[2019] IEHC 720

THE HIGH COURT

[2001 No. 15119 P]

BETWEEN

COMCAST INTERNATIONAL HOLDINGS INCORPORATED, DECLAN GANLEY, GANLEY INTERNATIONAL LIMITED AND CGI LIMITED

PLAINTIFFS

AND

THE MINISTER FOR PUBLIC ENTERPRISE, MICHAEL LOWRY, ESAT TELECOMMUNICATIONS LIMITED, DENIS O'BRIEN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 1st day of November, 2019

Introduction

1. This is a ruling on three motions brought on behalf of the plaintiffs seeking orders for discovery by the first, fifth and sixth defendants (*"the State defendants"),* the second defendant ("*Mr. Lowry*"), and the fourth defendant ("*Mr. O'Brien").* The action against the third defendant has been abandoned.

2. The action is complicated. The motions were complicated to begin with and were further complicated, after the initial exchange of affidavits and after the motions were first listed for hearing, by the decision of the Court of Appeal in *Tobin v, Minister for Defence* [2018] IECA 230. Since the hearing of the motions that additional complication has been dispelled by the decision of the Supreme Court in *Tobin* [2019] IESC 57.

3. Although detailed written submissions were filed there was not, in the end, much between the parties as to the principles of law generally applicable to motions for discovery. There was, however, extensive argument as to the applicability of some of those principles to these motions, and as to the application of such of the principles as are applicable.

Background

4. On 2nd March, 1995 the then Minister for Transport, Energy and Communications, Mr. Michael Lowry T.D., announced a bid process for the award of the second GSM Mobile phone licence in Ireland.

5. A very complicated tender process was put in place. That process was divided into two phases. The object of the first phase, which has been referred to as the evaluation phase, was to select from among those who might bid for the licence the winning tender. The object of the second phase, which has been referred to as the licence award phase, was, as it was put, the interrogation of the winning bid and the making of a final decision as to the award of the licence.

6. The first phase saw the establishment of a project group; the development of an evaluation model; the advertisement for requests for proposals, which were required to address the prescribed evaluation criteria; and the appointment of external consultants, Andersen Management International (*"AMI"*) to conduct an evaluation of the tenders.

The evaluation criteria were weighted, and proposals were to have been subjected to qualitative and quantitative evaluation. An information memorandum which was circulated at the start of the process was twice supplemented. The evaluation model was twice amended.

7. The declared object of this process was that it should be impermeable to political influence.

8. What was called the evaluation model was developed and amended during the evaluation phase and the model was eventually finalised on 27th July, 1995.

9. There were six tenderers or bidders for the licence, including a consortium called the Cellstar Group, with which the plaintiffs were associated, and Esat Digifone ("*Esat*"), with which Mr. Denis O'Brien, through a company of which he was the principal shareholder, Communicorp Group Limited (*"Communicorp*), was associated.

10. On 25th October, 1995 the Minister announced that the second GSM mobile telephony licence would be awarded to the Esat Digicom Consortium.

11. On 6th May, 1996, at the end of the licence award phase, the licence was awarded to Esat Telecommunications Limited.

The plaintiffs' claims

12. The plaintiffs' claim is that the tender process was compromised and corrupted by Mr. Lowry, as the Minister, meeting with the bidders; advising or making suggestions to Esat Digifone, specifically Mr. O'Brien; disclosing to Mr. O'Brien important changes that would be made to the evaluation criteria; by the imposition of a cap of IR£15 million on the licence fee; by extending the closing date for receipt of tenders; by side-lining the project group; by intervening with the ESB to ensure that Esat would be permitted to erect masts on ESB pylons; and otherwise in a number of ways by interfering with the evaluation process to ensure that Esat Digifone would emerge as the successful bidder.

13. The plaintiffs allege that during the licence award phase, the Minister ignored the fact that ownership of Esat had changed since its tender was submitted; failed to give any consideration to the allegedly precarious financial state of Communicorp; and conducted the negotiations in the licence award phase on the basis that the licence would inevitably be awarded to Esat.

14. The plaintiffs' case is that Mr. O'Brien made, and Mr. Lowry accepted, a number of payments, directly or indirectly, which were made to influence the outcome of the process in each phase, or were made in recognition of the fact that he had done so.

The establishment of the Moriarty Tribunal

15. By order made by the Taoiseach on 26th September, 1997, pursuant to resolutions of both houses of the Oireachtas, a Tribunal was established under the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979 under the chairmanship of Mr. Justice Moriarty, to enquire urgently into and to make such findings and recommendations as it might think

fit in relation to inter alia whether any substantial payments had been made directly or indirectly to Mr. Lowry during any period in which he held public office, in circumstances giving rise to a reasonable inference that the motive for making the payment was connected with any public office held by him; and whether Mr. Lowry did any act or made any decision in the course of any ministerial office held by him to confer any benefit on any person making any such payment or procured or directed any other person to do such act or make such decision.

The proceedings

16. On 15th June, 2001, a day short of six years from 16th June, 1995 when the deadline for the receipt of tenders had been extended, the plaintiffs issued a plenary summons in linked proceedings against the same defendants (2001 No. 9288P) claiming a declaration that that decision was null and void and damages for alleged breach of statutory duty, misfeasance in public office, breach or procuring a breach of the Prevention of Corruption Act, 1906, fraud, deceit, breach of duty and breach of contract.

17. On 10th October, 2001, a fortnight short of six years after 25th October, 1995 when the announcement was made that Esat Digifone had won the competition, the plaintiffs issued the plenary summons in these proceedings, claiming a declaration that that decision was unlawful, null and void and to no effect, and damages in respect of the same alleged causes of action by reference to that later decision.

18. The plaintiffs' object or hope in issuing the summonses when they did was to forestall any issue as to whether the claims were statute barred. The summonses were not served until shortly before they would have expired and thereafter no step was taken until a statement of claim was delivered on 3rd June, 2005.

19. By notice of motion issued on 29th May, 2006 the State defendants applied for orders dismissing the actions on the grounds of inordinate and inexcusable delay. That application succeeded in the High Court, but the Supreme Court unanimously allowed the plaintiffs' appeals.

20. In separate judgments delivered on 19th October, 2012 [2012] IESC 50 the five members of the Supreme Court who had heard and decided the appeals gave their reasons for the decision which had been made on 17th July, 2012 to allow the appeals.

21. Denham C.J. identified 14 reasons for the conclusion that the case was unique, including that the facts on which the claim was founded were being investigated by the Moriarty Tribunal at the same time as the proceedings were contemplated and commenced; that the nature of the facts alleged were serious and rare; that the facts in such proceedings are of their very nature very difficult to expose and particularise; and that the case is complex.

22. The Chief Justice accepted the explanation offered by counsel for the plaintiffs that the plaintiffs were not in a position to prosecute the claim in any wholly informed way until they had been educated by the investigative hearings of the Moriarty Tribunal. Denham

C.J. noted that the plaintiffs had awaited the completion of the investigative stages of the Tribunal but not the report before delivering their statement of claim. She noted that the findings of the Tribunal were not admissible in civil proceedings but that the investigation had exposed information, facts, documents and witnesses of assistance to the plaintiffs.

23. Hardiman J. also emphasised the uniqueness of the case. The principal relevant unique factor, he said, was that the inquiry had produced evidence of a money trail which, if capable of being established in proceedings, would be extremely valuable to the plaintiffs, which evidence would not have been available to them by any other means. Hardiman J. referenced the observation by Clarke J. (as he then was) that the significant powers of compellability available to the Tribunal meant that there had been a significant degree of forensic disclosure from financial institutions and others.

The pleadings

24. As the investigation of the Moriarty Tribunal unfolded, the plaintiffs were better educated, and the statement of claim as originally drafted pleaded the plaintiffs' case in general terms. The publication of the report and findings of the Tribunal provided the plaintiffs with what they believe to be a detailed roadmap and on 28th October, 2014 (by leave of the High Court (Keane J.) given on 21st July, 2014) the statement of claim was substantially amended to plead the case previously made with considerable particularity and, as will be seen, to significantly expand on the case previously made.

25. The amended statement of claim sets out the plaintiffs' case as to what the tender and evaluation process should have been, and precisely how and when it was allegedly interfered with.

26. The summonses and statements of claim as issued and as originally delivered were directed, respectively, to the decision to extend the deadline for the submission of tenders and the announcement of the outcome of the selection process.

27. The statement of claim as originally delivered had set out particulars of alleged wrong doing on the part of the Minister under four headings:-

(a) The Minister compromised the integrity of the tender process by breaching the guidelines for communications with bidders,

(b) The Minister, his servants or agents, disclosed or caused to be disclosed confidential information in relation to the bid process to Esat,

(c) The Minister, his servants and agents, modified the terms of and unlawfully interfered with the tender process to favour Esat, and

(d) The Minister accepted improper payments made by Mr. O'Brien and/or Esat which payments were made to influence the outcome of the tender process and/or to reward the Minister for having intervened to insure the awarding of the licence to Esat.

28. The original statement of claim gave ten particulars of the allegation that the Minister had modified the terms of and unlawfully interfered with the tender process to favour Esat. In each case the particulars were of specific alleged interventions on the part of the Minister, for example, by the imposition of the cap of IR£15 million on the licence fee, the extension of the deadline for tenders, the modification of the evaluation methodology, the undermining of the substantive evaluation process, the failure to assess Esat's financial and technical capacity, and so forth.

29. In the amended statement of claim there is a potentially significant amendment to heading (c) by the deletion of the word "*to favour Esat",* so that the allegation now is that the Minister modified the terms of, and unlawfully interfered with, the tender process, generally.

30. The amended statement of claim adds six new particulars under heading (c). The first new particular, of which 25 elements are set out over five pages, is an allegation that the evaluation methodology was modified from that set out in the request for proposals and/or the evaluation model.

31. Immediately before the particulars of wrongdoing on the part of the Minister, the amended statement of claim pleads, further and alternatively and, significantly, without prejudice to the allegations of wrongful interference with the integrity of the process and corruption, that the tender process was vitiated by breach of the general principles of then European Communities law, now European Union law, including but not limited to the principles of equal treatment, non-discrimination, transparency, proportionality, objectivity and effective judicial protection; unlawful delegation; breach of the plaintiffs' legitimate expectations and breach of the plaintiffs' constitutional rights to protection of private property and due process.

32. The prayer to the amended statement of claim includes three new declarations: (1) a declaration that the State defendants conducted the tender process for the award of the licence in a manner that was not fair, impartial and free from corruption and infringed the plaintiffs' legitimate expectations in that respect, (2) a declaration that the tender process was vitiated by breach of the general principles of European Communities, now European Union, law, and (3) a declaration that the State defendants conducted the tender process in a manner that failed to respect their right to respect for, and protection of their rights to, private property and due process. The claim for damages is extended to include conspiracy, breach of legitimate expectation, and wrongful interference with the plaintiffs' constitutional rights.

33. In as much as the case now encompasses a general challenge to the award of the licence on public procurement grounds, it does not appear to me to be the same case, or a refinement or development of the case, which the Supreme Court allowed to proceed but I must deal with this discovery application on the basis of the case as it has been pleaded.

34. The other amendments to the statement of claim which I find to be particularly relevant for present purposes are that it is now alleged that following the conclusion of the tender

process and during the licence award phase, the Minister is alleged to have proceeded to award the licence to Esat notwithstanding a change of ownership of the consortium; to have conducted the negotiations in that phase on the basis that the licence would inevitably be awarded, despite the changed ownership and amendment of the tender submission and without consideration of whether it would be lawful to award the licence; and that the Minister failed to consider, adequately or at all, the alleged precarious financial state of Communicorp.

35. While it might be said that the prayer to the amended statement of claim does not include a claim for a declaration specifically focussed on the award of the licence on 6th May, 1996 and, perhaps, that there is some ambiguity in the repeated reference to *"the tender process",* it is quite clear that there is a challenge to, or complaint in relation to, the licence award phase and that plaintiffs' case is that the award of the licence, if not invalid, was wrongful.

36. I dwell to some extent on the pleadings and the amendments because it was submitted on behalf of the State defendants by Mr. Conleth Bradley S.C. firstly, that the action is not a technical challenge to procurement, and secondly, that the claims are confined to the "*tender process*", that is the evaluation phase. I cannot agree. It seems to me that the amended statement of claim clearly complains of wrongful interference in the licence award phase, for which there is, at the very least, a claim for damages. This, as will be seen, effectively disposes of the argument of the State defendants that 25th October, 1995 should be the cut-off date for discovery.

37. The defence of the State defendants starts with a number of preliminary objections. It is pleaded that the original, as well as the added, claims are statute barred; that the claims ought to have been made by way of application by way of judicial review, within the time limits prescribed by O. 84; that the decisions of 25th October, 1995 and 6th May, 1996 were informed or governed or predicated on a decision of the Government made on 2nd March, 1995, which has not been challenged; that any challenge to the award of the licence ought to have been brought by a statutory appeal; that the plaintiffs have been guilty of delay and/or laches; and that the plaintiffs have no entitlement to maintain the proceedings, specifically that the plaintiffs do not have the authority of the Cellstar Group, which submitted the tender.

38. I pause here to observe that the plea that any challenge to the award of the licence on 6th May, 1996 ought to have been by way of statutory appeal reinforces my conclusion that the amended statement of claim includes an attack on the licence award phase and the award of the licence.

39. The State defendants deny that the State is liable or responsible for the alleged wrongful acts or any acts or omissions of Mr. Lowry (if any), or that the alleged wrongful activities (if they occurred) were carried out by Mr. Lowry in his capacity as a Minister.

40. As to the facts, the State defendants' defence is a comprehensive traverse. The defence challenges the plaintiffs' description and characterisation of the tender process and licence

award phase; their participation in the "*Comcast*" tender; and seriatim the particulars of alleged wrongdoing on the part of the Minister. It is denied that the plaintiffs have suffered loss and damage, alternatively that the alleged or any wrongdoing was causative of the alleged or any loss. It is specifically denied that the plaintiffs would, in any event, have been successful in the competition.

The claim for discovery by the State defendants

41. By letter dated 24th October, 2016 the plaintiffs' solicitors wrote to the Chief State Solicitor requesting voluntary discovery of 22 categories of documents, said to be relevant and necessary for the fair disposal of the action and for saving costs, for the reasons set out in 27 pages.

42. An exchange of correspondence over the following months did not really advance matters. The focus of the State defendants' concern was the commercial confidentiality of the tender documents and the plaintiffs' entitlement to discovery by the State defendants of categories 15 – 22, which can be broadly characterised as the documents in relation to the money trail. There was a meeting between the solicitors for the plaintiffs and the solicitor for the State defendants, but no agreement could be reached.

43. The plaintiffs' motion for discovery against the State defendants was issued on 16th March, 2017 and is grounded on an affidavit of Ms. Fiona O'Sullivan solicitor, which mirrored, more or less, the letter seeking voluntary discovery.

44. In a letter of 20th April, 2017, the Chief State Solicitor addressed the substance of the request. The letter was highly critical of the request for voluntary discovery in a number of respects but engaged with the substance and, with a caveat to which I shall come, offered to make discovery by reference to a reformulation of categories 1 – 14, but declined to make discovery of the money trail documents.

45. The affidavit of Mr. Donal McGuinness solicitor, sworn in answer to the motion, mirrors, more or less, the letter of 20th April, 2017.

46. The first general objection to the request for voluntary discovery is that it is said to have sought a manifestly disproportionate and oppressive number of categories – 22 categories and 61 subcategories, 83 in all – many of which were said to be *"equally general or more general in nature*", and that there was significant duplication.

47. The criticism of the formulation of the categories and subcategories calls for close examination, but I can see no basis in principle for a complaint that the number of categories of discovery is oppressive. Complex litigation will give rise to myriad issues and the number of categories necessary will be dictated by the number of issues arising on the pleadings. The use of subcategories - in all cases said to be included in the category - can, as will be seen, be useful in identifying at an early stage the requesting party's perception as to what is or is not included in the category and can facilitate a discussion, and if necessary a ruling, as to what is or is not included.

48. In any event, as Mr. O'Moore observes, the substantive response to the request for discovery shows that Mr. McGuinness had successfully navigated the categories and subcategories.

49. A second general objection, or observation, by the State defendants was that discovery of documents emanating from the other competitors in the tender process gave rise to issues of commercial confidentiality. The State defendants in correspondence and in the replying affidavit suggested that this was a matter that required resolution: but did not suggest how it might be resolved. The plaintiffs, by their solicitors, had in correspondence offered an undertaking to maintain confidentiality by restricting distribution to their legal advisors and experts, subject to the possibility that the State defendants might later agree to, or the court might permit, wider distribution. This was later supplemented by an argument that the information is by now so old that it cannot be, or is unlikely to be, commercially sensitive.

50. At the hearing of the motions the issue of a confidentiality protocol had not been resolved but Mr. Bradley was confident that it could be, and Mr. O'Moore did not demur, and I proceed on that assumption.

51. A number of criticisms as to the precision with which the categories were formulated are best addressed when dealing, *seriatim,* with the categories sought by the plaintiffs and the reformulations proposed by the State defendants.

Legal principles

52. The general principles of law applicable to an application for discovery are well settled. The starting point is that the documents must be relevant to the issues disclosed by the pleadings. Secondly, the discovery must be necessary for the fair disposal of the action. As was explained by Fennelly J. in *Ryanair plc v. Aer Lingus cpt* [2003] 4 I.R. 264, the requirement of relevance does not mean absolutely necessary, but the court will consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. Thirdly, on the authority of *Framus Ltd. v. CRH plc* [2004] 2 I.R. 20, there must be some proportionality between the extent and volume of the discovery and the extent to which the documents are likely to advance the requesting party's case or damage the requested party's case. It is settled law that once the requesting party establishes relevance and necessity, the onus will be on the requested party to establish that the discovery would be disproportionate.

53. The parties were agreed that the principles were usefully summarised in the judgments of the Court of Appeal in *BAM v. National Treasury Management Agency* [2015] IECA 246 and *O'Brien v. Red Flag Consulting* [2017] IECA 258. *BAM* is also clear authority for the proposition that there are not special rules for different kinds of legal proceedings, specifically that no special rules apply to public procurement claims.

54. Counsel for the plaintiffs submitted that because this case raises issues of European Union law, it is necessary to ensure that the general principles derived from the Treaty on the Functioning of the European Union were observed in the management of the litigation,

namely, transparency and effective judicial protection. I do not believe that the necessity to ensure transparency and effective judicial protection is confined to cases which raise issues of European Union law.

55. It was submitted on behalf of the plaintiffs, citing *Dome Telecom Ltd. v. Eircom Ltd.* [2008] 2 I.R. 726, *Framus and in Ryanair plc v. Aer Lingus cpt,* that the court is entitled to take into account the particular challenge facing a plaintiff seeking to prove covert conduct. Much was made of the information asymmetry between the parties, the importance of contemporary documents in procurement cases, the importance of evaluation documents and tender submissions, and the importance of discovery in causation disputes.

56. I accept the general proposition that a plaintiff seeking to prove covert conduct may face particular challenges in formulating the categories of documents required, but this does not appear to me to be such a case. With the assistance of the Moriarty Tribunal report the plaintiffs have been able to spell out their case and to formulate the categories of discovery sought with reasonable precision.

57. While there was some debate in relation to the additional principles which the court was urged could be taken into account, the case was made and answered by reference to the core issues of relevance, necessity, reasonableness and proportionality and I will deal with it on that basis.

Interrogatories and notice to admit facts

58. I mentioned in the introduction that the motions had been complicated to some extent by the judgment of the Court of Appeal in *Tobin v, Minister for Defence* [2018] IECA 230. The motion for discovery by the State defendants was issued on 16th March, 2017. The exchange of affidavits was completed on 18th April, 2018 and the motions were given a hearing date for 15th January, 2019. On 27th November, 2018 the Chief State Solicitor wrote to the plaintiff's solicitors referring to the decision of the Court of Appeal in *Tobin* which had been delivered on 9th July, 2019. The plaintiffs were invited to discontinue the discovery motions and seek such information as they required by interrogatories and/or a notice to admit facts. The plaintiffs' solicitors initially took the position that the necessity for discovery could not be obviated by interrogatories or notices to admit facts but soon after served a notice to admit facts with 595 paragraphs and 566 interrogatories. In due course the defendants – to use an entirely neutral word – responded.

59. While the State defendants had made the case in correspondence that the plaintiffs should first exhaust the possibility of obtaining the information required by interrogatories or notices to admit facts, this was not followed through in argument. Mr. Sreenan, for the plaintiffs, took the simple position that the defendants' responses had not at all obviated the necessity for any of the discovery sought and said that he would answer any submission that might be made by the defendants' counsel that they had. As far as the State defendants are concerned there was no such submission and so the question never got off the ground.

60. Counsel for Mr. Lowry and Mr. O'Brien made some reference to the replies to the notice to admit facts and the answers to interrogatories, to which I will come in due course.

61. By way of general observation, many of the questions posed both by the notices to admit facts and interrogatories were compound leading questions which, to my mind, the plaintiffs could never have expected would be answered in a way that would obviate, or even reduce, their demand for discovery. The reality of this case, it seems to me, is that the plaintiffs' object in seeking discovery is to seek to put themselves in the way of formulating the questions and more or less compelling the answers that they hope will bring the court to the conclusions which were reached by the Moriarty Tribunal.

Disproportionate and oppressive

62. Since the application was heard, as I have said, the Supreme Court has delivered its judgment in *Tobin.* This re-establishes the orthodox position that the starting point, in relation to which the onus is on the requesting party, is whether the documents sought are relevant. Relevance is to be determined by reference to the pleadings. Once the documents are shown to be relevant, the default position is that production is necessary. If it can be demonstrated that compliance with the obligation would be particularly burdensome, that is a factor that the court can take into consideration. The onus of establishing that compliance would be a real problem is on the requested party, and the requested party must set out in reasonable detail why it is said to be so. To the extent that the objection is grounded on legal argument, the requested party must set out the argument. To the extent that the objection is grounded on fact, the requested party must put before the court the evidence which is said to establish the asserted facts.

63. In this case the State defendants have sought to make the case that the number of categories and subcategories sought is oppressive and disproportionate. I have dealt with that.

64. In the Chief State Solicitor's letter of 27th November, 2018 it was asserted that the discovery sought was manifestly oppressive and disproportionate, but no reason was given. The letter did refer again to the 22 categories and 61 subcategories - 83 in all - but there is no logical connection between the number of categories and the burden of complying with the request.

65. A recurring objection to the plaintiffs' formulation of the categories is that there should be a time limit. This argument is based, variously, on the proposition that any document coming into existence after the proposed cut off date could not be relevant, and that without a cut-off date the State defendants would need to make enquiries or searches over a very long period of time. I will deal with the relevance argument in addressing each of the disputed categories. As far as the apprehended burden of complying with an order for discovery without a cut-off date is concerned, it seems to me that the State defendants have simply not laid the ground in fact for any such argument. By contrast, for example, with Tobin there is no evidence as to what enquiries or searches it is apprehended might have to be made, or where, or by whom, or how long these might take. It is plain as day that it will take a great deal of time and work to complete the

discovery in this case. That is so even of the discovery which the State defendants have proposed. There is no evidence by which I could assess the extent to which the burden of making the discovery sought would be lessened by the imposition of a cut-off date.

66. I find that the State defendants have not discharged the onus of establishing that the discovery sought is disproportionate or oppressive.

Statute of Limitations

67. The plenary summonses in this case were issued in 2001 and were directed to events in 1995 and 1996. The case was substantially enlarged by the delivery of the amended statement of claim. The State defendants have pleaded that all causes of action are statute barred and that the relevant date for determining whether the additional claims are statute barred is the date of delivery of the amended statement of claim, which in both actions was 28th October, 2014.

68. Mr. Bradley argues that the court on this application should take into account the fact that the statute has been pleaded. The starting point, it is said, is the pleadings, and the limitation issue is evident from the pleadings. The court was not asked to decide whether the added claims are or are not statute barred but it was said that this was something that could be taken into account.

69. I cannot accept this argument. What it amounts to, it seems to me, is a suggestion that on a discovery motion the court should take a provisional view of the likely determination of this issue. That, it seems to me, must be wrong in principle. The object of the discovery sought is to put the plaintiffs in the way of proving the disputed issues of fact. Absent a motion for the determination of the statute issue as a preliminary issue of law, it will be a matter for the trial judge.

Moriarty Tribunal documents

70. The plaintiffs' object on this application is to gather evidence in the hope that they can prove their case at trial. They clearly hope and expect to capture not only the contemporaneous documents, correspondence and records which have been in the possession or power of the defendants since the time of the competition but also any material provided to any of the defendants in the course of the investigation by the Moriarty Tribunal.

71. One of the issues raised in correspondence by the solicitors for Mr. Lowry was whether such material as may have been provided to the parties to the tribunal of inquiry was provided on the basis of an implied undertaking of confidentiality that it would be used solely for the purposes of the inquiry and for no other purpose and would not be disclosed to any other person.

72. Mr. Lowry was represented until 2015 by Kelly Noone & Company solicitors and since April, 2017 has been represented by Fanning and Kelly solicitors. In a letter of 20th October, 2017 Fanning and Kelly observed that Mr. Lowry's former solicitors had in the past received certain documents from the Moriarty Tribunal on a strictly confidential basis. Those documents, it was said, had been treated as subject to the same implied

undertaking as applied to High Court discovery and so, it was said, could not come within the scope of a request for discovery.

73. Mr. Buckley, for Mr. Lowry, flagged the issue of confidentiality but suggested that it did not formally arise on this application.

74. There is no evidence before the court as to what documents were provided to such of the defendants as participated in the Moriarty Tribunal or the basis on which any such documents may have been provided. It was hypothesised that some documents might have been made available under cover of letters imposing confidentiality obligations and others not. It was suggested that confidentiality might be limited to such documents as were not deployed at public hearings.

75. In *Cork Plastics (Manufacturing) v. Ineos Compounds U.K. Ltd.* [2011] 1 I.R. 492, Clarke J. said, at p. 501:

> *"… I adopt the proposition stated in Matthews and Malek, Disclosure (3rd ed., 2007) that the existence of an obligation not to make collateral use (or an implied undertaking to the same effect) does not prevent the disclosure, as opposed to the production, of the documents concerned. The documents are in the 'possession or power' of the party concerned. It is the production which is not, without further action, possible. In those circumstances any documents in respect of which an appropriate obligation exists should be referred to in the affidavit of discovery concerned but, if desired, an appropriate objection to production can be made."*

76. There may or may not be issues down the road as to the production of documents but for the moment it is sufficient to note that it was not established by any of the defendants that the listing of any documents obtained from the Moriarty Tribunal would breach any confidentiality obligation.

77. I turn then to the categories.

State defendants

78. The plaintiffs seek discovery by the State defendants and by Mr. Lowry of the same 22 categories of documents. They seek discovery by Mr. O'Brien of 24 categories, the first 22 of which are the same as those sought against the State defendants and Mr. Lowry. There was a good deal of overlap in the arguments on each of the motions in respect of each of the categories.

Category 1 – The competing tenders

79. The plaintiffs ask for discovery of:-

> *"All documents evidencing submissions made by each of the tenderers in the process for the award of the Second GSM Mobile Licence whether submitted before or after the date for submission of tenders on or about 17th May, 1995 including but not limited to:*
>
> *(1) All documents evidencing the initial tender submissions furnished by the tenderers;*

(2) All documents evidencing clarifications provided by tenderers and/or any agent acting on their behalf;

(3) All documents evidencing notes of any oral presentations made by tenderers;

(4) All documents evidencing any communications between any tenderer and/or any agent acting on their behalf and the Minister and/or the Project Group and/or AMI and/or any agent acting on their behalf; and

(5) All documents submitted by any tenderer during the negotiations in the Licence Award Phase of the competition."

80. Mr. McGuinness in his replying affidavit observed that the capitalised term *"Second GSM Mobile Licence*" was not defined in the discovery letter or the amended statement of claim but said that he understood it to refer to "*the licence"* as defined at para. 10 of the amended statement of claim, which is the (uncapitalized) *"second GSM mobile phone licence"* . He was correct.

81. The State defendants are willing to make discovery of this category, limited to documents *"coming into existence before 25th October, 1995*" and limited to subcategories (1), (2) and (3).

82. The objection to subcategory (4) is that it goes far beyond the category itself and seeks general discovery, which is not permitted under the rules. The objection to subcategory (5) is that the licence award phase was a separate phase of the process and that no reason is provided to support the discovery of documents relating to the licence award phase.

83. I do not believe that the State defendants' objections to subcategory (4) is well founded. The category is directed to the engagement of all of the bidders in the evaluation phase. It seems to me that any distinction between subcategory (2) – clarifications by tenderers – and subcategory (4) – communications by and with tenderers – would be artificial. Subcategory (4) is a subcategory of category 1, and it is not a request for general discovery.

84. I accept the argument in relation to subcategory (5) that the tender process phase is separate to a licence award phase. The licence award phase is the subject of a separate category of discovery, to which I shall come.

85. The real issue in relation to this category is whether the discovery should be limited to documents "*coming into existence before 25th October, 1995".* The State defendants' insistence on the backstop date appears to be principled rather than practical. It is said, correctly, that 25th October, 1995 marked the end of the tender phase, but it is not suggested that a search for submissions made by any of the tenderers after that date would be burdensome or oppressive in practice. While it is the plaintiffs' case that the tender phase came to a conclusion by the announcement of Esat Digifone as the winner, the case is that the announcement was made before the process of evaluation had

concluded. It seems to me that it is by no means unreasonable to suppose that there was further communication from the unsuccessful tenderers after the date of the announcement.

86. Separately, I think that the plaintiffs' objection to a cut-off date by reference to the coming into existence of documents, rather than the event, is also well founded. As counsel submitted, a cut-off date by reference to the date on which a document came into existence would exclude a record made on the following day of the events of the critical date. I accept also that in a case of considerable controversy, as this was, important documents could come into existence long after the events recording or commenting on the process.

87. I propose to make an order for discovery in terms of category 1, including but not limited to subcategories (1), (2), (3) and (4) without a time constraint.

Categories 2 and 3 – the tender process

88. The plaintiffs seek discovery of: -

> *"Category 2 - all documents relating to the development and/or design of the tender process"* and;
>
> *"Category 3 - all documents relating to the development and/or design and/or drafting of the [Request for Proposals], and/or the Information Memorandum and/or the Supplemental Memorandum and/or the Second Supplemental Memorandum, and/or the Evaluation Model and/or any amendments thereto".*

89. The State defendants argue that category 2 is too vague and that it appears to directly overlap with category 3. A slightly revised category is proposed, limited to all documents coming into existence on or before 25th October 1995 "*evidencing*" the drafting of the request for proposals etc.

90. Again, the battle focussed on the insistence of the State defendants that the category be limited to documents coming into existence on or before 25th October 1995. Again, in my view, when it is recognised that the plaintiffs' case is that the process was allegedly subverted, and the project group and the consultants side-lined, it can be readily contemplated that documents may have come into existence after the date of the announcement.

91. As to the formulation of the category, I prefer "*relating to*" as proposed by the plaintiffs, to "*evidencing*" as proposed by the State defendants.

92. I will make an order for discovery of:-

> *" All documents relating to the design and/or drafting of the [request for proposals], and/or the Information Memorandum and/or the Supplemental Memorandum and/or the Second Supplemental Memorandum, and/or the Evaluation Model and/or the design and/or drafting of any amendments thereto".*

Category 4 – The cap on the licence fee

93. The plaintiffs ask for discovery of all documents relating to the imposition of a cap of IR£15 million on the licence fee.

94. The counterproposal is that discovery might be made of all documents coming into existence on or before 25th October 1995 "*recording the reasons*" for the imposition of the cap.

95. For the reasons given in relation to the other categories, I do not believe that the date constraint has been justified. Similarly, I see no justification for confining this category to whatever documents might have been generated recording the reasons for the imposition of the cap, rather than all communications and memoranda which might have preceded or post-dated the announcement of the award, from which the reasons or justification for the cap might be divined.

Category 5 – Extension of the date for tenders

96. The plaintiffs ask for discovery of all documents *"relating to the timelines in the tender process".*

97. There is substance to the State defendants' position that this is rather vague. The category is tied back in the reasons to para. 28(c)(ii) of the amended statement of claim, which is a plea that the Minister extended the closing date for the submission of tenders from 23rd June 1995 to 4th August 1995, with the object and effect of favouring Esat.

98. Counsel for the plaintiffs accepted the criticism of the formulation of the category but contested the argument that it might be subject to a time constraint.

99. I will make an order for discovery of a reformulated category 5 of *"all documents relating to the reasons for the amendment of the final date by which tender bids were to be lodged".*

Category 6 – Participation of the project group

100. The plaintiffs ask for discovery of:-

> *"All documents relating to the participation of the Project Group in the tender process, including but not limited to all documents relating to:*
>
> *(1) The selection of the members of the Project Group; and/or*
>
> *(2) The identification of the members of the Project Group; and/or*
>
> *(3) The qualifications and/or experience of the members of the Project Group; and/or*
>
> *(4) Instructions issued to the Project Group; and/or*
>
> *(5) Terms of reference and/or protocols pursuant to which the Project Group operated; and/or*

(6) Meetings attended by members of the Project Group; and/or

(7) Documents produced by members of the Project Group; and/or

(8) Communications between members of the Project Group internally; and/or

(9) Communications between members of the Project Group and the Minister and/or the Department and/or [the consultants]; and/or

(10) Communications between members of the Project Group and tenderers."

101. The counterproposal of the State defendants is that discovery might be made of all documents coming into existence on or before 25th October 1995 allegedly evidencing communications between members of the Project Group and the Minister in connection with the tender process, without subcategories.

102. For the reasons already given, I do not believe that the imposition of a time constraint is appropriate. If, as the plaintiffs' case is, the project group was side-lined, documents may have come into existence after the date of the announcement. Moreover, it seems to me that the proposed restriction of this category to communications between members of the project group and the Minister is unwarranted. The defence of the State defendants, as I have said, puts in issue the pleaded construct of the tender process, and it seems to me that the plaintiffs' case engages issues as to how the project group was supposed to conduct its business, as well as the manner in which it did so.

103. I do, however, take the view that subcategories (1), (2) and (3), which identify the selection, identification and qualifications and experience of the members of the project group are not relevant to the participation of the project group in the tender process, and have not been tied back to the complaints of irregularity set out in the amended statement of claim.

104. I will make an order in the terms of category 6 as proposed by the plaintiffs, save for subcategories (1), (2) and (3).

Category 7 – Participation of Andersen Management International

105. The plaintiffs ask for discovery of:-

"All documents relating to the participation of AMI in the tender process, including but not limited to all documents relating to:

(1) The selection of the representatives of AMI who would participate in the tender process; and/or

(2) The identification of the representatives of AMI who would participate in the tender process; and/or

(3) The qualifications and/or experience of the representatives of AMI who would participate in the tender process; and/or

(4) Instructions issued to the representatives of AMI; and/or

(5) Terms of reference and/or protocols pursuant to which AMI operated; and/or

(6) Meetings attended by representatives of AMI; and/or

(7) Documents produced by representatives of AMI; and/or

(8) Communications between representatives of AMI; and/or

(9) Communications between representatives of AMI and the Minister and/or the Department and/or the Project Group;

(10) Communications between representatives of AMI tenderers.

106. The State defendants' counterproposal is similar to that which was made for category 6, namely, that discovery might be made of all documents coming into existence on or before 25th October 1995 allegedly evidencing communications between members of Anderson Management International and the Minister in connection with the tender process.

107. For the reasons given in relation to category 6, I do not believe that the date constraint has been justified and that the revised formulation would be unduly restrictive. Similarly, I think that the selection, identification, qualifications and experience of the representatives of AMI are not relevant to their participation in the tender process and so subcategories (1), (2) and (3) are not correct subcategories of category 7. Nor is there any issue on the pleadings in relation to selection, identification or qualification of the AMI staff, as such.

Category 8 – Evaluation of tenders

108. The plaintiffs ask for discovery of all documents relating to the review and/or assessment and/or evaluation of tenders, including but not limited to all documents relating to guidelines and/or guidance and/or policies and/or instructions relating to same, to internal communications relating to same, to minutes of meetings relating to same and/or to reports relating to same.

109. The counterproposal is that the State will make discovery of all reports and minutes of meetings coming into existence on or before 25th October, 1995 evidencing the review and/or assessment and/or evaluation of tenders.

110. I accept the argument of the plaintiffs that discovery in relation to the review, assessment or evaluation of tenders would be of significantly limited value without the guidelines and policies by reference to which that review was to have been carried out.

111. This category is tied back to para. 28 of the amended statement of claim which introduced a challenge to the tender process on general public procurement grounds, which enormously expanded the nature of the challenge.

112. The suggested date constraint has not been justified.

113. I will make an order in the terms sought by the plaintiffs.

Category 9 – The qualifications of those involved in evaluation

114. The plaintiffs ask for discovery of all documents relating to the identification and qualifications of those involved in the evaluation of tenders.

115. The State defendants have declined this category on the grounds that it is irrelevant to the proceedings and therefore unnecessary. It is said that the reason supporting this category references a single specific pleading. In principle, I see nothing wrong with that.

116. The amended statement of claim is, as the State defendants say, very elaborate. The statement of claim as originally delivered was divided into paragraphs, numbered in Arabic numerals, sub-paragraphs identified by letters, and particulars, identified by small Roman numerals. The amended statement of claim introduces a number of new paragraphs, a number of new particulars, and a large number of elements in some of the particulars, which, like the paragraphs, have been numbered using Arabic numerals. It is quite difficult to follow.

117. The substance of the original statement of claim was abuse of public office and corruption. That plea was made in paragraph 15. That plea was immediately followed by a heading "*Particulars of wrongdoing on the part of the Minister*" under which followed four lettered subparagraphs, including (c), *"The Minister modified the terms of and unlawfully interfered with the tender process to favour Esat".*

118. The amended statement of claim introduced a new paragraph, immediately following what had been para. 15, which pleads further and alternatively, that the tender process was vitiated by alleged breaches of European Communities law, breach of the plaintiffs' legitimate expectations and constitutional rights to private property and due process. The new paragraph is followed by the heading *"Particulars of wrongdoing on the part of the Minister"*, and the lettered subparagraphs. Subparagraph (c) has been amended by the addition of the words "*servants or agents*" and the deletion of the words *"to favour Esat"*. Six new particulars were added to sub-para. (c), including what is now para. 28(c)(iii), that the evaluation methodology was modified from that set out in the request for proposals and/or the evaluation model. There are 25 elements to that, including at para. 28(c)(iii)(14) that *"the Qualitative Evaluation, and in particular, the Evaluation of the Financial Key Figures Dimension, was conducted without reference to and/or consultation of the necessary expertise."* That is the hook on which the plaintiffs hang this category.

119. The exquisitely detailed challenge to the procurement process is a million miles away from the unique and unprecedented case that survived the challenge of delay. The challenge to the expertise of the persons who made the qualitative evaluation, albeit that it is a plea in the alternative, sits very uneasily with the core case that the process was allegedly subverted and corrupted. I can easily understand the State defendants' view

that this is a fishing exercise, but the prohibition on fishing is directed to the use of nets rather than lines. With some misgivings I have come to the view that the category has been sufficiently tied back to the pleadings.

120. I add for completeness that I have reflected on the compatibility of allowing this category and my decision to exclude from categories 6 and 7 the selection, qualifications and experience of the members of the project group and the representatives of AMI who participated in the tender process. I think that this category focusses specifically on those who were involved in evaluation, rather than the members of the project group or the representatives of AMI generally, and for that reason is different.

Category 10 – Communications with Mr. O'Brien and others

121. The plaintiffs seek discovery of all documents relating to communications relating to the tender process and/or the award of the licence to Esat on 6th May, 1996 between the Minister and/or the Department with the plaintiffs and/or with Esat and/or with the fourth defendant and/or with Mr. Tony O'Reilly and/or with the chairman of the Persona consortium and/or with the then Taoiseach.

122. This category is tied back to the allegations in the statement of claim that the integrity of the tender process was compromised by the Minister meeting the chairman of the Persona consortium (which was one of the bidders); by the Minister meeting Mr. Denis O'Brien and suggesting that IIU, a corporation associated with Mr. O'Reilly, should become involved in the Esat Digifone consortium; that the Minister intervened in the substantial evaluation process to ensure that the bidder was selected otherwise than by reference to the recommendation of the project group; and an allegedly false representation by the Minister that the licence had been awarded to Esat because it had submitted the best bid.

123. The State defendants' counterproposal is that discovery would be made of all documents coming into existence on or before 25th October, 1995 evidencing information allegedly passed to Esat by the Minister concerning the change of the competition structure from a "*straight auction*" to a "*beauty contest";* information allegedly passed to Esat by the Minister concerning a letter of 20th July, 1995 confirming European Commission approval for the tender process; information allegedly passed to Esat by the Minister concerning the identity of the underwriter of the tender submitted by the Cellstar Group; and a rumour allegedly passed to the then Taoiseach, Mr. John Bruton T.D., by the Minister that there could be a conflict of interest in awarding the licence to another bidder, Irish Mobicall. The counterproposal is tied back to the particulars by reference to which the plaintiffs justify the request.

124. The date constraint, for the reasons already given, has not been justified.

125. The plaintiffs take issue with the formulation of what is offered by reference to *"information allegedly passed"* and a *"rumour allegedly passed*", which they argue is subjective and confers excessive discretion on the Minister to assess whether or not documents evidence information or rumours passing. No less, the plaintiffs argue that

the offer of discovery made is too closely focussed on the particulars of the alleged interference by the Minister and not on what they say is the substance of the dispute, which is the fairness, honesty and transparency of the tender process.

126. It seems to me that the plaintiffs' arguments are correct and that the complaint goes beyond the specific instances identified in the statement of claim to the overall honesty and transparency of the tender process and I will make an order in the terms sought by the plaintiffs.

Category 11 – The introduction of IIU Nominees to the consortium

127. The plaintiffs seek discovery of all documents relating to the entry of IIU Nominees into the Esat consortium. This is tied back to the allegation that the suggestion that IIU should become involved came from the Minister; that the Minister unlawfully procured and facilitated the entry of IIU into the consortium after the Esat Digifone bid had been submitted on 4th August, 1995; and that the Minister failed to undertake any or any adequate assessment of the financial standing of Esat or IIU before the licence was signed.

128. The counterproposal is that discovery might be made of all documents coming into existence before 25th October, 1995 evidencing the Minister's alleged involvement in respect of the entry of IIU Nominees Ltd. into the Esat consortium in the context of the tender process.

129. For the reasons already given, I do not believe that the date constraint is justified. Moreover, as far as this category is concerned, the plaintiffs' case is that IIU became involved during the course of the tender process and remained involved right up to the date on which the licence was signed.

130. In my view an examination or assessment of the extent to which Mr. Lowry was or was not involved in the entry of IIU Nominees into the consortium requires an overall picture of when and the circumstances in which that came about. The proposed alternative, I think, would leave too much to the judgment of the State defendants as to whether such documents as exist in relation to the entry of IIU do or do not evidence involvement on the part of the Minister.

Category 12 – The decision to select Esat as the preferred bidder

131. The plaintiffs ask for discovery of all documents relating to the decision to select Esat as the preferred bidder.

132. This is refused on the grounds that it duplicates category 8. I see the State defendants' argument but on close examination I do not believe that it stands up. Category 8 is directed to the evaluation of the tenders and if the decision to award the licence was made on the basis of such evaluation, the decision to select Esat would probably be captured by category 8. However, the plaintiffs' case is that the evaluation process was corrupted and side-lined and that the decision was not based on the evaluation.

133. I think that the plaintiffs have made out the relevance and necessity of this category.

Category 13 – The licence award phase

134. The plaintiff seeks discovery of all documents relating to the licence award phase.

135. This is refused on the grounds that it is said to be too broad, unsupported by sufficient reasons, and a fishing exercise.

136. The plaintiffs seek to justify this category by reference to the allegations at para. 28(c)(xiii),(xiv) and (xv) of the amended statement of claim that there was a change of ownership of the Esat consortium between the date on which the tender was submitted and the date on which the licence was awarded; and that the Minister conducted negotiations in the licence award phase on the basis that the licence would inevitably be awarded to Esat.

137. The State defendants point to the plea at para. 28(c), of which para. 28(c)(xiii),(xiv) and (xv) are the particulars, which is that the Minister unlawfully interfered with the tender process. The tender process, it is said, came to an end on 25th October, 1995 and the licence award phase was separate. So, it is said, anything done or not in the licence award phase could not be a particular of interference with the tender process. I see the point, but I think that it is pedantic.

138. The plaintiffs' complaints in relation to the licence award phase have been set out and this category engages with the pleadings. The category, I agree, appears to be very broad but the issue is whether the Minister did or did not do or fail to do what has been alleged during that phase.

139. I am satisfied that the plaintiffs have made out the relevance and necessity of this category.

Category 14 – Electricity Supply Board

140. The plaintiffs ask for discovery of all documents relating to contacts made by or on behalf of the Minister with the ESB in advance of the announcement of the results of the competition regarding whether or not Esat would be permitted to erect masts on ESB property.

141. The counterproposal is that the State defendants will make discovery of all documents coming into existence on or before 25th October 1995 comprising, or referring to alleged contacts made by or on behalf of the Minister with the ESB in advance of the announcement of the results of the competition for the purposes of allegedly ensuring Esat would be permitted to erect masts on ESB property.

142. There is some disconnect between the category as formulated by the plaintiffs and the pleading. While the category refers to documents relating to contacts made in advance of the announcement of the results of the competition, the pleading is that the Minister abused his position prior to the award of the licence by intervening with the ESB.

143. Again, the difficulty I have with the State defendants' argument is that I do not see the justification for limiting the discovery in relation to what was or was not done during a particular period to documents which came into existence during that period.

144. The State defendants' counterproposal suggested that the category should comprise documents "*comprising or referring to*" rather than *"in relation to*". Mr. Bradley was unable to say what the difference was. I do not understand what difference there might be between the words, but I prefer the plaintiffs' formulation of the category as documents *"relating to*" alleged contacts with the ESB rather than, as suggested on behalf of the State defendants, documents "*comprising or referring* to" alleged contacts.

145. To clearly tie the category back to the issue at para. 28(c)(xvi) of the amended statement of claim - that the alleged intervention was prior to the award of the licence - I will revise the category to "*all documents relating to contacts made by or on behalf of the Minister with the ESB prior to the final award of the licence on 6th May 1996 regarding whether or not Esat would be permitted to erect masts on ESB property."*

Categories 15 – 21 – The money trail

146. The amended statement of claim sets out seven alleged payments and benefits said to have been made or provided to Mr. Lowry by Mr. O'Brien and/or the Esat Digifone consortium and the roundabout route by which they are allegedly made. The plaintiffs seek discovery of all documents and records in relation to the alleged payments and benefits and list, as subcategories, the money trail identified in the Moriarty Tribunal report. The reasons given are that the payments were allegedly intended to, and did, influence the outcome of the evaluation and the conduct of the negotiations in the licence award phase.

147. The State defendants object to making any discovery under these headings on the grounds that they are not relevant and not appropriately sought against the State defendants. I cannot understand that argument. The plaintiffs' case is that the process was corrupted and subverted, that they have suffered loss and damage, and that the State is liable in damages. I think that I can properly accept that if what is alleged to have happened happened, the State was unaware of it at the time, but the entirety of the plaintiffs' case as to the making and acceptance of these payments and benefits is contested. These documents are at the very core of the case and I see no reason why an order for discovery by the State defendants might not be appropriate.

148. A relatively minor point is made that some of the subcategories seek discovery as to the ownership of companies which information, it is said, is readily obtainable from the appropriate registry. Given the nature of the allegations, I think that this argument is naïve. The registers will show who is registered as the owner. The registered owner may not be the true owner.

149. It is said that the request in some respects is oppressive and unnecessary because it relates to actors outside the Minister. I see nothing in this argument.

Category 22 – Investment of Advent International in Communicorp.

150. Part of the plaintiffs' case is that in the course of the tender process Mr. O'Brien misrepresented to the project group and to AMI the extent to which a company called Advent International had invested in, and was prepared to further invest in, Communicorp. Discovery is sought of all documents relating to the investment of Advent International in Communicorp on the ground that it is necessary to allow the plaintiffs to prove the falsity of the representations.

151. The State defendants answer is that these allegations have nothing to do with them.

152. I do not agree. The reasons given in support of this category are rather general, but part of the plaintiffs' case is that there was no, or no adequate, assessment of the financial strength and capacity of the Esat Digifone consortium, of which Communicorp was a member. It seems to me that this category goes to the issues as to the assessment of the financial capacity of Esat Digifone in the evaluation process, and whether the issue was revisited or not in the licence award stage.

The claim for discovery by Mr. Lowry

153. The plaintiffs ask for an order for discovery by Mr. Lowry of the same 22 categories as are sought against the State defendants.

154. Mr. Niall Buckley, for Mr. Lowry, indicated that his client was amenable to making discovery of categories 1 – 14 in such terns as might be ordered against the State defendants and tentatively suggested that the order against Mr. Lowry might be limited to such documents as are or would have been in his possession or power in his personal capacity. It was submitted (without an affidavit) that Mr. Lowry does not recall with precision individual documents to which he might notionally have had access in his capacity as Minister and that to require him to list and briefly describe in a second schedule all potentially discoverable documents which he formerly had in his possession would be unduly burdensome and unrealistic.

155. I accept that Mr. Lowry will not be able to list and briefly describe the entire Department file and that the files are by now upwards of twenty years old but in the meantime, starting from quite soon after the licence was awarded, the evaluation and the award of the licence has been the subject of considerable controversy, centred on Mr. Lowry. It seems to me that it is reasonable to suppose that Mr. Lowry may recall certain important documents which he will be able to identify. In my view the propositions that an order in the terms sought would on the one hand be unduly burdensome and on the other unrealistic, are contradictory.

156. As to categories 15 to 21 - which Mr. Buckley calls the UK transaction documents - it is argued that the plaintiffs in part have not taken sufficient account of the answers to interrogatories and in part have ignored sworn negative answers.

157. Mr. Buckley points, by way of example, to category 16, which seeks all documents relating to the payment of £147,000 into an account with Irish Nationwide (IOM) Limited on 21st October, 1996, and - by ten steps identified as subcategories - a complicated trail

starting with a transfer of £407,000 from an account in the name of Woodchester/Investec in the name of Radio Investments NV through Dublin to the Isle of Man ending up with the transfer of £147,000 into the Irish Nationwide (IOM) account. In a very useful table, Mr. Buckley has reproduced the relevant interrogatories and answers. In answer to the interrogatories, Mr. Lowry has admitted the transfer of £147,000 to the account, and that the account was held in his name but otherwise has answered that he has "*no direct knowledge*" of the various transactions.

158. The observation that the ten subcategories are not really subcategories, but separate categories is, I think, correct but the request has been carefully tied back to specific pleading. The issue is whether the payment into Mr. Lowry's account can be traced back to Mr. O'Brien and the admission of the eventual deposit is no help. It does not matter that Mr. Lowry is not alleged to have been directly involved in the various steps. The premise of the plaintiffs' case is that the several steps were devised to conceal the alleged link and in my view the documents sought are directly relevant to the case pleaded.

159. Mr. Buckley submits that it is not ordinarily appropriate to order discovery solely to allow the requesting party to challenge the accuracy of an opponent's affidavit. He refers to *Kilkenny Community Communications Co-op v. Broadcasting Commission* (Unreported, Supreme Court, 31st July, 2003) [2003] IESC 50 and the authorities referred to in that decision. I think that Mr. Buckley is probably correct in his submission that the principle is not confined to judicial review cases, but it is well established that because judicial review is concerned how the decision was arrived at as opposed to the merits, discovery is necessarily restricted. In my view the discovery now sought is not sought to establish whether the answers to interrogatories was correct – in the main the answer was that Mr. Lowry had no direct knowledge.

160. Mr. Buckley proposes a number of revised categories in which, broadly speaking, he seeks to remove such of the steps identified in the plaintiffs' request as are not demonstrably and strictly speaking subcategories of the general category. In my view, the plaintiffs have made out the relevance and necessity of the categories and the alleged steps.

161. Separately Mr. Buckley argues that the discovery of the UK transaction documents should be time limited to documents generated prior to 31st December, 2004. That date is suggested as a date which is said to reasonably post-date the tribunal's enquiries. It is submitted that a requirement for discovery beyond that date would produce starkly diminishing returns but would be significantly and unnecessarily onerous for Mr. Lowry. Specifically, it was said that an obligation to make discovery beyond that date would start to trespass on judicial review proceedings challenging costs decisions of the tribunal.

162. The fundamental problem with this argument is that it is not based on evidence. Mr. Lowry did not file an affidavit in answer to the application. In principle, the argument of diminishing returns hypothesises a good deal of work that will identify a small number of relevant and necessary documents. In principle, then, the imposition of a cut-off date would mean that the plaintiffs would not have access to relevant and necessary documents. Mr. Buckley suggests that there was an internal dynamic of submissions to

the tribunal in relation to costs and responses to the tribunal's provisional findings. It is not immediately obvious to me how the engagement in relation to costs might have generated relevant documents, but I think that Mr. Lowry's responses to provisional findings very easily could have.

163. As I have said in relation to the date constraint suggested by the State defendants, any date constraint must be referable to the events the subject of the proceedings rather than the date on which documents were generated or came into existence.

164. Apart from the issue or potential issue of confidentiality in relation to the documents obtained by Mr. Lowry from the Moriarty Tribunal, Mr. Buckley raised the question as to whether it would be counterproductive to *"pollute the discovery process*" by including tribunal documents. The argument was that there might be nothing surprising if a party had a particular document (Mr. O'Callaghan, for Mr. O'Brien gave the example the minutes of a project group meeting in July, 1995) from the tribunal, but it might be surprising if he had it independently. That it seems to me is something that can be simply dealt with by the deponent identifying in the schedule the provenance of the document.

165. I will make an order for discovery by Mr, Lowry in the same terms as the order against the State defendants.

The claim for discovery by Mr. O'Brien

166. On 15th May, 2006 a defence and counterclaim was delivered on behalf of Mr. O'Brien. This was not amended following delivery of the amended statement of claim, nor, it appears, have the plaintiffs delivered a defence to counterclaim. But no point was taken in argument that the pleadings were not closed.

167. The plaintiffs ask that Mr. O'Brien should be ordered to make discovery of 24 categories of documents, the first 22 of which are the same as those requested of the other defendants.

168. Mr. O'Callaghan makes five preliminary points. The first is that whether this is an exceptional case or not, the rules are the same for all cases. I accept that argument.

169. Secondly, it is submitted that the fact that the case is based on alleged covert acts is not relevant. As previously indicated, I agree. With the assistance of the Moriarty Tribunal report, the plaintiffs have pleaded their case with great specificity. The consequence of this, says Mr. O'Callaghan, is that the relevance, necessity and proportionality of the discovery can be determined by reference to those specific pleas and should be limited to the specific acts complained of. I find that on this point I disagree.

170. The plaintiffs' case is that the process of evaluation of the bids and the award of the licence was subverted and corrupted. The defendants' case is that it was not. In my view this engages an assessment of how the process ought to have been conducted and how it was conducted. To focus the categories too closely on the specific allegations would be to focus the searches on a quest for smoking guns. Take for example the

allegation that Mr. Lowry intervened to have the deadline for the submission of tenders extended. The issue, of course, is whether he did but it seems to me that the proper resolution of that issue will entail an examination as to why, generally, the deadline was extended. There may, I suppose, be a memorandum of instruction to extend the deadline but if there is, that may have come about on the suggestion of the project group or the consultants, or it may have been made in the teeth of strong opposition from the project group or the consultants. The significance of any such memorandum in resolving the specific issue will depend upon the context in which it came into existence. Or, for the sake of argument, the paperwork may not show that Mr. Lowry was involved or may show that he was not at all involved, in the decision.

171. In *Tobin* Clarke C.J., at para. 7, outlined the importance of discovery in our legal system. At para. 7.4 he said:-

> *"It is undoubtedly true that much discovered documentation does not find its way onto the evidence. But it would be easy to underplay the potential importance of discovery to confine its contribution to ascertaining the true facts to the documents which ultimately find their way into the evidence. Discovery can also influence the evidence presented in other ways, such as by ensuring that it may be unnecessary to go into much documentary material, precisely because the party which has discovered the documents in question will almost inevitably have to present a case in oral evidence which is consistent with the documentary record. It would be a significant hostage to fortune for a party to present oral evidence which seemed inconsistent with documents which that party had itself produced on discovery, unless some compelling reason for the divergence could be given. It might turn out to be wholly unnecessary to refer to the documents in question in evidence but that would not mean that those documents may not have had a significant effect on the overall run of the case."*

172. Mr. O'Callaghan's third general point is that the court should take into account the fact that the action follows the investigations of the Moriarty Tribunal which went on for many years and in the course of which the defendants were provided with documentation. An order which included this material, it is said, could have a potentially distorting effect. For example, if Mr. O'Brien had from the tribunal the minutes of a meeting of the project group from July, 1995 it would be innocuous, but if he had it otherwise, it might be explosive. This argument was also made on behalf of Mr. Lowry and in my view the issue can easily be dealt with by the deponent identifying, as part of the brief description, the provenance of the documents.

173. Mr. O'Callaghan argues that the plaintiffs have not demonstrated how the documents provided to Mr. O'Brien by the tribunal could confer any litigious advantage on them. Leaving aside the principle that the onus on the requesting party is limited to establishing relevance, I think that they have established that the documents would confer a litigious advantage. The tribunal documents will not by themselves prove anything, but they will allow the plaintiffs to identify witnesses and the evidence that those witnesses can give.

174. Mr. O'Callaghan raised the issue of the confidentiality of the documents obtained by Mr. O'Brien from the Moriarty Tribunal. The terms on which those documents were provided, it is submitted, mean that they cannot even be listed. This argument is based on an assertion in Mr. O'Brien's solicitors' response to the plaintiffs' solicitors' letter seeking voluntary discovery that Mr. O'Brien *"may hold or have held documentation provided to him by the Moriarty Tribunal during the course of the public and private phases of its investigation, such documentation was provided on terms of confidentiality for the purposes of the tribunal only and is not documentation which [he] can discover for the purposes of these proceedings."*

175. The plaintiffs' motion for discovery by Mr. O'Brien is grounded on a 47 page affidavit of Mr. Murrough McMahon, solicitor, which mirrors, more or less, the 41 page letter seeking voluntary discovery. The replying affidavit of Ms. Mary Tobin, solicitor, simply exhibits the letter which she wrote in reply to the request. There is no evidence of what documents were obtained by Mr. O'Brien from the tribunal, or when, or on what terms. Mr. O'Callaghan refers to a dictum of Finlay C.J. in *Ambiorix v. Minister for the Environment* [1992] 1 I.R. 277 at p. 286 where it was said:-

> *"As a matter of general principle, of course, a party obtaining the production of documents by discovery in an action is prohibited by law from making any use of any description of such documents or the information contained in them otherwise than for the purposes of the action. To go outside that prohibition is to commit contempt of court."*

176. The argument was not really developed. Nor, on the evidence, was there much basis on which it might have been developed.

177. *Ambiorix* was a decision of the Supreme Court on a claim of absolute executive privilege for documents created by senior civil servants for consideration by Ministers relating to the formulation of policy and legislative proposals. The *dictum* relied upon was by way of warning by the court, in dealing with an argument which had been made on behalf of the defendants that the information in the documents could be of very considerable commercial value to the plaintiff development companies. I do not understand the Supreme Court to have meant that the prohibition against making any use of any description of discovered documents is necessarily a prohibition on describing the documents. I do not see any inconsistency between what was said by the Supreme Court in *Ambiorix* and what Clarke J. said in *Cork Plastics.*

178. Mr. O'Callaghan's fourth point is that the stated reason for some of the categories is that the plaintiffs should have won the competition when in fact they came in sixth out of six in the competition. It is true that the reasons suggest that the documents are necessary to prove the likelihood of the plaintiff's tender having been successful but the headings in the particulars of special damage include loss of opportunity to be awarded the licence as well as loss of profits in respect of the operation of the licence. I observe in parenthesis that there is no evidence that the plaintiffs' bid came in last but in principle I cannot

accept that the court's approach to a discovery application should be coloured by a provisional view, or scepticism, of the plaintiff's prospects of success.

179. Mr. O'Callaghan's last preliminary point is to underline Mr. O'Brien's status in the competition. Mr. O'Brien was a shareholder in Communicorp, which was a shareholder in Esat Telco, which was a 40% participant in the Esat Digifone consortium. Esat Digifone was awarded the licence, which was later sold on to 3 Ireland Hutchinson Limited. Mr. O'Callaghan mentions these matters to give the court some understanding of what is in Mr. O'Brien's possession, power and procurement but says - correctly - that these are probably matters to be dealt with in his affidavit of discovery.

Category 1 – The competing tenders

180. It is submitted on behalf of Mr. O'Brien that the category sought is too broad, but no alternative formulation is proposed. The argument is that the category should be closely tied back to, and limited to, the identified instances of alleged wrongful interference: which was Mr. O'Callaghan's second general point.

181. For the reasons already given, I am satisfied that the formulation proposed by the plaintiffs has been justified. In any event, the burden of compliance will fall mainly on the other defendants.

Categories 2 and 3 – The tender process

182. Mr. O'Callaghan offers the same argument in support of his criticism of these categories, for which, again, no alternative formulation is proposed, and he supposes, perhaps correctly, that the only way Mr. O'Brien will have documents relating to any of the first fourteen categories is if he got them from the tribunal.

183. For the reasons given, I think that the plaintiff has established the relevance of whatever documents Mr. O'Brien may have or have had, including any he may have been given by the Moriarty Tribunal. The provenance of the documents can be dealt with in Mr. O'Brien's affidavit of discovery.

Category 4 – The cap on the licence fee

184. An alternative formulation is proposed of "*all documents relating to the letter sent from Commissioner Van Miert confirming the European Commission approval for the tender process dated 20th July, 1995 such discovery to be limited to documents generated before 27th July, 1995.*"

185. The plaintiffs counter that their case is based on the alleged communication of information concerning discussions with the Commission, rather than the letter. I think that the plaintiffs are correct. Secondly, it is said that there is no warrant for limiting the discovery to documents generated before a particular date. For the reasons already give, I agree.

186. Mr. O'Callaghan suggests that there were documents "*presumably*" at the tribunal discussing why the Commission decided to come up with the cap, and that such documents are irrelevant. I cannot agree. Part of the plaintiffs' case is that the cap

came about because of Mr. Lowry's intervention. That, it seems to me, puts the rationale for the cap squarely in issue.

Category 5 – Extension of the date for tenders

187. Mr. O'Callaghan argues that this category is too broad and that the discovery should be focussed on the extension of the date for tenders from 23rd June, 1995 to 4th August, 1995 and confined to any documentation evidencing a direction by the Minister that the timelines should be changed.

188. I have previously dealt with the issue of the vagueness of this category, and with the argument that it should be confined to documents evidencing a direction by the Minister.

189. As in the case of the other defendants, I will make an order for discovery by Mr. O'Brien of a reformulated category 5 of *"all documents relating to the reasons for the amendment of the final date by which tender bids were to be lodged".*

Category 6 – Participation of the project group

Category 7 – Participation of Andersen International

190. A similar reformulation is proposed for each of these categories as *"all documents relating to communications between members of the project group [or AMI]and the fourth named defendant limited to the period between the commencement of the competition and the date of award of the licence."*

191. The plaintiffs counter that the reformulation is again based on a failure to understand the reasons given in support of the request; that it would exclude communications by the consortium; and that it would exclude communications with the Minister, the Department, and AMI.

192. It seems to me that the position of Mr. O'Brien in relation to these categories is different to that of the other defendants. I accept that the role of the project group and AMI in the tender process is of great significance to the plaintiffs' case but what I do not see in the pleadings is any allegation that Mr. O'Brien interfered with the work of the project group or AMI.

193. Mr. O'Callaghan urges that what is relevant is any interaction or inappropriate communication between Mr. O'Brien and the project group or AMI. With the clarification, if needed, that the relevant communication or interaction is not limited to inappropriate communication or interaction, I am persuaded that the plaintiffs have not, as far as Mr. O'Brien is concerned, established the relevance or necessity of these two categories as formulated by them.

194. I accept, however, the plaintiffs' argument that the category should not be limited to Mr. O'Brien personally and should not be limited to the date on which the licence was awarded.

195. I will make an order for discovery by the fourth defendant of:-

"all documents relating to communications between the project group or any member of the project group and the fourth named defendant and/or the Esat Digifone consortium and/or any other member of the Esat Digifone consortium." and

"all documents relating to communications between AMI or any representative of AMI and the fourth named defendant and/or the Esat Digifone consortium and/or any other member of the Esat Digifone consortium."

Category 8 – Evaluation of tenders

196. It is said that this category is too broad, but no alternative is proposed. For the reasons already given, I will make an order for discovery in the terms sought.

Category 9 – The qualifications of those involved in evaluation

197. Mr. O'Callaghan objects that this category is hopelessly vague. For the reasons given, I do not believe that it is, but the plea on which it is founded has nothing to do with Mr. O'Brien and I do not believe that it is reasonable to suppose that Mr. O'Brien had any part in the selection of those who were involved in evaluation.

Category 10 – Communications with Mr. O'Brien and others

198. Mr. O'Callaghan acknowledges the relevance of any communications there might have been between Mr. Lowry and Mr. O'Brien but argues that it would be disproportionate and unnecessary to order Mr. O'Brien to make discovery of documents evidencing communications between the Minister or the Department and Mr. O'Reilly, or the chairman of the Persona consortium, or the Taoiseach. It is argued that the discovery should be limited to the period between the commencement of the competition and the date of award of the licence.

199. The plaintiffs' response implicitly, at least, seems to accept the substance of what is said as to communications between the Minister and the Department and anyone other than Mr. O'Brien. It is contended that there should be no time limit and (although this is how it was originally framed) that the category should not be limited to Mr. O'Brien personally. As I have previously said, I accept the plaintiffs' argument that important documents may come into existence later which may be an important record of events which occurred earlier.

200. I will make an order for discovery by Mr. O'Brien of:

"all documents relating to communications relating to the tender process and/or to the award of the licence to Esat Digifone on 16th May, 1996 between the Minister and/or Department and the fourth defendant and/or the Esat Digifone consortium and/or any other member of the Esat Digifone consortium."

Category 11 – The introduction of IIU Nominees to the consortium

201. There was engagement in correspondence in relation to this category. By shortly before lunchtime on the third day of the hearing, the disagreement had been confined to an argument about a comma.

202. There will be an order for discovery by Mr. O'Brien of:-

> *"all documents relating to any meeting between the Minister and the fourth named defendant in September, 1995, relating to the entry of IIU into the Esat consortium such discovery to be limited to the period between the commencement of the competition and the date of the award of the licence."*

Category 12 – The decision to select Esat as the preferred bidder

203. Mr. O'Callaghan argues that the category is very broad but says that his client has no documents relating to the decision to select Esat as the preferred bidder.

204. The documents are plainly at the heart of the case and whether Mr. O'Brien has or had documents within this category, and if he has or had, when and how they came to be in his possession or power is relevant.

205. There will be an order for discovery by the fourth defendant of all documents relating to the decision to select Esat as the preferred bidder.

Category 13 – The licence award phase

206. It is argued on behalf of Mr. O'Brien that this category is sufficiently covered by category 12 which, it is said, is the nub of the alleged wrongdoing.

207. I cannot agree. The plaintiffs justify their request by reference to the allegations there was a change of ownership of the Esat consortium between the date on which the tender was submitted and the date on which the licence was awarded, and that the Minister conducted negotiations in the licence award phase on the basis that the licence would inevitably be awarded to Esat, as well as the alleged meeting.

208. I will make an order for discovery by the fourth defendant of all documents relating to the licence award phase.

Category 14 – ESB

209. The position taken on behalf of Mr. O'Brien is that this category has nothing to do with him.

210. I cannot agree. The plaintiffs' case is that contact was made with the ESB by Mr. Lowry regarding whether Esat would be allowed to erect a mast on ESB property. If there was any such contact, it may have influenced the Esat Digifone bid. As far as the case against Mr. O'Brien is concerned, his state of knowledge of any contact, if there ever was any contact, is just as relevant as the issue as to whether there was, in fact, any contact.

Categories 15 – 21 – The money trail

211. In relation to the several categories of documents referred to in argument variously as the money trail and the UK transaction documents, Mr. O'Brien recognises that there are documents to which he has access, and which are relevant, and he proposes a number of revised categories.

212. These categories, as I have said, are at the core of the case. Armed with the report of the Moriarty Tribunal, the plaintiffs hope, by discovery, to put themselves in a position of

proving in court that there was a link between Mr. O'Brien at one end and Mr. Lowry at the other end of a number of payments and property transactions. There are seven such payments and transactions, and for each a list of steps by which, it is said, the connection can be established. Although the steps are expressed as subcategories, they are not. But the documents in the numbered paragraphs are in my view, clearly relevant and necessary for the fair disposal of the plaintiffs' case.

213. Mr. O'Brien's counterproposals focus on particular steps to the exclusion of others and on payments made from accounts in his name or controlled by him, at which point, if the suggested limitations were to be accepted, the trail - if there is a trail - would go cold.

Category 15 – US$50,000 to Fine Gael

214. The plaintiffs seek discovery of all documents relating to a payment of US$50,000 made on or about 29th December, 1995 by Telenor Invest AS (one of the members Esat Digifone consortium) to an offshore account in the name of a Mr. David Austin. This money is said to have been intended to have been a donation to Fine Gael, which Fine Gael said it would not take, which was paid anyway, and which was ultimately repaid. The plaintiffs' case is that this was a disguised payment, instigated by Mr. O'Brien, which was intended to influence the outcome of the tender process and/ or the award of the licence or as a reward to Mr. Lowry.

215. The category is followed by five steps which are (1) the initial transfer of US$50,000 into the account of Mr. Austin, (2) a fundraising function in aid of Fine Gael on 9 November, 1995, (3) a decision of Mr. John Bruton that Fine Gael should not accept a donation from Esat, (4) a payment by Mr. Austin to Mr. Frank Conroy of Fine Gael on 6th May, 1997 of the Irish pound equivalent of US$50,000, and (5) the repayment of the money on 2nd March, 1998 and the reasons for the repayment.

216. Mr. O'Brien's counterproposal is to make discovery limited to the alleged request to Telenor Invest AS to make the initial payment, limited to documentation generated before that date.

217. I have already set out my view on the limitation of categories by reference to the date on which the documents were generated.

218. In my view, if this payment was intended to be paid on to Fine Gael any documents in relation to the fundraising function in aid of Fine Gael on 9th November, 1995 would be captured by the category, as would any documents in relation to the later payment by Mr. Austin to Mr. Frank Conroy of the Irish pound equivalent of US$50,000, as would any documents in relation to the repayment said to have been made on 2nd March, 1998. I am in some doubt as to the relevance of the views of Mr. John Bruton as to whether or not to accept a donation from Esat but what tips the balance is the fact that the plaintiffs make the case that notwithstanding Mr. Bruton's views, the payment was later made.

219. I find that there is substance to the objection that the counterproposal is confined to the alleged request to Telenor Invest AS, as opposed to the payment and that the proposed cut-off date is not appropriate.

220. In relation to the next category, to which I shall come, a dispute as to whether what were said to be subcategories were truly subcategories, and as to whether the discovery should cover the transactions specified in the paragraphs, was resolved by the parties agreeing to the category.

221. I will make an order for discovery by Mr. O'Brien of:-

> *"all documents relating to the payment of US$50,000 on or about 29th December, 1995 by Telenor Invest AS to an offshore account operated by Mr. David Austin."*

222. That will capture all documents and records in the possession or power of Mr. O'Brien in relation to how the payment came to be made and how it came to be repaid.

Category 16 – Deposit of £147,000 with Irish Nationwide (IOM)

223. In addressing the State defendants' response to the request for the money trail documents I looked, by way of example, at category 16 which seeks all documents relating to the payment of £147,000 into a numbered account with Irish Nationwide (IOM) Limited on or about 21st October, 1998. This category is said to include, but is not to be taken as limited to, ten steps set out in numbered paragraphs which are:-

> *"(1) All documents relating to the transfer of £407,000 from an account with Woodchester/Investec in the name of Radio Investments NV through Allied Irish Banks, Dublin, to a bank account in Allied Irish Banks Isle of Man in the name of Diest Trading;*
>
> *(2) All documents relating to the ownership and/or control of Diest Trading;*
>
> *(3) All documents relating to the opening of an account in the Isle of Man in the name of Mr. Aidan Phelan on or about 10 July, 1996;*
>
> *(4) All documents relating to a cheque drawn on Mr. Phelan's Isle of Man account in favour of Mr. David Austin, also on or about 10 July, 1996 ;*
>
> *(5) All documents relating to a transfer on or about 19 July, 1996 of £100,000 from the account of Mr. Aidan Phelan to an account of Mr. David Austin in Bank of Ireland (Jersey);*
>
> *(6) All documents relating to a transfer on or about 26 July, 1996 of £100,000 from the account of Mr. David Austin to [a numbered] account;*
>
> *(7) All documents relating to the lodging of the cheque payment of £50,000 (specified above) to [the same numbered] account;*

(8) All documents relating to a bank draft obtained by Mr. David Austin on or about 16 October, 1996 funded by a debit to [the same numbered] account;

(9) All documents relating to the deposit in the Minister's account at Irish Nationwide (IOM) Limited; and/or

(10) All documents relating to the transfer of £147,000 from the Minister's account at Irish Nationwide (IOM) Limited to [the same numbered] account."

224. Mr. O'Brien's counterproposal is to make discovery in relation to the deposit of £147,000, including but not limited to (1) the transfer of £407,000 from the account with Woodchester/Investec Bank, through AIB Dublin, to AIB Isle of Man in the name of Diest Trading, (2) the opening of the account in the name of Mr. Phelan, (3) the cheque drawn on Mr. Phelan's account in favour of Mr. Austin, and (4) the transfer of £100,000 from Mr. Phelan's account to Mr. Austin's account in Bank of Ireland (Jersey).

225. Much was made of the fact that the counterproposal was to make discovery of documents in the "*possession or power*" of Mr. O'Brien, while the request had been for documents in his "*possession, power or procurement".* I do not believe that anything at all turns on this. I was reminded in argument that the rules had been amended to add procurement, but I do not believe this to have altered the established obligation of the deponent of an affidavit of discovery.

226. The real objection to the reformulation was that it omitted six of the alleged steps. Mr. Sreenan, in response, took the position that the category as originally formulated, without the numbered paragraphs, would capture the trail and it is accepted that there should be an order for discovery by Mr. O'Brien of:-

> *"all documents in his possession, power or procurement relating to the deposit of the sum £147,000 into account number 023/01/01505 with Irish Nationwide (IOM)"*

Category 17 – Purchase of property at Mansfield

Category 18 – Purchase of a property at Cheadle

Category 19 – Purchase of shares in Doncaster Rovers

227. The plaintiffs' case is that Mr. O'Brien funded the purchase by Mr. Lowry of a number of properties in England. By reference to the Moriarty Tribunal report they identify a number of payments and companies and the steps by which they hope to establish the connections.

228. Mr. O'Callaghan's reformulated categories focus on the payments, to the exclusion of the application of the payments or the purchases to which the plaintiffs allege they related. In my view it would be a considerable litigious advantage if the plaintiffs could find in the hands of Mr. O'Brien (otherwise than from the Moriarty Tribunal) documents in relation to the purchase of the properties and the application of the proceeds of the payments allegedly made by him.

229. As to the purchase of Doncaster Rovers Football Club, the counterproposal is to limit the discovery to four of plaintiffs' non-exhaustive eight steps and to impose a start date which is asserted, without evidence, to have been the date of acquisition of the shares, and an end date five years later. The date on which the purchase of the shares was completed is upwards of eight or nine months after the alleged date of the initial proposal to Doncaster Rivers and four months after contracts were exchanged.

230. Mr. O'Callaghan quite correctly argues that the order for discovery must be fashioned by reference to the pleadings, but the fact is that the steps identified in relation to each of the categories of discovery have all been set out in the amended statement of claim.

231. I find that the relevance and necessity of the categories sought has been made out and I see no justification for any of the restrictions proposed.

Category 20 – Payment of £150,000 to Mr. Phelan

232. Discovery is sought in relation to a payment of £150,000 alleged to have been made to Mr. Kevin Phelan by a company called Westferry on 22nd August, 2002.

233. The counterproposal is that discovery might be made of such documents as came into existence on or before 22nd August, 2002. I do not see the justification for restricting the discovery by reference to the date on which the documents came into existence, a fortiori a date so close to the alleged payment that it would exclude a receipt of the following day.

Category 21 – Payment of stg.£65,000 to Mr. Phelan

234. Discovery is sought by Mr. O'Brien in relation to a payment of £65,000 alleged to have been made to Mr. Kevin Phelan by a company called Vineacre Limited, of which Mr. Lowry was a director, in or about March or April, 2002 in relation to a property project in Wigan.

235. This is a payment alleged to have been made by Mr. Lowry, ostensibly for remuneration but the predominant purpose of which is said to have been to ensure that Mr. Phelan would not undermine Mr. Lowry's account to the Moriarty Tribunal of his involvement with the UK property transactions.

236. Mr. O' Callaghan says that this has nothing to do with his client. He points to the reason given in support of this category - which is that the discovery is necessary to enable the plaintiffs to demonstrate that Mr. Lowry made the payment - and then back to the statement of claim where it is alleged to have been made by Vineacre, of which Mr. Lowry (but not Mr. O'Brien) was a director.

237. On this issue, I think that Mr. O'Callaghan is correct. Absent any plea that Mr. O'Brien made the payment, the plaintiffs' reason falls apart.

Category 22 – Investment of Advent International in Communicorp.

238. The plaintiffs seek an order directing Mr. O'Brien to make discovery of all documents relating to the investment of Advent International in Communicorp.

239. Part of the plaintiffs' case is that in the course of the tender process Mr. O'Brien misrepresented the extent and nature of the investment of Advent International in Communicorp; the extent to which Advent International had committed to make further investment; and the voting rights attached to the shares in Communicorp. The alleged misrepresentations are said to have been made in the course of Esat Digifone's oral presentation on 12th September, 1995. This part of the plaintiffs' case is made at para. 29(a) and (b) of the amended statement of claim. It was not part of the case as originally pleaded and so was not addressed by Mr. O'Brien's defence and counterclaim which, as I have said, was not amended following delivery of the amended statement of claim.

240. Mr. O'Callaghan objects that the category is much too broad and suggests that it be confined to all documents relating to the representations made by Mr. O'Brien to the project group or AMI on 12th September, 1995.

241. In his answers to interrogatories and the notice to admit facts, Mr. O'Brien has admitted that he made the representations, so the issue is as to their alleged falsity.

242. It seems to me that the plaintiffs' case will be fairly met by an order for discovery by Mr. O'Brien of:-

> *"all documents relating to the accuracy of the representations made by Mr. O'Brien to the project group or AMI on 12th September, 1995."*

Category 23 – the commercial advantage arising from the award of the licence

243. The plaintiffs seek discovery by Mr. O'Brien of:-

> *"All documents relating to the commercial advantage arising from the award of the licence to Esat and/or ownership of the licence by Esat and/or the cost and/or the value of the licence and/or the margins and/or profits earned by Esat and/or any entity related to Esat and/or the fourth named defendant arising from the award of the licence to and/or ownership of the licence by Esat including but not limited to:*
>
> *(1) All audited annual accounts of Esat for each year of the ownership of the licence;*
>
> *(2) All documents relating to the management of the licence in each year of ownership of the licence;*
>
> *(3) All documents relating to the costs and outlays incurred in the operation and/or management of the licence in each year of the ownership of the licence;*
>
> *(4) All documents relating to numbers of staff employed in the operation and/or management of the licence in each year of the ownership of the licence,*
>
> *(5) All documents relating to decisions taken in respect of the management of the licence in each year of the ownership of the licence;*

(6) All documents relating to investments in Esat and/or in entities related to Esat and/or made to the fourth named defendant (sic.) in connection with the licence;

(7) All documents relating to the profits derived from the sale of the licence;

(8) All documents relating to the negotiations for the sale of the licence;

(9) All documents relating to the offers received by Esat and/or any entity related to Esat and/or the fourth named defendant for the purchase of the licence in each year of the ownership of the licence."

244. The plaintiffs' case is that all of these documents are relevant to their claim for damages and that discovery is necessary for the fair disposal of that part of their claim and for saving costs. Mr. O'Brien refuses to make the discovery sought and has not suggested any alternative wording.

245. In support of the request, the plaintiffs argue that Mr. O'Brien is uniquely well-placed to provide documents to reveal the value of the licence and that the documents sought will reveal the profits earned by Esat while it owned the licence and by the sale of it.

246. In a letter dated 7th March, 2017 to Mr. O'Brien's solicitors, the plaintiffs' solicitors set out the basis of their claim for damages. But for the matters complained of, it is said, the Cellstar Group would have been awarded the licence. The profits and gains of the members of the winning consortium, it is said, are the most appropriate benchmarks or proxies for the profits and gains which the members of the Cellstar consortium would have earned, subject to such adjustments as may be necessary and appropriate for any material differences between the business that the Cellstar consortium would have carried on and that carried on by Esat.

247. Mr. O'Callaghan argues that – apart from the fact that Mr. O'Brien no longer has any of these documents – the category is far too broad. The premise of the request, he says, is that if Esat had not won the competition and been awarded the licence, Cellstar would have; and that Cellstar thereafter would have made exactly the same profits and decisions as were made by Esat. The discovery sought, it is said, is unnecessary, oppressive and lacking in proportionality. The claim for loss has not been particularised and the plaintiffs should engage an expert to offer a view as to the value of the licence. It is argued that the plaintiffs do not need these documents to instruct an expert, and an expert would not need them to write a report. It is said to be a matter of public knowledge that the licence was later sold by Esat for €2 billion, and if the plaintiffs want to claim that they are at the loss of that, they can do so.

248. I have to say that I have some misgivings as to the relevance of this category. In principle, damages for breach of contract are to be assessed at the date of the breach. The plaintiffs' case is that by reason of the matters complained of they are at the loss of the licence, or perhaps the loss of the chance to have been awarded the licence, as of the

date on which the licence was awarded to Esat. The remedy for that loss, it seems to me, must be the value of the licence at the date upon which it was awarded and not its value years later. The evidence is fairly thin, but it appears to be common case that Esat exploited the licence for a number of years before selling it. Presumably when the licence was sold it was sold with the business which had been built up in the interim. If it was, the price achieved will have reflected the value of the business built up as well as whatever increase there may have been in the value of the licence by reason of changes in the market for mobile telephone services.

249. It seems to me that the plaintiffs and the Cellstar consortium must have had their own business plan to exploit the licence and develop their business if they had secured the licence. To date the plaintiffs have put no figures at all on their claim for damages. Mr. Sreenan argues that the best evidence of the value of the licence to the plaintiffs would be the value of the licence to Esat. I have to say that I am far from convinced of that. Moreover, I am far from convinced that the appropriate way to measure the value of the licence as of the date on which it was awarded is to work backwards from what it was worth (or what was paid for it) when Esat disposed of it. I accept, of course, that the licence was valuable to whomever it might be awarded but it seems to me that what the plaintiffs allegedly lost was the value which the licence would have been to them, rather than what it turned out to have been worth to Esat.

250. Mr. Sreenan argues that this category of discovery would be of litigious advantage not only in formulating the plaintiffs' claim for damages but in dealing with any challenge to the construct of the claim for damages. I can easily see the advantage to the plaintiffs in formulating their claim of a clear understanding of how Esat exploited the licence, but I am not at all sure that this would be a reliable indication of what the plaintiffs might have done with the licence had they been awarded it. The plaintiffs' declared intention is to make such adjustments to Esat's figures as may be necessary or appropriate having regard to material differences between the business it would have operated and that operated by the winning consortium. If this is a correct approach to the assessment of damages, it does not strike me as particularly fair that the plaintiffs should be armed with detailed information as to Esat's business model before declaring what their business model would have been. With the best will in the world it would be difficult for the plaintiffs to dispassionately make the case that the business they would have operated would have been less successful than that operated by the winning consortium. It seems to me that the recognition that some adjustments might be necessary or appropriate goes to show that the true measure of what the plaintiffs claim to have lost was the value of the licence to them.

251. The second leg of the plaintiffs' argument is that extensive discovery in relation to the commercial advantage derived by Esat from the licence would enable them to deal with - or indeed might forestall – a challenge that their claim was speculative, or unrealistic, or failed to make adequate provision for the cost of this or that. On that I think that the plaintiffs are on very much firmer ground, but it seems to me that the time at which discovery in relation to Esat's business model will become necessary for the fair disposal

of the claim will be after the plaintiffs' claim has been formulated and articulated. So, for example, the results achieved by Esat may be material in assessing the reliability of the plaintiffs' projections or budgets, but the first step is to establish what those budgets and projections are.

252. I do not accept the plaintiffs' argument that they are entitled to discovery of this category of documents in order to formulate their damages claim, but I am prepared to contemplate that they may be able to establish the relevance and necessity of some documents for the fair disposal of whatever claim they make, after they have made it.

253. In my view the appropriate course is to make no order at this stage but to adjourn this element of the motion until the claim has been formulated and particularised.

Category 24 – damage to Mr. O'Brien's reputation

254. Mr. O'Brien has pleaded that these proceedings were instituted by the plaintiffs maliciously and out of spite and without reasonable or proper cause and has counterclaimed for damages for abuse of process

255. The plaintiffs seek discovery by Mr. O'Brien of all documents relating to the loss and/or damage and/or damage to reputation and/or moral stigma which he alleges he suffered as a result of the issuing of these proceedings.

256. This has been agreed.

Electronically stored information

257. One of the orders sought by the plaintiffs is an order pursuant to O. 31, r. 12(2)(c)(ii) directing each of the defendants to make available inspection and searching facilities using their own information and communications technology system so as to enable the plaintiffs to avail of any search functionality available to each of the defendants.

258. Such an order may be made where the court is satisfied that the discovery ordered includes electronically stored information and is satisfied that such information is held in searchable form and can be provided without significant cost to the party from which discovery is requested.

259. The plaintiffs' application for electronic inspection was resisted on the grounds that it would be oppressive, wholly disproportionate and/or impossible to comply with. In the replying affidavit filed on behalf of the State defendants, Mr. McGuinness, a solicitor in the Chief State Solicitor's office, said that:- *"The technology systems concerned I am instructed are computers dating from 1995 which either no longer exist or would be impossible to trace."* The plaintiffs' position on this was that the Minister had not substantiated that averment or provided any explanation of the technology.

260. On this issue I am satisfied that the State defendants' response did not really address the question. The question was whether the records are stored electronically, in searchable format. The response was that the machines on which the documents may have been generated or stored at the time have been lost or destroyed. I accept that it is highly

likely that the machines which were in use in 1995 have long ago been replaced but there is no evidence as to what happened to the data which was stored on those machines – whether it was destroyed or backed up onto the replacement machines.

261. On the evidence before the court I could not be satisfied that the State defendants have electronically stored information, whether in searchable format or otherwise.

262. The order for discovery will require the disclosure of all documents whether on paper or electronically stored. For the purpose of complying with the order for discovery the State defendants will need to apply their minds to the question of what, if any, documents are stored electronically. The affidavit of discovery will disclose what, if any, information is so stored. The question of the necessity for an order under O. 31, r. 12(2)(c)(ii) can be revisited at that stage.

Conclusions

263. There will be orders for discovery in the terms indicated.

264. I will hear counsel on what progress has been made in agreeing a confidentiality protocol.

265. I will adjourn generally, with liberty to re-enter, the application for discovery by Mr. O'Brien of documents in relation to the commercial advantage derived by Esat from the licence, and the application for electronic inspection and searching facilities.