Approved
No redactions necessary

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 364

Record Number: 2020/71

Noonan J.

Murray J.

Collins J.

BETWEEN

DANIEL CREAN

Plaintiff/Appellant

AND

JAMES HARTY, HEATH SERVICE EXECUTIVE and
SOUTH INFIRMARY – VICTORIA HOSPITAL CORK LIMITED

Defendants/Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 22 December 2020

INTRODUCTION

1. This appeal raises a net but important issue concerning the extent to which section 13(1)(b) of the Civil Liability and Courts Act 2004 (*"the 2004 Act*") obliges a defendant in a personal injuries action to provide particulars of a denial pleaded in their defence.

BACKGROUND

2. The context in which this issue arises may be stated shortly. The Plaintiff, Mr Crean, had a total right hip replacement in October 2015. The operation was carried out by the First Defendant, Mr Harty, in the Victoria Hospital in Cork. Mr Crean had undergone a total right hip replacement in 1986 which was revised in 1989 and the operation in October 2015 was therefore his third surgery on his right hip. He alleges that, consequent on the October 2015 operation, he developed peripheral neuropathy of his right lower leg and sues for that injury and its consequences. Mr Crean does not allege that the surgery was performed negligently. Rather, his claim is that the surgery was performed without his informed consent[1] and, in his Personal Injuries Summons, he sets out various matters in terms of the risks of the procedure which, he says, the Defendants failed to advise him of before his operation in 2015.[2] In essence, it is said that the procedure involved significant additional risks by reason of the fact that he had had two previous surgeries on his right hip In particular, it is said that the risk of significant nerve damage was "*significantly increased*" by reason of those previous surgeries.[3] Mr Crean says that he was not warned of these risks.

3. The manner in which the Defendants have pleaded to this claim is central to this appeal. Separate Defences were delivered by the First Defendant and by the Second and Third

[1] Summons, paragraph 10.

[2] *Ibid*, paragraph 11.

[3] *Ibid*, paragraph 11(h)

Defendants but they are in materially identical terms. I take the following from the Defence of the First Defendant, Mr Harty:

> *"3.* ***The grounds upon which the First Named Defendant claims they not liable for any injuries suffered by the Plaintiff are as follows****:*
>
> *(a) The First Named Defendant denies that they were guilty of negligence and/or breach of duty in the manner alleged in the Personal Injuries Summons.*
>
> *(b) The First Defendant denies that they failed to obtain the Plaintiff's informed consent prior to surgery on 07 October 2015.*
>
> *(c) Each and every particular of negligence and/or breach of duty alleged is denied and the Plaintiff is put on strict proof in respect of the alleged negligence and/or breach of duty on the part of the First Named Defendant."*

There are other pleas in the Defences but, apart from a plea to the effect that any alleged negligence, breach of duty or failure to obtain informed consent (all *"strenuously denied*") was not causative of any injury or loss, none relates to the issue of informed consent.

4. Mr Crean's solicitors then wrote looking for particulars. In relevant part (certain of the particulars sought related to another aspect of the Defences) the letters for particulars stated as follows (again I use the letter directed to Mr Harty's Defence):

"The first-named defendant by his Defence, having pleaded, inter alia, at paragraph 3(b) thereof that an informed consent to the surgery of 7th October, 2015, had been obtained prior to that surgery:

Give full and detailed particulars of the information and advice provided to the plaintiff prior to the said surgery of 7th October, 2015, which it will be alleged met the requirements of informed consent, stating:

(a) What precise information and/or advice is alleged to have been given to the plaintiff;

(b) The person, or persons, whom it is alleged gave such information and/or advice as each individual mentioned is alleged to have imported to the plaintiff

(c) The dates, times and places when the plaintiff was allegedly given such information and/or advice as is alleged by such person, or persons;

(d) Whether such information and/or advice is alleged to have been provided in writing to the plaintiff. If provided in writing, furnish a true copy of any such written document."

(hereafter "*the Particulars")*

5. The Defendants' declined to provide the Particulars, stating that:

> *"This request seeks particulars of a straight denial of a plea contained in the Personal Injury Summons. It is not permissible to raise particulars upon a denial."*

6. The Plaintiff then brought a motion to compel the provision of the Particulars. That motion was heard by the High Court (Cross J) on 24 February 2020. Following a brief hearing, the Judge refused the motion *ex tempore*, on the basis that the Particulars were sought of a denial and also, it appears, on the basis that the Judge considered that they were a request for evidence. The 2004 Act did not, in the Judge's view, require the Defendants to go further than they had in their defences.

THE APPEAL

7. The Plaintiff appeals the refusal to direct the Particulars. The 2004 Act was, he says, enacted to provide for "*maximum disclosure*" in personal injuries litigation. Whatever may be the position generally regarding the provision of particulars of a denial, the Plaintiff says that position here is that section 13(1)(b) of the 2004 Act required the Defendants to give "*full and detailed particulars*" of the denial in paragraph 3(b) of their respective Defences that they failed to obtain informed consent. The Defendants had failed to give the statutorily prescribed particulars and, accordingly, the Plaintiff submits that this Court could and should direct the provision of such particulars now.

8. The Plaintiff says that, otherwise, he is at risk of the "*perfect ambush"* at trial. While the Plaintiff had been furnished with a copy of the consent form executed by him, the Defendants could at trial seek to make the case that the consent form did not capture all of their interactions with him in terms of obtaining his informed consent to the operation and the Plaintiff would have no advance notice of such a case. That, it is said, would be unfair to the Plaintiff and contrary to the objective of section 13(1)(b).

9. In response, the Defendants say that the requirements of section 13(1)(b) are complied with by pleading a "s*traight denial*" (or, as it was also characterised, a "*flat denial*") . The denial at issue here is said to be such a denial and thus compliant with the statute. The Defendants accept that, had paragraph 3(b) of the Defences been drafted in the form of a positive plea to the effect that they had obtained the informed consent of the Plaintiff, the Particulars would be appropriate and would have to be provided. But, they say, the plea is a negative plea. They also argue that the Particulars impermissibly seek evidence. Finally, they rely on the fact that the Plaintiffs' medical records (including the consent form) had been provided to him. The Plaintiff was also aware of what had been advised to him about the risks of the operation and clearly was in a position to instruct an expert. That being so, the Defendants say that the Particulars are not necessary.

DISCUSSION

Preliminary

10. There is a significant volume of authority on the circumstances in which further particulars will be directed pursuant to what is now Order 19, Rule 7 RSC. The principal authorities are identified and discussed in detail in two recent decisions to which the Court was referred, the first being the decision of the High Court (McDonald J) in *Allied Irish Bank v AIG Europe Limited* [2018] IEHC 677 and the second the decision of the Supreme Court in *Quinn Insurance Limited (in Administration) v PriceWaterhouseCoopers (A Firm)* [2019] IESC 19.

11. The Plaintiff brings his application not in reliance on Order 19, Rule 7 but pursuant to Order 1A, Rule 11(1)(iv) RSC [4] and says that the jurisprudence regarding the former is not material to the application or this appeal. In his submission, the 2004 Act was intended to provide for an entirely new pleading regime in personal injuries actions, involving much greater transparency and disclosure, and says that the clear effect of section 13(1)(b) of the 2004 Act is to entitle him to the Particulars here.

12. It may be convenient at this stage to set out the provisions of section 13(1):

> *"13(1) All pleadings in a personal injuries action shall—*

[4] Rule 11(iv) simply provides for the bringing of "*An application for an order for the delivery by the opposing party of further and better particulars of any pleading delivered by such party;"*

(a) in the case of a pleading served by the plaintiff, contain full and detailed particulars of the claim of which the action consists and of each allegation, assertion or plea comprising that claim,[5] *or*

(b) in the case of a pleading served by the defendant or a third party contain full and detailed particulars of each denial or traverse, and of each allegation, assertion or plea, comprising his or her defence."

13. I should also refer to section 12 of the 2004 Act which (*inter alia*) requires a defence in a personal injuries action to specify "*the grounds upon which the defendant claims that he or she is not liable for any injuries suffered by the plaintiff*" as well as to section 14 which provides for the parties to such an action to verify their pleadings on affidavit. A plaintiff is required to swear such an affidavit on service of any pleading "*containing assertions or allegations*" or where they provide "*further information".* A defendant must do so if where they serve any pleading "*containing assertions or allegations*."

14. While the Court was not referred to any authority in which these provisions of the 2004 Act have been considered, there are, in fact, a number of such authorities, including *Armstrong v Moffatt* [2013] IEHC 148, [2013] 1 IR 417, *Murphy v Depuy Orthopaedics Inc* [2016] IECA 15 and *Coleman Harvey v Depuy International Ltd* [2016] IEHC 382. The two *Depuy* cases concerned claims for defective hips and in each case the

[5] Section 12(1)(a) must be read with section 10 of the 2004 Act which prescribes what is to be pleaded in a Personal Injuries Summons, including "*(f) full particulars of the acts of the defendant constituting the .. wrong and the circumstances relating to the commission of the said wrong*" and *"(g) full particulars of each instance of negligence by the defendant."*

defendants had pleaded a defence based on section 6(e) of the Liability for Defective Products Act 1991.[6] In each case, the defendants were directed to provide particulars/further particulars of the state of the relevant scientific and technical knowledge at the time that the allegedly defective hips were put into circulation. In *Murphy*, such an order was made even though the plaintiff had already been furnished with the defendants' expert reports, the court taking the view that such reports could not constitute compliance by the defendants with their obligation to deliver particulars of fact in a pleading.[7]

15. In *Armstrong v Moffatt*, the High Court (Hogan J) observed that "*the Act of 2004 introduced very significant changes to the system of pleading in personal injury cases".* He later observed that *"the general principles regarding the delivery of particulars are, of course, unaltered by the Act of 2004. Yet … the manner in which these principles should be applied by the courts must perforce be significantly changed as a result of the enactment of this Act."* Part of the purpose of the 2004 Act, in his view, was to curb the "*excesses*" of "*pleaders who at times seemed to revel in [the] glorious new art form"* of exploring every *"possible detail or dimension of a statement of claim"* by way of raising further particulars:

> *"If, therefore, a personal injuries case is properly pleaded in the manner*

[6] Which provides that a producer shall not be liable if he proves "that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered."

[7] Per Finlay-Geoghegan J, at para 23.

required by s. 10, the necessity for further extensive particulars in the manner that was common and standard prior to the enactment of the Act of 2004 should be very much the exception, not the rule."[8]

The qualifier in that statement is, of course, crucial and, subject to the same qualification, it would appear to apply equally to a personal injuries defence that is properly pleaded in the manner required by sections 12 and 13(1)(b) of the 2004 Act.

16. In *Murphy v Depuy Orthopaedics Inc*, this Court did not have to consider whether the 2004 Act effected any material changes to the pre-existing pleading rules for personal injury actions. The Court was of the view that there could be no dispute that the defendants were obliged to give full and detailed particulars of the section 6(e) defence. That followed from "*the long-standing authorities"* of *Mahon v. Celbridge Spinning Company Ltd.* [1967] IR 1 and *Cooney v. Browne* [1985] IR 185 which the Court noted, had been cited with approval since the passing of the 2004 Act in *Armstrong v. Moffatt.*

17. The particulars sought in the *Depuy* cases were in respect of a statutory defence where the onus of proof was on the defendants. The particulars at issue did not relate to denials in the defences and the *Depuy* decisions therefore did not address the extent (if any) to which a defendant may be directed to give particulars of a denial.

18. That issue was considered in detail by McDonald J in *Allied Irish Banks plc v AIG*

[8] At para 20.

Europe Ltd. In his summary of the applicable principles at paragraph 38 of his judgment, the judge stated that:

> *"(g) It is also well established that the court will not direct a party to provide particulars of a denial in a pleading. This is confirmed by the authors of Delany and McGrath on Civil Procedure (4th Ed.) 2018, at paragraph 5-128. Delany and McGrath cite as authority for this proposition the decision of the Court of Appeal of England and Wales in Pinson v. Lloyds [1941] 2 K.B. 72. Logically, the same principle must apply to a non-admission. In Warner v. Sampson [1959] 2 WLR 109, Ormrod L.J. made clear that a denial and a non-admission have a similar effect in that both pleas have the effect of putting the opposing party on proof of its case. At this point, it should be noted that there is a dispute between the parties as to whether the principle that one cannot obtain particulars of a denial can be said to be applicable in the Commercial Court. This is an issue which is addressed further below."*

However, he immediately added that:

> *"(h) Particulars of a denial will, however, be ordered where the denial amounts in substance to a positive allegation. This principle is succinctly stated by Delany and McGrath at para. 5-129 as follows:-*
>
> > *'However, the position [is] different where the traverse [is] of a negative allegation…in which case, the question whether or not [the] defendant can be ordered to give particulars depends on whether the traverse is a mere traverse or whether, though negative in form, the negative is*

pregnant with an affirmative, in which case particulars of that affirmative must be given.'

19. Later in his judgment, McDonald J sought to identify the rationale for the principle that particulars will not be ordered of a denial. The explanation offered by Goddard LJ in *Pinson v Lloyds and National Provincial Bank Ltd* [1941] 2 K.B. 72 – namely that, as a matter of common sense, a defendant could not give particulars of a mere denial because "*there is nothing which the defendant can particularise"* – was, in his opinion, unsatisfactory. He preferred the analysis of Astbury J in *Weinberger v Inglis* [1918] 1 Ch 133 which identified the rationale in terms of the onus of proof. As a general rule, Astbury J observed, the court would not order a defendant to give particulars of facts and matters which the plaintiff had to prove to succeed in their claim, especially when that defendant had "*confined himself to putting the plaintiff to the proof of allegations in the statement of claim."*[9] McDonald J considered that to be *"an entirely rational explanation for the principle*". While the fundamental principle was that a party should know in advance, in broad outline, the case which that party would have to meet at trial, the party on whom the onus of proof rests knows what it has to prove at trial, it was for that party to makes it case and it could "*force the opposing party to narrow the scope of the work which it must undertake in order to prove its own case.*"[10]

20. Whatever the rationale for the principle that particulars will not be ordered of a denial, that the principle is not absolute or all-encompassing is evident from *Allied Irish Banks*

[9] Quoted at paragraph 41 of the judgment of McDonald J.

[10] At paragraph 43

plc v AIG Europe Ltd itself. As the judgment makes clear in paragraph 38(h), particulars of a denial will be ordered *"where the denial amounts in substance to a positive allegation."* That would appear to be so even where the positive allegation in question relates to an issue in respect of which the onus of proof is on the opposing party.

21. Here, of course, the disputed plea in the Defendants' Defences is negative in form (each of the Defendants *"denies that they failed to obtain the Plaintiff's informed consent*"). Many – perhaps most – such denials will be negative in substance as well as in form (for instance, a denial of a failure to drive with due care and attention). However, it appears to me that the plea here, though negative in form, is in substance a positive plea to the effect that the Defendants in fact obtained the Plaintiff's informed consent prior to the index surgery. The Defendants accept – correctly in my view – that had the pleading been expressed in such terms, Mr Crean would be entitled to the Particulars. It follows, in my view, that, quite apart from the provisions of the 2004 Act, the Plaintiff is entitled to the Particulars here.

22. Absent such Particulars, the Plaintiff will not know the case he has to meet at trial as regards the central issue in his claim. It is important in this context to recall that, in addition to pleading a breach by the Defendants of their duty to obtain his informed consent to the index surgery – the plea to which paragraph 3(b) of the Defences responds – the Plaintiff has pleaded various specific risks which, on his case, he ought to have been advised of but was not. The Defendants have simply denied those pleas also. The Plaintiff is therefore unaware of what the position of the Defendants is in relation to those pleas – whether, for instance, the Defendants dispute that the alleged

risks identified in the Summons were in fact risks of the surgery at all or whether, though accepting that such risks arose, their position is that they were not, in the circumstances, under a duty to advise of such risks or whether, in fact, they assert that the Plaintiff was advised of those risks and gave (informed) consent on that basis. In my view, these considerations confirm the conclusion that, applying the established principles of pleading, without consideration of the 2004 Act, the Plaintiff is entitled to the Particulars.

23. But, if I am wrong in that conclusion, the provisions of the 2004 Act put the matter beyond doubt in my view. It is, of course, highly unusual for the Oireachtas to legislate for the form of pleadings in any area of litigation. That is generally left to the relevant Rules Committees. It seems wholly implausible that the Oireachtas intended simply to enshrine into primary legislation the existing principles of pleading under the Rules, as developed in the jurisprudence. That impression is strongly confirmed by the relevant provisions of the 2004 Act. I agree with Hogan J that the Act makes very significant changes to the system of pleading in personal injury actions. The requirement for pleadings to be verified on affidavit is a very significant innovation. In addition, the provisions of sections 10-13 of the Act are clearly intended to ensure that parties (including defendants) plead with greater precision and particularity so that, in advance of trial, the actual issues between the parties will be clearly identified. Even if not a regime of "*maximum disclosure*", the pleading regime introduced by the 2004 Act certainly imposes obligations of enhanced disclosure on personal injury litigants. [11]

[11] In the recent *Review of the Administration of Civil Justice Report* (October 2020) the key recommendation in relation to pleading is that the rules be amended to require parties to plead their case with "*far greater precision"*

24. It is in this context that section 13(1)(b) is to be interpreted and applied. In relevant part, it requires ("*shall*") a defendant to give "*full and detailed particulars of each denial and traverse*" in their defence. Unless the Court here is to conclude that these words do not mean what they say, the Defendants here were required to give "*full and detailed particulars*" of the denial pleaded in paragraph 3(b) of their respective Defences.

25. To this, the Defendants say that "*a straight denial*" complies with the requirements of section 13(1)(b). As a general proposition, that cannot be so. A straight denial – perhaps more accurately characterised as a bald denial – appears to be precisely what this part of section 13(1)(b) is targeted at. As already noted, there may be circumstances where it is not possible to give particulars of a denial but where it is possible, section 13(1)(b) mandates the provision of such particulars. Here, it is clear, further particulars can be provided. The Defendants themselves accept that that is so. They accept that if the plea in paragraph 3(b) of their Defences was expressed in positive form, the Plaintiff would be entitled to the Particulars sought by him. Their sole argument is that, because paragraph 3(b) is framed negatively, particulars need not be provided. That argument is, in my view, swept away by the unambiguous and imperative terms of section 13(1)(b). It makes it clear that the mere fact that a plea is expressed in negative terms – by way of denial or a traverse – does not exempt a defendant from providing appropriate particulars.

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than has historically been the case, the suggestion being that "*the standard of particularity of pleading in personal injuries actions*" introduced by the 2004 Act should serve as the model for such rules: para 10.2.3 (page 131)

26. Such particulars ought to have been included in the Defences and, as they were not, the Court is entitled to direct their provision now.

27. As to the Defendants' objection that the Particulars impermissibly seek evidence rather than facts, as O' Donnell J observed in *Quinn Insurance Limited (in Administration) v PriceWaterhouseCoopers (A Firm)* that distinction, though "*hallowed by repetition"* requires closer attention.[12] Frequently, the distinction is framed in terms of *what* must be proved (facts) as opposed to *how* it is to be proved (evidence). [13] But, as O' Donnell J explains, "*if the provision of proper particulars is clearly necessary to enable the applicant properly to prepare for trial, or in other respects is a proper one, the information must be given, even though it discloses some portion of the evidence on which the other party proposes to rely on trial."*[14] Here, the Particulars do not in my view go materially beyond the *what* of the Defendants' case on informed consent. Even if they do, they are, in my opinion, necessary to enable the Plaintiff to prepare for trial and are otherwise proper particulars in the circumstances here.

28. There are a number of other objections made by the Defendants that I should address. It is said that the Plaintiff knows what was disclosed to him and is therefore in a position to instruct his lawyers. Indeed – so it is said – the Plaintiff has been able to instruct an expert. On that basis, the Defendants contend that the Particulars are unnecessary. I do not agree. It is well-established that, if particulars are otherwise appropriate, it is no

[12] At paragraph 22.

[13] At paragraph 23.

[14] At paragraph 22, citing *Marriott v Chamberlain* (1886) 17 QBD 154, at 161.

answer to assert that they address matters within the knowledge of the inquirer. That principle, and the rationale for it, was very clearly explained by Clarke J. (as he then was) in *Moorview Developments v. First Active plc* [2005] IEHC 329:

> *"7.2 It should be noted that the fact that a party is required to be told, as part of the pleading process, are not the facts as they may objectively be, but the facts as his opponent alleges them to be. Therefore, an assertion that the other party well knows the relevant fact will rarely be a sufficient answer to what would otherwise be a proper request for particulars. A requesting party may well have its own view about what the truth in respect of a relevant factual issue is but that does not absolve his opponent, where it is part of his case, from setting out in reasonable detail the relevant facts which he alleges."*

29. The argument that the Plaintiff does not need the Particulars because he has been provided with his medical records, including a copy of the Consent Form signed by him, fails for the same reason. As Counsel for the Plaintiff submitted, it may be that the Defendants here will contend that the Consent Form does not record the entirety of their interactions with the Plaintiff in terms of obtaining his informed consent for the index surgery and that there were other interactions that they will seek to prove in evidence. The Plaintiff is, in my view, entitled to be told whether that is the case. If, in fact, the Defendants' case is that the Consent Form is the only relevant record, and that the only risk disclosures made to the Plaintiff are those recorded in that Form, the Plaintiffs are entitled to be told that. That entitlement arises under section 13(1)(b) of the 2004 Act

and is not, as the Defendants suggest, dependent on him invoking the provisions of Order 32, Rule 4 RSC.

30. The final point made by the Defendants is that, by reason of the provisions of SI 391 of 1998, [15] the Plaintiff will have access to the Defendants' expert evidence before trial and that evidence "*must be based upon a factual foundation typically recited in the relevant reports.*"[16] Accordingly, the Defendants argue, "*the factual foundation*" of the their case will be disclosed to the Plaintiff in advance of trial and he will not be at risk of an ambush, perfect or otherwise, at trial.

31. In my opinion, the fact that the "*factual foundation*" of the Defendants' case on informed consent *may* become evident to the Plaintiff when their expert evidence is disclosed in accordance with SI 391 of 1998 cannot relieve them from the obligation to provide proper particulars now. It is clear from the authorities that the existence of pre-trial procedures involving the exchange of witness statements and/or expert reports may be very relevant where what is at issue is the level of detail that a party is required to provide by way of particulars: see, for example, *Thema International Fund plc v HSBC Institutional Trust Services* [2010] IEHC 19, at para 4.1. That is not the issue here, however. The Defendants here have failed to provide *any* particulars in circumstances where, in my view, they were required to do by the terms of section 13(1)(b) of the 2004 Act. The fact that they will be required to disclose their expert evidence in advance of trial does not exempt them from the requirements of Section 13(1)(b). The regime

[15] Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998.

[16] Defendants' written submissions, at paragraph 19.

for exchange of expert reports in personal injury litigation was well-established when the 2004 Act was enacted and its provisions are clearly intended to impose additional and independent obligations on personal injury litigants. As was said by Finlay-Geoghegan J for this Court in *Murphy v Depuy Orthopaedics Inc*, *"expert reports delivered pursuant to S.I. 391 (which are intended evidence) cannot fulfil an obligation to deliver particulars of fact in a pleading*". To adopt any other approach here would severely undermine the objectives of the 2004 Act and be wholly at odds with the clear terms of section 13(1)(b).

32. Finally, I should note that the Defendants have not suggested that it would be unduly burdensome for them to provide the Particulars nor have they advanced any specific objection to any individual particular sought by the Plaintiff. Their objections have at all times been to the principle of being required to provide *any* particulars arising from the plea in paragraph 3(b) of their Defences.

33. As will be evident from the above, I do not regard the Defendants' various objections as well-founded. It follows that I would set aside the order made by the High Court (including the order for costs in favour of the Defendants) and substitute for it an order directing each of the Defendants to provide the further and better particulars of their respective Defences sought in paragraph 2 of the letters of the Plaintiff's solicitors dated 15 and 17 August 2018.

34. As the Plaintiff's appeal has been wholly successful, it would appear to follow that the Plaintiff is entitled to the costs of the appeal and also to the costs of the application in

the High Court. The Judge awarded the costs of the High Court to the Defendants but put a stay on that order until the determination of the proceedings. Stays in such terms are commonly granted where orders for costs are made in relation to interlocutory orders and it would appear appropriate that any orders for costs made by this Court should be subject to such a stay. If any of the parties wish to contend for a different form of order, they will have liberty to apply to the Court of Appeal Office within 14 days (not counting the Christmas vacation) for a brief supplemental hearing on the issue of costs. If a party requests such a hearing and it results in an order in the terms I have suggested, that party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Noonan and Murray JJ have authorised me to record their agreement with it.