

THE HIGH COURT
COMMERCIAL

[2014 No. 692 P.]

BETWEEN

NOKIA SOLUTIONS AND NETWORKS UK LIMITED

PLAINTIFF

AND

**IBB INTERNET SERVICES LIMITED, IRISH BROADBAND INTERNET SERVICES LIMITED (TRADING AS IMAGINE NETWORKS) AND
IMAGINE COMMUNICATIONS GROUP LIMITED**

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 1st day of July, 2016

1. The defendants in these proceedings have brought a discovery motion having failed to agree with the plaintiff on a number of issues after the exchange of requests for voluntary discovery. The categories now in dispute are as follows:-

Category 1(A)

All documents that evidence and/or record:-

- (i) the financial and/or technical standing of the plaintiff at the time of the alleged assignment; and,
- (ii) any discussions, negotiations or exchanges between the plaintiff and Motorola in respect of the financial and/or technical standing of the plaintiff prior to the alleged assignment of the MSA [Master Service Agreement] on 29th April, 2011.

Category 2(C)

All documents that evidence and/or record:-

- (c) the entity (or entities) on whose behalf MCC made payments to the plaintiff or to Motorola.

Category 3

All documents that evidence and/or record:-

- (a) the reasons for the "complete review" by the plaintiff of the invoices issued by Motorola as pleaded at para. 16 of the statement of claim;
- (b) the outcome of that review;
- (c) the necessity and/or reasons for the re-issuing of invoices by the plaintiff in or around 19th September, 2011;
- (d) any consideration given by the plaintiff or by Motorola to the validity of any invoices issued by either to the defendants (or either of them);
- (e) that the sum claimed by the plaintiff against the first and second named defendants respectively might not properly be due and owing, whether in whole or in part, together with any documents that while not evidencing or recording this, are suggestive of it;
- (f) [Plaintiffs proposed discovery accepted but on the basis that it does not address the other sub-categories]
- (g) how the alleged liability of the defendants (or either of them) was reflected in the relevant company accounts.

Category 4

All documents that evidence and/or record the reasons for the decision to issue credit notes to the first named defendant in or around 19th September, 2011.

Category 5

(a) All documents that evidence and/or record:-

- (i) the completion and/or calculation of the invoices;
- (ii) the consideration given by the plaintiff to delays in the rolling out of sites;
- (iii) the consideration given by the plaintiff to delays in rolling out of sites and/or failures in meeting cluster delivery dates.

(b) Any project contracts or cluster contracts upon which the invoices relied upon by the plaintiff are based.

2. Having considered the affidavits and exhibits and the submissions of counsel I have reached the following conclusions on the disputed items of discovery.

Category 1(A)

3. The defendants claim that this is relevant because the validity of the assignment of the Master Acquisition Agreement ("MSA") depends on the financial and/or technical standing of the plaintiff prior to the date of the assignment since the power to assign on consent is subject to the proposed assignee being of equivalent financial and technical standing to Motorola. While paras. 4 and 5 of the defence raise this issue the defence does not appear to explicitly deny that the plaintiff failed to meet the criteria. Rather the defence states that the plaintiff has failed *"to demonstrate to the satisfaction of the defendants herein...that it is of equivalent financial and/or technical standing to Motorola Ltd. as required by clause 45.2 thereof"*. Accordingly the defendants deny that the purported assignment by Motorola Ltd. of the MSA to the plaintiff complied with the agreement and maintains that it is therefore null and void and of no effect.

4. The plaintiff argues that its entitlement to sue as assignee is an objective issue and therefore documents evidencing or recording discussions negotiations or exchanges are irrelevant. It seems to me that that is correct insofar as category 1(A)(ii) is concerned. So far as category 1(A)(i) is concerned the plaintiff has offered to set out in correspondence the position with respect to the plaintiff's financial and technical standing at the time of the alleged assignment and will also provide documentation relied upon as evidencing the position in that regard. It seems to me that that is entirely reasonable and sufficient. Therefore I will make no order with regard to category 1(A). If the plaintiff does not provide reasonable information in accordance with its proposal the defendants can make a further application in that regard.

Category 2(C)

5. As this matter concerns payments already made which are not being sued for in these proceedings this category is neither necessary nor relevant. The plaintiff has already offered to provide a schedule summarising the information referred to in category 2(A), (B) and (C) in the original request subject to the defendants first providing a schedule of all payments made to the plaintiff or Motorola by the first or second defendant. In my view that is reasonable. But I am not making any order with regard to that offer and I am refusing the application for category 2(C) discovery.

Category 3

6. I refuse to make an order under this heading as the category sought is neither relevant nor necessary and in my view amounts to a fishing exercise. Invoices were withdrawn as issued by Motorola because they did not comply with the terms of the MSA and the plaintiff contends that the invoices now furnished and upon which it relies in these proceedings are the only ones relevant to the proceedings. The defendant has agreed to category 3(F). So far as the other categories are concerned they are neither relevant nor necessary and I will not allow them.

Category 4

7. I refuse this category as being unnecessary and irrelevant. The plaintiff is not suing the defendants for a sum of €268,991.80 because it has giving the defendants a credit for that. Since the sum is not being sued for the documents sought in category 4 are neither relevant nor necessary and I refuse this category.

Category 5

8. The defendants did not raise a dispute notice so far as the invoices were concerned. The defence admits that the plaintiff issued invoices to the first defendant on the 19th September, 2011, to the value of €22,780,000.00 as particularised at para. 17 of the statement of claim and that they were delivered under cover of correspondence of the same date. These are the invoices on which the plaintiff will rely at the trial of the action. Since the defendant did not raise a dispute notice within the period provided for in the MSA and since they have been provided with the invoices as the documents on which the plaintiff will rely, the discovery sought in category 5 is neither relevant nor necessary and in any event would be oppressive and disproportionate having regard to the fact that no dispute notice was raised within the period provided for in the MSA. I refuse to make an order under this heading.