



**THE COURT OF APPEAL  
CIVIL**

**Birmingham P.  
Faherty J.  
Murray J.**

Neutral Citation Number: [2020] IECA 120  
**Record Number 2019/157**  
**High Court Record Number 2009/515P**

**Between:**

**HIRESERVICES E AND HIRESERVICES I LIMITED**

**PLAINTIFFS/RESPONDENTS**

**- AND -**

**AN POST**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Murray delivered on the 29th day of April 2020**

**Background**

1. This is an appeal against a judgment and order of Creedon J. refusing the appellant's application for further and better discovery. The judgment was delivered on 29 June 2018 [2018] IEHC 400 and the order perfected on 28 March 2019.
2. The respondents' claim is for specific performance of an alleged contract for the hire of motor vans, together with damages for breach of that agreement. Their essential case is that the appellant having agreed to hire vehicles from the respondents for a period of five years, breached that contract by ceasing to make the agreed rental payments and by seeking to return the vehicles before that agreed period had concluded.
3. The agreement is alleged to have been entered into with the first named respondent between July and December 2006 for the hire of twenty vehicles, being followed by a further agreement in early 2007 for the hire of another twenty vans. The business of the first named respondent was assigned to the second named respondent in October 2007. The breach of the alleged contract is said to have taken place in March 2008 when, it is claimed, the appellant indicated that the agreements did not comply with its purchasing arrangements. The appellant ceased to make rental payments in July 2008.
4. The plenary summons issued in January 2009 and a statement of claim was delivered in May of that year. The second named respondent was joined to the proceedings in March 2011 and an amended statement of claim delivered shortly thereafter. In October 2011, the appellant delivered a defence and counterclaim. This pleads that the vans were

furnished to the appellant on foot of a framework agreement made orally between the parties in June 2006. The terms of that alleged framework agreement, as pleaded, were that the first named respondent agreed to supply for short term hire vehicles at a spot rate of €80 per week, the number of vehicles supplied to be on an 'as needed' basis. It pleads that the first named respondent was notified of the appellant's intention to return the vehicles in June 2006 but that the first named respondent wrongfully refused to accept delivery of the vehicles until November 2009. The appellant says that in consequence of what it alleges was the wrongful refusal of the respondents to accept return of the vehicles, it incurred costs for storage and security. A reply and defence to counterclaim was delivered in November 2012.

**The application for further and better discovery:**

5. By letter dated 28 November 2012 the appellant sought voluntary discovery from the respondents. Twelve categories of documents were identified. By letter dated 12 February 2013 the respondents agreed to make the discovery requested, subject to a clarification contained there as to the scope of category two. On 29 June 2013, an affidavit of discovery was sworn on behalf of the respondents by Joe Jackson, a director of the appellants. The appellant says that from that point to 25 January 2017, the respondents took no further steps to prosecute their proceedings.
6. The application giving rise to this appeal originated with a letter sent by the appellant on 25 January 2017. In that letter, the appellant contended (a) that the respondents must have or have had documents falling within five identified categories as described in the agreement as to discovery but had failed to discover these documents and (b) seeking three additional categories of discovery. The appellant maintains that the latter categories were not new, but that they merely set out material which the appellant says it expected the respondents to have discovered on foot of the original agreement between the parties. On 31 May, the respondents' solicitors wrote expressing surprise at the time the appellant had taken to raise objection to the affidavit of discovery. The letter did not engage with the substance of the issues raised by the appellant.
7. The motion for further and better discovery was issued on 23 August 2017. It sought orders striking out the respondents' claim for failing to make discovery, orders for further and better discovery, and in the alternative orders for further discovery. The motion was grounded on an affidavit sworn by Ms. Mahon, the appellant's solicitor. On 28 November 2017, and while this motion was pending, the respondents delivered a supplemental affidavit of discovery. That affidavit of discovery comprises the only response of the respondents to the various complaints made in Ms. Mahon's affidavit. It does not engage in any way with the contentions advanced by Ms. Mahon, instead discovering a number of documents under categories 10 and 11.
8. In rejecting the application, Creedon J. referred to the judgment of Kenny J. in *Sterling Winthorp Group Ltd. v. Farbenfabriken Bayer AG* [1967] IR 97, concluding that the plaintiff had complied with the agreement reached between the parties in respect of discovery and that the defendant had not met the test set out in that case.

9. The appellants' complaints as argued before this Court were threefold. First, they sought orders directing the respondents to make discovery of the three additional categories. Second, the appellant complains of a failure by the respondents to properly itemise the documents in respect of which they are claiming privilege. Third, it was claimed that the respondents failed to make full discovery of all documents in their possession or power within categories 1, 2, 4, 7 and 10 as agreed.

**Three additional categories.**

10. The three additional categories of discovery sought in the notice of motion are as follows:
- (i) Documents evidencing correspondence, communication and/or discussion between the respondents in respect of the hiring of vehicles by the respondents to the appellant;
  - (ii) Documents evidencing correspondence, communication and/or discussion between the respondents and the appellant in respect of the hiring of vehicles by the respondents to the appellant;
  - (iii) The respondents' template contracts for longer term leases of motor vehicles (i.e leases in the region of five years' duration) and samples of such contracts as concluded with customers.
11. The appellant describes the function of these categories as '*providing a clear breakdown of the various categories of documentation which the Defendant ... expected to receive by way of discovery*'.
12. However described, the position in relation to these categories is, in my view, straightforward. If they are merely elaborations upon the documents discovery of which has already been directed, the respondent is required to make discovery of them. That being so, the new categories are otiose and the concern that documents captured by the new categories ought to have been, but were not, discovered in the original affidavit of discovery is properly addressed within the application for further and better discovery.
13. The legal test in this regard is clear. Further and better discovery will only be directed where it has been shown that there are documents which the party that has made discovery was required to discover, but has not discovered, and/or that the person making the affidavit of discovery has misunderstood the issues in the action and/or that his view as to whether documents are outside his discovery obligation was wrong. (*Sterling Winthorp Group Limited v. Farben Fabriken Bayer AG* [1967] IR 97 at pp.100, 103 and 105; *O'Leary v. Volkswagen Group Ireland Ltd.* [2015] IESC 35 at para. 56).
14. An order of this kind will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession that ought to have been, but were not, disclosed in the first affidavit of discovery (*Sterling Winthorp Limited v. Farben Fabriken Bayer AG* at p. 100). It is a matter for the party seeking the order to establish that there has been a default so as to raise '*a reasonable suspicion that the party who had already made an affidavit had other documents relating to the matters in*

*question in his possession'* (*Lyell v. Kennedy (No. 3)* (1884) 27 Ch.D. 1, 20). Where the party seeks to do this by evidence, the evidence should be that of a person with knowledge of the facts deposed to (*Victoria Hall Management Limited and ors v. Cox and ors* [2019] IEHC 639 at paras. 97 and 99, affirmed on other grounds [2020] IECA 79). In this regard hearsay evidence should not be admitted as of course but only where this is unavoidable for genuine and identified reasons of urgency, or difficulty in procuring direct evidence (*Joint Stock Company Togliattiazot v. Eurotoaz Limited* [2019] IEHC 342 at para. 16).

15. Insofar as the three additional categories are concerned, the appellant had failed to discharge this burden. The only evidence sustaining its claim that there are documents within these headings that ought to have been, but were not, discovered is the assertion by the appellant's solicitor, Ms Mahon, to that effect. Mr. Jackson, who swore the original affidavit of discovery has deposed in his supplemental affidavit that further searches were conducted on foot of the appellant's request and that there are no further discoverable documents. In those circumstances, the appellant has not discharged the burden of showing that there are in existence further documents within these categories that ought to have been discovered.
16. The Court does have a separate jurisdiction to direct the respondents to make additional discovery of new categories of documents even though categories of discovery have already been agreed between the parties or directed by the Court. Originally, this would have followed from the inherent jurisdiction of the Court to vary interlocutory orders. That included the power to amend those orders '*to reflect and deal with legal and practical issues*' that might have manifested themselves after the discovery orders were made (see *Irish Bank Resolution Corporation Ltd. v. Quinn* [2015] IECA 84). However, an express power to direct additional discovery now appears in the Rules of the Superior Courts in O. 31, r.12(11) RSC. That enables application to the Court so as to vary the terms of a discovery order or agreement. It appears to me to necessarily follow from the inclusion of this express power that it now exhaustively defines the circumstances in which additional discovery can be directed after orders for discovery have been agreed or made in an action.
17. Order 31, r.(12)(11) provides as follows:

*'Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that –*

- (i) *further discovery is necessary for disposing fairly of the case or for saving costs, or*
- (ii) *the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery.'*

18. The next following sub-rule provides:

*'An order under sub-rule (11) shall not be made unless:*

- (i) the applicant for same shall have previously applied by letter in writing to the other party specifying the reasons why each variation is sought and requesting that party's agreement to the variations sought, and*
- (ii) a reasonable period of time for agreement has been allowed, and*
- (iii) the party or person requested has failed, refused or neglected to agree to such variation or has ignored such request'.*

19. An application pursuant to this provision will not be granted simply because the documents are relevant and necessary in the sense explained most recently in *Tobin v. Minister for Defence* [2019] IESC 57. The interests of all in the efficient disposition of proceedings requires that a party has one chance to seek discovery and having agreed to or obtained orders for discovery of particular categories of documents must have good reason for coming again. A discovery order (and an agreement as to discovery is treated as an order – O.31, r.12(4)(2)) is interlocutory in character. An interlocutory order can generally only be reopened where there is a good reason for doing so such as a material change in circumstances (*Bank of Ireland v. Gormley* [2020] IECA 102 at para. 27). Bearing in mind that the purpose of an order for discovery is not merely the advancement and protection of the interests of the parties to an action, but that it also places on the court record for the benefit of the parties and the court a sworn statement itemising relevant documents (*Cleary and ors v. Sheehan* [2013] IEHC 456 at para. 26), the Court retains the power to make such an additional order when it determines that an injustice would be done without such a direction (see *Victoria Hall Management Limited and ors v. Cox and ors* [2019] IEHC 639 at para. 109; *Lagan Construction Group Holdings Ltd. v. Ben McArdle Ltd.* [2017] IEHC 427 at para. 25). However, all of this is the exception rather than the norm. The default position is that the discovery is as agreed or directed, and that some good reason must be given for revisiting that agreement or order. No good reason has been given here to justify the directing of new categories of discovery at a point which is now eight years after discovery was agreed, and seven years after it was made.

20. This is aside entirely from the fact that there is no application pursuant to these provisions before the Court. Although the Rule is referred to in the appellant's submissions on appeal, it did not form part of the relief claimed in the High Court, or the matters considered by the High Court Judge. Even if this is to be overlooked, any such relief would have been premature as the preconditions to the exercise of the jurisdiction provided for in sub-rule (11) have not been complied with. That procedure is mandatory. The Court cannot make an Order under the provision unless the process identified in the Rule has been exhausted (*UCC v. ESB* [2017] IEHC 599 at para. 46). Finally, given that it has been the appellant's consistent contention that the new categories are not actually

new at all, merely reflecting a reformulation of the categories as originally cast, it is impossible to see how the request could ever come within the provision.

**The scheduling of the privileged documents.**

21. The second issue relates to the question of privilege. This arises in the following way. In neither affidavit of discovery have the respondents listed the documents over which privilege is claimed. The First Schedule Second Part to the first affidavit contains generic reference to correspondence between the respondents and their solicitors, correspondence with counsel, correspondence with third parties engaged for the purposes of advising the respondents in the proceedings and confidential communications concerning and conveying legal advice prepared in the course of the proceedings. The same schedule in the supplemental affidavit refers to *'all correspondence passing between Solicitor, Plaintiff and Counsel and documents prepared or sought by the Plaintiff's Solicitor in respect of the prosecution of the Plaintiff's claim over which legal professional privilege is being claimed.'* As the appellant notes in its submissions, this formulation in the second affidavit potentially extends to documents which are not privileged: documents sought by the respondents' solicitor in respect of the prosecution of their claim are not necessarily privileged.
22. It is clear that neither formulation complies with the Rules. These require an individual listing of the documents with the general classification of privilege claimed in respect of each document indicated in such fashion as would convey to a reader of the affidavit the general nature of the document concerned in each individual case together with the broad heading of privilege being claimed for it, *Bula Limited v. Crowley* [1991] 1 IR 220, 222. The default here is thus absolutely clear cut.
23. The respondents object to this issue being raised, as *'the Defendant's Notice of Motion did not seek any relief arising out of the Plaintiff's claim of legal privilege and it is very clear that this issue was not before the Court'*. I do not believe this objection to be well founded. The relief claimed in the Notice of Motion included an Order directing the respondents to make further and better discovery. The requirement to deliver an affidavit of discovery which properly addresses any claim of privilege made in accordance with the relevant legal requirements falls within this relief. While the affidavit grounding the application – that of Ms. Mahon – did not refer to this objection, the issue was an unusually simple one depending on the terms of the affidavit of discovery itself, and it was raised by counsel in the course of the application. This is less than desirable, and may have implications in costs, but the obligation is firmly placed on a party making discovery to remedy deficiencies in their affidavit of discovery when drawn to their attention. While the comments of Clarke J. (as he then was) in *Moorview Developments Ltd. v. First Active plc.* [2008] IEHC 274, [2009] 2 IR 788 at 817 that *'there remains a clear obligation on a party to remedy any failure to make discovery'* were directed to a failure to include a specific document in an affidavit of discovery, the same principle necessarily applies where a significant and indisputable omission of the kind in issue here is drawn to the party's attention. The respondents have pointed to no prejudice in consequence of this issue not being raised in the motion or grounding affidavit and have

advanced no argument that the affidavits were other than non-compliant with the relevant legal requirements. The privilege schedule is not drawn in accordance with law, and that deficiency must now be addressed.

**The second schedule to the affidavit of discovery.**

24. Although specific complaint is made in relation to different aspects of categories 1, 2, 4, 7 and 10 of the discovery as made by the respondents, a common theme running through the propositions advanced by the appellant in respect of each of these categories arises from the terms in which the second schedule to each of the original affidavit and supplemental affidavits of discovery is expressed. The need for, and terms of, the second schedule arise from the *Affidavit as to Documents* set out at Appendix C to the Rules of the Superior Courts. In it, the deponent must identify the documents which '*they have had, but have not now, in [their] possession or power*'.
25. The nature and extent of the obligation arising from this requirement is explained by Abrahamson et al *Discovery and Disclosure* (3rd Ed. 2019) para. 7-85, as follows:

*'The deponent is required to include in the second schedule to his or her affidavit all documents in the specified categories relevant to the matters in question in the proceedings which were at one time but are no longer in his or her possession, power or procurement. Importantly, the deponent must explain what has become of the documents and, where possible, in whose possession they are at the time of swearing the affidavit. The form appended to the RSC suggests that this information might be contained in the body of the affidavit. However, it is acceptable to include this detail in the second schedule where there is a large number of documents necessitating a variety of explanations. The body of the affidavit, which contains the sworn evidence, should verify any such information set out in the schedule.'*

26. The first schedule first part of the original affidavit of discovery sworn by Mr. Jackson on 29 June 2013 lists 1,193 separate documents, these being the total number of documents disclosed over eleven categories. The full extent of the documents within the second schedule – that is all the documents falling within those eleven categories which the respondents once had but longer had - was stated to be as follows:

*'Originals of all letters, communications and documents sent by the Solicitors for the Plaintiff and the Plaintiff herself [sic.] to the persons therein named and mentioned in the First Part of the First Schedule hereto.'*

27. This schedule is not referred to in the body of the affidavit of discovery. The form in Appendix C envisages separate paragraphs averring that the deponent has had but no longer has in his possession or power of procurement the documents relating to the matters in question set forth in the second schedule. Paragraph 5 requires that the deponent state when those documents were last in his possession or power. Paragraph 6 requires that the deponent state what has become of these documents. Paragraph 7 then

contains an averment to the effect that the deponent has not and never had any documents other than those in the first **and second schedule**.

28. Paragraphs 5 and 6 of Appendix C are not replicated in the original affidavit of discovery delivered in this case at all. Paragraph 7 is – twice – its contents being reflected in both paragraphs 4 and paragraphs 7 of the affidavit of discovery. However, both of these paragraphs refer only to the deponent not having and never having had any documents '*other than and except the documents set forth in the said **First Schedule***'. Even in its own terms, this is wrong: the respondents once had the documents contained in the second schedule. The consequence is that the respondents in the body of their first affidavit of discovery failed to comply with the clear obligation on the face of the Rules to (a) record that they once had the documents in the second schedule, (b) stating when they had the documents, (c) stating what has become of the documents and (d) confirming that they never had any other documents within the discovery obligation.
29. Of course, some flexibility has to be allowed to parties in crafting affidavits of discovery so as to reflect the particular circumstances of their individual cases. However, the original affidavit of discovery delivered here corresponds with neither the spirit nor form of the rule. Most critically, there is no averment that the documents appearing in the second schedule are the only documents that have been but are no longer within the possession or power of the respondents falling within the categories of documents which they are required to discover. Nowhere in the body of the affidavit is there a single averment directed to the second schedule. On this basis alone, the affidavit of discovery as originally delivered by the respondents is significantly deficient.

**Categories 1, 2, 4, 7 and 10**

30. As I have noted, Ms. Mahon in affidavit of 17 August 2018 alleged deficiencies in five categories of the discovery - categories 1, 2, 4, 7 and 10. These categories were directed to (respectively) individual vehicle hire documents, the supply of the vehicles in issue by the entities from whom the respondents obtained the documents, the purchase of extra equipment and supplies referred to at para. 14 of the statement of claim, a copy of the contractual terms referred to at para. 8 of the statement of claim and certain rental agreements.
31. In relation to each of these categories, the appellant expressed and explained its surprise that the respondents did not have and never had the documents of which further discovery was thus sought. In response, Mr. Jackson swore a supplemental affidavit of discovery on 28 November 2017. As I have previously observed, this is the only affidavit delivered by the respondents in response to the appellant's complaints regarding discovery. As I also observed Mr. Jackson did not (as respondents to applications of this kind would commonly do) engage in that affidavit with any explanation as to how it is that the documents identified by Ms. Mahon in her affidavit are not and never were in the possession or power of the respondents.
32. Thus, in that affidavit, Mr. Jackson referred to Ms. Mahon's affidavit and to those categories in respect of which she had made complaint. He said (paragraph 5) that the



respondents had undertaken 'a complete and thorough search in order to locate all documentation falling within the categories request [sic.] by the Defendant within its power or possession'. Referring to the request for further and better discovery in respect of categories 1,2,4,7,8,10 and 11, he averred as follows:

*'I say that the Plaintiffs have in their power, possession or procurement those documents pertaining to categories 10 and 11 only.'*

33. He then (para. 9) averred to the Second Schedule to that affidavit recording that he once had but no longer had the documents relating to the matters in question in the suit set forth in the Second Schedule. The second schedule, in turn, is as follows:

*'The originals of all letters sent by the Plaintiff which were posted to the persons or companies to whom they were addressed and which it is believed they are not in possession of the party or persons to whom they were addressed and which it is believed they are now in the possession of the party or persons to whom such correspondence was addressed.'*

34. At paragraph 10, Mr. Jackson avers as follows :

*'I say and believe that according to the best of my knowledge, information and belief the I have not now and never has had in my possession, custody or power or in the possession, custody or power of my solicitors or agents, Solicitors or Agent or in the possession, custody or power of any other person or persons on my behalf, any document of any kind or any electronically stored information or any copy of or extract from any kind or any electronically stored information, or any copy of or extract from any such document or information relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, and falling within the relevant categories of documents specified.'*

35. The averment presents a number of minor errors of a kind that frequently occur – most particularly that Mr. Jackson is swearing the affidavit not on his own behalf but on behalf of the respondents. Strictly speaking, indeed, the entire averment is itself false: it states that the respondents do not have and never had any documents within the relevant categories. It should, of course, be qualified by reference to what has been discovered in the first and second schedules of both affidavits of discovery. Nonetheless, it can reasonably be said that the intention is obvious.
36. In normal circumstances, in respect of categories 1,2,4,7,8, 10 and 11 the Court would have to conclude – as did Crendon J. – that the supplemental affidavit of discovery of Mr. Jackson resolves the issues raised by the appellant. The appellant has adduced no evidence that could support the proposition that the respondents have additional documents that have not been discovered. All the Court has been provided with is an assertion to this effect, made it should be said by a deponent with only second hand knowledge of the issue. Mr. Jackson, a director of the plaintiffs, has averred in response

that the only additional documents the respondents presently had were those that had been previously disclosed or were being discovered in that affidavit. He has also (albeit belatedly, and somewhat imperfectly) effectively averred that the respondents never had other documents within the categories other than those disclosed in both schedules. Generally, to make further orders of the kind sought by the appellants would, produce the consequence condemned by Murphy J. in *Phelan v. Goodman* [2000] 2 IR 577 at 584:

*'To order the first defendant to swear a further affidavit of discovery presumably would result in his repeating the statements made and sworn by him on several occasions, namely, that he has not and never had any documents in addition to those already discovered in his power or possession relating to the matters in issue in the present case.'*

37. However, there are a number of circumstances attending this application which have taken me to the conclusion that the respondents should now be directed to deliver a single, composite, new affidavit of discovery listing each document in each category which they are discovering, each document which they say they once had but no longer have, listing each privileged document and otherwise in full compliance with the Rules of the Superior Courts. The circumstances which lead to me to conclude that this should be directed are as follows.
38. First, it follows from my conclusion on the privilege issue that a further affidavit of discovery properly scheduling all material over which privilege is now being claimed will, in any event, now have to be filed. That means that there will be three affidavits of discovery. The discovery now being made is more effectively and properly done by the delivery now of a single affidavit
39. Second, I am concerned at the fracturing of the second schedule and averments regarding same as between the two affidavits sworn to date. The first affidavit was deficient insofar as it failed to properly address the obligation to aver that the party making discovery never had any other documents. Yet it is in that first affidavit that almost all of the documents are being discovered.
40. Third, I am struck by the fact that while in the supplemental affidavit Mr. Jackson avers that he has caused a search to be undertaken for documents of the kind addressed by Ms. Mahon in her affidavit, he makes no reference to any investigations being undertaken so as to ensure that the respondents in delivering their affidavit of discovery have a full and complete understanding of which of these documents may once have been in the possession of the respondents. The obligation on a party making discovery is not limited to a duty to search out all documents in the possession, power or procurement of that party. It includes an obligation to ascertain precisely what documents within the scope of the discovery obligation were once in its possession, and what has become of them. The evidence before the Court does not generate any confidence that that obligation has been discharged by the respondent.

41. The position of the respondents is not helped in this regard by the fact that they have chosen to provide no explanation of any kind in response to the averments of Ms. Mahon explaining how documents which, based on her evidence, one might have thought existed at some point, never actually existed at all. Here, the respondents must not merely swear an affidavit of discovery which properly addresses the contents of the second schedule but must explain – either in that affidavit or in a separate affidavit – the precise steps they have taken to ascertain what documents within the categories the respondents once had but no longer have. The Court clearly has jurisdiction to require such explanations, and in this case the unsatisfactory history of this aspect of the discovery made by the respondent merits its exercise (see *James Elliot Construction Limited v. Lagan and ors* [2017] IEHC 278 at para. 6, 11 and 19).

**Conclusion:**

42. First, the appellant's application for discovery of three additional categories of documentation is refused on the basis that, on the appellant's own case, these documents are within the discovery categories which have already been agreed. Insofar as they are not, the appellant has not disclosed any legal basis for new discovery being ordered at this point in the proceedings.
43. Second, the respondents' affidavits of discovery are both deficient insofar as they ought to have, but did not, list individually the documents over which privilege is claimed.
44. Third, the appellant has identified classes of documents which it says existed or must have existed and which fall within the discovery categories. The respondents have averred in response that they do not have those documents. They have also averred, albeit in a technically imperfect way, that they never did. In normal course, this is the end point for an application for further and better discovery. If the averments made are believed by the appellants to be false, they are free to cross examine the deponent on these issues at trial. This court cannot make orders for discovery of particular types of documents in the teeth of an affidavit of discovery based solely on assertion.
45. However, having regard to the fact that a further affidavit of discovery must now be sworn in any event to deal with the issue of privilege, having regard to the failure of the respondents to properly address in their first affidavit the issue of what documents they previously had but no longer have that fall within the discovery agreement, taking account of the manner in which this issue is now addressed in the second affidavit and the absence of any averment that any investigation has been undertaken by the respondents to address whether documents of the kind referred to by Ms. Mahon have existed in the past but are no longer in existence, combined with the absence of any clear explanation in the affidavits the respondents have delivered in response to this motion, I believe that it is appropriate that the respondents now deliver a single composite affidavit of discovery in full compliance in all respects with the Rules of the Superior Courts.
46. In consequence, I would allow this appeal and in substitution for the Order of the High Court refusing the application, would make an Order requiring the respondents to swear a single composite affidavit of discovery making discovery of all documents in their

possession power or procurement within the categories contained in the letter from the appellant's solicitors of 28 November 2012 subject to a clarification as to the scope of category two as referred to in the letter dated 12 February 2013, that affidavit of discovery to properly list and schedule all documents over which the respondents claim privilege, and otherwise to comply with the provisions of the Rules of the Superior Courts as explained in this judgment. In this regard, the respondents must not merely swear an affidavit of discovery which properly addresses the contents of the second schedule, but must explain – either in that affidavit or in a separate affidavit – the precise steps they have taken to ascertain what documents within the categories the subject of this application, the respondents once had but no longer have.

47. Birmingham P. and Faherty J. are in agreement with this judgement and the Order I propose.