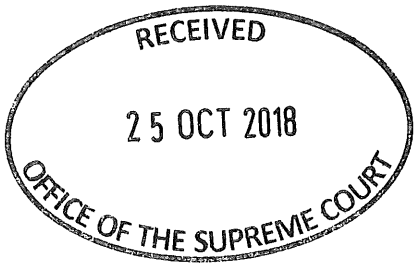
Appendix FF

No. 2



O. 58, r. 18(1)

SUPREME COURT

Respondents' Notice

Supreme Court record number		S:AP:IE:2018:000150

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

Gavin Tobin	V	Minister for Defence, Attorney General and Ireland

Date of filing	25 October 2018
Name of Respondents	Minister for Defence, Attorney General and Ireland
Respondents' solicitors	Hayes Solicitors
Name of Appellant	Gavin Tobin
Appellant's solicitors	Patrick V Boland & Son Solicitors

1. Respondent Details

Where there are two or more Respondents by or on whose behalf this notice is being filed please also provide relevant details for those Respondent(s)

Respondents' full name	Minister for Defence, Attorney General and Ireland

The Respondent was served with the application for leave to appeal and notice of appeal on date
11 October 2018

The Respondent intends:	
	to oppose the application for an extension of time to apply for leave to appeal
	not to oppose the application for an extension of time to apply for leave to appeal
x	to oppose the application for leave to appeal
	not to oppose the application for leave to appeal

x	to ask the Supreme Court to dismiss the appeal

	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court

	Other (please specify)

If the details of the Respondents' representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of Respondents' representation are correct and complete on notice of appeal:	Yes

Respondents' Representation

Solicitor:			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	

How would you prefer us to communicate with you?

	Document Exchange		E-mail
	Post		Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	

Postcode	

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
	Document Exchange		E-mail
	Post		Other (please specify)

2. Respondents' reasons for opposing extension of time

If applicable, set out concisely here the Respondent's reasons why an extension of time to the applicant/Appellant to apply for leave to appeal to the Supreme Court should be refused Not applicable.

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

Set out concisely whether the Respondent disputes anything set out in the information provided by the applicant/Appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute: Paragraph 1: In this action, the Appellant seeks an award of damages against the Respondents in respect of personal injuries which he claims to have suffered through allegedly being exposed to toxic chemicals whilst employed as an aircraft mechanic serving with the Air

Corps at Casement Aerodrome between January, 1989 and September, 1999.

Paragraph 2: According to the pleadings filed on his behalf, the Appellant worked as an aircraft mechanic serving with the Air Corps at Casement Aerodrome, Baldonnell. The Appellant claims that he finished Air Corp Apprentice School Training in July, 1991 and was assigned to the Engine Repair Flight Workshop (*"the ERF"*), a workshop area at Casement Aerodrome, for 10 weeks before being assigned to various other locations for a period of 30 weeks. The Appellant's case is that in the course of his employment as an aircraft mechanic at Baldonnell, he was exposed to toxic chemical fumes and that he was on one occasion subjected to a practice known as "tubbing" which involved being doused with chemicals by other Air Corps personnel. The only area within Baldonnell which the Appellant has in his pleadings identified as being a location at which he was actually exposed to toxic chemical fumes is the ERF. (see paragraph 9 of the Personal Injury Summons and paragraphs 9(a), 9(b) and 10 of the Replies to Particulars).

At paragraph 4 - the characterisation of the Respondents' response to the Discovery is best described as the Respondent consented to some categories, suggested limitations to others and objected with the others.

At paragraph 5,6 and 7 the characterisation of the Respondents' objection to the discovery is best described by reference to the schedule attached to the Notice of Appeal to the Court of Appeal. A copy of this Schedule is attached hereto. As can be seen from the Schedule, the Respondents objected to several categories on the basis that they were not relevant.

At paragraph 6 the Appellant's pleading regarding his exposure to toxic chemical and the location of such exposure is best considered by reference to the Personal Injuries Summons, the Replies to Particulars and the Judgment of Hogan J at paragraph 24-26. With regard to the alleged location of the Appellant's exposure to toxic chemicals, see above at paragraph 2(c.). The only location mentioned in his pleadings as being a place in which he was exposed to chemicals is the ERF. Contrary to what the Appellant contends in his Notice of Appeal, it is the pleadings and not what is said on affidavit that determine the parameters of the matters at issue in a case.

At paragraph 10 – The characterisation of the judgment of Hogan J. is best considered by reference to the Judgment itself rather than the purported summary of the findings set out which are not entirely accurate.

At paragraph 10 – It is disputed that at paragraph 26 of the Judgment 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. In direct contrast to the summary of the Appellant the Court held at paragraph 26 the *"... only pleaded case which the plaintiff has made concerning specific incidents of direct personal exposure to toxic chemical fumes concern occurrences at the ERF."* At paragraph 31 of the Judgment the Court held the Plaintiff ought to deliver interrogatories in respect of the chemicals listed by him in Replies to Particulars requesting the Minister to state *"whether these particular chemicals were in fact used during the course of the plaintiff's employment at the ERF and if so, to estimate the amount of the quantities that were so utilised in the ERF during the relevant period of the plaintiff's employment there."*

At paragraph 34 and 37 of the Judgment the Court noted the Respondents had consented by way of offer to make discovery but the Appellants did not accept that offer and pursued the discovery as originally sought.

At paragraph 50 the Court held that in cases where discovery is likely to be extensive, an order for discovery should not be made unless the applicant for discovery had first sought to obtain by other means the information which it was hoped to obtain by discovery. In particular, the court directed that interrogatories or a notice to admit facts should be served. Contrary to what the Appellant suggests in the Notice of Appeal, the court's decision was wholly in accord with existing legal principles and did no more than apply what the law currently provides for.

4. Respondents' reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the Respondent's reasons why:

The Respondents maintain that the decision in respect of which leave to appeal is sought does not involve a matter of general public importance; and it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court for the following reasons:

1. The grounds on which the Appellant relies in its application for leave to appeal appear slightly confused in that they focus on the merits of the proposed appeal and do not explain why it is that the proposed appeal involves a matter of general public importance and/ or why it is in the interests of justice that the Appellant be given leave to appeal.

2. The main basis of the Appellant's application for leave to appeal appears to be that the judgment of the Court of Appeal in some way made new law or altered what were understood to be the existing legal principles. This argument seems to derive from the fact that on several occasions in the Judgment, the Court of Appeal referred to the burdens which modern discovery practice has placed on the legal system. For example, at para. 12, Hogan J. remarked, *"In its own way, this appeal serves to illustrate the crisis – and there really is no other word for it – now facing the courts regarding the extent of burdens, costs and delays imposed on litigants and the wider legal system by the discovery process as it presently operates."* However, these sentiments were hardly new and several judgments of the Superior Courts contain observations at the extent to which the additional costs and delays which the discovery process act as an obstacle to the efficient and fair disposal of litigation. For example, in *Thema International Fund plc v HSBC International Trust Services* [2011] IEHC 496, Clarke J. referred to the need *"to tame the monster that discovery can now become"* (para. 2.5).

3. Although having its formal foundations in Order 31 and its predecessors, the rules relating to discovery are largely judge-made (witness Peruvian Guano). Unsurprisingly, the Courts' approach has evolved from time to time. The capacity to develop principles to meet changing circumstances is, of course, a defining and valuable characteristic of the common law. Changes in technology (photocopying; electronic documents/emails) have dramatically impacted on the burden and cost of discovery (and the cost and duration of civil proceedings). The Courts can and must respond to those challenges and it is quite mistaken to suggest that only the Rules Committee has the power to address them. In a series of decisions, the Court of Appeal have sought to define and delimit the proper parameters of discovery - see for instance BAM [2015] IECA 246, IBB Internet Services [2015] IECA 282 and Bohringer [2015] IECA 282. There are numerous High Court decisions to the same effect. It is wrong to regard the Court of Appeal's decision in Tobin as an outlier or as any kind of radical departure from the existing jurisprudence.

4. Leaving aside the understandable expressions of frustration at the impact of the discovery process in its current form on modern litigation, the decision which the Court of Appeal made in this case did no more than reflect the law existing law. The court held that it would not grant an order for discovery where there were alternative means of seeking the information in question by means other than discovery. At

paragraph 31 of the Judgment, Hogan J. held: *"In these circumstances the Court should not now make an order for discovery unless all other available options have been properly explored. It should be recalled that the plaintiff already knows – or, at least, seems to know – the chemicals and solvents which were used by him, since a list of these chemicals is listed by him at reply no. 9(b) and 9(d) in his reply to particulars. This would seem to be an obvious instance of where the plaintiff might be permitted to serve interrogatories on the Minister requesting him to state whether these particular chemicals were in fact used during the course of the plaintiff's employment at the ERF and, if so, to estimate the amount of the quantities that were so utilised in the ERF during the relevant period of the plaintiff's employment there."*

5. It has long been a requirement that as part of its obligation satisfy the court that discovery is necessary for the fair disposal of proceedings, the applicant must show that the information in question could be obtained by alternative means including by serving interrogatories or a notice to admit facts. For example in *Cooper Flynn v Raidió Teilifís Éireann* [2000] 3 I.R. 344 Kelly J. agreed (at p. 353.) with the following statement from the judgment of the English Court of Appeal in *Wallace Smith Trust Co v Deloitte* [1997] 1 W.L.R. 257:

> *"Disclosure will be necessary if: (a) it will give 'litigious advantage' to the party seeking inspection (Taylor v Anderton) and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g. interrogatories) or from some other source (see e.g. Dolling-Baker v Merrett) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (see e.g. Science Research Council v Nassé per Lord Edmund-Davies)."*

6. Kelly J. made a similar statement in *Anglo Irish Bank Corporation Ltd v Browne*:[1] *"Discovery ought not to be ordered where the information sought to be gleaned by it is capable of being obtained by an alternative less expensive and less time consuming method. In this regard, I have in mind the use of interrogatories."*[2] Similar comments were made by the Court of Appeal in *McCabe v Irish Life Assurance plc*,[3] where it was stated: *"Often the delivery of interrogatories can obviate the necessity for expensive and time consuming discovery..."*[4]

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[1] [2011] IEHC 140; unreported High Court, Kelly J., April 14, 2011.
[2] *Ibid.*, at p. 3.
[3] [2015] 1 I.R. 346.
[4] *Ibid.*, at p. 348.

7. The Appellant's suggestion at paragraph 2 that effect of the Court of Appeal's judgment would be to *"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"*, illustrates why there is a need to actually implement the existing legal rule that discovery should not be ordered if there is an alternative means of obtaining the information in question as the statement presupposes that in all cases, an applicant for discovery will serve interrogatories and will also seek discovery. The point of the requirement is that where interrogatories are served, it should in most cases not be necessary to seek discovery on the same points.

8. The Appellant asserts that the practice outlined by Hogan J. which should be adopted going forward, namely that no order for discovery should be made unless all other avenues are explored and have been shown to be inadequate, will delay the administration of justice and make it more expensive and time consuming. In the first instance the Appellant ignores that the Court considered the re-calibration and adjustment of discovery practices should relate to cases where the discovery sought is likely to be extensive. Secondly, there is no merit to the Appellant's assertions: it is clear that exploration of alternative avenues will not cause more expense or time, but will in fact accomplish the opposite. The very purpose of such exploration is to save time and costs, and exploring these avenues in order to avoid discovery will, in more cases than not, remove the need entirely for any discovery applications. Interrogatories are more direct, require an answer, under oath, and can be used as evidence, a process which shaves hundreds of hours of manpower and costs and obviates the need for wide ranging discovery. Indeed, as described by Fennelly J. in *Ryanair plc v. Aer Rianta Cpt* [2003] 4 I.R. 264, 277, and noted by Hogan J. in the Court of Appeal decision in question, "*The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.*" There are less oppressive, less time consuming and less expensive methods of obtaining the information concerned available to the Appellant and it is in the interests of all parties that such methods are explored before wide ranging discovery is sought.

9. The requirement that information sought by way of discovery is not otherwise available, such as through interrogatories, is not a novel point of law, nor does it constitute a departure from the settled jurisprudence of the Superior Courts and, as a

result, it is not an issue of legal importance. The Court of Appeal's reiteration of this point does not therefore amount to an additional requirement for applicants to meet nor does it amount to a *de facto* amendment of the Rules of the Superior Courts, as suggested by the appellant. Indeed, interrogatories and other avenues, such as a notice to admit facts, have always been available, more cost effective and less time consuming routes prior to discovery.

10. The suggestion at paragraph 3 that the Court of Appeal was wrong to hold that the State should not be treated differently to any other litigant is difficult to credit. In *LM v Garda Commissioner* [2015] IESC 81, the Supreme Court in recognized that the State, like other institutions which tend to frequently be the subject of litigation is particularly affected by the costs of making discovery. O'Donnell J. held, at para. 31:

> *"It is unrealistic not to recognise that much, if not all, substantial litigation is brought against parties which have the resources to meet any award of damages. It is also not uncommon for plaintiffs in such claims to be unable to discharge any award of costs from their own resources. Discovery, although available to all parties, will often bear more heavily on defendants against whom allegations are made than on the party making the allegation. Where a claim is extensive, and is brought by a plaintiff not able to satisfy any award of costs, and where discovery and consequent preparation of evidence is extensive and costly, the economic and commercial logic of settling such claims may become pressing."*

11. The discovery as ordered by the High Court would be incredibly burdensome on, and oppressive to, the Respondent. The uncontested High Court evidence was that it would take 10 members of staff diverted from their existing duties some 220 hours to review, locate and categorise the documents dating back to 1990, most of which are held only in manual form and stored in a variety of locations. In the context of this unduly burdensome task, Hogan J. was correct not to treat the State defendants any differently from other defendants. He accepted that they might be in a better position than others to secure the necessary resources, but his justification was entirely fair and correct at para. 17: *"this cannot in any sense take from the nature of the demands with which compliance with this request would impose. These are burdens which fall to be discharged by the taxpayers and just because this is a very large and diffuse body, their interests in ensuring an efficient system of litigation cannot nevertheless be overlooked."*

12. At paragraph 3, the Appellant refers to the decision of the Supreme Court in *AIB v Ernst & Whinney* [1993] 1 IR 375, which was an application for non-party discovery against the Minister for Industry & Commerce, and says that there is a divergence between the way in which the position of the State was treated by the Supreme Court in that case and by the Court of Appeal in this case. This is simply not correct. *AIB v Ernst & Whinney* an application for non-party discovery where under Order 31, Rule 29 RSC, the party seeking non-party discovery is required to indemnify the non-party with regard to the costs of making discovery. Further, the applicant defendant expressly undertook to pay the State's costs (see p. 386). *AIB v Ernst & Whinney* is not authority for the proposition that the State is not entitled to argue that the cost of making discovery in any particular case will be oppressive. On the contrary, *LM v Garda Commissioner* [2015] IESC 81 is authority for the proposition that the State should be heard on such an argument.

13. The Appellant asserts that there is now much uncertainty as to when a party should seek discovery and it is therefore within the public interest for legal practitioners to be able to properly advise their clients whether or not a discovery application is premature or not. There is again no merit in this assertion: not only is there no uncertainty as to when an application is premature or not, on the contrary, Hogan J. has provided very clearly within his judgment that in cases where the discovery sought is likely to be extensive, the applicant for discovery must first seek to obtain the information in question by alternative means, whether by serving interrogatories or otherwise.

14. At paragraph 6, the Appellant suggests that there *"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."* This is incorrect and there is no legal issue on this point. Under Order 31, Rule 12 RSC discovery may only be ordered of a category of documents which is relevant to the matters in issue in a case. What is or is not a matter in issue is determined solely by the pleadings. That this is so is a necessary precondition to the fair and just disposal of litigation because if it were otherwise, litigants would be able to introduce into proceedings issues which did not arise on the pleadings and had been introduced solely by way of an affidavit. The dictum of McCracken J. in *Hannon v Commissioners of Public Works* [2001] IEHC 59 to which the Appellant refers does not alter this fundamental principle of law. The full dictum reads: *"Relevance is not*

to be determined by reason of submissions as to alleged facts put forwards in Affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents.". This is not authority for the proposition that a litigant may for the purposes of an application for discovery introduce an issue of fact (in this case the alleged location of his alleged exposure to chemical solvents) which is not made on the pleadings.

15. In this case, the only pleaded case made by the Appellant was that he was exposed to chemicals and solvents in the ERF, a single location. The Appellant's affidavits seek to introduce thirteen additional locations into the case.

16. The fundamental principle that relevance must be determined by reference to the pleadings was reaffirmed by the Court of Appeal in *BAM PPP PGGM Infrastructure Cooperatie UA v National Treasury Management Agency* [2015] IEHC 370, where it was held that it was well established that discovery may not be permitted for the purpose of exploring for possible relevant material or for testing averments. In a discovery application, the issues that arise in the pleadings are to be ascertained first and relevance is to be determined by those issues. The court does not have the power to engage in an investigation of the parties' relationship or the circumstances that gave rise to the proceedings: *"It is not the case that the issues, as defined in the pleadings in an action, are merely some of the matters to be taken into account by the Court; they are the matters to be taken into account. The dispute between the parties is not to be considered as something outside the pleadings."* (para. 37)

17. Ultimately, the onus is on the Appellant to plead his case correctly, and discovery is to be determined on the basis of the issues which are raised on the pleadings in any particular case; here, the only issue the Appellant has pleaded in terms of location is that he was exposed to toxic chemical fumes whilst in the ERF. Indeed, Hogan J. considered this matter carefully in his judgment, clearly concluding at para. 26, *"It is true that in his replying affidavit the plaintiff stated that there were thirteen additional locations within Casement Aerodrome which "were regularly frequented by Aer Corps personnel". I repeat, however, that the only pleaded case which the plaintiff has made concerning specific incidents of direct personal exposure to toxic chemical fumes concern occurrences at the ERF."* Discovery should be limited only to the pleadings as they stand.

18. The Courts refusal to order the Respondents make discovery of training records pertaining to the applicant's special safety training in chemicals does not raise an

issue of public importance. The Order of the High Court made in respect of Category 5 and 6 was appealed by the Respondents. While the Respondents made an offer to the Appellant in respect of these categories this offer was not accepted and therefore in those circumstances it was open to the Court to refuse to order discovery in the circumstances of this appeal. The Court did not go beyond the relief sought in the appeal. Further, Hogan J. was clear and reasonable in his approach to the category of documents in question. While he believed that the plaintiff was entitled to ascertain the extend of the training with which he had been provided, the training documents sought were not necessarily intrinsic to the exercise. All that was required was whether he received training, its nature and whether it extended to toxic chemicals of the kind alleged. He was correctly of the view that the information could be ascertained by seeking leave to serve interrogatories without the need, at least in the first instance, for discovery of these categories.

**delete where inapplicable*

5. Respondents' reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondents' grounds of opposition to the ground(s) of appeal set out in the appellant's notice of appeal (Section 6 of the notice of appeal):

The Appellant has failed to set out any reason in fact or law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court.

Without prejudice to the foregoing, the Respondents will rely on the entirety of the Court of Appeal Judgment of Hogan J. at the hearing of the application for leave to appeal.

Response to Grounds 1 and 4

In accordance with settled caselaw, the onus is on the Appellant to plead his case correctly, and discovery is to be determined on the basis of the issues which are raised on the pleadings in any particular case; here, the only issue the Appellant has pleaded in terms of location is that he was exposed to toxic chemical fumes whilst in the ERF.

Response to Ground 2

The discovery as ordered by the High Court would be incredibly burdensome on, and oppressive to, the Respondent. The uncontested High Court evidence was that it would take 10 members of staff diverted from their existing duties some 220 hours to review, locate and categorise the documents dating back to 1990, most of which are held only in manual form and stored in a variety of locations.

Response to Ground 3

In the context of this unduly burdensome task, Hogan J. was correct not to treat the State defendants any differently from other defendants. He accepted that they might be in a better position than others to secure the necessary resources, but his justification was entirely fair and correct: *"this cannot in any sense take from the nature of the demands with which compliance with this request would impose. These are burdens which fall to be discharged by the taxpayers and just because this is a very large and diffuse body, their interests in ensuring an efficient system of litigation cannot nevertheless be overlooked."*

Response to Ground 5

There is no necessity for the court to consider the circumstances where an appellate court can go beyond the relief sought in an appeal. The Appellant did not accept the offer of discovery made by the Respondents in respect of the appellant's training therefore it was open to Hogan J. to consider the category as Ordered by the High Court and to refuse to grant same. He was clear and reasonable in his approach to the category of documents in question. While he believed that the plaintiff was entitled to ascertain the extend of the training with which he had been provided, the training documents sought were not necessarily intrinsic to the exercise.

Response to Ground 6

The requirement that information sought by way of discovery is not otherwise available, such as through interrogatories, is not a novel point of law, nor does it constitute a departure from the settled jurisprudence of the Superior Courts and, as a result, it is not an issue of legal importance and the Court of Appeal's reiteration of this point does not therefore amount to an additional requirement for applicants to meet nor a de facto amendment of the Rules of the Superior Courts, as suggested by the appellant.

Response to Grounds 7 and 8

It is incorrect to assert that the Court of Appeal erred in determining that interrogatories were suitable in the circumstances of the within proceedings, and that interrogatories were suitable to the nature of this case. There is no merit in this assertion: it is clear that exploration of such avenues will not cause more expense or time, but will in fact accomplish the opposite. Interrogatories are more direct, require an answer, under oath, and can be used as evidence, a process which shaves hundreds of hours of manpower and costs and obviates the need for wide ranging and oppressive discovery. On the basis of the content of the Plaintiff's pleading including his replies it is not accurate to suggest he does not have enough information to pose proper interrogatories.

Response to Ground 9

The Court of Appeal was entirely correct, for all the reasons outlined, to restrict the premature discovery application and confine such discovery to the matters that were relevant and necessary in the circumstances.

Name of counsel or solicitor who settled the grounds of opposition (if the Respondent are legally represented), or name of Respondent in person:

Maurice G. Collins SC, Andrew Fitzpatrick SC, Sarah Corcoran BL.

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claim the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

Are you asking the Supreme Court to:		
depart from (or distinguish) one of its own decisions?	☐ Yes	x No
If Yes, please give details below:		
make a reference to the Court of Justice of the European Union?	☐ Yes	x No
If Yes, please give details below:		

Will you request a priority hearing?``	☐ Yes	x No
If Yes, please give reasons below:		

Signed: Hayes.

Hayes solicitors
Lavery House
Earlsfort Terrace
Dublin 2

Please submit your completed form to:

The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the Appellant and each other Respondent within 14 days after service of the notice of appeal.

SCHEDULE

Schedule to Notice of Appeal to the Court of Appeal

THE COURT OF APPEAL

BETWEEN/

GAVIN TOBIN

Plaintiff/Respondent

-and-

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

Defendants/Appellants

Appellants' Appeal against High Court Order for Discovery dated 14th October, 2016

Schedule to Notice of Expedited Appeal

Category	Respondent's request	Appellants' offer	High Court Order	Grounds of Appeal
1.	The Safety Data Registrar maintained by the Defendants in respect of Casement Aerodrome for the period between 1st January 1990 and 1st September 1999 to include each safety data sheet in relation to each and every chemical being utilised at the said premises during the said	The Material Safety Data Sheets regarding the chemicals utilised at the ERF Work Shop between the period 1st January 1990 and the 1st September 1999.	As per Respondent's request.	The Learned High Court Judge erred in failing to accept the Appellants' evidence that the phrase *"Safety Data Registrar"* was not known to it and that as a consequence, it would be more appropriate to make discovery of *"Material Safety Data Sheets."* As a

Category	Respondent's request	Appellants' offer	High Court Order	Grounds of Appeal
	period.			consequence of the High Court Order, the Appellants are required to make discovery of a category of documents of which they have no knowledge and which will lead to no documents being discovered. The Appellants had argued that discovery of the documents in question should be limited to documents concerning *"the ERF Work Shop"* but the Learned High Court Judge ordered that discovery should concern the *"Casement Aerodrome"* generally. The *"ERF Work Shop"* is the location within Casement Aerodrome in which the Respondent alleges in his pleadings that he suffered exposure to chemicals and accordingly, discovery ought to have been

Category	Respondent's request	Appellants' offer	High Court Order	Grounds of Appeal
				limited this location. The Learned High Court Judge erred in failing to take account of this.
2.	All documentation, notes, records, reports, etc. listing or identifying any chemicals which were utilised by the Plaintiff in the course of his duties during the said period together with any documentation identifying the quantities and dates of purchase of such materials.	In place of discovery, Plaintiff should serve upon the Defendants a set of interrogatories requesting that the Defendants identify whether the chemicals identified at paragraph 9(d) of the Plaintiff's Replies to Particulars were in fact use in the ERF Work Shop during the specific periods of time identified by the Plaintiff.	As per Respondent's request.	The Learned High Court Judge erred in law in failing to limit the discovery to documents concerning *"the ERF Work Shop"* and instead ordered that discovery be made generally. This was in error because the actual location that the Respondent alleges in his pleadings the exposure to toxic chemicals took place was the ERF Work Shop and accordingly, discovery ought to have been limited to this category. Moreover, the Learned High Court Judge erred in failing to properly consider the oppressive burden that would be placed upon the Appellants in being required to make discovery in the

Category	Respondent's request	Appellants' offer	High Court Order	Grounds of Appeal
				terms sought by the Respondent. Captain Caitriona NicCaba swore two affidavits which outlined in detail that if the Appellants were ultimately ordered to make discovery in the terms sought, they would be required to engage ten members of staff to work for approximately 220 man hours to review, locate and categorise the documents in question. The Learned High Court Judge ought to have considered an alternative means of providing the Respondent with the information that he genuinely required to make his case which was less oppressive and more proportionate. Instead of ordering discovery in the terms sought by the Respondent, the court ought to have instead required the

Category	Respondent's request	Appellants' offer	High Court Order	Grounds of Appeal
				Respondent to serve interrogatories upon the Appellants as per the Appellants' offer.
3.	The Material Balance Records maintained by the Defendants at the said premises for each chemical including details of issue, return, consumption, spillage and each type of loss.	Consent.	As per Appellants' request.	
4.	Any safety statements and/or risk assessments relating to the duties which the Plaintiff was required to carry out in the course of his employment at Casement Aerodrome during the said period together with any documentation relating to any action that it deemed necessary and/or remedial actions which were undertaken following upon the risk assessments having been carried out.	Consent.	As per Appellants' request.	
5.	All documents, notes, reports, records, etc. pertaining to	All documents, notes, reports, records, etc.,	As per Appellants' offer but amalgamated with Category 6	The Appellants do not appeal against the decision of the

Category	Respondent's request	Appellants' offer	High Court Order	Grounds of Appeal
	general safety training and special safety training in chemicals which was provided to the Plaintiff in the course of his employment by or on behalf of the Defendants.	pertaining to special safety training in chemicals which was provided to the Plaintiff in the course of his employment by or on behalf of the Defendants.	below.	Learned High Court Judge to order discovery of documents pertaining to "*special safety training*" but excluding documents "*pertaining to general safety training.*" However, the Appellants' appeal against the decision of the Learned High Court Judge to amalgamate Category 5 with Category 6 and to order that the Appellants make discovery of documents "*pertaining to the provision of information with regard to the dangerous properties of the chemicals...*". The Learned High Court Judge erred in ordering that Respondent to make discovery in the terms directed because the category is not specific in the sense that it does not identify to whom it is said the information in question

Category	Respondent's request	Appellants' offer	High Court Order	Grounds of Appeal
				would have been provided. The Learned High Court Judge also erred in failing to consider that it followed from the allegations made in the Respondent's Personal Injury Summons that the Respondent's case is concerned only with information which was provided to him regarding chemicals and that consequently any documents which fell within this Category 6 as sought by the Respondent would automatically fall within Category 5 as originally offered by the Appellants. There was no necessity to place the additional burden on the Respondents by requiring them to make discovery in the terms sought in respect of Category 6 as well as Category 5 and the Learned High Court Judge

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				erred in adopting this approach.
6.	All documents, notes, records, reports etc., pertaining to the provision of information with regard to the dangerous properties of the chemicals utilised by the Plaintiff in the course of his employment.	Defendant objects to discovery of this category.	See Category 5 above.	See Category 5 above.
7.	All documents, notes, records, reports, etc. pertaining to the provision of personal protective equipment to the Plaintiff to be utilised by him in the course of his duties at Casement Aerodrome during the said period together with any documents, records, reports etc. pertaining to the instruction and/or training provided to the Plaintiff with regard to the use and operation of such personal equipment.	Consent.	As per Appellants' request but noted as category 6 in the High Court Order.	
8.	All documents, notes, records, reports, plans, technical data	Consent.	As per Appellants' request but noted as category 7 in the High	

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	etc., pertaining to the provision of ventilation within the work shop at Casement Aerodrome where the Plaintiff was required to carry out his duties to include design, specification, certification, installation, inspection, maintenance and replacement documents.		Court Order.	
9.	All reports, records, test results, etc. relating to any air monitoring and exposure monitoring and tests carried out by or on behalf of the Defendants in respect of the work shops where the Plaintiff was required to carry out his duties.	Consent.	As per Appellants' request but noted as category 8 in the High Court Order.	
10.	Any accident, incident or injury records pertaining to chemical exposure for the relevant period to include reports of any such accidents or injuries to the Heath & Safety Authority.	Appellants object to discovery of this category.	Any accident, incident or injury records pertaining to chemical exposure for the relevant period in relation to the alleged *'tubbing'* incidents whereby the Plaintiff was allowed to be doused with chemicals by other Air Corp personnel while in the	The Learned High Court Judge erred in concluding that discovery of this category was necessary for the fair disposal of the cause or action herein. The Respondent's case as it appears from his pleadings is

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			course of his duties, to include reports of any such accidents or injuries to the Health & Safety Authority. (Noted as category 9 in the High Court Order.)	that he was exposed to dangerous chemicals and was not properly trained or given proper equipment to ameliorate the risk that he would be exposed to dangerous chemicals and would be injured as a result. The Appellants made it clear that they were prepared to make discovery of documents relating to these issues and repeats its position that the issues recited above are the core allegations in the proceedings. The category sought by the Respondent concerned notifications of accidents and/or spillages to the Health & Safety Authority but documents within this category have no bearing upon the Respondent's core allegations. Therefore

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				discovery of the said category was not necessary for the fair disposal of the cause or action.
11.	All records, reports, incident reports, etc., pertaining to spillages of chemicals to include any documentation relating to the procedure to be adopted on spillages and the reason therefore.	Defendant objects to discovery of this category.	All records, reports, incident reports, etc., pertaining to spillages of chemicals arising out of the alleged *'tubbing,* incidents whereby the Plaintiff was allowed to be doused with chemicals by other Air Corp personnel to include any documentation relating to the procedure to be adopted on such spillages and the treatment thereof. (Noted as Category 10 in the High Court Order.)	The Appellants objected to discovery in the form originally sought by the Respondent by virtue of the fact that the Respondent's Personal Injury Summons does not contain an allegation that there were inadequate procedures in place for dealing with spillages of chemicals. The Learned High Court Judge ordered discovery of a more limited form than that sought by the Respondent and limited it to documents pertaining to spillages of chemicals arising out of alleged *"tubbing incidents"* whereby the Respondent was alleged to have been doused with chemicals by Air Corps

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				personnel. The Learned High Court Judge erred in ordering or determining that discovery of this category is necessary for the fair disposal of the cause or action herein. The Respondent himself is in a position to give evidence of the occurrence of all alleged "*tubbing incidents*" and does not require discovery of incident reports in order to be in a position to do so.
12.	All environmental impact records, environmental impact records, Environmental Protection Agency Emission Licences, EPA inspection records, reports or correspondence relating to Casement Aerodrome for the relevant period.	All environmental impact reports, environmental protection agency emission licences, EPA inspection records, reports or correspondence relating to chemical safety at the ERF Work Shop at Casement Aerodrome generated in the period 1st January 1990 to 1st	All Environmental Impact Reports, Environmental Protection Agency Emission Licences, EPA Inspection Results, reports or correspondence relating to Casement Aerodrome for the relevant period for the ERF work shop and the following locations: the Engine Repair Flight building and adjoining workshops, the Engine Shop,	The Appellants submitted that the discovery as sought by the Respondent should be limited: (a) geographically by limiting the same to documents concerning the ERF Work Shop; and (b) temporally by

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		September 1999.	the Non Destructive Testing Shop, the Machine Shop, the Basic Flight Training School Hangar, the Light Strike Squadron Hangar, the Transport and Training (shared with maritime) Hangar, the Air Support Company Signals (the Top Workshop), the Engineering Wing Hangar and adjoining workshops, the Spray Painting Shop, the Hydraulic Shop, the Sheet Metal Shop and the Welding Shop. (Noted as Category 11 in the High Court Order.)	limiting the discovery to documents generated in the period 1st January, 1990 to the 1st September, 1999. The Learned High Court Judge rejected this and erred in doing so. The discovery as sought by the Respondent ought to have been limited geographically to the ERF Work Shop because that is the only location identified in the pleadings at which the Respondent contends that he was exposed to dangerous chemicals. Further, the discovery ought to be limited to cover only the period identified at (b.) above because this is the period in which the Respondent contends that the chemical exposures occurred.

Category	Respondents request	Appellants' offer	High Court Order	Grounds of Appeal
13.	All records relating to the disposal of chemicals maintained at Casement Aerodrome to include documentation in relation to disposal methods, method statements, segregation and labelling of waste chemicals and the monitoring personnel involved in such activities.	Appellants objected to discovery of this category.	All records and documents relating to the Plaintiff's undertaking in tasks related to the emptying, cleaning and restocking of chemicals, vats or baths.	The Learned High Court Judge erred in ordering the Appellants to make discovery of this category because the category is phrased too generally, and is worded in such a way that it is not possible to identify with precision documents which would fall within its compass. Moreover, the Learned High Court Judge erred in failing to limit discovery of this category geographically to the ERF Work Shop and temporally to the period 1st January, 1990 to the 1st September, 1999.
14.	All standard operating procedures for use by personnel relating to the activities which they are required to carry out in the course of their duties during the relevant period.	Appellants objected to discovery of this category.	This category was refused.	Not applicable.
15.	The plans, specifications etc.	Consent.	As per Respondent's request.	

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	pertaining to the work shops at Casement Aerodrome where the Plaintiff was required to carry out his duties to include any documentation relating to the equipment, facilities and services to be used in such buildings and also the refreshment rooms and sanitary facilities available within and/or adjacent to the said buildings.		(Noted as Category 13 in the High Court Order.)	