



THE COURT OF APPEAL

[2019] IECA 284

**Edwards J.
McGovern J.
Donnelly J.**

Record No: 286/2019

PATRICK MCNALLY

APPELLANT/PLAINTIFF

V

**MOLEX IRELAND LIMITED
AND MOLEX INCORPORATED**

RESPONDENTS/DEFENDANTS

JUDGMENT of Mr Justice Edwards delivered on the 13th of November, 2019.

Introduction

1. This is an appeal against the ex tempore judgment and Order of Noonan J. dated the 21st of May, 2019, refusing to grant discovery to the appellant/plaintiff in the following terms:

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

2. For convenience, the appellant/plaintiff will be referred to throughout this judgment simply as “the plaintiff”; and the respondents/defendants will be referred to simply as “the defendants”, or if referred to individually as “the first named defendant” or “the second named defendant”, as appropriate.

The context in which the disputed category of discovery was sought

3. The application for discovery of this category of documents arises in the context of personal injuries proceedings brought by the plaintiff in the following circumstances. The first named defendant manufactures and repairs products for the electronics industry at its plant at Shannon, County Clare. The plaintiff, who is a mechanical engineer, claims to have been employed, by the first named defendant (a matter that is disputed), at that plant from February 1983 until January 1990. It is pleaded that the second named defendant is the parent company of the first named defendant with a registered address in the United States of America and that at all material times the second named defendant controlled and supervised the operations of the first named defendant.

4. The plaintiff's case, as pleaded, is that he suffered personal injuries, loss and damage as a result of exposure to a chemical solvent, i.e. trichloroethylene, in the course of his work at the said plant at Shannon, County Clare; which exposure, it is alleged, was caused by the negligence, breach of duty and breach of contract of the defendants, and each of them, their servants or agents. This the "wrong" alleged against the defendants.
5. Various particulars are pleaded as to the acts of the defendants, their servants or agents said to constitute the alleged wrong and concerning the circumstances in which the alleged wrong was committed. Amongst these it is pleaded that the plaintiff's work was to repair tools and machine parts in a small workroom within the production plant. It is further contended that for a minimum of six hours per day the plaintiff's work was confined to this small workroom and that the plaintiff worked an average of 48 hours per week in shifts of either 8 or 12 hours. It is pleaded that the plaintiff worked at a tool repair bench and that before, during and after the repair work carried out by him, tools and machine parts were cleaned in a tool cleaning tank within the workroom. The plaintiff contends that this tank was directly beside his repair bench and that it contained a chemical solvent known as trichloroethylene, otherwise known as TCE, and also known as "trike", which was pumped under pressure onto the tools and machine parts which had been placed on a mesh within the tank for cleaning, before being returned to a reservoir and recirculated in the same manner until the process was complete. The plaintiff alleges that when this tank was uncovered, the workroom, and those present within it, were exposed to trichloroethylene vapour. It is pleaded that the plaintiff and his colleagues were required to stand at this tank while cleaning the tools in trichloroethylene with their bare hands, and all the while breathing in solvent vapour. It is pleaded that the plaintiff was exposed to trichloroethylene vapour at concentrations of between 1000 and 8900 mg/m³, and that this was at least twice the occupational exposure limit permitted at that time. It is further pleaded that the workroom was not ventilated with fresh air and that no air extraction system was in place. The plaintiff claims to have been exposed to trichloroethylene at these high levels for a period of seven years and that in consequence of this he has developed Parkinson's disease.
6. The personal-injury summons goes on to set forth some twenty six specific allegations of negligence and breach of duty designated (a) to (z) respectively. Amongst these are the following pleas which may, inter alia, be of relevance to the category of discovery in controversy in this appeal:
 - (a) exposing the plaintiff to trichloroethylene, a known neurotoxin;
 - (b) exposing the plaintiff to trichloroethylene at levels that were unsafe;
 - (c) exposing the plaintiff to trichloroethylene levels which exceeded the occupational exposure limits permitted at that time;
 - (n) failing to issue the plaintiff with any or any appropriate safety guidelines or otherwise to train and instruct him on the safe use of trichloroethylene;

- (o) failing to protect the health and safety of the plaintiff as an employee, and in particular failing to consider and evaluate the health risks posed by the use of trichloroethylene;
- (p) failing to provide the plaintiff with any direction or instruction on how the job was to be performed safely and with minimized risk to his health;
- (r) failing to instruct or to properly instruct the plaintiff in the safe use of a neurotoxic agent;
- (x) failing to warn the plaintiff of the dangers of being exposed to trichloroethylene;
- (z) at the time of the plaintiff's employment at the defendant's facility, the neurotoxicity of trichloroethylene was well understood in the industry, as was the need to protect employees from breathing its fumes and allowing absorption through the skin. The defendants' efforts at ventilating the plaintiff's workspace from noxious fumes consisted of removing some ceiling tiles in the summer months. In or about 1985 when the workspace was relocated to a remodelled workspace with the addition of blower heaters and coolers, the defendants failed to avail of the opportunity to provide mechanical extraction ventilation and/or modify the work process. In respect of the cleaning tank, the defendants' instructions were merely to keep her hinged and unsealed lid thereon when not being used for cleaning tools. In the circumstances there was an egregious and wilful disregard for the safety of the plaintiff and his colleagues

7. The Personal Injuries Summons in this case is dated the 2nd of June, 2015. A Defence was filed on behalf of the defendants on the 5th of May, 2016. This contains a preliminary objection asserting that the plaintiff's claim is statute barred. Without prejudice to that, the Defence is essentially a traverse of the plaintiff's claim and it puts the plaintiff on proof of all of the essential components of his claim, including, but not confined to; proof of all particulars of the acts of the defendants allegedly constituting the wrong, proof of the particulars of the circumstances relating to the alleged commission of the wrong, proof of the particulars of negligence and/or breach of duty and/or breach of contract alleged on the part of the defendants, their servants or agents, and proof of the particulars of injuries allegedly sustained by the plaintiff. It denies *inter alia* that the plaintiff's development of Parkinson's disease has anything to do with his employment history. Further, it is asserted by way of substantive defence that the plaintiff was not in fact employed at the material times by the defendants but rather was employed by another company, Molex Illinois S. A. Geneve; and that the defendants are not liable for or responsible in law for any negligence, breach of duty or breach of contract on the part of Molex Illinois S. A. Geneve.
8. On the 8th of May, 2017, the solicitors for the plaintiff wrote to the solicitors for the defendant seeking voluntary discovery pursuant to Order 31 Rule 12 of the Rules of the Superior Courts 1986 (as substituted by the Rules of the Superior Courts (No 2)

(Discovery) 1999 [SI 233 of 1999] of fourteen categories of documents, designated "A" to "N" inclusive.

9. On the same date the solicitors for the plaintiff wrote to the solicitors for the defendant seeking further and better particulars of the matters contained in the defendants Defence dated the 5th of May, 2016. Amongst the queries raised were:
 7. Please confirm for the duration of the plaintiff's employment at the production plant known as Molex Shannon, Co. Clare, the yearly quantities of Trichloroethylene purchased for use at the production plant known as Molex, Shannon, Co. Clare and the purposes for which the Trichloroethylene was purchased.
 10. Please confirm the names, types and quantities of all chemicals, detergents, cleaning agents and solvents purchased and used at the production plant known as Molex, Shannon, Co. Clare and in particular the chemicals, detergents and cleaning agents which the plaintiff was required to use in the course of his employment.
10. By a subsequent letter dated the 22nd of May, 2018, the solicitors for the plaintiff also sought voluntary discovery of a fifteenth category of documents, designated "O".
11. By late summer of 2018 the defendants had not yet made the voluntary discovery sought. In the circumstances the plaintiff issued a Notice of Motion to compel discovery on the 4th of September, 2018. The order under appeal arises from the hearing of that motion and we will return to it in due course. Before doing so, however, it is necessary to outline further details of the chronology to date.
12. Subsequent to the issuance of this motion, but prior to the 7th of May, 2019, the defendants delivered undated replies to the plaintiffs request for particulars dated the 8th of May, 2017. The replies to queries numbers 7 and 10, respectively, were as follows:
 7. The duration of the plaintiff's employment at the production plant known as Molex, Shannon, Co. Clare is within the knowledge of the plaintiff. The defendants do not have any records which indicate whether it ever purchased Trichloroethylene for any purpose. Accordingly, in the event that the defendants did purchase Trichloroethylene it does not have records that indicate the yearly quantities purchased or the purposes for which it was purchased during the period of the plaintiff's employment.
 10. The only cleaning agent within the defendants' knowledge which was purchased and used at the production plant was "Gizer". The defendants believe that another cleaning agent "Gun Kat" may have been used at one stage but this cannot be confirmed.
13. Following receipt of these replies, the solicitors for the plaintiff wrote to the solicitors for the defendant on the 7th of May 2019, seeking voluntary discovery of yet further documents, involving in effect putting forward a recast and extended version of the existing fourteenth category, i.e., "N", and adding a new sixteenth category, respectively.

This was in circumstances where, notwithstanding the earlier requests for voluntary discovery, the defendant had still not made any discovery at all up to that point, and the plaintiff's pending motion had yet to be heard.

14. Although the plaintiff's solicitor's letter of the 7th of May, 2019, does not specifically do so, it is proposed both for convenience and for consistency to designate the additional requests for voluntary discovery contained therein as categories "N(Ext)" and "P" respectively. The additional documents sought were:

N(Ext): "any documentation in your possession or within your procurement relating to all claims of the occurrence of any neurodegenerative disorders or injuries from the use of Trichloroethylene, Gizer or Gun Kat at any of your production or workplace facilities worldwide";

P: "any documentation in your possession or in your procurement relating to the degreasing tank referred to in the Personal Injuries Summons, specifically in relation to the manufacture of the said degreasing tank, who made it, what model it is, and when it was purchased";

15. The plaintiff's motion for discovery came on for hearing approximately two weeks later on the 21st of May, 2019. Through a process of negotiation engaged in in advance of the hearing, and arising from which there was ultimately considerable agreement between the parties, an order for discovery in respect of certain of the categories designated "A" to "M", and "O" and "P", inclusive, was no longer pressed for by the plaintiff; and the scope of the discovery to be made by the defendants in respect of what then remained of those categories was also limited in some instances. There is no controversy in respect of any of that. The matters in respect of which it was agreed there would be discovery ultimately became the subject of consent orders, and they form no part of this appeal.
16. However, it did not prove possible for the parties to reach agreement in respect of category "N (Ext)". This was notwithstanding an offer by the plaintiff made in the course of the hearing before the High Court to limit the geographical scope of the request from worldwide to "Europe and North America" and, if necessary, to further limit it to "Ireland and North America". Accordingly, the court was required to rule in respect of category "N (Ext)" and, as previously stated, the outcome was a refusal to grant discovery in respect of that category.
17. It should be recorded at this point, as it may become a matter of significance, that the defendants did not file any affidavit in reply to the plaintiff's motion and sought to rely instead on the submissions of counsel.

The High Court judgment.

18. This court has been provided with a transcript of the hearing before the High Court on the 21st of May, 2019, including the ex tempore judgment of the High Court judge. Having outlined the background to the motion, and the nature of the discovery being sought, the High Court judge continued:

"Now in the course of argument before me this morning, Mr. O'Donoghue, leading counsel for the plaintiff, has indicated that he is prepared to confine that category without limit as to time, but to Europe and North America, rather than purely worldwide and, indeed, I think if necessary he said to Ireland and North America.

No replying affidavit has been delivered by the defendants but I think -- and although Mr. O'Donoghue pointed to that fact, I don't think the defendants can really be criticised to the extent that the motion issued in this matter that is now before the court was issued on the 4th of September 2018, long before this particular category, as I say, in very recent weeks has been sought by the plaintiff. However, it appears not to be in real dispute between the parties that, as I've said, the defendants are part of a very substantial conglomerate with facilities all over the world and I think I'm entitled to assume therefore that potentially a huge number of documents would have to be interrogated and searched by the defendants going back at least 36 years and of course, possibly longer than that because documents prior to the employment of the plaintiff could be potentially relevant to the category that has been sought, so it is a somewhat potentially, well I will say infinite, but certainly a very very long period of time indeed..

*It seems to me that there have been very many recent judicial criticisms of the discovery process as it currently stands. The time, cost and effort involved in making discovery is frequently disproportionate to the objective that it seeks to obtain and I think it is recognized now by almost everyone as an area that is in need of urgent reform. Of course it goes without saying that any applicant seeking discovery must establish that the discovery is necessary for the Pharaoh disposal of the case or, indeed, for saving costs and I think that requirement in the rules has led to much recent emphasis in the jurisprudence on the principle of proportionality and that is particularly evident from a recent judgment of the Court of Appeal delivered by Mr. Justice Hogan on 9 July 2018 in *Tobin v. The Minister for Defence*, a case coincidentally not entirely dissimilar to the present in its facts, to the extent that the plaintiff had been exposed to toxic chemical fumes as a result of which he suffered injury and in the course of his judgment in that case, Mr. Justice Hogan approved the observations by Mr. Justice Kelly, as he then was, in the *AstraZeneca* case where he stated that the principle of proportionality governing discovery requests required an assessment of "the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage that of his opponent." And Mr. Justice Hogan noted that Mr. Justice Barniville in another recent case called *Dunnes Stores v. McCann*, which is reported in 2018 IEHC at page 123, and referring to the case at paragraph 18 of his judgment, Mr. Justice Hogan noted that Mr. Justice Barniville had said that the court should be scrupulous to ensure that discovery is really needed and to refuse such discovery where interrogatories would be more appropriate or where an alternative means of proof is available to the applicant for discovery."*

19. After quoting some further passages from the judgment of Hogan J. in the Court of Appeal in *Tobin v The Minister for Defence*, in which Hogan J. had suggested that recourse to interrogatories would perhaps have been appropriate, and further indicated that he would postpone making an order for discovery until that option had been explored, the High Court judge then continued:

“So, applying those principles to the facts of this case, it does seem to me that the discovery sought by the plaintiff, given its antiquity, potential breath in terms of time periods involved and the potential oppression I think that would inevitably be involved means that the plaintiff has not satisfied me that the discovery is necessary for the fair disposal of the case in the absence of the plaintiff not having employed the alternative procedures which are of course available, that’s to say by way of seeking interrogatories or possibly a notice to admit facts or other notices seeking admissions and I’m not therefore satisfied that the making of such an order for discovery would, certainly at this time, be proportionate. So for those reasons, therefore, I propose to refuse the particular category that is now in issue before the court.”

Grounds of Appeal.

20. The Notice of Appeal complains that the High Court judge erred:

- i. in holding that it was necessary to seek the information instead by way of a Notice to Admit Facts or by way of seeking leave to serve a Notice of Interrogatories, prior to seeking discovery;
- ii. in holding that the plaintiff’s letter dated 8 May 2017 (paragraph N) as extended by letter dated 7 May, 2019 requesting discovery of *“any documentation in the Defendants’ possession or within the Defendants’ procurement relating to all claims of the occurrence of any neurodegenerative disorder or injuries from the use of Trichloroethylene, Gizer or Gun Kat at any of the Defendant’s production or workplace facilities worldwide”* was not an appropriate or adequate request for the information sought;
- iii. in holding that discovery particular sought (*sic*) was excessively onerous on the defendants to comply with;
- iv. [in failing to hold] that in accordance with Order 31 of the Rules of the Superior Court, the discovery sought is necessary for disposing fairly of the cause or matter or for saving cost;
- v. [in failing to hold] that the documentation sought is necessary to assist the plaintiff to prove negligence of the defendants and without which the plaintiff’s case is prejudiced;
- vi. [in failing to hold] that the said documentation is solely within the possession and or procurement of the defendants and that interrogatories are not an appropriate pre-condition to seeking this discovery in the circumstances of the case.

- vii. in not distinguishing *Toibin v Minister for Defence* [2018] IECA 230 from the facts of the present case.

Grounds of Opposition

21. The defendants have put forward the following grounds of opposition:

- i. The High Court judge was correct in fact and/or in law in holding that it was necessary to seek information by way of Notice to Admit Facts or by way of seeking leave to serve a Notice of Interrogatories prior to seeking discovery;
- ii. The High Court judge was correct in fact and/or in law in holding that the discovery requested by the appellant was not an appropriate or adequate request for the information sought;
- iii. The High Court judge was correct to hold that the discovery sought was excessively onerous;
- iv. The discovery sought is not necessary for disposing fairly of the case, or for saving costs, whether pursuant to Order 31 of the *Rules of the Superior Courts 1986* as amended, or at all;
- v. The documentation sought is not necessary to assist the plaintiff in proving negligence on the part of the defendants, nor is the plaintiff prejudiced without it;
- vi. Interrogatories are an appropriate pre-condition to seeking discovery of the documentation sought in the circumstances of the case.
- vii. The High Court judge was correct in law in his application of *Tobin v Minister for Defence, Ireland and the attorney General* [2018] IECA 230.

Additional grounds on which the decision should be affirmed:

- i. The discovery sought is disproportionate and is unlikely to advance the case of the appellant or damage the defence of the respondents;
- ii. The discovery sought is not necessary for the proper administration of justice;
- iii. To require the respondents to make the discovery sought would be oppressive;
- iv. Granting the discovery sought would impose an unreasonable burden on the respondents;
- v. To grant the discovery sought would unjustifiably increase legal costs and lead to delay;
- vi. Discovery ought to be refused where alternative, less expensive and less time-consuming means of proof are available;
- vii. Granting discovery of the category sought would be premature.

The Supreme Court's Decision in *Tobin v Minister for Defence*

22. Before turning to a consideration of the parties' respective submissions it is important to record that since the judgment in the High Court was delivered the Supreme Court has given judgment in a further appeal from the decision of the Court of Appeal in *Tobin v. Minister for Justice* [2018] IECA 230 ("*Tobin*"). In the Supreme Court, the court's judgment, which bears the neutral citation [2019] IESC 57, was delivered on the 15th of July, 2019 by Clarke C.J., with whom the other members of the court agreed. It allowed almost the entirety of the appeal and in consequence overturned the decision of the Court of Appeal on which the High Court judge in the present case had placed much reliance.
23. Clarke J. reviewed the case-law in segment 6 of his judgment, noting that a court hearing an application for discovery will only order a party to make discovery if it is satisfied that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs. The test as to relevance is that set down in the judgment of Brett J. in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano* (1882) 11 Q.B.D. 55 ("*Peruvian Guano*"); whereas that as to necessity is to be found in the judgment of Fennelly J. in *Ryanair plc. v. Aer Rianta c.p.t.* [2003] 4 I.R. 264 ("*Ryanair*").
24. In addition, in an effort to limit the burdens, costs and delays incurred by orders for discovery in modern practice, two further considerations have sometimes been proposed; one being that of proportionality and the other being the suggestion that alternative, more efficient methods of disclosure should first be pursued.
25. In regard to the requirement of proportionality, the Chief Justice in *Tobin* locates its genesis in remarks of his predecessor, Murray C.J., in *Framus Ltd. v. CRH plc* [2004] 2 I.R. 20, and points to its application by Fennelly J. in the Supreme Court in *Dome Telecom Ltd. v. Eircom Ltd* [2008] 2 I.R. 726 and by Kelly J. in the High Court in *Astrazeneca AB and Ors. v. Pinewood Laboratories Ltd. & Ors.* [2011] IEHC 159.
26. In regard to "alternative means of proof", the Chief Justice in *Tobin* recalled Fennelly J.'s statement in *Ryanair* that the courts may, in their analysis of the necessity of an order for discovery, have regard to "alternative means of proof" available to the plaintiff. The Chief Justice suggested that this has led to the courts seeking to curtail the breadth of discovery orders by sometimes introducing a requirement that alternative methods of ascertaining the information required – such as by means of the delivery of interrogatories – are pursued prior to the making of an order for discovery. By way of example he pointed to the decision of Kelly J. in the Commercial Court in *Anglo Irish Bank Corporation Ltd. v. Browne* [2011] IEHC 140; as well as to that of this court in *McCabe v. Irish Life Assurance Plc* [2015] 1 I.R. 346 and that of Barniville J. in the High Court in *Dunnes Stores & Anor v. McCann* [2018] IEHC 123.
27. Drawing on this jurisprudence, the Chief Justice distilled certain general principles which he presents in segment 7 of his judgment in *Tobin*.
28. As a starting point the importance of discovery in our legal system is recognised, and it is noted that sometimes a party to litigation may not be able to gain access to all material

evidence without recourse to the various procedural measures which the Rules of Court permit, of which discovery is one. The point is made that discovery can play an important role in ensuring that the case presented by an opponent is not inconsistent with the documentation which that opponent possesses but which is withheld from the court. The Chief Justice further noted that discovery can also play a role in keeping parties honest, for it cannot be ruled out that some parties might succumb to the temptation to present a less than full picture of events to the court, were it not for the fact that they know that any attempt to do so may be significantly impaired if there is a documentary record which shows their account either to be inaccurate or materially incomplete. The fact that much discovered documentation does not find its way into evidence does not mean that it was not of importance or potential importance. He points out that discovery can influence the evidence presented in other ways, such as by ensuring that it may be unnecessary to go into much documentary material, precisely because the party which has discovered the documents in question will almost inevitably have to present a case in oral evidence which is consistent with the documentary record. Accordingly, discovery when used appropriately, improves the chances of the court being able to get at the truth in cases where facts are contested. In that way, he contends, it makes a significant contribution to the administration of justice.

29. However, as the Chief Justice goes on to point out in *Tobin*, discovery can also hinder access to justice if it becomes disproportionately burdensome for the party from whom discovery is sought, particularly in terms of cost. It might lead to parties feeling forced to settle proceedings on terms which do not reflect the strength and weakness of their respective cases, but which are heavily, and inappropriately, influenced by the fact that going through a discovery process will place a very significant financial burden on the party concerned. Moreover, where the financial resources available to the parties may differ significantly, the existence of overbroad discovery can operate to the advantage of the well-resourced and to the inappropriate disadvantage of the small man or the small or medium sized enterprise.
30. Where the price which has to be paid in seeking "perfect justice" is that the costs of litigation generally soar to the extent that they impose a materially increased barrier to access to justice, then the overall interests of justice are not served. Procedures like discovery can sometimes be used tactically by one or other party (or, indeed, both) to gain a litigious advantage rather than to achieve the specific end to which the procedure is properly directed, and this needs to be borne in mind.
31. In para 7.13 of his judgment in *Tobin*, the Chief Justice reiterates that the key criteria remain those of relevance and of necessity. He continued:

"However, it also seems clear that there has been much greater scrutiny of the issue of "necessity" in more recent times. The traditional position very much accepted that if documents were relevant, their discovery would almost inevitably be necessary. However, much of the recent case law has indicated a need to move away from that position. Where there are other equally effectual means of

establishing the truth and thus providing for a fair trial then discovery may not be "necessary". This will certainly be so where it can be shown that the cost of making discovery would be significant and would greatly outweigh the costs of pursuing some alternative procedural mechanism to establish the same facts. Similar considerations apply when the likely true relevance of documentation may not become clear until the trial but where the immediate disclosure of the documentation concerned would necessarily involve disclosing highly confidential information. Furthermore, the development of a proportionality test can itself be seen as a further refinement of the concept of "necessity".

32. "Necessity", per the jurisprudence, means that the disclosure of the documents concerned may be necessary for the fair and just resolution of the proceedings and potentially for saving costs. However, the starting point, in Clarke C.J.'s belief, has to remain a consideration of what is "relevant". In his view, it should remain the case that the default position should be that a document whose relevance has been established should be considered to be one whose production is necessary; a position capable, however, of being displaced for a range of other reasons. The Chief Justice then went on to say:

"If it can be demonstrated that compliance with the obligation to make the discovery sought would be particularly burdensome, then a court will have to weigh in the balance, in deciding whether discovery is truly "necessary", a range of factors, including the extent of the burden which compliance will be likely to place on the party concerned, the extent to which it might reasonably be expected that any of the contested documentation whose discovery is sought will play a reasonably important role in the proper resolution of the proceedings and, importantly, the extent to which there may be other means of achieving the same end as that which is sought to be achieved by discovery but at a much reduced cost."

33. He added (at para 7.17):

"[I]t is really the question of the proportionality of the order sought and the possibility that the same ends could be achieved by significantly cheaper means that come into play."

34. The Chief Justice was at pains to emphasise (at para 7.18) that that it can properly be said that access to justice has been impaired even where it cannot be demonstrated that a relevant party could not afford the burden of making full discovery. A party which will be required to expend a great deal of money on making full discovery may be inhibited in its ability to properly conduct litigation even if could not be heard to say that it did not have the money to do so. Likewise, he felt it was important to emphasise that access to justice does not only apply to plaintiffs who might be inhibited in their ability to bring cases but applies equally to defendants who may be inhibited in their ability to properly defend proceedings because of what might be seen to be the excessive burden of the costs of litigation.

35. Clarke C.J. then indicated (at para 7.19) that:

“The first question that needs to be asked is as to whether a party which has been requested to make discovery has established that there would be a real problem in being required to make discovery in what might loosely termed “ordinary” or “full” terms, that being the disclosure of all documents which meet the test of relevance. It seems to me to equally follow that, when requested to make voluntary discovery, it is incumbent on a party who may wish to argue that the discovery sought is excessively burdensome, to set forward in its response, and in some reasonable detail, just why that is said to be so.”

36. Moreover (at para 7.21):

“Where it is sought to suggest that the discovery of documents whose relevance has been established is not necessary, the burden will lie on the requested party to put forward reasons as to why the test of necessity has not been met. Those reasons should initially be addressed in the response of the requested party to the letter seeking discovery. In the event of a court being required to adjudicate on such matters, then, to the extent that the reasons for suggesting that discovery of any particular category of document is not “necessary” is dependent on facts, it is for the requested party to place evidence before the courts to establish the relevant facts. To the extent that the opposition to discovery may be based on legal argument, then it is for the requested party to put forward its reasons as to why production is not necessary.”

37. Accordingly, while it is for the requesting party to establish relevance (which in most cases will *prima facie* also establish necessity), if it is sought to contest necessity then it is for the requested party to establish, whether by facts or argument, that discovery is not necessary even though the documents sought have been shown to be relevant. It is also for that party, at least initially, to suggest any alternative means of obtaining the relevant information which are said to be less burdensome but potentially equally effective. The time at which a requesting party needs to deal with those issues of necessity is after a case has been made to the effect that it is not necessary that all potentially relevant documents be discovered.

38. Further, it will be appropriate for a court to take into account the manner in which the case is pleaded, not only for the purposes of determining relevance, but also to assess the extent to which a party who objects to making discovery, on the grounds that it is excessively burdensome, has contributed to that situation by the manner in which they have pleaded their case.

39. It bears commenting upon that the facts at issue in *Tobin* bore a superficial similarity to those in the present case in as much as it was also a personal injuries action in which the plaintiff claimed to have suffered injuries due to exposure to dangerous chemicals and solvents at work. The plaintiff in that case was an apprentice aircraft mechanic in the Aer Corp based at Casement Aerodrome. The State requested particulars of the plaintiff’s

claim, replies to which were furnished in March 2014. In those replies, Mr. Tobin specified that his first exposure to solvents and dangerous chemicals was in the Engine Repair Flight workshop ("the ERF") in July 1991 and stated that his last exposure to chemicals "as part of his day to day employment" was in February 1994, when he was transferred to Air Support Company Signals to work in IT. A list of those chemicals to which he was allegedly exposed, being those of which Mr. Tobin stated that he was aware, was also provided.

40. In the defence delivered by the State in June, 2015, every allegation or assertion made by Mr. Tobin in his personal injury summons was denied, save for the fact that it was accepted that he had been employed as an aircraft mechanic at Casement Aerodrome. In effect, Mr. Tobin was put on full proof of every aspect of his claim. In addition, contributory negligence was pleaded against him.
41. In August, 2015, Mr. Tobin sought voluntary discovery from the State by letter, setting out fifteen categories of documents requested, to which the State did not respond thereby precipitating the issuance in October, 2015 of a motion seeking an Order for Discovery, which motion was for the most part contested. In an affidavit sworn on behalf of the State by Captain Nic Caba, the logistical and financial burden which an order for full discovery would impose on the State was set out. It was estimated that it would take ten members of staff and approximately two hundred and twenty man-hours to locate, review and categorise the documents sought. This estimation was contested by Mr. Tobin in his replying affidavit.
42. Further, it was deposed that discovery in respect of certain categories of documentation should be limited to the records of the ERF, rather than those of the entirety of Casement Aerodrome. This was based on the contention that Mr. Tobin's claim was limited to an allegation that he was exposed to dangerous chemicals during the course of his work at the ERF. In an affidavit sworn by Mr. Tobin in reply, it was deposed that there were 12 separate locations within the Casement Aerodrome where he and his fellow Air Corps personnel were regularly exposed to dangerous chemicals.
43. In addition, in respect of category 2, which sought discovery of all documentation, notes, records, reports, etc., listing or identifying any chemicals utilised by Mr. Tobin in the course of his duties, their quantities and the dates of their purchase, the State proposed that Mr. Tobin issue a set of interrogatories requesting that the State identify whether the chemicals listed in the replies to particulars were, in fact, in use in the ERF during the specified time period. In response, Mr. Tobin deposed that the list referred to was incomplete and that he did not and could not be expected to know all of the chemicals which were in use within the workplace. On that basis, it was said that the use of interrogatories would not allow for an appropriate or fair disposition of the case.
44. Applying the principles he had earlier identified to each of the categories of discovery sought by Mr Tobin, Clarke C.J. concluded that they were relevant and necessary in the context of the claim being made. Moreover, the respondents to the motion (i.e., the State) had not demonstrated that, in all the circumstances of this case, ordering them to

make discovery of the disputed categories would be disproportionate having regard to the burden which that would place on the State and also having regard to the availability of interrogatories which, it was contended, would adequately meet any reasonable needs of Mr. Tobin. On proportionality, he stated:

"In my view, it is possible to say that making full discovery in this case would place a material burden on the State, but it should equally be emphasised that the burden in question is far from the upper end of the scale and is well removed from the type of case which has led to many judicial pronouncements about the very real problems which discovery can create for access to justice. It would, in my judgment, be appropriate to characterise the burden in this case as being moderate rather than severe or extreme. That does not mean that it should be ignored but at the same time it would not be appropriate to place the same weight on the burden which making full discovery in these proceedings would place on the State, as might be the case where full discovery would lead to the very severe burdens which have been placed on parties in other cases."

45. With regard to alternative remedies, he concluded:

"Ultimately, the issues to which these disputed categories of discovery relate will have to be resolved on evidence at trial. There will have to be some evidence as to the chemicals to which Mr. Tobin was exposed and there will have to be some evidence as to the existence or otherwise of any incidents involving such chemicals and the training which Mr. Tobin was likely to have received. It seems to me that if those questions were to be raised in any meaningful way by means of interrogatories it would be necessary for the State to engage in significant research through its own documentation so as to enable it to answer the questions raised properly."

46. In reaching this conclusion, importance was attached (at para 9.4) to the fact that the State had put Mr Tobin on full proof of his claim:

"...if the State is to give meaningful information by means of interrogatories then it will have to know the answers. If it already has the information which would allow it to give answers, then it is hard to see why appropriate admissions could not have been made already. But if the State does not have the answers at this stage, then it seems almost inevitable that a significant amount of research will have to be carried out to enable proper answers to be given. Against that background, I am not convinced that the State has established that there will be a very great saving achieved in the circumstances of this case by using the procedural device of interrogatories as opposed to discovery. That is not to say that there might not be other cases where the use of interrogatories or other procedural measures might not be likely to achieve much the same ends at much less cost."

47. In the circumstances, Mr. Tobin was found to be entitled to use procedural measures to ascertain the full range of chemicals to which he might have been exposed and, insofar as

it was possible, the circumstances in which that exposure took place, together with information concerning the training which he received. It had not been demonstrated that such information could be given in an authoritative way without carrying out at least a significant amount of the research which would be needed to make discovery. Furthermore, those issues are central to Mr. Tobin's case and the discovery sought related, therefore, to questions which were far from tangential or of only minor consequence. In all those circumstances, the State was found not to have discharged the onus which rests on it to demonstrate that alternative procedural measures could give all or most of the information to which Mr. Tobin was reasonably entitled but at the deployment of greatly reduced resources.

Application of the Tobin Principles to the present case

48. In my estimation it is clearly demonstrated from the pleadings and the affidavit sworn in support of the motion by the plaintiff's solicitor that the material in controversy and in respect of which discovery is sought is relevant in the context of the personal injuries claim being pursued by the plaintiff. He is put on proof of almost every aspect of his claim including causation. The availability of evidence tending to show knowledge of the danger, and foreseeability of the risk of injury, will be important to him in seeking to sustain his case.
49. Moreover, the fact that the material is relevant suggests prima facie that its discovery of it is necessary. However, the defendants seek to dispute this, contending that a discovery order would be unduly burdensome on them and, moreover, that it would be disproportionate to order discovery having regard to that burden in circumstances where the plaintiff could obtain the information which he in fact requires through alternative means, either through a carefully crafted Notice for Particulars, through a Notice to Admit Facts or by means of Interrogatories.
50. Although the defendants seek to make the case that discovery would be unduly burdensome, and disproportionate, it is a matter of significance that the defendants have not filed any affidavit in response to the motion. Although they seek to make the case that the nature and extent of the discovery requested would be unduly burdensome they have placed not a scintilla of evidence before the court as to why in fact that would be so. Counsel for the defendants points simply to the second sentence of the trial judge's ruling as recorded in the transcript, where he stated "*It is clear from the evidence and from the pleadings that the defendants are part of a large United States multinational corporation*", as though it were enough. In my view it is not enough, and not so by a significant margin. In that regard we have not been told the number of production or workplace facilities involved; the geographical spread involved (bearing in mind the plaintiff's offer to limit his claim for discovery to the defendants' production or workplace facilities in Ireland and North America); the numbers of personnel who might potentially be involved; the potential number of records involved and where and how they might be stored; the precise anticipated difficulty in identifying and collating the documents in respect of which discovery is sought; the projected numbers of personnel who would be required to be deployed to perform that exercise; the projected number of man hours involved; the

projected cost thereof and perhaps also, if relevant, any limitation of resources available to the defendants that they would wish to rely upon. It is not for the courts to speculate on such matters simply on the basis that the defendants are part of a large United States multinational corporation. If a case of undue burden is being advanced, then the nature and extent of the burden needs to be spelt out and established in evidence. The defendants have failed to do so. In so far as the High Court judge was disposed to forgive this default on the basis that the request for the additional material now sought to be discovered was made late in the day, he was in error in my view. The appropriate way to have dealt with that would have been to grant the defendants an adjournment (with possible costs implications for the plaintiff) so that they could prepare the necessary affidavit evidence, had such an adjournment been sought. He could even have offered it of his own motion. However, no such adjournment was sought, nor was it offered, and the trial judge was not entitled to infer an undue or substantial burden in the absence of sufficient evidence tending to support such an inference.

51. However, if for argument's sake we were to approach the matter on the basis that the court could accept, as matter of likelihood, and notwithstanding the paucity of evidence as to detail, that it would be burdensome, whatever about unduly so, for the defendants to have to make the discovery sought in this case, it still begs the question as to whether the defendants have discharged the onus upon them of showing that alternative means of obtaining the relevant information exist which would be less burdensome but potentially equally effective. Once again, there is no evidence in that regard, although paragraph 7.21 of the judgment of Clarke C.J., where he remarks: "*[t]o the extent that the opposition to discovery may be based on legal argument, then it is for the requested party to put forward its reasons as to why production is not necessary*", appears to leave open the possibility that legal argument alone might in some cases suffice.
52. Counsel for the defendants has pointed to the Rules of the Superior Courts as providing for each of the three suggested alternative means by which the information which the plaintiff hopes to obtain on discovery could more readily, and more economically, be obtained. It seems to me, however, that similar issues arise in this case to those with which the Supreme Court had to grapple in the *Tobin* case. Legal submissions only take the defendants so far. Yes, they have demonstrated that alternative means of obtaining the information do exist, but they have not demonstrated that they would be substantially less onerous to comply with than making the discovery sought in the circumstances of this case. To do so would require evidence, and once again the defendants have put forward no evidence. As was the case in *Tobin*, it is reasonable to apprehend that unless the defendants have the actual information readily to hand (and they have not stated that they do), answering relevant queries whether they are put by way of Notice for Particulars, Notice to Admit Facts, or by way of Interrogatories, will almost certainly involve them engaging in significant research through their own documentation so as to enable them to answer the questions raised properly.
53. In all the circumstances of the case I am satisfied that the defendants have not discharged their onus of showing that the discovery sought is unnecessary on account

that it would be unduly burdensome and/or disproportionate having regard to the existence of alternative means of obtaining the information sought. In so far as the High Court judge found otherwise he was in error, although in fairness to him his decision was rendered, as has been pointed out, before the Supreme Court delivered its judgment and ruling in the *Tobin* case. I would therefore allow the appeal and grant an order for discovery in the following terms:

“Any documentation in the defendants’ possession or within the defendants’ procurement relating to all claims of the occurrence of any neurodegenerative disorders or injuries from the use of Trichloroethylene, Gizer or Gun Kat at any of the defendants’ production or workplace facilities in Ireland and North America.”