THE HIGH COURT

[2015 No. 6438 P]

BETWEEN

GARRETT KELLEHER

PLAINTIFF

AND

NATIONAL ASSET LOAN MANAGEMENT LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Pilkington delivered on the 6th day of June, 2019.

1. This is the plaintiff's motion for discovery pursuant to RSC Order 31.

2. The plaintiff had borrowings which came within that category of loans acquired by the defendant, a limited company and group entity within National Asset Management Agency ("NAMA").

3. In his amended statement of claim delivered on 16 March 2017, the plaintiff seeks declaratory and other reliefs arising from what he contends to be the deliberate and malicious disclosure of confidential information concerning the plaintiff to a third party or parties by the defendant. As a consequence, the plaintiff claims damages including aggravated and/or exemplary damages for misfeasance in public office, breach of confidence, negligence, breach of duty and breach of statutory duty.

4. Within this amended statement of claim, three newspaper articles and one matter relating to the Chicago Spire project are specifically pleaded as matters where information that could only have been within the purview of the defendant appears to constitute the release of confidential information. The four instances are as follows: -

> (a) An article in the Sunday Independent on 17 June 2012;
>
> (b) An Article in the Sunday Business Post on 10 March 2013;
>
> (c) An article in the Sunday Times newspaper on 16 February 2016;
>
> (d) That from in or around mid-2011, the defendant, its servants or agents, sent commercially sensitive confidential information it held with regard to the plaintiff's involvement in the Chicago Spire project, to certain third parties who had no legitimate reason to receive it.

5. At paragraph 12 of the amended statement of claim it is pleaded that additional particulars of the negligence, breach of duty (including statutory duty) and breach of confidence may be advanced upon "the completion of discovery and/or the administration of interrogatories." Particulars were raised concerning the matters pleaded at paragraphs (a) to (d) above, particularly concerning the parties to whom the defendant communicated confidential information. The plaintiff replied to particulars in 2015 and in 2017 (undated but I assume this is the year), with the latter replies focussing very much upon category (d) above (the Chicago Spire project) where they again contend that full details of the third parties to whom confidential information was sent by this defendant cannot be furnished until "discovery has been completed."

6. In its amended defence delivered on 6 November 2017, the defendant pleads that, arising from a forensic review by auditors retained by NAMA, it learnt a National Assets Loan Management Ltd. ("NALM") employee Enda Farrell furnished confidential information between October 2011 and February 2012 to third parties who had no legitimate reason to receive it. This in turn resulted in an enquiry, High Court proceedings by NAMA and NTMA (resulting amongst other matters in permanent injunctive reliefs against Mr. Farrell and his spouse regarding any further disclosure or dealing with the information), a reference of the matter to An Garda Síochána and a prosecution by the DPP. In April 2016, Mr. Farrell pleaded guilty to unlawfully disclosing information to third parties in breach of s. 7 and s. 202 of the National Asset Management Agency Act, 2009. That information was set out in a letter to this plaintiff of 7 November 2016 which is set out in more detail below (paragraph 9).

7. Two affidavits are sworn in support of the plaintiff's application for discovery. In that sworn by the plaintiff on 19 April 2008, he exhibits certain correspondence between himself and the defendant with regard to what he describes as the Enda Farrell leaks and expresses concern that confidential information concerning himself and his wife may have been disclosed to third parties.

8. That email correspondence appears to begin on 7 June, 2016 in which the plaintiff writes to ask, given the media coverage surrounding Enda Farrell, whether Mr. Farrell sent confidential information concerning himself and the Shelbourne connection (including in relation to any confidential information the defendant or NAMA would have acquired) in respect of any of the plaintiff's non-NAMA assets and also expresses concern that a breach of disclosure might have been made. On 10 and 14 June the defendant replies in a somewhat guarded fashion.

9. On 7 November, 2016 a more comprehensive response is sent by the defendant to the plaintiff personally (the plaintiff seeks to make much of the fact that it was not sent to his solicitors – given that all information is now before the court this distinction appears academic). By that letter of 7 November 2016, the defendant states in respect of the Garda Bureau of Fraud Investigation concerning Mr. Enda Farrell;

> (a) Information relating to Shelbourne was disseminated by Mr. Enda Farrell on 21 September 2010, 30 March 2012 and 4 July 2012.
>
> (b) The parties in receipt of this information were QED Equity, Fidelity Worldwide Investment and AREA Property Partners. All of these entities were made aware of the High Court Order of Kelly J. of 26 November 2012 restraining Mr. Farrell, his wife (and any other persons having notice of the making of the Order) from using, disclosing and/or dealing with, in any manner whatsoever, any confidential information of the NTMA or NAMA.

One assumes that it is on the basis of this information that the plaintiff amended his statement of claim on 16 March 2017.

10. On 16 February 2018, a letter for voluntary discovery was dispatched. Not long after, on 12 March 2018, this motion for discovery issued. The letter dealing with that request was sent by the defendant on 23 March 2018 after this motion issued. It is my understanding that there has been no further correspondence between the parties seeking to narrow the issues between them as to the documentation to be discovered.

11. The documentation sought is within five categories which is set out later in this judgment, together with the more limited discovery offered by the defendant.

12. The case law and criteria to be considered in any discovery application are well established. In addition to this well-known criteria the plaintiff contends that, in cases of unconscionable conduct (an allegation raised within the plaintiff's written submissions but not specifically pleaded, although it must be noted that at paragraph 14 of the amended statement of claim there is a pleading that the acts of the defendant constitute 'targeted malice'), the usual threshold for the granting of discovery may be modified. This is linked to the fact that the plaintiff contends that he is unaware of the extent and particulars of any wrongdoing on the part of the defendant in the dissemination of information, owing to the fact that that the information is peculiarly within the knowledge of that defendant.

13. Both parties accept the well-established principles for the grant of discovery; the difference between them arises as to the applicability of the criteria, on the specific facts of this case, as to whether what has been described as the 'limited threshold' test might be applicable.

14. In the case of *Denis O'Brien v. Red Flag Consulting Ltd. & ors*. [2017] IECA 258, the Court, citing the authorities including *Hannon v. Commissioner of Public Works* (unreported, High Court, 4th April 2001), *Framus Ltd. v. CRH plc*. [2004] 2 IR 20, and *Hartside Ltd. v. Heineken Ireland Ltd*. [2010] IEHC 3 distilled the specific rules derived from the relevant cases in the following terms: -

> "1. The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties. [*Stafford v. Revenue Commissioners*]
>
> 2. Relevance is determined by reference to the pleadings. Order 31, r. 12 specifies discovery of documents relating to any matter in question in the case. [Hannon, para.2]
>
> 3. There is nothing in the *Peruvian Guano* test which is intended to qualify the principles that documents sought on discovery must be relevant, directly or indirectly, to the matter in issue between the parties in the proceedings.
>
> 4. An applicant for discovery must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information. [*Peruvian Guano*, page 65]
>
> 5. An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments. [*Framus Ltd v. CRH plc* [2004] 2 IR 20, page 34-35]
>
> 6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. [*Hartside Ltd v. Heineken Ireland Ltd*, para.5.9.]
>
> 7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases that their discovery is necessary for the fair disposal of those issues, the question whether discovery is necessary for "disposing fairly of the cause or matter" cannot be ignored. [*Cooper Flynn v. Radio Telefís Éireann* [2000] 3 IR 344]
>
> 8. The court should consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. [*Ryanair plc v. Aer Rianta cpt* [2003] 4 IR 264]
>
> 9. 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 or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial. [*Framus*, page 38]
>
> 10. In certain circumstances, a too-wide ranging order for discovery may be an obstacle to the fair disposal of proceedings. [*Independent Newspapers (Ireland) Ltd v. Murphy* [2006] 3 IR 566, page 572]
>
> 11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties. [*Hannon*, para.4]
>
> 12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly. [*McCabe v. Ireland* [1999] 4 IR 151, page 156]."

15. The plaintiff seeks to invoke the principles enunciated in *National Education Welfare Board v. Ryan & ors.* [2008] 2 IR 816 ("*Ryan*"), *O'Brien v. Revenue Commissioners* [2016] IEHC 138 ("*O'Brien*") and finally *Hartside Ltd. v. Heineken Ireland Ltd.* [2010] IEHC 3 ("*Hartside*") where Clarke J. stated as follows: -

> "The overall problem is one between balancing, on the one hand, the need to facilitate a party who may have a legitimate claim but who may require access to information available only to its opponent in order to fully plead and ultimately substantiate that claim on the one hand, and the need to prevent, on the other hand, a party, by making a mere allegation, from being able to have a wide range of access to its opponent's documentation, including what may well include highly confidential documentation. The balance struck in both *Moorview, National Education Board* and *Ryanair*, leads to the conclusion that a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation."

16. It seems to me that the plaintiff has to satisfy a court not only that it can pass the modified or a limited threshold test as specified above, but secondly it remains that in any discovery application the documentation sought must comply with the overarching criteria that it is necessary and/or relevant to the issues pleaded.

17. In the motion seeking discovery, the grounding affidavit of Ms. Sarah Watson, solicitor sworn on 12 March 2018, very much reiterates the contents of the letter for voluntary discovery. It is followed by an affidavit of the plaintiff personally sworn on 19 April

2018 in which he requests that the court grant the discovery sought and not in the restricted form offered by the defendant's solicitors in their letter of 23 March 2018.

18. A significant number of matters raised by the plaintiff within his affidavit appear to me to be matters properly for adjudication or consideration by the trial judge. In any event, the plaintiff raises concern as to the defendant's initial failure to appraise him of the unlawful disclosure of his confidential information and he avers that the defendant has conducted itself in an evasive and disingenuous manner in dealing with the unlawful disclosure of information confidential to him. Moreover, at paragraph 14 of his affidavit, he avers that the defendant was fully aware of the disclosures of information relating to his business when it delivered its original defence but very deliberately failed to bring these matters to his attention.

19. Moreover, and perhaps somewhat surprisingly, the plaintiff reveals that he has met Mr. Enda Farrell, who has in turn prepared a witness statement in related proceedings involving the parties to this action. It appears that Mr. Kelleher has been in a position to obtain information directly from Mr. Farrell. The plaintiff expressed particular concern with the dissemination of information with regard to a valuation report in respect of the Chicago Spire. In short, Mr. Kelleher raises very serious issues as to the competence of the defendant in terms of their preservation of his confidential information, their conduct in revealing the role of Mr. Enda Farrell in the dissemination of that information and his views surrounding the leak with regard to confidential documentation, particularly surrounding the Chicago Spire valuation. It is noteworthy that the plaintiff does not in any sense deal with any of the specifics or precise categorisation of the documents sought to be discovered but deals more with the generalities of his case which he wishes to highlight in order to demonstrate the necessity for the discovery that he now seeks.

20. Within Mr. Kelleher's affidavit and indeed the submissions of his counsel make reference to the use of the legal pleading phrase 'or at all' within the defendant's (amended) defence (particularly paragraph 14). This is highlighted, it appears, to suggest the defendant by such a plea is being disingenuous (or worse) in its denial of the plaintiff's allegations. The defendant is of course entitled to put the plaintiff on proof and the use of that phrase is a well-known pleading device to suggest that the specific allegation within the pleading is denied as alleged within this amended statement of claim or in any way. In my view, nothing turns upon it in respect of this discovery application; if anything were ever to arise in my view it is a matter for the trial judge.

21. In the replying affidavit of Ms. Margaret Magee sworn on 25 May 2018, she points to what she describes as a distinct want of proportionality in the discovery sought of this defendant. She avers that providing this discovery would involve scrutinising in excess of 265,000 emails and 228,490 documents. She also avers to certain internal matters that would have to be attended to (allocation of staff and resources and so on) in complying with the plaintiff's present request for discovery. No further affidavits were filed.

Discovery;
22. The plaintiff seeks five separate categories of discovery, which I set out below and within each category summarise the respective parties position and my own views thereafter;

Category 1
23. "All documents, including telephone records, relating to and/or evidencing the release and/or communication and/or dissemination of any confidential information concerning the plaintiff and/or any aspect of his banking and/or business affairs to a third party or third parties, by the defendant, its servants or agents, in circumstances where: -

> (a) Such reliefs and/or communication and/or dissemination was in breach of the duty of confidentiality owed by the defendant to the plaintiff, or,
>
> (b) Such reliefs and/or communication and/or dissemination was viewed by senior management within the defendant as being impermissible and/or not in accordance with the defendant's obligation to protect confidential information from inappropriate and/or unlawful disclosure, or,
>
> (c) Such reliefs and/or communication and/or dissemination was done outside the proper course of the defendant's statutory obligation."

24. The plaintiff claims that this information is required for the reasons both in its initial letter seeking voluntary discovery and in the affidavit of Ms. Watson grounding the motion. The plaintiff points to their pleading as to the statutory duties of the defendant (including to protect the plaintiff's confidential information – specifically at paragraph 12 of the amended statement of claim) together with its duty of care to him. The plaintiff contends that the defendant released, communicated or otherwise disseminated to a third party or third parties, the information furnished in confidence by the plaintiff. They continue: -

> "Arising from these pleas the categories of documentation sought is relevant and necessary to assist in establishing whether or not the defendant did in fact communicate any information to third parties or a third party in breach of its duty to the plaintiff."

25. The defendant's response points to the fact that very specific allegations of unlawful disclosure of confidential information have been made, specifically those at paras. 7-11A of the amended statement of claim as recited at para. 4 above. Secondly, the defendant points to a further response to a request for particulars dated 9 March 2016 where the information disseminated is clearly set out. In essence, the defendant asserts (in respect of this and other categories) that the plaintiff has already clearly identified the breaches of confidence with appropriate specificity, the defendant has in turn set out the matters relating to Mr. Enda Farrell (whilst maintaining their denial of either primary or vicarious liability for his actions). It is in my view also noteworthy in respect of this and other categories of discovery that thereafter no amendment of pleadings has been sought to allege any other or further or additional specific breaches of confidential information since the matters pleading within the amended pleading.

The defendant's suggested discovery
26. Based upon the above, the defendant seeks to limit the discovery to two specific categories: -

> (a) With regard to the newspaper articles, as pleaded at paragraphs 7, 8 and 9 the dates should range from 1 January 2012 (six months prior to the publication of the first article) up to and including 16 February 2015 being the date of the third and final newspaper article and;
>
> (b) With regard to the disclosure of the allegedly confidential information, the defendant has informed the plaintiff that the disclosure by Enda Farrell was in the period July 2010 to July 2012.
>
> (c) They seek a further refinement of the category by the deletion of the words 'relating to' as they contend it provides

too broad a scope of documentation sought by discovery.

Accordingly, the proposal for discovery in respect of this category is sub-divided by the defendant as follows:

Category 1 A
27. "All documents evidencing the release and/or communication and/or dissemination by the defendant of information which appears in the three newspaper articles referred to in para. 7, 8 and 9 of the amended statement of claim and which the plaintiff alleges was uniquely in the possession of the defendant, as set out in the letter from Johnson Solicitors to Arthur Cox Solicitors dated 9 March 2016, in circumstances where: -

> (a) Such release and/or communication and/or dissemination was in breach of the duty of confidentiality owed by the defendant to the plaintiff; or
>
> (b) Such release and/or communication and/or dissemination was viewed by senior management within the defendant as being impermissible and/or not in accordance with the defendant's obligation to protect confidential information from inappropriate and/or unlawful disclosure; or
>
> (c) Such release and/or communication and/or dissemination was done outside the proper course of the defendant's statutory obligations."

This category is for the period from 1 January 2012 up to and including 16 February 2015.

Category 1 B
28. "All documents evidencing the release and/or communication and/or dissemination by Enda Farrell of information relating to the plaintiff for the period from 21 September 2010, to 4 July 2012."

Determination
29. In my view, category 1 as sought by the plaintiff has the potential that, if granted in the form sought, will necessitate or involve a twofold process by this defendant. The entirety of the documentation involving the plaintiff would have to be analysed and there would then have to be an internal assessment as to whether any such documentation constituted the breach of duties contended for by the plaintiff.

30. In addition, in order to ascertain the breadth of documentation the entirety of matters "relating to" this plaintiff would have to be gathered and internally scrutinised and examined to see whether they come within the criteria of category 1. In other words, in one sense the defendant is required to undertake an extensive internal adjudication to determine what if any documentation is ultimately necessary or relevant to be furnished to the plaintiff by way of discovery.

31. In my view, the category as drafted is far too broadly drawn and places too heavy an onus upon the defendant to ascertain the documentation that is required by this plaintiff. In my view, that goes beyond the parameters of what is usually understood by discovery, namely the furnishing of documentation within a specific category which is then examined by the other side in the manner of their choosing. Some degree of identification of documentation is obviously involved within any discovery process by the party furnishing the documentation, but in my view the analysis required in seeking to comply with this request for discovery places too significant a burden upon the party obliged to comply with its terms.

32. To the extent that the plaintiff pleads that it cannot provide additional information as to the circumstances surrounding the appearance of allegedly confidential information within three specified press articles. then in my view all documentation pertaining to those articles is a proper matter to be discovered by this defendant.

33. With regard to the defendant's suggested categories 1 A and 1 B, in my view the time frame contended for by the defendants is appropriate in the circumstances. This plaintiff has within his affidavit set out conversations that he has had with Mr. Enda Farrell. Arising from those conversations if they give rise to any suggestion that any additional documentation is to be sought arising from any information furnished then that would lend itself to a more focused application for discovery of the furnishing of interrogatories, both of which might be directly linked to any information which the plaintiff has received. It appears that no documentation is being sought arising from any contact between the plaintiff and Mr. Farrell or any matters he has averred to within other proceedings involving these parties.

34. In my view, the documentation offered within categories 1 A and 1 B by the defendant meets this category of documentation sought by the plaintiff.

Category 2
35. "All documents relating to and/or evidencing any information concerning the plaintiff and/or any aspects of his banking and/or business affairs sent by the defendant, its servants or agents, to a third party or third parties who had a legitimate reason to receive the said information."

36. In the plaintiff's reasoning for the necessity for this category they state as follows: -

> "The documentation sought is therefore relevant and necessary in order to assess whether or not any third parties who received information concerning the plaintiff from the defendant had a legitimate reason to receive it, thereby establishing whether or not the information was set wrongfully by the defendant."

37. The defendant, aside from contending the category is too broad and constitutes a fishing expedition. It further contends that a denial within its amended defence to the effect that it did not send information to third parties with no legitimate interest to receive the documentation, is in and of itself sufficient to in essence challenge this pleading by seeking the breadth of documentation within this category.

38. Again, I find this category extraordinarily broad. In essence it again, but in a different formulation, seeks the entirety of the documentation sent by the defendant, its servants or agents to any third party with the rider that they must have had "a legitimate reason to receive the said information." It seems to encompass the entirety of the plaintiff's documentation which could have been sent to third parties for any myriad of legitimate reasons. As has been pointed out, if a third party had a legitimate reason to receive the information then it is difficult to discern the necessity or relevance for now furnishing that documentation within the discovery process. In my view that is a trawling exercise by this plaintiff.

39. Insofar as this category obliquely or otherwise refers to the actions of Enda Farrell, then that has been dealt with elsewhere.

40. I see nothing within the reasons furnished seeking this category of documentation that seeks to in any sense narrow the categories or volume of discovery sought. In my view, it constitutes in essence a request by this plaintiff for the entirety of the documentation furnished by the defendant to any third party concerning this plaintiff and it will then be the role of those advising the plaintiff to sift through the entirety of the documentation to see if there have been any breaches of confidence by them. That in my view is what is generally colloquially referred to as a "fishing expedition." The category is declined for the reasons set out above and because the plaintiff has not in any sense sought to delimit the request by time or its relevance and necessity to the significant amount of documentation it now seeks. This category is declined.

Category 3
41. "All discovery relating to and/or evidencing the release and/or communication and/or dissemination by Enda Farrell of any confidential information concerning the plaintiff and/or any aspect of his banking and/or business affairs to a third party or third parties."

42. The plaintiff contends that this category of documents is sought in order for it to assess, *inter alia*, "whether the defendant was liable for his actions" (a reference to Enda Farrell).

43. The defendant contends that this category is now properly contained within its proposal for revised category 1 B.

44. It is noteworthy that category 3 is not limited in time nor is any specificity placed upon the nature of the documentation sought. Again, also the use of the phrase "confidential information" appears suggestive of the defendant having to analyse the nature of any documentation concerned. With particular regard to this category, as the plaintiff has himself now dealt with Enda Farrell as referred to in his affidavit one would perhaps anticipate more specificity within this category of discovery.

45. In my view, the documentation offered within category 1 B by the defendant meets this category of documentation sought by the plaintiff.

Category 4
46. "All documentation relating to and/or evidencing any investigation or enquiries conducted by the defendant, its servants or agents, or any other entity into the release and/or communication and/or dissemination of confidential information concerning the plaintiff and/or any aspect of his banking and/or business affairs."

47. Within this category the plaintiff states that it requires this documentation and claims it is relevant and necessary "in order to establish what steps have been taken by the defendant in discharge of its duty to keep the plaintiff's information confidential, and the basis upon which the defendant concluded that there had been no communication, release or dissemination of the said information."

48. In refusing the category sought, the defendant's claim that the issue is, as a matter of fact and law, for a court to determine as to whether there has been any unlawful disclosure of the plaintiff's confidential information. The fact that there may or may not have been any investigation or inquiry is not, they assert, relevant to that issue. Again, insofar as Enda Farrell is involved, the steps taken have been set out in the letter of 26 November 2012 and the surrounding documentation will be addressed by their proposed category 1 B.

49. In my view, any investigation or inquiry conducted by the defendant cannot be utilised by the plaintiff to then seek to make additional allegations against this defendant as to the discharge of confidential information. This category is declined.

Category 5
50. "All documents relating to and/or evidencing any communications, correspondence, or requests from any third party for information concerning the plaintiff and/or any aspects of his banking and/or business affairs."

51. The plaintiff contends that this category is necessary to determine how any communications from any third party concerning this plaintiff were handled by the defendant.

52. The defendant contends that, other than the documentation it has agreed to disclose, anything further is neither relevant nor necessary and is again a fishing expedition.

53. This category is simply too broad and again would, albeit from a slightly different perspective, require that the entirety of the documentation concerning this plaintiff and this defendant would require to be disclosed.

54. Taking the categories of documentation sought as a composite unit, the defendant would be obliged to disclose the entirety of all of the plaintiff's information and in my view, that is not a proper narrowing of the issues in respect of any allegation of breach of confidentiality. In addition, one could envisage a scenario where confidential aspects of other parties' documentation would have to be carefully scrutinised in ascertaining any relevant documentation within this category.

55. On the basis of its total lack of specificity, and without there being no reference any dates or time limits, this category is also declined.

General Considerations
56. The categories that have been expressly declined in my view also fail the proportionality test in that the class of documentation sought is so broad without, it appears, any attempt at further refining these matters that it would constitute an undue and unfair burden upon the defendant for orders to be made of the type sought by this plaintiff. Moreover, in my view there are certainly matters that could perhaps be advanced by way of interrogatories and in addition once discovery has been made, there is always the possibility for the more focused and forensic application for further and better discovery arising from the documentation this defendant has agreed to furnish.

57. It appears from the categories of documentation sought that the burden within this discovery process would fall disproportionately upon the defendant. Not only would they have to assemble the documentation (as would be usual within the discovery process) but in my view the degree of analysis and scrutiny to which that documentation would be put to determine, the parameters of what constitutes a document within the specific categories sought is too broadly drawn.

58. I am satisfied that the discovery offered by the defendant in response to this request is appropriate. Moreover, I note that there was no modification within the initial categories sought by the plaintiff arising from the defendant's reply on 23 March 2018 (admittedly after the motion issued) but well in advance of the hearing of this application.

59. Within the majority of the categories of documentation sought by the plaintiff, it is on occasion difficult to discern the line to be drawn between a request for information on the facts of this case and the plaintiff seeking to "trawl" through the documentation to see what other documentation it can glean in support of its contentions.

60. As stated by Fennelly J. in *Ryanair v. Aer Rianta* [2003] 4 IR 264: -

> "[The court] …should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation."

61. It is clear that the trend or focus of the courts in applications for discovery has been towards encouraging a more nuanced and focused approach in respect of the documentation sought by a party to litigation. Whilst the parties do not disagree to any extent as to the applicable law in this jurisdiction, the plaintiff further contends that as the defendant is guilty of unconscionable conduct, the normal considerations for the granting of discovery must be modified to reflect the fact that the plaintiff can in essence only become aware of certain matters to the extent that the defendant has the particulars within their power possession or procurement. As set out above, in my view what is referred to as the modified test as exemplified in the decision of *Hartside Ltd. v. Heineken Ireland Ltd.* ("*Hartside*") does not and cannot be taken to mean that once a pleading of the disclosure of highly confidential information is made, and in this case partially substantiated in respect of Enda Farrell, then the plaintiff is in some way at large in respect of the documentation that it can seek thereafter. In my view, this is to misstate the position.

62. The case of *O'Brien v. The Revenue Commissioners & ors*. [2016] IEHC 138 (*'O'Brien'*) has many similarities to the facts of this case. That case is also an application for discovery in which the plaintiff claims damages for misfeasance of public office, breach of duty, (including statutory duty), breach of confidence and breach of his constitutional rights to privacy arising out of the late alleged disclosure of documents and/or information concerning his private tax affairs by the defendants, their servants or agents to a number of persons in the "media". In considering the judgment of *National Education Welfare Board v. Ryan & ors.* [2008] 2 IR 816, and the decision of Clarke J., McDermott J. stated as follows in respect of that case: -

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

The judge continued: -

> "It is submitted that this case has particular relevance to the dilemma faced by the plaintiff who contends that there may have been further disclosure of his tax affairs of which he is unaware and particulars of which he can have no knowledge until after discovery and unless discovery is granted in the terms sought, he will be deprived of the opportunity of pleading the full extent of the defendants' alleged wrongdoing."

63. While thereafter, the court, having commented upon the correspondence between the parties resulting in a number of amended requests for discovery, then goes on to consider the eight categories of documentation sought by the plaintiff.

64. The court continued: -

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

65. In my view, the passage cited above has a particular resonance in respect of the arguments advanced by this plaintiff.

66. McDermott J., having carefully considered the categories of documents stated: -

> "It is said that the discovery sought may or is likely to reveal other occasions of wrongdoing by the first named defendant its servants or agents. However, in my view, what the plaintiff proposes in relation to discovery in these categories would amount to what has been referred to as a 'fishing' or 'trawling' expedition. There is no identifiable event since 2003 relied upon in the statement of claim or particulars furnished that might provide any basis for the assertions made. It is simply said that there is a possibility that the documents sought may be relevant…. I am not satisfied that the plaintiff has reached the threshold of pleading in respect of these unspecified complaints such as to give the defendants or the Court a 'reasonable picture' of any such events or how documents in relating thereto may advance proof of the occurrence of such events or may establish intention or recklessness on the part of the defendants in respect of the events of the 16th May. I am not satisfied that the plaintiff has passed 'the limited threshold of being able to specify a legitimate basis for (his) case' such as to justify wider discovery than that to which the defendants have agreed in respect of these categories."

67. In my view, the comments of the learned judge in respect of his assessment of the discovery sought within *O'Brien* is apposite to the facts of the present case. The plaintiff has pleaded specific events upon which he relies and also with regard to matters in 2011 surrounding the plaintiff's involvement and financial details concerning the Chicago Spire project.

68. Based upon the pleadings, the notice and replies to particulars, and indeed both affidavits grounding this application, there is insufficient additional information put before this Court to raise the modified or limited threshold test by which I can determine whether and in what circumstances additional documentation should be furnished by way of discovery. I also note that in the *O'Brien* case it is clear that there was extensive correspondence between the parties seeking to narrow the categories of discovery sought. That is not the position here. It would also appear on the facts of the *O'Brien* decision that the documentation sought was delimited to some extent in a manner not sought by this plaintiff.

69. The court will therefore direct discovery of the documents which the defendant has agreed to discover and which it has categorised as category 1 A and 1 B in their solicitor's letter of 23 March 2018 (exhibit 'GK5' within the present proceedings).

70. I shall hear the parties as to any further orders as required.