THE HIGH COURT

[2017 No. 7252 P.]

BETWEEN

DECLAN DE LACY

PLAINTIFF

AND

PAUL COYLE, MARGARET COYLE, EMILY COYLE AND AMY COYLE

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on the 18th day of July, 2018

1. There are two motions for discovery before the court namely: -

(a) the plaintiff's motion dated 12th April, 2018 in which the plaintiff seeks an order directing the defendants to make discovery of fifteen separate categories of documents running from Category A to Category O; and

(b) a motion brought by the defendants (who are currently acting in person) dated 17th April, 2018 in which the defendants seek an order directing the plaintiff to make discovery of 22 categories of documents.

Background

2. These proceedings were commenced in August 2017 by the plaintiff in his capacity as official liquidator of Decobake Ltd. (in liquidation) ("Decobake"). Decobake was incorporated on 5th May, 2000. Decobake was involved in a wholesale and retail business selling baking ingredients and equipment. It operated from premises at Clane Business Park, Clane, Co. Kildare and from 3/4 Bachelors Walk, Dublin 1. Among the innovations introduced by Decobake was the manufacture of what is described as "ready-to-roll icing" together with printer cartridges with edible ink. This allows printing onto A4 size sugar sheets and Decobake was a leader in the market for products of this kind.

3. On 29th June, 2017 a petition was brought on behalf of Dublin City Council for the winding up of Decobake. On the same day an application was made for the appointment of a provisional liquidator. The plaintiff in these proceedings Mr. de Lacy was appointed provisional liquidator on that day. Subsequently, on 24th July, 2017, the court made an order winding up Decobake.

4. These proceedings were commenced by the plaintiff on 8th August, 2017. The defendants named in the proceedings were all either directors or employees of Decobake. Mr. Paul Coyle, the first named defendant and Mrs. Margaret Coyle, the second named defendant were both directors of Decobake. As explained in paragraph 5 below, the remaining defendants are their daughters who were employees of Decobake.

5. In these proceedings the plaintiff makes a number of allegations against the defendant. These include the following allegations in para. 12 of the statement of claim: -

(a) the defendants have interfered with and obstructed the plaintiff in carrying out his duties as liquidator and have attempted to "*sabotage the liquidation and/or to damage the said Company in relation to its employees, supplies and/or customers to the advantage of the defendants and to the detriment of the liquidation and/or the Creditors".*

(b) on 30th June, 2017 the first and second defendants misappropriated a sum of €49,491.00 from a company bank account and this sum was only returned to the plaintiff's solicitor a short time prior to the hearing of the *ex parte* application for an injunction;

(c) the defendants convened and attended staff meetings following the appointment of the provisional liquidator with a view to discouraging employees from cooperating with the plaintiff;

(d) the defendants have failed to furnish to the plaintiff all passwords and access codes to enable him to have access to the company's email systems and email accounts;

(e) the defendants allegedly made contact with Musgrave Ltd. (the largest customer of Decobake) asserting personal intellectual property rights and trade secrets in respect of the cartridges and sugar sheets purchased by Musgrave Ltd. from Decobake;

(f) there are also allegations made in relation to the removal of motor vehicles;

(g) there is an allegation that the fourth named defendant had as part of her employment with Decobake set up a Facebook "chat group" known as the Decobake caking and decoration chat group and that this is now the property of Decobake. It is alleged that this chat group has effectively being taken over by the fourth named defendant for her own purposes and is being used by her to post messages opposing the plaintiff's appointment as a liquidator and using the chat group to promote her own personal business ventures and the sales of her own personal products.

6. One of the most significant allegations made in the statement of claim is that between 2011 and 2014 it was Decobake and its employees which developed the recipe and method of production for the icing used to make sugar sheets and developed the process for transforming this icing into A4 size sheets and affixing it to a backing page. It is also alleged that it was the company and its employees that developed the original recipe and method of production for Decobake's ready-to-roll icing product which was traded by Decobake under the brand name "Ice Wise".

7. The allegations which are made by the plaintiff are vigorously contested by the defendants. The defendants have delivered a very full defence. They have also delivered a document described as "additional defence" and they have also delivered a counterclaim. Among the allegations made by the defendants are the following: -

(a) It is alleged in para. 23 of the defence that any loss suffered by Decobake which has been sustained is as a result of the plaintiff's *"total mishandling of the business of the Company and its lack of knowledge and incompetence of a very specific market."* It is alleged that the plaintiff has been "grossly negligent" in his stewardship of the liquidation.

(b) In para. 38 of the defence, the defendants contend that the plaintiff misled the court in an *ex parte* motion. In this regard, it should be noted that on 8th August, 2017 a number of orders were made on an *ex parte* basis by the court on the application of the plaintiff. The order was subsequently continued by consent by an order made on 12th October, 2017. However, it was later varied by a further order of the court made on 20th October, 2017.

(c) The first defendant contends that any intellectual property rights in relation to the recipes and methods of production of the sugar sheets, the Ice Wise product, the edible ink and the edible ink printers are owned by him personally and not by Decobake.

(d) In the counterclaim, it is alleged that the plaintiff has mismanaged the affairs of the company and that the plaintiff has defamed, slandered and libelled the defendants.

(e) It is also alleged in the counterclaim that the plaintiff has infringed the intellectual property rights of the first named defendant.

(f) Among the relief claimed in the counterclaim is a declaration that the first named defendant is the rightful owner of the relevant intellectual property rights. In addition to claiming payment of royalties and damages, the defendants seek aggravated and/or exemplary damages.

8. I must emphasise that the allegations on both sides are significantly more extensive than I have set out above. However, at this point in this judgment, I do not believe that it is necessary to set out all of the allegations made on both sides. It is sufficient to record that both sides have made very strong allegations against the other.

The Principles to be Applied

9. Before turning to the respective applications for discovery, it is important that I should identify the relevant principles to be applied by the court in considering applications of this kind. I have been referred to a large number of authorities. I have, in particular, been referred to the decision of the Supreme Court in *Framus Ltd. v. CRH plc*. [2004] 2 I.R. 20 and three decisions of the Court of Appeal namely, *BAM PPP PGGM Infrastructure v. National Treasury Management Agency* [2015] IECA 246, *IBB Internet Services Ltd. v. Motorola Ltd.* [2015] IECA 282, and *Boehringer Ingelheim Pharma GmbH v. Norton (Waterford) Ltd.* [2016] IECA 67.

10. In the *BAM* case, Ryan P. at para. 29 summarised the relevant principles to be applied. When para. 29 of the judgment of Ryan P. in that case is read with para. 12 of the judgment of Finlay Geoghegan J. in the *Boehringer* case and paras. 12 and 13 of the judgment of Hogan J. in the *IBB Internet Services* case, it seems to me that the principles can be summarised as follows: -

(a) The primary test is whether the documents are relevant to the issues between the parties. Once that is established, it will follow in most cases that discovery is necessary for the fair disposal of those issues;

(b) relevance is determined by reference to the pleadings. Order 31, rule 12 specifies that discovery of documents must relate to a matter in question in the case;

(c) however, relevance must be established as a matter of probability and not only possibility;

(d) the formulation by Brett L.J. in the *Peruvian Guan*o case (1882) 11 Q.B.D. 55 remains the applicable test for relevance. In the words of Brett L.J. the relevant test is: -

> *"It seems to me that every document relates to the matter in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences";*

(e) an applicant for discovery must show that it is reasonable for the court to suppose that the category of documents in question contains relevant information (i.e. information which is relevant to an issue in the case);

(f) an applicant is not entitled to discovery based on speculation;

(g) in certain circumstances, an overly broad ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse;

(h) in addition, the applicant for discovery must show that the discovery sought is necessary for disposing fairly of the cause or matter or for saving costs;

(i) in considering the question of necessity, the court must have regard to what is genuinely necessary for the fairness of the litigation;

(j) there must also be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant for discovery or damage the case of his or her opponent;

(k) in those cases where discovery would potentially impose an unusual burden on a party, the court must examine whether what is sought is likely to produce genuinely useful evidential material;

(l) discovery may become oppressive. The court should not allow it to be used as a tactic in war between parties."

12. In addition to the principles summarised in para. 10 above, there are a number of other principles which are potentially relevant in the present case. These are:-

(a) the principle of proportionality is potentially engaged where the category of documents sought is inherently confidential and this is particularly so where the documents involve the confidence of a non-party to the proceedings. This is clear from a series of decisions of Clarke J. (as he then was) in *Independent Newspapers (Ireland) Ltd v. Murphy* [2006] 3 IR 566, Tele*fonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 265 and *Thema International Fund plc v. HSBC International Trust Services (Ireland)* [2010] IEHC 19. However, Clarke J. made clear that if the information is of significance to a fair determination of the proceedings, then it is unlikely that confidentiality would be sufficient to outweigh the need for the proper administration of justice;

(b) it must also be borne in mind that when it comes to the personal data of non-parties, the Data Protection Act 2018 specifically authorises the processing of personal data where it is necessary for the purposes of or in connection with legal proceedings or is otherwise necessary for the purposes of establishing exercising or defending legal rights. S. 47 of the Data Protection Act 2018 makes this clear;

(c) in proceedings relating to the ownership of intellectual property or to infringement of intellectual property rights it may be necessary to restrict access to discovered material to the lawyers for the parties together with named individuals or experts. The rationale for the approach taken was explained by Lord Dyson in *Al Rawi v. The Security Service* [2011] 3 WLR 388 as follows: -

". . . where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. It is commonplace to deal with the issue of disclosure by establishing "confidentiality rings" of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. Such claims by their very nature raise special problems which require exceptional solutions. I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party".

(d) it is clear from the decision of Kelly J. (as he then was) in *Koger Inc. v. O'Donnell* [2009] IEHC 385 that the establishment of a "confidentiality ring" will only be permitted where there are exceptional circumstances to justify it.

(e) More recently, Barrett J. reviewed the law in relation to confidentiality rings in his judgment in *Goode Concrete v. CRH plc* [2017] IEHC 534 and he concluded that the court has an inherent jurisdiction to order a confidentiality ring in cases where it was shown to be appropriate.

(f) It is also important to bear in mind that discovery can only be sought for the purposes the proceedings in which the application is made. Discovery cannot be sought in High Court proceedings to assist in relation to an issue that may arise in separate proceedings. Similarly, discovery cannot be used for the purposes of obtaining documents to assist in the formulation or prosecution of a criminal complaint which any party intends to make against the other.

(g) Any discovery made in High Court proceedings is subject to an implied undertaking to the court (enforceable in the same way as an express undertaking) that the documents disclosed pursuant to the order or agreement for discovery will be used solely for the purposes of those proceedings and no other purpose. Thus, documents which are disclosed as a consequence of discovery in High Court proceedings cannot be disseminated or published.

(h) There are circumstances where an applicant can apply to the court for leave to use documents discovered in one proceedings for some other purpose. However, that requires an application to the court and the application will only be permitted in special circumstances. That issue does not arise here.

(i) It is also important to bear in mind that discovery does not require a party to generate documents that do not currently exist in either paper or electronic form.

(j) However, discovery does extend to documents which were once but are no longer in a party's possession or power. That is why the affidavit of discovery will have two schedules. In the first schedule a party must list all of the documents which are now in the possession or power of that party. In the second schedule, it is necessary to list all the documents which were once but are no longer in the possession or power of the party making discovery.

The Plaintiff's Motion

13. I will not add to the length of this judgment by setting out in full each of the categories of discovery sought by the plaintiff. I will do so only to the extent necessary. The relevant categories are described in the notice of motion. I now deal with them, in turn.

Category A

14. As appears from the email dated 11 March 2018, from the first named defendant to the plaintiff's solicitor the defendants have no objection to making discovery of this category of documents. I therefore do not need to address it here.

Category B

15. In Category B, the plaintiff seeks discovery of all communications between the defendants and suppliers, customers and employees of Decobake and with any persons or entities interested in acquiring the business of Decobake from the date of appointment of the provisional liquidator on 29 June 2017 to 12 April 2018 (namely the date of the motion). The defendants expressed concern that disclosure of this category of documents would give rise to difficulty in relation to the private data of third parties. They also expressed concern that some of the data is likely to be of commercial sensitivity to them insofar as it relates to their new business (Sugar Sisters).

16. The defendants also complained that the category was too wide. In order to deal with this concern, the category was reformulated in the course of the hearing by the plaintiffs as follows: -

"All communications evidenced in writing or electronically (including communications during meetings and by Social Media) sent between the defendants and

(a) Suppliers of the company;

(b) All trade customers, all customers identified in the books and records of Decobake and all customers identified in the emails sent or received on the email accounts in the domain name of Decobake.com;

(c) Employees of the company;

and

(d) Persons and/or entities interested in acquiring the business of Decobake (or Decobake itself), or anyone on their behalf from 29 June 2017 to date and all documents relating to and/or evidencing the purpose of the said communications."

17. It seems to me that the category as so reformulated is sufficiently precise to enable the defendants to know what documents fall within it.

18. It also seems to me that the category of documents is clearly relevant to a number of issues pleaded in the statement of claim. These include para 12 (b) where it is alleged that the third named defendant communicated with Decobake employees by Facebook advising that they should not attend work. It is also relevant to para. 12(e) of the statement of claim where it is alleged that the defendants sought to dissuade employees from cooperating with the plaintiff. It is also relevant to the allegation made in para. 12 (f), 12 (g), and 12 (h) where further allegations are made about allegedly improper communications with employees.

19. The category is also relevant to the allegation made in para. 12 (n) where an allegation is made that during August 2017 the defendants made contact with the largest supplier of goods to Decobake leading to that supplier withholding goods ordered by Decobake. In my view, the category is likewise relevant to the allegation made in para. 12 (o) of the statement of claim that Decobake's largest customer, namely Musgraves, were (so it is alleged) wrongfully approached by the defendants asserting intellectual property rights in respect of the cartridges and sugar sheets purchased by Musgraves from Decobake.

20. Finally, in this context, the category is relevant to the allegation made in para. 14 of the statement of claim that in August 2017 the defendants communicated with a potential purchaser of Decobake threatening that an injunction would be sought against any party who attempted to buy Decobake.

21. In my view, the plaintiff has made out a case that discovery of this category of documents is necessary in order to dispose of these proceedings fairly. The plaintiff has no means of obtaining access to these documents save by means of discovery. Given the nature of the allegations which have been made in the statement of claim, it seems to me that it would be essential that these communications should be discovered and should be placed before the court in evidence. The communications are likely to be of significant assistance to the court in deciding whether or not there is any substance to the allegations made by the plaintiff in the statement of claim (as outlined above). The documents will assist in proving whether the communications between the defendants and other parties were innocent or wrongful.

22. The manner in which the category has been reformulated removes any concerns about commercial sensitivity. The category (as reformulated) makes clear that it only relates to trade customers of Decobake and all customers identified in the books and records of Decobake and customers identified in the emails sent or received on email accounts in the domain name of Decobake.com. I am also of opinion that discovery of this category of documents will not involve any disproportionate burden on the defendant. The period in respect of which discovery is sought is relatively brief. From start to finish, the period is less than ten months in duration. Moreover, as noted above, discovery of this category may assist the Defendants in demonstrating that their contacts with others were entirely innocent.

23. Insofar as the defendants have concern about private data of third parties, that concern is met by the provisions of s. 47 of the Data Protection Act 2018 (as outlined in para. 12 (b) above).

24. In these circumstances, I propose to make an order in the terms set out in para. 16 above.

Category C
25. The defendants have no objection to making discovery of documents in Category C and therefore this category does not require consideration in this judgment.

Category D
26. The plaintiff seeks discovery of all documents relating to the withdrawal, transfer and disposal of the sum of €49,491.00 in the period between 29 June 2017 and 7 July 2017.

27. There is a clear dispute between the parties in relation to what occurred in relation to the withdrawal of the sum of €49,491.00. In para. 12 (d) of the statement of claim it is alleged that the first and/or second named defendants misappropriated this sum from a bank account of Decobake. It is alleged that the sum was only returned to the plaintiff's solicitor less than 45 minutes prior to the hearing of an *ex parte* application on 7 July 2017 seeking an injunction. In para. 11 of the defence, the allegation of misappropriation is denied. It is also denied that the funds were only returned on foot of the proposed application for an injunction. Furthermore, in the course of their submissions to me at the hearing of the plaintiff's motion, the defendants strongly made the case that the withdrawal of these monies was entirely innocent.

28. In light of the allegations made on both sides, it is clear that discovery of this category of documents is relevant to an issue on the pleadings. It also seems to me to be manifestly necessary that discovery of this category of documents should be ordered in circumstances where the plaintiff had no other means of obtaining access to any documents held by or on behalf of the defendants in relation to this issue.

29. In my view, the disclosure of this category of documents will assist in demonstrating whether there is any substance to the very serious allegation which is made by the plaintiff in his statement of claim and which is so vigorously contested by the defendant.

30. I will therefore order discovery of documents within Category D.

Category E
31. This category relates to the accounting software, the email systems, the email accounts and domain name of Decobake. As formulated, Category E seeks documents evidencing the administrator codes, authorisation codes, passwords and access codes for the accounting software, the email systems, the email accounts and the domain name "Decobake.com". The category also includes all documents relating to the withholding by the defendants of the relevant codes.

32. In the affidavit of Kevin Barry grounding the plaintiff's application, it is contended that discovery of this category of documents is necessary in light of the allegation made in the statement of claim that the defendants have withheld passwords and codes (which is denied by the defendants in their defence).

33. In his email of 11March 2018, Mr. Coyle, the first named defendant, has contended that there are no documents in the defendant's possession in relation to this category of documents. That would not, however, be a basis on which the court would refuse discovery if the court was satisfied that discovery of this category of documents was both relevant and necessary. In such circumstances, if the defendants had no documents in this category, they would be required to confirm this on affidavit.

34. However, during the course of the hearing before me, I made it clear that I did not believe that it was appropriate that the court should be asked to direct the defendants to make discovery of the codes and passwords themselves. An order to that effect forms part of the substantive relief claimed by the plaintiff in para. 1 (i) of the prayer in the statement of claim. It does not seem to me to be appropriate that the court should direct discovery where, to do so, would effectively give a plaintiff part of its substantive relief. The plaintiff would thereby obtain part of the substantive relief claimed by it without a trial.

35. I was, however, informed that an order had already been made by the court on 8 August 2017, directing the defendants to furnish to the plaintiff the relevant passwords and access codes to enable the plaintiff to have access to the accounting software and email systems. I note that the order made by the court on that occasion was made on an *ex parte* basis. That interim order appears to have been continued by consent by a further order made by the court on 12 October 2017 when the defendants were represented by solicitor and counsel. If there is already an order to that effect in existence, then the plaintiff has the means to enforce that order in the usual way and does not require discovery for that purpose. The provisions of O. 31 and the relevant case law make clear that discovery will only be ordered where it is shown to be necessary. Thus, even if one were to discount the considerations identified in para. 34 above, it seems to me that it would not be appropriate to direct discovery of this category of documents.

36. On day two of the hearing there was an attempt made to significantly reformulate Category E so as to capture documents not previously sought in the request for discovery. However, I took the view (and I am still of that view) that it would not be appropriate to permit such a reformulation of this category at such a late stage in the hearing after the court had already heard argument from both the plaintiff and the defendants in relation to the category in question.

37. I therefore refuse to direct the defendants to make discovery of Category E save to the extent that Category E relates to documents relating to or evidencing the defendants' withholding of the codes. This is relevant to the allegation made in para. 12 (l) of the statement of claim which is specifically denied in para. 19 of the defence. This element of Category E does not involve the granting of any of the substantive relief claimed in the proceedings. Nor is it covered by the order previously made on 8th August 2017.

38. The only order that I will therefore make is an order that the defendants do make discovery of documents relating to or evidencing their withholding of the passwords or codes.

Categories F and G
39. No objection is taken by the defendants to making discovery of these categories of documents and they therefore do not require consideration by me.

Category H
40. This category relates to a number of motor vehicles. There are a number of allegations made in the statement of claim in relation to six specific motor vehicles. In relation to a motor vehicle registration number 171 KE 3095 it is alleged that this motor vehicle was unlawfully taken by the first named defendant knowing it to be property of the company. In addition, it is pleaded that the defendants retained five other motor vehicles and have wrongfully converted them to their own use. These allegations are specifically denied in the defence. This category of documents is therefore relevant to an issue on the pleadings. In the course of the hearing before me Mr. Coyle, the first named defendant informed me that the plaintiff has all the documents in relation to the motor vehicles and that accordingly there is no necessity for discovery of this category of documents. Mr. Coyle also contended that the plaintiff had agreed to take some of these vehicles on 9 November 2017 and that the plaintiff never turned up to collect them.

41. For the reasons outlined above, it seems to me that this category of documents is relevant to an issue on the pleadings. I have no evidence before me that establishes that all of the documents relating to the vehicles have already been handed over to the plaintiff. That is not something that was put on affidavit by the defendant. In the circumstances, I am not in the position to conclude that discovery of this category of documents is not necessary. In my view, on the basis of the evidence currently before the court, discovery of this category is necessary in circumstances where, as Mr. Barry explains in his affidavit grounding this motion, a full history and management by the defendants of these vehicles is required so that the court can adjudicate on the allegations made by the plaintiff (which are all very fully denied by the defendants).

42. It is important, however, to point out that the defendants are only are required to make discovery of documents which they have now or once held. In the case of documents, they once held but no longer have, these will have to listed in the second schedule to the affidavit of discovery and the defendants should explain what became of them in the body of the affidavit.

43. I will therefore make an order directing the defendants to make discovery of the documents in category H.

Categories I and J
44. The defendants do not object to making discovery of the documents in these categories and I therefore do not need to consider them.

Category K
45. In this category, the plaintiff seeks discovery of documents relating to posts and messages evidencing the defendant's Social Media usage since 29 June 2017 "insofar as these constitute or relate to communication with persons that are employees, servants, agents, suppliers and/or customers and/or prospective customers of the Company or sales leads or potential sales leads including their

communications through the "Decobake Caking & Decorating Chat Group" and the "Decorating Baking & Caking Chat Group".

46. This category of documents is relevant to the allegation made in para. 12 (s) of the statement of claim that the defendants have sought to "sabotage" the liquidation or otherwise damage Decobake through the use of the chat group on Facebook.

47. In his email of 11 March 2018 in response to the request for discovery, Mr. Coyle, the first named defendant, said that there would need to be clarification in relation to communications requested in circumstances where Mr. Coyle contended that the defendants would need to request permission from any third parties to release their private data to you. The email also stated, for the record, that there had been no communications with the employees of the company in any form. He also said: -

> *"Notwithstanding the proceeding, there is no real objection to the request, the issue is the data protection and the enormity of the request. If you could provide more accuracy to your request it would assist".*

48. In the course of his submissions on behalf of the defendants, Mr. Coyle amplified what he said in this email. He submitted that the defendants have a real concern about the onerous nature of this request. Their concern that there may be many thousands of communications that will need to be reviewed. He also stressed the concerns which the defendants have in relation to data protection.

49. As noted above, this category is undoubtedly relevant to an issue on the pleadings. It also seems to me that the necessity for this category of documents has been made out by the plaintiff. The plaintiff has no access to these documents save through discovery.

50. Insofar as the defendants have concerns in relation to data protection, I have already drawn attention to the provisions of s. 47 of the Data Protection Act, 2018 which, in my view, authorises the disclosure of personal data for the purposes of complying with discovery obligations in litigation. Moreover, I have no doubt that the trial judge will be mindful that personal data relating to third parties should not be unnecessarily disclosed during the course of the trial.

51. The case law discussed above shows very clearly that a court, in deciding whether to grant discovery should have regard to the burden which discovery may place upon a party to legal proceedings. It is clear that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant for discovery or damage the case of his opponent.

52. In light of the principle of proportionality I had initially thought that it might be appropriate to confine Category K to those emails or communications of a potentially disparaging kind. However, on reflection, I have come to the conclusion that it would not be in the interest of either party to confine category K in that way. In the first place, such an exercise would not lighten the burden on the defendant. In order to comply with discovery of this category of documents, the defendants would still have to sift through all of their communications. The defendants would also, in such circumstances, be placed in a very invidious position in having to make judgment calls as to whether a particular document was or was not of a disparaging nature. Secondly, and more importantly, I consider that it is very important and in the interests of both sides that this material is disclosed in its entirety. In my view, if all of the documents in this category are disclosed, it should assist in demonstrating whether there is any substance at all in the allegation which the plaintiff makes. The communications may in fact show that the defendants have acted quite innocently. On the other hand, of course, if there is any substance to the allegations which the plaintiff makes, then one would expect that this would be reflected in the communications to be discovered in this category.

53. In the circumstances, I am of opinion that the utility of this category of discovery outweighs any concerns about burden and I will make an order directing the defendants to make discovery of the documents in category K but, with a view to ensuring that the category is not open-ended in time, I will limit the period in respect of which discovery is to be made to the period commencing on 29 June 2017 and ending on 12 April 2018 (which was the date of the plaintiff's motion).

Categories L, M and N
54. No dispute arises between the parties in relation to these categories and they therefore do not require consideration by me.

Category O
55. In this category, the plaintiff seeks discovery of *"all books and records of the Company on which the defendants or any of them intend to rely on during the course of the proceedings".*

56. In my view, it is not permissible to seek discovery framed in these terms. This is akin to seeking general discovery which is no longer permitted under O. 31, r. 12. Moreover, it fails to identify any issue on the pleadings to which this category could be said to be relevant. As the case law shows, discovery cannot be sought unless the party seeking discovery demonstrates that it is relevant to an issue on the pleading.

57. I therefore refuse to make an order directing the defendants to make discovery of documents within category O.

The Defendants' Motion
58. I now turn to the defendants' motion dated 17 April 2018. In that motion, the defendants seek discovery of 22 individual categories of documents. It is unnecessary in this judgment to replicate each of the categories in full. The relevant categories are described in the notice of motion. Before turning to the individual categories, I should record that the Plaintiff, in his affidavit sworn on 11 May, 2018, complains that the defendants' request is too onerous. He says that since his appointment as liquidator, he has taken possession of 180 bankers' boxes of documentation. In my view, I believe that the issue of proportionality can only realistically be considered in the context of each individual category of discovery sought. I would, however, observe that, as liquidator, the Plaintiff will, in all likelihood, have to acquaint himself with the records of Decobake in order to carry out his duties as liquidator and to prepare for the hearing of these proceedings.

Category 1
59. In Category 1, the defendants seek documentation relating to the engagement of KTech Security by the plaintiff to include documentation evidencing the need to engage a security firm and evidencing the *"alleged/inferred aggressive nature of the Defendants . . .to also include correspondence and statements from the Gardaí and KTech in relation to this matter".*

60. In the defendants' request for discovery the defendants maintain that discovery of these documents is necessary for a fair hearing of the proceedings. It is said that discovery is required to establish whether it was necessary for the plaintiff to engage a professional security firm. It is also stated that the documentation is required *"in order to validate the accuracy of the content of the*

Provisional Liquidator's semester report being one of the documents on which Declan De Lacey grounded his ex parte application to the court for injunctive proceedings and will further demonstrate the groundless allegations by Declan De Lacey in these proceedings . . . The defendants require discovery of these documents to demonstrate the malicious falsehoods and misrepresentations of fact by Declan De Lacey in his attempt to mislead the court".

61. In his replying affidavit sworn on 11 May 2018, the plaintiff expresses concern that the purpose of the defendants' application for discovery in these proceedings is not to advance the issues in these proceedings but is being sought to obtain evidence for use in separate proceedings such as the appeal brought by the defendants against the winding up order and the proposed criminal prosecution. The plaintiff draws attention to para. (d) on p. 1 of the defendants' request for voluntary discovery which states that the discovery is "*also necessary for the Court of Appeal Case (367 COS) and the legal submissions I am required to submit and for supplementing evidence for the Criminal Prosecutions before the Criminal Courts of Justice*".

62. In addition, in para. 16 of his affidavit the plaintiff contends that the documentation in relation to the engagement of KTech Security is not material to the issues in dispute in the proceedings. He also says that "*insofar as there is a dispute concerning the behaviour of the defendants in respect of which the assistance of security was called in aid, the defendants are fully au fait with the events and these have been more than adequately pleaded".*

63. I wish to make it very clear that there would be no basis on which discovery could be ordered in these proceedings where the documents are sought for use in other proceedings. I have already drawn attention to the well settled law that documents discovered in these proceedings can only be used for the purposes of these proceedings and I have highlighted that the party seeking discovery is subject to an implied undertaking to the court to that effect. It would therefore be quite improper for discovery to be sought for the purposes of other proceedings such as the pending appeal in the Court of Appeal in respect of the winding up order. Any use of the documents subsequently discovered in these proceedings for purposes other than the defence of these proceedings or the prosecution of the counterclaim would, in the absence of express leave of the court, constitute a contempt of court.

64. In dealing with Category 1, I must therefore solely have regard to the issues which are raised on the pleadings in these proceedings. In my view, there is an issue on the pleadings to which Category 1 is relevant. In para. 12 of the statement of claim it is alleged (*inter alia*) that the defendants interfered with and obstructed the plaintiff in carrying out his duties as liquidator and were deliberately and actively uncooperative with him from the outset of his appointment as provisional liquidator. In para. 3 of a notice for particulars dated 1 December 2017, the defendants sought particulars of this allegation. The response provided by the plaintiff on 7 December 2017 expressly refers to the report of the plaintiff in his capacity as provisional liquidator dated 24th July 2017. To that extent, the report of the provisional liquidator has been adopted into the pleadings in these proceedings. In para 4.3 of that report, there is express reference to the liquidator being concerned that the first named defendant would resist the entry by the plaintiff into the Decobake premises. Para 4.3 expressly states: -

> *"The provisional liquidator had regard to the circumstances that arose when the landlord for the premises in Clane had re-entered that property and when the Dublin City Sherriff had sought to seize assets, which are more particularly described in para. 3.2 and 8.5 below. The provisional liquidator arranged to be accompanied by security personnel employed by KTech (a security firm) and brought his intentions to An Garda Síochána who were also in attendance. On the advice of the Gardaí, who were aware of the aforementioned circumstances, the provisional liquidator deferred taking possession of the premises until the day following his appointment so that An Garda Síochána could have adequate personnel present in the event of a disturbance"*

65. In light of the way in which the plaintiff has chosen in his pleadings to specifically refer to the events described in his report of July 2017 and to adopt that report as part of the particulars of his claim, it seems to me that the documentation evidencing any requirement to engage a security firm and evidencing the alleged aggressive nature of the defendants is relevant to an issue on the pleadings. I do not believe that it is an answer to this request for discovery that, as contended by the plaintiff in para. 16 of his affidavit, the defendants are fully "*au fait with the events and these have been more than adequately pleaded*." Given the serious nature of the allegations which are made, it seems to me that the defendants are entitled to explore the basis on which the plaintiff formed the view that the engagement of security personnel was required in this case. The defendants have no means to gain access to these documents save by means of discovery. Furthermore, I can see no basis on which it could plausibly be said that discovery of this category of documents is unduly burdensome.

66. However, it seems to me that Category 1 is somewhat loosely formulated. It also seems to me to presuppose that, for example, there are statements from members of An Garda Síochána or KTech staff. It would be impossible to know whether there are any such statements and I therefore believe that the category should be more appropriately formulated as follows: -

> *"All documentation relating to the engagement of KTech Security by the plaintiff in his capacity as provisional liquidator or liquidator of Decobake to include documentation received by the plaintiff evidencing the alleged requirement to engage a security firm"*

Category 2

67. In relation to this category, the defendants seek discovery of stocktake sheets "*Itemising each stock item, quantity in stock, and the stock value applied" they seek the originals with "dates, times and signatures of each staff who signed off the stock counts and the number of days required to count the stock and prepare the stock value reports".*

68. The defendants submit that this documentation is required to validate the stocktake figures supplied by the plaintiff in his report as provisional liquidator of July 2017 which they say they strenuously contest. They also maintain that the stocktake figures will assist in demonstrating whether loss has been sustained by the company as alleged by the plaintiff. In addition, they submit that the documentation is required in order to validate the accuracy of the provisional liquidator's report and they believe that this category of discovery will demonstrate what they describe as the "*groundless allegations*" by the plaintiff in these proceedings.

69. In response, the plaintiff says in para. 17 of his affidavit that the stock that was on the premises on the date of his appointment on 29 June 2017 is not material to the dispute in the proceedings "*concerning the damaging impact resulting from the defendants' wrongful conduct after the date of my appointment as provisional liquidator on 29th June 2017 and its impact on the goodwill and trade of the company. Furthermore, an itemised list of all of the stock and all subsequent dealings in stock purchases and sales, is highly commercially sensitive in light of the defendants' direct competition with the Company."*

70. However, it seems to me that aspects of this category are relevant to the following issues which arise on the pleadings: -

(a) In para. 27 of the counterclaim the defendants allege that the plaintiff refused or neglected to provide an adequate detailed stocktake other than a pro forma stocktake "*with the intention of defrauding the creditors for his own gain*";

(b) In para. 28 of the counterclaim there is an allegation that the plaintiff refused or neglected to involve the directors in relation to the stocktake to ensure a valid uncontested stocktake "*as per best practice*".

71. These allegations are specifically denied in paras. 56 and 57 of the defence to the counterclaim delivered on behalf of the plaintiff. In these circumstances, there is clearly an issue on the pleadings relating to the stocktake. It should be noted, at this point, that in the plaintiffs' report, as provisional liquidator, dated 24 July 2017, the plaintiff states that he engaged McKay Asset Valuers and Auctioneers to count and value the stock. According to the report of the plaintiff, the cost price of the stock was estimated at €525,000 while the likely realisable value was assessed at €184,000.

72. The defendants have no access to any records relating to the stocktake undertaken by the plaintiff by any means other than discovery. In the circumstances, it seems to me that discovery of documents relating to this stocktake is necessary in order to deal with the issues on the pleadings identified above. However, it seems to me that Category 2 presupposes that a stocktake was undertaken in a particular manner. For the purposes of directing discovery, I do not believe that it would be appropriate to presuppose that records exist which identify the dates times and signatures of each member of staff who signed off on the stock counts (which is envisaged by the current form of Category 2 as proposed by the defendants). It seems to me that Category 2 requires to be revised in the following terms: -

> *"All documents relating to the stocktake undertaken by or on behalf of the plaintiff following his appointment as provisional liquidator"*

73. If there are records which records the dates, times and signatures of the staff who carried out the stocktake, or which record the number of days on which the counting of stock took place those records would be captured by this category. However, it is important for the parties to understand that the only obligation (in the context of discovery) is to disclose documents which exist (or which once existed) which are in the possession or power of the relevant party. There is no requirement that a party should create documents (which do not previously exist in material or electronic form) for the purposes of discovery.

74. I am conscious that the plaintiff in his affidavit sworn on 11 May 2018 has expressed concern about the burden that the discovery process may place on him. I do not believe that the category set out in para. 72 above is unduly burdensome since I is confined to the single stocktake mentioned in the plaintiff's report of July 2017. I am confident that any stocktake carried out in the course of a liquidation will have been effected in an orderly way and that the nature of the stocktake will have been recorded by those who carried it out. The documents to be discovered in this category should be readily available.

75. I am also conscious that the plaintiff has expressed concern that an itemised list of all the stock is highly commercially sensitive in light of the fact that the defendants are now competing with Decobake. However, I fail to see how disclosure of a stocktake which took place more than twelve months ago could be said to give rise to any commercial sensitivity. It also has to be borne in mind that the defendants here are not strangers to Decobake. They were all involved in Decobake prior to the appointment of the plaintiff as its provisional liquidator. In the circumstances, it does not seem to me to be necessary to consider whether any form of "confidentiality club" should be imposed in relation to this category of documents. Nonetheless, I will give liberty to the plaintiff to apply in the event that there is some specific reason to justify why a year old stocktake is commercially sensitive.

76. For the reasons outlined above, I therefore propose to make an order that the plaintiff should make discovery of the documents described in para. 72 above.

Category 3

77. In respect of this category, the defendants seek discovery of: -

> *"Detailed original report of the fixed assets of the company, itemising each asset, its location, its estimated value, date and time of staff sign-off of reports"*

78. The defendants say that this category of documents is required to validate the fixed asset figures supplied by the plaintiff in his report as provisional liquidator (described above).

79. In para. 17 of his affidavit, the plaintiff takes the same approach in relation to Category 3 as he did in relation to Category 2 (as described above).

80. In order to assess the potential relevance of this category, it is necessary to consider the issues that arise on the pleadings. I note that it is specifically alleged in para. 16 (i) of the counterclaim that the plaintiff has a duty to provide an accurate account of the assets of Decobake. In para. 16 (l) it is also alleged that he has a duty to preserve the assets of Decobake. In this context, it is clear from the report of 24 July 2017 that in addition to the work done by McKay Asset Valuers and Auctioneers in relation to the stocktake, the same firm were engaged in the valuation of other assets held by Decobake. It therefore appears to be clear that a valuation was carried out by the plaintiff following his appointment as provisional liquidator. However, in contrast to the stocktake issue, I can find no allegation in the defendants' pleadings to the effect that the plaintiff has failed in the duties alleged in paras. 16(i) and 16(l) of the counterclaim. In the absence of such an allegation, I cannot see how any issue arises in the proceedings in relation to the valuation of fixed assets.

81. It therefore seems to me that the defendants have not established that discovery of documents relating to the valuation carried out by the plaintiff is relevant to any issue on the pleadings. I therefore do not need to address any issue of necessity. In the circumstances, I refuse to direct the plaintiff to make discovery of this category.

Category 4

82. In Category 4, the defendants had originally sought discovery of what was described as a detailed report of a specialist IT professional engaged to work on the IT system of Decobake. However, in the course of the hearing before me it was confirmed by the first named defendant, Mr. Coyle, that the defendants now accept that there is no such report. Accordingly, the application in relation to Category 4 was not pursued.

Category 5

83. The defendants seek discovery of "evidence" to support the plaintiffs' claims in para 3.2 of the report of 24 July 2017. It should be noted that in para 3.2 of that report, the plaintiff stated (with regard to attempted enforcement of rates claims): -

> *"A number of decrees/warrants for execution were obtained by Dublin City Council in respect of the company's indebtedness for local authority rates for the years up to and including 2015. These warrants for execution were passed to the Dublin City Sherriff who attended at the company's premises in Bachelor's Walk, Dublin 1, on 14 December 2016 with a view to seizing goods in satisfaction of the debts. The provisional liquidator is advised that the sheriff's attempts to enter on to the premises were met with physical force by those present, by whom he was excluded from the premises and consequently was unable to execute the warrants".*

84. The defendants say that discovery of this category of documents is required to establish or undermine the validity of the case made by the plaintiff that the defendants were aggressive or were involved in unlawful behaviour. They also say that the documentation is required in order to: -

> *"validate the accuracy of the content of the provisional liquidators' report being one of the document on which Declan De Lacey grounded his* ex parte *application to the court for injunctive proceedings and will further demonstrate the groundless allegations by Declan De Lacey in these proceedings . . . The defendants require discovery . . .to demonstrate the malicious falsehoods and misrepresentations of fact by Declan De Lacey in his attempt to mislead the court".*

85. In his replying affidavit the plaintiff suggests that these documents have no relevance to the issues in the proceedings. He also suggests that it is possible that the defendants seek discovery of these documents in furtherance of their appeal against the winding-up order.

86. It would obviously be impermissible for the defendants to seek discovery of this category of documents for the purposes of their appeal against the winding-up order. However, there are a number of issues on the pleadings which are relevant in this context. These are: -

> (a) In para. 38 of the defence, it is alleged by the defendants that the relief obtained at an interlocutory stage by the plaintiff in these proceedings was "*achieved fraudulently by submitting falsehoods, withholding material evidence, misleading the court in an ex parte motion which is contrary to the common doctrine of uberrime fidei"*
>
> (b) In para. 11 of the counterclaim it is alleged that the plaintiff brought *ex parte* proceedings and secured an interim injunction on the basis of misleading information and omissions of fact.
>
> (c) In the counterclaim delivered on behalf of the defendants, they seek payment of damages, including aggravated and/or exemplary damages on the basis of (*inter alia*) an alleged omission of material facts.

87. The provisional liquidators' report of 24 July 2017 was exhibited to the affidavit grounding the plaintiffs' *ex parte* application for an interim injunction. While the plaintiff has suggested in para. 19 of his affidavit sworn on 11 May 2018 that this category is not germane "*to the issues in these proceedings which concern conduct from the 29th June 2017 onwards and issues relating to Intellectual Property and ownership*", it seems to me that what was said by the plaintiff in para 3.2 of the report of 24 July 2017 is relevant to the issues described in para. 86 above. The material contained in para 3.2 of the report appears to me to be of relevance to the application for interim relief. Para. 3.2 contains material which had the potential to influence the court in its consideration as to whether interim relief should or should not be granted. Given the nature of the allegations made by the defendants in their defence and in their counterclaim (as outlined above) it seems to me that documents evidencing the statements made in para 3.2 of the report of 24 July 2017 are relevant to the issue raised by the defendants as to whether the court was misled in the course of the application for interim relief. The category is quite confined and I do not believe that it could be said to place any undue burden on the plaintiff. I am therefore of opinion that I should direct the plaintiff to make discovery of any written materials evidencing the matters stated in para. 3.2 of his report of 24 July 2017. It would, however, be inappropriate to direct discovery in the terms of Category 5 as drafted. The category, for example, seeks:-

> *"The details of who the Liquidator spoke to, date and time of communication and the exact contents of the communications both verbal and written are required …"*

As I have already made clear, the discovery process only captures documents which actually exist. There is no requirement for any party to generate documents or to provide information which is not recorded in documents. In the circumstances, it seems to me that Category 5 should be reformulated in the following terms:-

> *"Discovery of any written materials relating to or evidencing the matters states in para. 3.2 of the report of the plaintiff in his capacity as provisional liquidator dated 24th July, 2017."*

Category 6

88. The defendants seek discovery of documents relating to the collection by Decobake's credit card processor, Elavon, from credit card transactions forwarded to the Collector General in October 2016 together with communications between Elavon and the Collector General regarding an attachment notice. They also seek discovery of communications between the Collector General and Decobake in October 2016 in relation to monies owed to the Revenue, arrangements made and the subsequent rate of repayment of monies owed to the Revenue.

89. The defendants say that discovery of this category of documents is required in order to establish the validity of assertions made by the plaintiff in his July 2017 report as provisional liquidator. In his replying affidavit sworn on 11 May 2018, the plaintiff has said that the events of October 2016 long pre-date his appointment and pre-date all of the events which are material to the issues which arise in these proceedings.

90. I have carefully considered the pleadings and I have been unable to identify any issue on the pleadings which directly relates to the dealings between Elavon and the Collector General. I am also conscious that these events relate to a period going back to October 2016. However, I note that the issue is dealt with in para 5.5 in the plaintiffs' report in his capacity as provisional liquidator of 24 July 2017. In that section of his report, the plaintiff provided details to the court of a number of incidents of non-compliance by Decobake with its obligations in respect of VAT, PAYE and PRSI. This section of the report concludes as follows: -

> *"The provisional liquidator notes that the company has previously omitted to pay taxes as they fall due and that on 27 October 2016 the Collector General issued an attachment notice to Elavon, who processed the company's credit card receipts for an outstanding debt of €48,275.00 which sum was collected directly from Elavon."*

91. As noted above, Category 6 seeks documents passing between Elavon and the Collector General. It also seeks communications between the Collector General and Decobake in October 2016 into monies owed to the Revenue, arrangements made with Revenue and the subsequent rate of repayment of monies owed to Revenue.

92. I have to say that I was initially doubtful that the defendants had established the relevance of this category or that it was necessary that discovery should be made of documents within this category. However, on reflection, I believe that similar issues arise here as arise in relation to Category 5. I draw attention in particular to what is said in para. 29 of Mr. Coyle's affidavit sworn on 29th May, 2018 in support of the present motion where he says:-

> *"The plaintiff has made a claim that Elavon … did collect the … credit card receipts and paid them directly to the Collector General. The plaintiff made this claim in his … report on the 24th July, 2017 and subsequently submitted this report in his … application for interim relief …. The purpose of the plaintiff making this claim was to damage the defendants and in particular the first and second named defendants and make them out to be tax defaulters*. The facts relayed in the plaintiff's report are untrue. The Collector General never collected payments from Elavon through credit card receipts *and the discovery sought in this category is necessary and essential to clear the defendants good name and reputation …. It is the defendants position that the plaintiff deliberately mislead the court in this matter, however if this misinformation was to be somehow excused as an error, the defendants say it is necessary that it is established as the plaintiff has made many false claims against the defendants and the discovery of this category will assist them in their defence …*" (emphases added)

93. Having regard to this environment, it seems to me that the defendants have established that the category of documents described in para. 88 above is relevant to the issue raised by them at para. 38 of their defence and para. 11 of their counterclaim (as summarised in para. 86 above). It also seems to me that discovery of this category of documents is necessary in circumstances where the only means of access to these documents opened to the defendants is through the mechanism of discovery. In circumstances where the defendants no longer have access to company records, they are clearly not in a position to obtain access to these documents in any other way. As this category is quite confined, I do not believe that it places an undue burden on the plaintiff.

94. I reiterate, however, that the plaintiff is only obliged to make discovery of documents which are in his possession or power. I do not know, therefore, whether the plaintiff will in fact be in a position to make discovery of documents passing between Elavon and the Collector General. Unless the plaintiff, as liquidator of Decobake, has an enforceable legal right to documents held by Elavon, it may transpire that the defendants, if they wish to obtain such documents, will have to seek non-party discovery as against Elavon or as against the Revenue Commissioners. As I have already indicated, the plaintiff is only required to make discovery of documents within his possession or power. While the plaintiff has not, at this point, placed any evidence before the court to suggest that the documents are not within his power, this is something which may nonetheless arise when the plaintiff comes to swear his affidavit of discovery.

95. There is one further aspect of Category 6 which I believe requires consideration – namely the reference within the category to documents in relation to "the subsequent rate of repayment of monies owed to the Revenue". I do not see how this is relevant to the allegation that is made that the plaintiff has misled the court in relation to the position as between Elavon and the Collector General. In these circumstances, it seems to me that the most appropriate order to make in relation to Category 6 is to direct that the plaintiff should make discovery of documents within Category 6 subject to the following which should be substituted for the second sentence in Category 6:-

> *"Communications between the Collector General and Decobake in or about October 2016 in relation to monies owing to Revenue and the arrangements made for repayment of such monies."*

Category 7
96. I do not have to concern myself with Category 7 because it has been dealt with by agreement between the parties.

Categories 8 and 9
97. It is convenient to deal with Categories 8 and 9 together.

98. In Categories 8 and 9 the defendants seek discovery of all documents evidencing communications with the landlord of the Decobake premises at Clane and at Bachelors Walk detailing the indebtedness of Decobake to those landlords and the steps taken by the plaintiff to ascertain the *bona fides* of the landlords' claims.

99. The defendants contend that the landlords were not owed the amounts claimed by them and in fact were not owed any monies on the date of commencement of the liquidation of Decobake. The defendants maintain that discovery of the documents will establish this. They also say that the documentation is required in order to validate the accuracy of the report of 24th July, 2017.

100. In para. 21 of his affidavit sworn on 11th May, 2018, the plaintiff says that these matters are not in issue in the proceedings and that the plaintiff suspects that the true intention of the defendants in seeking discovery of these categories may well be to advance arguments they wish to make in other litigations.

101. However, during the course of the hearing before me, the defendants submitted that the category was relevant to the issue raised by them in para. 23 of their defence where, in answer to the allegation made in para. 12(p) of the statement of claim that Decobake and its creditors have suffered loss and damage as a consequence of the wrongdoing of the defendants, the four defendants deny that Decobake has suffered any loss or damage on their account and assert that any loss suffered by Decobake arose as a result of the plaintiff's mishandling of its business. They also allege that it is the actions of the plaintiff that has caused loss and damage to Decobake and its creditors and they assert that the plaintiff has been "*grossly negligent*" in his stewardship of Decobake.

102. In his request for particulars dated 21st December, 2017 the plaintiff, in para. 25 of the request, sought particulars of the allegations made in para. 23 of the defence. In their response dated 28th December, 2017, the defendants said that this was a matter for evidence at the trial. This does not appear to have been subsequently challenged by the plaintiff in any application before the court seeking to compel the defendants to provide particulars of the allegations made in para. 23 of the defence.

103. There is accordingly no express plea that the plaintiff wrongfully admitted claims by landlords which were not due by Decobake. However, it seems to me that such an allegation falls within the broad scope of para. 23 of the defence. On that basis, it seems to

me that the category of documents is relevant to an issue on the pleadings. It also seems to me that discovery of this category of documents is necessary in circumstances where the documents will assist in establishing whether or not there is any substance to the allegation made in para. 23 of the defence and also in circumstances where the defendants (who longer have any role within Decobake) have no other means of access to these categories of documents. I do not believe that this places an undue burden on the plaintiff sine it relates to dealings which took place with the landlords after his appointment as liquidator.

104. In the circumstances, it seems to me to be appropriate that I should direct discovery of documents in Categories 8 and 9.

Category 10
105. Category 10 is in the following form:-

> *"Documents in relation to an Excel sheet named "Bank items not posted to TAS" as detailed in paragraph 8.7 of the Liquidator's Report. The report of all unallocated payments to Margaret Coyle, Meta Coyle or Paul Coyle from 30 November, 2015 up to and including June 30 2017."*

106. This category refers to para. 8.7 of the report of 24th July, 2017. In para. 8.7 the plaintiff stated (*inter alia*):-

> *"In addition to the TAS book records the company's account administrator kept an Excel sheet of transactions named "Bank items not posted to TAS". The Excel spreadsheet shows transactions from 30th November, 2015 to 7th February, 2017. Within the transactions on the worksheet are withdrawals totalling €66,993.55 with the narrative "Margaret Coyle" or "Meta Coyle". The spreadsheet also contains lodgements totalling €30,000.00 that contain the narrative "Directors loans??"."*

107. In their request for discovery, the defendants say that this documentation is required to enable the first and second named defendants to prove that they did not take funds from Decobake for their own use. It is also suggested that this will further demonstrate what are suggested to be groundless allegations by the plaintiff in support of his application for interim relief of 8th August, 2017 put forward in his attempt (so it is alleged) to mislead the court.

108. It should be borne in mind that the only allegation that is made in the statement of claim in relation to the alleged misappropriation of funds by the first and second named defendants is in respect of the sum of €49,491.00. That is the allegation made in para. 12(d) of the statement of claim. That cannot be used as a basis for suggesting that Category 10 is either relevant or necessary. The allegation in relation to that payment is that it did not occur until on or about 30th June, 2017. It is therefore wholly unnecessary to seek discovery in respect of records in the period from 30th November, 2015 to 30th June, 2017. There is no necessity for discovery in those circumstances.

109. It is true that the defendants advance a further reason for discovery of this category – namely to demonstrate that the report of the plaintiff as provisional liquidator of 24th July, 2017 was misleading and that it in fact mislead the court in August 2017 when an application was made for an interim injunction. However, insofar as that reason is concerned, it is important to consider what is said by the plaintiff in para. 22 of his affidavits sworn on 11th May, 2018 where he says:-

> *"The Excel sheet to which [the defendants] is a document identified only in the Liquidator's Report and insofar as they seek "documents in relation to" that sheet, may involve an exceptionally onerous discovery requiring a comprehensive audit of all papers that came into my custody upon my appointment. As stated above, there are in excess of 180 boxes of Company materials which may need to be forensically reviewed in order property to address this speculative request for discovery which is not confined to the grounds advanced in support of it …".*

110. Notably when Mr. Coyle came to swear a replying affidavit on 29th May, 2018, he did not deal with this averment by the plaintiff which is raised very specifically in relation to this category.

111. In light of what has been said by the plaintiff, it seems to me that it would be manifestly disproportionate to direct the plaintiff to make discovery of the documents in Category 10. It has not been demonstrated to me that discovery of what is clearly a very onerous category of documents is so essential to an issue in the case that the burden imposed on the plaintiff in making discovery of this category could be said to be justified. In these circumstances, I refuse to direct the plaintiff to make discovery of Category 10.

Category 11
112. It is clear from para. 30 of Mr. Coyle's affidavit sworn on 29th May, 2018 that no dispute arises in relation to Category 11 and I therefore do not need to deal with it.

Category 12
113. In Category 12, the defendants seek discovery of documents evidencing details of the parties interested in acquiring the business of Decobake. The defendants refer in this context to para. 11.1 of the report of 24th July, 2017 and to para. 14 of the statement of claim. The defendants say that discovery of this category of documents is necessary in order to substantiate the assertions made by the plaintiff that the defendants made contact with potential purchasers of the Decobake business with a view to dissuading them from purchasing Decobake.

114. In response, the plaintiff in para. 23 of his affidavit sworn on 11th May, 2018 says that this is manifestly a matter of upmost commercial sensitivity in circumstances where efforts continue to be made by him to dispose of the Decobake business. He maintains that discovery of this category of documents would be "*catastrophic to my responsibilities as Liquidator*" and that it is not probative in relation to any of the issues in dispute.

115. In relation to this category, it is important to bear in mind what is in issue in the proceedings. The allegation that is made by the plaintiff in relation to attempts by the defendant to dissuade potential purchasers from acquiring the Decobake business is set out in paras. 14 and 15 of the statement of claim. In para. 14 of the statement of claim there is a specific plea that the defendants communicated with Doric Crafts threatening that an injunction would be sought against any party who attempted to buy Decobake. In para. 15 of the statement of claim it is alleged that the defendants have deliberately attempted to dissuade any potential purchaser from acquiring Decobake. By a request for particulars served on 1st December, 2017 the defendants (at para. 23 of that request) sought further particulars of the attempts made by the defendants to dissuade potential purchasers from acquiring Decobake. In the response from the plaintiff dated 7th December, 2017 the defendants were told that this a matter for evidence.

116. In my view, if the defendants are to be in a position to deal with the allegations made in paras. 14 and 15 of the statement of claim, they will need to have access to any documents in the possession or power of the plaintiff relating to the allegation that they

approached potential purchasers of Decobake with a view to dissuading those purchasers from proceeding. Otherwise, the defendants will be at a distinct disadvantage in dealing with this aspect of the plaintiff's case at trial. However, it seems to me that the category of documents proposed by the defendants goes well beyond what is required in order to deal with the allegations made in paras. 14 and 15 of the statement of claim. In particular, it seeks details of all parties who have an interest in acquiring Decobake. I can see no basis on which it could be said that discovery of such a wide category of documents is relevant or necessary. In my view, the only appropriate discovery to be directed in relation to the issues in paras. 14 and 15 of the statement of claim is in relation to documents evidencing any attempts made by the defendants or any of them to dissuade parties from acquiring the business of Decobake. I cannot see how this gives rise to any commercial sensitivity in relation to this narrow category of documents. If the plaintiff has evidence of such attempts to dissuade potential purchasers of the Decobake business, then, of necessity, the defendants must already be aware of the identity of those particular parties. If, on the other hand, the plaintiff's case boils down to saying that the defendants have acted in a more general way to inform the market (as opposed to any individual parties) that attempts to purchase Decobake would be problematic, then the documents to be discovered in this category will not identify any individual parties.

117. I will therefore direct the plaintiff to make discovery of documents evidencing any attempts by the defendants or any of them to dissuade any interested parties from acquiring the business of Decobake.

118. Lest I am wrong in my views in relation to commercial sensitivity, I will give liberty to the plaintiff to highlight any documents in his affidavit of discovery which give rise to any concerns about commercial sensitivity and I give liberty to the plaintiff to apply to the court to propose a procedure to deal with any issues of commercial sensitivity.

Category 13

119. Category 13 is in the following terms:-

> *"All documents evidencing the date and time the directors of the company were served with the court papers re: the liquidation. Evidence and all documents detailing the exact time the directors transferred funds from the company account. All audio and video records recorded by Ktech Security and Declan de Lacy on the morning of 30th June, 2017 when Declan de Lacy took possession of the premises."*

120. The defendants say that discovery of this category of documents is necessary in circumstances where the plaintiff claims that the first and second named defendants knew that a provisional liquidator had been appointed to Decobake prior to the transfer of funds and which is alleged by the plaintiff to have constituted a theft of Decobake money by them. The defendants say that they were not aware of the appointment and they deny any theft. They say that discovery of this category of documents will assist them in proving their innocence and will further demonstrate what they suggest are the "*groundless*" allegations made by the plaintiff in these proceedings.

121. In response to the request for discovery, the plaintiff's solicitors in their letter of 11th May, 2018 have indicated that the plaintiff is prepared to make discovery of all documents evidencing the withdrawal, transfer and disposal of €49,491.00 from Decobake's account between 29th June, 2017 and 7th July, 2017.

122. As noted previously, there is an issue on the pleadings in relation to the alleged misappropriation of the sum of €49,491.00. The allegation is made in para. 12(d) of the statement of claim. It is alleged that the misappropriation occurred on 30th June, 2017. This allegation is specifically denied in the defence at paragraph 11. In the course of their submissions to me at the hearing of the motion for discovery, the first named defendant contended that the timing of the withdrawal was crucial to the issue of misappropriation. Mr. Coyle said that it will be the defendants' case at trial that they were unaware of the appointment of the plaintiff as provisional liquidator at the moment of the withdrawal. He also submitted that the video will show that both he and the second named defendant were visibly shocked at the sudden arrival of a provisional liquidator (namely the plaintiff) at the Decobake premises on 30th June which he says occurred after the monies had been transferred.

123. In response, counsel for the plaintiff has argued that what is being offered by the plaintiff is sufficient. Counsel also argue that it will be a matter for the defendants to prove the time at which the relevant transfer took place and the time at which they first became aware of the appointment of the plaintiff as provisional liquidator. With regard to the video, counsel argued that it was not in any way probative. Counsel submitted that the video footage will not establish that the defendants were surprised or shocked. It was also suggested that the defendants may have feigned surprise.

124. It seems to me, however, that both the time of the withdrawal and the time at which the defendants became aware of the appointment of the provisional liquidator are both important issues in relation to the very serious allegation that is made of misappropriation of Decobake funds. The defendants will, of course, be in a position to give evidence of their recollection of the timing of both of these events. However, it would undoubtedly be of assistance to the defendants if there are documents available which may corroborate what they say. Conversely, the documents may undermine what they say. Thus, it seems to me that documents relating to the timing of these events are clearly relevant. Likewise, it seems to me that discovery of such documents is necessary within the meaning of the case law in circumstances where these documents are held by the plaintiff and the defendants have no means of access to them save by means of discovery.

125. I have not seen the video which was discussed at the hearing before me. I am not sure that it will have the probative value which the defendants suggest. Nonetheless, it is likely that a video made in 2017 will show the precise time at which it was taken. Furthermore, the defendants may well be correct in suggesting that their genuine surprise will be evident from the video. I therefore have come to the conclusion that the video is relevant in the sense described in the *Peruvian Guano* case – in that the video may contain information which will enable the defendants to advance their defence and undermine the case made by the plaintiff.

126. It therefore seems to me to be appropriate to direct the plaintiff to make discovery of documents within Category 13. I am, however, concerned about some of the language used in Category 13 as it is currently framed. It seems to me that it should be reformulated more precisely as follows:-

> *"Any documents evidencing the date and time the defendants were served with the court papers in relation to the appointment of the provisional liquidator and the presentation of the petition for the winding-up of Decobake and any documents detailing the time at which the directors of Decobake transferred the sum of €49,491.00 from a company bank account together with the audio and video records of the taking of possession of the Decobake premises by the plaintiff on the morning of 30th June, 2017."*

127. I therefore direct that the plaintiff should make discovery of the documents in Category 13 as set out in para. 126 above.

Category 14
128. With regard to Category 14, the defendants seek discovery of documents evidencing all communications between the plaintiff and two buyers of the Musgrave Group detailing the efforts made by the plaintiff to ensure continuity of supply of products from Decobake to Musgraves. They also seek discovery of documentation showing the dates of despatch of the first orders sent to Musgraves after 30th June 2017 and details of the departments to which they were going and the goods referenced on the orders. The defendants say that discovery of this category is necessary in order to validate the plaintiff's claim that the actions of the defendants damaged the business of Decobake with Musgraves.

129. In response to this request, the plaintiff, in paragraph 24 of his affidavit sworn on 11th May 2018, says that the defendants seek to interrogate the entire of the trading relationship between Musgraves and Decobake. He says that this is "*hugely commercially sensitive information*" in circumstances where Musgraves had previously conducted business with Decobake to a value of more than €500,000 per annum and in circumstances where Musgraves continue to do business with Decobake, albeit at a lower volume now. The plaintiff also says:-

> *"The commercial sensitivity of documents going to the Company's relationship with Musgrave Group is amplified in the context of the first defendant having disclosed by email addressed to me and dated 22nd December 2017 and 2nd February 2018 his intent to seek a trading relationship between his new business and Musgrave Group … . In the context of affidavits supporting the application for interim and interlocutory injunctions I have already placed on oath and exhibited communications issued by the defendants to Musgraves specifically threatening them as to the liability they may incur in trading with the Company in goods which, the first defendant claimed, were the subject of his Intellectual Property Rights and to which, he asserted, the Company had no licence. These claims of course are being vigorously disputed."*

130. Again, in the context of this category, it is essential to consider the issues raised on the pleadings. In paragraph 12(o) of the statement of claim the plaintiff alleges that the defendants wrongfully made contact with Musgraves by email dated 3rd August 2017, asserting personal intellectual property rights and trade secrets in respect of cartridges and sugar sheets purchased by Musgraves from Decobake and offering to supply these products to Musgrave within three weeks and requesting Musgraves to confirm that they would discontinue purchasing these products from Decobake. It is also alleged that the email was coupled with numerous telephone calls in or about the same time by the first named defendant to Musgrave in which the first named defendant requested Musgraves to cease trading with Decobake and to commence to purchase products directly from him instead.

131. There is accordingly an issue on the pleadings in relation to alleged attempts by the defendants to take Musgrave business away from Decobake. In addition, it must be borne in mind that in paragraph 12(p) of the statement of claim it is alleged that by reason of (*inter alia*) the allegations relating to Musgraves, Decobake and its creditors have suffered loss and damage which is continuing.

132. The allegations made in paragraph 12(o) of the statement of claim are the subject of paragraph 22 of the defence where it is alleged that the second, third and fourth defendants deny any contact with Musgraves. However, the first named defendant admits that he did make contact with the in-store bakery buyer of Musgrave on or about 3rd August 2017. Paragraph 22 alleges that the first named defendant was entitled to do so in circumstances where he is the owner of the intellectual property in question. In the same paragraph, the first named defendant denies that there were any phone conversations with the in-store buyer.

133. With regard to paragraph 12(p) of the statement of claim, the defendants deny that Decobake has suffered any loss or damage and they contend that any loss which has been incurred has arisen as a consequence of the plaintiff's *"total mishandling of the business of the Company and his lack of knowledge and incompetence of a very specific market".*

134. In addition, in paragraph 37 of the counterclaim, the defendants contend that the plaintiff has lost what they describe as a "€500,000 business" with Musgraves "*within the first ten days".*

135. There are therefore issues on the pleadings in relation to:-

(a) The extent of the contact made by the defendants with Musgraves;

(b) the extent to which any such contact could be said to have damaged the business of Decobake;

(c) the extent to which the alleged mishandling of the business by the plaintiff damaged Decobake; and

(d) the loss of the Musgraves business within the first ten days following the plaintiff's appointment.

136. Category 14 must therefore be considered in the context of these issues. Notwithstanding the reasons advanced for seeking discovery of this category, the language of the category, by its own terms, only extends to communications dealing with the efforts of the plaintiff to ensure continuity of the Musgraves business and also certain details relating to the first supplies to Musgraves.

137. Category 14 is not concerned with the allegations which are made in paragraphs 12(o) and 12(p) of the statement of claim. Thus the issues described at para. 135(a) and (b) above are not engaged by this category. It is concerned with the efforts made by the plaintiff to ensure continuity of supply of products from Decobake to Musgraves. On the face of it, Category 14 might be said to relate to an extensive period of time covering all efforts made by the plaintiff to ensure continuity of supply of products from Decobake to Musgraves. However, very significantly, in paragraph 37 of the counterclaim, the defendants allege very specifically that the plaintiff lost the business of Musgraves within the first ten days following his appointment. That is the nature and ambit of the allegation made in paragraph 37 of the counterclaim. In light of that very specific allegation, I do not believe that the more general allegation that is made by the defendants – in relation to the alleged mishandling of the business of Decobake by the plaintiff – can be relied on by the defendants in support of their request for an order that the plaintiff should make discovery of documents within this category. Insofar as the relationship with Musgraves is concerned, the defendants have narrowed the allegation very specifically in paragraph 37 of the counterclaim. It therefore relates solely to the first ten days following the plaintiff's appointment as provisional liquidator.

138. Category 14, as framed, is therefore very obviously too wide in its terms. Having regard to the allegation which is made that the business was lost within the first 10 days, the communications between the plaintiff and Musgraves which will be relevant are those which relate to what took place within the first ten days following the plaintiff's appointment. In those circumstances, the concerns expressed by the plaintiff in paragraph 24 of his affidavit in relation to the burden of dealing with the entire trading relationship with Musgraves do not seem to me to arise. The plaintiff could not properly, on the face of the pleadings, be directed to make discovery of the entire trading relationship between Musgraves and Decobake from the date of his appointment. He could only be required to make

discovery of relevant documents in relation to the relevant period – which, as noted above, is very specific. However, although the defendants have confined their case to the 10 day period in question, it seems to me that the period to be covered by any order of discovery would have to be somewhat longer, since even if the business was lost within the first 10 days, the attempts by the plaintiff to continue it are likely to have extended beyond that period. Taking a cautious approach, it seems to me that a period of 6 weeks would be appropriate. It also seems to me that documents evidencing the date of first supplies to Musgraves after the appointment of the plaintiff as provisional liquidator would be relevant to this issue. Obviously, if supplies were reinstated that would be relevant to the case made by the defendants that the business was lost.

139. Subject to what I have said above, it seems to me that the defendants have established that there is a necessity that the plaintiff should make discovery of documents relevant to the allegation in paragraph 37 of the counterclaim. Very obviously, the defendants have no access to such documents save by means of discovery.

140. In these circumstances, I believe that it is appropriate to direct the plaintiff to make discovery of all documents relating to efforts made by him to ensure continuity of supply of products from Decobake to Musgraves in the 6 week period commencing on 30th June 2017 together with any documents evidencing the date on which goods were first supplied to Musgraves following the appointment of the plaintiff as provisional liquidator. That seems to me to be sufficient to deal with the issue which arises on the pleadings. I do not believe that any more extensive discovery is required in relation to this issue.

141. Having regard to the limited period involved, discovery of this category could not be said to impose any unfair burden on the plaintiff. I also find it difficult to see that any issue as to commercial sensitivity would arise in relation to the documents of this kind especially in circumstances where Mr Coyle on behalf of the defendants confirmed in the course of his submissions to the court on day 2 of the hearing that any information on pricing could be redacted. However, if there any are issues of commercial sensitivity, they can be dealt with in the same way as I suggest at paragraph 118 above in respect of Category 12.

Category 15
142. Category 15 extends to two classes of document namely: -

> (a) Documents evidencing the plaintiff's claim that the third named defendant contacted various employees, identifying the various employees concerned and the content of such communications. In addition, documents are sought evidencing incidents where the third named defendant sought to persuade company employees not to deliver goods to customers. In respect of this class of documents, the plaintiff, in his solicitor's letter of 11th May, 2018, has offered to make discovery of documents evidencing communications by the third named defendant to Decobake employees since 29th June, 2017 that show that the third named defendant sought to persuade the employees not to deliver goods to Decobake customers or to operate Decobake vehicles. It seems to me that the offer that has been made by the plaintiff adequately deals with this class of documents. I therefore do not believe that any order is required in relation to this element of category 15;
>
> (b) The second class of documents covered by category 15 comprise documents evidencing that insurance was in place and was up to date on or about 2nd August, 2017. In the course of the hearing before me, Mr. Coyle, the first named defendant, confirmed that what he has in mind is motor insurance. There is a dispute between the parties as to whether discovery should be made of documents relating to such insurance.

143. It was submitted on behalf of the plaintiff that the insurance issue does not arise on the pleadings. However, it seems to me that there is an issue on the pleadings in relation to the insurance of the car fleet. In this regard, para. 12(h) of the statement of claim alleges that the third named defendant contacted various employees of the company and falsely claimed (*inter alia*) that the company motor vehicles were not insured. In para. 15 of the defence it is expressly pleaded that the third named defendant informed one employee of Decobake that the fleet insurance was due to lapse and that the company motor vehicles would be without insurance. The intent underlying this plea appears to be that what was said by the third named defendant was true, such that the plaintiff is incorrect to allege that any false claim was made by her.

144. In the circumstances, it seems to me that there is, in fact, an issue on the pleadings as to whether a false claim was made by the third named defendant that the company fleet was not insured. In those circumstances, it seems to me that discovery documents evidencing that the insurance was in place and up to date on or about 2nd August, 2017 is in fact relevant to an issue on the pleadings. Furthermore, it seems to me that discovery of such documents is necessary in circumstances where the defendants no longer have any access to Decobake records. If the defendants are to defend the allegation made in para. 12(h) of the statement of claim as to the allegedly false claim made by the third named defendant, it must follow that they are entitled to discovery of these documents. In my view, both the relevance of the necessity of this element of category 15 has been made out by the defendants and I therefore direct that the plaintiff should be make discovery of documents evidencing whether insurance was in place and was up to date on or about 2nd August, 2017.

Category 16
145. With regard to category 16, the defendants here seek discovery of documents evidencing the plaintiff's claim that Decobake has been unable to receive orders or stock from its main supplier Culpitt UK. The defendants say that this should include statements of accounts evidencing that there has been no supply to Decobake and evidencing that all of the suppliers to Decobake were contacted by the defendants and subsequently refused to trade with Decobake. The defendants also seek to discovery of documents evidencing the date of orders placed with suppliers and the date the orders were subsequently supplied to Decobake.

146. By their letter dated 11th May, 2018 the solicitors for the plaintiff offered to make discovery of communications from Culpitt stating that it was unable to release goods to Decobake between 29th June, 2017 and the date of commencement of these proceedings. During the course of the hearing before me this was amended to read as follows:-

> *"Communications from Culpitt Limited and other suppliers stating why they were unable to supply and/or release goods to the company between 29th June, 2017 5th June 2018 together with the first invoice if and when the supplier concerned resumed supplying goods to Decobake."*

147. I am of opinion that the offer by the plaintiff to make discovery in the terms set out in para. 146 above is all that is required in order to enable the defendants to deal with the relevant allegations made in paras. 12(m) and 12(n) in the statement of claim. In those subparagraphs, the plaintiff alleges that the defendants approached Culpitt Limited and other suppliers with a view to dissuading them from supplying goods to Decobake. I do not believe that it is necessary that full statements of accounts should be disclosed. In my view, it is sufficient that the first invoice from the relevant supplier should be made available. This is in light of the submission made to me by Mr. Coyle the first named defendant during the course of the hearing before me in which he said that it is crucial that the defendants know for how long supplies were withheld from Decobake. Mr. Coyle explained that if Decobake was

without supplies for a short period that should not be a problem but if it was for a long period, Decobake may have suffered a loss. If the plaintiff makes discovery of the first invoice from the suppliers that should, in my opinion, be sufficient to deal with this concern on the part of the defendants. That will show the date when the supplier was prepared to do business with the plaintiff as liquidator of Decobake.

148. I therefore I propose to direct the plaintiff to make discovery of documents in the terms set out in para. 146 above save that I believe that the words "*evidencing why they were unable to supply"* should be substituted for the words "*stating why they were unable to supply*". I have a concern that the latter formulation may be too restrictive.

Category 17
149. In respect of category 17 the defendants seek discovery of documents evidencing the alleged theft of motor vehicle 171 KE 3095. As framed, the category would extend to Garda reports (together with pulse numbers and charge sheets) and all other communications between the plaintiff and/or his agents and members of An Garda Síochána or the Director of Public Prosecutions. The category also extends to documents from the relevant finance company that shows all payments on the vehicles were up to date at the time of the alleged theft together with documents evidencing the finance agreement itself and the guarantee and the finance for the vehicle.

150. In their letter dated 11th May, 2018 the plaintiff's solicitors have said that the plaintiff is prepared to make discovery of all documents "*going to the taking of motor vehicle 171KE 3095 and statements from any finance house concerning the funding of the vehicle and any guarantee relating thereto".*

151. The defendants say that discovery is required in light of the allegation made in para. 12(q) of the statement of claim that the first named defendant "*stole*" the vehicle in question. That allegation is expressly denied in para. 24 of the defence. In addition, the defendants refer to paras. 23 and 24 of their counterclaim in which it is alleged that the plaintiff failed to maintain payments on Decobake vehicle leases and it is also alleged that the plaintiff has falsely accused the first named defendant of theft of the vehicle in question. It is also alleged that the plaintiff abused his position as liquidator by attempting to influence members of An Garda Siochana to falsely arrest and charge the first named defendant of theft.

152. I am of the view that the terms of the discovery proposed in the plaintiff's solicitors letter of 11th May, 2018 is sufficient to enable the defendants to address the issues on the pleadings outline above. I would, however, make one slight change to the category so that it reads:-

> *"All documents relating to the taking of motor vehicle 171-KE-3095 and statements from any finance company concerning the funding of the said vehicle and any guarantee relating thereto."*

153. It seems to me that this category is sufficiently wide to deal with the defendants' concerns. It would be going too far, in my view, to direct the plaintiff to make discovery of Garda reports, PULSE numbers or charge sheets. The court has no means of knowing whether any such documents are within the possession or power of the plaintiff. However, if any such documents are within the possession or power of the plaintiff, they would, in my view, be covered by the terms of the category set out in para 152 above. I, therefore, will direct the plaintiff to make discovery of documents within that category.

Category 18
154. Insofar as category 18 is concerned, the defendants seek discovery of documents evidencing the plaintiff's claim that the Facebook chat group is the property of Decobake. They also seek discovery of documents evidencing the list of members of the chat group and showing whether those members are or were customers of Decobake together with their accounts and purchase history. They also seek documents evidencing posts on the chat group opposing the plaintiff's appointment as liquidator.

155. In their letter dated 11th May, 2018, the solicitors for the plaintiff have said that the plaintiff would be prepared to make discovery of the following documents relating to the chat group namely:-

> (a) the list of members;
>
> (b) the registration of the chat group; and
>
> (c) any change in the name of the chat group.

156. The defendants say that discovery of the category as formulated by them is necessary in light of the allegation made in para. 12(s) of the statement of claim that the chat group is the property of the company and that it has in excess of two thousand members, the majority of whom are customers of Decobake. In the defence delivered on behalf of the defendants, they plead in para. 26 that the fourth named defendant set up the chat group on her own accord in her own time and without any request from Decobake. In other words, the defendants' case is that the third named defendant is herself the owner of the goodwill in the chat group.

157. The defendants also refer to para. 38 of their counterclaim where they allege that the plaintiff has falsely claimed that the chat group is the property of Decobake. They also alleged that the plaintiff has misrepresented that two thousand members of the chat group chat group are customers of Decobake without any proof or evidence.

158. I do not believe that the offer made in the plaintiffs solicitors letter of 11th May, 2018, deals sufficiently with the issues on the pleadings. In my view, the defendants are entitled to discovery of the following:-

> *"Documents evidencing that the Facebook chat group known as 'Decobake Caking and Decorating Chat group' is the property of Decobake together with any documents evidencing the members of that group and any documents showing whether any of those members were customers of Decobake."*

159. It seems to me that discovery of this category of documents is necessary in order to allow the defendants deal with the allegations made in para. 12(s) of the statement of claim (together with the replying allegations made by them in their defence and in their counterclaim) as to the ownership of the chat group and whether the majority of members of the chat group were also customers of Decobake. In my view, the defendants are entitled to see the documents in the plaintiff's possession or power relating to this issue in circumstances where they have no means of access to the plaintiff's documents save through the mechanism of discovery. I do not believe that discovery of this category of documents will impose an unacceptable or disproportionate burden on the defendants. In some respects, this category is the mirror image of the plaintiff's Category K. If the plaintiff is entitled to seek

discovery of the documents in Category K, then it would be manifestly unjust in my view that the defendants would not be entitled to discovery of this category.

160. I stress, however, that the plaintiff is under no obligation to create documents which do not previously exist in either paper or electronic forms. There may be very little in the way of documentation in relation to this category.

161. For the reasons outline above, I will direct the plaintiff to make discovery of the documents in the category outlined by me in para 158 above. I appreciate that the category as originally formulated by the defendants goes beyond what I am prepared to direct. However, nothing has been submitted to me (nor is there anything in the papers before me) which establishes the necessity for the plaintiff to make discovery of anything more than what is set out in para. 158 above.

Category 19
162. Insofar as category 19 is concerned, the defendants are prepared to accept what is offered by the plaintiff namely the log book of vehicle number 06-D-7225. I do not need to concern myself with category 19.

Category 20
163. With regard to category 20, the defendants seek documents evidencing the contracts (whether express or implied) held by the third and fourth defendants with Decobake since the appointment of the plaintiff as provisional liquidator together with documents evidencing the attempts by the plaintiff to require the third and fourth defendants to return to work. They also seek discovery of documents evidencing the alleged breaches by the third and fourth named defendants of duties owed by them to Decobake.

164. This category of discovery is sought in circumstances where it is alleged in para. 18 of the statement of claim that the defendants are guilty of breach of contract and breach of duty and it is further alleged in para. 20 of the statement of claim that the defendants acted in breach of their duty of care to Decobake.

165. In support discovery of this category of documents, the defendants say that the third and fourth named defendants were not employees of the company and owed no duty to the company. However, this is contradicted by the terms of para. 1 of the defence delivered on 18th December, 2017, in which it is expressly stated as follows:-

> *"The third and fourth named defendants, Emily Coyle and Amy Coyle…are the daughters of the first and second named defendants that were employees of the company working in different but similar areas…"*

166. In the circumstances, there could not be said to be a dispute on the pleadings as to whether the third and fourth named defendants were employees of Decobake. However, there is obviously an issue on the pleadings as to whether the third and fourth named defendants acted in breach of their duties as employees. It is clear from paras. 34 and 36 of the defence that the defendants deny all of the claims of breach of contract and breach of duty made in paras. 18 and 20 of the statement of claim.

167. In the circumstances, it seems to me that the only issue in dispute between the parties relates to whether there were breaches of duties by the defendants. Therefore, it seems to me that the only aspect of category 20 that is relevant is what is currently requested in the last sentence of category 20 namely:-

> *"Documents evidencing the breach of duties of the third and fourth named defendants or any duties owed by them to the Company at the material time."*

168. It seems to me to be a matter of basic justice that the third and fourth named defendants should have access to any documents held by the plaintiff (if there any such documents) which evidence any breaches of duty alleged against them. I, therefore, believe that it is necessary that discovery should be directed of the category outlined in para. 167 above. In my view, this category will of necessity also require the plaintiff to discover any contractual or other documents evidencing any duties alleged owed by the third and fourth named defendants and I therefore do not believe that it is necessary to separately provide for that in the formulation of this category.

Category 21
169. It is necessary to set out the terms of category 21 in full. As currently framed, category 21 is in the following terms:-

> *"Documents evidencing Rares Lazar's expertise and/or knowledge of Food Production, Edible Food Dyes, manufacture of Edible dyes/inks and Bakery Equipment prior to his employment with Decobake…to include documents of employment with other Companies in Ireland or in the EU in relation to any associated trades where he learnt or acquired knowledge in Food Production, Edible Food Dyes and Bakery Equipment. Specifically, documents evidencing where and when Rares Lazar required expertise in Bakery Sheeting equipment. Documents detailing the employment, names of employers, Job descriptions of all employments for the five years preceding his Employment with Decobake…Documents evidencing all communications with Suppliers, Consultants, Trade Reps of Companies, equipment suppliers, supplier of specialist backing paper and any other documentary evidence which he was allegedly developing the products in relation to the Intellectual Property dispute."*

170. In order to understand the potential relevance of this category, it is necessary to bear in mind that there is a very significant dispute between the parties as to the ownership of the intellectual property in the recipes and methods of production for the icing used to make sugar sheets, the process of transforming this icing into A4 size sheets and affixing it to a backing sheet and in the recipes and methods of production of the ready to roll icing product which is currently traded under the brand name "Ice Wise", the recipes and processes for manufacturing the edible ink used by Decobake when filling printer cartridges for printing onto sugar sheets and the design of the Decobake printers which are used to print onto such sugar sheets. It is alleged in para. 23 of the statement of claim that these were all developed by employees of Decobake. In the plaintiff's response to the defendants' request for particulars dated 1st December, 2017, the plaintiff identified at para. 31, that is was Rares Lazar who was responsible for the development of the intellectual property in all of these recipes and methods of production. This is vigorously contested by the defendants. In particular, the defendants claim that the first named defendant personally developed all of the intellectual property such that he is the owner of the intellectual property and he has claimed that none of the sugar sheets, cartridges, printers, recipes or method of manufacture can be used or manufactured without his licence.

171. There is, therefore, a very significant dispute in the proceedings about the ownership of the intellectual properties. In truth, it seems to me that this is probably the most significant issue in the entire case.

172. In response to the request for discovery made by the defendants in respect of category 21, the solicitors for the plaintiff in the

letter of 11th May, 2018, offered to provide the curriculum vitae of Mr. Lazar ("if existing"). They also proposed that both parties agree to discover all documents going to the creation of the disputed intellectual property subject to the court imposing a confidentiality club as regards access and dissemination of the documents. They suggested that the club comprise David Brophy of F.R. Kelly Patent Agents on behalf of the plaintiff, Kevin Barry of O'Shea Barry Solicitors for the plaintiff, an individual nominated by the defendants in the firm of Tomkins & Co. Patent Agents on the basis that each of the persons within the club would undertake to the court not to share or disclose such documents or any of the information contained therein either with their own clients or any third parties. The proposal was that there would also be liberty to apply.

173. In my view, it is obviously crucial that both sides should discover all of the documents in their respective possession or power relating to the creation of the intellectual property the subject matter of these proceedings. This also seems to me to be a case where inevitably, having regard to the subject matter and the nature of the dispute as to ownership, a confidentiality club or ring will have to be put in place. I have already drawn attention in para. 12(c) above to the observations of Lord Dyson in *Al Rawi v. Security Service* where he explained that it is commonplace to deal with the issue of disclosure in a case of this kind by establishing "confidentiality rings" of persons who alone may see confidential material and which will be withheld from the actual parties to the litigations.

174. It seems to me that where there is a dispute as to the ownership of intellectual property rights, this is classically a case where it is acknowledged that exceptional circumstances arise justifying the establishment of a confidentiality ring or club. This is particularly so in circumstances where, it is clear from all of the papers before me, that Decobake and the defendants are now in competition with one another. In the event that the plaintiff succeeds at trial in establishing that it is Decobake which is the owner of the intellectual property, it would be highly damaging to the value of the intellectual property of Decobake if, in the meantime prior to trial, the intimate details of the development of that intellectual property was disclosed to a competitor of the plaintiff. In these particular circumstances, it seems to me to be inevitable that a confidentiality club will have to be established here.

175. In expressing this view, I am very mindful of the concerns expressed by the defendants about the additional cost to them of engaging an expert such as a partner in Tomkins & Co. for this purpose. However, I regret to say that I cannot conceive of any way in which a confidentiality club could be dispensed with in a case of this kind. In my view, it is a necessary incident of any case relating to the ownership of intellectual property where the parties are competitors.

176. Turning to the substance of this category, I must say that, in my view, it would not be sufficient for the plaintiff to discover merely the curriculum vitae of Mr. Lazar. It seems to me that any documents within the possession or power of the plaintiff which relate to Mr. Lazar's expertise and experience are relevant to the issue as to the developer of the intellectual property. If Mr. Lazar did not have the necessary expertise or experience, this would significantly assist the case made by the defendants and would undermine the case made by the plaintiff. Accordingly, this seems to me to be a classic case where discovery is required. Again, it must be born in mind that the defendants have no access to such documents save through the mechanism of discovery. In the circumstances, I am of the view that both the relevance and necessity of documents relating to Mr. Lazar's expertise and experience has been established.

177. However, it does not seem to me that it is necessary or appropriate to formulate the category in the prescriptive manner evident in the defendant's formulation set out in para. 169 above. It seems to me that category 21 can more appropriately be split into two subcategories as follows:-

> (a) documents evidencing the expertise and experience of Rares Lazar in the field of food production, edible food dyes, manufacturing processes for edible dyes/inks and bakery equipment both prior to and subsequent to his employment with Decobake; and
>
> (b) documents relating to the development of the intellectual property in the products, processes, production methods and know-how the subject matter of these proceedings.

178. I find it difficult to see that a confidentiality club would be required in relation to the experience and expertise of Mr. Lazar. However, for the reasons set out in paras. 173 -174 above, it seems to me that the plaintiff is absolutely correct in suggesting that there would have to be a confidentiality club in respect of the second sub-category relating to the creation of the intellectual properties. It seems to me that this confidentiality club should, in the first instance, comprise the following:-

> (a) Mr. Kevin Barry, Solicitor to the plaintiffs;
>
> (b) Mr. David Brophy of F.R. Kelly Patent Agents; and
>
> (c) A patent agent nominated by the defendants.

179. There will, of course, be liberty to apply in relation to the composition of the confidentiality club. There would also have to be liberty to apply to confidentiality generally. While I cannot see how the expertise and experience of Mr. Lazar can be said to be commercially sensitive, I do not exclude the possibility that the plaintiff made be in a position, following assembly of the documents relevant to this issue, to establish that the documents (or some of them) are so commercially sensitive that they should be subject to the same confidentiality club as will require to be put in place in relation to the creation of the intellectual property. I, therefore, believe that there should also be liberty to apply in relation to that issue.

180. As already mentioned, I am very conscious that the creation of this club will create expense for the defendants. However, if the defendants ultimately succeed in their defence of these proceedings or in their counterclaim, they will be able, in due course, to seek recovery of costs on a party and party basis. In circumstances, where the creation of the club is, in my view, an essential step in these proceedings, I believe that the costs of the creation of the club should ultimately be recoverable as part of the party and party costs of which ever party is ultimately successful in these proceedings. In my view, the cost of establishment of the club is both necessary and proper for the attainment of justice in this case and for the purposes of enforcing or defending the rights of the party who will ultimately be found to be successful in these proceedings. I, therefore, believe that the reasonable costs of the creation of the club should, in due course, be recoverable pursuant to Order 99, rule 10(2).

181. Therefore, I will make an order in the terms of para. 177 above. Insofar as the documents covered by para. 177 (b) above are concerned, they will not be disclosed to the defendants themselves, but will be made available solely to the members of the confidentiality club to be established on the basis set out in para. 178 above. As acknowledged by the plaintiff in paragraph 27 of his affidavit sworn on 11 May, 2008, there will be liberty to the parties to apply to extend the membership of the Club.

Category 22
182. Category 22 relates to a Facebook private message conversation between the plaintiff and Kevin Barry which was exhibited as DDL 43 to an affidavit sworn by the plaintiff on 1st September, 2017. The defendants specifically seek that the documents should be provided in "original format and/or a high quality full colour print".

183. In the reasons given by the defendants for discovery of this category, the defendants contend that the Facebook message passing between the plaintiff and Mr. Barry was "photoshopped". The exchange between the plaintiff and Mr. Barry related to payment of an electricity for the supply of electricity to the defendants' home. As I understand it, the account was routed through Decobake, and following the appointment of the plaintiff as liquidator, payment of that account was initially stopped but when the ESB threatened to cut off supply, the liquidator says that he advanced money out of his own funds to ensure continuity of supplies.

184. In submissions, the first named defendant alleged that the plaintiff's solicitor had intimated to the solicitors then acting for the defendants that the plaintiff would have the electricity to the defendants' home disconnected. This apparently arose in the course of an application to the Court of Appeal for a stay on the winding up order.

185. According to the defendants, the exchange of messages between the plaintiff and his solicitor were doctored in order to give the impression, contrary to the alleged threat described in para. 185 above, that the plaintiff was personally concerned about the plight of the defendants and they contend that discovery of this category is necessary in order to demonstrate the falsity of this purported concern.

186. I have considered the pleadings in the case. I can see no issue on the pleadings to which this category of discovery could be said to be relevant. In my view, if the defendants were to advance what is a very serious allegation that a court appointed liquidator and his solicitor had doctored evidence before the court, any such allegation would have to be distinctly and very clearly pleaded. In circumstances where I can see nothing relating to this issue on the pleadings, I do not believe that the defendants have established that this category of discovery is either relevant or necessary. In the circumstances, I refuse to direct the plaintiff to make discovery of documents within category 22.

The Orders to be Made
187. In light of the matters discussed previously in this judgment, I believe that the following orders now require to be made:-

> (a) In so far as the plaintiff's motion is concerned, there will be an order that the defendants' make discovery of the documents described in category B to the extent set out in para. 16 above; the documents described in category D; the documents described in category E to the extent set out in para. 38 above; the documents described in category H; the documents described in category K but limited to the period between 29 June, 2017 and 12 April, 2018. The plaintiff's application for discovery of the documents described in category O is refused.
>
> (b) In so far as the defendants' motion is concerned, there will be an order that the plaintiff makes discovery of: the documents described in para. 66 above (which is a reformulation of category 1); the documents described in para. 72 above (which is a reformulation of category 2); the documents described in para. 87 above (which is a reformulation of category 5); the documents described in category 6 subject to the amendment in the terms set out in para. 95 above; the documents described in categories 8 and 9; the documents described in para. 117 above (which is in substitution for category 12); the documents described in para. 126 above (which is a reformulation of category 13); the documents described in the first sentence of para. 140 above (which seems to me to be all that is necessary to direct in respect of category 14); the documents described in the last sentence of para. 144 (which is a reformulation of the second aspect of category 15, the court having taken the view that the offer by the plaintiff described in para. 142(a) is sufficient in respect of the first aspect of category 15); the documents described in para. 146 above revised in the manner set out in para. 148 (which is a reformulation of category 16); the documents described in para. 152 (which is a reformulation of category 17; the documents described in para. 158 above (which is a reformulation of category 18); the documents described in para. 167 above (which seem to me to be the only element of category 20 which has been shown to be necessary); the documents described in para. 177 above (which is a reformulation of category 21) but subject, in so far as the subcategory described in para. 177(b) is concerned to the establishment of a confidentiality club comprised in the manner set out in para. 178 above. There is liberty to apply in relation to the composition of the club going forward. The defendants' application for discovery of categories 3, 10 and 22 is refused.
>
> (c) if any issues of commercial sensitivity arise on either side which have not been expressly dealt with previously in this judgment, there is liberty to both sides to apply.
>
> (d) There is no need to make any orders in relation to the remaining categories of discovery. As outlined in the course of this judgment, those categories have been dealt with by agreement of the parties.
>
> (e) I will hear the parties in due course as to who should swear the respective affidavits of discovery and as to the time required for both sides to swear the affidavits. I will also hear the parties in relation to costs although I should signal at this stage that, subject to any submissions that may be made by the parties, my preliminary view is that the costs of both motions should be costs in the cause.

Concluding remarks
188. I believe that it is important to draw attention to the length both of the hearing on discovery and of this judgment. In my view, it is unsatisfactory that so much time should be taken up with disputes about discovery. I do not wish in any way to single out the parties in this case and I therefore address these observations more generally. I strongly believe that parties to High Court litigation should make strenuous efforts to resolve disputes about discovery before ventilating such a dispute before the court. In most cases, it should be possible for the parties to agree the ambit of discovery by reference to the applicable principles which are now well-established in the case law. Beginning with a careful review of the issues raised on the pleadings, parties should be able to work out for themselves what is relevant and what is necessary in any particular case.

189. In my view, in cases where it has not been possible to resolve any dispute in the initial exchange of correspondence, it would make sense for parties to meet either in person or by telephone conference to try to reach agreement in advance of filing their respective applications to the court. If parties proceeded in that way, it might well avoid a court hearing entirely and, in that way, significantly reduce both the costs of proceedings and the amount of court time taken up in hearing and adjudicating on disputes of this kind. Again, I stress that I make no criticism of the parties here but, having spent three days hearing the motions in this case and

having spent a considerable length of time considering the pleadings and the submissions in preparing this judgment, it strikes me that there must be a more efficient and less costly way to resolve disputes of this kind.

Denis McDonald