

**THE HIGH COURT**

**[2024] IEHC 346  
RECORD NO. 2010 2605P**

**BETWEEN**

**MICHAEL LEAHY**

**Plaintiff**

**And**

**OSB GROUP LIMITED, DOELLKEN-KUNSTSTOFFVERARBEITUNG GMBH AND  
EIRFOAM LIMITED**

**Defendants**

**Judgment of Mr. Justice Conor Dignam delivered on the 7th day of June 2024**

**INTRODUCTION**

1. This my judgment on the plaintiff's application to strike out the second and third-named defendant's defence.
2. The plaintiff had also issued other motions but it has not been necessary to determine those and this judgment is therefore limited to the strike out application.
3. That application has two limbs. The plaintiff seeks:
  - (i) an Order pursuant to Order 31 Rule 21 of the Rules of the Superior Courts striking out the second and third-named defendant's Defence on the grounds that those defendants are in breach of a discovery Order made by Barniville J on the 22<sup>nd</sup> October 2018; and
  - (ii) an Order pursuant to Order 19 Rule 28 striking out the Defence as it discloses no reasonable cause of action or answer to the plaintiff's case and is shown by the pleadings to be frivolous and vexatious.

4. It seems to me to make more sense to deal with the second of these first.

## **BACKGROUND**

5. It is not necessary to set out the factual background in any significant detail though it will be necessary to refer to some of the facts during the course of this judgment.

6. In or about 2003/2004, the plaintiff set about establishing a business manufacturing and selling customised laminated worktops. The first-named defendant is a provider of kitchen and furniture materials. The second-named defendant is a manufacturer and supplier of PVC, ABS, acrylic and melamine edge-banding or edgings for such worktops. This defendant is based in Germany. The third-named defendant is a distributor of kitchen and furniture materials and is the agent of the second-named defendant in the State.

7. In April 2004, the plaintiff purchased a specialised piece of manufacturing equipment known as a BAZ or IMABAZ machine to manufacture kitchen worktops.

8. The plaintiff claims that he entered into a contract with the second and third-named defendants for the supply of edgings for the manufacture and completion of the worktops and that he relied on representations made by all three defendants as to the fitness for purpose of the edgings for use in the plaintiff's manufacturing process and as to the time that it would take to match the colour of those edgings to the laminate worktops which the plaintiff was going to manufacture. He claims that these representations were made, inter alia, during a visit to the second-named defendant's factory in May 2004. He says this was a "specification meeting". The defendants deny this and, while admitting that the visit took place, describe it as an "exploratory meeting". This meeting is central to the plaintiff's claim. The plaintiff's case is that as events transpired, the edgings supplied by the second and third-named defendant were not fit for purpose as they could not be properly affixed without defect to the plaintiff's worktops. He also claims that the matching of edgings to the worktops was excessively slow which led to delays in the manufacturing process in 2004 and 2005. There is considerably more detail to the plaintiff's claim but it is not necessary to go into all of the detail at this stage.

9. He claims that all three defendants owed him a duty of care and acted in breach of that duty by way of negligence, negligent misstatement and misrepresentation. The plaintiff claims that he has, as a result, suffered loss and damage in the amount of €22.7 million (he originally claimed loss and damage in the amount of €6.5 million but claimed the amount of €22.7 million in an Amended Statement of Claim delivered in 2018).

10. The plaintiff issued proceedings in March 2010 and delivered a Statement of Claim in January 2011. He delivered an Amended Statement of Claim in April 2011. A Defence was delivered in October 2011. The plaintiff delivered a second Amended Statement of Claim on the 22<sup>nd</sup> October 2018 (he was granted liberty to do so on consent). The second and third-named defendants delivered their Amended Defence in April 2019. The plaintiff subsequently issued a motion to deliver a further Amended Statement of Claim. However, he withdrew that application. In those circumstances, the relevant pleadings are the Amended Statement of Claim of the 22<sup>nd</sup> October 2018 and the Amended Defence of the 11<sup>th</sup> April 2019.

### **ORDER 19 RULE 28**

11. The plaintiff seeks an Order pursuant to Order 19 Rule 28 of the Rules of the Superior Courts striking out the second and third-named defendants' Defence on the grounds that it discloses no reasonable answer to the plaintiff's claim or is shown by the terms of the pleadings to be frivolous and vexatious.

12. The sole basis set out in the Notice of Motion for this application is that the pleadings do not disclose any reasonable answer or are frivolous and vexatious. The plaintiff, in the Notice of Motion, does not rely on the Court's inherent jurisdiction. I have nonetheless gone on to consider whether the plaintiff would be entitled to an Order striking out the proceedings in the exercise of the Court's inherent jurisdiction. I have done so in circumstances where the plaintiff acts in person. That is insufficient in itself to permit the Court to go beyond what is expressly stated in the Notice of Motion because to adopt such an approach would be to treat persons who are represented and those are not represented unequally. However, in this case, it was clear from the contents of the plaintiff's grounding affidavit and his replying affidavit and his oral and written submissions that he was relying on the Court's inherent jurisdiction also.

13. I am satisfied that the plaintiff must fail on this application under both jurisdictions for the following reasons.

14. Order 19 Rule 28 as it stood at the time of this motion provided, inter alia:

*"The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."*

15. An application to strike out a Defence under Order 19 Rule 28 is very unusual and Orders doing so are even more rare. This is perfectly understandable when one considers the principles applying to applications under Order 19 Rule 28. These principles are very well-established and well-known and it is not necessary to set them out in any great detail.

16. It is a jurisdiction which must be exercised sparingly. The jurisdiction is exercisable on the pleadings only and the case of the party whose pleading is sought to be struck out must be taken at its height. It must be assumed that the facts contained in the pleading are true and that the party will succeed in establishing those facts. Of course, this is of particular significance in the case of an application to strike out a Defence because the Defence may be limited to straight denials and putting the plaintiff on proof of their allegations.

17. It is sufficient to refer to a number of paragraphs from Delany and McGrath on Civil Procedure, 4<sup>th</sup> Ed, 2018 (to which I was referred by the second and third-named defendants). The authors state:

*"16-05 In Aer Rianta cpt v Ryanair Ltd it was emphasised by Denham J that the jurisdiction under rule 28 is one which a court will be slow to exercise and it should "exercise caution in utilising this jurisdiction." However, she went on to say that "if a court is convinced that a claim will fail", a pleading will be struck out.*

*16-06 It is well-established that the jurisdiction conferred by Order 19, rule 28 is exercisable by reference to the pleadings only. In McCabe v Harding O'Higgins CJ stressed that, in order for rule 28 to apply, "vexation or frivolity must appear from the pleadings alone", a point that was reiterated by Costello J in Barry v Buckley, who stated that "the court can only make an order under this rule when a pleading discloses no reasonable cause of action on its face". This basic principle was reaffirmed by Costello J in D.K. King, where he stated that rule 28 only applies*

*where it can be shown that the text of the plaintiff's summons or statement of claim discloses no reasonable cause of action or that the action is frivolous or vexatious. So, for the purposes of considering whether to accede to an application based on rule 28, the court should consider the pleadings only, ignoring any affidavit evidence filed, and further must proceed on the basis that any statements of fact contained in the pleading sought to be struck out are true and can be proved by the party. Clarke J made it clear in Salthill Properties Ltd v Royal Bank of Scotland plc that "the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim." As Baker J stated in Wilkinson v Ardbrook Homes Ltd, the approach of the court should be "to ask whether the plaintiff could possibly succeed on the case as pleaded and in light of the facts asserted, and only if it is satisfied that a plaintiff could not possibly establish those facts, or could not possibly succeed on the pleadings, should the proceedings be struck out."*

18. Baker J in *Wilkinson v Ardbrook Homes* was dealing with an application under both Order 19 Rule 28 and under the Court's inherent jurisdiction.

19. Delany and McGrath went on to say:

*"16-07 A pleading such as a statement of claim can be struck out where it fails to disclose a reasonable cause of action, i.e. where the facts and matters pleaded in the statement of claim do not constitute a cause of action that is known to the law or likely to be established. Similarly, a pleading such as a defence may be struck out where the facts and matters pleaded do not actually set out a defence to the plaintiff's claim that has any reasonable prospect of success. If the ingredients of a good cause of action or defence are pleaded, then an application pursuant to rule 28 will not succeed regardless of the evidence or the party's prospects of establishing that cause of action or defence at trial."*

20. Irvine J dealt with the meaning of "frivolous and vexatious" in *Fox v McDonald* [2017] IECA 189. She said, inter alia:

*"[t]he word 'frivolous' when used in the context of O. 19 r.28 is usually deployed to describe proceedings which the court feels compelled to terminate because*

*their continued existence cannot be justified having regard to the relevant circumstance."*

21. The plaintiff relied on statements in the judgments of Clarke J in *Keohane v Hynes [2014] IESC 66* and MacMenamin J *Ewing v Ireland and the Attorney General (Unreported, Supreme Court, 11<sup>th</sup> October 2013)*. In particular he relied on *Ewing* to submit that the "basic principle", i.e., that in deciding whether to strike out proceedings under Order 19 rule 28 the Court should consider the pleadings only (referred to in *D.K v King [1994] 1 IR 166* (quoted by Delany v McGrath above)), has now been advanced to permit the Court to engage with the evidence. I do not agree that this is the effect of the judgment in *Ewing*. It is clear from paragraphs 26 and 27 of MacMenamin J's judgment that his statement that the court "*...is not limited to a consideration of the pleadings but may be free to hear evidence on affidavit relating to issues in the case*" is referring to an application under the Court's inherent jurisdiction rather than an application under Order 19 Rule 28. It has also been made clear in more recent authorities that the Court remains limited to the pleading when considering an application under Order 19 Rule 28. The plaintiff's reliance on *Keohane* and *Ewing* is more directly relevant to the Court's inherent jurisdiction.

22. The Defence that has been delivered on behalf of the second and third-named defendants for the most part either simply denies the plaintiff's pleas or otherwise puts him on proof of them. If they succeed on these, i.e. if the plaintiff fails to discharge the burden of proving those facts, then the defendant will succeed in their defence and it is impossible to see how, in this case, putting the plaintiff on proof does not amount to a reasonable answer on the pleadings.

23. The defendants also plead that the plaintiff failed to mitigate his losses and that he was guilty of contributory negligence. Detailed particulars of the latter are given at paragraphs 5(b) and 56 of the Amended Defence. I must, under Order 19 Rule 28, take these pleas at their height and must assume the defendants will establish them. Thus, on the pleadings, they disclose a reasonable answer or reasonable partial answer to the claim.

24. The Amended Defence does contain a number of admissions or positive pleas (for example, paragraphs 1(c), 10, 21, 22, 26, 27, 29, 35, 39 and 45). None of these mean that the Amended Defence as a whole fails to disclose a reasonable answer to the claim. For example, the defendants admit that the meeting or visit to the second-named

defendant's factory took place in May 2004 but the fact of the meeting is not determinative of the plaintiff's claim (and, therefore, neither is the defendant's admission). The purpose of the visit and what happened before, during, and after it are the significant issues and the alleged purpose of that visit and what happened at it are matters which are denied and in respect of which defendants make specific positive pleas in relation to those matters.

25. The plaintiff relies on certain pieces of evidence to argue that certain facts are "admitted" and to submit that on the basis of those admitted facts the Court can conclude that the Defence does not disclose a reasonable answer. In exercising its jurisdiction under Order 19 Rule 28 the Court can (and must) have regard to "admitted facts". However, these must be formally admitted facts either in the pleadings or by reference to the pleadings and not be matters of construction by the Court. The plaintiff prepared a booklet for the hearing containing selected documents (for the most part contemporaneous to the matters in dispute) and invited the Court to interpret some of these documents as constituting admissions of fact or as putting facts beyond dispute. Many of these documents have to be interpreted in the context of other documents, conversations or interactions and sometimes these other documents were not included in the booklet and even where they were it was not clear that there could not be a dispute as to precisely what they mean. Thus, these can not be treated as admitted facts for the purpose of Order 19 Rule 28. These are more properly matters for an application under the Court's inherent jurisdiction.

26. In those circumstances, the plaintiff's application on the basis that the Defence does not disclose a reasonable answer or is shown to be frivolous and vexatious must fail.

27. The Court also has an inherent jurisdiction to strike out a Defence where it is satisfied that it is bound to fail.

28. The principles applicable to the Court's inherent jurisdiction are also well-established. They have been set out in many cases, including recently by the Court of Appeal in *Scotchstone Capital Fund Ltd & anor v Ireland & anor* [2022] IECA 23 and *McAndrew v Launceston Property Finance DAC & anor* [2023] IECA 43.

29. One of the key differences between the Order 19 Rule 28 jurisdiction and the inherent jurisdiction (at least under the previous Order 19 Rule 28) is the ability of the Court to engage with the evidence (albeit to a very limited extent) and in particular with

documentary evidence (see, for example, *Salthill Properties Limited & anor v Royal Bank of Scotland plc & ors* [2009] IEHC 207, *Lopes v Minister for Justice, Equality and Law Reform* [2014] IESC 21 and *Keohane v Hynes*). Clarke J deals at length with the Court's ability to engage with the evidence in these judgments. He noted in *Salthill Properties* (paragraph 3.12)(referred to in paragraph 6.1 of *Keohane*) that "*The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim.*" He acknowledged that the Court may assess the evidence and the facts but made clear that the extent to which this could be done is "extremely limited". He also noted that where a case is dependent on documents, it may be easier for the court to reach an assessment as to whether the claim is bound to fail. He said in paragraph 6.4 of *Keohane*:

*"More recently still, in Lopes, I said the following at para.2.6 of my judgment: "At the same time, it is clear that certain types of cases are more amenable to an assessment of the facts at an early stage than others. Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important to keep in mind the distinction, which I sought to analyse in Salthill Properties, between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well."*

30. The plaintiff has not expressly relied on the Court's inherent jurisdiction, but he has in fact relied on the principles set out in this line of authority. He accepted that the Court's ability to strike out the claim on the basis that it was bound to fail was limited and could only be done on the basis of facts which are admitted or which are incontrovertible. He also accepts that the Court's ability to engage with the evidence is limited. He has asked the Court to engage with the evidence and conclude on the basis of that evidence that the second and third-named defendant's defence is bound to fail. In particular, he relies on the Court's ability to refer to and engage with documents. As discussed above, he pointed to a number of pieces of documentary evidence which he submitted were "incontrovertible" and which contained what he said were "admissions" and submitted that on the basis of *Keohane v Hynes* and *Ewing* the Court can therefore reach a conclusion that the defence is bound to fail on the basis of this documentary evidence.



31. It is necessary to refer to what Clarke J said in relation to the Court's ability to engage with the documentary evidence. As noted in the quote above, Clarke J dealt with this in *Salthill Properties*. He said:

*"3.9 So far as the general question of whether proceedings are, on their merits, bound to fail it seems to me that it is necessary to address the question which arose for debate between the parties as to the approach which the court should take to the evidence as presented on an application to dismiss such as that with which I am involved. It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established. Likewise, a defendant in a specific performance action may be able to persuade the court that the only document put forward as being a note or memorandum to satisfy the Statute of Frauds, could not possibly meet the established criteria for such a document. More difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.*

*3.10 However, it is important to emphasise the different role which documents may play in proceedings. In cases, such as the examples which I have given earlier, involving contracts and the like, the document itself may govern the legal relations between the parties so that the court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned.*

*3.11 However, there are other cases where documents are not vital in themselves save that they may cast light on the underlying facts which may be at the heart of the proceedings concerned. Correspondence, minutes of meetings, memoranda and the like, do not, of themselves, create legal relations between the parties. Rather they purport to reflect facts such as what was said at meetings, what was communicated from one party to another or the like. Parties may explain or seek to clarify what might otherwise appear to be the natural meaning of such documents. At the end of the day, it will be what view the court takes as to what actually happened that will determine the facts on the basis of which the court will come to*

*its judgment. Contemporary documentation is often a very valuable guide to such facts, but such documentation is not necessarily determinative. It is important, in that context, not to confuse cases which are dependent on documents themselves with cases where documents may be a guide, albeit often a most important guide, to the underlying facts which need to be determined in order to resolve the issues between the parties."*

32. The documents referred to by the plaintiff fall into the second category, i.e., they are documents which may cast light on the underlying facts or are *"an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well"* rather than documents which *"govern the legal relations between the parties so that the Court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned."* The documents, including those contained in a booklet prepared by the plaintiff to assist the Court and referred to by him, are part of the kaleidoscope of evidence which the Court will have to consider when endeavouring to establish the underlying facts but they can not be said to be documents which govern the relationship or which can simply be interpreted by the Court as definitively having one meaning or the other. Two examples may be referred to in order to illustrate the point:

(i) For example, the plaintiff referred to a document entitled "Investigation Report" dated the 30<sup>th</sup> May 2005 and an email of the 4<sup>th</sup> August 2005 from the third-named defendant to the second-named defendant. He submits that the Court can conclude on the basis of these documents that a test was carried out by a third party company ("Homag") which supports the plaintiff's position or that the test that was conducted was a sham test and therefore helps establish his case against the defendants. There is undoubtedly support in these documents for the plaintiff's position that they show that a test was carried out by Homag. The "Investigation Report" contains the following:

**Test by HOMAG:** *We made tests with a different glue system with higher working temperature on a Homag BAZ. Target: to reduce the discolouring in the radius. We used the edgeband which we have delivered to the customer.*

**Result:** *We got a good result by radius 20 and 30 mm without any discolouring. Attachment some finger samples."*

The reference to "Test by Homag" clearly suggests that Homag carried out a test. In the email of the 4<sup>th</sup> August 2005, an employee of the third-named defendant states, inter alia:

*"...I think one of the reason Michael Leahy does not want Michael Arlt to give you his report is because Doellken did not give a report on **the tests that were carried out by Homag** on the ABS edging that was sent over to you by us, this was taken from stock in question..."* (emphasis added)

Again, the reference to "*the tests that were carried out by Homag*" clearly suggests that Homag conducted tests.

The plaintiff states at paragraph 156 of his grounding affidavit that it is his belief that "*the second defendant is in fact hiding the true Homag report.*"

However, in an email from a Mr. Oliver Riemer, a representative of the second-named defendant with whom the plaintiff had some dealings, stated in an email of the 25<sup>th</sup> May 2005 to the third-named defendant that:

*"...Peter Horlacher have tested the ABS edgeband 45 v 2 mm you have sent us from Ideal Kitchen, do you remember. Peter still stay by Homag on a BAZ, and is making some test including a EVA [illegible word]. The result: He has made a 20 mm radius with out any problems."*

Peter Horlacher is an employee of the second-named defendant who authored the Investigation Report.

Furthermore, the second-named defendants have stated in correspondence from their, solicitor since 2017 that the test referred to in the Investigation Report was conducted by an employee of the second-named defendant, Mr. Peter Horlacher, in the Homag factory. They wrote in an email of the 20<sup>th</sup> July 2017 the defendants' solicitor stated that:

*"We have taken further instructions from our client who confirm to us that Mr. Horlacher attended at Homag's factory to conduct the test. The test was obviously done on a Homag machine as opposed to the IMA machine which you*

*purchased. We are advised by our client that no independent test was carried out by Homag."*

In a further letter of the 21<sup>st</sup> July 2017 they wrote, inter alia:

*"The situation in relation to the test referred to is that it was carried out by Mr. Peter Horlacher, an employee of Dollken at the Homag factory.*

*The purpose of the test was to confirm that the edging ordered by you was suitable for the purpose for which it was intended.*

*The format of the test of which you have a copy is contained in the report.*

*Mr. Horlacher was instructed to carry out the test by the persons to whom he issued the report Messrs Meyer Zu Drewer Kliewe and Reimer and it was on their instructions that the document was generated."*

Thus, while there is support in the Investigation Report and the email for the position of the plaintiff, it is simply not open to the Court to conclude that they definitively have that meaning in light of the other evidence.

(ii) By way of further example, the plaintiff points to a report/email from a Mr. Michael Arlt on a test which he carried out and which the plaintiff says is determinative. Mr. Arlt apparently is a well-respected technical expert with the machine manufacturer from whom the plaintiff bought his machine, IMA. In his report, he recommended that 1.5mm edging should be used for the plaintiff's purposes. The plaintiff had purchased and been supplied with 2mm edgings. The plaintiff's position is that this report therefore clearly establishes beyond dispute that the problem which he was experiencing with applying the edging to the worktops that he wanted to manufacture was with the edging that had been supplied and therefore the defendants must fail in their defence. However, it is entirely inappropriate on a motion of this type to take one document in isolation. There are, for example, suggestions in the documents that while Mr. Arlt recommended that a different edging would have to be used, he did not test the edging being used by the plaintiff (in an email of the 4<sup>th</sup> May 2005 a Mr. Nutthoff, an employee of the second-named defendant, stated to the third-named defendant that "...We have received the report of Michael Arlt of IMA. Clear suggestion to use

*1,5mm thick edgeband for the required type of radius. No mention of any tests on 2mm edgeband that we have delivered about tightest possible radius. Our technician Mr. Kliewe will come at short notice to Ideal Kitchens in order to use existing 2 mm thick edgeband. We will not take it back.”*). Of course, this may be right or wrong and it has to be said that it is at odds with the contents of Mr. Arlt’s report (and with views expressed by a Mr. Kliewe, an employee of the second-named defendant) but a motion of this type is not an appropriate forum for resolving such conflicts. Indeed, the existence of such conflict suggests it is not possible to grant the relief sought.

More importantly, even assuming this report/email from Mr. Arlt means what the plaintiff says it means, this is not sufficient in itself to establish liability because the plaintiff will have to establish the other necessary limbs of the case: either that the defendants incorrectly specified 2mm edgings or supplied 2mm edgings when they knew or ought to have known they were not fit for the intended purpose. These are matters which are at the heart of the dispute between the parties: the plaintiff claims that at the meeting in May 2004, the second-named defendant specified the type of edgings to be used, knowing what the plaintiff wanted to use them for, and he ordered them according to that specification. However, this is denied by the defendants and there are statements in the documents that the second-named defendants did not even know what machine the plaintiff would be using until well into 2005. For example, in an email from Mr. Notthoff to Mr. Kliewe (two employees of the second-named defendant), Mr. Notthoff states: *“We delivered ABS and 3D in 2mm. It’s with these the customer has the issues. During the exhibition he wanted to know in conversation with us what was the tightest radius possible with 2mm. We declined) (Mr. Bollow (Technician) and myself to give and answer there and then on this point...we delivered exactly what he ordered: **previously there was absolutely no mention of processing on a BAZ.**”* (emphasis added)

33. These are just examples. I have considered all of the documents relied upon by the plaintiff.

34. In my view, this is not the type of engagement with the evidence which is permitted on an application pursuant to the Court’s inherent jurisdiction.

35. Even if I am wrong on this, I do not believe that I could conclude on the basis of this evidence that the defendants could not succeed or that the Defence must be struck out given the very high bar that must be reached by an applicant for an Order which

would have the effect of disentitling the defendants from even defending the claim against them.

### **ORDER 31 RULE 21**

36. The plaintiff also seeks an Order striking out the Defence of the second and third-named defendants on the grounds that they have failed to comply with an Order for discovery made by Barniville J on the 22<sup>nd</sup> October 2018. That Order provides:

*"IT IS ORDERED that the Second and Third named Defendants do within Four weeks from the date hereof make Discovery on Oath of all documents in said Third and Fourth named Defendants possession power or procurement relating to the said Plaintiff in Person."*

37. That the Court has jurisdiction to strike out a Defence where the defendant fails to comply with an Order for discovery is well-established. It is expressly provided for in Order 31 Rule 21. That states:

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

38. It is equally well-established that the jurisdiction to strike out is one to be exercised sparingly.

39. I was referred to the judgment in *Green Pastures (Donegal) v Aurivo Co-operative Society Ltd & Ramsey [2014] IEHC 209* in which Ryan J had to consider an application to strike out a Defence on the grounds of an alleged failure to make proper discovery. Ryan J refused to do so, saying *"This a situation entirely different from a case where there is some malicious determination to evade the obligation to make discovery."* In the course of setting out the parties' submissions, he helpfully referred to a number of authorities on the jurisdiction to strike out for failure to make discovery.

40. In *Mercantile Credit Company of Ireland & Anor. v. Heelan & Ors.* [1998] 1 I.R. 81 Hamilton C.J. held at page 85:

*"The power given by the said rule [Order 31, Rule 21] to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness. It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect. The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."*

41. In *Murphy v. J. Donohue Limited* [1996] 1 I.R. 123 Barrington J. held at page 142:

*"Order 31, r. 21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court.*

*Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendant's defence. But such cases will be extreme cases. As Hamilton CJ put it in *Mercantile Credit Co v Heelan* (Unreported, Supreme Court, 14<sup>th</sup> February, 1995):-*

*"The powers of the Court to secure compliance with the rules and orders of the Court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."*

42. In *Dunnes Stores v Irish Life Assurance* [2010] 4 IR 1 Clarke J said at page 8:

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

43. Of course, the starting point must be that the Court must be satisfied that there has been a failure to comply with the Order for discovery. The burden of establishing that is on the party seeking the relief. It seems to me that the standard is the balance of probabilities. The Court must also be satisfied that any such failure is culpable in the sense set out in *Mercantile Credit Company* and *Murphy v J Donohoe* and that it means that the plaintiff may not get a fair trial.

44. Discovery was made on behalf of the second and third-named defendants by an affidavit of discovery sworn by Mr. Karl-Heinz Krull on the 20<sup>th</sup> November 2018. I understand that inspection of documentation had previously been provided to the plaintiff (see paragraphs 3 – 5 of Mr. Krull's affidavit. The question is how does the plaintiff say the second and third-named defendants are in breach of the discovery Order. In other words, what documents does the plaintiff say should have been discovered and were not?

45. The plaintiff's grounding affidavit (grounding the application for both reliefs) runs to forty-seven pages and contains 167 paragraphs. His replying affidavit is twelve pages long and has 66 paragraphs but has attached to it an eleven-page document containing what the plaintiff calls "*a list of thirty-two outrageous conducts by these Defendants*". The affidavits and this schedule contain a lot of argument and go to the substance of the case. It is extremely difficult to identify precisely what the documents (or categories of documents) are that the plaintiff says should have been discovered and were not.

46. At paragraph 23 of the affidavit sworn on behalf of the second and third-named defendants in reply to this application (by Mr. O'Neill, the defendants' solicitor) he said that pursuant to a review of the plaintiff's affidavits to identify the specific complaints made by the plaintiff in relation to discovery he had identified the following complaints (I have changed the order of them slightly):



- (i) a failure to discover a fax dated 11<sup>th</sup> May 2024 from the third-named defendant to the first-named defendant;
- (ii) a failure to discover a fax dated 11th June 2024 from the third-named defendant to the first-named defendant;
- (iii) a failure to discover any documents relating to the meeting between the plaintiff and Mr. Bollow and Mr. Kunibert of the second-named defendant in May 2004;
- (iv) a failure to discover any document authored by Mr. Bollow;
- (v) a failure to discover correspondence between Mr. Nutthoff of second-named defendant and IMA, a third party machine manufacturer, in 2004.
- (vi) a failure to discover any document relating to a putative meeting between these defendants that occurred in or about August or September 2005;
- (vii) a failure to discover notes of a meeting occurring on the 20<sup>th</sup> May 2005 authored by Oliver Riemer of the second-named defendant;
- (viii) a failure to discover documents relating to any lab testing performed by the second-named defendant in 2005 to match edgings for supply to the plaintiff;
- (ix) a failure to discover any report arising from a site visit by representatives of these defendants to the plaintiff's premises in May 2005;
- (x) a failure to discover a copy of a report in respect of testing performed by Homag;

47. Mr. O'Neill also said that it appeared that the reference to a fax of the 11<sup>th</sup> June 2004 (number (ii) above) appeared to arise from a typographical error in the plaintiff's grounding affidavit and that it should in fact refer to the fax of the 11<sup>th</sup> May 2004 (at point (i)). The plaintiff did not demur from this summary as a correct summary of his complaints. At the hearing, I asked the plaintiff to identify the documents or categories of documents which he says should have been discovered. He identified the following:

- (a) the fax of the 11<sup>th</sup> May 2004;
- (b) correspondence from the third-named defendant in relation to arranging a meeting in May 2004 (which led to the fax of the 11<sup>th</sup> May 2004);
- (c) documents in relation to that meeting of the 11<sup>th</sup> May 2004;
- (d) documents which the plaintiff gave to the representatives of the second-named defendant at that meeting including the drawings and specifications of the IMA machine which the plaintiff was purchasing;
- (e) notes taken by Mr. Bollow and Mr. Hochler, employees of the second-named defendant with whom the plaintiff met in May 2004;
- (f) the sign-in and sign-out sheet for the second-named defendant's factory on the day on which the plaintiff visited the factory for the meeting with Mr. Bollow and Mr. Hochler;
- (g) a letter from the second-named defendant to IMA (the machine manufacturer) following the meeting in May 2004 in relation to changing the roller from a metal roller to a rubber roller.

48. As will be noted, this reflects in part the summary given by the second and third-named defendants' solicitor though the latter is more extensive.

49. Items (a)-(f) all relate to the meeting of May 2004, as do items (i)-(v) of Mr. O'Neill's list. Item (g) (item (v) in Mr. O'Neill's list as set out above) is said to arise from that meeting. I will approach the application on the basis of a combination of these two lists.

50. In short, the plaintiff's case is that in April 2005, the second and third-named defendants received a report from the expert, Mr. Arlt, supported by Mr. Kliewe, which, according to the plaintiff, supports his case that the second-named defendant is at fault for supplying product which they should have known was unfit for purpose. He submits that this has caused them to hide the documents relating to the meeting of May 2004 because they would show that the second-named defendant knew his specifications and therefore supplied the wrong product.

51. I propose to address each category of documents identified above. I will deal with some of them together.

***The fax of the 11<sup>th</sup> May 2004***

52. The plaintiff has a copy of this fax. His complaint is that it was not discovered by the second and third-named defendants. It is accepted on behalf of the second and third-named defendants that it was not provided in their discovery.

53. The plaintiff places very great emphasis on the failure to discover this document. In their written submissions, the second and third-named defendants describe this as "*[T]he sharpest point of the Plaintiff's complaint in respect of these Defendants' discovery*". I accept that it might be described as the "*sharpest point*" but, as is clear from the above, it is by no means the only complaint made by the plaintiff. Nonetheless, the plaintiff does place considerable emphasis on it. He says, firstly, that the failure to discover it is in itself a fundamental breach of the Order. Secondly, he says that the defendants deliberately withheld it so as to try to conceal or obscure the purpose of the meeting which took place in March 2004. He says it was withheld to "*obscure a trail of documents relating to Christopher Bollow fatal to the second and third named defendant's defence.*" This meeting, its purpose and what was discussed at it is central to the plaintiff's claim and is the subject of a direct conflict between the parties in the pleadings. The plaintiff claims that this fax establishes the fact of this meeting and is part of the chain establishing the purpose of the meeting.

54. This fax is from the third-named defendant to the first-named defendant and is headed "*Visits of Michael Leahy to Durapol and Dollken*". It gives an address for the Durapol representative and an address for Mr. Bollow as the second-named defendant's representative and concludes "*We must know when the dates and times Michael will be calling as arrangements will have to be made.*" There are also some handwritten notations which appear to be a contact phone number and the day of the proposed visit.

55. I am satisfied for the following reasons that the fact that this document was not discovered does not warrant or justify the relief sought by the plaintiff. As noted above, the purpose of the Court's jurisdiction is not to punish a party for a default in making discovery. It is, rather, to ensure compliance with the Court Order and to ensure that there is a fair trial. Firstly, it is deposed on behalf of the second and third-named defendants that "*none of these Defendants retained a copy of this fax nor were these*

*Defendants aware of the existence of this document until April 2019.*" In circumstances where it was sent by the third-named defendant, technically, if it was no longer in their possession, it should have been listed in the Second Schedule to the affidavit of discovery as a document that was once, but was no longer, in their possession. It could also have been obtained from the first-named defendant (as, indeed, it ultimately was). Thus, technically there was a failure to comply with the Order for discovery either by failing to take steps to obtain it from the first-named defendant or by failing to list in the Second Schedule. However, in circumstances where the unchallenged evidence is that the second and third-named defendants were not aware of it, which can be understood given the nature of the document, I am not satisfied that this failure is culpable. Secondly, the plaintiff has the document. It is not entirely clear when he first obtained it. He appears to have had it before the 19<sup>th</sup> July 2011 as it is attached to Replies to Particulars which he delivered on that date. He also appears to have received it from the first-named defendant sometime prior to 2019 (see paragraphs 20 and 21 of Mr. O'Neill's replying affidavit) though there may be some dispute about this. In any event, there is no dispute but that the plaintiff has the document. He is therefore not in any way prejudiced in using it to make the point that it establishes part of the chain to establish that the meeting was a "specification meeting". Thirdly, it is important to note that at paragraph 10 of the second and third-named defendants' Amended Defence dated the 11<sup>th</sup> April 2019, it is expressly admitted that the meeting took place with the plaintiff in May 2004. Thus, this fax is not necessary in order for the plaintiff to prove that the meeting took place. The issue is what the purpose of the meeting was. In paragraph 10 of the Defence the plaintiff's claim that it was a "*specification meeting*" or that the plaintiff gave specifications is denied and it is expressly pleaded that the visit was an "*exploratory visit*". The fax does not speak to the precise purpose or nature of the meeting and therefore can be of little assistance on those matters. The plaintiff has it but even if he did not, it is difficult to see how the failure to make discovery of it could have prejudiced a fair trial.

56. In those circumstances, the fact that this fax was not discovered could not ground an Order striking out the Defence.

#### ***Other documents relating to the visit in May 2004***

57. It seems to me that categories (iii)-(v) from Mr. O'Neill's summary and categories (c)-(f) of the plaintiff's list given at the hearing can be dealt with together. (Category (ii) in Mr. O'Neill's list is an error). These categories essentially comprise any documents relating to the plaintiff's visit to the second-named defendant's factory in May 2004, and,

in particular, any information given by the plaintiff and notes taken or documents generated by the representatives of the second-named defendant at that visit by the plaintiff to the second-named defendant's factory in March 2004. The starting point is that Mr. Krull has deposed that the documents which he has in possession, power or procurement are those set out in the First Schedule to his affidavit and that to the best of his knowledge the defendants have or had no other discoverable documents in their possession, power or custody. He also positively deposes at paragraph 11 that he "and *these Defendants understand that in giving discovery the said Defendants are obliged to discover all documents...within their possession, power or procurement relevant to the category of discovery...*" The first question is whether, in light of that sworn statement by Mr. Krull on behalf of the defendants, the plaintiff has discharged the burden of proving that the defendants have failed to discover documents which should have been discovered.

58. Mr. Leahy says (at, inter alia, paragraph 34 of his grounding affidavit) that *"In May 2004 the plaintiff armed with the required parameters such as machine type IMABAZ, glue type PUR and minimum radius 30mm – travelled to the second defendant's factory for that application specification meeting with Mr. Bollow...regarding the application specification **Mr. Bollow been provided with the said parameters and drawings of the IMABAZ**...Mr. Bollow sought no further information from the Plaintiff regarding the application specification of the edgings."* (emphasis added). He also says at paragraph 27 of his replying affidavit that *"in all sub-categories documentation was generated by the Defendants – be it documents delivered to me – **documents generated in front of my eyes as by Mr. Bollow and Mr. Notthoff at the May 2004 specification meeting** – IMA documents delivered by me at the May 2004 specification..."* (emphasis added).

59. However, he goes on to say at paragraph 30 that *"I say that it is inconceivable and without probability, that any firm's international sales manager such as Mr. Notthoff when meeting one of their international agent's client's with the agenda of sales – that travelled such a distance, would not by protocol around the relationship of principle to agent generate notes, documents and/or minutes of meeting to advise (sic) their agent of the agenda and outcome of such meetings having taken place at the primary business premises – of which credence to by my belief that documents generated have been omitted in beach of the Discovery Order of Justice Barniville for the Defendant's to gain advantage"*(sic). He makes the exact same point in paragraph 31 about Mr. Bollow as *"international technical adviser"* and a related point in paragraph 32 to the effect that it is inconceivable that Mr. Bollow would not have taken notes to advise himself. It is

entirely unclear why the plaintiff would speculate as to these matters if he is satisfied that he witnessed Mr. Notthoff and Mr. Bollow generating such notes and it tends to undermine the strength of his averments that he saw Mr. Bollow and Mr. Notthoff generating documents.

60. It is expressly stated by Mr. O'Neill, the solicitor for these defendants who swore the replying affidavit on behalf of these defendants, that "*these Defendants have no documents in their possession, power or procurement authored by either of Mr. Bollow or Mr. Nutthoff which references the meeting between them and the Plaintiff in May 2004*" and that "*these Defendants have no documents in their possession, power or procurement authored by Mr. Bollow which is responsive to any category of discovery.*"

61. Thus, there is a clear conflict between the parties about key types of documents in these categories. (I appreciate that all individual types of documents within this broad category are not dealt with). Crucially, the plaintiff could have sought to cross-examine Mr. Krull and/or Mr. O'Neill but he did not do so. Essentially, what the plaintiff says is that the defendants' averments can not be trusted and he says that as this meeting was a specification meeting it is inconceivable that the second-named defendant's employees would not have taken notes or that he would not have provided specifications and information to them at that meeting. There is undoubtedly a logic and a high degree of common-sense to that position. However, it is premised on an issue which is a fundamental source of conflict between the parties. The plaintiff says it was a specification meeting and therefore specifications would have been provided and notes would have been taken. However, the defendants say at paragraphs 10 and 11 it was not a specification meeting. If that is the case, then it is entirely possible that notes were not taken.

62. Thus, while there may be a logic to what the plaintiff says, that is insufficient in light of the contents of Mr. Krull and Mr. O'Neill's affidavits and, where he did not seek to cross-examine either of those deponents, I can not resolve the conflict on the affidavits and can not be satisfied that the plaintiff has discharged the burden of establishing that there are such documents in existence or in the possession or procurement of the defendants.

63. It is, of course, important to note that this replying affidavit was sworn by the defendants' solicitor. That is unsatisfactory. The affidavit should have been sworn by an employee or officer of the defendants. I accept that Mr. O'Neill is acting on instructions and, indeed, as set out in his affidavit, that he has been very involved in the discovery

process. Nonetheless, an affidavit making positive averments in respect of what documents are (or are not) in the possession or procurement of the party should be sworn by that party. It will, therefore, be necessary for a confirmatory affidavit to be sworn and I propose to direct that such an affidavit be sworn and delivered. That is an important safeguard for the plaintiff and, indeed, for the Court.

64. Furthermore, as noted above, Mr. O'Neill's affidavit does not deal with individual types of documents within this category, including sign-in and sign-out documents and any documents which the plaintiff may have given to Mr. Bollow and Mr. Notthoff. This is understandable given the difficulty in identifying precisely what documents the plaintiff was saying should have been discovered but were not and that he only identified these ones at the hearing. Mr. Krull has already said that the only documents in their possession, power or procurement are the ones listed in the Schedules to the affidavit (which do not include these documents). It seems to me that I could not conclude that the plaintiff has established that there has been a culpable breach of the Order. However, in circumstances where these items have not been squarely addressed, I think it appropriate to direct the defendants to make an affidavit of further and better discovery to either discover such documents or to clearly state that they have no such documents.

***Notes made by Mr. Oliver Riemer of a meeting on 20<sup>th</sup> May 2005***

65. This appears to arise from a meeting between Mr. Riemer, an employee of the second-named defendant, and the plaintiff, following which Mr. Riemer gave a commitment that products would be sent to the lab to be matched within a specified period of time. This appears to have generated some documents including a Report dated 'Gladbeck 20<sup>th</sup> May 2005'.

66. It is deposed by Mr. O'Neill that the defendants do not have a copy of such notes made by Riemer. The plaintiff has not established any basis upon which I could conclude that this averment is incorrect and I therefore could not strike out the Defence on the basis of the failure to discover such notes. My comments about the need for an affidavit to be sworn by an employee or officer of the defendants also apply here

***Lab work to match edgings in 2005***

67. Part of the plaintiff's claim is that the second-named defendant claimed to be able to match any worktop with edgings and, as noted in the previous section, undertook in May 2005 (through Mr. Riemer) to do so in the second-named defendant's lab but were

guilty of unacceptable delay in doing so. In fact he appears to go further and says that the lab was not used at all because priority was given to other customers and instead the matching process that was applied to his products was a simple manual comparison using production samples.

68. There are documents which indicate that there was an agreement that products would be sent to the lab (see email from Mr. Riemer of the 24<sup>th</sup> March 2005 to the third-named defendant). It is not entirely clear from the Amended Defence whether it is admitted or denied that the second-named defendant undertook this matching process (which is done in the lab).

69. Mr. O'Neill has sworn on behalf of the defendants that they "*do not retain copies of any lab work undertaken in 2005, if any, to match edgings in respect of the Plaintiff.*" This is an unsatisfactory response in two respects. The use of the caveat "if any" means it is unclear whether products were sent to the lab or, if they were, whether any work was carried out on them. This lack of clarity reflects the position in the Amended Defence on this issue. Secondly, the substance of the reply seems to be that if documents were generated, they were not retained. If that is the case, i.e. if documents were generated but not retained, it seems to me that these documents should be included in the Second Schedule. If the position is that there were no such documents either because nothing was sent to the lab or because no documents were generated, then there is simply nothing to include in an affidavit of discovery. However, in light of the lack of clarity, it is appropriate to direct an affidavit of further and better discovery either to say that there were and are no such documents or that there were such documents but they are no longer in the power, possession or procurement, i.e, listed in the Second Schedule.

70. I am also satisfied that this does not give rise to a risk of an unfair trial. If no documents are discovered that facilitates the plaintiff in making the case either that no product was sent to the lab to be matched – which is his point - or the matching process was not being done or was not being taken seriously.

### ***Reports relating to a visit to the plaintiff's premises in May 2005***

71. As adverted to above, the plaintiff claims that a Mr. Horlacher and Mr. Riemer visited his factory in May 2005 and that Mr. Horlacher carried out testing on the 2mm edging using the plaintiff's BAZ machine and they showed that the 2mm edging was impaired when forming the target 30mm radius. The plaintiff submits (at paragraph 140 of his grounding affidavit) that "*...the second defendant wants us to believe having*



*travelled from Germany to Ireland that neither Mr. Horlacher and/or Mr. Reiner (sic) generated a report and/or notes on the May18test (sic) carried out at the plaintiff's factory on the 2mm ABS edging to report back Dollken – the plaintiff believes that is improbable nonsense."*

72. Mr. O'Neill states "...these Defendants do not retain any report or reports, if any, which may have existed in 2005, relating to a visit to the Plaintiff's premises in May 2005, other than those documents already discovered to the Plaintiff which reference same."

73. Again, this is an unsatisfactory response because it is unclear whether the defendants are saying that there was or is no such report or that there was one but it is no longer available. If it is the defendants' position that there was no such report or reports then this should be clearly stated. If, on the other hand, it is their position that there was a report but it is no longer available then that should be stated by way of inclusion in the Second Schedule. Alternatively, it may be that the defendants do not know whether or not such a report existed. If so, then that should be stated. I am not satisfied that it would be appropriate to strike out the claim as there may have been no breach and I will therefore direct the delivery of an affidavit of further and better discovery.

#### ***Report in respect of testing performed by Homag***

74. This is a particularly contentious topic between the parties. It is discussed at length above.

75. The plaintiff relies on the Investigation Report of the 30<sup>th</sup> May 2005 and the email of the 4<sup>th</sup> August 2005, both of which are quoted above, to submit that there was a test conducted by Homag and that there must be a report of it. He also referred to emails of the 29<sup>th</sup> March and the 30<sup>th</sup> March from the third-named defendants to the second-named defendants and an email of the 29<sup>th</sup> July 2005 from the third-named defendant to the second-named defendant saying "O'Sullivan says that Michael Leahy has told them that he has told Michael Arlt not to give you any report until he receives a copy of the report that Homag made on the ABS edging we sent back." The first two of those emails are not relevant to this issue.

76. However, as is also referred to above, it was stated by Mr. Riemer as long ago as the 25<sup>th</sup> May 2005 that Mr. Horlacher, an employee of the second-named defendant,

conducted the test and, in correspondence since 2017, the defendants' solicitors have stated that Homag did not conduct a test and the test referred to was carried out by an employee of the second-named defendant in the Homag factory.

77. In those circumstances, there is simply no sufficient basis upon which I could conclude that there is a report of another test which has not been discovered.

### ***Correspondence between Mr. Nutthoff and IMA***

78. The plaintiff claims that following his visit to the second-named defendant's factory in May 2004, Mr. Nutthoff was in correspondence with IMA, the manufacturer of the machine which the plaintiff was buying and that he instructed that the steel rollers on the machine were to be replaced with rubber rollers. He says at paragraph 37 of his grounding affidavit that when he next visited IMA after this visit to the second-named defendant's factory he mentioned to the IMA engineers about the rubber rollers and "*...IMA confirmed Mr. Nothoff had informed IMA of the required change and it had been made.*" He complains that this correspondence has not been exhibited.

79. Mr. O'Neill says that these defendants do not retain any correspondence between Nutthoff and IMA in relation to the plaintiff from 2004 or 2005. As discussed above, this response is not adequate but that would not justify an Order striking out the proceedings. It should be made clear whether the defendants' position is that such correspondence does not exist, existed but is no longer in their possession, power or procurement, or that they do not know whether it ever existed. I will also direct that this be addressed in an affidavit of further and better discovery.

80. I am in any event satisfied that the absence of such documentation from the defendants' discovery would not risk or prejudice a fair trial. The plaintiff can seek discovery from IMA.

### **Documents relating to a meeting in August/September 2005**

81. This arises from an email of the 29<sup>th</sup> September 2005 from Mr. Riemer to the third-named defendants which has the first-named defendant and the plaintiff's trading name in the subject line. It is clearly referring to the plaintiff and is providing a summary of a conversation between Mr. Riemer and a representative of the third-named

defendant. It states, inter alia, "*We talked about the situation, as we discussed 5 weeks ago in our meeting by O'Sullivan.*" "O'Sullivan" refers to the first-named defendant.

82. No documents relating to a meeting five weeks before the 29<sup>th</sup> September 2005 were discovered and this was not addressed by Mr. O'Neill in his affidavit. This was raised in the plaintiff's grounding affidavit (for example, paragraph 155). In those circumstances, I am satisfied that the plaintiff has established that there may be documents relating to that meeting which have not been discovered. However, it seems to me that this is most appropriately addressed by an Order to deliver an affidavit of further and better discovery. There is no basis at this stage upon which I could conclude that the failure to discover such documents is culpable. For example, the affidavit of further and better discovery may confirm that there are no such documents or there may be a good explanation as to why they were not discovered.

### **SUMMARY**

83. I will, therefore, refuse the plaintiff's application pursuant to Order 19 Rule 28 to strike out the Defence of the second and third-named defendants on the grounds that it discloses no reasonable answer or that it is shown by the pleadings to be frivolous or vexatious.

84. I will also refuse the application to dismiss or strike out the defence under the Court's inherent jurisdiction on the basis that it is bound to fail or is frivolous or vexatious.

85. I will also refuse the plaintiff's application pursuant to Order 31 Rule 21 to strike out the Defence of the second and third-named defendants on the grounds that they are in breach of the Order of Barniville J of the 22<sup>nd</sup> October 2018. I will, however, direct that an affidavit be sworn by or on behalf of an employee or officer of the second or third-named defendant to address the matters dealt with in paragraphs 63 and 66 of this judgment and to make further and better discovery as dealt with in paragraphs 64, 69, 73 and 82 of this judgment. I will hear from the parties as to the appropriate time period for doing so.