THE HIGH COURT

[2016 No. 3300 P]

BETWEEN

SUSQUEHANNA INTERNATIONAL GROUP LIMITED

PLAINTIFF

AND

DANIEL NEEDHAM

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 24th day of November, 2017.

1. This judgment is given in the motion for discovery brought by the plaintiff against the defendant and raises the novel question of whether a court should order a person to make discovery of documents that he or she can obtain on foot of a data subject protection request.

The proceedings

2. The plaintiff, Susquehanna International Group Limited ("SIG"), is a limited liability company with registered offices at the IFSC in the City of Dublin. The defendant is a trader in financial instruments and lives in Dublin. The defendant was employed by the plaintiff from 4th September, 2006, until 29th April, 2016, pursuant to a contract of employment made in writing. The defendant was initially employed as an assistant trader and was promoted to the role of trader in the course of his employment. The defendant was paid a substantial salary and bonus payments in respect of his employment.

3. The defendant gave notice to the plaintiff on 1st April, 2016, that he intended to terminate his employment, and, having worked out his period of notice, left his employment on 29th April, 2016.

4. The plaintiff seeks injunctive relief and damages for breach of contract arising from what it claims are certain breaches of contract by the defendant relating to confidential documents obtained in the course of his employment regarding the business, employees and business relationships of the plaintiff.

5. The plaintiff claims that the defendant has breached the express terms of his contract of employment by which, *inter alia*, the defendant agreed not to in any manner or capacity hire or solicit for employment or otherwise attempt, directly or indirectly, to provide any information for use in connection with the possible hiring or solicitation of any employee of SIG, (an "SIG person") within the meaning of Clause 11.4 of the defendant's contract of employment.

6. I will examine more fully below the claims made in the statement of claim relevant to the disputed discovery, but, in essence, the statement of claim pleads that the defendant was in breach of the covenant against the inducement of persons to leave the employment of the plaintiff and his obligation to preserve confidential information, trading strategies and commercial know-how of the plaintiff firm.

7. The defendant was one of a number of employees who tendered notice of termination of their employment to the plaintiff in March and April of 2016. Some or all of those persons have since taken up employment with Citadel LLC ("Citadel"), a company which was, at the material time, registered in London and which has now established a place of business in Dublin. The defendant was for a time subject to a restriction on taking up employment with a firm in the same business as his former employer but has now commenced employment with Citadel.

8. The primary action of the plaintiff is that the defendant has breached the terms of his contract of employment, *inter alia*, by assisting Citadel with the recruitment of other SIG employees and supplying Citadel with confidential information concerning the business of SIG, including the identity and details of other traders employed by SIG, the types of trades carried on by them, the profits earned by them and details of confidential trading strategies and models used by SIG or in the course of being developed.

9. Citadel operates a business of investment trade in broadly the same field as SIG and was at the material time intending to set up business in Dublin. It is pleaded that the intention of Citadel and its objective was to acquire a readymade business by persuading a group of employees of SIG who would have knowledge and expertise in financial trading to leave SIG and bring with them their knowledge and confidential information, including the know-how and trading strategies of SIG.

10. It is common case that the defendant did discuss taking up employment with Citadel and that he was recruited through a company, Execuzen Ltd., acting on behalf of Citadel.

11. Discovery of three categories of documents is sought, and the defendant has not refused to make discovery, and. rather has sought to limit the categories in the way that will appear in the course of this judgment.

12. I will deal with each category of documents separately.

Category 1:

13. Discovery is sought in respect of the following category of documents:

> "All documentation relating to any interactions howsoever described between the defendant and Citadel LLC or its associated or affiliated entities and between the defendant and Execuzen Limited or any individuals employed by or acting on behalf of Execuzen Limited generated during the period between 1st August, 2015 and 29th January, 2017 to include, but strictly without prejudice to the generality of the foregoing, all such documents held by Citadel and Execuzen that the defendant can obtain on foot of data protection requests."

14. A number of principled objections are made by the defendant to the discovery sought in category 1. I will deal with these in turn and note that some of the arguments relate also to the remaining two categories.

Request is too broad

15. The defendant argues that the discovery sought is broad, vague and impermissibly wide-ranging. He is not prepared to make discovery in regard to documentation relating to the "associated or affiliated entities" of Citadel, as he argues that those entities are ill-defined and might involve him having to discover documents from entities that he himself cannot identify.

16. In order to deal with this argument, it is necessary to consider the application of the well established principles that discovery should be ordered only in respect of documents which are relevant and necessary.

Discovery: relevance
17. Whether discovery should be ordered in respect of a category of documents is well-established in the authorities. In short, documents are to be discovered if they are relevant for the determination of the issues between the parties.

18. The test of relevance involves an examination of whether the categories of documents sought are relevant to the claim as pleaded and, for that purpose, pleadings include replies to particulars.

19. A disagreement arose in the course of the hearing of the motion regarding the fact that the plaintiff's counsel had produced in the course of argument a "dossier" obtained by the plaintiff in a data request against Execuzen in which an analysis of the SIG business is shown. In a document headed "Susquehanna International Group Ltd. breakdown and analysis" there is material titled "Business Information" which the plaintiff argues identified a conversation had with a person called "Dan" who was working for SIG and engaged in mathematical modelling. There is an entry that says "Dan says he knows he could bring an identified SIG employee" to a "new venture like Citadel". The identified person is known to have terminated his employment with the plaintiff and to now be either working with or intending to work with Citadel at that point.

20. I accept the argument of the defendant that the dossier which has not been exhibited on affidavit is not evidence on which I can rely and that the determination of an application for discovery is to be made by reference to the pleadings and not by reference to contested allegations of fact in affidavits, as a court hearing an application for discovery might otherwise be compelled to make a determination on the credibility or weight of contested averments on affidavit.

21. Accordingly, I propose considering the application for discovery by testing the relevance of the categories to the pleadings, and not the dossier. However, that approach also means that I must not make a determination on the discovery application by reference to the unsubstantiated submissions of fact made by counsel for the defendant that the person named "Dan" in the dossier may not in fact be the defendant but rather another person with the same Christian name. I also for that reason cannot determine the application for discovery on the basis that the defendant has denied that he gave any confidential information to Citadel, or accept his assertion that the person identified in the dossier who was later employed by Citadel through Execuzen was directly contacted by Execuzen and that the introduction was not made by the defendant.

22. I note that the defendant has not sworn an affidavit for the purposes of the motion and the replying affidavit is sworn by his solicitor on his behalf. I note also that the allegations and particulars of breach of confidence and breach of contract are all denied in the defence.

23. I also accept the argument of the defendant that the request for discovery of documents relating to "Citadel or its associates or affiliated entities" has the appearance of being a very broad trawl, and equivalent to what is commonly called "fishing". It seems that the primary Citadel company, or at least a primary company which trades under that name, has offices and its registered address in London and that it also operates as a company registered in the United States. It is not asserted that the defendant had association with Citadel or any company associated with it or any of its subsidiaries or companies bearing that name other than for the alleged purpose in respect to which these proceedings are brought. The allegation in the statement of claim is that a company identified as "Citadel LLC" intended to set up business in Ireland and has had the benefit of being supplied with confidential information concerning the business of SIG. Having regard to the fact that there is no evidence of any other association between the defendant and a Citadel "entity", I consider that the request for discovery of documentation relating to Citadel or its associated or affiliated entities has the appearance of being broad but is not truly broad when tested against the pleaded facts.

24. However, in the interests of clarity, I consider that the phrase used in the request could be refined so that discovery is ordered in regard to communication with Citadel LLC or its parent or any Citadel subsidiary or associated company which intended to or did in fact establish a business in Ireland.

25. The defendant also argues that the inclusion of a request for documentation relating to his engagement with Execuzen Limited is not discoverable, and that that firm is not named in the statement of claim. The statement of claim pleads that the defendant supplied Citadel with confidential information, and paragraph 5.5 expressly pleads that "arising out of the activities of Citadel and/or its agents", offers of employment were made to a number of SIG employees. Execuzen was the recruitment agency through which the defendant and some or all of the other former employees of SIG were engaged. Therefore, the fact that Execuzen is not named in the statement of claim does not make any engagement between the defendant and that firm irrelevant to the claim, as Execuzen is acknowledged to have acted as a recruiting agent for Citadel. I consider that the claim as formulated permits me to make an order for discovery relating to documents which might have been generated in the course of the recruitment process or for the purposes of the employment by Citadel, by itself or through an agent, of the relevant persons, including the defendant.

26. The defendant argues that the request for documentation "relating to any interactions howsoever" is impermissibly broad and is equivalent to "blanket discovery", as described in *Ryanair plc v. Aer Rianta c.p.t.* [2003] IESC 62, [2003] 4 I.R. 264, or is "too wide ranging", as described in *Framus Limited & Ors. v. CRH plc & Ors.* [2004] IESC 25, [2004] 2 I.R. 20, and I agree. The documentation that is relevant to the present case is documentation relating to or evidencing contact and engagement that the defendant had relating to the employment of himself and of the other SIG employees to whom Citadel made an offer of employment. The defendant is uniquely placed to know who those persons are, as the claim is made in respect of persons who formerly worked with him in SIG and who now work, are about to commence work or did work in the relevant period with Citadel.

27. Discovery therefore is to be made of documents relating to or evidencing contact and engagement that the defendant had relating to the employment of he himself and of the other SIG employees to whom Citadel made an offer of employment.

Necessity
28. The defendant has already voluntarily offered not only his own electronic devices but those of several of his family members for inspection and review. The defendant prepared a number of memoranda for his interview with Citadel, some of which were sent by email to his family members from his personal Gmail account. Those memoranda included lists of persons who worked in SIG and who have now moved or are about to move to Citadel. It is denied that the defendant ever passed on that information regarding his co-workers to Citadel, but whether that denial would be borne out at the trial is a matter in respect of which I can make no assumptions.

29. The defendant argues that, in the light of the fact that he has already voluntarily offered his own Gmail account and those of his family members, disclosure of other documentation is unnecessary and oppressive. Counsel points to the fact that the passing on of that information is denied in the defence but that is not determinative, as the fact that it is denied makes it an issue in the proceedings in respect of which discovery is to made on account of relevance.

30. Whether discovery is necessary cannot, bar an argument of oppression, be assessed on the basis that the requesting party already has a large volume of documentation. The class of documents sought to be discovered in the present application would include those documents already agreed to be disclosed in the form of email accounts of the defendant and his family members, but I cannot at this juncture safely make the assumption, which counsel for the defendant invites me to make, that the plaintiff already has enough documents and sufficient material to advance his case by reason of the nature and probable extent of the documentation agreed to be disclosed such that discovery of further documentation should not be directed.

31. Counsel describes the defendant as having acted in an "unusually cooperative fashion" and that approach is to be admired. The level of cooperation, however, cannot influence my decision whether to grant discovery of the documents now sought, as the discovery process is not to be viewed as a process of attrition by which the party is rewarded for doing what he or she would be compelled to do in any event. Counsel for the defendant also argues that, as the plaintiff has issued separate proceedings against Execuzen and has obtained discovery from it in that litigation, the documentation sought against the defendant is not necessary. It goes without saying that the documentation discovered in the other proceedings may not be used for the current proceedings without leave of the Court and the plaintiff is bound by its implied undertaking regarding how the documents obtained in the other discovery may be used. That argument fails.

The documents that may be available through data protection rights
32. The primary dispute between the parties referable to this category is the request that the defendant make discovery of documents which could be available to him on foot of a data subject access request.

33. The plaintiff argues that this class of documents is within the "power" of the defendant, as explained by the Supreme Court in *Thema International Fund plc v. HSBC International Trust Services (Ireland) Ltd.* [2013] IESC 5, [2013] 1 I.R. 274 where, at para. 5.9, Clarke J. (as he then was) accepted the test identified by Lord Diplock in *Lonrho Ltd. v. Shell Petroleum* [1981] 1 W.L.R. 627 as:

> "In that context, Lord Diplock defined the term "power" to mean:-
>
> > "… a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future."

34. Clarke J. identified the test as follows in para. 5.19:

> "The position adopted in most of the common law jurisprudence to which reference has been made and also adopted under the former rule in this jurisdiction under *Johnston v. Church of Scientology* [2001] 1 I.R. 682 has, in my view, the considerable merit of certainty. A party either has documents in its possession or has the legal entitlement to require possession. In those circumstances the document must be discovered. In all other circumstances, the document does not have to be discovered. Subject to the argument, to which I will now turn, concerning whether the addition of the word "procurement" to the rule has altered that situation I do not see any basis in principle for deviating from the law as stated in *Johnston v. Church of Scientology*."

35. Accordingly, a document is capable of being the subject matter of an order for discovery if the document, while not in the possession of a person, is one in regard to which he or she has the legal entitlement to procure or obtain.

36. The question then, is whether the defendant in the present proceedings has a "presently enforceable legal right", to borrow the language of Lord Diplock, to obtain copies of the document.

37. The relevant documents are more likely than not held in the offices in England of Citadel and/or Execuzen. No evidence of foreign law was produced at the hearing, but it is common case that the right to seek and inspect personal data is a right which derives from the Data Protection Directive (EU Directive 95/46/EC). There is no dispute between the parties as to the purpose of the Directive, being to provide a person with the right of access to data relating to him or her, and such a right is recognised as deriving from fundamental rights, including the right of privacy. It is agreed by both parties that, under the law of England and Wales, a person has a right of access under the Data Protection Act 1998 and a direct right of access to the Court to enforce that right.

38. Counsel for the plaintiff makes a simple but compelling argument that the defendant has a right as a matter of European law, however it has been transposed, to obtain from the relevant persons information in the form of data relevant to him. The example given of particular relevance in the present case is that a person has the right to obtain under data protection legislation documents relating to any interview process engaged by a prospective employer regarding that person.

39. The defendant makes a number of arguments in support of his contention that he cannot be compelled to make a data subject access request in aid of making discovery. The first argument relies on a decision of the Court of Appeal of England and Wales in Durant v. Financial Services Authority [2003] E.W.C.A. Civ. 1746. That judgment concerned a request by Mr. Durant for disclosure of information under s. 7 of the Data Protection Act 1998. In the course of the judgment Auld L.J. observed that the request for data made by Mr. Durant was:

> "a misguided attempt to use the machinery of the Act as a proxy for third party discovery with a view to litigation or further investigation, an exercise, moreover, seemingly unrestricted by consideration of relevance." (para. 31)

40. Counsel for the defendant argues that it is wrong as a matter of principle for a person to be compelled to use data protection processes to achieve a purpose which more properly should be achieved by an order for discovery or non-party discovery. She argues that the power to order discovery is a judicial power and not one that any other body or person may usurp and relies on the dicta of Walsh J. in *Murphy v. Corporation of Dublin* [1972] I.R. 215 at p. 234 that:

> "It is … impossible for the judicial power in the proper exercise of its functions to permit any other body or power to

> decide for it whether or not a document will be disclosed or produced. In the last resort the decision lies with the courts so long as they have seisin of the case."

41. The defendant's counsel argues that the plaintiff is attempting to bypass the judicial process by seeking an order the direct effect of which will require the defendant to avail of his data protection rights, and that the correct approach is for the plaintiff to seek non-party discovery against the relevant persons.

42. More fundamentally, she argues that the objective of data protection law and the Directive is to protect the right of an individual to privacy, to enable the individual to correct any inaccuracy in the personal data relevant to them held by others or to ensure that records of an inaccurate nature are not kept about that person. She points to Recital 41:

> "Whereas any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing;

whereas, for the same reasons, every data subject must also have the right to know the logic involved in the automatic processing of data concerning him, at least in the case of the automated decisions referred to in Article 15(1);.."

43. The substantial rules are to be found in Article 12 of the Directive which requires that Member States shall guarantee every data subject the right to obtain from the holder without constraint certain documents, or, as appropriate, the right to erasure or blocking of incomplete or inaccurate data

44. I accept the argument of counsel for the defendant as to the purpose of the Data Protection Directive and the source of the right of a person to make a data request. I consider too that, there are likely to be circumstances where another remedy such as non-party discovery is more appropriate. This derives from the principle that discovery must not be permitted to be oppressive of a litigant and must be proportionate.

45. I am not satisfied that the request in the present case is oppressive or disproportionate. From the evidence and arguments before me, I am satisfied that the defendant has a unique right to seek certain classes of documents. While the request is couched in the language of contemporary data rights, the class of documents sought to be discovered is a type of document which is known and recognised in the common law. A person may be compelled to make discovery of documents which are in the possession of an agent of that person, for example a solicitor, a banker or a trustee, to take a few examples. While I accept that counsel for the defendant is correct regarding the purpose of the Data Protection Directive, and while the plaintiff could seek in the alternative to make an application for non-party discovery against Citadel or Execuzen, the test remains that which is long established in the authorities, namely whether the documents are relevant and necessary and the request is proportionate and not unduly oppressive.

46. Counsel relies on the judgment of Barrett J. in *Glaxo Group Ltd. & Anor. v. Rowex Ltd.* [2016] IEHC 253, where he, correctly in my view, noted that care was required in regard to the protection of confidential information. That plaintiff had brought proceedings for trademark infringement against the defendant and both parties had sought discovery against the other. In the course of his analysis of the legal principles, Barrett J. said at para. 41 that "individuals should enjoy a high level of protection when it comes to personal data" and that discovery ought not to be used to compel "inappropriate disclosures of personal data". Barrett J. did not need to address the issue as it had mostly been resolved in the currency of the application, although he did go on to say that if a person, whether for "good reason, bad reason or no reason", declined to consent to the release of their personal data, the court would not intervene. That statement is not authority for the proposition that, if documents are relevant, they could not be ordered to be discovered if the person making discovery had to obtain the documents through a date subject access request.

47. I am not satisfied that the defendant has made out an argument that the documents sought from the recruitment company and/or Citadel regarding the course of engagement he had with them which led to his decision to take up employment with Citadel, or by which he allegedly disclosed information relating to other persons with whom he worked in SIG, is confidential or highly personal information of the type referred to.

48. I am not satisfied therefore that the information in respect of which discovery is sought in category 1 is information of a personal or confidential nature of the type to which Barrett J. referred, or of the type referred to by Clarke J. in *Hartside Ltd. v. Heineken Ireland Ltd.* [2010] IEHC 3 at para. 5.9 where he referred to "the undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information". That *dicta* and the approach of Barrett J. seem to me to correctly express a difficulty that arises with a broad request for discovery and highlights the requirement that a court should engage a degree of scrutiny with regard to the test of relevance and necessity where information is likely to be highly confidential or personal.

49. The present request for discovery is not in my view an attempt to use data protection law for a collateral purpose. The judgment of the Court of Appeal for England and Wales in *Durant v. Financial Services Authority* is not on point, as it concerned whether the applicant was himself entitled to access to information, and the Court held that he was misguided, as the proper course of action was to seek discovery and not to make a data request.

50. It matters not therefore that data protection legislation deriving from the Directive has the primary purpose of protecting the right of privacy and accuracy regarding personal data held by others, if the effect of the legislation is to make available as of right certain information held by others relevant to that person.

51. There is no principled reason why information which is capable of being obtained by a data request cannot be the subject matter of a request for discovery. The law would suggest that a data access request ought not to replace discovery where discovery is the more relevant remedy, and the corollary may equally be the case, that discovery ought not to replace a data request. But the question at issue in the present case is whether the defendant can be compelled to obtain documents which are within his power by making a data request. I consider that he can.

52. However, I accept the argument of counsel for the defendant that the test of whether a document is in the power of a person must, having regard to the complex nature of the data protection legislation, not be used as a tool of oppression. The defendant is to be directed to make discovery of all documents that are reasonably available to him by means of a data subject access request and that will require him to take reasonable steps to procure the documents by such means.

53. This might have the inevitable consequence in the present case that the defendant would be unable to procure some or all of the data through either Execuzen or Citadel without a challenge of a refusal, whether such challenge is to be through the relevant Data Protection Commissioner or to a relevant court. It is too early in the process for me to determine how far the defendant is required to go to obtain the relevant information but I consider that he must take reasonable steps to obtain such documentation, as I consider

that the documentation, insofar as it exists, is documentation to the production of which he has a legal right.

54. It will be necessary to therefore give the defendant liberty to apply in regard to this class of documents if he fails to obtain the documents after a reasonable process has been engaged by him.

Alternative means to obtain the documents
55. Counsel for the defendant argued that the plaintiff had available to it the option of seeking non-party discovery against Execuzen and Citadel, albeit it was acknowledged that the discovery process would most likely be made in the Courts of England and Wales and would therefore involve the enforcement process through the Central Authority.

56. In *Ryanair plc v. Aer Rianta c.p.t.* Fennelly J. acknowledged that, in lieu of making an order for discovery, a court may have regard to an alternative means of obtaining documents, or an alternative means of proving the facts which those documents might serve to prove. MacMenamin J. in *Linfen Ltd. & Ors. v. Rocca & Ors*. [2009] IEHC 292, [2009] 2 ILRM 504 explained the matter as follows:

> "…the mere fact that a document is relevant will not inevitably lead to a finding that discovery of that document is also necessary, as against that particular respondent. The issue may hinge on evidence as to the conduct of other respondents. Discovery of documents may not be necessary if the applicant has sufficient alternative means available to deal with matters at issue in the trial or whether, in the first instance, the applicant should appropriately seek discovery against another party." (para. 31)

57. For the purposes of the argument, I accept that it is open to the plaintiff to seek non-party discovery against one or both of these entities but that fact alone does not prevent me from directing discovery by that party. In general, it seems to me that, as a matter of preference, a court would make an order for discovery against a party to the proceedings, rather than engaging in the more cumbersome and costly process of seeking discovery against a non-party. The costs of non-party discovery are, under the Rules of the Superior Courts, to be met by the party seeking that discovery, but those costs may ultimately come to fall on some other party to the proceedings depending on the result of the litigation. A rush to seek non-party discovery when those documents could be made available by a party must, therefore, not be a first option and it seems to me that the fact that the application for discovery against a party is straightforward, less costly process. The fact that such costs may be levied eventually against that party tends to support a view that discovery against a party is to be preferred.

58. Therefore, the argument that discovery ought not to be directed as the documents can equally or readily be made available through a request for non-party discovery against Citadel or Execuzen must fail in the present case.

The cut off date for the order
59. It is argued that the period for which discovery is sought goes beyond the claim in seeking discovery up to and including 29th January, 2017, the date the defendant took up employment with Citadel.

60. The plenary summons issued on 15th April, 2016, and the defendant argues that that date is the relevant cut-off date, as it identifies the nature and extent of the plaintiff's claim. The defendant is prepared to give discovery up to and including 29th April, 2016, the day he actually left his employment with the plaintiff.

61. The defendant argues that, if discovery is to be granted, the discoverable documents ought to be those which were in existence at the date that the proceedings were commenced or, at the latest, the date he left his employment. The plaintiff argues otherwise and says that there may be relevant documents which came into existence after the proceedings were commenced.

62. There is little authority on this point and that is because the test to be applied by a court in ordering discovery must always start with the pleaded claim, taking into account the requirements of proportionality, relevance and necessity.

63. Some assistance is to be gained from the judgment of O'Sullivan J. delivered on the 2nd February, 2000, in *McDonnell v. Sunday Business Post Ltd and Others*, in which he was hearing an application for discovery against the plaintiff, who had commenced proceedings claiming damages for libel. Counsel had argued that the discovery order should relate to documents in existence at or prior to the date of publication of the alleged libellous newspaper article, but counsel for the defendant argued that documents that may have come into existence subsequently could well relate to a matter in question and would clearly be relevant. O'Sullivan J. dealt with the matter as follows at p. 10 of his judgment:-

> "It seems to me that there should be some reasonable limit on the categories of documents which are ordered to be discovered and which came into existence after the date of publication. I consider that any such document is discoverable only if a draft or earlier edition thereof or working papers in relation thereto was or were in existence at the date of publication."

64. O'Sullivan J. therefore posited a test of relevance and necessity which linked the documents to the event in respect of which the proceedings were commenced, but which did not envisage a cut-off date as invariably being the date of the institution of proceedings. That approach commends itself in the present case and I consider it possible that there may be documents which are relevant and necessary to the matters in issue and which were generated after the defendant left his employment with the plaintiff.

65. Therefore such documents are discoverable, and in the circumstances I propose that the order for discovery require discovery to be made up to the date of the motion

The undertaking
66. In correspondence between the parties through their respective solicitors in April, 2016, the plaintiff has accepted undertakings, *inter alia*, from the defendant not to induce any "SIG Person" to discontinue an existing employment relationship with the plaintiff, not to solicit directly or indirectly such persons away from that employment, communicate with such persons regarding the likelihood or possibility of that person moving to a different employment and generally restraining the taking up of employment with a rival firm for a period of eighteen months. The defendant argues these undertakings offer sufficient protection to the plaintiff when taken together with his agreement to delete emails and relevant potentially confidential documents from all devices and systems owned by him, or to which he has access. It is argued in those circumstances that the plaintiff is sufficiently protected in respect of any possible future breach.

67. I disagree that the giving of these undertakings in the context of an application for injunctive relief determines the relevance or necessity of the discovery of the documents sought, and whilst I accept that there is no reason to suppose that the defendant has

breached or will breach this solemn undertaking, the giving of the undertaking does not relieve the defendant of the obligation to make discovery. To consider otherwise could be a pre-judging of the factual claims to be determined at trial

Category 2
68. Category 2 seeks discovery of documentation, whether confidential or otherwise, connected to the business of the plaintiff that the defendant sent to his personal email address or that of other persons. Discovery is agreed to be made of this category and the only issue between the parties is the time limit. The defendant is prepared to give discovery up to the date he left the employment of the plaintiff on 29th April, 2016 and my views with regard to the cut-off date above are relevant.

69. Discovery is to be made up to the date of the motion.

Category 3
70. Under this category the plaintiff seeks:

> "All documentation generated in the period between 1st August, 2015 and 29th January, 2017 relating to any interactions howsoever described between the defendant and any other employee of the plaintiff howsoever connected to the defendant or those other employees leaving the employment of the plaintiff to commence employment with Citadel LLC."

71. The reason given for seeking this category is that the documents "are relevant and necessary for the determination, *inter alia*, of the plaintiff's claim that the defendant conspired with other employees in relation to the circumstances in which the defendant and other employees would leave the employment of the plaintiff."

72. The grounding affidavit of the solicitor for the plaintiff avers to a belief and apprehension that the defendant connived with Execuzen and Citadel and assisted in the targeting of employees of SIG.

73. The defendant argues that this category is "wholly" objectionable, not rooted in the proceedings and is framed in exceptionally broad terms.

74. The defendant is correct that the claim is not made in conspiracy but breach of confidence is pleaded, as is a claim that the defendant has, *inter alia*, breached his contract by assisting in the recruitment of other SIG employees by Citadel. A specific former employee of SIG is identified by name in the pleadings. The plaintiff in replies to particulars has acknowledged that the claim was not made in conspiracy. The defendant argues that this category is a classic fishing expedition made in order to obtain information in regard to employees not identified in the pleadings. He points to the fact the allegations in the statement of claim are unspecific and neither the statement of claim nor the replies to particulars identify any other person apart from the named employee.

75. Paragraph 5.5 of the statement of claim pleads that offers of employment were made to "a group of SIG employees", including the defendant, by Citadel "arising out of the activities" of Citadel and or its agents. There is then a plea as follows:

> "The Plaintiff apprehends and contends that the Defendant breached the provisions of his contract of employment by assisting Citadel with the recruitment of other SIG employees and in particular the Defendant caused an approach to be made or assisted in the making of an approach to one [employee identified], an employee of the plaintiff".

76. I consider that that plea is broadly made and includes a claim that the defendant assisted with the recruitment of persons other than the one identified person, and I note also that the plea is followed by an assertion that further particulars will be given following discovery and other pre-trial processes.

77. Counsel for the defendant relies on the recent judgment of the President of the Court of Appeal in *O'Brien v. Red Flag Consulting Limited & Ors* [2017] IECA 258. There, the Court of Appeal upheld a judgment of the High Court that the plaintiff was not entitled by discovery to ascertain the identity of a wrongdoer. The facts and reasoning are complex, in that it was regarded as relevant that Mac Eochaidh J. in the High Court had already refused an order under the jurisdiction identified in *Norwich Pharmaceutical Co. & Ors. v. Customs and Excise Commissioners* [1974] A.C. 133. The Court of Appeal held that there was "no new basis advanced by the plaintiff to produce a different result from the previous unsuccessful application" (para. 37). The reasoning of the Court of Appeal was, *inter alia*, that the matter was *res judicata* and the discovery motion proceeded on the basis that the Court of Appeal agreed with the finding of the High Court that the plaintiff did not pass the threshold required to establish that the documents were relevant in the light of the pleadings.

78. The judgment of the Court of Appeal in that case is relevant to the argument of the defendant because counsel argued that the dossier obtained through Execuzen could not form the basis of the request for discovery. In the course of argument, the plaintiff agreed with that proposition and argued, correctly in my view, that the request for discovery is firmly rooted in the pleadings, which expressly plead that the defendant by his actions had enticed other employees of SIG to move to Citadel. The request for documentation that might show interaction with other persons is within that pleading, but is also borne out by the fact that the emails sent by the plaintiff from his personal Gmail account to his family members did contain a list of those employees, some or all of whom did subsequently take up employment with Citadel. While the defendant denies that he used that information in the course of interviews with Citadel, the fact remains that he himself had identified those persons in his preparatory paper work, and the plaintiff is aware that certain other former staff of SIG did move to Citadel. Thus there is a basis in the pleadings and in the known facts which justifies disclosure of other documents.

79. The judgment of the High Court and of the Court of Appeal on appeal in *O'Brien v. Red Flag Consulting Limited & Ors*. was grounded on the fact that the identity of the clients of the defendant was not relevant to the proceedings. I consider that particular finding to be central to the reasoning of the Court of Appeal and of the High Court in *O'Brien v. Red Flag Consulting Limited & Ors*., and to be readily distinguishable from the present case. The identity of the persons who might have by reason of an alleged wrongful act of the defendant chosen to take up employment with Citadel is relevant to the present proceedings.

80. For that reason, I reject the argument of the defendant that category 3 is impermissibly wide, is a fishing exercise and must be refused on the basis identified in *O'Brien v. Red Flag Consulting Limited & Ors..* There is a pleaded basis and a factual basis to substantiate the request for discovery.

81. I will hear counsel on the exact form of the order, but propose that discovery be made within ten weeks, with the proviso that the time for discovery for the class of documents that may require the defendant to make a data subject access request be extended if necessary, whether by agreement or further order. The defendant is to exhibit in with his affidavit of discovery correspondence regarding the request and by affidavit explain the then current progress.