THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 79

Appeal Record No.: 2019/441

Costello J.
Ní Raifeartaigh J.
Power J.

BETWEEN/

VICTORIA HALL MANAGEMENT LIMITED. PALM TREE LIMITED, GREY WILOW LIMITED, ALBERT PROJECT MANAGEMENT LIMITED, O'FLYNN CAPITAL PARTNERS AND O'FLYNN CONSTRUCTION (CORK)

RESPONDENTS/PLAINTIFFS

- AND–

PATRICK COX, ROCKFORD ADVISORS LIMITED, LIAM FOLEY, FOLEY PROJECT MANAGEMENT LIMITED, EOGHAN KEARNEY, CARROWMORE PROPERTY LIMITED AND CARROWMORE PROPERTY GARDINER LIMITED AND CARROWMORE PROPERTY GLOUCESTER LIMITED

APPELLANTS/DEFENDANTS

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 2nd day of April, 2020

1. This is an appeal from a decision of the High Court (Barniville J.) on a discovery motion by the defendants/appellants in the case. The most unusual feature of the appeal is that it came on for hearing on a date after the trial of the substantive proceedings had commenced (but during a hiatus in that trial). This arose in circumstances which will be described below.

2. The hearing of the application for discovery before the High Court took place in July 2019. Barniville J. delivered judgment on 11th September, 2019. The order of the High Court was dated 24th September, 2019 and it was perfected on 4th October, 2019. Notice of Appeal was filed on 25th October, 2019 and a directions hearing was held before this Court on 29th November, 2019. The trial commenced on 14th January, 2020 and adjourned on 5th February, 2020. It has been provisionally listed for 16th June, 2020 for resumption of the trial. The appeal in respect of the discovery issue was heard on 3rd March, 2020. The unusual chronology suggested by this brief description will be examined in some detail below but it is first necessary to explain the background to the motion.

The dispute in the substantive proceedings

3. The nature of the dispute between the parties is succinctly summarised by Barniville J. in his judgment and I will adopt most of his summary here. For the purposes of this section, I intend to refer to the parties as they were in the High Court – plaintiffs and defendants. The plaintiffs are property development companies variously registered in Ireland, England, Wales and Jersey. Part of their business involves the development of student accommodation. They claim that three former employees of the plaintiffs or other entities within the O' Flynn group of companies ("OFG") have acted in breach of their respective contracts of employment and in breach of other duties in various respects. These three former employees are Patrick Cox, Liam Foley and Eoghan Kearney, the first, third and fifth defendants. It is alleged that Mr Cox actively competed with the plaintiffs and concealed and diverted significant investment opportunities for his own benefit or for the benefit of the other defendants and appropriated or failed to return and used a substantial amount of confidential documentation relating to the business of OFG. It is also alleged that Mr Foley and Mr Kearney appropriated or failed to return and may have used such confidential documentation themselves for the benefit of companies of which they are directors and ultimate beneficial owners, namely the sixth, seventh and eighth defendants ("the Carrowmore companies"). It is alleged that Mr Cox acted in breach of contract and in breach of duty by failing to disclose certain commercial opportunities to the plaintiffs and that he diverted those opportunities for the benefit of the defendants and appropriated and retained certain confidential information. One such alleged commercial opportunity was a student accommodation project at Gardiner Street in Dublin. The plaintiffs make various claims against Mr Cox in relation to that project. The plaintiffs also allege that the defendants conspired to injure the plaintiffs as a result of which, it is alleged, the plaintiffs suffered loss and damage. In addition to declarations and damages, the plaintiffs seek an account of profits allegedly made by the defendants on foot of the commercial opportunities allegedly concealed from the plaintiffs and diverted to the defendants.

4. The defendants delivered a comprehensive defence in which they raised a series of preliminary objections and set out a detailed denial of the plaintiffs' claims. One of their preliminary objections was to the effect that the plaintiffs had engaged in acts, omissions and/or decisions which were prohibited by National Asset Management Agency ("NAMA"). The plea went on to say that insofar as any of the claims related to any acts, omissions and/or decisions which were prohibited by NAMA and/or any relevant legislative provisions and/or were not disclosed to NAMA in accordance with statutory obligation in that regard and/or in respect of which the consent of NAMA was not obtained and/or such acts, omissions and/or decisions were not in accordance with the restrictions imposed by NAMA and/or the provisions of any relevant legislative provisions:-

   (a) the plaintiffs are not entitled to the reliefs claimed or to any relief; and/or

   (b) the plaintiffs are estopped from claiming such reliefs; and/or

   (c) it would be contrary to public policy to grant the reliefs claimed or any reliefs to the plaintiffs or any of them against the defendants or any of them; and/or

(d) in the exercise of its discretion, the Court should refuse to grant the reliefs claimed or any relief.

5. In supplemental replies to particulars dated 21st December, 2016, the defendants' then solicitor, McCann Fitzgerald, gave further particulars in relation to the matters pleaded above. They asserted that an OFG entity named Victoria Hall Limited disposed of two valuable sites in Birmingham and Coventry by agreement with NAMA in 2012. It was alleged that OFG informed NAMA that the first plaintiff (Victoria Hall Limited) or (Victoria Hall Management UK Limited) may be involved in a management capacity with the sites following their sale but that both of them were non-OFG entities. It was asserted that subsequent to the sale, the sites were sold to a joint venture involving the third plaintiff in a transaction arranged by the second plaintiff and the first plaintiff. It was contended that the third plaintiff earned more that €10m from the subsequent sale of the developed site in or about September–November 2013. The defendants asserted that Mr Cox, the first defendant, assisted in structuring the joint venture in question and that he sought and obtained reassurance from Mr Nesbitt (director of a number of the plaintiff companies), at that time, that the third plaintiff was not part of OFG or related to or associated with OFG. The defendants contended that Mr Nesbitt reassured him that the entities developing the Birmingham and Coventry projects were not part of or associated with OFG and that Mr Cox was requested not to disclose any information relating to the business of those entities to the group finance director of OFG. The supplemental replies went on to refer to various matters relating to ownership and control of a number of the plaintiff companies. It was asserted that the two sites in question (Birmingham and Coventry) were sold for approximately £1m sterling but that in advance of the sale, a value of more than £5m sterling had been attributed to the sites by Victoria Hall Management UK Limited and Grey Willow Limited (the third plaintiff).

6. I pause to note that it was, therefore, clear from the time of delivery of those particulars in December 2016 that allegations were being made by the defendants about the Coventry-Birmingham projects. In essence, these were allegations that NAMA had been misled by the plaintiffs and that arrangements had been made behind NAMA's back which resulted in large amounts of money being made on a deal by some of the individuals involved in the plaintiff entities unbeknownst to NAMA.

7. The defence also denied all allegations of breach of contract and other wrongful conduct and pleaded in particular that there was a letter from Mr Nesbitt dated 14th July, 2014 which approved the entitlement of Mr Cox in his own right or through the second defendant, Rockford Advisors Limited, or any other associated companies to engage in real estate activities in Dublin, including the acquisition, development and sale of land and the acquisition, redevelopment and sale of residential or commercial investment properties; further, that should any single project related investment exceed €500,000 by Mr Cox, that he would inform Tiger Developments, being the division of OFG with whom Mr Cox had his contract of employment, and seek approval which was not to be unreasonably withheld. The defendants contend that the opportunities pursued by Mr Cox were in accordance with the terms of that letter.

8. Subsequently, the pleadings were amended but I do not think that the amendments are material for present purposes.

The discovery process and the background to the judgment of Barniville J.

9. The parties engaged in the discovery process from late 2016/early 2017. It proved to be very contentious and there was a considerable amount of correspondence as well as numerous applications to court. As only one of the three motions before the High Court is under appeal, I will concentrate on the history of that particular motion. This history is relevant because the motion under appeal issued in the form of a motion for "further and better discovery" and the plaintiffs submitted that it was, in reality, an attempt to re-litigate in 2019 a category of documents of which discovery had been refused in 2017. At the hearing of this appeal, counsel on behalf of the defendants abandoned for the first time the contention that what was sought constituted "further and better discovery" and confined his submission to the contention that the discovery was necessary in the interests of justice.

10. The defendants' original motion for discovery issued on 18th January, 2017 and was ruled on by McGovern J. on 20th February, 2017. Within the motion before McGovern J. on 20th February, 2017 was a category of documents sought known as category 8(f). This category was described in the following terms: -

> "*All documents which refer to and/or record and/or evidence: - (i) any assets or sites in Birmingham or Coventry acquired by the plaintiffs or any of them directly or indirectly from the O' Flynn Group; and/or any assets or sites in Birmingham or Coventry disposed of by the O' Flynn Group out of which any of the plaintiffs made financial gain."*

11. The plaintiffs initially agreed to make discovery under category 8(f) but subsequently brought a motion to clarify and, if necessary, vary the terms of discovery ordered under category 8(f). Their motion in this regard issued on 15th June, 2017. The order resulting from that application was dated 11th July, 2017 and is referred to as the "recast order". In the course of the application for clarification, McGovern J. considered an affidavit sworn by Ms Karen Harty of McCann Fitzgerald, the defendants' former solicitors, and in particular paragraph 34 of that affidavit which set out the documents that the defendants were contending were covered by category 8. McGovern J. gave a ruling. He ordered that his previous order of 20th February, 2017 be "recast". The new wording was as follows:-

> "1. All documents which evidence:-
>
> (a) The consent and any terms thereof issued by NAMA in relation to the sale by Victoria Hall Limited of the property at Alma Road, Coventry and the property at Selly Oak, Birmingham.
>
> (b) The contract and any terms thereof relating to the sale of the lands at Alma Road, Coventry and Selly Oak, Birmingham by Victoria Hall Limited to JJ Gallagher Limited.

(c) Any contract between (i) Victoria Hall Limited and/or any company in the O'Flynn Group and (ii) any of the plaintiff companies or any directors of the plaintiff companies in relation to the transfer or sale by Victoria Hall Limited of the properties at Alma Road, Coventry and Selly Oak, Birmingham.

(d) The contract(s) or agreement(s) under which the plaintiff companies or any of them acquired an interest in the lands at Alma Road, Coventry and/or Milton Grove, Selly Oak, Birmingham.

2. Correspondence between the O'Flynn Group and/or any of the plaintiffs and NAMA in respect of the Birmingham and Coventry sites sold by Victoria Hall Limited, including correspondence in respect of the site to the north of Dale Road on which Victoria Hall Limited applied for planning permission on 22nd September, 2011, disclosures to NAMA relating to the above and requests for consents, including, form A's and consents given by NAMA;

3. Documents relating to planning applications made by Victoria Hall Limited and/or Victoria Hall Management Limited in Coventry on 22nd June, 2011 and Birmingham on 22nd September, 2011, including, disclosures made to NAMA in respect of the applications and the subsequent grants of planning permission and the request and consents of NAMA relating to expenditures on said planning applications."

12. Notably, McGovern J. did *not* order a discovery of a different category described as:-

> "Communications between the O'Flynn Group and/or the plaintiffs and the purchaser (J.J. Gallagher) or any associated or related companies prior to or post the sale by Victoria Hall Limited of the sites in Coventry and Birmingham."

13. There matters rested as of July 2017. The discovery of documents proceeded and the trial was listed for 14th January, 2020.

14. Then, on 26th June, 2019, six months before the trial date, the motion which is the subject of this appeal was issued by the defendants in the form of a motion for further and better discovery. They contended that the sought-for documents ought to have been discovered by the plaintiffs on foot of the order of the High Court (McGovern J.) of 11th July, 2017. The motion referred to two categories of document. The first category referred to documents relevant to an agreement or arrangement under which it is alleged that a Tony Gallagher or entities connected to him were interposed between OFG and certain of the plaintiffs in relation to the acquisition and disposal of sites at Coventry and Birmingham, including, payments made to Mr Gallagher or connected entity or any repayment or request for repayment of those payments. The second category referred to documents relevant to debt applications and any associated communications made to Royal Bank of Scotland and Co-Op Bank in relation to the development of the sites at Coventry and Birmingham.

15. The motion was grounded upon an affidavit of the first defendant, Mr Cox, dated 26th June, 2019 and an affidavit of Mr Hugh Millar (the defendants' solicitor) which exhibited a

witness statement which had been obtained by the defendants from Mr Tony Barry, who had worked for the Flynn Group between 2004 and 2014. It contained material which supported the defendants' case on the Birmingham-Coventry transactions

16. Mr Cox averred that the plaintiffs' counsel at the hearing before McGovern J. on 11th July, 2017 had said that the recast categories together with admissions made by the plaintiffs would give "the full picture" of what was and was not disclosed to NAMA. He asserted that discovery made by the plaintiffs did not give that full picture and that the plaintiffs had not made discovery of any documents relating to an alleged agreement under which Mr Gallagher was interposed as middle man between the O'Flynn Group and certain of the plaintiffs allegedly to disguise the true market value of the site from NAMA.

17. Mr. Nesbitt swore a replying affidavit denying the allegations and making various objections to the order sought, including, to the admissibility of the Tony Barry statement.

18. Another affidavit was sworn to support the defendants' motion by Simon Fox on 16th July, 2019. Mr Fox is a former employee of Tiger Developments Limited (a part of OFG) and worked with Mr Cox. He is currently development manager of Carrowmore Property UK Limited. His affidavit referred to alleged dealings between representatives of the plaintiffs and Mr Gallagher in relation to the purchase and onward sale of the two sites in Coventry and Birmingham.

19. Mr Millar of Crowley Millar Solicitors swore an affidavit dated 16th July, 2019 on behalf of the defendants exhibiting a report by a Sean Murray, accountant, dated 16th July, 2019 which set forth an analysis of the documents discovered and reached certain conclusions adverse to the plaintiffs in relation to the sale of the Coventry and Birmingham sites and the information and material disclosed to NAMA. Mr Cox swore and additional affidavit on 16th July, 2019 which contained further allegations against the plaintiffs in relation to the Coventry and Birmingham sites. Mr Nesbitt filed a further affidavit denying the allegations and objecting to the order sought.

20. During the hearing of the motion, it was indicated on behalf of the defendants that a lengthier list of the documents that were actually being sought by the defendants in the motion had been prepared. Barniville J. decided that he should first deal with issues of principle and then see if it was necessary to deal with issues arising in connection with the list.

21. The defendants contended before Barniville J. that the plaintiffs should be required to make further and better discovery of the documents listed in the notice of motion and contended that those documents ought to have been discovered under the McGovern J. order. Alternatively, they contended that even if the documents were not covered by that order, the plaintiffs should be directed to make discovery of those documents in the interests of justice.

22. The plaintiffs opposed the motion on a number of grounds. First, they objected to the circumstances in which the defendants had brought the motion including some of the material relied upon in support of the motion. In particular, the plaintiffs objected to the admissibility of the witness statement of Mr Barry on the basis that it amounted to hearsay evidence. His witness statement had been procured by the defendants and was exhibited to an affidavit supporting the motion, although he himself had not sworn an affidavit, nor was there any explanation as to why he had not done so. Secondly, they contended that the documents sought on the motion did not fall within the terms of category 8(f) as ordered by McGovern J. They contended that, on the contrary, the documents now sought were among the categories of documents in respect of which he had refused to order discovery. The plaintiffs submitted that the defendants were seeking to go behind the McGovern J. order in their motion despite the fact that they had never appealed his order. Finally, they contended that the discovery was not necessary for the fair disposal of the proceedings or in the interests of justice.

The High Court judgment of Barniville J. under appeal

23. In the relevant portion of his judgment dealing with this particular issue (the only issue now under appeal), Barniville J. addressed, in the first instance, the plaintiffs' objection to the hearsay evidence of the witness statement of Tony Barry. Barniville J. said that he would most likely have ruled the witness statement inadmissible were it not for the fact that the defendants, albeit very belatedly, had put in further affidavits in support of their motion in the days immediately prior to the hearing. Having regard to all of this evidence in support of the defendants' motion, Barniville J. decided that it was not necessary to rule on the objection to Mr Barry's witness statement because there was admissible evidence to ground the motion in the form of the other affidavits.

24. Secondly, Barniville J. concluded that the documents now being sought by way of further and better discovery were *not* covered by the terms of category 8(f) as recast by McGovern J. in the order of 11th July, 2017. He accepted that the plaintiffs were correct in submitting that an order made by a court should be interpreted on its own terms and not by reference to a submission made by counsel in the course of the hearing that proceeded the making of the order. Thirdly, he held that category 8(f) as recast in the order of McGovern J. required the plaintiffs to make discovery of what was disclosed to NAMA but did not encompass what *was not* disclosed to NAMA. He concluded, therefore, that the documents now sought were *not* covered by category 8(f) as recast. Barniville J. said that he was fortified in his conclusion by the fact that one of the categories of document being sought by the defendants was a category of communications between O'Flynn Group and/or the plaintiffs and Mr Gallagher's company prior to or post the sale of the sites. This had been expressly drawn to the attention of McGovern J. by counsel and therefore, when ruling on the application, Mc Govern J. was fully conscious of the categories being sought in Ms. Harty's affidavit and yet had decided to recast the orders in terms which did not include that particular request. Also, the discovery being sought now would have been encompassed by the discovery in a different sub-paragraph, sub paragraph (a) of the defendants' motion, which was refused by McGovern J. when he recast the order. Barniville J. said that the appropriate remedy for the defendants, if they

were unhappy with the order, would have been to appeal it but they did not do so, and that it was not appropriate for them to seek further and better discovery of documents in respect of which discovery had been refused.

25. Barniville J. then moved to the defendants' alternative submission; namely the issue of whether an order of discovery should nonetheless be made now by way of additional or supplementary discovery, i.e. the fall-back position adopted by the defendants in the event they were unsuccessful in establishing that the documents fell within the category ordered by McGovern J. He noted that the plaintiffs had conceded that the additional documents sought would probably be relevant in the *Peruvian Guano* sense if this were a fresh application for discovery without the complex procedural history in respect of the application, but that they contended that it was not necessary that the defendants obtain discovery of these additional documents for the fair disposal of the proceedings because: (i) it would be inappropriate to make the order in circumstances where McGovern J. had two years ago refused to grant discovery of documents in similar terms; (ii) in circumstances where Mr Murray had been in a position to prepare his report and draw the conclusions that he did, it was clear that neither he nor the defendants were hampered by the discovery now sought; and (iii) there was other evidence, as set out in the affidavits put forward in support of the defendants' motion, in relation to the disposal and onward sale of the Coventry and Birmingham sites and subsequent development and operation of those sites.

26. Barniville J. was satisfied on the basis of those arguments that "in the very particular circumstances of this case", he should not direct the plaintiffs to make the additional discovery sought. He stated: -

> "If this were an entirely fresh application without the procedural history to which I have referred, and if I were satisfied that an injustice would be done to the defendants if they did not obtain the discovery sought on this application, I would have directed the plaintiffs to make the additional discovery sought. However, I cannot ignore the procedural history and the need to ensure that there is at some point finality in the discovery process. Proceedings would become intolerably delayed and disrupted if it were possible, notwithstanding a previous refusal of discovery, to return to seek discovery in similar terms at a later stage in the process. That said, if I were satisfied that an injustice would be done to the defendants if they did not obtain this additional discovery, even with that procedural history, I would have directed the plaintiffs to make the additional discovery. However, I am not satisfied that any injustice would be done to the defendants for the reasons I have mentioned."

Events after the order of the High Court was made and before this appeal came on for hearing

27. A number of additional affidavits were sworn before the hearing of this appeal. Patricia O'Brien, solicitor on behalf of the plaintiffs, swore an affidavit and made complaint about the conduct of the defendants during the period between the High Court judgment and the present appeal. The chronology set out by her is essentially as follows:

- 11th September, 2019: Judgment delivered by Barniville J.
- 24th September, 2019: Terms of the orders finalised by Barniville J.
- 7th October, 2019: Order of Barniville J. perfected.
- 25th October, 2019: Defendants lodge their notice of appeal without having given any indication to the plaintiffs that they intended to do so. They also failed to notify the plaintiffs that an appeal had been lodged.
- 4th November, 2019: Upon the solicitors for the plaintiffs making enquiries directly with the Court of Appeal, they learned that the defendants have lodged their appeal as described above.
- 5th November, 2019: The solicitors for the plaintiffs wrote to the solicitors for the defendants complaining that, notwithstanding the imminence of the trial date, they had not been notified of the intention to appeal and that they had only recently become aware of the appeal.
- 6th November, 2019: The solicitors for the defendants replied stating that they had made enquiries with the Court of Appeal to expedite the appeal and proposed that they would deliver written submissions for the appeal on 15th November, 2019.
- 7th November, 2019; The solicitors for the plaintiffs wrote to the solicitors for the defendants proposing that they should serve their submissions by 13th November, 2019. On the same day during a mention before the High Court, Barniville J. - upon being informed of the notice of appeal - noted that no stay had been placed on the trial date. (In fact, no application for a stay of the trial was ever made.) On the same date, the notice of appeal was formally served on the plaintiffs; it having been emailed the day before.
- 29th November, 2019: The case was listed in the Court of Appeal for directions and the defendants served a copy of their written submissions, despite their own earlier suggestion that they would do so on 15th November. The defendants sought a priority hearing of their appeal which was opposed by the plaintiffs. Costello J., who was dealing with the directions, said that she not satisfied that the matter could be dealt with within the time period nor was she satisfied that there was any urgency to the application having regard to the delay in bringing the application and the appeal, and to the fact that there had been no application to adjourn the trial in the High Court. The matter was listed for directions on 31st January, 2020.
- 20th December, 2019: The trial was listed in the call over list and was called on for hearing for four weeks commencing 14th January, 2020. No application for a stay was made by the defendants.
- 14th January, 2020: The trial commenced in the High Court before Quinn J. The defendants did not at any stage indicate to the trial judge that they were intending

to pursue the discovery appeal during the trial notwithstanding that the trial judge queried with the parties the proposed timing for the running of the trial on a number of occasions. Evidence was heard from nine witnesses including Michael O'Flynn who spent almost seven days in the witness box. Questions in respect of the role of Mr Gallagher were put to Mr O'Flynn during this lengthy cross examination.

- 31st January, 2020: The appeal was listed for hearing on 3rd March, 2020. Costello J. stated that the arguments as to whether or not it should proceed in the middle of the High Court trial should made to the Court hearing the appeal. On the same date, Quinn J. was informed by counsel for the plaintiffs that the defendants were seeking to appeal a discovery order made by the Court notwithstanding that the trial had already commenced.

- The trial adjourned as the parties had very significantly underestimated the duration of the trial and, in accordance with the practice in the commercial list, the case was relisted to resume at a later date.

- 3rd March 2020: This appeal was heard.

28. Ms O'Brien also complained that the defendants' notice of appeal sought an order for discovery in terms of what they described as "a schedule of documents prepared by the parties during the course of the hearing of the motion before the High Court" when in fact the schedule was never agreed by the plaintiffs. She indicates that her firm wrote to the solicitors for the defendants on 5th February, 2020 noting this and requesting a copy of the schedule. They received no response to this letter although they did receive a copy of the schedule at the request of counsel. She said that a review of the document shows that rather than narrowing the terms of the discovery sought, the schedule is actually wider and different than the documents sought in the notice of motion.

29. Ms O' Brien also gave details of the time and money already spent on uploading, processing and searching almost three million documents on foot of the discovery order to date. She averred that the cost of discovery already made was in excess of €1.3m gross. She discussed what would be involved in future discovery if it were ordered at this stage and suggested that the cost would be substantial.

30. A number of affidavits were sworn on behalf of the defendants. An affidavit dated 26th February, 2020 was sworn by Kevin Albert, Senior Consultant of Reveal Data Corporation Limited, who had been engaged by the defendants, and he sought to estimate the time and costs that would be involved in making the additional discovery sought. He gave his understanding as to what was required and calculated a figure of approximately €10,000.00 for the further discovery sought.

31. Patrick Cox, the first defendant, swore an affidavit dated 25th February, 2020 in which he said that the documents sought on appeal related to a central issue in the proceedings, namely the Coventry/Birmingham transaction. He said that the plaintiffs had conceded

before the High Court that the documents were relevant to issues in the proceedings and averred that:

> "what has occurred since the hearing in the High Court has demonstrated further the relevance of the documents and their acute importance to a fair determination of the plaintiffs' claim against the defendants."

32. Mr Cox pointed out that the application for a priority hearing of the appeal had been resisted by the plaintiffs and said that the appeal came on mid-trial for this reason. He said that the plaintiffs had "fought tooth and nail to avoid making discovery of those documents". He said that the plaintiffs had repeatedly said that the allegations concerning the Coventry and Birmingham transaction were untrue to the extent that their counsel in opening the case had said that the making of those allegations would give rise to the largest award of aggravated damages in the history of the State. Under a heading in his affidavit "[f]acts that have emerged since the commencement of the trial", Mr Cox exhibited certain excerpts from the transcript of the trial to date. He discussed the significance of this evidence in some detail in his affidavit. Although I have examined the affidavit and exhibits carefully, I will refrain from either setting out the details or discussing them here as this could be prejudicial to the ongoing trial. In general terms, Mr Cox's view was that the trial court is faced with two contradictory stories: that at present there was no documentary evidence before the court to either support or undermine the plaintiffs' evidence in respect of certain specific matters relating to the Coventry-Birmingham transactions; and that the documentation sought is crucial as to issue of the credibility of the witnesses for the plaintiffs. He pointed out that it was not merely the defendants who relied on the Coventry Birmingham transactions but that the plaintiffs themselves were relying on the allegations to justify an award of aggravated damages.

33. Mr Millar, solicitor, of Crowley Millar solicitors, in an affidavit of 26th February, 2020 sought to explain the delays relating to the appeal mentioned by Ms O'Brien in her affidavit, described above. He explained that it was a period of "intense activity" during which several hundred pages of witness statements were being worked upon and were delivered on 8th October, 2019 together with numerous exhibits running to thousands of pages. He said that a decision was taken to appeal the High Court's decision but due to a misunderstanding, for which he took responsibility, the notice of appeal was not served until 6th November which was an error. He did not give a precise date as to when the intention to appeal was formed but said that the content of the plaintiffs' witness statements received on 8th October was a factor in the decision; therefore it must have been after that date. He said that the defendants' legal team was also preparing to defend three motions listed for hearing on 7th November. He said it was entirely incorrect that they were trying to delay to trial and on the contrary were anxious to progress the proceedings. Everything took much more time than anticipated and the submissions for the Court of Appeal were not available until 29th November. He did not accept that there was a pattern of casual delay as had been alleged by the plaintiffs. He said that the volume of paperwork in the proceedings was unprecedented. He accepted that no application to vacate the trial date was made and averred that this was because the

personal defendants did not want it delayed by reason of the fact the proceedings had been ongoing since 2016 and they were anxious for them to be brought to a close.

34. Ms O'Brien swore an affidavit in reply and asserted that the affidavit of Mr Albert was based on two false premises. The first was the premise that the only data sources relevant to the discovery requests were email accounts used by Michael O'Flynn and John Nesbitt, and the second was the false premise that there was some temporal limitation on the discovery request and that those email accounts needed to be searched only for the period of 1st November, 2011 to 31st December, 2012. She averred that these false premises meant that Mr Albert's estimate of the costs and time associated with the discovery requests was inaccurate. She said that if were one to draft the discovery request as understood by Mr Albert, it would read as follows:

> "All emails in the period from 1 November 2011 to 31 December 2012 with respect only to two properties situate at Coventry and Birmingham either sent to/by or copied to either Michael O'Flynn or John Nesbitt and being to/from or copied to Tony Gallagher, Mark Edwards, Barry Fisher or Sue Barnes".

35. This was very different and much narrower from what had actually been sought. Ms O'Brien also averred that the solicitors for the defendants had not clarified whether they were now seeking the discovery sought in the notice of motion before the High Court or that requested in their notice of appeal (which were not the same in scope), but that in any event neither of those was the same as the scope of discovery apparently envisaged by Mr Albert. She said that the discovery as sought in the notice of motion would require all documents evidencing all communications and interactions between a large number of people not considered by at all Mr Albert and that, at a minimum, there would likely be at least 22 individuals involved in these interactions and communications. She went on to describe the logistical exercise of identifying the correct people, searching for relevant documents, and reviewing them for relevance, privilege and commercial sensitivity. She also took issue with Mr Albert's claim that document reviewers typically review 350 to 500 documents in an eight-hour day, citing *Law Society of Ireland: Civil Litigation* (3rd edn, Oxford University Press 2013) where it was said that a useful rule of thumb was that a reviewer could review and subjectively code around 150 documents per day. She said that their experience already undertaken in these proceedings was that the number of documents reviewed on a daily basis was 264 on first review and 146 on second review. She also took issue with Mr Albert's figures in respect of the actual costs of searching and reviewing. She said that a cost range of between €120,000.00 and €300,000.00 was not unreasonable for a discovery exercise requiring the review of between 15,000 and 100,000 documents. They had asked PWC to review Mr Albert's affidavit and she exhibited a letter dated 27th February, 2020 from them, in which they questioned whether Mr Albert had factored in the total end-to-end costs associated with conducting a document review, oversight of the process by an experienced solicitor, and the possible complexity of the documents in question.

36. On the issue of relevance, she distinguished between what had been sought in the High Court and the expanded category of documents now being sought on appeal. She asserted that the vast majority of those documents were not relevant to any matters in issue.

37. Ms O'Brien averred that a proper disposal of the appeal required that only matters which before the High Court were considered by the Court of Appeal, but she also asserted that Mr Cox had misrepresented the evidence that was given to the court of trial since the High Court judgment.

38. She also averred that the affidavits of Mr Cox and Mr Albert of the same date were not even consistent with each other regarding the scope of the discovery sought.

39. With regard to Mr Miller's affidavit setting forth explanations for the delays with regard to the appeal, she commented that intensity and volume of documents and correspondence were normal features of cases in the commercial court and impacted on both parties in equal measure. Ms O'Brien pointed out that he did not identify any date on which the decision to appeal was taken and submitted that his explanation based on the intensity of work was not an acceptable excuse.

Submissions of the parties on the appeal

40. The defendants appealed and from here on in, I will refer to the defendants as the appellants and the plaintiffs as respondents.

41. In their written submissions, the appellants laid emphasis on the importance of the documents sought to assist with proving their case in respect of the Birmingham Coventry transactions. They said that they were in a position to establish some of the key facts through their own evidence but that they needed the documents in order to challenge the oral evidence of witnesses. They relied on the Supreme Court decision in *Tobin v. Minister for Defence* [2019] IESC 57 and, in particular, on those passages of the judgment in which it was pointed out that discovery can play an important role in ensuring that the case presented by an opponent is not inconsistent with the documentation which the opponent possesses but is withheld from the court:

> "I might add that in my experience, discovery can also play a role in keeping parties honest, for it cannot be ruled out that some parties might succumb to the temptation to present a less than full picture of events to the court, were it not for the fact that they know that any attempt to do so may be significantly impaired if there is a documentary record which shows their account to be inaccurate or materially incomplete. I consider that latter point to be of particular importance, for it provides a potential counter weight to the oft quoted argument that the vast majority of documents which are discovered do not find their way into the evidence presented to the court.
>
> It is undoubtedly true that much discovered documentation does not find its way into the evidence. But it would be to underplay the potential importance of

discovery to confine its contribution to ascertaining the true facts to the documents which ultimately find their way into the evidence. Discovery can also influence the evidence presented in other ways, such as by ensuring that it may by unnecessary to go into much documentary material, precisely because the party which has discovered the documents in question will almost inevitably have to present a case in oral evidence which is consistent with the documentary record. It would be a significant hostage to fortune for a party to present oral evidence which seemed inconsistent with documents which the party had itself produced on discovery, unless some compelling reason for the divergence could be given. It might turn out to be wholly unnecessary to refer to the documents in question in evidence but that would not mean that those documents may not have had a significant effect on the overall run of the case" (paragraphs 7.3-7.4).

In this regard, it was noted that the trial had been halted on the application of the respondents precisely at the point where Mr Nesbitt would be questioned about the transactions in question.

42. For their part, the respondents laid considerable emphasis on the timing of this appeal. They set out the complicated history of discovery process and the events since the perfection of the order of Barniville J. They pointed out that no application for a stay of the trial pending further discovery had ever been made by the appellants, that the issuing of the appeal and the filing of submissions had not been done in a timely fashion, and that the appellants had not informed the trial judge that this appeal was outstanding. They said that it was pure happenstance that it had been possible for the appellants to obtain a hearing date of the appeal prior to the conclusion of the trial. If there had not been a natural break in the trial and an application were made to the Court of Appeal to have a hearing of a discovery appeal mid-trial in circumstances where no stay had been sought or obtained of the trial, it would be unprecedented for the Court of Appeal to entertain such an appeal. They said that, by analogy, the comments of McKechnie J. in Ryanair Ltd v. Bravofly *Ltd* [2016] IESC 53 applied and, in particular, paragraph 25 where he stated that:

> "It has long been an established practice of this Court to refuse to entertain an appeal moved by an aggrieved party from an adverse decision made by the trial judge whilst the substantive proceedings are ongoing."

He referred to the decision in *Condon v Minister for Labour* [1981] IR 62 and *Superwood Holdings* [1994] 4 IR 531 and then continued that:

> "Any other approach, if routinely adopted, would be incompatible with and grossly disruptive of good and efficient administration, would potentially fragment in a disorderly manner the unity of a trial, would lengthen the duration of cases and increase their costs, and would result in a state of continuing uncertainty for the parties which is inimical to the principle of finality of litigation. No system of administration could survive such a practice."

The respondents submitted that these comments had equal force in the present context of an appeal being pursued mid-trial in respect of a discovery matter. They submitted that the effect of ordering discovery at this stage would be that it would take considerable time to comply with it; that it would delay the progress of the High Court trial; that it would potentially require witnesses to be recalled; where it might further require witness statements to be delivered (this being a commercial case), that the appellants had opened their case and gone into evidence on the basis of a "universe of documents relevant to the trial", and that it would be prejudicial and against the interests of the administration of justice to require further documents at this stage.

43. On the merits of the discovery appeal itself, the respondents supported the High Court's conclusion that the further and better discovery sought was not in fact within the scope of the original order for discovery but rather had been considered and rejected by McGovern J., and that no appeal of this decision was ever brought. As to the 'fall-back' submission of the appellants, namely that discovery should be ordered even if it did not fall within the scope of McGovern J's order, the respondents raised the issues of necessity and proportionality, submitting that it would be disproportionate to order discovery either in the terms sought in the original notice of motion or the "revised schedule" referred to in the notice of appeal. They submitted that this was not agreed between the parties and that the revised schedule was furnished to them only after the hearing of the appeal had been fixed. They submitted that the revised schedule in fact sought broader categories of documents than were originally sought in the notice of motion before the High Court and that it appeared to abandon one particular category of documents originally sought (that concerning debt applications to RBS and CoOp Bank). They submitted that the appellants were treating the appeal as yet another fresh application for discovery which was wholly improper and impermissible as a matter of law. In terms of the costs and time involved in potential discovery, they pointed out that Ms O'Brien had referred to the significant costs of €1.2m that had already been incurred in making discovery.

44. The respondents also submitted that the appellants had described their defence in terms of alleged fraud but that this had never been pleaded in the case and that the respondents had indicated that they intend to seek aggravated damages arising out of the conduct of the defence in this regard, i.e. the making of serious and unpleaded allegations of fraud.

45. In oral submissions, counsel on behalf of the appellants accepted that they were in default in terms of the speed with which the appeal was launched and the written submissions furnished, and relied upon the explanations set out in the affidavits. He said that, fortuitously, a possibility had arisen to "put matters right" notwithstanding this default. He wished to make clear that the trial was not adjourned because the appellants had persuaded the Court of Appeal to hear the appeal but that Mr Nesbitt did not move on to deal with the Coventry Birmingham aspect of the case because of the respondents' application to the trial judge and not any application by the appellants. Significantly, counsel stated that he was no longer pursuing the appeal insofar as it concerned the submission that the discovery sought was within the discovery originally ordered by

McGovern J. Accordingly, therefore, the application for further and better discovery was simply abandoned at the hearing of the appeal. Counsel submitted, however, that he was saying that the discovery sought was essential for the fair disposal of the proceedings. Considerable emphasis was laid on the facts of the case and the evidence given in the trial to date, including not only the testimony of witnesses but also the contents of certain emails in connection with the Birmingham-Coventry transactions. As previously mentioned, I do not consider it appropriate to set these out or comment upon them in circumstances where a trial is ongoing and the effect of doing so might carry the risk of prejudice to that trial, but I have examined them.

46. Counsel on behalf of the respondents said that the appeal had been argued as if it were a *de novo* hearing when it was not. He submitted that Barniville J.'s reasoning was impeccable and contained nothing approaching the level of error or risk of serious injustice that the jurisprudence of the Court in *Lawless v. Aer Lingus* [2016] IECA 235, for example, required to be present in order to overturn a High Court decision on discovery.

47. He submitted that it would be unthinkable for the Court of Appeal to order discovery at this late stage, having regard to the chronology described. He supported the portion of Barniville J.'s judgment in which he dealt with the issue of necessity in the particular context of where the cases stood at that time (which was summer of 2019) and in light of its complex procedural history.

48. He referred to the case that was being made by the other side on the illegality front and submitted that they had been making this case for some considerable time and that the same reasoning as to lack of necessity applied for McGovern J. and Barniville J. applied with equal force today and that the courts could not keep re-visiting the same proposition repeatedly.

49. Referring to the chronology of events since the perfection of Barniville J.'s order, counsel on behalf of the respondents noted that when the directions hearing took place, Costello J. had said that she would put the case back into the directions list for 31st January, "by which time the trial should be over and then we will see what will happen with the appeal". It was pure happenstance which had enabled the appellants to come back to the Court and ask for a hearing of the appeal during the break in the trial which had occurred. He said that the granting of discovery at this late stage would be "against every instinct of finality and litigation and the orderly running of trials" and that those ideas were not merely matters of administrative efficiency but were central to justice.

50. He said that he did not accept the appellants' characterisation of the evidence and what had emerged at the trial, but that he would not consider it appropriate to ask the Court to start evaluating evidence given in a trial at hearing and that such a course would be a "recipe for disaster".

51. In reply, counsel on behalf of the appellants, when asked why the appellants had not appealed the order of McGovern J. when he refused category 8(f) in 2017, said that it was likely that the appellants' understanding of the position at the time was in no way

comparable to what they knew now, "which has emerged in truly spectacular fashion at the trial". He submitted that the decision of the Supreme Court in *Ryanair* set outs what should happen "as a matter of course" but that the present case was absolutely not a matter of course, particularly in circumstances where the respondents were now seeking aggravated damage at the highest level on the basis of these particular allegations. He submitted that it was an extremely exceptional case where there was great danger of injustice if discovery were not granted and that a core element of the case would go without essential evidence in circumstances where Mr Flynn and Mr Nesbitt know precisely where any document must be or not be. He said that there were three months and thirteen days before the hearing was due to commence and it would be a grave injustice if the appellants could not obtain access to the documents on this essential issue.

52. Finally, counsel also suggested that the Court might consider granting discovery of a much-reduced and narrow category of documents, namely: "All emails in the period from 1 November 2011 to 31 December 2012 with respect only to two properties situate at Coventry and Birmingham either sent to/by or copied to either Michael O'Flynn or John Nesbitt and being to/from or copied to Tony Gallagher, Mark Edwards, Barry Fisher or Sue Barnes", i.e. the category described by Ms. O'Brien in her affidavit as being the one which best corresponded to Mr. Albert's assumptions and for which he estimated the costs of discovery as approximately €10,000.

53. In further reply, counsel on behalf of the respondents objected that this was the first time a suggestion had been made that the category of discovery would be narrowed again and that he had had no opportunity to respond to this suggestion at any stage.

The Court's decision

54. The outstanding feature in this appeal is the late stage at which the Court has been presented with the issue of discovery. The circumstances which have given rise to this situation have been described in detail above. The trial of the action has already started on the basis of a particular 'universe of documents' which had been discovered prior to the trial; counsel's opening was crafted against the backdrop of that 'universe'; and a substantial amount of evidence has already been given by witnesses. It is only through the happenstance of an adjournment of the trial, to use the language of the respondents, that the Court has been presented with an opportunity before the trial itself has concluded to rule on the appeal in respect of the appellants' discovery motion.

55. The courts, for good reason, frown heavily upon late applications for discovery, particularly any attempt to litigate the issue of discovery during the currency of trials. The reasons for this attitude were set out by McKechnie J. in *Ryanair v. Bravofly* as quoted above. It is not simply a question of administrative efficiency; it is an aspect of the justice of proceedings, more particularly the requirement of procedural justice to all concerned. The observations of McKechnie J. apply with equal, and perhaps greater, force to a situation where what is in issue is not a fresh discovery application arising for the first time during a trial but a late attempt to obtain discovery of documents in circumstances where the same request was previously the subject of judicial refusal and was not appealed.

56. Barniville J, who heard the motion some six months before the beginning of the trial, took into account the complex procedural history of the various discovery requests made in the proceedings as well as the lateness of the current application, and declined to order the category of discovery the subject of this appeal. It is important that this Court, being an appellate court, approach his judgment by applying the appropriate test as set out in cases such as *Lawless v. Aer Lingus* (referred to above) and, more recently, *Tobin v. Minister for Defence* [2019] IESC 57 where the Chief Justice stated that a trial judge's decision on a discovery application should be afforded a wide margin of appreciation.

57. It is significant that, at the hearing of the appeal, counsel for the appellants abandoned the submission that what was sought fell within the order of McGovern J. of July 2017 (and therefore that it was an application for further and better discovery) and confined his submission to one based on the necessity for the discovery sought. He relied heavily on evidence emerging from the trial. He submitted that the evidential landscape which had now emerged established that the documents sought were of crucial importance to the doing of justice in the case and that there was a real risk that (alleged) wrongdoing on the part of the respondents might remain hidden if there were no documents showing that their testimony or that of their witnesses was untrue; that, in effect, they could give false evidence with impunity if the sought-for documents were not discovered; and that an award of aggravated damages might ultimately be made against the appellants if they did not have full access to all relevant documents to prove their case and contradict the testimony of witnesses called on behalf of the respondents.

58. This is an appeal against an order of the High Court and it does not seem appropriate to me for the Court to weigh in the balance the evidence which has emerged at the trial and which was not before the High Court judge on the motion for discovery. It may be that exceptional cases may arise where, by reason of evidence emerging at trial, *the trial court* would entertain a late application for discovery, but that is a different matter from seeking to rely upon fresh evidence from the trial to support an appeal against an order of the High Court which was made before the trial commenced. In effect, it would be an attempt to have an appellate court deal with a *de novo* application on the basis of, *inter alia*, evidence which was not before the High Court judge. This is not permissible.

59. If anyone should deal with discovery issues arising out of evidence given at trial, it should be the trial judge, who will have a much deeper and more extensive understanding of the evidence and the issues. Where a trial judge exercises his or her discretion to order discovery during a trial, such a case would have to present with exceptional features such that the interests of justice could be said to outweigh the potential prejudice that would be caused to the other side by the lateness of any discovery ordered at the trial stage. Without wishing to lay down any hard and fast rules, I could anticipate that such a situation might arise where, for example, the need for some crucial piece of discovery had only become evident during the trial for some particular reason, such as the unforeseen (and not reasonably foreseeable) emergence at the last minute of new information, or some entirely unexpected twist in the evidence of the witnesses. Even then, it would be relevant to consider the conduct of the party seeking such late discovery and whether it

could (or not) fairly be said that they had exhausted all reasonable avenues of seeking relevant documents before the unexpected development had taken place, bearing in mind that some degree of twists and turns in the evidence is part and parcel of the trial process. It would also be important to consider the scope of the documents sought; such an application might well be more likely to succeed if the category of documents sought was narrow in scope and specific in nature. However, this is an exercise which is different in scope and nature from what is before this Court on appeal from a judgment and order of the High Court handed down and perfected four months before the trial.

Discussion of what is properly before the Court

60. Turning then to what is actually before this Court, namely, an appeal in respect of the High Court judgment, the first point of note is that one of the bases upon which the application was urged upon the High Court has now fallen away because it was abandoned during the appeal; this was the submission that the application was an application for further and better discovery. Accordingly, what is before the Court is whether or not Barniville J. stayed within the appropriate parameters of his discretion in relation to what was simply a late application for discovery.

61. I would accept in the first instance that the 'relevance' test was satisfied. Although the scope of the documents actually sought by the appellants appears to have expanded and varied over time as between (a) the documents sought in the motion for further and better discovery; (b) the 'list' referred to in the High Court judgment; and (c) the "schedule" referred to in this appeal, I accept, in principle, that at least some of those documents would satisfy the test of relevance for the purpose of discovery. Indeed, the High Court accepted this and proceeded with the rest of the analysis on that assumption. I agree with the High Court that it is at the next stage of the analysis where the problems arise; the requirements of necessity and proportionality, as well as the overall interests of justice.

62. Barniville J, in rejecting the appellants' "alternative submission" (the issue now before the Court – a simple and late application for discovery), laid emphasis upon the procedural history of the case, the lateness of the application, the fact that a similar category of documents had previously been refused by McGovern J. in 2017 (a decision in respect of which there was no appeal), and the alternative sources of evidence available to the appellants. Applying the test for appellate review as described in *Lawless and Tobin*¸ I am of the view that Barniville J. made no legal error and was well within the parameters of his discretion when he refused the discovery sought and for the reasons given by him.

63. Indeed, one could expand on some of the points mentioned by Barniville J. and add to their number. . First, bearing in mind the similarity between what was now being sought by the appellants in the summer of 2019 and what had been refused by McGovern J. in 2017, it could be said that the application before Barniville J. was, in reality, an attempt to circumvent the time-limits with regard to appeals set out in the Rules of the Superior Courts, an attempt which should not be condoned by the courts. This point is reinforced by the abandonment at the hearing of the appeal of the submission that the documents fell within the order of McGovern J.

64. Secondly, it could also be said that the relevance of the category of documents sought had not emerged only recently prior to the application before Barniville J. While the importance of certain aspects of the Birmingham-Coventry transactions may have come into greater focus in 2019 than was apparent in 2016 or 2017, the relevance of these transactions was nonetheless well appreciated and within the sights of the appellants as far back as December 2016 when they delivered replies to particulars mentioning these transactions. It was certainly within their sights when they made their discovery application and when they relied upon Ms Harty's affidavit in the application before McGovern J. in July 2017. Yet there was no appeal in respect of this category of documents, despite the fact that they are now said (by the appellants) to be so significant that a grave injustice may be worked if they are not discovered and that this potential injustice outweighs factors such as the undoubted lateness of the application. If this category of document is so significant, the refusal of discovery in respect of a similar category should have been appealed. Thirdly, this is not a case where what is in question is a small, easily-defined pool of documents. The appellants themselves appeared to have formulated what they want in three different ways (in the notice of motion of June 2019, in the "list' referred to at that hearing, and in the "schedule" before this Court). Further, given the vastly differing estimates of cost and time for further discovery that were deposed to on affidavit on behalf of each of the parties, the totality of which evidence leaves unanswered many questions about the cost and time that would be required, this is not a situation where the Court could be confident that discovery (if ordered) would be of a small, focussed group of documents which could be dealt with at a reasonably modest cost.

65. Fourthly, it is clear that there is some evidence available to the appellants from other sources, such as the evidence of Mr Barry, Mr Cox and Mr Fox. It is not clear to the Court whether the report of Mr Murray will ultimately be admissible at the trial (there was some suggestion that it would not), but it is at least clear that there was available to him sufficient evidence to reach the conclusions he did in his report. That is not in any way to diminish the importance of emails and the like as a potential source of independent contemporaneous evidence when corporate wrongdoing is alleged; such potentially corroborative evidence can be crucial in tilting the evidence one way or another at this type of trial if the remainder of the evidence involves conflicting oral testimony to be resolved by the trial judge. However, the availability of other evidence is a factor to be considered in the context of (late) discovery litigation where the test of necessity is central.

66. Finally, the appellants' conduct since the perfection of the High Court order has not improved their position. The Court notes the following:

    a. They allowed 21 days to elapse before they issued a notice of appeal, although the trial was only some three months away when the High Court order was perfected;

    b. They failed to notify the other side of their intention to appeal;

c. They failed to notify the other side that they had issued of a notice of appeal, leaving the other side to find out for themselves;

d. They allowed four more weeks to elapse (from the issuing of the notice of appeal) before they filed written submissions, which was on the date of the directions hearing before this Court, and later than the date that they themselves had suggested;

e. They failed to notify the trial judge of the existence of the appeal and did not request a stay of the trial at any stage nor give any indication that the trial could not fairly proceed in the absence of the requested documents (this of course being at a time when they already had the witness statements of the other side). The case was case-managed in the commercial list of the High Court in which the trial judge assigns dates for trials on the basis that the parties' respective cases will be ready for trial when they comply with the directions of the court, thus guaranteeing that the action will proceed on the date it is listed for trial. (Due to the case management, the normal requirement that counsel certify that the case is ready for trial before it can be assigned a date for hearing, does not apply.) If it was apparent before the trial that discovery of the category of documents under appeal was genuinely necessary to prevent a potential injustice taking place, it was an egregious failure to have informed the trial judge of the existence of the appeal and/or to request a stay.

67. It is true that the appellants requested an expedited hearing of the appeal at the directions hearing on 29th November, 2019, but this was (understandably) opposed by the respondents and I do not think that blame can be laid at the respondents' door for doing so or for the lateness of this appeal more generally. An expedited hearing was refused because there was no possibility of the appeal being heard, judgment delivered, and discovery made (if ordered) prior to the commencement of the trial on 14th January, 2020. It may well also be true that the appellants were extremely busy with pre-trial preparation and witness statements in particular, and that the issuing of the appeal on the discovery motion was overlooked through error, as Mr Millar averred; but given the absence of any appeal of the June 2017 order, the lateness of the application for further and better discovery (June 2019) and imminence of the trial (January 2020), it behoved them to move with more than the usual expedition. If the documents were as important as they now assert they are, it was crucial to move as speedily as possible. And yet, even when the notice of appeal issued after someone noticed that this had been overlooked, the written submissions did not follow in early course. It must be remembered that even if discovery had been ordered on appeal, this would have been the *beginning* of the process, not the end of the process; documents would have had to be searched for, search terms agreed, results de-duplicated, a redaction exercise carried out, affidavit(s) sworn, witness statements reviewed in light of anything new arising, and so on.

68. All of these considerations, added to the reasons given by Barniville J., in my view detract from the merits of the appellants' late plea for discovery and gives greater reason to refuse the application. For those reasons, I would dismiss the appeal.

69. As this judgment is to be delivered electronically, Costello and Power JJ. have indicated their agreement with it.