

250

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal



For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from

<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
---	---

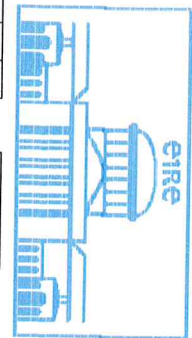
[Title and record number as per the High Court proceedings]

Gavin Tobin	V	Minister for Defence, Attorney General and Ireland
High Court Record Nr	2014/691P	Court of Appeal Record Nr
		2016/579
Date of filing	10 OCT 2018	
Name(s) of Applicant(s)/Appellant(s)	Gavin Tobin	
Solicitors for Applicant(s)/Appellant(s)	Patrick V Boland & Son Solicitors	
Name of Respondent(s)	Minister for Defence, Attorney General and Ireland	
Respondent's solicitors	Hayes Solicitors	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	
If yes, give [Supreme Court] record number(s)		

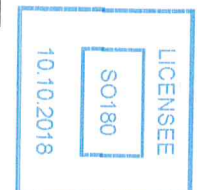
Are you applying for an extension of time to apply for leave to appeal?	Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Irvine, Peart and Hogan JJ
Date of order/ Judgment	9 July 2018 perfected on 27 September 2018



1194965104
434896



Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Gavin Tobin
-----------------------	-------------

Original status	<input checked="" type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
	<input type="checkbox"/>	Petitioner		

Solicitor			
Name of firm	Patrick V Boland & Son		
Email	law@pvbolandsolicitors.ie		
Address	Main Street, Newbridge, Co Kildare	Telephone no.	(045)-431216
		Document Exchange no.	50006
Postcode	n/a	Ref.	MW

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	David Nolan SC		
Email	dnolan@lawlibrary.ie		
Address	158/159 Church Street Building, Church Street, D7	Telephone no.	01-817 5078
		Document Exchange no.	815202(B)
Postcode			

Counsel			
Name	Finbarr Fox SC		
Email	ffox@lawlibrary.ie		
Address	158/159 Law Library Building, Church Street, D7	Telephone no.	01 - 817 5105
		Document Exchange no.	815205
Postcode			

Counsel	
Name	David Geoghegan
Email	david.geoghegan@lawlibrary.ie

Address	Law Library, Four Courts, D7	Telephone no.	086 3189284
		Document Exchange no.	813259
Postcode			

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Minister for Defence, Attorney General and Ireland
------------------------	--

Original status	<input type="checkbox"/>	Plaintiff	<input checked="" type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?
	<input type="checkbox"/>	Applicant		Respondent	
	<input type="checkbox"/>	Prosecutor		Notice Party	
	<input type="checkbox"/>	Petitioner			
Yes		<input checked="" type="checkbox"/>	No		

Solicitor			
Name of firm	Hayes Solicitors		
Email	law@hayes-solicitors.ie		
Address	Lavery House, 2 Earlsfort Terrace, D2	Telephone no.	01-6624747
		Document Exchange no.	175
		Ref.	LOR/RS
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Andrew Fitzpatrick SC		
Email	andrew@andrewfitzpatrick.ie		
Address	Law Library,	Telephone no.	

	Four Courts, D7	Document Exchange no.	
Postcode			

Counsel			
Name	Sarah Corcoran		
Email	scorcoran@lawlibrary.ie		
Address	Law Library, Four Courts, D7	Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange
<input type="checkbox"/>	Post

<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

The appellant seeks leave to appeal against the judgment and Order of the Court of Appeal varying the Order of the High Court (McDermott J) requiring the Respondents to make discovery of various categories of documents.

1. Between 1989 and 1999, the Respondents employed the Appellant at the Casement Aerodrome. The Appellant's case is that he was exposed to dangerous chemicals and solvents during the course of his employment. There are various other individuals that have initiated similar proceedings against the Respondents arising out of their exposure to chemicals and solvents.
2. In January 2014, the Appellant issued personal injuries proceedings against the Respondents. The Appellant asserted, *inter alia*, that he was not provided with a safe system and place of work; that he was not provided with proper equipment; that he was not properly trained; and that he was dangerously exposed to chemicals and solvents at the Casement Aerodrome.
3. In June 2015, the Respondents delivered a Defence which denied every assertion or allegation contained within the Personal Injuries Summons, save for the description of the Appellant and that he had been employed by the Respondents. In particular, the Respondents put the Appellant on proof of the fact that he was ever exposed to dangerous chemicals or solvents.
4. In October 2015, the Appellant issued a notice of motion seeking discovery of 15 categories of documentation. After the issue of the notice of motion, the Respondents consented to various categories of discovery. In relation to the remaining categories of discovery, the Respondents made general objections to making discovery and also specific objections in respect of certain categories.
5. By way of general objections, the Respondents advanced two primary arguments. First, the Respondents argued that the discovery should be limited to a particular section of Casement Aerodrome called Engine Repair Flight ('ERF'), as opposed to the entire Casement Aerodrome. Second, the Respondents contended that the discovery should not be made in certain respects as it would be unduly burdensome on the State and that the Appellant ought to seek leave to deliver interrogatories instead.
6. With respect to the first argument, the Respondents stated that Replies 9(a) and 9(b) of

the Appellant's Replies to Particulars resulted in the Appellant confining his claim to only the ERF and not to the Casement Aerodrome. In the Replies to Particulars, the Appellant asserted that his first exposure to chemicals was in the ERF and that his last 'day to day' exposure was in the ERF. The Appellant in his replying affidavit at paragraph 8 averred that he was exposed to dangerous chemicals in various other areas of the Casement Aerodrome and not just the ERF. The Appellant in his Replies to Particulars pleaded that he worked in various sections of Casement Aerodrome. The Appellant's Personal Injuries Summons at para 5 clearly indicated that his claim was predicated on exposure to dangerous chemicals and solvents '*during the course of his employment at Casement Aerodrome.*'

7. With respect to the second argument, the Respondents stated it would be too burdensome to make discovery in certain respects and that interrogatories ought to be delivered instead. This primarily applied with respect to category 2 which sought discovery of all documentation identifying the chemicals used by the Appellant including the quantities purchased for the Casement Aerodrome.
8. On 7 October 2016, McDermott J delivered judgment and granted a significant portion of the discovery sought by the Appellant, and made amendments to certain categories. McDermott J specifically rejected the Respondents' arguments in respect of the discovery being too burdensome or the Appellant ever limiting his claim to just the ERF as opposed to the Casement Aerodrome. McDermott J held that discovery was necessarily burdensome in light of the Defence filed. He further held that the Appellant was not able to identify all of the chemicals to which he was exposed and, therefore, the delivery of interrogatories was inappropriate in all of the circumstances.
9. On 22 December 2016, by Notice of Expedited Appeal, the Respondents appealed the decision of McDermott J seeking an order directing the Respondents to make discovery in terms set out in the offer scheduled to the Notice of Expedited Appeal. The Respondents advanced broadly similar arguments to those advanced before the High Court.
10. On 9 July 2018, Hogan J delivered the Court of Appeal's judgment which significantly reduced the discovery ordered by McDermott J. The Court made the following points of relevance to the within appeal. At para 12, the Court stated that the Appellant's legal advisors had correctly applied existing discovery rules, but that the existing

discovery rules required change. At para 17, the Court held that the State should not be treated differently to any other litigant. At para 26, the Court held that the Appellant had identified other areas in the Casement Aerodrome - other than the ERF - where he had also been exposed to chemicals. At para 31, the Court held that the Appellant ought to deliver interrogatories in respect of the chemicals used at the Casement Aerodrome in order to '*estimate the amount of quantities used.*' At para 34 and 37, the Court held that the Respondents had consented to provide training records, but refused to order the category and instead stated that the Appellant should deliver interrogatories in respect of the training that he received. At para 50, the Court held that it had to recalibrate discovery practice and that no such order should be made unless *all* alternatives had been exhausted.

5. Reasons why the Supreme Court should grant leave to appeal

Matters of general public importance and the interests of justice

1. The Appellant submits that the following matters of public importance arise in the within appeal and why in the interests of justice leave to appeal ought to be granted.
2. First, the Court of Appeal acknowledged that the Appellant's legal advisers followed the current discovery practice, but that the current discovery practice '*has become the problem*' and '*it now behoves the judiciary to re-calibrate and adjust that practice*' and that '*no such order should be made unless all other avenues are exhausted and these have been shown to be inadequate.*' [emphasis added] In the Appellant's submission this new discovery practice will, in fact, delay the administration of justice and make it more expensive and time consuming. It will put a greater strain on judicial resources, as all litigants will have to exhaust all possible legal processes that are available prior to seeking discovery. It would seem that the obligation is on an applicant to prove that all processes have been exhausted and are shown to be inadequate. There does not appear to be any scope for an applicant to argue that

alternative legal processes would be futile or not provide as litigious an advantage.

3. Second, the Court of Appeal specifically held at para 17 that the State should not be treated differently to any other litigant. In the Appellant's submission, this finding is directly contradicted by a prior Supreme Court authority *AIB v Ernst & Whinney* [1993] 1 IR 375. In the *Ernst* decision, the State was subject to a non-party discovery request which would have taken approximately 6 months to complete. A unanimous Supreme Court found that the State was in a unique position compared to other defendants and, as a matter of law, should be treated differently in assessing whether an order for discovery is burdensome or not. Finlay CJ held that it would be '*particularly appropriate*' for a State body to provide the discovery in order to facilitate the administration of justice. McCarthy J held that the court could envisage '*the serious damage that might be done to a small firm of auditors and accountants...such an objection taken by a Department of State, charged with monitoring the insurance industry should not be sustained.*' O'Flaherty J held that the obligation to ensure that justice is done in an individual case '*should predominate*' over '*the inconvenience of the departmental officers.*' As such, in the Appellant's submission there is a matter of utmost public importance that must be resolved in that the Court of Appeal and Supreme Court have given diametrically opposed statements of law in relation to whether or not the State should be treated differently to other litigants in determining whether an order for discovery is too burdensome or not.
4. Third, an issue of utmost public importance arises in respect of whether the Court of Appeal or the Superior Courts Rules Committee is the appropriate body to amend the rules pertaining to interlocutory applications. In the Appellant's submission, it is only the Superior Courts Rules Committee with the concurrence of the Minister for Justice by statutory instrument pursuant to section 36 of the Courts of Justice Act 1924 and section 68 of the Courts of Justice Act 1936 that can lawfully amend the rules. It is necessary that there is clarity about the ability of the courts to amend the rules pertaining to interlocutory applications. In the Appellant's submissions, the Court of Appeal judgment amounts to a *de facto* amendment of the Rules of the Superior Courts in that it imposes additional requirements for applicants to meet which are not contained within the Rules of the Superior Courts.
5. Fourth, it seems clear that the Court of Appeal judgment will have significant ramifications for legal practitioners in this jurisdiction, as it will affect potentially all

discovery applications into the future. There is now uncertainty about when it is appropriate for a party to seek discovery. Inevitably discovery applications will be resisted on the basis that an applicant has not exhausted every conceivable legal procedure available. Consequently it will become less clear when a party is entitled to discovery. This will result in legal advice in relation to discovery applications becoming more vague and uncertain, which will in turn result in more contentious discovery applications. It is, therefore, strongly in the public interest for legal practitioners to be able to properly advise their clients whether or not a discovery application is premature or not.

6. Fifth, a particular issue of public importance in the context of discovery applications arises in respect of whether averments in an affidavit can affect the relevancy of a category of documentation. The Court of Appeal held that the only pleaded case made by the Appellant was that he was exposed to chemicals and solvents in the ERF and that averments in affidavits could not be used to determine the relevance of a category. In support of this proposition, the Court of Appeal and the Respondents cited an incomplete and abridged version of the *dictum* of McCracken J in *Hannon v Commissioners of Public Works* [2001] IEHC 59. The full and unabridged *dictum* of McCracken J has been cited with approval by the Supreme Court in *Framus Ltd v CRH* [2004] 2 IR 20, which clearly states that relevance can be determined by reason of '*submissions as to alleged facts put forwards in affidavits*' if the alleged facts '*relate back to the pleadings.*' As such, in the Appellant's submission there is a clear conflict of authority with respect to whether or not a litigant's averments in an affidavit can affect the relevancy of documents or not in a discovery application.

7. Sixth, an issue of public importance arises in respect of the Court of Appeal's decision to refuse to order the Respondents to make discovery of training records pertaining to the Appellant's special safety training in chemicals. As stated above, the Court of Appeal accepted that the Respondents were consenting to this category of discovery, but still refused to grant discovery and instead required the Appellant to seek leave to deliver interrogatories in respect of his training. In the Appellant's submission, a few issues arise in this respect. The Respondents' Notice of Expedited Appeal only sought that the High Court order be varied so that the Respondents would be obliged to make discovery in terms of the offer set out in the schedule. The Court of Appeal in fact went further than the relief sought by the Respondent by outright refusing to

order the category as offered in the schedule. It is necessary for there to be clarity about the circumstances where an appellate court can go beyond the relief sought in an appeal and whether a court can refuse to order a category of discovery that is being consented to. It is notable in this regard, that there was no argument whatsoever by the Respondents that there would be any burden in respect of providing the discovery pertaining to training records. Furthermore, there was no suggestion, as there was in respect of other categories, that interrogatories ought to be served by the Appellant in respect of the training that he received. As such, this particular order made by the Court of Appeal is particularly unjust in the circumstances.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Grounds of appeal and legal principles related to each ground

1. The Court of Appeal erred in determining that the Appellant's claim was limited to the ERF as opposed to the Casement Aerodrome.
2. The Court of Appeal erred in determining that the discovery as ordered would be too burdensome.
3. The Court of Appeal erred in determining that the Respondents as State entities must be treated identically to all other litigants in assessing whether or not an order for discovery was burdensome or not.
4. The Court of Appeal erred in holding that the relevance of categories of discovery could not be determined by averments made in affidavits.
5. The Court of Appeal erred in refusing to order discovery of a category that the Respondents were consenting to and which went further than the reliefs sought by the Respondents in the Notice of Expedited Appeal or advanced at the hearing of the appeal.

6. The Court of Appeal erred by including additional requirements for an applicant to meet in a discovery application, which are not contained within the Rules of the Superior Courts. The only body capable of amending the Rules of the Superior Courts is the Superior Courts Rules Committee in concurrence with the Minister for Justice by way of statutory instrument pursuant to section 36 of the Courts of Justice Act 1924 and section 68 of the Courts of Justice Act 1936.

7. The Court of Appeal erred in determining that discovery could only be sought and granted where all other legal procedures had been exhausted and found to be ineffective.

8. The Court of Appeal erred in determining that interrogatories were suitable in the circumstances of the within proceedings. In particular, the Appellant does not have enough information to pose proper interrogatories and the nature of interrogatories is completely unsuitable to the nature of the case being made.

9. The Court of Appeal erred by not granting the Appellant the categories of discovery which were relevant to the issues between the parties and necessary for the fair disposal of the action.

Statutory provisions relied on:

1. section 36 of the Courts of Justice Act 1924;
2. section 68 of the Courts of Justice Act 1936.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Finbarr Fox SC, David Nolan SC, David Geoghegan

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

[2018] IECA 230

References to Law Report in which any relevant judgment is reported
n/a

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

1. An Order setting aside the Court of Appeal Order perfected on 27 September 2018;
2. An Order restoring the High Court Order perfected on 21 December 2016, requiring the Respondents to make discovery of the categories of documents set out therein;
3. Such further or other Order;
4. Costs of and incidental to the initial discovery application and all subsequent appeals thereto.

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

Not applicable.

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

Not applicable.

Are you asking the Supreme Court to:
depart from (or distinguish) one of its own decisions? Yes No

Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed: *Patrick V. Boland Sen*

(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court

The Four Courts,

Inns Quay,

Dublin 7

And/

Messrs Hayes,

Solicitors for the Defendants/Respondents,

Lavery House,

Earsfort Terrace,

Dublin 2.

Ref. LOR/RS

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.