] from their insurers concerning fire safety at the Douglas Village Shopping Centre.”

180. Bearing in mind that this motion is brought on behalf of all the relevant parties to both sets of proceedings, it is relevant to note that the Manufacturer and the Tenants plead that the Owners were guilty of contributory negligence regarding the spread of the fire, including in relation to the construction/installation of the fire system in the Shopping Centre.

181. On this basis, it seems clear that this category is relevant. This is because there may be reference to fire safety in the correspondence between the Owners and their insurers and so this Court does not agree with the Owners’ suggestion that this amounts to a ‘fishing expedition’ by the Car Defendants.

182. A further objection was made by the Owners. It is that the Manufacturer is the lead motioner in this discovery application, which will be shared amongst all the relevant parties. The Distributors have not, to date, pleaded contributory negligence against the Owners. Thus,

the discovery of this category, relating to contributory negligence, will be shared with the Distributors, who have not pleaded contributory negligence. However, McDonald J., who would have been aware of the pleadings, determined that in all the circumstances of the pleas being made by all the parties, and the similarity between them, that it was appropriate to make an order that the proceedings be heard together and discovery be shared by all parties. Accordingly, this Court rejects the suggestion that it should now order discovery of a certain category of documents because it is to be shared.

Category 30

“All documents created between the period on or after 1 November 2007 and 19 March 2020 recording and/or evidencing compliance and/or non-compliance by [the Owners] with their obligations under Regulation 13 (c) of the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. No. 2099/2007).”

183. For the reasons already stated, this Court refuses to insert an end date of 19th March, 2020 regarding the creation of documents, since relevant documents may have been created after the date the proceedings were issued and these will not necessarily be privileged. Instead it will insert an end date of 11th March, 2021 for the reasons already stated.

Category 31 (c) and (d)

“All documents evidencing or recording:

- (a) The systems and/or safeguards to prevent, limit and/or mitigate the outbreak and/or spread of fire at the Douglas Village Shopping Centre;
- (b) The systems and/or safeguards to protect the safety of occupants;
- ~~(c) The operation of such systems and/or safeguards on 31 August 2019; and/or~~
- ~~(d) Any changes to such systems and/or safeguards since 31 August 2019.”~~

184. As regards sub-category (c), it seems to this Court that, as claimed by the Owners, this category is already covered by Category 19, and so will not be ordered.

185. As regards para (d), this is a ‘post-fire’ objection. However, for the reasons set out at Category 3, this is not accepted as valid, so this will be ordered.

MOTION 3 - DISCOVERY SOUGHT BY MANUFACTURER FROM TENANTS

186. The next motion arises in the Tenants' Proceedings and the lead motioner is the Manufacturer seeking discovery against the Tenants, to be shared with all relevant parties.

187. When considering whether to grant discovery of documents in a dispute between a plaintiff and defendant, it is necessary to consider the application in the context of the particular dispute. This point, while relevant to the other motions considered in this judgement, is particularly relevant to the application for discovery by the Car Defendants against the Tenants.

A common sense or proportional approach to the 'necessity' for discovery

188. The plaintiffs in the second set of proceedings, the Tenants, are a group of small-scale retail tenants in the Shopping Centre, i.e. a book shop, a shoe shop, a butcher, a florist and a jeweller.

189. They are suing the Distributors, the Manufacturer, the Driver and the Owners for the losses they claim to have suffered arising from the fire.

190. In addition to making similar claims, as are made in the Owners' Proceedings, against the Car Defendants and the Driver regarding their responsibility for the start and spread of the fire, they claim that their landlord, the Owners, were guilty of negligence regarding the spread of the fire from the car park to their retail units. In this regard, uncontroverted submissions were made that the car park was an integral part of the Shopping Centre, since the car park was on the first floor, second floor and roof of the development, with shops under it and to the side of it.

191. It is to be noted that despite the number of claims and counter-claims from the various parties in the two sets of proceedings, the Tenants are different from all the other parties in one respect, namely that they are not identified as wrongdoers by any party in this litigation.

192. Rather they are the only persons who are party to the proceedings solely on the basis of being 'wronged' by the actions of the others. Therefore, the Tenants' conduct prior to the date of the fire on 31st August, 2019 is not in issue.

193. So for example, if the butcher happened, by coincidence, to have in his possession prior to the fire on 31st August, 2019, documents regarding alleged defects in Zafiras, because, say, he had heard of the investigation in the UK regarding such cars, it could not be denied that those documents are relevant to the issues in dispute between the parties regarding the cause of the fire.

194. On one interpretation of the law, this would mean based on the traditional approach to discovery, that it should be ordered since:

“the default position should be that a document whose relevance has been established should be considered to be one whose production is necessary.” (per Clarke C.J., as he then was, at p. 277 of *Tobin*)

195. However, as is also clear from *Tobin* at p. 221, ‘necessity’ in the context of discovery is a broad concept. In this context, and in this Court’s view, it means that discovery should operate in the real world and so with a common sense or proportionate approach to whether a category of documents is genuinely necessary for disposing fairly of the cause or matter. This principle is reflected in the statement of Fennelly J. set out below from *Ryanair plc. v. Aer Rianta cpt* [2003] 4 I.R. 264 that there must be some proportionality between the extent or volume of the documents to be discovered and their likelihood to advance the case being made.

196. In this case, this means that while the Court accepts on the one hand that if the butcher had such documents in her possession they would be relevant to the dispute, but on the other hand in determining whether a category is relevant *and* necessary, such as to order discovery, this Court must have regard to the *likelihood* of such documents regarding alleged defects in Zafiras being in the possession of the Tenants prior to the date of the fire and even if they were, by happenstance in his possession, the extent to which discovery is necessary in order to dispose fairly of the dispute.

Any special circumstances relevant to the discovery application?

197. Another general point of relevance is that the Tenants do not have a common insurer with any of the other parties, unlike the Driver and the Owners (who have AIG as a common insurer). The position of the Tenants can therefore be distinguished in these critical respects from the position of the Owners, which is relevant when one considers the extent to which it is necessary to order discovery against it.

Discovery to be ‘costs-efficient’

198. It is also relevant to note that by Order of McDonald J. dated 14th April, 2021 the two sets of proceedings are to be case managed together and to proceed to trial in a structured and ‘costs efficient way’. This Order provides that:

“Every effort is to be made by the parties to **avoid any duplication of costs** in relation to pre-trial steps including discovery. Requests for **discovery are to be tailored appropriately to ensure that a single request for discovery** should, where possible, cover all liability issues in both sets of proceedings relevant to the party seeking discovery. In addition discovery is to proceed on the basis that discovery in one set of proceedings would be available in both proceedings with the implied undertaking varied accordingly.” (Emphasis added)

Documents requested of another party to the litigation

199. It is also relevant to note that the Tenants stated, in their letter dated 1st April, 2021 to the lead motioner, the Manufacturer, that:

“Similar documentation has in fact been requested of the appropriate co-defendants [the Owners]. There is therefore a risk of duplication and risk of placing an undue burden on the [Tenants] to make **discovery of documents that may be discovered more expeditiously and more appropriately in the first instance, by other parties to this action.**

Without prejudice to the points set out above the [Tenants] will consider any further reasonable request for discover of documents where it is established that all more appropriate means of sourcing the documents have been exhausted.” (Emphasis added)

200. Against this background, the categories of discovery sought by the lead motioner, on behalf of all the other relevant parties, from the Tenants are set out below. As before, where a category proposed by the Manufacturer is rejected in full by the Tenants, this is set out, without amendment.

Categories 1 and 2

Category 1

“All documents evidencing and/or recording that the first, second, third and seventh Defendants:

- (a) Caused, allowed or permitted a fire to start in the Zafira B vehicle bearing registration mark 06 C 17323 (“the Vehicle”);
- (b) Designed, manufactured, produced, supplied, distributed marketed, and sold a vehicle that was defective and liable to catch fire;
- (c) Failed to exercise due skill, care and diligence in or about the administration of the Recalls;
- (d) Failed to provide any or any adequate instructions and warnings to the Driver;
- (e) Failed to comply with the requirements of Directive 2001/95/EC General Product Safety and the European Communities (General Product Safety) Regulations 2004 (as amended).”

Category 2

“All documents evidencing the allegation that the HVAC System in Zafira B vehicles posed a continuing risk of fire unless the defects were remedied.”

201. These two categories relate to documents that the Tenants might have regarding its allegations of negligence against the Car Defendants and these categories are rejected in full by the Tenants.

202. Clearly these are relevant categories of documents, since one is dealing with documents which could advance the Tenants’ case against the Car Defendants or damage the Car Defendants’ in their defence.

203. However, as previously noted, the case law makes clear that the discovery must also be necessary for the fair disposal of the matter.

204. Considering that one is dealing with butchers, florists etc., it is highly unlikely that these parties would have any documents regarding the alleged failures of the HVAC system in Zafiras prior to the date of the fire on 31st August, 2019. There was no relationship between the Tenants and the Car Defendants before the fire. In addition, there is no allegation that the Tenants had any knowledge in relation to the commencement of the fire or that they were guilty of any wrongdoing in this regard, in contrast to the position of say the Owners or the Driver.

205. It is difficult to see on what basis the Tenants are likely to have such documents, even though it is accepted that, if they did, they would be relevant documents. This is because one cannot of course eliminate the possibility that one of the Tenants has such documents in her possession, for example if the butcher or florist was the owner of a Zafira car and had done some independent research on the cause of the Zafira fires, which issue had received publicity in the UK prior to the fire in the Shopping Centre.

206. However, as noted by Murray J., as he then was, in *Framus Ltd. v. CRH plc* [2004] 2 I.R 20 at para. 36:

“As Fennelly J. pointed out in [*Ryanair plc. v. Aer Rianta cpt* [2003] 4 I.R. 264] the crucial question is whether discovery is necessary for “disposing fairly of the cause or matter”. I think it follows that there must be **some proportionality between the extent or volume of the documents** to be discovered and the degree to which the **documents are likely to advance the case of the applicant or damage the case** of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial.” (Emphasis added)

207. It seems to this Court that ‘necessity’ and ‘proportionality’ in this context, insofar as it refers to the ‘extent’ of the documents sought, applies, not just to the number of documents, but also to the type of documents sought, bearing in mind from whom they are sought, and whether they are genuinely likely to be required for the fair disposal of the matter.

208. In this case, the documents sought are highly unlikely to be in the possession of the Tenants and even if they are, they are likely to be documents of a type that are publicly available and so unlikely to advance the case of the Car Defendants or damage the Tenants’ case (beyond what is already in the public domain).

209. On this basis it seems clear to this Court that this category of documents, insofar as it refers to documents which might have been in the possession of the Tenants, prior to the fire, could not be said to be genuinely necessary for the fair disposal of this matter.

210. As regards documents which were created, or came into the possession of the Tenants relating to the alleged negligence of the Car Defendants after the fire, it seems clear that these documents will in all likelihood be privileged. This is because they will, of necessity, be dealing with the cause of action which the Tenants believe they have, not just against their landlord, the Owners, but also the Car Defendants, for the commencement and spread of the fire. In this regard, in its written submissions, the Manufacturer does not contest the suggestion in correspondence by the Tenants that any such documents are ‘*manifestly privileged*’. Rather the

Manufacturer refers instead to the fact that the category is not onerous, in light of the agreement between the parties not to schedule documents which deal with advices etc. from counsel and expert witnesses.

211. This does not however answer the key point that any such documents regarding alleged defects in the Vehicle in the possession of the Tenants, who are accused of no wrongdoing, will in all likelihood be privileged, such that it is not proportionate to seek such documents from the Tenants as there is unlikely to be (non-privileged) documents which will advance the Car Defendant's case or damage the Tenants' case.

212. For this and the other reasons of distinction between the Tenants and the other parties, set out above, these two categories of discovery are therefore rejected.

Category 5

“(a) Documents evidencing any insurance claim made by each of the Callistoy Plaintiffs [i.e. the Tenants], and responses thereto, in respect of loss or damage allegedly caused by the fire on 31 August 2019 at the Douglas Village Shopping Centre (“the Fire”).

(b) Correspondence with [the Owners] in relation to the alleged losses relating to the Fire and/or to insurance claims.”

213. This category of documents is rejected in full by the Tenants.

214. When considering this category, it is important to bear in mind that the lead motioner is seeking this category from the Tenants on behalf of all the other parties, i.e. the Car Defendants, the Driver and the Owners. It is also relevant to note that the Tenants, like the Car Defendants, are alleging that the Owners negligently failed to limit and minimise the spread of the fire in the Shopping Centre.

215. Against this background, it is to be noted that Category 5(a) is objected to by the Tenants on the grounds that they have agreed to provide documents relating to this same subject matter, which category is limited to those documents provided by the *Tenants to their insurers*. They dispute the relevance of any documents provided by the *insurers to the Tenants*, to the cause, nature and spread of the fire.

216. Unlike the previous issue in Categories 1 and 2, regarding the alleged defects in the Zafiras (where the Tenants would have had no involvement, or connection, with this issue), we are here dealing with the spread of the fire and in particular the fire damage to the Tenants' premises, with which the Tenants are intimately involved.

217. In this regard, it is accepted by the Tenants that they may have documents which evidence the spread of the fire in their correspondence to their insurers. While it is likely that most of the relevant documents, regarding the spread of the fire, will be from the Tenants to their insurers, it is not possible to say with any certainty that the insurers will not be commenting on the cause or spread of the fire in the correspondence they send to the Tenants. Accordingly, this subcategory is permitted in full.

218. As regards Category 5(b), the Tenants object to this category on the grounds that this application for discovery relates to the quantum module of the trial, and not the liability module of the trial which is due to be heard at a later date.

219. However, a key issue in the liability module of the trial is the question of who might have been responsible for the spread of the fire. Accordingly, for the same reasons as set out in Category 23 in Motion 2, this is permitted.

220. For this reason, this category is permitted in full.

Category 6

“All documents evidencing or recording:

- (a) The alleged damage to the Douglas Village Shopping Centre (“DVSC”) (including the individual units occupied by each of the [Tenants]) arising from the circumstances of the fire on 31 August 2019;
- (b) The alleged damage to the Car Park at the DVSC arising from the circumstances of the fire on 31 August 2019;
- (c) The necessity for complete closure of the DVSC; and
- (d) The necessity for the demolition of the affected section of the Car Park at the DVSC.”

221. The Tenants have agreed to provide discovery of documents relating to damage to contents, stock, fixtures and fittings provided to their insurers and documents evidencing damage to their retail units.

222. While the documents listed in Category 6 are clearly relevant to the dispute, it seems to this Court that it is not necessary for an order of discovery to be made against the *lessees* of the Shopping Centre regarding damage to the Shopping Centre and car park belonging to the Owners and *lessors* of the Shopping Centre regarding its closure and demolition. The most appropriate person for such an order to be made against is the owner (and lessor) of the property. Furthermore, it is to be noted that discovery of these documents has been sought and ordered against the Owners (see Category 23 *et al* of the discovery sought by the Car Defendants against the Owner in Motion 2).

223. As noted by McMenamin J. in *Linfen Limited v Rocca* [2009] IEHC 292 at para. 28:

“In a multi-party case such as this, a **court should seek to ensure that discovery is in fact necessary** between a particular applicant and respondent. To lose sight of this consideration is to run the risk of needless duplication, and to impose on parties an unwarranted financial burden.” (Emphasis added)

224. Similarly in this case, it seems an unwarranted financial burden on the Tenants to have to search for documents that they are very unlikely to possess and even if they do possess, such documents are likely to be in the possession of the Owners (who is obliged to discover them).

225. In this regard, in correspondence the Tenants stated to the Car Defendants that to the extent that any such documentation exists, it must be in the possession, power or procurement of the Owners. It is relevant to note that this is not denied by the Car Defendants. Instead they state that on the basis that the Tenants state that they are unlikely to have many such documents, it would not therefore involve a significant burden for the Tenants to discover them. However, the term ‘necessary’ as it applies to discovery means that a discovery which is unnecessary is not ordered. Whether the search will reveal few or a lot of documents is beside the point.

226. In this case, this Court concludes that this category, although relevant, is not necessary to be discovered by the Tenants as there are more appropriate ways in which the documents can be discovered.

Category 7A

227. The background to this Category 7A is that a similarly, but not identically, worded category (which is referred to as Category 7) was sought by the Manufacturer and was agreed with the Tenants.

228. That Category 7 is more restrictive than the Category 7A which is being sought by the Distributors. The agreed Category 7 states:

“All correspondence between the [Tenants] and their insurers, Aviva Ireland Insurance DAC, in relation to the cause of the fire at the Douglas Village Shopping Centre up to 21 August 2020.”

229. Against this background, Category 7A is set out, with the additional changes to Category 7, being sought by the Distributors (but not agreed by the Tenants), duly marked up:

“All correspondence between the [Tenants] , the owner/operator of the Douglas Village Shopping Centre and/or their insurers, ~~Aviva Ireland insurance DAC~~, in relation to:

(i) the cause circumstances of the fire at the Douglas Village Shopping Centre up to on 31 August 2019 and the investigation into those circumstances;

(ii) the closure of the Douglas Village Shopping Centre; and

(iii) the damage caused by the fire and the demolition, emergency or reinstatement works required.”

230. Both categories deal with the correspondence between the Tenants and their insurers in relation to the fire and it is clearly accepted by the Tenants that such correspondence is relevant. However, the Tenants object to the extension of the category in the manner suggested by the Distributors.

231. The Tenants object to the extension of this category as they say that it includes correspondence between the Tenants and the Owners, for similar reasons to their objection to Category 6, namely that it is not necessary, as the Distributors could seek this correspondence from the Owners.

232. However, this category is very different from Category 6. Category 6 deals with “all documents” relating to the alleged damage to the Shopping Centre, the car park, the closure of the Shopping Centre and its demolition. It is true that these are matters which are primarily, and almost exclusively, matters of concern to the Owners, rather than the Tenants.

233. However, in Category 7A, we are dealing with a very limited category of documents, namely correspondence originating from the Tenants to the Owners (and *vice-versa*).

234. In these circumstances, this Court would not conclude that it is disproportionate to seek discovery from the Tenants (rather than from the Owners) of letters etc. *sent by and to* the Tenants. This is in contrast to the position regarding ordering discovery of Category 6 documents from the Tenants (when clearly it is more appropriate for ‘*all documentation*’, regarding the damage, closure and demolition of the Shopping Centre, to be obtained from its owner, rather than a tenant therein).

235. Accordingly, this Court rejects the Tenants’ objection to the first amendment to Category 7A, wherein it is expanded to include correspondence not just between the Tenants and their insurers, but also with the Owners.

236. As regards the remaining amendments suggested by the Distributors, the primary objection of the Tenants to expansion of the subject matter beyond just the cause of the fire, appears to be that these matters relate mainly to the aftermath of the fire and the circumstances and investigation of the fire.

237. The Tenants say that these issues are secondary to the primary issue in dispute which is the cause of the fire. However, while they may be secondary issues, they are still issues in dispute between the parties and are therefore relevant for the resolution of the dispute and accordingly this objection is rejected and Category 7A is permitted without amendment.

Category 9(b)

“In respect of each of the [Tenants], all documents recording and/or evidencing:

(b) Fire safety information provided by the [Tenants] to their insurers on placement or renewal of their insurance.”

238. The Tenants object to this category in full.

239. This is a limited and confined category of documents namely fire safety information provided by the Tenants to their insurers. It is relevant to bear in mind, as noted previously, that this discovery although sought by the Manufacturer, as lead motioner, is to be made available to the Owners. In this regard, the Tenants’ pleaded case is that the Owners were guilty of negligence in relation to the spread of fire.

240. In these circumstances, where the documents could well be relevant to the dispute between the parties, and in view of the limited category of documents at issue, this Court will permit this category in full.

Category 10

“All documents created prior to 31 December 2019 evidencing, referring or relating to the systems and safeguards in place (including any systems and safeguards put in place by [the Owners], their servants or agents) so as to prevent the outbreak of fire and/or prevent the spread of the fire at the Douglas Village Shopping Centre (“DVSC”) premises, and to include documents, created on or before 31 August 2019, evidencing or recording information provided to the [the Tenants] before 31 August 2019 by the owner/operator of the DVSC relating to:

- (a) The plans and procedures to be followed and the measures to be taken in the case of an emergency or serious and imminent danger due to fire at the DVSC;
- (b) All written assessments of the risks to the safety, health and/or welfare at work of the employees and visitors to the DVSC due to fire; and
- (c) The identification by the owner/operator of the DVSC, their servants or agents of the hazards due to fire at the DVSC and/or the assessment by the owner/operator of the DVSC, their servants or agents of the risks presented by those hazards.”

241. This is agreed by the Tenants subject to the insertion of the underlined text.

242. There is no dispute between the parties regarding the relevance of this category relating as it does to the fire systems and fire safeguards in place in the Shopping Centre and in particular relating to documentation provided to the Tenants by the Owners. The only issue between the parties relates to the inclusion of the cut-off date suggested by the Tenants.

243. However, since one is dealing with documentation that is clearly relevant to the issues in dispute, it is not clear why a document which was created before 31st December, 2019 might be relevant but a document created after 31st December, 2019 might not *per se* be relevant.

244. Since the fire took place on 31st August, 2019, it is true to say that it is probable that documents created prior to 31st December, 2019 will be more likely to be relevant under this category, than ones created after that date. However one cannot say that a document created after 31st December, 2019 might not relate to the fire systems and fire safeguards in place in the Shopping Centre prior to the date of the fire.

245. Similarly, regarding the proposed cut-off date for information provided to the Tenants, one cannot say that a document sent to the Tenants after 31st August, 2019 might not be relevant to the plans, procedures etc. in the case of a fire which occurred on that date.

246. Furthermore, since no evidence has been provided by the Tenants to the effect that without these time-limits ‘*the discovery sought would be particularly burdensome*’ (per Clarke C.J. in *Tobin* at p. 227), this Court will permit this category in full.

247. However, for the same reasons as stated earlier, this Court will insert a ‘line in the sand’ date of 11th March, 2021 to replace ‘31 December 2019’ on the first line.

Category 11

“All documentation recording, referencing and/or evidencing the results of any inspection and/or investigation carried out by the [Tenants], their servants, agents or insurers in relation to:

- (a) The circumstances in which the fire commenced in the Douglas Village Shopping Centre (“DVSC”) on 31 August 2019 and/or the root cause of the said fire;
- (b) The subsequent spread of the said fire and/or cause of the said spread;
- (c) The response to the fire by staff and other persons at or about the DVSC;

but excluding documentation created by an expert appointed by the [Tenants] or recording such expert’s analysis or findings.”

248. This category is clearly of primary relevance to this dispute between the parties since it deals with the key issue in dispute, namely the cause of the fire and the cause of its spread.

249. It is objected to by the Tenants on the basis that there is a disconnect between the apparent intention of the wording of the category on the one hand, to target fact evidence (and so not to capture expert evidence or interpretation of facts, which would be privileged), and on the other hand, its alleged failure to achieve this purpose. In particular, the Tenants claim that the use of the term ‘*the results*’ of any inspection and/or investigation, by definition, will capture some documents evidencing interpretation of facts.

250. This Court sees some merit in this argument and in the circumstances, the Court will order discovery in the foregoing terms, but inserting the following phrase, highlighted in bold, after the word ‘results’ on the first line.

“All documentation recording, referencing and/or evidencing the results (**by which is meant fact evidence, excluding any interpretation of same**) of any inspection and/or investigation carried out by the Callistoy Plaintiffs, their servants, agents or insurers in relation to:

- (a) The circumstances in which the fire commenced in the Douglas Village Shopping Centre (“DVSC”) on 31 August 2019 and/or root cause of the said fire;
- (b) The subsequent spread of the said fire and/or cause of the said spread;
- (c) The response to the fire by staff and other persons at or about the DVSC;

But excluding documentation created by an expert appointed by the Callistoy Plaintiffs or recording such expert’s analysis or findings.”

Category 12

“All documents howsoever described, referring to or evidencing:

- (a) Whether the Driver took the steps to ensure that the Zafira Vehicle was free from faults and defects, in a proper state of repair and in a safe and roadworthy condition;
- (b) The alleged failure of the Driver to comply with the Recalls; and
- (c) The steps taken by the Driver to prevent the spread of the fire

but excluding (i) documents obtained from any of the other parties in discovery or (ii) documents which are in the public domain or (iii) documents which were created by or on

behalf of the [Tenants] or any expert retained by them for the purposes of these proceedings and therefore covered by litigation privilege.”

251. This category is rejected in full by the Tenants. It seeks documents in the Tenants’ possession which evidence the alleged negligence of the Driver in how she dealt with the Vehicle and the recalls.

252. Clearly it is relevant to a key issue in dispute in the litigation, namely the alleged liability of the Driver for the fire and its spread, but it raises the issue once again of whether it is necessary, in the sense of being proportionate regarding the type of documents being sought, and from whom they are being sought, in light of the degree to which they are likely to damage the Tenants’ case or advance their opponents’ case.

253. Just as under Categories 1 and 2 (where this Court concluded that the Tenants are highly unlikely to have any documents in their possession prior to the fire, relating to the alleged negligent manufacture/recall of the Zafiras by the Car Defendants and that any such documents which come into their possession after the fire are likely to be for the purpose of the litigation and therefore privileged), it is also the case that is highly unlikely that the Tenants have documents in their possession relating to the Driver’s negligent repair etc. of the Vehicle prior to the fire, and that, to the extent that any such documents which came into their possession after the fire, they are likely to be for the purposes of the litigation.

254. For the same reasons as set out under Categories 1 and 2, this Court concludes that it is not necessary for the fair disposal of this matter, for this category of discovery to be granted.

MOTION 4 – DISCOVERY SOUGHT BY DISTRIBUTORS FROM THE DRIVER

255. The final motion for discovery was taken in the Owners’ Proceedings by the Distributors against the third party, the Driver, but again with the resulting discovery available to all relevant parties.

Category 8 B

256. The Court was advised that the key issue in dispute between the parties was the following Category 8B as set out in the letter of 26th November, 2021 from the Driver’s solicitors to the Manufacturers’ solicitors as follows:

“All documents in the power, possession or procurement of the Driver, her servants or agents, ~~and all documents in the possession of her insurer~~ comprising: (a) all documents furnished by or on behalf of the Driver to the Insurer; (b) all statements made by or on behalf of the Driver or any other witness to her Insurer or any other party; and (c) all notes of any interviews with or statement made by the Driver, or on her behalf, or by any other witness, relating to:

- (i) ~~the purchase, maintenance, repair, use of~~ and any recall relating to the Zafira-B vehicle bearing registration mark 06-C-17323 (‘the Vehicle’); and/or
- (ii) the circumstances and events surrounding the fire at the Douglas Village Shopping Centre (“the Property”) on 31 August; and/or
- (iii) the root cause of the fire that took place at the property on 31 August, 2019.”

257. This category is agreed by the Driver, subject to the deletion of the marked text.

Deletion of ‘purchase, maintenance, repair’

258. The Driver claims that there is an overlap between the ‘*purchase, maintenance, repair*’ of the Vehicle in this category and Category 4 which has been agreed to be discovered by the Driver and which states:

“All documents evidencing and/or recording:

- a. The service history of the Zafira Vehicle
- b. Any repairs replacement parts, modifications and/or other works carried out on or in respect of the Zafira Vehicle.
- c. Any National Car Test inspection appointment, inspection result and/or certification in respect of the Zafira Vehicle;
- d. Any accident involving the Zafira Vehicle
- e. Any criminal prosecutions arising from the use or state of repair of the Zafira Vehicle;
- f. The placement of the Third Party’s insurance on the Zafira Vehicle including without limitation insurance application forms;
- g. Any claim on insurance involving the Zafira vehicle howsoever arising;
- h. The Third Party’s purchase of the Zafira Vehicle (including without limitation, copies of any adverts selling the Zafira Vehicle, copy of transfer of ownership

documents, copy vehicle registration certification and documents describing the condition of the Zafira Vehicle at the time of sale).”

259. However, unlike the very general terms of Category 4, Category 8B is quite specific and is directed at statements from persons regarding the alleged connection between the repair of the Vehicle and the cause of the fire, and so it may capture matters, such as documents from the Driver’s husband in this regard, that might not be captured by the more general documents in Category 4 regarding the service history of the car.

260. In circumstances where it has been confirmed by letter dated 19th November, 2021 from the Driver’s solicitors, that the Driver’s husband was ‘*advised to check the coolant level*’ in the Vehicle on the morning of the fire, any documentary evidence of witnesses such as him, which is in the possession or procurement of the Driver, could be of significance.

261. Accordingly, while there may be some overlap, this Court will nonetheless err on the side of ordering the discovery, without the deletion of this part of the text, particularly in light of the observations earlier and below regarding, *inter alia*, the alignment of interests between a plaintiff and a defendant (via their insurers, AIG) in the two sets of proceedings and the non-receipt by the Car Defendants’ experts of relevant material regarding the Vehicle in the summary provided to them.

Deletion of ‘all documents in the possession of the insurer’

262. As background to the Distributors’ application to include in the discovery against the Driver, documents in the possession of the Driver’s insurer, the Distributors relied on, *inter alia*, what they said was a failure by the Driver to disclose information and/or documents which they say are of crucial significance to establishing the cause of the fire.

Failure to disclose repair to Vehicle’s engine coolant system on eve of fire

263. This arises because, by letter dated 19th November, 2021, the solicitors for the Driver confirmed that on the 14th November, 2019 they became aware that, on the eve of the fire, i.e. on the 30th August, 2019, the coolant system in the Vehicle was repaired by Auto Mechanic, a garage repair business in Cork. This repair work involved the replacement of the upper heater radiator hose/pipe in the Vehicle and the replacement of coolant.

264. Furthermore, it is clear from that letter that the Driver accepts that repairs to an engine coolant system in a car are relevant to an investigation of the cause of a fire in that car. This is evident because, in rebutting the claim that the Driver should have disclosed, to the Car Defendants’ experts, the repair of the engine coolant system in the Vehicle, the Driver claimed that ‘*no prejudice has been caused to your client*’ (see the letter of 25th November, 2021 from the Driver’s solicitors to the Distributors’ solicitors). Significantly, the Drivers’ solicitors, in their letter of 19th November, 2021, suggested that providing this information to the Car Defendants’ experts would have made no difference to the investigation since:

“Any objective fire investigator has in mind the possibility of leak of coolant or any other fluid causing fire.” (Emphasis added)

265. It is also relevant to note that within days of discovering (on 14th November, 2019) that the engine coolant system in the Vehicle had been repaired on the eve of the fire, the Driver’s solicitors sent their motor experts to Auto Mechanic to discuss the repairs (on 21st November, 2019).

266. Bearing all of this in mind, it is relevant to note that on the 10th October, 2019, the Distributors had sought from Mr. Michael Hannon, a loss adjuster for AIG (the insurer of the Driver, as well as the Owners) ‘*witness statements/interviews*’, in relation to the fire, with the Driver of the Vehicle.

267. Then on the 15th October, 2019 the Distributors sought from the Driver’s solicitors copies of ‘*the service records/history*’ to include ‘*details of all other works or repairs performed*’ on the Vehicle.

268. On the 17th October, 2019, the Distributors sought once again from the Driver’s solicitors details of the ‘*service records/history*’ of the Vehicle.

269. A further reminder was sent by the Car Distributors to the Driver’s solicitors on the 4th November, 2019 regarding these requests and referencing the fact that:

“Our experts require access to this information immediately and would also like to have the opportunity to interview the driver. Please furnish us with an update regarding the driver **by return.**” (Emphasis added)

270. It is clear therefore that these regular and now urgent requests and reminders regarding the service history of the Vehicle were made in the weeks leading up to the discovery by the Driver’s solicitors, on 14th November, 2019, of the details regarding the repair of the engine coolant system on the Vehicle on the eve of the fire.

271. However, this information was not provided to the Distributors once the Driver’s solicitors obtained that information on the 14th November, 2019, despite these urgent and regular requests for same.

272. More significantly, only a few weeks after learning of the repair of the engine coolant system, the Driver’s solicitors sent a précis, (“Précis”) on the 2nd December, 2019, with the background to the Vehicle and what occurred on the date of the fire, for the purpose of a vehicle inspection to be carried on the 3rd December, 2019, as part of the Joint Investigation, by several experts appointed by insurance companies who are involved in this litigation.

273. As previously noted, it seems clear that this Joint Investigation, and the views of the experts involved, is likely to play a significant role in the determination of the cause of the fire for the purposes of this litigation.

274. This Précis provided background to these experts regarding the road-worthiness/state of repair of the Vehicle, since it refers to its most recent NCT:

“The last NCT test on her vehicle was carried out on 9th January 2019 and on that date the vehicle was issued with a valid NCT certificate until the 24th January 2020.”

275. While not explicitly stated, this sole reference to the state of repair of the Vehicle would seem to suggest that there was nothing else of relevance, regarding the state of repair of the Vehicle, in the context of the Joint Investigation into the cause of the fire.

276. This Précis makes no reference to the fact that the engine coolant system had been repaired on the eve of the fire. This is so despite the fact that this part of car is so relevant to the investigation of car fires, that, as already noted, the Driver’s solicitors would comment that *‘[a]ny objective fire investigator has in mind the possibility of leak of coolant or any other fluid causing fire’*.

277. Nor was any reference made in the Précis to what appears to be the equally relevant fact that the husband of the Driver was advised to check the coolant level on the morning of the fire.

278. This information regarding the repair of the engine coolant system in the Vehicle first came to the knowledge of the expert appointed on behalf of the Manufacturer (Dr. Denis Wood) in the summer of 2021, when he was notified during the course of the Joint Investigation that the Vehicle had been repaired on the eve of the fire. This is evidenced by the letter dated 3rd September, 2021 from the Manufacturer’s solicitors to the Driver’s solicitors:

“Dr Denis Wood recently told us of critical facts about works to [the Driver’s] vehicle undertaken just one day before the fire, which had not previously been disclosed to us or to him despite being known to your clients. Dr Denis Ward only learned of the facts shortly before he contacted us.”

279. It is of course true that by letter dated 17th May, 2021 from the Driver’s solicitors to the Distributors’ and Manufacturer’s solicitors (separately), they were both put on notice of Replies to Particulars made by the Driver to the Tenants in the Tenants’ Proceedings.

280. Thus, if the Car Defendants had sought copies of those Replies to Particulars from the Tenants they would have become aware at that stage of the repairs to the engine coolant system on the eve of the fire.

281. However, the letter in question referencing the Replies focused on issues arising in relation to the address of the Driver, and the letter itself did not make reference to the repairs that took place on the 30th August, 2019. As previously noted, the Manufacturers only became aware of the repairs on or around 3rd September, 2021, and the Distributor on or around the 6th September, 2021.

282. In any case, as previously noted, one is still dealing with a period of 18 months between 14th November, 2019 and 17th May, 2021, and during this period the Car Defendants' experts are participating in a Joint Investigation, which commenced on 9th December, 2019, in a situation where AIG's/Owners'/Driver's experts are aware of the repair of the engine coolant system, but where the Car Defendants' experts are not.

283. There is another aspect of this failure by the Driver to disclose the repair of the coolant system in the Vehicle which is relevant.

Changing conclusions by Driver regarding the cause of the fire

284. This is the fact that on 6th April, 2020, and so a few months after

(i) the Driver had failed in November, 2019 to disclose the repair of the coolant system to the Car Defendants and

(ii) after the Driver in December 2019 had referenced only one matter of relevance regarding the state of repair of the car (i.e. that it had passed its NCT) in the Précis to the experts investigating the cause of the fire,

the Driver wrote to the Distributors' solicitors regarding the cause of the fire in the following terms:

“[T]he information furnished to date (which includes the CCTV footage and still photographs of the incident, security guard eyewitness statements, other eyewitness photos of the incident together with the précis of our client's version of events) **are sufficient and satisfies both our client and our experts as the root cause of the Fire being within the HVAC system.**” (Emphasis added)

285. However, a very different position is adopted in the letter of 19th November, 2021 when the Driver is seeking to justify the non-disclosure of the repair of the engine coolant system in the Vehicle, on the grounds that it made no difference to the investigation. This is because in addition to stating that 'any objective fire investigator' will have in mind 'coolant' as a cause of fire, the Driver now states:

“Our experts have collected and examined all of the data in a logical and unbiased manner. No conclusions have been presented and we expect it will be some time yet and after the discovery process has concluded when the experts are in a position **to formulate a final opinion.**”

286. In addition to relying on the foregoing reasons to support discovery being extended to documents in the possession of the Driver's insurer (AIG), the Distributors also rely on the fact that AIG is the common insurer of the Driver and the Owners, whose interests are therefore aligned in this respect.

Sharing of information between parties on opposite sides, but not with the Car Defendants

287. In this regard, the Distributors claim that, as AIG is the insurer for the Driver and for the Owners, there has been a sharing of information between the third party (the Driver) and the plaintiff (the Owner) in the Owners' Proceedings. It is claimed that this is because in reality they are the one economic entity for the purposes of these proceedings, since AIG has used its rights as subrogee to the Driver and the Owners to advance its own commercial interests. This

is because it is claimed AIG will suffer financially if any negative findings are made against the Driver or against the Owners, even though the Owners are the plaintiff and the Driver is the defendant in the Tenants' Proceedings (and a third party in the Owners' Proceedings).

288. In this regard, evidence was provided to this Court of the sharing of information between the Owners and the Driver, but not with the other parties. For example, submissions were made by the Manufacturer that details were contained in the Statement of Claim issued by the Owners which could have only come from the Driver, e.g. the use of the car on the day of the fire, the fact that the Driver received the first recall notice but claimed she did not receive the second or third recall notice, etc.

289. This approach to the litigation is claimed to be to the detriment of the parties being sued as allegedly liable for the fire (the Car Defendants), who it must be remembered are claiming that it is the Driver who is liable for the fire (and so the Car Defendants joined the Driver to the Owners' Proceedings against them).

290. As previously noted, it is also significant to note that in the Tenants' Proceedings, the Tenants sued the Driver as a co-defendant alleging that she was also liable for the fire.

291. On one level, it is perhaps not surprising that in the Owners' Proceedings, the Owners, in effect AIG, would not sue the Driver, in effect AIG. However, contrasting this with what was done by the Tenants does highlight the reality of litigation like this, which is in effect litigation by insurance companies, in all but name.

Expert acting for plaintiff and defendant

292. Indeed, the fact that this litigation involves, in effect, AIG on both sides of the fence as plaintiff and third party in the Owners' Proceedings (and as defendant in the Tenant Proceedings) is highlighted by the fact that Mr. Masson has acted for both the Owners and the Driver. This is because he acted as the Driver's expert in relation to the investigation of the fire. See for example, the uncontroverted statement in the letter dated 11th December, 2020 from the Manufacturer's solicitors to the Driver's solicitors that:

“You also wrote on 2 December 2019 to **Lee Masson, forensic investigator retained by AIG in its capacity as insurer of your client's vehicle**, with what you described in that letter as your client's account of events.” (Emphasis added)

293. Yet, as already noted in relation to the first discovery motion, the same expert, Mr. Masson has provided an expert opinion on behalf of the Owners.

294. It is also relevant to note that the Driver's solicitors sought to defend the failure to disclose the repair of the Vehicle on the eve of the fire, in their letter of 25th November, 2021 to the Distributors' solicitors, by stating:

“Crucially, no prejudice has been caused to your client. **Our experts, who are independent** and acutely mindful of their obligations to the court, are firmly of the

view that there is no other material way in which the investigation and preservation of the Vehicle could have been undertaken.” (Emphasis added)

295. It is relevant to note that this claim that the Driver’s experts are independent is made in the context of a situation where Mr. Masson is acting as expert for the Driver, the defendant/third party in these joined proceedings, as well as the plaintiff, the Owners, in these joined proceedings.

296. Indeed, the fact that there is no real difference between AIG/Driver and AIG/Owners is also clear from the correspondence from the Driver’s solicitors, who in their letter dated 11th October, 2019 set out the client as ‘AIG Europe’. In later letters, it is stated that the firm’s client is the Driver.

297. More significantly, the Owner’s solicitors in their letter of 20th December, 2019 make it plain that because both the Driver and the Owners are insured by AIG, they are to be treated as one and the same and writing to one is akin to writing to both. This is because, the Owners’ solicitors in this letter make it plain that they are replying not just to the Distributors’ solicitors’ letter to the entity listed as their client (AIG), but also they are replying to the Distributors’ solicitors’ letter to the Driver (insured by AIG):

“YOUR CLIENT: OPEL AUTOMOBILE GMBH (“OPEL)

OUR CLIENT: AIG EUROPE S.A.

[...]

We have been instructed by AIG Europe S.A. following the fire which took place at Douglas Village Shopping Centre in Cork on 31 August 2019 (“the Fire”). We refer to you previous correspondence with our client, **with [the Driver’s solicitors]** and your latest letter to [a loss adjuster].” (Emphasis added)

298. In addition, in a letter dated 26th May, 2020 the Owners’ solicitors sought to argue that statements made by the Driver were privileged. One could legitimately ask how could the Owners’ solicitors, whose interests are *ostensibly* adverse to the Driver (since the Driver claims not to be liable for the fire and the Owners claim not to be liable, through contributory negligence, for the fire), assert privilege on behalf of the Driver, when they are not on record for the Driver?

299. The answer to this unusual aspect of this case appears to be that unlike in most other litigation, this is a case where AIG is in effect the party to the litigation in place of the Driver and the Owners in joined proceedings, where the Owners are plaintiffs and the Driver is a defendant.

300. The Car Defendants claim that all of this amounts to a litigation advantage for the Driver/Owners and/or a litigation disadvantage to the Car Defendants which is sufficient to justify the order for discovery against the Driver (in respect of the documents covered by Category 8B) being extended to those documents in the possession of AIG, particularly when

one also takes into account the non-disclosure by the Driver of the repairs to the engine coolant system in the Vehicle.

301. The Car Defendants make the plausible point that it is somewhat artificial that AIG, the party that is for all intents and purposes running the litigation, *albeit* in the name of the Owners and the Driver, is able to hide behind a veil of subrogation when it comes to disclosing documents between the parties to litigation, as it is not a ‘party’ to the litigation and so is not caught by the terms of a discovery order under Order 31, Rule 12(1) which only applies to ‘*any other party*’ to the litigation.

Case law on extending discovery to documents in possession of a party’s insurer?

302. One might have sympathy with the view expressed by the Car Defendants that it is somewhat artificial to treat an insurance company, which is running the litigation and sharing information between a plaintiff and a defendant, as not being the ‘party’ to the litigation for the purposes of obtaining a discovery order.

303. However, the relevant rule, Order 31, Rule 12(1) of the Superior Court Rules, as currently drafted, states:

“Any party may apply to the Court by way of notice of motion for an order directing any **other party** to any cause or matter to make discovery on oath of the documents which are or have been in **his possession**, power or procurement relating to any matter in question therein[...].” (Emphasis added)

304. In this regard, it is not disputed by the Distributors that what is being sought by them goes beyond the *prime facie* terms of Order 31 Rule 12(1) which applies to a party to the litigation and documents in her possession. It is also not disputed that there appears to be no Irish or English authority in which such discovery was extended to a party’s insurer.

305. In this regard, reliance was placed by the Car Defendants on Australian cases which they said supported the extension of the Driver’s discovery in this case to its insurer, AIG.

306. The first is a case from the Supreme Court of Victoria, *Leader Westernport Printing Pty Limited v. IDP Instant & Duplicating Pty Limited* (1988) 5 ANZ Insurance Cases 60-856. However, the facts of this case are somewhat different to the current case in that the documents sought to be discovered were included, in error, in an Affidavit of Discovery, which was sworn by the plaintiff director of the company. The plaintiff stated these should not be discovered as they were not in the possession of the plaintiff’s solicitor as the solicitor of the plaintiff, but rather in his possession as the solicitor of the insurance company, and should therefore not be discovered. Gobbo J. rejected this argument, stating it was artificial to say the documents were not in the possession of the plaintiff’s solicitor, because he held that a solicitor cannot simply assert in what capacity he holds the documents. Emphasis was placed by Gobbo J., in support of a finding that the documents should be discovered, on the fact that it had been sworn in an affidavit that the documents were in the possession of the plaintiff.

307. For this reason, this decision is of limited relevance to the current case.

308. In any case, in another decision by the Supreme Court of Victoria a different conclusion was reached regarding discovery of material on an insurer's file. In *Hooker v. McCain Australia* [1981] VicSC 595 (18th December 1981) the Court rejected the proposition that the insurance file was in the power of the defendant because the insurer was the defendant's agent. At para. 7 O'Bryan J. states:

"The defendant could not seek an order for inspection of the file from this Court unless it became involved in litigation against the insurer and the file became a relevant document in such proceedings. **There is no legal relationship in existence between the defendant and its insurer save that created through a policy of insurance....** I have come to the view that the file of the insurer is neither in the possession of the defendant nor is it within the power of the defendant. It is not discoverable to the plaintiff."

309. However, of more importance in this Court's view is the approach of the Irish courts to the not unrelated topic of obtaining discovery from a company, of documents in the possession of a connected company. In this regard, reliance was placed by the Car Defendants on the Supreme Court case of *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited* 2013 [IESC] 3 in which Clarke J., as he then was, made the following comments at para. 7.1 in the context of a claim for non-party discovery. In considering this extract, it needs to be borne in mind that a party seeking an order for non-party discovery must indemnify the non-party in respect of its costs. In this context Clarke J. stated:

"While, strictly speaking, a party would be entitled to require its opponent to bring an application for third party discovery in the event that its opponent wished to obtain disclosure of relevant documents held by a related (although non-party) company, it seems to me that a party who imposed on its opponent such a cumbersome procedure, without there being some good reason, could well find that the court would be unsympathetic to applying the usual costs regime which applies in respect of true third party discovery involving orders against entities which have no connection with the parties."

310. In reliance upon this statement, the Car Defendants have submitted that this analysis should apply to the situation where AIG, like the connected company in *Thema*, is a non-party to the litigation but is acting as subrogee for the Driver (from whom discovery is sought), particularly where AIG is also subrogee for the Owners and has directly or indirectly shared information of the Driver with the Owner, but not the Car Defendants.

311. This Court agrees that there is considerable force in this argument regarding a court being sympathetic to a costs order application, where a cumbersome procedure is imposed without good reason, for a non-party discovery order against AIG.

312. However, it is notable that that is the extent of the analysis by the Supreme Court, namely it does not go beyond a negative costs order being made against a non-party, in that case a connected company of the party from whom discovery was being sought.

313. On this basis, it seems to this Court that it is a considerable step from *Thema* for this Court to conclude that, not only should costs not be awarded to a non-party insurer, but discovery should be ordered against it *via* a discovery order made against the insured.

314. It is worth setting out the part of the judgement of Clarke J. regarding whether there should be an expansive interpretation of the term ‘procurement’, so as to include a connected company of the party to the litigation. At para 5.19 he states:

“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 *Johnson v. Church of Scientology* 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. In all other circumstances, the document does not have to be discovered. Subject to the argument, to which I will now turn, concerning whether the addition of the word ‘procurement’ to the rule has altered that situation I do not see any basis in principle for deviating from the law as stated in *Johnson v. Church of Scientology*.” (Emphasis added)

315. The only English authority on the point opened to the Court was *James Nelson & Sons Ltd v. Nelson Line (Liverpool) Ltd* [1906] 2 KB 217. This case involved a claim by cargo owners against shipowners for breach of warranty for seaworthiness. The plaintiffs were insured by underwriters, and the main action was carried out by solicitors employed by the underwriters. The underwriters had earlier employed a surveyor to carry out an inspection of the ship, the report of which was held by the solicitors on the behalf of the underwriters. The defendants applied to the plaintiffs for inspection of the report, not in the possession of the plaintiffs, but in the possession of their underwriters. It was held that there was no power to order discovery of the report in the possession of the underwriter’s solicitors.

316. At p. 222, Sir Henn Collins M.R. states:

“The question is whether the rules as to discovery, as interpreted by decided cases, entitle the Court to make the order applied for by the defendants. Bigham J., whose experience in questions of this kind yields to that of no other member of the Bench, declined to make the order, presumably on the ground that **there was no authority for such an order. We are not, as it seems to me, at large to do abstract justice in the matter, but are limited by the express provisions of the rules on the subject.** The whole matter of discovery has been the subject of special legislation, **and we must look to that legislation**, as interpreted by the cases, to see whether we are not **really being invited by the defendants' counsel to take a step beyond anything which has heretofore been regarded as covered by the enactments** as to discovery. I think that is what we are invited to; and, though I sympathise to some extent with a good deal that the defendants counsel said, I do not feel justified in taking that step into the infinite,

and departing from the firm foothold afforded by the statutory enactments and decisions on the subject.” (Emphasis added)

317. This Court does understand the concerns expressed by the Car Defendants about the artificiality of treating only the Owners and the Driver as being the ‘parties’ to the litigation, and AIG as not a party to this litigation, when it is seems clear that in everything but name AIG is a party to the litigation.

318. In this regard, this Court also understands the case being made by the Car Defendants that not permitting the Car Defendants to discover from the Driver (insured by AIG) non-privileged factual documents regarding the cause of the fire, in the possession of her insurer’s, when AIG is running the litigation, seems artificial.

319. However, as in *Nelson*, this Court is bound by the rules of court as they are currently drafted. Accordingly, where there is no authority in this jurisdiction for disclosure to extend to a party’s insurer, this Court does not believe that it should extend discovery to a litigant’s insurance company, by means of a court decision, since it involves such a fundamental change to the current position.

320. If it was felt that there should be an exception created for discovery to apply to insurance companies who are in effect ‘parties’ to the litigation, then it seems to this Court, that it should be made by an amendment to the Superior Court Rules or by other legislation, rather than by a court seeking to do ‘*abstract justice*’ (in the words of Henn Collins M.R.), even though plausible reasons have been provided in the particular circumstances of this case (set out above) why such an order might be appropriate, *albeit* based on evidence adduced at an interlocutory stage.

321. Indeed, this strict approach by this Court to the interpretation of the rules of court is supported by the decision in *Thema*, which emphasised the ‘*considerable merit of certainty*’ regarding the rules of disclosure, which rules cover not just this one-off litigation, but the vast swathes of litigation in this country. In this regard, it is important to bear in mind that the furthest that the Supreme Court was prepared to go was to say that there may be adverse cost consequences where discovery has to be unnecessarily sought against a non-party. It is also clear from para 7.1, quoted above, that the Supreme Court was of the view that the party to litigation, the subject of the request for discovery, is entitled to oblige her opponent to bring an application for non-party discovery.

322. In this regard, a further reason for this literal and strict approach by this Court to discovery under Order 31 Rule 12(1) is that while litigious disadvantage has been cited as a reason for the order of discovery being extended to AIG, this disadvantage can be overcome by the Car Defendants applying for non-party discovery from AIG, *albeit* that this is not an ideal way and is arguably an inefficient use of court resources to achieve this result. If this option were not available then it might well be a matter of fundamental unfairness as alleged by the Manufacturers in their legal submissions, on the basis that:

“discovery of any statement made by the Driver will be frustrated if it should turn out that it was taken and held by AIG rather than any named party to the [Owners’ and Tenants’] Proceedings. A failure to discover any statements by the Driver on this basis would be patently unfair [...]”

323. However, the reason that this is not a case where it can be definitively stated that there is fundamental unfairness is because there is an option open to the Car Defendants of obtaining non-party discovery, if necessary.

324. Accordingly, this Court is saying to the Car Defendants, *albeit* with some reluctance, that they may have to go ‘the long way around’ to obtain any documents in AIG’s possession (if the Driver does not discover them as being documents that she can procure). This reluctance arises in particular because McDonald J. ordered that every effort was to be made by the parties ‘to avoid any duplication of costs’ and that requests for discovery were ‘to be tailored appropriately to ensure that a single request for discovery’ should cover all liability issues in both sets of proceedings. However, for the reasons aforesaid, this Court feels it is bound by the clear provisions regarding discovery contained in the Superior Court Rules.

325. It is also of course relevant to note that discovery of documents by the Driver already extends to those documents which are in the possession of AIG, which are in the procurement of the Driver, as the Driver is the client of AIG.

326. To the extent that the Car Defendants are of the view that the Driver has not discovered documents in the possession of AIG, but within the procurement of the Driver, it will be open to them to seek non-party discovery against AIG. While, in all the circumstances of this case outlined above, it might seem inefficient and wasteful of court resources to take the ‘long way around’, all the authorities seem, to this Court, to support this approach.

327. For example, in *Chambers v. Times Newspapers* [1991] 2 I.R. 424 at p. 429 Morris P stated:

“In my view [...] **the court should be slow to put someone, not a party to the action, to the trouble of making discover if it can be avoided** and I am satisfied that an order should only be made against a third party in circumstances where the documents in question are not readily available to be discovered by a party to the action or where in the particular circumstances of the case the court in the interests of justice require that it should be done.” (Emphasis added)

328. In this case, this Court has in fact been provided with evidence, regarding AIG being in effect a plaintiff and a defendant and evidence of the sharing of relevant information solely between those parties, which has been argued supports the view that the interests of justice might require such an order.

329. However as noted by Morris P., to make an order against a non-party, the documents should not be readily available to be discovered by a party to the action. In this regard, it is not clear that the documents, which the Car Defendants suspect exist and may be in the possession

of AIG, are *not* in fact either in the possession of the Driver or within the procurement of the Driver.

330. Consistent with this approach is the statement in Abramson, Dwyer & Fitzpatrick, *Discovery and Disclosure* (3rd edn, Round Hall 2019) 140 at para. [10 – 21] where in relation to motions for non-party discovery, it is stated that:

“The motion should be grounded upon an affidavit, which should include averments as to the likelihood that **the documents** sought are in the possession or power of the non-party and the fact that they **are not available elsewhere. This is often best established by first seeking the documents in question by motion *inter partes*.**” (Emphasis added)

331. It is also relevant to note that there is no motion for non-party discovery at this stage before the Court. In line with the statement of Morris P, this Court does not believe it would be appropriate to order non-party discovery without a motion to that effect.

332. In all the circumstances, this Court refuses to extend this category of discovery to documents held by the Driver’s insurer.

333. However this Court does see merit in expanding the category to clarify that it includes documents which had been previously in the Driver’s possession, power or procurement, by amending the first line to read:

“All documents which are in the power, procurement or possession (or which have been in the possession) of the Driver, her servants.....”

so as to clarify, for the avoidance of any doubt, that the discovery includes documents which the Driver is in a position to obtain by right from AIG, including, but not limited to, by way of a data subject access request under the Data Protection Acts.

Category 9 and 9A

334. The Distributors seek the following category of documents (Category 9) from the Driver:

“(a) All documents recording, referencing or evidencing the date on which the Driver’s address ceased to be 14 The Mews, Shanakiel, Cork, T23EDP2.

(b) All documents recording, referencing, or evidencing the date on which the Driver’s address changed to 1 Wolfe Avenue, Cork, T12WV4A.”

335. For its part, the Manufacturer seeks the following category of documents (Category 9A) from the Driver (and the Distributors have indicated their agreement with this category):

“(a) All documents recording, referring to or evidencing the date from which the Driver ceased to receive mail addressed to her and posted to the property at 14 The Mews, Shanakiel, Cork, T23EDP2.

(b) All documents recording, referring to or evidencing the date from which the Driver commenced receiving mail addressed to her and posted to the property at 1 Wolfe Avenue (otherwise 1 Woulfe Avenue), Cork, T12WV4A.”

336. The Driver has objected to both categories of discovery in their entirety.

337. This category, whether 9 or 9A, is relevant because an issue in this case is the claim that the Driver did not receive the second and third recall letters from the Distributors in circumstances where she had moved her residence from Shanakiel to Wolfe Avenue, *albeit* that the house in Shanakiel had not been sold, and her husband continues to reside there occasionally.

338. Thus, an issue to be resolved is the question of when the Driver ceased receiving mail addressed to the Driver at the Shanakiel address.

339. It does not appear to be disputed by the Driver that this category is relevant, since she relies on the principle that discovery may not be ordered if it is ‘*particularly burdensome*’ (see *Tobin* at p. 227).

340. In this regard, the Driver claims that other methods are available to obtain this information and her solicitor has offered to provide a copy of the deed of conveyance for the Wolfe Avenue property and a utility bill for as early as the Driver can obtain following her occupation of that property.

341. However, this does not deal with the key issue of when the Driver ceased to receive mail addressed to her at the Shanakiel property and when she began receiving mail addressed to her at the Wolfe Avenue property.

342. Furthermore it seems to this Court that if one considers the terms of Category 9A, as distinct from Category 9, this is drafted in a way which reduces the potential burden arising. This is because counsel for the Manufacturer submitted that, in relation to (a) and (b), the earliest document addressed to 1 Wolfe Avenue would suffice and there would not be a need for a large volume of documents. This Court sees the logic in this submission and so does not believe that this is particularly burdensome in the context of this litigation.

343. In these circumstances, this Court will order the discovery of Category 9A.

CONCLUSION

344. There are approximately 44 categories of discovery which this Court has had to consider in two sets of overlapping proceedings involving several different parties, quite apart from the number of agreed categories of discovery.

345. In those circumstances, there may well be some issues that need to be clarified before final orders are made. In this regard, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45

am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).