

THE HIGH COURT

[2013] No. 9965 P

BETWEEN

DENIS O'BRIEN

PLAINTIFF

AND

THE REVENUE COMMISSIONERS, MICHAEL K BRENNAN AND ETÁIN CROASDELL

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 16th day of March, 2016

1. This is an application for discovery of documents pursuant to Order 31 Rule 12 of the Rules of the Superior Courts set out in the schedule to the motion.

Background

2. The plaintiff's claim is for damages for misfeasance of public office, breach of duty (including statutory duty), breach of confidence and breach of his constitutional right to privacy arising out of the alleged disclosure of documents and/or information concerning his private tax affairs by the defendants, their servants or agents to a number of persons in the "media".

3. The events which precipitated these proceedings are outlined in the Statement of Claim. The second defendant is an inspector of taxes, a revenue officer within the meaning of the Taxes Consolidation Act 1997 (as amended). The third defendant is a solicitor to the first defendant, a revenue officer within the meaning of the 1997 Act and a servant or agent of the first defendant.

4. As appears from the pleadings, during the tax year 1999/2000 the plaintiff disposed of shares in Esat Telecom in exchange for loan notes in BT Hawthorn Ltd. These notes were disposed of by the plaintiff to Chase Bank Plc. for a substantial consideration. The disposal gave rise to a significant potential capital gains tax liability for the tax year 2000/2001 in addition to liability on certain other capital gains arising on the disposal of other assets. An assessment was raised on 8th October, 2002 by an inspector of taxes in respect of capital gains tax arising from this disposal. This assessment was appealed to the Appeal Commissioner and a hearing took place on the 7th, 8th and 30th July, 2003. A decision was communicated to the parties on the 26th September, 2003 which allowed the plaintiff's appeal.

5. The inspector of taxes requested the Appeal Commissioner to state a case for the opinion of the High Court pursuant to section 941 of the 1997 Act. There was a delay in settling the terms of the Case Stated between the plaintiff and the inspector of taxes but it was signed by the Appeal Commissioner and stated to the High Court on the 16th December, 2011.

6. The question for determination by the High Court was whether having regard to the evidence given and the facts found by the Appeal Commissioner, the Commissioner was correct in holding that 6 Raglan Road, Ballsbridge, Dublin 4 was not a permanent home available to the plaintiff for the tax year 2000/2001 for the purposes of article 4.2 of the Ireland/Portugal Double Taxation Convention.

7. The case was heard by Laffoy J. on the 16th April, 2013 and judgment was delivered on the 6th September in favour of the plaintiff (*O'Brien - v. - Quigley* [2013] IEHC 398).

8. As set out in the Statement of Claim a number of articles were published in the Sunday Business Post, the Sunday Independent and the Sunday Times setting out various matters concerning or relating to the private tax affairs and/or information of the plaintiff. The article in the Sunday Business Post allegedly stated

"... court documents in relation to the O'Brien case had been obtained by this newspaper ...".

The Sunday Independent newspaper referred to matters relating to or referring to the Case Stated including material said not to have been opened at the hearing of the Case Stated before the High Court. The Sunday Times newspaper article is also said to have detailed matters concerning or relating to the private tax affairs and/or information of the plaintiff and accompanying the article were a number of photographs said to have been taken from the Case Stated. A complaint is made that the article published matters relating to evidence given during the in-camera hearing held before the Appeal Commissioner. This article also referred to the fact that

"a source involved in the case said disagreement over the wording of the "Case Stated" document was why it took so long to reach this stage".

9. A further article is said to have appeared in "The Story.ie" which published a copy of the Case Stated in its entirety. The article stated:

"Below is the Case Stated document from the High Court hearing between Denis O'Brien and Revenue for the claim of €57 million in capital gains tax. The story was reported by Justine McCarthy and Mark Tighe "who kindly shared the document with The Story.ie" in the Sunday Times ..."

10. The wrongdoing alleged against the defendants is set out at paragraphs 10 and 11 of the Statement of Claim as follows:

"10. As is apparent from the three articles as published in separate Sunday newspapers and the article published online by The Story.ie, the Case Stated had been provided to members of the press media. Furthermore, a person "involved in the case" had spoken to a person(s) of the press media in relation to matters concerning and/or relating to the Case Stated. The plaintiff is currently unaware of any further disclosures as may have been made by or on behalf of any of the

defendants herein, or such other persons, and reserves his rights in that regard.

11. Both the Case Stated and matters referred to therein, and the reasons as to why the Case Stated did not come on for hearing until it did, constitute private confidential information and material and/or tax payer information concerning and/or relating to the plaintiff."

11. It is claimed *inter alia* that the first named defendant owed a duty of care to the plaintiff not to disclose private confidential information and material and/or tax payer information concerning and/or relating to the plaintiff. The second and third defendants are said to owe "a commensurate" duty to the plaintiff as employees and/or servants and/or officers and/or agents of the first named defendant.

12. The plaintiff seeks damages for misfeasance of public office by the defendants because they knowingly or with reckless disregard or indifference acted and/or conducted themselves in a manner which was *ultra vires* their powers and "knowingly and deliberately imparted to unauthorised personnel purported details and facts as to the manner and fashion in which the Case Stated came to be agreed". It is alleged that in doing so an attempt was made to portray the plaintiff as being deliberately obstructive and failing to comply with his obligations in relation to the presentation of the Case Stated.

13. It is also alleged that if the defendants acted within their powers they "knowingly and/or with reckless disregard exercised their powers/authority in an improper manner and/or than otherwise than in an honest attempt to perform the functions of their office". They are also said to have acted in breach of statutory duties said to be imposed by sections 851(A)(2) and (3) of the Taxes Consolidation Act 1997 and/or in disregard of their obligations under the Customer Service Charter issued by the first named defendant that information given to the Revenue must be treated in confidence and would not be disclosed except as provided by law. A breach of the Data Protection Acts 1988 to 2003 is also alleged. An alternative plea of negligence and breach of duty is also made and a breach of the plaintiff's constitutional right to privacy.

14. Before these proceedings issued correspondence took place between the solicitors and the defendants and it was acknowledged that information set out in the articles referred to above was made available to journalists or "the media". This was made very clear at an early stage. The defendants regarded the release of a copy of the Case Stated and the written submissions furnished in the case to the Court as entirely proper. It was also accepted that journalists were informed that a delay had taken place caused by the time it took to agree the terms of the Case Stated between the parties. The hearing itself was in open court and the defendants maintain that the entire process was conducted in public in accordance with law as is evident from the judgment of Ms. Justice Laffoy which was delivered in public.

The Correspondence

15. On the 17th May, 2013 William Fry, solicitors on behalf of the plaintiff wrote to Ms. Croasdell, the solicitor who had carriage of the case on behalf of the first named defendant seeking an urgent review and explanation as to why "a copy of the Case Stated and related documentation" was provided by "your organisation, its agents, or counsel to journalists or any other third party". A review was also requested concerning the comments published in The Sunday Times relating to any disagreement over the wording of the Case Stated. At that stage the plaintiff was reserving his right to bring the matter to the attention of the High Court.

16. By return Ms. Croasdell replied that she had furnished a copy of the Case Stated to the journalists who attended the hearing. She stated that the document was a matter of public record and was read out in open court. She claimed that it was not a confidential document and rejected Mr. O'Brien's objections to its distribution noting "it is surely in everybody's interest that Court proceedings are accurately reported".

17. On the 23rd May, 2013 William Fry replied noting that Ms. Croasdell had furnished a copy of the Case Stated documents to journalists who attended the hearing. The letter requested that Ms. Croasdell deal with the "The Sunday Times article which stated that a source involved in the case said the disagreement over the wording of the Case Stated document was what delayed its progress". The letter sought the names and contact details of each journalist to whom a copy of the Case Stated was provided by the Revenue Commissioners, its servants or agents and/or any third parties to whom the Case Stated "or any other documents or information concerning this matter or our clients tax affairs have been furnished by the Revenue Commissioners its servants or agents". It also sought confirmation as to whether or not the Revenue Commissioners as a matter of practice provided copies of Case Stated documents to journalists in all cases and the source of the quote in The Sunday Times article. Confirmation was sought as to whether Ms. Croasdell or counsel or any other person representing the Revenue Commissioners spoke with journalists who attended the hearing about the case and if so, the details of such conversations.

18. By reply dated 30th May, Ms. Croasdell indicated that she was probably the source of the comment regarding the disagreement over the wording of the Case Stated following a query from The Sunday Times concerning the delay in proceedings made through the press office. She stated that she gave the press office the reply in the same terms as the statement quoted. She noted "it is a bland and factually correct statement".

19. William Fry solicitors, by letter dated 6th June, sought the legislative or other authority which allowed for the provision of court documents such as a Case Stated to third parties. On 10th June Ms. Croasdell wrote citing the decision of Hogan J. in *Allied Irish Banks Plc. v. George Tracey (No. 2)* [2013] IEHC 242 which specifically dealt with the right of public access to court documents and in which he held that the public were entitled to have access to documents which are opened without restriction in Court.

20. By letter dated 13th August, William Fry solicitors complained that their client was "firmly of the opinion that both the Case Stated document and the reasons as to why the Case Stated did not come on for hearing until it did constitute private confidential information and material and/or tax payer information concerning and/or relating to him". The letter also threatened proceedings as did two further letters to the defendants.

21. The Revenue solicitor Ms. Manning, by letter dated 28th August, 2013, rejected the assertion that the Case Stated document or the reasons why the case did not come on for hearing until 2013 constituted either private confidential information or tax payer information concerning or relating to Mr. O'Brien. It was not accepted that any private confidential information or tax payer information was revealed. A letter confirmed that the Case Stated and the explanation for the delay in the case coming on for hearing were communicated by Ms. Croasdell acting in her capacity as Assistant Revenue Solicitor representing the Revenue Commissioners.

22. By letter dated 18th December, 2013 Mr. Lee, solicitor advised William Fry solicitors that they had become aware that on the 17th April, 2013 in response to a request from a journalist the Revenue Press Office provided a journalist with a copy by email of the Revenue's legal submission in the case which had been previously opened to the High Court. The letter was brought to their attention "simply to ensure that the full factual picture is known". There followed further letters seeking and furnishing particulars.

23. A full defence was delivered on the 18th July, 2014 which outlined the details of the correspondence set out above. It was claimed that the Case Stated, the statement and/or the submissions in issue in the case were not confidential nor did they constitute "tax payer information" for the purposes of section 851(A) of the Taxes Consolidated Act 1997 and if they did, they ceased to be so when opened to the High Court in the course of the hearing of the Case Stated on the 16th April, 2013 in accordance with the administration of justice in public under article 34.1 of Bunreacht na hÉireann.

24. At paragraph 2(viii) it was claimed:

"... the Defendants and each of them at all times acted reasonably and in good faith in relation to the disclosures referred to above. Each of those disclosures was made in the good faith belief that it was not in any manner wrongful or improper. In particular as is pleaded below, the disclosure of the Case Stated occurred in circumstances where the defendants were advised by Senior Counsel (advice which they accepted and relied on) that, having regard to the fact that the Case Stated had been opened before the High Court in the course of the hearing of the Case Stated proceedings by Laffoy J. on the morning of 16th April, 2013, there was no impediment to providing a copy of it to the media and that the media were entitled to a copy thereof. The Submissions having also been opened in the course of the High Court hearing, the Defendants considered that the same position applied to that document".

The defendants relied upon the fact that the Statement of Claim disclosed no loss or damage to the plaintiff arising from the disclosures. Furthermore, they proposed to rely upon the fact that the hearing of the Case Stated took place in open court and was the subject of significant media interest and coverage and that in the judgment of the 6th September, 2013 the High Court made extensive reference to the contents of the Case Stated and the submissions made by the parties.

25. Of particular relevance is paragraph 11 of the defence which set out in detail and with some elaboration what had occurred on the 16th April, 2013 at the Four Courts in respect of the disclosure of information. Having set out the history and nature of the case paragraph 11 stated as followed:-

"11... (viii) The Case Stated was heard by the High Court (Laffoy J.) on 16th April, 2013. In the course of that hearing senior counsel who appeared on behalf of the Inspector of Taxes opened the Case Stated to the High Court and opened the submissions which were handed into the Court at the commencement of the hearing.

(ix) At all material times, the Case Stated and the Submissions were public documents and did not contain confidential information and/or material and/or tax payer information concerning and/or relating to the plaintiff. Further, or in the alternative (but without prejudice to the forgoing), the Case Stated and the submissions relating thereto became public documents and ceased to contain confidential information and/or material and/or tax payer information concerning and/or relating to the Plaintiff when they were opened to the High Court. For the avoidance of doubt, the Defendants plead that the Case Stated and Submissions were opened to the Court and/or are to be taken as have been so opened and even if they were not read out in their entirety to the Court.

(x) After the Case Stated and the Submissions were opened to the High Court and after the Court had risen at or about 1pm on 16th April, 2013, the Third Defendant was requested by journalists who were in attendance at the hearing for a copy of the Case Stated in circumstances where it was said that it was difficult to hear and to follow what was being said to the Court and they wished to ensure that the case was accurately reported. The Third Defendant informed the journalists that she would consider their request.

(xi) The Third Defendant subsequently discussed the journalists' said request with Senior Counsel who was appearing on behalf of the Inspector of Taxes at the said hearing and with the Second Defendant. Senior Counsel advised that in circumstances where the Case Stated had been opened to the High Court, the journalists were entitled to receive a copy thereof.

(xii) The Third Defendant was subsequently approached by journalists who reiterated the request for a copy of the Case Stated. Having regard to the advice of Senior Counsel and in circumstances where the defendants were entitled and/or required so to do, the Third Defendant furnished a copy of the Case Stated to the journalists.

(xiii) The Third Defendant was subsequently approached by another journalist who requested a copy of the Case Stated. The Third Defendant informed her that a copy of the Case Stated had been provided to one of her colleagues who had said that the journalists work as a pool and that he would furnish it to his colleagues.

(xiv) At or about 13:13 on 16th April, 2013 Michelle Carroll press and media relations manager from the Press Office of the first defendant received a request from a journalist working for The Sunday Times who was in attendance at the said hearing for a copy of the Case Stated which was opened to the Court that morning. Ms. Carroll also received a request for a copy of the Case Stated from Prime Time to ensure that the case was accurately reported. In the circumstances of aforesaid and in circumstances where it was stated that they had not received a copy of the Case Stated, the Third Defendant emailed an electronic copy of the Case Stated to Ms. Carroll who in turn furnished it to the journalist who had requested it.

(xv) Ms. Carroll was subsequently requested by a Sunday Times journalist to confirm when the Appeal Commissioner made his decision which was the subject of the Case Stated and why it took ten years for the case to be heard by the High Court. Ms. Carroll raised these requests with the Third Defendant who confirmed that the decision of the Appeal Commissioner was made in 2003, the Case Stated was largely agreed between the parties and it took a long time to agree it which information was then published as the Statement.

(xvi) On 17th April, 2013, Ms. Carroll received an enquiry from the Sunday Business Post in relation to the Submissions on behalf of the Tax Inspector. Ms. Carroll raised that inquiry with the Third Defendant who confirmed that, the Submissions having been opened in Court a copy could be provided as requested. In the circumstances aforesaid, the Third Defendant emailed a copy of the submissions to Ms. Carroll and Ms. Carroll subsequently furnished a copy of those submissions to the Sunday Business Post. By letter dated 18th December, 2013 the solicitors for the defendant informed the solicitors for the plaintiff of the foregoing. ..."

26. The principles relating to this application are well settled. As stated in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55 the focus is on whether documents may be of assistance to the applicant in respect of the proof or disproof of any matter in question in the action. As stated by Brett L.J. (at pages 62 to 63):-

"The documents to be produced are not confined to those, which would be evidence either to prove or disprove any matter in question in the action; and the practice with regard to insurance cases shows, that the court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidenced to support or defeat any issue in the cause.

The doctrine seems to me to go further than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may, not which must, either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences ..."

27. The test was subsequently applied by the Supreme Court in *Ryanair v. Aer Rianta* [2003] 4 I.R. 264. The Supreme Court held that the applicant must discharge the burden of proving that the discovery sought "is necessary for disposing fairly of the cause or matter". It is necessary to furnish the reasons why each category of documents is "necessary" or "required" for the fair disposal of the action. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced. It is "of no importance that a party is curious about the contents of a document or would like to know the contents of it he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it" (per Bingham MR in *Taylor v. Anderton* [1995] 1 W.L.R. 447 at p. 462, adopted and applied by Kelly J. in *Cooper Flynn v. Radio Telefís Éireann* [2000] 3 I.R. 344 at p. 354).

28. As stated by Fennelly J., in *Ryanair v. Aer Rianta* (at page 277):-

"The Court, in exercising the broad discretion conferred on it by O. 31 R. 12(2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant. These may, no doubt, include the possible service of notices to admit facts or documents. But there are two sides to litigation. The behaviour of the opposing party is relevant. That party may, for example, have made or may offer to make admissions of facts, and thus persuade a court that discovery on some issues is not necessary. This is, perhaps, axiomatic. Those facts will no longer be in issue. On the other hand, it is difficult to see how a party, such as the defendant in the present case, which contests all the relevant facts on the pleadings and has formally objected to the right of its opponent to resort to affidavit evidence, can plausibly ask the court to deprive its opponent of access to documents which will enable it to prove matters which it disputes."

29. As already noted, the applicant must show that it is reasonable for the Court to suppose that the documents contain information which may enable the applicant to advance his own case or to damage the case of his adversary. However, as stated by Murray J. in *Framus Ltd. v. CRH Plc.* [2004] 2 I.R. 20 (at pages 34 to 35) "an applicant is not entitled to discovery based on mere speculation or on the basis of what has been traditionally characterized as a fishing expedition". In the same case Murray J. adopted as a succinct expression of the principles applicable, the following statement by McCracken J. in *Hannon v. Commissioners for Public Works* (unreported, High Court McCracken J. 4th April, 2001):

"(1) The Court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the Court to order discovery simply because there is a possibility that documents may be relevant.

(2) Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward 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. It should be noted that order 31 rule 12 of the Rules of the Superior Courts specifically relates to discovery of documents "relating to any matter in question therein".

(3) It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other party's documentation is not permitted under the Rules.

(4) The Court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties."

30. It has been acknowledged that cases will occur, such as those involving fraud or unconscionable conduct, in which the normal considerations for the granting of discovery may be modified because the plaintiff may not be aware of the complete extent and particulars of the wrongdoing of the defendant because of its very nature. Discovery may be modified because a person alleging fraud may not be aware. In *National Education Welfare Board v. Ryan and others* [2008] 2 I.R. 816 the plaintiff alleged that the first defendant had received bribes or secret commission from the second defendant in order to overcharge the plaintiff for goods and services. The second defendant served a detailed notice for particulars on the plaintiff. The second defendant contended that the plaintiff had not only failed to comply with its obligations to set out allegations of fraud with sufficient particularity in the Statement of Claim but had compounded that situation by refusing to answer what it asserted was a reasonable notice for particulars. The second defendant applied to strike out the proceedings and the plaintiff brought a motion for judgment in default of defence against the second defendant. Clarke J. in ordering the second defendant to file its defence held that in the ordinary way the entitlement to seek discovery only arose when the issues between the parties had become clear as a result of the filing of a defence. Discovery was limited to materials or issues which arose on the pleadings. Accordingly, if the plaintiff who made an allegation of fraud was required to give full and exhaustive particulars prior to defence in a manner which necessarily narrowed the case, there would be a real chance that in a genuine case of fraud the perpetrator would avoid making discovery in respect of aspects of the fraud because the plaintiff would not have been sufficiently aware of the details of those aspects to plead them in an appropriate manner in advance. On the other hand the learned judge acknowledged that care had to be taken not to allow a party, by the mere invocation of an allegation of fraud, to become entitled to engage in a wide-spread trawl of the alleged fraudster's confidential documentation in the hope of being

able to make his case. Clarke J. stated:-

"12. Where ... a party, in its pleadings, specifies, in sufficient, albeit general, terms the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a *prima facie* case to that effect, then such a party should not be required, prior to defence and, thus, prior to been able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a *prima facie* case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial."

The learned judge noted that it was the very nature of fraud (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to defence (and thus discovery) would be to create a classic catch twenty-two: the case would be narrowed but discovery would be directed only towards the case as narrowed. In those circumstances aspects of the fraud or its consequences would as a result, never be revealed. This would be "an unjust solution".

31. It is submitted that this case has particular relevance to the dilemma faced by the plaintiff who contends that there may have been further disclosure of his tax affairs of which he is unaware and particulars of which he can have no knowledge until after discovery and unless discovery is granted in the terms sought, he will be deprived of the opportunity of pleading the full extent of the defendants' alleged wrongdoing. In a later decision of *Hartside Ltd. v. Heineken Ireland Ltd.* [2010] IEHC 3 Clarke J. in considering the issue of discovery referred back to the *National Education Board v. Ryan* decision and stated as follows:-

"The balance (to be) struck ... leads to the conclusion that a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before been giving access to their opponents relevant documentation. The need for such a restriction seems to me to stem from the undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information."

The Documents Sought

32. The plaintiff seeks discovery of eight categories of documents. They were initially sought in a letter dated 18th November, 2014. Following correspondence between the parties a number of amended requests for discovery were made. The documents as presently sought are set out in a letter of the 15th May, 2014. Apart from an agreement to make discovery of the documents set out in category 4 of the notice of motion, the defendants declined discovery in respect of the other categories sought save to the extent set out in a letter dated 2nd December, 2014. The categories now sought in this motion were set out in a memorandum furnished to the Court. The memorandum also sets out the extent to which the defendants are willing to make discovery in respect of each category of documents sought.

Categories 1, 2, 3, 4 and 5

Category 1

33. The plaintiff seeks:

"All documents created prior to 18th September, 2013 that record, evidence and/or otherwise refer to all communications howsoever effected as between the Defendants and each of them, and members of the media and/or any other third party concerning and/or relating to information and material relating to the Plaintiff forming the subject matter of the Case Stated including but not limited to, the disclosure of the Case Stated document, the Submissions and matters concerning the preparation of the Case Stated document including the statement."

Category 2

34. This seeks:

"All documents created prior to 18th September, 2013 that record, evidence and/or otherwise refer to all discussions, correspondence and/or consideration on the part of each of the Defendants individually and between them as to the disclosure of information and material relating to the Plaintiff forming the subject matter of the Case Stated, including, but not limited to, the disclosure of the Case Stated document, the Submissions and matters concerning the preparation of the Case Stated document including the Statement."

Category 3

35. This seeks:

"All documents created prior to 18th September, 2013 that record, evidence and/or otherwise refer to any advices, including but not limited to those advices of Senior Counsel as pleaded in the Defence, that the Defendants, or any of them, received as to the disclosure of information and material relating to the Plaintiff forming the subject matter of the Case Stated including, but not limited to, the disclosure of the Case Stated document, the Submissions and matters concerning the preparation of the Case Stated document including the Statement."

Category 4

36. The defendants are satisfied to make discovery of all documents in Category 4 sought by the plaintiff. These are:

"All documents created prior to 18th September, 2013 that record, evidence and/or comprise all correspondence as between the Defendants and the Plaintiff, his servants/agents, arising out of what is referred to in the Statement of Claim as "the 2003 Disclosure" i.e. the 2003 Correspondence pleaded in the Statement of Claim."

Category 5

37. This seeks:

"All documents created prior to 18th September, 2013 that record, evidence and/or otherwise refer to the policies and procedures of the Defendants in relation to the provision/disclosure of information and material and/or tax payer information to members of the media and/or other third party."

38. The defendants are happy to submit to an order of a more limited kind in respect of categories 1, 2, 3 and 5. In respect of category 1 the defendants are satisfied to discover all documents created prior to 18th September, 2013 that record, evidence or otherwise refer to all communications howsoever effected as between the Defendants and each of them and members of the media regarding the disclosure of the Case Stated signed by the Appeal Commissioner as stated to the High Court on 16th December, 2011, the Submissions to the High Court in respect of the Case Stated, the preparation of the Case Stated document and the statement set out in paragraph 8 of the Statement of Claim. The "statement" refers to the reference in the article in The Sunday Times of the 21st April, 2013 that a source involved in the case said that disagreement over the wording of the Case Stated document was the reason it took so long to progress. Similarly, the defendants are satisfied to discover documents in category 2 prior to 18th September, 2013 that record, evidence and/or otherwise refer to all discussions, correspondence and/or consideration on the part of each of the defendants individually and between them regarding the disclosure of the Case Stated document, the Submissions and the preparation of the Case Stated document together with the statement. The defendants will also consent to an order in respect of category 3 in respect of all documents created prior to 18th September, 2013 that record, evidence and/or otherwise refer to any advices that the defendants received regarding the disclosure of the Case Stated document, the Submissions and the preparation of the Case Stated document and the statement including but not limited to that of senior counsel as pleaded in the defence. The defendants will also discover all documents created prior to the 18th September, 2013 sought under category 5 that record evidence and/or otherwise refer to the policies and procedures of the defendants applicable to the disclosure of the Case Stated document, the Submissions, the preparation of the Case Stated document and the statement to members of the media.

39. The defendants decline discovery of documents relating to disclosure to "any other third party" apart from journalists or members of the media in respect of the Plaintiff's tax affairs relating to the Case Stated as claimed in Categories 1,2 and 5. It seems to me that in respect of the Case Stated, the Submissions and the statement referred to, that the broad category of persons defined as "members of the media" may not capture potential wrongful disclosure to one or more third parties who may be the source of the published information.

40. The defendants also decline discovery relating to disclosures of information and material relating to the Plaintiff that formed the subject matter of the Case Stated in addition to the Case Stated, the Submissions and the statement made in respect of the delay caused by time taken to agree the terms of the Case Stated though they have agreed to discover documents relating to any disclosure of information or material concerning the preparation of the Case Stated document. I am satisfied that the defendants' proposed formulation in that regard meets the requirements of discovery in this case.

41. The defendants submit that the additional documents sought under these categories are irrelevant and/or unnecessary for the fair trial of the action having regard to the pleadings in the case and the nature and extent of the plaintiff's claim.

42. The plaintiff submits that the more extensive discovery sought is also necessary to enable him to gain access to documents concerning other occasions upon which the defendants may have disclosed private confidential information and material and/or tax payer information concerning his case to journalists or other elements of the media. He believes that if this happened in the past it must have been done knowingly or with reckless disregard or indifference to his right to confidentiality or privacy and the statutory restrictions which apply to the defendants their servants or agents in the exercise of their powers. The plaintiff characterises such behaviour as unconscionable and submits that this type of information is unlikely ever to come to light in the absence of discovery. It is claimed that he will be unable to particularise more fully and establish the further breaches of his rights and the deliberate and reckless nature of such disclosure by the defendants in this case without access to documents concerning such past disclosures. It is said that discovery is necessary to ascertain the extent and nature such wrongful disclosure.

43. The plaintiff relies upon a previous exchange of correspondence in 2003 with the first named defendant as evidence of the relevance and/or necessity for the discovery sought. It is claimed that in 2003 the defendant improperly disclosed material and information concerning and relating to the plaintiff's tax affairs. A Sunday newspaper at the time threatened to publish an article concerning the plaintiff's tax affairs based, it was alleged, on information disclosed to the first defendant by the plaintiff. Though that article was never published, it is claimed that in correspondence between the plaintiff and the first defendant resulting in a letter dated 18th July, 2003, the Revenue Commissioners agreed that "any suggestion of a breach of confidentiality on the part of Revenue would indeed be a most serious matter". The letter also stated that the first defendant was satisfied, following an inquiry, that it was not the source of any alleged disclosure to the press concerning a tax appeal hearing by the plaintiff. The Chairman of the Revenue Commissioners confirmed that the plaintiff's rights under the Tax Payers Charter would be respected at all times.

44. The defendants deny that they were responsible for the alleged disclosure in 2003. In paragraphs 16(i)-(vi) of the defence it is claimed that a comprehensive investigation of the alleged disclosure was carried out at the time which concluded that Revenue was not the source of any disclosure. The first defendant outlined in detail to William Fry solicitors on behalf of the plaintiff the nature, extent and result of that inquiry and was thanked for the manner in which it addressed the plaintiff's concerns.

45. Though this background was pleaded at paragraphs 18 to 21 of the Statement of Claim it is not part of the present claim for damages. However, the plaintiff claims that the more recent disclosure is a breach of the assurance said to have been given by the first defendant to the plaintiff's solicitors that his rights under the Tax Payers Charter would be respected at all times by the Revenue and that a breach of confidentiality would be viewed as a serious matter. Of course, these are considerations to which any tax payer is entitled. The letter of 18th July does not confer on Mr. O'Brien's rights as a tax-payer a higher standard of protection than that applicable to others. His claim is for damages for a failure to observe rights to which he is entitled as is any other tax payer.

46. It is clear that no further allegations of wrongful disclosure of confidential information to journalists or sources in the media since 2003 has been pleaded by the plaintiff other than the specific matter now set out in the Statement of Claim. It is not suggested that there has been any further publication of such material in the meantime. The reference to other occasions, insofar as it exists in the Statement of Claim, occurs within paragraph 10 which states:-

"The plaintiff is currently unaware of any further disclosures as may have been made by or on behalf of any of the defendants herein, or such persons and reserves his rights in that regard".

47. The plaintiff does not allege that there has been further disclosure or publication of such materials. I do not regard this paragraph as a plea that on another or diverse other occasions the defendants, their servants or agents have made such disclosures to journalists, other members of the media or any other third parties. It is simply asserted that he is unaware of any such occurrence. I am not satisfied that the pleadings disclose any alleged facts that might provide a nexus between the asserted cause of action and

the claim for damages beyond the single incident referable to the 16th April, 2013. However, this paragraph is now said to supply the basis for a more extensive claim that goes beyond the events of that date. I regard this submission as based on speculation and assertions unsupported by reference to any identifiable event or fact alleged to have occurred.

48. It is said that the discovery sought may or is likely to reveal other occasions of wrongdoing by the first named defendant its servants or agents. However, in my view, what the plaintiff proposes in relation to discovery in these categories would amount to what has been referred to as a "fishing" or "trawling" expedition. There is no identifiable event since 2003 relied upon in the Statement of Claim or particulars furnished that might provide any basis for the assertions made. It is simply said that there is a possibility that the documents sought may be relevant. The suggested relevance is in respect of unspecified events of disclosure to journalists or the media which have never come to the plaintiff's or public attention. I am not satisfied that the plaintiff has reached the threshold of pleading in respect of these unspecified complaints such as to give the defendants or the Court a "reasonable picture" of any such events or how documents in relating thereto may advance proof of the occurrence of such events or may establish intention or recklessness on the part of the defendants in respect of the events of the 16th May. I am not satisfied that the plaintiff has passed "the limited threshold of being able to specify a legitimate basis for (his) case" such as to justify wider discovery than that to which the defendants have agreed in respect of these categories(subject to the amendment of same required in respect of third parties).

49. It is also important to note the admissions contained in the defence at paragraph 2 and confirmed in Ms. Croasdel's affidavit concerning the events of 16th April which are central to the plaintiff's case. The defence narrows the issues of fact between the parties in respect of that matter. Furthermore, the defendants have offered complete discovery in relation to documents related thereto. I am not satisfied that the plaintiff has established that the nature of the defendants' response to this case or indeed, to the concerns raised in 2003 gives rise to the same concerns of concealment or potential suppression of relevant material that arise in the cases of fraud or other cases of unconscionable behaviour as discussed in the authorities. The acknowledged response of the first defendant to the allegation made in 2003, the admissions contained in the defence, and the early and full explanation of those events, (whether they afford a full defence or not) satisfy me that the wider disclosure claimed is not relevant or necessary for the fair trial of the issues between the parties.

Categories 6 and 7

50. In category 6 the plaintiff seeks:

"All documents created prior to 18th September, 2013 that record, evidence or otherwise refer to any other requests received by the Defendants from members of the media requesting the disclosure of information and material and/or tax payer information, in respect of any person, including the Plaintiff, and the responses by the Defendants to those requests (i) for a period of four years ending on the date of the disclosure of what the Plaintiff alleges is private confidential information and material and/or tax payer information concerning and/or relating to the Plaintiff forming the subject matter of the Case Stated (16th April, 2013) and (ii) with respect to all cases that were stated to the High Court. The Plaintiff accepts that private confidential information and material and/or tax payer information with respect to persons other than the Plaintiff may be redacted in order to maintain the confidentiality of the information in question."

51. Category 7 seeks:

"All documents created prior to 18th September, 2013 that record, evidence or otherwise refer to any steps taken by or on behalf of the Defendants as a consequence of the 2003 Disclosure, or otherwise, with the objective of seeking to ensure insofar as is possible that information and material and/or tax payer information concerning the Plaintiff and/or any person would not be disclosed to any unauthorised third party including members of the media".

52. I am not satisfied that these categories refer to any documents which are relevant to the matters in dispute between the parties arising on the pleadings. Discovery of these documents is not necessary for the fair trial of the real issues between the parties. The categories are sought on the basis of a number of assertions and a presumption that the first defendant acknowledged that there was wrongdoing on its part in 2003 which is completely rejected. The inquiry in 2003 resulted in a determination that no wrongful disclosure had occurred and a reaffirmation of the plaintiff's entitlement to confidentiality in his tax affairs when dealing with the first named defendant. This has not been challenged. No claim for relief is made by the plaintiff in these proceedings in respect of the alleged events of 2003 as acknowledged in the replies to particulars furnished to date. I am not satisfied that the very wide nature of the discovery claimed which extends beyond the defined issues and the parties in this case over a period of four years in which no case of wrongful disclosure has been alleged in respect of the Plaintiff(apart from the single occasion on the 16th April 2013) or any other third party, could be justified on any of the established principles.

53. It is said that these categories are also sought because the defendants have relied upon a plea that they at all times acted in "good faith" at paragraph 2(viii) of the defence and that they are relevant and necessary to enable the Plaintiff to engage with this defence and undermine it. The proposition that there has been more extensive wrongful disclosure by the Defendants to third parties other than the Plaintiff and other than that pleaded is entirely speculative and is not reasonably referable or relevant to the pleaded issues. I regard this aspect of the application as wholly remote from the reality of the issues to be determined in respect of the plaintiff's claim. I am not satisfied that such documents may be relevant or necessary to prove the plaintiff's case or the fair trial of the action. The application for discovery in respect of categories 6 and 7 is refused.

Category 8

54. This category relates to the employment records of the second and third defendants. The discovery is said to be relevant and necessary because of the failure to admit that they were at all material times "public officers" and therefore liable for acts of misfeasance of public office. The Defendants declined discovery under this category. Paragraphs 7 and 8 of the defence admit that the second and third defendant are respectively an Inspector of Taxes and a Revenue Officer and a Principal Solicitor employed by the first defendant. Both hold employment under statute. However, no admission is made that they are "public officers" and it is claimed that discovery is necessary to establish that fact. It seems to me that to succeed the Plaintiff must establish that the two defendants were public officers and exercised power in that capacity. The definition of public officer is a broad one and I am satisfied that paragraphs 7 and 8 constitute an acceptance that the second and third defendants are public officers. I am not satisfied that discovery is necessary to enable the Plaintiff to establish the relevant proofs required on that issue and I did not understand the Defendants to be seriously disputing this aspect of the case.

Conclusion

55. The Court will direct discovery of the documents which the Defendants agreed to discover in respect of Categories 1, 2, 3, 4 and 5 in their letter of the 2nd December, 2014 with the addition that the discovery should also be in respect of documents concerning the disclosure of the Case Stated, the submissions and documents related to the preparation of the Case Stated and the statement

regarding the delay in agreeing the draft of the Case Stated to any third party under Categories 1, 2 and 5 . The application in respect of Categories 6, 7 and 8 is refused.