

**THE HIGH COURT**

[2022] IEHC 555

**[Record No. 2015/4515P]**

**BETWEEN**

**PATRICK MCNALLY**

**PLAINTIFF**

**AND**

**MOLEX IRELAND LIMITED & MOLEX INCORPORATED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Mark Heslin delivered on the 11<sup>th</sup> day of November 2022.**

**Introduction**

**1.** The case comes before this Court by way of a motion issued by the plaintiff on 29<sup>th</sup> September, 2021 seeking (1) an order pursuant to O.31, r.21 of the Rules of the Superior Courts striking out the Defence in these proceedings for failing to comply with the order of discovery made by the Court of Appeal on 13 November, 2019; and (2) such further and/or order/consequential orders as the court shall deem appropriate. I am grateful to Mr. O'Donoghue SC for the plaintiff and to Mr. McDonagh SC for the defendant who provided detailed written submissions and made skilled oral submissions at the hearing. These were of great assistance to the court in reaching this judgment and I will refer to the principal submissions during this judgment as well as certain of the authorities which counsel on both sides helpfully drew to the Court's attention and which seem to me to be of most assistance in determining the matter.

**The Plaintiff's Personal Injuries Proceedings**

**2.** The underlying proceedings comprise a claim for personal injuries which the plaintiff commenced by means of a personal injury summons which issued on 2 June 2015. In summary, the plaintiff, who is a mechanical engineer, and who claims to have been employed by the first named defendant, from 1983 to 1990, alleges that he sustained personal injuries, loss and damage as a result to exposure to a particular chemical *i.e.* Trichloroethylene (hereinafter "TCE"). The plaintiff pleads that the first named defendant is a limited liability company which manufactures and repairs products for the electronic industry, with a plant located in Shannon Industrial Estate. He pleads that the second named defendant, with a registered address in Illinois, USA, is the parent company of the first. The plaintiff pleads *inter alia*, that he was employed in the Shannon plant and, for a minimum of six hours per day, his work was confined to a small workroom within the first named defendant's production plant where he repaired tools and machine parts. The plaintiff pleads that he worked at tool repairing bench and that before, after, and during repairs, tools and machine parts were cleaned in a tool cleaning "tank" within the workroom, which tank was located directly beside the plaintiff's repair bench. The plaintiff pleads that this tank contained a chemical solvent known as TCE. He pleads that when this tank was covered, TCE vapour was exposed to the workroom. The plaintiff pleads that he and his colleagues were required to stand at the tank cleaning tools in TCE with their bare hands and breathing in solvent vapour. He pleads that the workroom was not ventilated and that he was exposed to at least twice the permitted occupational limit of TCE for a period of seven years. The plaintiff pleads that he left this job in January 1990 and that, in 2012, he attended his doctor with symptoms of stiffness; a sore back; dragging of his left leg; and a slowing of his speech and that, in January 2013, he was diagnosed with Parkinson's disease. The plaintiff pleads that in

August 2014 he was advised that the probable cause of his Parkinson's disease was exposure to TCE from 1983 to 1990 whilst an employee of the first named defendant at the Shannon plant. Twenty-six allegations of negligence and breach of duty (a) to (z) are pleaded at para. 5 of the personal injury summons.

**3.** Among the twenty-six specific pleas of negligence include the following:-

- "(a) Exposing the plaintiff to Trichloroethylene, a known neurotoxin;*
- (b) exposing the plaintiff to Trichloroethylene at levels that were unsafe;*
- (c) exposing the plaintiff to Trichloroethylene levels which exceeded the occupational exposure limits permitted at that time;*
- (d) failing to ensure that the Trichloroethylene tank was covered and properly sealed from the workspace at all times;*
- (e) failing to ensure that the tank which contained Trichloroethylene was designed in a way which limited its exposure to employees, and in particular in failing to site the said tank in a well-ventilated outdoor or partially covered space;*
- ...*
- (n) failing to issue the plaintiff with any or appropriate safety guidelines or otherwise to train and instruct him on the safe use of Trichloroethylene;*
- (o) failing to protect the health and safety of the plaintiff as an employee, and in particular failing to consider and evaluate the health risks posed by the use of Trichloroethylene;*
- (p) failing to provide the plaintiff with any direction or instruction on how the job was to be performed safely and with minimised risk to health;*
- ...*
- (r) failing to instruct or to properly instruct the plaintiff in the safe use of a neurotoxic agent;*
- ...*
- (x) failing to warn the plaintiff of the dangers of being exposed to Trichloroethylene;*
- ...*
- (z) at the time of the plaintiff's employment at the defendants' facility, the neurotoxicity of Trichloroethylene was well understood in the industry, as was the need to protect employees from breathing its fumes or allowing absorption through the skin. The defendants' efforts at ventilating the plaintiff's workspace from noxious fumes consisted of removing some ceiling tiles in the summer months. In or about 1985 when the workspace was relocated to a remodeled workspace with the addition of blower heaters and coolers, the defendants failed to avail of the opportunity to provide mechanical extraction ventilation and/or modify the work process. In respect of the cleaning tank, the defendants' instructions were merely to keep a hinged and unsealed lid thereon closed when not being used for cleaning tools. In the circumstances, there was an egregious and wilful disregard for the safety of the Plaintiff and his colleagues..."*

#### **Defence**

**4.** A full defence was filed by the defendants on 5 May, 2016 in addition to an assertion that the plaintiff's claim is statute barred, and without prejudice to that plea, the plaintiff is put on full proof of his claim in every respect.

## The use of TCE

5. It is clear from the pleaded case that the use of TCE at the Shannon plant is a central issue for the plaintiff to establish. Indeed, counsel for the plaintiff submitted during the hearing of this motion that *"The plaintiff has no case unless TCE was used"*.

## Plaintiff's Notice for Particulars

6. In these circumstances it is unsurprising that in a Notice for Particulars dated 8 May, 2017, the plaintiff's solicitors, Messrs Boyce Kelly sought, *inter alia*, the following particulars of matters contained in the Defence: -

*"4. Please confirm the rate of Trichloroethylene to the plaintiff and his colleagues in the tool room at that time.*

*5. Please confirm what the occupational limited permitted at that time was as regards to exposure to Trichloroethylene ....*

*7. Please confirm for the duration of the plaintiff's employment at the production plant known as Molex, Shannon Co. Clare the yearly quantities of Trichloroethylene purchased for use at the production plant known as Molex, Shannon, Co. Clare and the purposes for which the Trichloroethylene was purchased."*

*10. Please confirm the names, types and quantities of all chemicals, detergents, cleaning agents and solvents purchased and used at the production plant known as Molex, Shannon, Co. Clare and in particular the chemicals, detergents and cleaning agents which the plaintiff was required to use in the course of his employment"*.

## Defendants' Replies to Particulars

7. The Replies to the aforesaid Particulars which were furnished by Messrs BLM, solicitors for the defendants comprised: -

*"4. Not a matter for particulars, rather expert evidence.*

*5. Not a matter for particulars, rather expert evidence.*

*7. The duration of the plaintiff's employment at the production plant known as Molex, Shannon, Co. Clare is within the knowledge of the plaintiff. **The defendants do not have any records which indicate whether it ever purchased Trichloroethylene for any purpose.** Accordingly, in the event defendants did purchase Trichloroethylene it does not have records that indicate the yearly quantities purchased or the purpose for which it was purchased during the period of the plaintiff's employment..*

*10. The **only cleaning agent within the defendants' knowledge which was purchased and used at the production plant was "Gizer". The defendants believe that another cleaning agent "Gun Kat" may have been used at one stage but this cannot be confirmed**"*. (Emphasis added)

## Discovery sought by Plaintiff

8. The plaintiff sought voluntary discovery in 2017 and 2018 running to sixteen categories. The plaintiff issued a motion seeking an order for discovery on 4 September 2018 which was returnable before this Court on 21 May, 2019. Shortly before the hearing of that motion, the plaintiff requested an additional category of discovery ('N') and this was incorporated into the motion which was determined by this Court (Noonan J). That category was in the following terms: -

*"Any documentation in your possession or within your procurement relating to all claims of the occurrence of any neurodegenerative disorders or injuries from the use of Trichloroethylene, Gizer, or Gun Kat at any of your production or workplace facilities worldwide."*

## **Ireland and North America**

**9.** The plaintiff accepted during the course of the hearing of the discovery motion that the geographical limit of category N could be confined to Ireland and North America. It is common case that this Court refused discovery of category N on the basis that there were alternative means, such as the raising of interrogatories or the delivering of a notice to admit facts, by which the information might be sought, and to order discovery of category N would be unduly onerous on the defendants. This decision gave rise to an appeal by the plaintiff which was determined in its favour by the Court of Appeal. Judgment in the matter was delivered by Mr. Justice Edwards on 13 November, 2019 and I will presently look at the Court of Appeal's decision which ordered the defendants to make discovery of category N.

### ***Tobin v Minister for Justice* [2019] IESC 57**

**10.** Before looking at the Court of Appeal's judgment, it should be noted that, subsequent to this Court's refusal of category N, the Supreme Court delivered its judgment in *Tobin v Minister for Justice* [2019] IESC 57 on 15 July 2019 (Clarke CJ). As to the facts in *Tobin*, the case concerned a claim for personal injuries allegedly suffered by the plaintiff due to exposure to dangerous chemicals and solvents at work, in circumstances where the plaintiff was an apprentice aircraft mechanic in the Aircorp based at Casement Aerodrome. Among the categories of discovery sought by the plaintiff against the State was all documentation listing or identifying any chemicals used by the plaintiff in the course of his duties as well as their quantities and the dates of their purchase. The State opposed this category, suggesting that the plaintiff issue a set of interrogatories requesting that the State identify whether the chemicals listed by the plaintiff in his Replies to Particulars were, as a matter of fact, used in the 'Engine Repair Flight' workshop where, according to the pleaded case, the plaintiff was first exposed to solvents and dangerous chemicals in July 1991 (the last pleaded exposure being in February 1994). At the risk of oversimplification, the Supreme Court's decision emphasised that, whilst the party seeking discovery must establish relevance and, in most cases, relevance will *prima facie* amount to necessity, the party resisting discovery bears the obligation to establish that it is *not* necessary for discovery of relevant documents to be made. With respect to alternative means of obtaining the relevant information, these must potentially be equally effective, not merely less burdensome. In *Tobin* the Supreme Court looked at the question of alternative means and took the view that if the relevant questions were to be raised in any meaningful way by means of interrogatories, it would be necessary for the State to engage in significant research through its own documentation in order to properly answer the questions. The court was not convinced that the State had established that there would be a very great saving achieved by the use of interrogatories as opposed to discovery. The Supreme Court's decision in *Tobin* provided the backdrop to the Court of Appeal's judgment in the present case and it is to this I now turn.

### **The Court of Appeal's judgment**

**11.** The principles which emerged from *Tobin* were applied in the Court of Appeal's 13 November 2019 judgment which ordered that the defendants make discovery of category N. The following comprise *verbatim* extracts which seem to be useful to note, as they set out the context in which the defendants were ordered to make discovery: -

*"[The plaintiff] is put on proof of almost every aspect of his claim including causation. The availability of evidence tending to show knowledge of the danger, and foreseeability of the risk of injury, will be important to him in seeking to sustain his case"* (para. 48);

*"Although they seek to make the case that the nature and extent of the discovery requested would be unduly burdensome [the defendants] have placed not a scintilla of evidence before as [sic] to why that would be so. Counsel for the defendants points simply to the second sentence in the trial judge's ruling as recorded in the transcript, where he stated 'It is clear from the evidence and from the pleadings that the defendants are part of a large United States multinational corporation', as though it were enough. In my view it is not enough, and not so by a significant margin. In that regard we have not been told the number of production or workplace facilities involved; the geographical spread involved (bearing in*

*mind the plaintiff's offer to limit his claim for discovery to the defendants' production or workplace facilities in Ireland and North America); the numbers of personnel who might potentially be involved; the potential number of records involved and where and how they might be stored; the precise anticipated difficulty in identifying and collating the documents in respect of which discovery is sought; the projected numbers of personnel who would be required to be deployed to perform that exercise; the projected number of man hours involved; the projected cost thereof and perhaps also, if relevant, any limitation of resources available to the defendants that they would wish to rely upon. It is not for the courts to speculate on such matters simply on the basis that the defendants are part of a large United States multinational corporation. If a case of undue burden is being advanced, then the nature and extent of the burden needs to be spelt out and established in evidence. The defendants have failed to do so..." (para. 50);*

*"Counsel for the defendants has pointed to the Rules of the Superior Courts as providing for each of the three suggested alternative means by which the information which the plaintiff hopes to obtain on discovery could more readily and more economically, be obtained. It seems to me, however, that similar issues arise in this case to those with which the Supreme Court had to grapple in the Tobin case. Legal submissions only take the defendants so far. Yes, they have demonstrated that alternative means of obtaining the information...exist, but they have not demonstrated that they would be substantially less onerous to comply with than making the discovery sought in the circumstances of this case. To do so would require evidence, and once again the defendants have put forward no evidence. As was the case in Tobin, it is reasonable to apprehend that unless the defendants have the actual information readily to hand (and they have not stated that they do), answering relevant queries whether they are put by way of notice for particulars, notice to admit facts, or by way of interrogatories, will almost certainly involve them engaging in significant research through their own documentation so as to enable them to answer the questions raised properly" (para. 52).*

### **13 November 2019 Discovery Order**

**12.** Noting that this Court's refusal of the discovery sought pre-dated the Supreme Court's decision in *Tobin*, the Court of Appeal allowed the plaintiff's appeal and ordered the defendants to make discovery. The relevant category ordered can be seen both at para. 53 of the Court of Appeal's judgment and in that court's order which was made on 13 November, 2019, the operative part of which reads as follows: -

*"...IT IS ORDERED that the appeal be allowed and that the Defendant [sic] do within 12 weeks of the date of this Order make discovery on oath of the following documents which are or have been in their possession power or procurement.*

*Any documentation in the Defendant's possession or within the Defendants' procurement **relating to all claims of the occurrence of any neurodegenerative disorders or injuries from the use of Trichloroethylene, Gizer or Gun Kat at any of the Defendants' production or workplace facilities in Ireland and North America***

*-the affidavit on behalf of the Defendants to be made by Orla O'Connor..." (Emphasis added)*

### **Affidavits**

**13.** In dealing with the present motion, I have carefully considered all the evidence which was put before the court, in particular the following: -

- i. Supplemental affidavit of discovery sworn by Ms. Orla O'Connor on 19 March 2020 (purported compliance with the Court of Appeal's 13 November 2019 discovery order);
- ii. Affidavit of Ms. Etain Boyce solicitor for the plaintiff, on 29 September 2001 (grounding the plaintiff's motion) and the exhibits thereto;

- iii. Replying affidavit of Ms. O'Connor sworn 21 December 2001 and the exhibits thereto;
- iv. Supplemental affidavit of Ms. Boyce sworn 21 January 2022 and the exhibits thereto;
- v. Supplemental affidavit of Ms. O'Connor sworn 3 May 2022;
- vi. Affidavit of Catherine Kelly, solicitor for the plaintiff, sworn on 4 October 2022, and the exhibit thereto.

**14.** The first of the foregoing affidavits is at the heart of this application. It was sworn in purported compliance with the Court of Appeal's discovery order. During the course of this judgment, I will look at its contents closely.

**15.** It is unnecessary to comment on a paragraph-by-paragraph basis on the various affidavits which have been exchanged in the context of the present motion. It is sufficient to say that the affidavits sworn on behalf of the plaintiff comprise a critique of the defendants' 19 March 2020 affidavit and assert that there are irrefutable defects in the discovery process; that the defendant's failure to make proper discovery has been, not merely negligent, but wilful and prevents the plaintiff from having a fair trial because the discovery which has been made is so incomplete.

**16.** It is fair to say that the stance taken by the defendants is that Ms. O'Connor's 19 March 2020 affidavit constitutes full compliance with the defendants' discovery obligations. The defendants also make clear that the steps which were taken in order to ensure compliance with the Court of Appeal's discovery order have been set out in the 19 March 2020 affidavit.

**'Search sheet'**

**17.** That affidavit was accompanied by a single A4 sheet which details certain information under the headings Date/Name/Title/Comments. On its face, it appears to comprise (i) a setting - out of the individuals whom Ms. O'Connor contacted; and (ii) the searches conducted. This search sheet did not comprise part of Ms. O'Connor's 19 March 2020 affidavit. Thus, its contents have never been averred to. However, it is common case that it was proffered by way of an explanation of the searches undertaken. There was no objection to the admissibility of the search sheet for the purposes of the present motion. That being the position, I have engaged with the contents of the search sheet during the course of this judgment.

**18.** It is also fair to say that, other than the details in the search sheet and the averments made by Ms. O'Connor in her 19 March 2020 affidavit, none of the affidavits sworn on behalf of the defendants in opposition to the present motion provide any detail of *further* or *other* searches which are said by the defendants to have been carried out, but not captured by either (i) the 19 March 2020 affidavit or (ii) the search sheet which accompanied it.

**The Defendants' position**

**19.** The defendant's position is that all appropriate searches have been conducted and the defendants' attitude to the present motion is very clearly set out between paras. 20 and 22, inclusive, of their written submissions as follows: -

*"20. The plaintiff's criticisms of the searches conducted by the defendants are manifestly unfounded. In the supplemental affidavit of discovery, Ms. O'Connor describes having taken the following steps in order to identify any relevant documentation: -*

- (a) Ms. O'Connor identified all possible custodians of potentially relevant documents;*
- (b) Ms. O'Connor identified the possible locations in which those custodians may have held hard or soft copy documents;*
- (c) Ms. O'Connor completed a review of all available soft copy environmental health and safety records dating back to 2008, prior to which such documents were maintained in paper form;*

(d) Ms. O'Connor interviewed multiple representatives of the Defendants to ascertain whether any cases and/or claims had occurred which would not have been recorded; and

(e) Ms. O'Connor reviewed a summary of all employee compensation claims in the United States from 2003 to present, with no records available in respect of the period preceding that year.

21. Ms. O'Connor expressly avers that, on the basis of her investigations as aforesaid, no records or documentation pertaining to claims of the occurrence of neurodegenerative disorders or injuries from the use of trichlorethylene Gizer or Gunkhat at any of the defendants' production or workplace facilities in Ireland and North America.

22. In the present case, while the plaintiff may be frustrated by the fact that his claim is evidently unprecedented, it is respectfully submitted that the searches undertaken by Ms. O'Connor were wholly adequate. It cannot reasonably be argued that such efforts constitute, or even come close to, wilful default or negligence."

### **"Nil" documents**

**20.** In pursuance of the defendants' discovery obligations, Ms. O'Connor swore a "supplemental affidavit of discovery" on 19 March, 2020. As is clear from the First Schedule of Part One of this affidavit, it was averred on behalf of the defendants that there are "Nil" documents falling with the category ordered by the Court of Appeal.

### **The present motion**

**21.** It is in these circumstances that the present motion has been brought. The plaintiff contends that there has been a failure to comply with the Court of Appeal's order. The plaintiff characterises the deficiencies in the affidavit of discovery as being abject and submits that there has been non-compliance with the discovery order which is wilful and/or negligent. In response the defendants submit that there has been full compliance. They characterise the plaintiff's motion as misconceived and submit that it should be struck out.

### **Relevant principles**

**22.** Although, later in this judgment, I will return to the relevant jurisprudence, it is useful at this point to make reference to certain statements of principle of relevance. Counsel for the defendants emphasises that this Court's jurisdiction to strike out a defence pursuant to O.31, r.21 is discretionary and one to be exercised sparingly and only where wilful default or negligence has been established (see Hamilton CJ in *Mercantile Credit Company of Ireland Limited v Heelan* [1998] 1 I.R. 81, p.85; and *Murphy v J Donohoe Limited (No. 2)* [1996] 1 I.R.123, p.142). In *Ward v An Post* [2021] IEHC 470, I summarised the position in the following terms (at para. 365): -

"365. This court's power to strike out a defence is a discretionary one. It is not an obligatory power. At the risk of oversimplifying the principles which emerge from the relevant authorities, the following is a summary of the proper approach to the exercise by this Court of its power to strike out a Defence under O.31, r.21. It should not be exercised unless at least the following is established: firstly, the court must be satisfied that there has been a failure to comply with an order for discovery and, secondly, that such a failure is culpable in the sense of being deliberate and wilful having regard to all the circumstances and, thirdly, that the interests of justice require it." (para. 365).

**23.** In the same judgment I went on to state the following (from paras. 370 to 372):

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

evidence allowed the court to conclude that there was a realistic prospect of a fair trial being impossible, due to the other party's wilful refusal...

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

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

'20. I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequence of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned.'

21. It is only if it is proper and appropriate to conclude or infer from the failure to make proper discovery in the first place, that the failure concerned was designed for the purposes of not giving access to the other central relevant information, and where it will be appropriate to infer, in turn, from such a finding, a particular view on the issues to which that information refers, that it would be appropriate to allow a failure to make proper discovery to influence the court's decision on the merits of this case.'

**24.** It also seems appropriate to emphasise the purpose of discovery and the vital role it plays in the pursuit of justice. In *AIB Banks plc & Anor. v Ernst and Whinney* [1993] 1 IR 375, Finlay CJ observed that discovery is:

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

**25.** Equally well-established is the wide definition of relevance, per the oft-cited dicta of Brett L.J. in *Compagnie Financiere du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55, to the effect that a document relates to the matters in question in the action "which, it is reasonable to suppose, contains information which may, not which must, either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary". Far more recently, the court observed in *Marie Taylor v Clonmel Healthcare Ltd* [2004] 1 IR 169, that "discovery is with a view to fighting the case. It is to provide a party with the necessary additional ammunition to enable him or her win his or her case".

**26.** Also well-established is the obligation to make discovery of documents, not merely in the possession of, but also within the power or procurement of the party making discovery. As O'Flaherty J made clear in *Bula v Tara Mines Ltd* [1994] 1 ILRM 111: "A document is within the power of a party if he has an enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else". In *Thema International Fund PLC v HSBS Institutional Trust Services* [2011] IEHC 496 Clarke J (as he then was) stated the following, with respect to the obligation to make discovery of documents within a party's power and procurement:

"The position adopted in most of the common law jurisprudence to which reference has been made and also adopted under the former rule in this jurisdiction under *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."*

**27.** The foregoing dicta brings into sharp focus that discovery will not be adequate unless all potential third-party sources of documents are identified, proper searches carried with respect to these sources, and discovery made of documents which, although not in the possession of the party making discovery when the relevant order was made, can be procured, as of right, from others (an obvious and non-exhaustive list of such parties being lawyers, insurers, loss-adjusters, former employees or agents, and/or experts retained by the party under the discovery obligation). Equally well-established is how wide the definition of "documents", which includes all electronically stored information (see Order 31, rule 12 (13) of the Rules of the Superior Courts).

### **Searches**

**28.** A central contention advanced by the plaintiff is that the searches and interviews averred to on behalf of the defendants were inadequate and the plaintiff contends that the fact "Nil" documents have been discovered is a direct consequence of the inadequacy of the searches. It is appropriate at this juncture to look at the averments made with respect to the searches carried out, per the averments made by Ms. O'Connor in the 19<sup>th</sup> March, 2020 affidavit.

**29.** Ms. O'Connor identifies herself at para. 1 as a "Human Resources Director" in the second named defendant company and she avers that her affidavit is made with the authority of and on behalf of both defendants. She refers to the Court of Appeal's order and paras. 4 to 8, inclusive, comprise a setting out of the searches conducted. The following is averred at para. 4:

*"4. In pursuance of the defendants' discovery obligations, I, in the first instance, identified all possible custodians of potentially relevant documents. Thereafter, I identified the possible locations in which those custodians may have held hard or soft copy of the relevant documents."*

**30.** A number of observations can fairly be made with regard to the foregoing:

- (i) The number of possible custodians of potentially relevant documents is not specified;
- (ii) Where these possible custodians are located is not made clear;
- (iii) To the extent that the identified possible custodians were "carved out" of a larger group of personnel, the basis for their selection is not clear;
- (iv) Whether such larger group, or the identified possible custodians comprising a sub-set of same, included personnel in Ireland, is unknown;
- (v) Given that the Court of Appeal's order directs discovery of documents relating to "*all claims of the occurrence of neurodegenerative disorders or injuries*" from the use of TCD, it seems uncontroversial to say that documents concerning such claims could potentially be procurable from third party professionals such as lawyers, insurers, experts retained etc. but it is not at all clear from the averment at para. 4 whether the identified possible custodians included lawyers and/or insurers and/or such other third parties as may have documents procurable by the defendants;
- (vi) It is clear from the averments at para. 4 that it was the identification of what is described as "*possible custodians*" which determined the "*possible locations*" for the purposes of searches;
- (vii) As well as no indication being given in the affidavit as to the number or geographical location of the defendants' production or workplace facilities in Ireland and North America, it is certainly not averred that searches were conducted in all of them;
- (viii) Thus, the state of the evidence allows for a finding that, of the unspecified number of the defendants' production or workplace facilities in Ireland and North America, an

unspecified number of “possible locations” was identified, but this was done with reference to the prior identification of “possible custodians”, the net result being that it would appear that certain locations were searched and others were not (although the plaintiff and this Court is entirely unclear where and how many either category comprises).

**31.** In short, the fact that certain *locations* were not searched at all (the number and geographical location of which is entirely unknown) flowed from the identification of possible *custodians*, via a process which is entirely opaque. It is appropriate to quote *verbatim* paras. 5 and 6 from Ms. O’Connor’s affidavit, wherein she makes the following averments:

“5. I say in conjunction with the defendants’ Manager of Global Compliance Systems I completed a review of all available electronic **environmental health and safety records** on the defendants’ IT system “Enablon” for the period January 2017 to December 2019. I also completed a review of all available electronic **Health and Safety Records** prior to installation of “Enablon” for the period January 2012 to August 2017. I then completed a search on the defendants’ Sharepoint system which included data dating back to 2008. I say that prior to 2008, the defendants did hold **Environmental Health and Safety** records that were maintained in paper form and situated at individual sites. Due to the passage of time and the upgrading of IT systems the records are no longer available. I further say that I interviewed the defendants’ compliance leader together with General Counsel and site Human Resource leaders to determine if they were aware of any cases and/or claims of neurodegenerative disorders and/or injuries from the use of Trichloroethylene Gizer or Gun Kat which would have been recorded in the health and safety records. I say the defendants were not aware of any cases and/or claim pertaining to neurodegenerative disorders or injuries following the use of Trichloroethylene, Gizer or Gun Kat.

6. With the assistance of the defendants’ senior specialist in Global Product Compliance SSiGPC I completed a search of the defendants’ **health and safety** module in SAP (which is the defendants’ enterprise software). This data covers the period from 2008 to present. Prior to 2008, the defendants’ kept records of materials used in its products by way of a **Bill of Materials**. The records were uploaded into an SAP system in 2008. The data included all products that the defendants made from 2008 to the present. As regards the products that Molex produced but ceased making prior to integration into a SAP system, the defendants would have had a **Bill of Materials** in either paper or electronic form, depending on when a particular product was made. When production ceased on a product the defendants would delete and/or destroy the **Bill of Materials**. No documentation following within the category of documentation ordered were located.

7. As regards any claims of the occurrence of neurodegenerative disorders or injuries from the use of Trichloroethylene, Gizer or Gun Kat my investigations have established that there no [sic] records or documentation pertaining to claims of the occurrence of neurodegenerative disorders or injuries from the use of Trichloroethylene, Gizer or Gun Kat at any of the defendants’ production or workplace facilities in Ireland and North America exist.

8. I say with the assistance of the defendants’ claims manager, I reviewed a summary of all **employee compensations claims** for the Defendants’ plants in the United States for the period June 2003 to present. Efforts to identify records prior to 2003 were made however, it was not possible to locate any records prior to 2003. No documentation falling within the category of documentation ordered were located.” (Emphasis added)

**32.** It is clear from Ms. O’Connor’s averments that searches were conducted with respect to three categories, namely, what Ms. O’Connor describes as (i) “*Environmental Health and Safety Records*” and the defendants’ “*health and safety module in SAP*”; in addition to (ii) “*Bill(s) of Materials*” with respect to products made by the defendants, in particular, the “*records of materials used in its products*”; and (iii) “*employee compensation claims for the defendants’ plants in the United States*”. It is appropriate to look at what is said in relation to each of these three, in turn.

## **Environmental Health and Safety Records/Health and Safety**

**33.** As can be seen from the averments at para. 5, the review carried out was in respect of "all available electronic" records. In other words, only 'software' searches took place. Furthermore, what was searched contained only post-2008 records. With respect to records prior to 2008, para. 5 contains the averment that: "*Due to the passage of time and the upgrading of IT systems the records are no longer available*". Whether this is due to the loss or destruction of the records in question is unclear. What searches were carried out for "*environmental health and safety records that were maintained in paper form and situated at individual sites*" is unknown. It is not at all clear whether each of the defendants' sites was contacted. Nor is it clear whether any individual site in Ireland, specifically the facility in Shannon where the plaintiff claims to have been employed by the first named plaintiff, was searched, or not, for the possible existence of paper form, or other records.

### **'Search sheet'**

**34.** It is common case that Ms. O'Connor's 19 March 2020 affidavit was accompanied by an 'A4' sheet, upon which information is set out with reference to date/name/title/comments. During the hearing this was referred to by the plaintiff's counsel as a "search sheet" and I will use that designation. The search sheet did not comprise part of the affidavit sworn on 19 March 2020. However, it would certainly appear to comprise a record, proffered on behalf of the defendants, of the process which the defendants employed by way of searches, including interviews with certain of the defendants' personnel in the context of purported compliance with discovery obligations. In my view, this was not at all appropriate. In circumstances where the 'search sheet' contained information which is prima facie relevant to the question of discovery (and purports to refer to searches carried out) all such information should have been set out in affidavit form and averred to by the appropriate deponent(s). The fact that this was not done left the plaintiff in the impossible position of being unable to cross-examine any party with respect to the contents of the 'search sheet' despite the reality that the defendants were relying on it, in a material manner, in the context of asserting full compliance with their discovery obligations. If that were not so, the Court can fairly ask, rhetorically, why was the search sheet furnished at all? With reference to the contents of the search sheet, *names* are given for those individuals whom Ms. O'Connor referred to, by *title*, in her affidavit. For ease of reference these are as follows: -

- Global Compliance Manager (Mr. Jason Zidek);
- Compliance Leader (Mr. Joel Eurich);
- General Counsel (Mr. Bob Zeitler);
- Human Resource leaders (Mr. Shawn Flate, Mr. Jim Mason and Mr. Greg Eden);

**35.** It will be recalled that the search for environment health and safety records was carried out by the defendants' manager of Global Compliance systems. According to the search sheet, that was a Mr. Jason Zidek. In the manner previously looked at, it was a search of electronic records only, and only from 2008 onwards.

**36.** Although averments are made at para. 5 to the effect that none of the parties interviewed were "*aware of any cases and/or claim pertaining to neurodegenerative disorders or injuries following the use of Trichloroethylene, Gizer or Gun Kat*", the search in itself records *inter alia* the following (opposite references to Mr. Jim Mason, Director HR and Mr. Greg Eden, Director HR): -

*"Took lead HR role at Molex's Lincoln, Nebraska manufacturing facility on July 15, 2019. Joined Molex August 2014. Not aware of any **complaints of exposure to TCEs**. Not aware of anyone **claiming they had a neurodegenerative as a result of working at Molex**.*

*Worked in HR at Molex's Lincoln, Nebraska facility for 25+ years. Not aware of and has never heard of any **complaint of exposure to TCE**. Not aware of anyone **claiming they had a neurodegenerative as a result of working at Molex**."*

**37.** It does not seem to me that the confirmations recorded in the search sheet reflect the scope of the Court of Appeal's discovery order. The defendants' discovery obligations were not limited to documents concerning "*complaints of exposure to TCE*". Nor were the defendants' discovery obligations limited to documents relating to claims by employees that they sustained a neurodegenerative disorder. The category, as ordered by the Court of Appeal requires the production of documents "*relating to all claims*" and includes "*injuries*" as well as neurodegenerative disorders.

**38.** Furthermore, although the averments made by Ms. O'Connor evidence that interviews were conducted with five individuals, it is not at all clear whether those five individuals were directed to conduct any searches and, if so, what searches were carried out and where. It can also be said that, even though this Court still has no idea of what production or workplace facilities the defendants operate in Ireland and North America, the only locations identified in the search sheet comprise the following: -

*"Little Rock, Arkansas manufacturing facility (one of two main Molex LLC manufacturing facilities in the US);"*

*"Molex's Lincoln, Nebraska manufacturing facility".*

**39.** It would appear from the foregoing that, of the five persons interviewed, none were from the defendants' production or workplace facilities in Ireland.

#### **"Any records would be at site"**

**40.** Furthermore, whereas Ms. O'Connor avers that she interviewed the defendants' Compliance leader, the following entry appears on the search sheet: -

*"18/12/2019 Joel Eurich, VP, Global Compliance and EH&S did not track EHS issues at corporate level before 2010. **Any records would be at site.**"* (Emphasis added)

Quite apart from the explicit terms of the Court of Appeal's discovery order which, in my view, made it necessary for searches both physical and electronic to be carried out at all the defendants' sites in Ireland and North America, the foregoing result of the defendants' own investigations underlines that necessity. The averments made by Ms. O'Connor do not allow for a finding that these necessary searches were conducted.

#### **Records "no longer available"**

**41.** At para. 5 of Ms. O'Connor's affidavit, she averred inter alia that: "*...prior to 2008, the defendants did hold environmental health and safety **records** that were maintained in paper form and **situated at individual sites**. Due to the passage of time and the upgrading of IT systems the records are no longer available*". (Emphasis added). Furthermore, the search sheet contains the following entry with respect to "*Joel Eurich VP Global Compliance and EH&S*": - "*Did not track EHS issues at corporate level before 2010. Any records would be **at site***". Despite the foregoing, no averment is made on behalf of the defendants as to what, if any, searches, including physical searches of all, or indeed any, individual sites in Ireland and North America have been conducted. Nor is there any averment made as to when these "*paper form records*" which were "*situated at individual sites*" were last available; or the manner in which they were disposed of; or the extent, if at all, that third parties may have copies. It seems to me to be entirely sub-standard for the defendants to have averred that these records are "*no longer available*" without having provided a clear and comprehensive account, on affidavit, as to all attempts made to establish what happened to these records and all attempts made to recover them, including from third party sources. It also seems to me to be a statement of the obvious that it cannot be known that records situated at individual sites are no longer available *unless* searches have been conducted at each individual site. It is not at all clear that searches of each individual site have been carried out.

**42.** The discovery order contains no temporal limitation and the geographical limitation is North America and Ireland. Given the terms of the discovery order, I take the view that proper compliance required and requires the defendants to undertake thorough searches at each and every one of its

sites / facilities (i.e. at each of what the Court of Appeal's order describes as "*the defendants' production or workplace facilities in Ireland and North America*"). The evidence does not support the defendants' submission that all necessary searches were conducted. The state of the evidence is that necessary searches, including at each site / facility in North America and Ireland, were not carried out.

### **Third parties**

**43.** Bearing in mind the observations made earlier about the obligation to make discovery of documents in the power or procurement (not merely possession) of the party under the discovery obligation, there is also a complete lack of clarity as to whether third party professionals (e.g. lawyers, insurers, loss adjusters, experts in the medical, forensic or other field, or any other potential third-party sources) were contacted to see if they hold relevant documentation. Nor is it at all clear whether former or retired members of the defendants' staff (be they employees, servants or agents) were contacted regarding the possible whereabouts of records, or what might have become of them. I say this in circumstances where, although interviews appear to have been conducted with five individuals, none of them appear to have been 'in post' during the period (February 1983 to January 1990) when the plaintiff alleges that he was employed by the defendants at their product plant in Shannon.

**44.** Drawing together the foregoing observations, it seems to me that, with regard to the searches carried out by the defendants with respect to Environmental and Safety records/Health and Safety, (i) only software or electronic searches were conducted; (ii) these concerned records which go back no further than 2008; (iii) it is not clear what physical searches were conducted at any individual sites or facilities, despite the search sheet recording the defendants' compliance leader stating "*any records would be at site*" and despite the terms of the Court of Appeal's discovery order which makes specific reference to "*...any of the Defendants' production or workplace facilities in Ireland and North America* ; (iv) whether and to what extent efforts were made to procure records from third parties is entirely unknown; (v) whether and to what extent enquiries were made with former members of staff, in particular those employed during the period 1983 – 1990, is unknown; (vi) whether the five individuals interviewed were instructed to carry out searches is unknown; (vii) None of the five individuals interviewed appear to have worked for the defendants during the relevant period 1983-1990 and whether any of them are based in the Shannon plant which features in the plaintiff's claim is unknown; and (viii) the omission of the term "*injuries*" from certain interview feedback as recorded on the search sheet is suggestive of interview criteria which differed in a material way from that of the discovery order (which *includes* the term "*injuries*" and is not limited to "*neurodegenerative disorders*").

### **Bills of material**

**45.** As can be seen from para. 6 of the defendants' 19<sup>th</sup> March 2020 affidavit, the second search category related to bills of material. What emerges from the averments at para. 6 is that software searches were made for the defendants' "*records of materials used in its products*" as well as "*all products that the defendants' made from 2008 to the present*". There can be no criticism whatsoever of the defendants first carrying out searches with respect to materials used in its products, but it will be recalled that the claim made by the plaintiff is not that he sustained injury as a result of a *product* manufactured by the defendants or that his injury was caused by materials *used in* the defendants' products. Rather, his claim is that a chemical solvent, TCE, was used as a cleaning product by the defendants and that his Parkinson's disease results from exposure to TCE whilst an employee of the defendants, in circumstances where he alleges that he was required to stand at the cleaning tank in a small workroom cleaning tools in TCE with his bare hands whilst breathing in vapours from same.

**46.** It is averred that the searches in question were conducted with the assistance of the defendants' senior specialist in Global Product Compliance. The search sheet identifies Mr. Vince Chan as the person in the foregoing role. It also states that the search was done "*to determine if TCE is found [in] any materials or product compositions used at Molex.*" The entry in the search sheet then

continues: "Chan's query found that Molex does not make any product that contains TCE as a material or within a component part. Due to the data restrictions of when Molex implemented the SAP system, this data covers the time period 2008 to the present. Met with Murphy to explain request to search procurement records." In short, there would not seem to be evidence of searches having been conducted for cleaning products *used at* the defendants' sites / facilities in Ireland and North America, as opposed to products *used in* those manufactured by the defendants. The former was required, given the Order made by the Court of Appeal.

**47.** Later in the search sheet, the following is recorded with respect to Mr. Paul Murphy who is identified as senior sourcing engineer: "Murphy provided an update and records. Murphy searched Molex's enterprise software SAP, which has all available records (dating to (sic) 2008) of Molex procurement in North America. Based on the search, there is no records that Molex has ever purchased Gizer or Gun Kat (including spelling variations Jizer and Gunkat) at any time since 2008. Records prior to 2008 would have been maintained in prior systems and/or paper form. Those records no longer exist."

**48.** The foregoing indicates that the only search done was with respect to "procurement in North America". There is no reference to any search having been conducted in respect of the purchase of materials for any production or workplace facility in Ireland, including any Shannon facility. Nor is there any averment in para. 6 that any search was conducted for "procurement" in Ireland. Furthermore, while the aforementioned entry concerning Mr. Murphy's search of "Molex procurement in North America" refers both to "Gizer" and "Gun Kat", no reference is made to either TCE or "trichloroethylene" despite the latter being specifically referred to in the Court of Appeal's discovery order. This omission suggests that the search of the defendants' purchases from 2008 onwards may not have included a search for the purchases of TCE. The defendants have not explained (i) what would appear to be a failure to search for purchases of TCE in respect of procurement in North America; (ii) what would appear to be a failure to search for cleaning products *used at* sites/facilities as opposed to *used in* the defendants' products; (iii) what would appear to be a failure to search for purchases earlier than 2008; and (iv) what would appear to be a failure to search for purchases with respect to products used in Ireland, in particular, Shannon. To say that this is surprising is an understatement, given the nature of the plaintiff's claim; the terms of the Court of Appeal's judgment insofar as it analysed category N and its significance in light of the pleaded claim; and what that Court ordered the defendants to discover.

#### **"Toxic Organic Management Plan"**

**49.** In an affidavit dated 4 October 2022, which was sworn by Ms. Catherine Kelly, solicitor for the plaintiff, she exhibits an 18 November 2009 copy-letter which appears on the headed paper of the second named defendant and is addressed to a named "Pre-treatment engineer" at a water division in North Little Rock. The letter is entitled "Molex Toxic Organic Management Plan (TOMP)" and the text of the letter reads:

*"Please find enclosed an updated TOMP for Molex which reflects recent changes in personnel. No changes in facility operations or management of toxics have occurred. Please contact me if you require additional information."*

Behind that letter is a three-page document, dated the 16<sup>th</sup> November, 2009, the front page of which states

*"Molex, Inc  
Little Rock Connector Plant,  
801 Murphy Drive,  
Maunelle, Arkansas.*

Molex

*Toxic Organic Solvent Management Plan*

**50.** At this juncture it is appropriate to make clear that no objection was made during the hearing to the admissibility of any of the documents exhibited. In other words, there was no suggestion made by either party to the effect that the court could not have regard to all exhibits for the purposes of determining the present motion. The aforesaid *Toxic organic solvent management plan* contains *inter alia* the following statements:

***"Trichloroethylene is a component of aerosol cleaner/degreasers and lubricants used at the facility. These products are sprayed directly onto parts or equipment and used in their entirety. Additionally, there are no floor drains present in the area of the cleaner/degreaser or lubricant use. Empty aerosol cans are handled as hazardous waste and shipped offsite for disposal. Records of hazardous waste manifests are maintained in the Environmental, Health and Safety (EHS) department."*** (Emphasis added)

**51.** On its face, this document would certainly appear to indicate that trichloroethylene, or TCE, was used by the defendants as of 2009. It seems uncontroversial to say that if trichloroethylene was used in 2009, the defendant must have *procured* (i.e., purchased) it. However, and in the manner recently examined, it would appear that the search carried out by Mr. Murphy related only to "Gizer" and "Gun Kat" (including spelling variants) but did *not* include trichloroethylene.

**Gizer and Gun Kat**

**52.** It will also be recalled that in the defendant's Replies to Particulars (which, although undated, appear to have been served in May 2019) it was stated by the defendants (at reply no. 3) that: - "*It is understood that Gizer was used to clean tools*". Later, at reply 10, the following was stated: - "*The only cleaning agent within the defendants' knowledge which was purchased and used at the production plant was 'Gizer'. The defendants believe that another cleaning agent 'Gun Kat' may have been used at one stage but this cannot be confirmed*". Those Replies were given in response to a Notice for particulars (served by the plaintiff on the 8 May 2017) in which queries were raised (arising from the Defence delivered) as regards how the plaintiff was instructed to clean tools at the tool cleaning tank; and what chemical/detergent/cleaning agent/solvent was utilised for this purpose while the plaintiff worked at the Molex production plant in Shannon.

**53.** It seems uncontroversial to say that, in order for the defendants to state (as they did, in May 2019) that "Gizer" was the "*only cleaning agent within the defendants' knowledge which was purchased and used at*"... the Shannon Molex plant, at least *some* record(s) existed which provided a basis for that "*knowledge*" on the defendants' part. Despite the foregoing, the supplemental affidavit of discovery sworn on the 19 March discovers no records concerning Gizer (or, for that matter, Gun Kat or Trichlorethylene / TCE).

**54.** The search sheet which accompanied the 19 March 2020 affidavit of discovery contains *inter alia* the following entry opposite "Bob Zeitler, Senior VP, General Counsel": "*Joined the Molex Legal Department on December 1, 1998, and has served as General Counsel since Spring 2007. Zeitler has **never heard of Gizer or Gun kat***". The first and very obvious point to make is that the extent to which Mr. Zeitler was questioned about TCE is not at all clear. Furthermore, it is a statement of the obvious that even though Mr. Zeitler apparently never heard of Gizer or Gun Kat, both were known to the defendants (in that they are both referred to by name in the defendants' Replies as products used or possibly used for cleaning, in Shannon), yet, inexplicably, the records upon which that knowledge is based have not been discovered.

**55.** In addition, the search sheet goes on to state the following opposite "Paul Murphy, Sr. Sourcing Engineer": "*Based on the search, there is no records that Molex has ever purchased Gizer or Gunkat (including spelling variations Jizer and Gunkhat) at any time since 2008*". The foregoing highlights the deficiencies in the searches carried out in the context of the supplemental affidavit of discovery sworn on the 19 March 2020. Once again, no reference to TCE appears, despite the contents of the

Court of Appeal's discovery order. Furthermore, had proper searches been conducted, it seems inconceivable that they would not have revealed the records which must have been relied upon by the defendants as a basis for stating, in their Replies to Particulars (received by the plaintiff in May 2019), that *Gizer* was the cleaning agent used at the defendants' Shannon production plant during the period of the plaintiff's alleged employment (1983 – 1990). What else would have been revealed is entirely unknown because the searches were deficient.

**56.** As I noted earlier, by letter dated 5 May 2020, the plaintiff's solicitors wrote to the defendants' solicitors highlighting their concerns and seeking an explanation. It is fair to say that the defendants' have neglected to provide an answer. Indeed, the same issue was raised at para. 48 of the affidavit which grounded the present motion (one Ms. Boyce swore on 29 September 2021) but no explanation has been provided on affidavit by the defendants. In my view, the reason is obvious, because there can be no explanation other than wholly inadequate searches having been carried out by the defendants. This is something they do not accept, but in this they are entirely incorrect.

### **Unknowns**

**57.** It seems appropriate, at this juncture, to recall the contents of para. 50 of the Court of Appeal's judgment of 13 November, 2019 wherein Edwards J set out what was plainly a non-exhaustive list of what that court had *not* been told. Three years later, and in the wake of purported (but wholly inadequate) compliance by the defendants with their discovery obligations, all the 'unknowns' identified by the Court of Appeal remain just that (i.e. unknowns). I acknowledge, of course, that the Court of Appeal referred to this long list of unknown information in the context of the defendants asserting that the making of discovery would be unduly burdensome, without having placed before the Court of Appeal "*a scintilla of evidence...as to why in fact that would be so*". However, it seems to me that in order for the plaintiff and this Court to be satisfied that the defendants had properly complied with their discovery obligations, much if not all of the information referred to by the Court of Appeal at para. 50 of its judgment, would have been disclosed. To take a very obvious example, the Court of Appeal stated *inter alia*, at para. 50 of its decision: -

*"...we have not been told the number of production or workplace facilities involved; the geographical spread involved (bearing in mind the plaintiff's offer to limit his claim for discovery to the defendants' production or workplace facilities in Ireland and North America); the numbers of personnel who might potentially be involved; the potential number of records involved and where and how they might be stored;"*

**58.** Despite the fact that Ms. O'Connor's 19 March 2020 affidavit was sworn in purported compliance with the Court of Appeal's 13 November 2019 order and contains a setting out (paras. 4-8 inclusive) of the enquiries made, the plaintiff and this Court are still none the wiser with regard to the 'unknowns' identified by the Court of Appeal. Ms. O'Connor's affidavit does not even contain basic information such as the numbers of the defendants' production or workplace facilities; the location of same in Ireland and North America; the number of personnel who may have, or have had, responsibility for relevant records (be they existing employees, past employees or third parties); and details with respect to all searches carried out in that regard.

**59.** In light of the Court of Appeal's judgment and discovery order, it seems to me that the plaintiff was entitled to expect at least the following in any affidavit of discovery furnished by the defendants: (i) confirmation that searches, both physical and electronic, were carried out at all of the defendants' production or workplace facilities in Ireland and North America; (ii) an identification of who carried out these searches; (iii) a setting out of precisely what those searches entailed; (iv) to the extent any records were said to be unavailable, an explanation of why this was so, and details of all efforts to track down same via other means, including from third parties; and (v) details of all third parties who may have access to, or may know the whereabouts of relevant records, and the searches conducted via third parties regard. The foregoing was not done, despite correspondence from the plaintiff's solicitors which identified the deficiencies in the defendants' approach.



## **Negligent**

**60.** In my view, the evidence examined in this judgment thus far allows for a finding that the defendants' approach to their discovery obligations fell well below the standard reasonably expected of parties in their position. In my view, there has been a failure to comply with the Court of Appeal's discovery order in that (a) such searches as were carried out appear to have been materially deficient and (b) other necessary searches do not appear to have been carried out at all. This, in my view, constitutes a negligent approach to discovery obligations on the part of the defendants.

### **"Seek and ye shall find"**

**61.** The biblical exhortation "*Seek and ye shall find*" (Matthew 7:7) has an obvious corollary (i.e. if one does *not* look for something, it will *not* be found). It is a statement of the obvious that if - as appears to be the case in light of the evidence - Mr. Murphy did *not* search for the purchase of trichloroethylene / TCE, it is unsurprising that no record of its purchase was discovered. The foregoing observation is made quite apart from the equally relevant fact that Mr. Murphy's search appears to have been with respect to North American purchases only, and, even then, only records from 2008 onwards (and did not include purchases for facilities in Ireland).

**62.** The 16<sup>th</sup> November 2009 *Toxic organic solvent management plan* (which contains a specific reference to the use by of TCE) would, however, appear to be something which would have been revealed by a search of available records of purchases dating *from* 2008 onwards. Furthermore, searches (which, *per* the search sheet, were carried out by Mr. Chan) refer to the use of the defendants' "*enterprise software*" to determine if TCE was found in any materials or product compositions "*used at Molex*". It will be recalled that Mr. Chan's search was with respect to what Ms. O'Connor describes as "*the defendants' health and safety module in SAP (which is the defendants' enterprise software). This data covers the period from 2008 to present.*" Given the fact that, on its face, the 16<sup>th</sup> November 2009 *Toxic organic solvent management plan* indicates that the second named defendant *used* trichloroethylene, it is impossible to understand why Mr. Chan's search did not reveal the second named defendant's November 2009 report and the records of purchases of the TCE which is referred to in that report. This fortifies me in the view that the defendants' searches have fallen well below the standard reasonably expected of parties in their position and constitute a negligent failure to make discovery. I now turn to the third category in respect of which searches were made by the defendants.

### **Employee compensation claims – United States**

**63.** The third of the three search categories is referred to at para. 8 of Ms. O'Connor's affidavit of the 19 March 2020 wherein she avers that, with the assistance of the defendants' claims manager "*I reviewed a summary of all employee compensation claims for the defendants' plants in the United States for the period June 2003 to present*". The Court of Appeal's order was not limited to the United States. The order specifically referred to Ireland and North America. Plainly, Canada comprises part of North America. If it is the case that the defendants have any sites in Canada, it would not appear that any search was conducted for claims taken by Canadian workers. Nor does it appear that searches were undertaken for employee claims in Ireland.

**64.** As to the searches averred to, these appear to have been confined to software or electronic searches only, and with respect to claims from 2003 onwards, only. Given the lack of temporal limit on the discovery obligation, and given its geographical scope, the searches averred to are plainly deficient in my view.

**65.** Nor is any reference made to physical searches at the defendants' sites. Furthermore, no reference is made to the extent to which searches were carried out with all potential third parties who might hold relevant records.

**66.** With respect to records prior to 2003 the following is averred: "*Efforts to identify records prior to 2003 were made, however, it was not possible to locate any records prior to 2003*". There is no setting out of what efforts were made and, thus, it is impossible to know the extent to which they

were reasonable or adequate. Furthermore, no reason is proffered as to why it was not “possible” to locate any pre-2003 records. It is unclear whether (i) they exist, but could not be located, or (ii) whether they are said to have been destroyed and, if so, when and in what context. Whether all pre-2003 records are physical (i.e., paper – only, or a combination of paper and electronic records) is unknown. Whether searches for same at each of the defendants’ sites were undertaken is entirely unclear. If one turns to the search sheet which accompanied the affidavit, it includes the following entry opposite the reference to “Adam Anderegg, claims manager”: “*Provided a summary of all workers’ compensation claims for Molex in the US for the period June 30, 2003, to the present. The records include information on the employee, date of injury, description of the accident/injury and other information. We are working to identify earlier records but have been unable to do so to date.*” The foregoing entry seems to be entirely consistent with the averment that the search undertaken related only to (i) employee (i.e. “workers’ compensation”) claims; (ii) in the United States, only. Plainly, the Court of Appeal’s order was not limited to employee claims alone. Nor was it limited to the United States. It included North America and Ireland and was not temporally limited. The foregoing highlights further deficiencies with respect to the defendants’ searches and underlines that the defendants’ approach to their discovery obligations has been negligent.

### **Insurers / Third parties**

**67.** The entry on the search sheet which relates to Mr. Anderegg goes on to include *inter alia* the following: “*January 1, 2015 – present – records from **Broadspire**. June 30 2003 - December 31, 2014 – records from **Travelers Insurance***” (Emphasis added). This is followed by a statement to the effect that a “Josh Wiersma” conducted a review of the records and nothing was found. It is unknown who “*Broadspire*” may be. No explanation is given in the affidavit. If they comprise an Insurer, it would appear that the relevant records were for employee compensation claims and only covered the period from January 2015 onwards (a search for employee claims being materially much narrower in scope than the Court of Appeal’s discovery order; and a search regarding records from 2015 onwards being in stark contrast to the Court of Appeal’s order having no temporal limit).

**68.** It seems safe to assume that “*Travelers Insurance*” may well be an Insurer of the defendants, or either of them, although no such clarity is given in the defendants’ affidavits. The following comments seem fair to make (i) the records from this Insurer appear to relate only to the period from June 2003 to December 2014; (ii) the extent to which the defendants or either of them had more than one Insurer during that period or since is not clear; (iii) the records appear to relate only to employee claims in the United States; (iii) it is entirely unknown what Insurer(s) acted for the defendants or either of them, prior to such involvement as Travelers Insurance had or has; (iv) it is unknown what records those parties have; (v) no reference is made to other third party professionals, be they lawyers, loss adjustors, medical experts, engineering experts, scientists, or otherwise. Again, this highlights the deficiencies in the defendants’ searches.

### **Records of whether the Defendants “ever purchased Trichlorethylene for any purpose”**

**69.** In my view the deficiencies in the searches conducted by the defendants are further highlighted by the following. At para. 7 of the defendants’ Replies to Particulars (which the plaintiff received in May 2019) the following is stated: “*The defendants do not have any records which indicate whether it ever purchased Trichlorethylene for any purpose.*” Ms. Boyce has, however, exhibited (with her 21 January 2022 affidavit) a report which she obtained from the “Environmental Protection Agency” (“EPA”) arising from a site visit which the EPA made to Shannon in 2019, wherein effluent from the defendants’ Shannon plant was tested in accordance with relevant licence requirements.

### **EPA report**

**70.** As I mentioned elsewhere in this judgment, no objection was taken by either party to the admissibility of any of the exhibits which were put before the court and this particular report comprises Exhibit “EB3” to Ms. Boyce’s 21 January 2022 affidavit. The first page of same includes *inter alia* the following: -

*"The site visit process is a sample on a particular day of an installations' compliance with some of its licence conditions";*

*Name of installation: Molex Ireland Limited;*

*Site address: Shannon Industrial Estate, Shannon, Clare"*

- *Date of inspection: 21/01/2019*

- *Announced: No.*

- *Samples Taken: Yes;*

**71.** Internal pages 4 to 9, inclusive, comprise a setting-out of the sample results. At para. 29 of her 21 January 2022 Affidavit Ms. Boyce avers *"that this report disclosed that Trichloroethylene, otherwise known as Trichlorethylene or TCE was detected in the defendants' effluent"*. It is fair to say that, on behalf of the defendants, Ms. O'Connor does not make any direct response to these findings in the EPA report (which concerned the EPA's January 2019 inspection). Rather, she makes the following averment:

*"I am advised that it does not support Ms. Boyce's contention that 'It is beyond coincidence that the defendants did not use TCE prior to 2019 but did use it in that year'. I am advised that the position remains that the defendants do not have any records which indicate that they purchased Trichlorethylene for any purpose"*.

**72.** It seems to me that it is putting it kindly to say that the foregoing averment is made in the most 'jesuitical' of terms, given that the evidence before this Court allows for the following findings:

(i) In January 2019, TCE was detected by the EPA in effluent from the defendants' Shannon plant;

(ii) This is not denied by the defendants;

(iii) Nor do the defendants deny the use of TCE in 2019, which gave rise to the EPA's finding;

(iv) Rather, the defendants take issue with the proposition that the use of TCE in 2019 makes it "beyond coincidence that the defendants did not use TCE prior to 2019";

(v) The defendants assert that they do not have any records which indicate whether they purchased TCE for any purpose;

(vi) Insofar as that assertion is based on the searches carried out to date, this Court is satisfied that those searches have been wholly inadequate;

(vii) In particular, it would appear that no search was conducted for the purchase or use of TCE in Shannon as part of the discovery process conducted by the defendants to date.

**73.** In my view, this highlights the wholly sub-standard approach by the defendants to the question of proper searches, given the scope of their discovery obligations. It fortifies me in the view that the defendants' approach to discovery has been negligent and the averment I have quoted seems to me to comprise a futile attempt to try and justify the approach taken or, to put it another way, a carefully crafted averment which may be technically true in light of what the searches revealed, but which masks the reality that the searches themselves were woefully deficient and, thus, failed to reveal relevant documents.

**74.** It will be recalled that among the other exhibits put before the court (and discussed elsewhere in this judgment) is the 16 November 2009 *"Molex Inc. – Toxic organic solvent management plan"* with respect to its *"Little Rock connector plant, Arkansas"*. That document comprised Exhibit "CK1" to the affidavit sworn by Ms. Catherine Kelly, solicitor for the plaintiff, on 4 October 2022. It will be recalled that Trichlorethylene is specifically referred to in that report, which stated *inter alia* that *"Empty aerosol cans are handled as hazardous waste and shipped offsite for disposal. Records of*

*hazardous waste manifests are maintained in the Environmental, Health and Safety (EHS) Department*". It is difficult to see how the following statements can be reconciled:

- *"Trichlorethylene is a component of aerosol cleaner/degreasers and lubricants used at the facility". (p. 2 of the Molex "Toxic Organic Solvent Management Plan");*
- *"I am advised that the position remains that the defendants do not have any records which indicate whether they purchased Trichlorethylene for any purpose" (para. 11 of Ms. O'Connor's 3 May 2022 affidavit).*

**75.** There is a very obvious tension between these two statements and this tension is compounded by the fact that the EPA in this jurisdiction found TCE in effluent from the defendants' Shannon plant, in January 2019, according to the report which was put before this Court (with no issue as to its admissibility). The only way this tension can be resolved is that the searches for records concerning the purchase by the defendants of Trichlorethylene/ TCE have been materially inadequate (i.e. it was on the basis of the results of wholly deficient searches that Ms. O'Connor made her averments). This underlines the negligent approach to discovery on the part of the defendants and, comparing both statements, one can well understand the suspicions on the part of the plaintiff which gave rise to this motion. Although entirely satisfied, having regard to the evidence examined in the judgment up to this point, that there has been a negligent failure to comply with discovery obligations, I propose to complete the analysis of the evidence by looking at certain other exhibits which, for the reasons presently set out, seem to me to be of less relevance.

### **Chicago Tribune**

**76.** Among the documents exhibited by the plaintiff's solicitor is a "*Chicago Tribune*" article dating from 6 August 2002, entitled "*EPA targets Downers firms*". It states, *inter alia*, the following:-

*"Of 500 homes tested by the Illinois EPA in unincorporated Downers Grove, more than 400 have private wells contaminated with trichloroethylene(TCE), tetrachloroethylene (also known as perchloroethylene, or PCE) or a combination of the two chemicals, which are used as solvents. About 200 wells tested over the federal safe drinking water standard..."*

**77.** The article proceeds to refer to letters sent by federal officials "*to businesses that used solvents in their operations or where groundwater and soil sampling detected contamination*". A list of those notified is set out and "*Molex*" appears in that list. A copy of this article comprises exhibit "*EB1*" to Ms. Boyce's grounding affidavit sworn on 29 September 2021. On the face of this document, it is not sufficiently clear to me that it is one which relates to a claim of the occurrence of neurodegenerative disorders or injuries from the use of TCE at any of the defendants' facilities in Ireland and North America.

**78.** Exhibit "*EB2*" comprises a "*general notice letter*" from the United States EPA which appears to be dated 1 August 2002 and gives the recipients notice of potential liability with respect to a site described as the "*Ellsworth Industrial Park Site, Wisconsin Avenue, Downers Grove, DuPage County, Illinois*". The foregoing would appear to be the subject of the Chicago Tribune article which comprised exhibit "*EB1*". Among the recipients of this general notice letter is "*Molex, c/o Gene Hermann, security/safety manager, 2222 Wellington Ct., Lisle IL 60532*". The said notice makes clear that the potential liability relates to the EPA's documentation of "*...the release or threatened release of hazardous substances, pollutants, or contaminants at the above-referenced Site*". Again, it is not immediately apparent that this comprises a document relating to a claim of the occurrence of neurodegenerative disorders or injuries from the use of TCE, Gizer or Gun Kat at any of the defendants' facilities in Ireland or North America.

### **Memorandum Opinion and Order**

**79.** Exhibit "*EB3*" to the grounding affidavit sworn by Ms. Boyce comprises a "*memorandum opinion and order*" by Judge Harry D. Leinenweber of the United States District Court, Northern District of Illinois, dated 31 December 2003 in proceedings entitled *Teresa Leclercq & ors v. The Lockformer Company & ors*. At para. 44 of her affidavit, Ms. Boyce makes, *inter alia*, the following averments:-

*"I say that this was a class action personal injuries litigation in which the second named defendant was named as a third party defendant in a third-party complaint for contribution filed by the Lockformer Company pursuant to s. 113(f) of CERCLA, 42 U.S.C. 9613(f) arising from the second named defendant's use of chemicals and solvents, including TCE, in their production facility in Lisle, Illinois, USA wherein the groundwater in a residential area, known as Downers Grove, adjacent to the industrial park where the second named defendant's plant was located, was found to be contaminated with TCE and other chemicals and solvents."*

**80.** Ms. Boyce then proceeds to make the following averment at para. 45:-

*"Therefore, I say that the averment that the defendants' global health and safety compliance manager 'has never heard of and is not aware of any case where an individual complained of exposure to TCE' is simply not credible."*

**81.** During the hearing, counsel for the plaintiff handed in, without objection on behalf of the defendants, an earlier *"Memorandum opinion and order"* by the same US District judge in the same matter. It contains, *inter alia*, a discussion of the common law doctrine of 'joint and several liability', stating *inter alia*, that: *"when two or more individuals tortiously contribute to the same, indivisible injury, each individual may be held jointly and severally liable for the entire injury"*. It was submitted on behalf of the plaintiff that this document was also of significance insofar as reference was made to *"injury"*, given that the Court of Appeal's discovery order referred to the occurrence of neurodegenerative disorders or *"injuries"* from the use of TCE etc. However, it is fair to say that the reference to *"injury"* in the 6 May 2002 document is made in the context of an analysis of the doctrine of joint and several liability. It is not sufficiently clear to me that it relates to a claim concerning the occurrence of neurodegenerative disorders or injuries from the use of TCE, Gizer or Gun Kat at any of the defendants' production or workplace facilities in Ireland and North America. It may fall within that category and certainly would if it concerned a claim of the type referenced in the Court of Appeal's order. However, on the face of the document itself, this is not sufficiently clear.

**82.** The defendants' position, with regard to the aforementioned documents, is averred to at paras. 24 and 25 of the replying affidavit sworn by Ms. O'Connor on 21 December 2021:-

"24. *In paragraphs 41-45, Ms. Boyce deposes to media reports concerning legal action arising out of alleged contamination of private wells 'South of the Downers Grove site'. In the first instance, I believe that this matter primarily concerned environmental issues only and did not relate to claims of the occurrence of neurodegenerative disorders as a result of exposure to chemicals. Secondly, while the media report suggests that the Second Defendant was named by the Environmental Protection Agency as a potentially responsible party, ultimately, it was not actually held responsible. Thirdly, as regards the class action brought against 11 businesses, as is made clear in the media report, a parent company of Lockformer Co. paid \$10 million to 186 homeowners. The Second Defendant did not contribute to this settlement, nor was it found to have contributed to groundwater contamination. Furthermore, there were no allegations from any plaintiff in respect of neurodegenerative disorders as a result of exposure to chemicals.*

25. *In all the circumstances, I am advised that exhibited reports do not advance the plaintiff's claim that the defendants have not complied with their discovery obligations."*

**83.** The averments made at paras. 24 and 25 may well be sufficient to address the concerns raised by the plaintiff upon learning, as a result of their own searches, of the litigation in question. However, in the manner discussed in this judgment, there were a host of other deficiencies with respect to the searches carried out (and not carried out) by the defendants which amply justify a finding of negligence with respect to discovery.

## Deficiencies

**84.** Throughout this judgment I have highlighted deficiencies in the defendants' approach to discovery, a non-exhaustive list of which comprise the following: -

(i) In circumstances where the plaintiff's claim relates to a period of alleged employment by the defendants from 1983 to 1990, and in circumstances where the Court of Appeal's order contains no temporal limit, there can be no temporal limit on searches for documents covered by the said order;

(ii) The only geographical limit on searches must accord with the Court of Appeal's order which specifically references "...any of the defendants' production or workplace facilities in Ireland and North America";

(iii) Records of the purchase of Trichlorethylene/TCE, Gizer or Gun Kat are prima facie relevant to the category of discovery which the Court of Appeal ordered. In the manner discussed in this judgment, certain searches would already appear to have been conducted by the defendants with respect to purchases/procurement. However, and inexplicably, the searches appear to have been carried out only with respect to Gizer/Gun Kat and only in North America. Proper compliance with the defendants' discovery obligations requires that searches be conducted, without temporal limit, in respect of the purchase of any or all products (Trichlorethylene/TCE; Gizer; Gun Kat) in North America and in Ireland, not limited to use in products manufactured by the defendants;

(iv) Compliance with the defendants' discovery obligations requires, not only electronic searches, but physical searches at all of the defendants' sites (i.e. facilities, in Ireland and in North America);

(v) Satisfactory enquiries must be made with each and every third party who may potentially hold records relevant to the category, or may know where such records can be found (a non-exhaustive list of which would include insurers, lawyers, loss adjustors, expert engineers, medical experts, scientific experts, and employees, including former employees);

(vi) Interviews may well form part of an appropriate investigation process in the context of discovery obligations but are not a substitute for adequate searches;

(vii) The defendants' affidavit of 19 March 2020 should comply in full with the provisions of Order 31 (in particular Rule 12 (13)) and it plainly does not, a non-exhaustive list of examples being (i) a failure to list, at Part Two of the First Schedule, those individual items over which privilege is asserted, as opposed to the 'catch all' paragraph employed; (ii) a failure to list, in the Second Schedule, those individual items which the defendants once had but no longer have; (iii) a failure to set out when the foregoing were last in the defendants' possession and why they are no longer in their possession or power; (iv) a failure to set out on affidavit in a detailed and transparent manner the process adopted, in particular the searches carried out (the contents of the search sheet being doubly unsatisfactory in that, first, it has no standing, not being a document sworn by Ms. O'Connor or by any of those who apparently conducted searches in association with her and, thus, rendering it impossible for meaningful cross examination in respect of what are not averments; second, it reveals the inadequacy of searches, including the apparent failure to search all the defendants' sites even though it contains inter alia the reference "*Any records would be at site*").

(viii) In essence, given that the only geographical limit imposed by the Court of Appeal was Ireland and North America, and given that the defendants' discovery obligations are not temporally limited, the scope of the order must also be reflected in the searches (including the searches for documents, via third parties).

### **Appropriateness of the Plaintiff's Motion**

**85.** It was entirely appropriate for the plaintiff's legal representatives to raise, in correspondence, the deficiencies with respect to the affidavits sworn. That correspondence included letters from Messrs. Boyce Kelly, solicitors for the plaintiff (e.g. dated 5 May 2020 and 14 September 2021, respectively) which set out what the plaintiff regarded as deficiencies in the discovery, as made by the defendants. In response, the defendants' attitude, as communicated in correspondence sent by Messrs. BLM, solicitors, was to say that the defendants "*have complied with your request for Discovery and any Motion that issues in respect of same will be strenuously defended*" (e.g. BLM communication dated 17 September 2020). In this judgment, I have highlighted a range of deficiencies which emerge from an analysis of the evidence before this Court and which wholly undermine the assertion made by the defendants on 17 September 2020 (and repeated in their opposition to this motion). In short, the defendants were wholly incorrect when contending that they had complied fully with their discovery obligations. The defendants' approach was negligent.

### **Unduly onerous**

**86.** In opposing the present Motion, no evidence has been proffered on behalf of the defendants to the effect that physical searches at every one of the defendants' sites or facilities would present any difficulty whatsoever. To make the foregoing observation is not to suggest that it is open to the defendants to argue (e.g. as a basis for 'cutting down' what would otherwise be the full range of appropriate searches) that it would be unduly burdensome for them to be expected to carry out thorough searches, both physical and electronic, of all potential sources and to make all necessary enquiries including with third parties (including searches of all sites or facilities in North America and Ireland). To put it crudely, that 'ship' has long since 'sailed'. I say this because the Court of Appeal rejected an equivalent submission, which was made by counsel for the defendants in an effort to oppose the discovery order itself.

**87.** Nor, in my view, was or is it open to the defendants to approach the discovery exercise on the basis that the aim is to avoid burden to them. That is not the aim. The fundamental aim is the fair disposal of the underlying proceedings. Full and proper compliance with discovery obligations will ensure that the trial judge has documents relevant to the issues in dispute. Full compliance with the defendants' discovery obligations may well involve significant time, effort and cost, but that is subordinate to the imperative of a fair hearing (particularly when these defendants proffered no evidence in support of the proposition that to require them to make discovery of the relevant category would be unduly onerous). For these reasons, I take the view that it is no longer open to the defendants to suggest that carrying out comprehensive and adequate searches, both physical as well as electronic, at *all* production or workplace facilities or sites in Ireland and in North America is unduly onerous or is unnecessary. Similar comments apply in relation to the obligation on the defendants to search for this category of documentation via all third parties (a non-exhaustive list of which would include lawyers, insurers and any experts - engineering, scientific, medical or otherwise). Bearing in mind the absence of any temporal limit, compliance with the defendant's discovery obligations requires thorough searches with all such third parties going back as far as those third parties' records extend.

### **Wilfulness**

**88.** The gravamen of the submissions made on behalf of the plaintiff is that the defendants' discovery process has been very deliberately fashioned to bring about a result where no documents would be furnished. In essence, it is submitted on behalf of the plaintiff that the defendants are involved in a wilful and mischievous effort to deprive the defendants, and, as a consequence, this Court, of access to relevant documentation. The Court is invited to take the view that Ms. O'Connor, who conducted the investigations, and those with whom she engaged (the five named individuals on the search sheet) were acting *mala fide*. In light of the evidence examined in this judgment, one could well understand those suspicions. However, carefully weighing up the totality of the evidence, and with no little hesitation, I do not believe that it would be entirely safe for this Court to take such a view. I say this for the following reasons.

## 'First blush'

**89.** Certain searches did take place. At 'first blush', the account given of those searches might well 'come across' as having been extensive. When subjected to closer analysis, the defendants' searches appear to me to be wholly deficient, sub-standard and negligent, having regard to the terms of the Court of Appeal's discovery order. However, if one did *not* look more closely at what searches were (and were not) carried out, one might erroneously make the leap from a view that searches were *extensive*, to a view that their extensiveness meant that the searches were *adequate*. Earlier in this judgment, I made clear that adequacy can only be determined with reference to the specific obligations which arise from the discovery order in question. However, it seems to me that Ms. O'Connor may well have erroneously made the leap from *extensive* to *adequate* and formed the view that the defendants had complied with their obligations. Indeed, bearing in mind the role of solicitors in the discovery process – something I will comment on presently – it appears that the defendants' solicitors may well have erroneously made the same leap and formed the same view.

## Human Resources Director

**90.** It also seems to me to be of some relevance that Ms. O'Connor identifies herself as a 'Human Resources' director. The affidavit which was sworn in purported compliance with the defendants' discovery obligation was not, for example, one sworn by someone with the role of 'Purchases' Director (i.e. someone who might well, due to their role, have *first-hand* knowledge of purchases; or ready access to purchasing records; or a particular insight, given their duties, as to all potential sources of records). Nor was the affidavit sworn by, say, an 'in-house' lawyer (who might well be expected to know how thorough and wide-ranging searches must be, in order to comply with the discovery order at the heart of this application, *and* who might also have a means of ascertaining all possible sources of documents). I do not, for a moment, suggest that any *lesser* standard applies where a non-lawyer swears a discovery affidavit. Nor do the forgoing comments absolve the defendants from their duty to comply in full with Order 31. I mention the foregoing for one reason only i.e. because Ms. O'Connor's likely lack of *first-hand* knowledge, which others within the defendants may have, seems to me to be a factor of some relevance in the context of my view that the evidence does not go as far as to allow for a finding that her averments were not made *bona fide*.

## Reliance on others

**91.** Furthermore, in the context of defending the (very flawed) approach taken by the defendants to their discovery obligations, Ms. O'Connor has made averments, which are said to be based on what she is "*advised*". By way of example, Ms. O'Connor made the following averment at para. 11 of her 3 May 2022 affidavit (concerning the 2019 EPA report which found TCE in the defendants' effluent): "*I am **advised** that the position remains that the defendants do not have any records which indicate whether they purchased trichloroethylene for any purpose*". Who advised her of this is not made clear (and it undoubtedly should have been) but I mention the fact that she is relying on advice from *others*, because it seems to me that (regardless of how unsatisfactory that situation is, in the context of the adequacy of discovery) it could well be unfair for this Court to infer that Ms. O'Connor has made an averment *mala fide*, when what she avers is based on information given to her by others. It seems to me that on the state of the evidence (however unsatisfactory that evidence is as regards compliance with discovery obligations) it would be unjust to take the view that the defendants' deponent, who *is* relying on information from others, has made averments which she does *not* believe to be true. Similar comments apply in relation to the averment made at paragraph 8 of Ms. O'Connor's 3<sup>rd</sup> of May 2022 affidavit, wherein she states: "*I am **advised** that it is not surprising that the defendants do not have a detailed explanation as to why the records are not available, what became of them.*" The foregoing seems to me to be a wholly unsatisfactory averment, but the point I wish to emphasise is that it is an averment made by Ms. O'Connor with reliance on unidentified others (whom, very obviously, the plaintiff had no scope to cross-examine, given that they swore no affidavit and are not even identified).



## Solicitors

**92.** The defendants have, at all material times, had available to them the expertise of their solicitors on record and there is no evidence to the effect that the defendants' solicitors have acted other than *bona fide* insofar as their duties are concerned. The following averments were made by Ms. O'Connor at para. 9 of her 3 May 2022 affidavit: "*I have been well advised that the extent of my discovery applications (sic) extends to making discovery of documentation which is within the Defendants' power or procurement*". This court is entitled to take it that the foregoing advice was given by the defendant's solicitors. Thus, the evidence supports a finding that the defendants' solicitors advised them of the importance of full compliance with discovery obligations. This Court is also entitled to take the view that, had the defendants' solicitors regarded the approach taken by the defendants as objectively sub-standard and deficient (which it undoubtedly was) the defendants' solicitors would have pointed this out in clear terms to the defendants with a view to ensuring proper compliance, by the defendants, with the latter's discovery obligations, in accordance with the duties resting on solicitors in the discovery context. As I observed earlier, the evidence seems to me to support a finding that both Ms. O'Connor *and* her solicitors erroneously took the view that searches which could be viewed as *extensive* necessarily meant that those searches were *adequate*. This is not so as a matter of logic and it is certainly not so on the facts of the present case, but the foregoing seems to me to be a factor which also weighs against a finding that Ms. O'Connor's affidavit evidences and comprises a wilful and deliberate failure to comply with the Court of Appeal's order, as opposed to negligence on the defendants' part.

**93.** Carefully weighing up all the evidence, it seems to me that matters can be summarised succinctly as follows. (i) the defendants have made wholly inadequate efforts to comply with their discovery obligations; (ii) it is the results of wholly inadequate searches which provide a basis for averments made by Ms. O'Connor on behalf of the defendants; (iii) although entirely satisfied that the defendants have been negligent with respect to their discovery obligations (and certainly troubled by aspects of the manner in which the defendants have conducted themselves) I cannot be sufficiently confident that "*the defendant is endeavouring to avoid giving the discovery*" (see Hamilton C.J. in *Mercantile Credit Company of Ireland Ltd. v. Helehan* [1998] 1 IR 82; at p. 85).

**94.** In my view it is entirely fair to attribute blame to the defendants in circumstances where the scope of the Court of Appeal's discovery order was clear but the evidence indicates that such searches as were carried out did not at all reflect the scope of their discovery obligations, either geographical or temporal. However, as the Supreme Court made clear in *Murphy v. Donohoe* [1996] 1 IR 123: -

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

## Fair Trial

**95.** The current position would appear to me to be that despite the plaintiff having afforded the defendants every opportunity to mend their hand with respect to deficiencies the defendants have adopted the stance that their searches were adequate and, hence, contend that they have discharged their discovery obligations. In the manner explained in this judgment, the defendants are wrong. Their searches have been inadequate. However, the belief (apparently genuinely – held by Ms. O'Connor) that the defendants' discovery obligations have already been complied with seems to me to explain the fact that no further searches appear to have been carried out by the defendants after the plaintiff's solicitors highlighting various deficiencies in the defendants' approach. Thus, I do not see that this Court can fairly hold that there is *no* likelihood of the existence of other relevant but as yet undisclosed documents.

### **Cross examination**

**96.** It seems to me that there can be no criticism of the plaintiff for not bringing an application to cross-examine Ms. O'Connor with respect to her supplemental affidavit of discovery of 19 March 2020. It is true that Ms. O'Connor has sworn her affidavit on behalf of the defendants, but the following would also seem to be the case. First, it appears clear that Ms. O'Connor did not conduct the entirety of the searches personally. Rather, she liaised with others. Leaving aside the wholly inadequate approach of swearing an affidavit which contains only part of what was relevant information (i.e. including other *prima facie* relevant information in an unsworn document which accompanied it), the reality is that there are at least five persons who are named in the search sheet and who are contended by the defendants to have had an involvement in searches. Thus, it seems clear that Ms. O'Connor has relied, to a material extent, on what others have said and done and, thus, could not account for the entirety of the process of the discovery searches through her own means of knowledge. Furthermore, given her role as human resources director, it is inconceivable that cross-examination of her would get to the heart of the issue to which the relevant discovery category, as ordered by the Court of Appeal, speaks. In other words, this Court is entitled to infer that Ms. O'Connor does not personally know (i) the entire information regarding what *claims* arose of the type described in the Court of Appeal's 13 November 2019 order or (ii) all potential sources of documents covered by the discovery order. It seems equally safe to assume that she does not have any personal knowledge of, for instance (iii) what quantities of TCE (or Gizer or Gun Kat) were purchased for used at the defendants' sites in Ireland and North America and (iv) what records were created in respect of purchases of such products. Given her position as Human Resources director (as opposed to, say, Purchases Manager) the foregoing would appear to be reasonable for this Court to infer. For these reasons, I accept entirely that cross-examination of Ms. O'Connor on the affidavit which she swore in purported compliance with the defendants' discovery obligations was unlikely to have served a useful purpose, and is unlikely to have progressed matters any further than the present application. When one adds to the foregoing, Ms. O'Connor's reliance on what she was *advised* by unnamed others (see, in particular, her averments at paras. 8 and 11 of her 3 May 2022 affidavit), it underlines that there can be no criticism of the plaintiff for bringing this Motion as opposed to seeking to cross-examine Ms. O'Connor.

### **Discretionary jurisdiction**

**97.** I am also very conscious that this Court's jurisdiction is a discretionary one and does not exist to punish the defaulter, but to facilitate the administration of justice. Hence, the order which flows from this Court's decision must be directed at ensuring that a fair trial can take place, if that remains possible. It seems to me that this Court should also keep in mind that the present application was not, for example, one in which the defendants' deponent was cross-examined and found to be, say, evasive or to have made no *bona fide* efforts insofar as the approach to discovery was concerned (for the reasons explained, cross-examination would not have advanced matters more than the present application). Rather, the state of the evidence allows for a finding that the defendants' approach was flawed and 'wrong-headed' (because, in essence, it involved searches which were far narrower than the scope of the Court of Appeal's order). However, in a motion which has necessarily comprised an exclusively 'papers-based' consideration of matters, it seems to me that the evidence does not support a finding of *mala fides* on the part of Ms. O'Connor, being the only deponent proffered by the defendants.

### **Further and better discovery**

**98.** It also seems to me that I should take account of what might be called the 'fall-back' position adopted by counsel for the defendants, which appears at para. 23 of the defendants' written submissions in the following terms: -

*"Without prejudice to the fact that appropriately thorough searches have been conducted, where a party, or this honourable **court**, perceives that a particular method may have **been deficient**, the appropriate remedies in the first instance would, logically, be to either*

seek **further and better discovery**, or hear oral evidence from the deponent and expose them to cross-examination. . .". (Emphasis added)

**99.** What I take from this submission, and from oral submissions in a similar vein made by counsel for the defendants, is that, although the defendants contend that their approach to discovery was entirely appropriate and their searches were wholly adequate, they are prepared to make further and better discovery if the court finds that their approach/searches were *not* so. In other words, the defendants have not set their face against making further and better discovery. On the contrary, through their counsel, they have indicated a willingness to do so if this Court finds that their approach to date was deficient (which it was). This preparedness to make further and better discovery, if ordered, seems to me to be another factor which weighs in favour of a fair trial remaining possible.

**100.** Accepting, for present purposes, that a finding of negligence 'triggers' the jurisdiction to dismiss the defence, it is clear that it is *not* simply a one-stage test. In other words, the court must then proceed to look at other matters, in particular, the question of whether a fair trial remains possible. Doing so, I am not satisfied that, in addition to the defendants' failure to make discovery to date, there is also ". . . a substantial risk of injustice which cannot be remedied by the making of an order for further and better discovery and/or in costs" (see Baker J. in *Go2Cape Verde Ltd. v. Paradise Beach Aldmento Touristico Algodoerio S.A.* [2014] IEHC 531). Thus, even if I am wrong in the view that the jurisdiction to dismiss the defence is engaged by the findings I have reached with regard to the defendants' negligence insofar as their discovery obligations are concerned, the outcome is materially the same in that, for the reasons explained in this judgment, I am satisfied that ordering further and better discovery, rather than dismissing the defendants' defence, is the appropriate course in the interests of justice, given my view that a fair trial remains possible.

**101.** In *Go2Cape Verde*, (where, unlike the present case, the relevant deponent was cross-examined and adverse findings were made by the Court) Baker J. held that a significant volume of documentation had deliberately not been discovered and she also came to the view that it was unlikely that discovery would be satisfactorily completed even if the relevant parties were given a further opportunity to do so. It does not seem to me that I can fairly hold, on the evidence in this case, that proper discovery will not be made if an opportunity is afforded to the defendants to do so.

**102.** Although this Court cannot condone the (flawed) approach which the defendants adopted and then steadfastly maintained (wrongly) despite correspondence from the plaintiff pointing out (validly) deficiencies in the defendants' approach, I have not been able to conclude that there has been a wilful evasion of discovery duties on the part of the defendants, as opposed to negligence with respect to discovery. That being so, it does not seem to me that I can fairly take the view that to order further and better discovery by means of proper compliance with the Court of Appeal's order is futile (i.e. could not render a fair trial possible). Taking that view would seem to involve, not only a finding that there has been wilful evasion to date, but to infer that this wilful evasion will continue into the future. Much as the court deprecates the narrowing by the defendants of searches to the extent that they did not at all reflect the breadth of the discovery ordered by the Court of Appeal, and the various attempts, both in correspondence and on affidavit, to defend their indefensible and sub-standard approach to discovery, I do not see that I can fairly hold that, henceforth, there will be deliberate evasion of this Court's order with a result that a fair trial shall be denied. I say this in circumstances where (i) *further* searches do not appear to have been done (because the defendants' have, to date, regarded their approach as satisfactory); (ii) thus, I cannot safely hold that there is no relevant documentation which remains to be discovered; (iii) the defendants have made clear their *preparedness* to make Further and Better Discovery, if ordered; and (iv) the evidence suggests, on the balance of probabilities, documents may well *exist* which the defendants were required to discover, but which have not been discovered (and which, if *properly* searched for, will be discovered).

**103.** With respect to this fourth point (iv), the defendants appear to have searched certain procurement records from 2008 onwards in respect of the purchase of 'Gizer' or 'Gun Kat' in North America (but do not appear to have, as yet, searched for TCE-purchases, be that in North America

or in Ireland). Nor have searches for records prior to 2008 been conducted. If one 'marries' the foregoing with the 2019 EPA report (which *prima facie* evidences that TCE was detected in the defendant's effluent) it strongly suggests that there *are* documents within the category ordered by the Court of Appeal which have yet to be discovered. Similarly, the fact that the defendants' Replies to Particulars indicated that "Gizer" was used to clean tools in the defendants' Shannon plant, yet no records whatsoever of any Gizer purchases have been discovered, strongly suggests that there *are* documents which the defendants are required to discover, but have not yet discovered.

**104.** For the foregoing reasons, I have come to the view that full compliance by the defendants with the Court of Appeal's order, by means of an order for further and better discovery made by this court, would ensure that a fair trial *remains* possible. I am fortified in this view by the guidance given by Murray J in *Hireservices Ltd. v. An Post* [2020] IECA 120, wherein the learned judge stated the following with respect to the test concerning the making of an order for further and better discovery: -

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

**105.** In my view, the foregoing test is met in the present case. Putting it in its most neutral terms, the evidence allows for a finding that Ms. O'Connor on behalf of the defendants believes that the defendants have complied adequately with their discovery obligations, by virtue of the searches which have been carried out. It is clear that the defendants regard, as being outside their discovery obligations, any documents which have not already been located by virtue of the searches conducted. In the foregoing, they are wholly mistaken, but the evidence does not go as far as permitting me to hold that the defendants' attitude flows from cynical or wilful evasion of discovery obligations (as opposed to a misunderstanding of the extent of their obligations, in particular, as regards the scope of proper searches, given the scope of the Court of Appeal's discovery order).

#### **Discovery and the solicitor's duties**

**106.** As to what must occur in the wake of this Court's judgment, it seems appropriate to refer again to the role of solicitors in supervising discovery, given their independent duties as officers of this Court. It is uncontroversial to say that a solicitor owes a duty to this Court to review documents disclosed by their client to ensure, insofar as possible, that no document coming within a category of discovery ordered, or agreed, is withheld. It seems to me equally uncontroversial to say that the solicitor's duty also extends to giving appropriate advice as to the breadth of searches that may be required in a given case, in order to reflect the breadth of the discovery order in question (in this case the Court of Appeal's order).

**107.** To say the foregoing is not to suggest that the obligation to *make* discovery rests on the solicitor. It does not. It is, however, to emphasise that the solicitor plays a vital role in ensuring that a party making discovery appreciates the scope of that obligation and acts accordingly. It also seems entirely fair to say that the solicitor plays a vital *supervisory* role in the discovery process undertaken by their client. In the manner explained in this judgment, it is important that both the party making discovery and their solicitors, do not fall into the error of believing that the extensiveness of searches equates to the adequacy of same. There are three 'moving parts' which a party subject to discovery obligations, and their solicitors, must keep ever in mind (i) the *scope* of the discovery order; (ii) the *potential sources* of documents and (iii) the *adequacy* of searches which must, of course, be extensive enough to reflect (i) and (ii).

**108.** The deficiencies as found by this Court will doubtless result in the defendants' solicitors reminding them in the clearest of terms of their obligation to disclose all documents within the relevant category, regardless of whether such document might advance or damage the case of either

party, and impressing on the defendants' the parallel obligation which underpins the foregoing, namely, to conduct all necessary searches of all possible sources. No doubt the defendants' solicitors will also perform, actively, their supervisory role with respect to discovery by the defendants, so as to ensure the defendants conduct *adequate* searches of *all* possible sources of documents, coming within the scope of the Court of Appeal's order. The obligation, of course, rests on the defendants to conduct all necessary searches in the context of making proper discovery, but the solicitor, as an officer of this court, plays a fundamentally important role in the process.

**109.** Without for a moment purporting to extend the well-established duties of a solicitor in the discovery process, given the defendants' negligence to date with respect to their discovery obligations, it is particularly important that their solicitors take all reasonable steps (consistent, as I say, with their role and their duties as solicitors and officers of this Court) with a view to ensuring that the defendants comply with the Court of Appeal's order. Indeed, were there to be a repeat by the defendants of their failure to comply with their discovery obligations, it is difficult to see how this would be other than *wilful*, given the contents of this judgment and how clearly the existing deficiencies have been highlighted.

### **Assessment Only**

**110.** For the sake of completeness, it should be noted that among the submissions made on behalf of the plaintiff is that, as an alternative to striking out the defendants' defence, the case should proceed on an 'Assessment-Only' basis or "*on the basis that the presence of TCE and the use of it by the plaintiff in the Shannon plant from 1983-1990 is conceded, so that breach of duty is conceded but the defendants are allowed to continue to dispute causation*". The plaintiff submits that the foregoing occurred in the case of *Wood v. Ministry of Defence* [2011] EWCA Civ 792. It is appropriate, however, to quote the first paragraph of that judgment of Dame Janet Smith to see how different that case is from this: -

*"1. This is an appeal from the order of HH Judge Taylor sitting as a Deputy High Court Judge in Middlesbrough on 5 May 2010. The claimant, Shaun Wood claimed damages for a neurological condition akin to Parkinson's disease which he alleged had been caused by his exposure to organic solvents during the course of his service in the RAF. **During the hearing, which was limited to issues of liability and causation, the Ministry of Defence (MOD) made an admission of breach of duty** but continued to dispute that its breach had caused the claimant any damage. Issues of limitation had been resolved in the claimant's favour at an earlier hearing". (Emphasis added).*

**111.** In *Wood*, an admission was made. The decision relied on also relate to a full hearing, on appeal, not the type of motion this Court is asked to determine. The situation in the present case is wholly different where a full defence has been filed and the plaintiff is on full proof. In my view, the decision in *Wood* is of no assistance in terms of the issues this Court has to resolve. This Court is not satisfied that the present situation involves, what was described in *Go2Cape Verde Ltd.* as a "*....substantial risk of injustice which cannot be remedied by the making of an order for further and better discovery and/or in costs*" (Emphasis added). There would without doubt be a very substantial risk of injustice if an order for further and better discovery were not made. However, for the reasons set out in this judgment the risk of injustice *can* be remedied in that fashion, with my preliminary view being very much to the effect that the costs of this motion should be borne by the defendants given that; (i) it was their failure to make proper discovery which necessitated the motion; (ii) they were given every reasonable opportunity, in correspondence, to 'mend their hand' but did not do so; (iii) the Court has found the defendants to have been negligent in their approach to their discovery obligations; (iv) the plaintiff, who also sought appropriate alternative relief at para 2 of the motion is entitled to relief. In this court's view, to remedy the current risk of injustice by ordering further and better discovery is a more appropriate relief than either striking out the defence or directing that the case proceed on an assessment only basis.

## **Delay**

**112.** The issue of delay was touched on during the submissions. There is no application before the court which is based on delay. It is fair to say that each side directs certain criticisms at the other on delay grounds. For example, the defendants point to the fact that the plaintiff pleads that he was diagnosed with Parkinson's disease in January 2013, whereas a personal injuries summons was not issued until two and a half years later in June 2015. Furthermore, it appears that the plaintiff first requested voluntary discovery in May 2017, but no motion was issued until September 2018. The plaintiff points to the fact that the Court of Appeal delivered its decision in November 2019 and, almost three years later, proper discovery has not been made by the defendants.

**113.** It does not seem to me to be appropriate or necessary, for the purposes of deciding the present application, to make any findings with respect to delay. I would, however, say that there is uncontroverted evidence before the court in the form of averments made at para. 50 of Ms. Boyce's grounding affidavit, sworn on the 29 September 2021, to the effect that the plaintiff's health is deteriorating; the prognosis is that he will continue to deteriorate; that his life-expectancy is significantly reduced; and that there is a concern that he will be unable to give evidence. Details with respect to the foregoing are set out in the nursing report of Noreen Roche, nursing consultant, dated 15 April 2021 which Ms. Boyce exhibits. It seems uncontroversial to say that the foregoing position argues strongly for matters to proceed from here without any *further* delay, in particular, with respect to the making of full and proper discovery underpinned by full and proper searches of all potential sources of documentation. Clearly, it is open to the parties to make the relevant application in the appropriate List, for priority with regard to a hearing date should they believe this to be appropriate.

## **Going forward**

**114.** The defendants, in conjunction with legal advisors, self-evidently have information which is not available to this Court. Thus, this Court cannot conceivably fashion a "checklist" of what practical steps these defendants, or any defendants, must take in order to satisfy their discovery obligations, going forward. However, the defendants will know (and in the context of taking instructions, their solicitors will learn) for example (i) what sites they operate or have operated in Ireland and North America; (ii) what Insurer(s) act or have acted for them at any stage in respect of claims of the type referred to in the Court of Appeal's order; (iii) what lawyer(s) have acted for them at any stage; (iv) what loss adjusters, expert engineers, medical experts or scientific experts act or have ever acted for them; (v) what other third party experts have acted for them at any stage; (vi) what employees present or past were responsible for purchasing products, including cleaning products, etc. Thus, the defendants, with advice from their solicitors, are in the unique position to ensure, as they must, that all relevant searches are undertaken, so that all relevant documents from all potential sources are discovered. No guidance given in this judgment dilutes or supplants the defendants' obligations in this regard.

## **Second hand information**

**115.** Earlier in this judgment I referred to the wholly inappropriate tendering of an unsworn 'search sheet'. Given the abject failure of the defendants to make proper discovery, there can be no repeat of a reliance on 'second hand' unsworn information, in a purported attempt at compliance with the Court of Appeal's order. One of the difficulties which the plaintiff was faced with flowed from the reality that meaningful cross examination of Ms. O'Connor on her averments was rendered impossible due to the fact that prima facie relevant information was on this unsworn search sheet which also identified by name persons referred to by title in Ms. O'Connor's affidavit whom, it appears, conducted certain searches. Ms. O'Connor was thus relying to a material extent on what others had done and said but without any effective means for averments (and none were made by these various individuals on the search sheet) to be tested.

**116.** Given the failure to make proper discovery to date, the plaintiff and this Court are entitled to expect that the party who swears the affidavit of further and better discovery on the defendants'

behalf (i) will have conducted the searches to which they are averring or (ii) will be intimately familiar with those searches which they caused to be carried out; (iii) will be familiar with all potential sources of documentation; and (iv) will be in a position (e.g. if cross-examined) to 'stand over' their averments with respect to the foregoing (i.e. not reliant on others who did *not* swear any affidavit, or on information which is *not* sworn, such as the 'search sheet' tendered by the defendants' in the present case). If that means that more than one affidavit needs to be sworn, so be it. The point is that, going forward, there must be complete transparency, given that, to date, this has been lacking.

### **Decision summarised**

**117.** The reasons for this Court's decision are set out throughout this judgment but, although it will inevitably involve repetition, it may well be of assistance to the parties to summarise certain matters, as follows.

**118.** I am satisfied that there has been a failure on the part of the defendants to make proper discovery and I reject the defendants' contention that there has been full compliance with what the Court of Appeal ordered.

**119.** At the heart of the defendants' opposition to the present motion is the proposition that *extensive* searches, including interviews with certain personnel, have been conducted and that, therefore, there has been *compliance* with the Court of Appeal's order for discovery. That logic is flawed.

**120.** The stance adopted by the defendants throughout the course of correspondence and by means of affidavits in opposition to this motion has been to say that the 19 March 2020 affidavit of discovery sworn by Ms. O'Connor constituted full and proper compliance with the defendants' discovery obligations. In this, they were wholly mistaken for the reasons I have set out.

**121.** The fact that searches might be described as extensive does not, of itself, mean that all searches of all possible sources of documents have been undertaken. In this case the searches were grossly inadequate.

**122.** Adequacy falls to be determined with reference to the discovery obligations which the relevant party is under (i.e. no emphasis on how many searches were carried has any meaning, if the terms and scope of the discovery order is not addressed by means of adequate searches undertaken with reference to all potential sources).

**123.** I am entirely satisfied that the scope of the searches undertaken did not reflect the scope of the Court of Appeal's discovery order.

**124.** The defendants' approach to discovery was without doubt, grossly sub-standard when viewed objectively and from the perspective of what could reasonably be expected of parties subject to the Court of Appeal's order of 13 November 2019.

**125.** Despite the reality that the Court of Appeal's order referred to documents concerning claims relating to neurodegenerative disorders or injuries from the use of TCE, Gizer or Gun Kat "*...at any of the defendants' production or workplace facilities in Ireland and North America*", the defendants do not appear to have conducted searches, physical and electronic, of all such facilities.

**126.** Rather, the initial step taken by the defendants appears to have been to identify, not production or workplace facilities (i.e. sites) but *individuals*, and the identification of those limited number of individuals appears to have determined what searches were (and were not) conducted. This was not an appropriate approach.

**127.** To the extent that the foregoing approach reflected the defendants' belief that to carry out more extensive searches would be unduly onerous, that was not a legitimate stance for the defendants to take. Without proffering a shred of evidence, the defendants argued in the Court of Appeal that it would be unduly onerous to require them to make discovery, and they were wholly unsuccessful in that submission made to that Court.

**128.** Without for a moment suggesting that there can ever be 'shortcuts' with respect to full compliance with discovery obligations, it is not open to these defendants to avoid carrying out *all* necessary searches of *all* potential sources, with the object of saving either time or cost.

**129.** The evidence before this Court allows for a finding that shortcuts have been taken, insofar as full compliance with the Court of Appeal's discovery order is concerned.

**130.** Such searches as were carried out appear to have largely comprised 'software' searches, and most from 2008 onwards.

**131.** It does not appear that all necessary investigations and searches were carried out via third parties.

**132.** The defendants' deficient approach could and should have altered, particularly as they were afforded at least two opportunities to do so.

**133.** The first was when the plaintiff's solicitors pointed out the deficiencies in correspondence.

**134.** The second was when the defendants' investigations resulted in statements including the following: "*Any records would be at site*" (see entry on the 'search sheet' opposite the reference to Joel Eurich, which appears after the words "*Did not track EHS issues at corporate level before 2010*").

**135.** Despite the foregoing, the defendants, inappropriately, stuck to the course they had embarked upon (i.e. searches far narrower in scope than the scope of the discovery order).

**136.** The affidavit sworn on 19 March 2020 does not comply with the relevant provisions of Order 31.

**137.** In short, the discovery process to date has been negligent. However, it seems to me that, on the balance of probabilities, the evidence does not safely support a finding that Ms. O'Connor's averments were made *mala fide*.

**138.** The evidence seems to me to support a finding that the fault lay in the defendants' approach to their discovery obligations, in particular, the deficiencies with regard to the investigations conducted, which deficiencies flowed from the defendants' failure to reflect the scope of the Court of Appeal's discovery order in the scope of the searches undertaken, geographical and temporal. This erroneous approach was compounded by a failure and refusal on the defendants' part to alter their flawed approach, despite being called on to do so in correspondence.

**139.** I take the view, on the balance of probabilities, that it was the outcome of a flawed approach to discovery upon which Ms. O'Connor made averments, rather than a deliberate ploy on the defendants' part to avoid their discovery obligations.

**140.** The state of the evidence does not allow me to conclude with sufficient confidence that the defendants' failure to comply with their discovery obligations amounted to a deliberate stratagem to deprive the plaintiff (and, as a consequence, a trial judge) of relevant documentation and information.

**141.** One could understand such a suspicion, and it is plainly a suspicion held by the plaintiff. However, and even though this Court's decision came down to 'fine margins', I have been unable to hold, on the balance of probabilities, that the failure to make proper discovery was a deliberate one.

**142.** However, given the negligent failure to make discovery, it was entirely appropriate for the plaintiff, through his solicitors, to point out the various deficiencies in correspondence and, when met with the repeated (but incorrect) assertion that the Court of Appeal's order had been fully complied with, it was entirely appropriate to issue the present motion.

**143.** Even if I am wrong in the view that the defendants' approach was negligent as opposed to a wilful default, the evidence does not appear to me to be such as would justify the court taking a particular view on the issues to which the information refers such as would allow the failure to make discovery to determine the *merits* of the underlying proceedings (as would occur if the defence was



struck out). I take this view because, for the reasons explained in this judgment, it seems to me that it remains possible for a fair trial to take place.

**144.** Thus, and *per* the approach taken by Clarke J (as he then was) in *Dunnes Stores (Ilac Centre) Limited*, I am satisfied that the proper approach by the court to this motion is to make orders which address the consequences of the failure to make proper discovery to date, as well as to make an appropriate costs order which recognises the failure on the defendants' part to make discovery, despite repeated requests to comply with the relevant order. This approach seems to me to be consistent with the principles which emerge from a range of authorities (see *Mercantile Credit Company of Ireland Ltd v Heelan* [1998] 1 I.R. 81, at p.85; *Murphy v J. Donohoe Ltd (No.2)* [1996] 1 I.R. 123, at p. 142; and *Go2CapeVerde Ltd v Paradise Beach Turistico Algodoeiro S.A.* [2014] IEHC 531, at para 27).

**145.** This Court is very much aware that the jurisdiction to strike out a defence for failure to make discovery is a discretionary one (see Hamilton CJ in *Mercantile Credit Company of Ireland Ltd*) and one to be exercised only in extreme cases (see *Murphy v Donohoe*) where the interests of justice require it. In circumstances where I take the view that a fair trial remains possible, it seems to me that the justice of the situation is met by ordering the defendants to comply in full and in a timely manner with the Court of Appeal's order, by way of an order directing further and better discovery.

**146.** In essence, the defendants have without doubt failed to make discovery *per* the Court of Appeal's order but, in the interests of justice, this Court is affording them the opportunity to remedy that failure by making further and better discovery.

**147.** Without suggesting that this judgment takes away from any obligation on the defendants pursuant to Order 31 and well established principles with respect to discovery, proper compliance with the Court of Appeal's discovery order requires the defendants to address all of the deficiencies which have been outlined in this judgment, by way of further and better discovery.

**148.** This judgment should also serve as a timely reminder to the defendants, and the solicitors advising them, that searches, however extensive they may appear to be at 'first blush', will be wholly inadequate unless those searches engage thoroughly and comprehensively with the scope of the discovery order to which the defendants are subject and take full account, in terms of searches, of all potential sources.

**149.** Although, for the reasons explained in this judgment, the court will not be striking out the defendants' defence, the plaintiff is undoubtedly entitled to relief in the form of an order for further and better discovery, with an order for costs in respect of this motion.

**150.** The time limit for making discovery shall be twelve weeks reflecting, precisely, the period ordered by the Court of Appeal. It seems to me that allowing twelve weeks should be more than adequate in circumstances where almost three years have elapsed since the Court of Appeal made its order.

**151.** The parties should correspond, forthwith, with regard to the precise terms of the order to be made and should submit an agreed draft to the Registrar within fourteen days. In the event of any dispute between the parties as to the terms of such an order, short written submissions should be filed within the same fourteen-day period.