



THE COURT OF APPEAL

**Baker J.
Costello J.
Donnelly J.**

Neutral Citation Number: [2019] IECA 360

Record Nos. 2019/269 & 2019/264

BETWEEN

**PERSONA DIGITAL TELEPHONY LIMITED
AND**

SIGMA WIRELESS NETWORKS LIMITED

PLAINTIFFS/RESPONDENTS

AND

**MINISTER FOR PUBLIC ENTERPRISE, IRELAND, THE ATTORNEY GENERAL AND DENIS
O'BRIEN**

DEFENDANTS/APPELLANT

AND

MICHAEL LOWRY

THIRD PARTY

JUDGMENT of Ms. Justice Donnelly delivered on the 16th day of December, 2019

Introduction

1. To keen followers of Supreme Court jurisprudence, the claims made by the plaintiffs in this case will be very familiar. Twice now, these proceedings have generated extensive judgments from the Supreme Court. In the first such judgment, reported under *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50, (those "Comcast proceedings" being separate but similar), the Supreme Court rejected the State defendants' application to have the proceedings dismissed for delay.
2. It may therefore appear as something of a surprise that it was only in February 2018 that the plaintiffs in the proceedings sought to serve an amended statement of claim. The explanation for that delay according to the plaintiffs, is because of their necessity to bring a motion regarding the legality of third-party funding. That motion resulted in the second Supreme Court judgment *Persona Digital Telephony Limited v. The Minister for Public Enterprise* [2017] IESC 27. Despite the refusal to grant the declaration sought by the plaintiffs in that motion, they are now in a position to proceed with the case. The absence of explanation as to how they are able to proceed in light of their submissions in the second case that the litigation could not proceed without such funding, has been the subject matter of criticism by the fourth defendant in particular during the course of this appeal.
3. It is a feature of this litigation that the fourth defendant applied to be joined as a defendant to these proceedings. Despite objection, he was joined as a co-defendant by

Order of the High Court following a judgment of Ryan J. on the 21st February, 2014. It is accepted by the fourth defendant that his joinder as a defendant would necessitate an amended statement of claim. His complaint now in relation to the amended statement of claim is that it has been delayed without reasonable excuse and that it contains claims against him that go beyond the initial claims.

4. These appeals, brought by the State defendants and the fourth defendant, are against the High Court decision to allow all the amendments to the statement of claim sought by the plaintiffs. A written judgment was delivered by Pilkington J. (see *Persona Digital Telephony Limited v Minister for Public Enterprise* [2019] IEHC 295).
5. In ease of comprehension, it is proposed to continue to use the terminology "plaintiffs" and "defendants" in this judgment. The third party played no part in these appeals.

The substantive case

6. The substantive case concerns the award of the second pan-European cellular digital land based mobile communications system (GSM) licence in 1995. The first named plaintiff was a consortium, which, along with five other companies, was an applicant for the licence. The second named plaintiff was one of a number of companies within the first named plaintiff's consortium. It was announced on the 25th October, 1995 that the Esat Digifone Consortium (hereinafter "Esat Digifone") (of which the fourth named defendant was the chairperson) had won the competition. Esat Digifone was subsequently awarded the licence on the 16th May, 1996. The award of that licence generated significant controversy leading to the establishment in 1997 of a Tribunal of Inquiry under the Tribunal of Inquiry (Evidence) Act, 1921 as amended, known as The Tribunal of Inquiry into Certain Payments to Politicians and Related Matters ("the Moriarty Tribunal"). The plaintiffs issued the plenary summons on the 15th June, 2001 which was well before the Moriarty Tribunal issued its report in 2011. In the original statement of claim the plaintiffs seek damages, including exemplary damages for breach of duty (including statutory duty), breach of contract, misfeasance in public office, breach of legitimate expectation, breach of constitutional rights, deceit, conspiracy, misrepresentation (including fraudulent misrepresentation), dishonest assistance, breach of the rights of the plaintiffs together with other reliefs arising out of the awarding of the licence to Esat Digifone.

The Motion to Amend the Statement of Claim

7. At the hearing of this motion in the High Court, the State defendants based their objection to the amendment of the statement of claim on the ground of delay and related issues such as prejudice and whether the statute of limitations applied. The fourth named defendant also relied upon delay but made particular complaint about two reliefs set out in the amended statement of claim relating specifically to him. These are reliefs of restitution for unjust enrichment and for an account of profits.
8. It was highly surprising that the main point argued by the State defendants on appeal, namely that the amendments represented new causes of action and an impermissible expansion of the original action, had not featured in the judgment of the High Court. It appears that this issue was raised before the High Court in a tangential way, and only in

answer to a question asked by the trial judge. It was not a point raised in any of the letters written by the State defendants or indeed in their written submissions to the High Court. It is also striking that the plaintiffs have not raised any objection to this point being raised on appeal. They accept that it was a point raised, albeit in the tangential manner described, in the court below. No blame lies on the trial judge in this regard as it was quite fairly conceded by State counsel that inspiration had only struck late in the day in this regard and it had not really been in focus during the hearing in the High Court.

9. The plaintiffs submit that they have utilised the 2011 report of the Moriarty Tribunal to particularise their claim. The plaintiffs submit that their basic claim remains the same (although as will be seen below the extent of this submission was at issue). They submit that many of the matters set out in the report were not known to the plaintiffs and could not have been known to them before these were exposed by the Moriarty Tribunal. They submit that pleas deriving from these are necessary for the purposes of determining the real questions of controversy on these proceedings. They submit that there is a public interest in having those issues determined and that they must be permitted to amend their pleadings to reflect what is now publicly known about the granting of the GSM licence.
10. The defendants claim that many of the amendments advance new claims that go wider than claims of corruption against the then Minister. They say that this is entirely prejudicial and contrary to the rationale of the Supreme Court in *Comcast* in permitting the proceedings to continue despite the inordinate delay up to that point in time. The fourth defendant makes specific objections to certain parts of the pleadings against him.

The law

11. There was little, if any, dispute between the parties as to the legal principles governing applications to amend pleadings. O. 28, r. 1 of the Rules of the Superior Courts (RSC) provide that: -

“The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

12. In *Rossmore Properties Limited v. Electricity Supply Board* [2014] IEHC 159 at para. 18 Birmingham J. set out the applicable principles in respect of an application to amend pleadings as follows: -

“18. *As might be expected, there have been many occasions over the years when the courts have been called on to consider applications for amendments with the result that there are a very considerable number of authorities in this area and I have been referred to many of them.*

19. *Counsel on behalf of the plaintiff has sought to summarise the particulars that emerge from these authorities and has done so as follows: -*

1. *The parties enjoy complete freedom of pleading. This is a reference to the fact that in the ordinary course of events a plaintiff is at large as to how he pleads his or her case. Absent pleas that are scandalous or vexatious or the like, the plaintiff cannot be dictated to as to how to formulate and present his or her claim.*
2. *Order 28 of the Rules of the Superior Courts which is the rule that deals with amendments is intended to be applied liberally.*
3. *Amendments shall be made for the purposes of determining the real questions in controversy between the parties.*
4. *Amendments should not be permitted when doing so could cause real or actual prejudice to other parties.*
5. *Amendments should be allowed if all that is present is litigation prejudice which is capable of being dealt with by orders for costs or other directions by way of case management.*
6. *There is no rule that per se precludes radical amendments.*
7. *There is no rule against introduction of a new cause of action if it falls within the ambit of the original grievance.*

I regard this summary as helpful and I am happy to adopt it. [...]"

13. In terms of the issue of prejudice, Clarke J. in *Woori Bank and Hanvit LSP Finance Limited v. KDB Ireland Limited* [2006] IEHC 156 at paras. 4.1 – 4.2 stated as follows: -
 - 4.1 *"Firstly a party resisting the amendment may be able to satisfy the court that, by virtue of the absence of the amended plea in the first place, steps have been taken which now make it impossible or significantly more difficult to deal with the case should the amendment be allowed. No such prejudice is contended for in this case.*
 - 4.2 *Secondly a party may be able to persuade the court that what I might call logistical prejudice would occur if the amendment is allowed. This will particularly be the case where the amendment is sought at a very late stage and could have the effect of significantly disrupting the intended proceedings. In such cases it may be that an amendment which could properly have been made at an earlier stage might be refused because to permit the amendment would have the effect of so altering an imminent trial as to require a significant adjournment to the prejudice of the party against whom the amendment is sought. It may well be that in the context of modern case management and the undoubted intention of the rules applicable to the Commercial Court (which rules are obviously predicated on an efficient and managed pre-trial process coupled with an early trial of the issues) that such logistical prejudice may loom larger in the considerations of the court.*

The effectiveness of case management can be significantly reduced if parties who do not comply with the directions of the court can escape the consequences of such failure without significant adverse results. Similarly belated applications to amend (after, for example, the parties have filed witness statements and the like) can have a significant effect on the ability to conduct a trial in a timely and orderly fashion. In that context it should also be noted that the nature of the relief sought can be a material factor in assessing the adverse consequences of a delay in trial. For example claims for specific performance or other similar proceedings (whose existence can have an effect on the ability of parties to deal in a commercial fashion with their assets) should be disposed of as quickly as possible and amendments which could have the effect of significantly delaying such proceedings can, in an appropriate case, give rise to a significant degree of what I have described as logistical prejudice.”

14. Finally, in *Porterridge Trading Limited and Others v. First Active Plc and Others* [2007] IEHC 313 at para 3.1 Clarke J. stated: -

*“3.1 The most recent authoritative statement of the law in relation to amendment of pleadings is to be found in *Croke v. Waterford Crystal* [2005] 2 I.R. 382. I applied the reasoning to be found in *Croke* in *Woori Bank and Another v. K.D. Ireland Limited* [2006] I.E.H.C 156. For the reasons set out in that latter judgment, I determined that an amendment should, ordinarily, be allowed unless it would cause prejudice to the other side, subject to the limitation that an amendment ought not to be allowed if the aspect of the case which would then proceed by virtue of the amendment was bound to fail. As set out in the judgment in *Woori Bank* the reasoning behind that view stems from the fact that, subject to the proceedings being frivolous or vexatious or being bound to fail, a party has, in most cases, an entitlement to plead the proceedings in whatever way it wishes. In those circumstances no leave of court is required. Subject only, therefore, to prejudice, it is difficult to see why a party who could have pleaded the case in the manner now sought to be achieved by amendment, should not be entitled to bring about such a situation by virtue of an amendment without the court engaging in significant scrutiny as to the merits of the case which, if the amendment be allowed, would now require to be litigated. It is also worth noting that the comments which I made in *Woori Bank* concerning prejudice, were subject to the qualification that where any prejudice arising could be otherwise dealt with (for example by an appropriate order as to costs) in a manner which was just to all parties, then such prejudice should not debar an amendment but should lead to other measures designed to mitigate or minimise the prejudice concerned.”*

A New Cause of Action

15. It is not disputed that even where an amendment to a statement of claim seeks to add further cause or causes of action such an amendment can be permitted. That broad statement is subject to the considerations set out above. If the case is bound to fail or will cause prejudice to the other side (which said prejudice could not be dealt with in another

appropriate manner), then amendments should not be permitted. In the present case, counsel on behalf of the plaintiffs, in written submissions stated that: -

“The nature of the claims [was] obvious and the case [was] not in the style of an ordinary procurement challenge or run of the mill judicial review.”

In oral submissions, counsel for the plaintiff, when asked whether they were making the case in the amended statement of claim that the new matters were evidence of a corrupt process rather than as evidence of a wrongful process, replied: -

“Yes. We are saying that and there is [sic] two sides to the corruption. There is the straightforward payment or bribes and whatever, but then there is the corruption of the process as described as McKechnie J. [...]”

16. Counsel went on to say that the plaintiffs' case was that because of the Minister's malign involvement in all of this, he influenced civil servants and insofar as the civil servants did his bidding in relation to the procurement process. He clarified that, if there was no proof of ministerial involvement and if the actions of the civil servants in departing from the procedures in the competition had absolutely nothing to do with the Minister and were *bona fide*, the plaintiffs could not succeed in the case that they have made.
17. The reference by counsel to McKechnie J., in the oral submission, was a reference to the description of the corruption of the process by McKechnie J. at paras. 4 and 5 of his judgment in *Comcast* as follows: -

- “4. *That process was intended to be fair, impartial, and independent: it was designed to be free of political influence and to be conducted in strict confidentiality by a project group, composed of civil servants augmented by outside experts. Guidelines were drawn up, rules and evaluation criteria were approved by the government. Contact with interested parties was to be scrupulously controlled. If adhered to, all of these steps, and others, should have lead to a declaration of success which in accordance with best international standards, would have been immune even from controversy or questioning, let alone from a Tribunal of Inquiry or from judicial challenge.*
5. *The Moriarty Tribunal found that Mr. Michael Lowry, T.D. (or "the Minister"), exerted "insidious and pervasive influence" on the evaluative process thereby undermining its integrity and independence. Improper payments and other benefits were found to have been furnished by or on behalf of Mr. Denis O'Brien (see paragraphs 6 & 9 infra) to Mr. Michael Lowry, T.D. in relation to the conduct of the latter in securing the award of the GSM licence to Esat Digifone. Such conduct included: inappropriate interaction with Esat Digifone and Mr. O'Brien, specifically during sensitive stages; acquiring inside information which in turn he disclosed to Mr. O'Brien; making known his preference for awarding the licence to Esat Digifone, conveying his views on how to address Esat Digifone's financial weakness by considering them curable by the granting of the licence; thereby rendering financial*

capability ultimately immaterial, contrary to Government policy; curtailing the work of the Project Group with decision-making power, by instead, centring such on a small subset of the group segregated from the expert consultants; and circumventing meaningful consideration by his Cabinet colleagues. This, it was found, resulted in the implementation of a process plagued with inadequacies and deficiencies, and in the creation instead of a distorted, renegade version of the originally planned evaluation process."

18. Counsel for the State defendants submitted that this concession by the plaintiffs was both insufficient and inappropriate and that what was required was clarity in the amendments as to the precise case being made. Counsel submitted that the Court had the power to make amendments to the proposed amendments as it sees fit.
19. According to the State defendants, this was not a case about wrongful acts of civil servants or corruption by civil servants. It was a case about corruption in "high office"; namely alleged corruption by a Minister. That was the filter through which the Supreme Court had permitted the case to proceed. It would neither be fair to the defendants to have to prepare a different case, many, many, years later if these amendments were allowed, or consistent with the basis upon which the Supreme Court had permitted the case to proceed. Counsel maintained that the amendments disclosed an attempt to introduce wholly new claims not relating to corruption. They pointed to many of the allegations now made as those which one sees in ordinary proceedings challenging a tender or procurement process. Those are the type of claims which the courts have repeatedly emphasised should be made and pursued with exceptional expedition. Counsel submitted that the plaintiffs have been wilfully vague on the issue of process error; neither accepting they cannot make it nor saying that that is not what they are doing.

The Supreme Court Decision in Comcast International Holdings Incorporated & Others v. Minister for Public Enterprise & Others [2012] IESC 50

20. It is important to recall the basis on which the Supreme Court allowed the appeal in *Comcast* and thereby permitted the already long delayed proceedings to continue. The Chief Justice in her judgment at paras. 44 - 47 stated: -

"44. However, if it had been necessary to consider this aspect of the test, I would have determined, as a matter of discretion, on the facts, that the balance of justice is in favour of the case proceeding. In such a determination I would take into account (i) the fairness to both parties, in all the circumstances, (ii) the absence of specific prejudice to the State; (iii) the fact that the parties and witnesses have over the years given statements and evidence before the Tribunal, so that the situation is not one where proceedings are commenced or continued long after events where there has been no reference to the facts in the meantime; (iv) the delay by the State during the proceedings; (v) the conduct of the State, which was a de facto acquiescence during 2002 to 2006; (vi) the fact that the State stated in a letter of the 31st March, 2006, that a motion to dismiss would be brought if the statement of claim was not delivered within the time period specified and consented to an extension of time for Persona to deliver its statement of claim, and Persona

complied with the terms of the letter; (vii) in all the circumstances, there is no risk to a fair trial or serious prejudice to the State; (viii) these proceedings make serious allegations of corruption by a Minister of the Government, not a matter which should be struck out on a technicality but which should be addressed in a full hearing in open court. In submissions it was argued by the State that the appellants' actions were not in the public interest, but were private commercial interests. However, this is not a case between private companies, rather it involves allegations of corruption by a Minister of State. There is a public interest in determining such a claim of corruption in high office. It is a matter of public interest as to whether a Minister of Government corrupted a State process. This is an important aspect of the case.

45. *The parties, in essence, argued the appeal in the Primor principles. It is not an appeal relating to delay in a criminal trial and thus that jurisprudence is not of assistance.*

Interests of Justice.

46. *There was a free standing issue raised as to whether the interests of justice enable the claim to be dismissed. However, Primor pointed out that the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so. Thus, the foundation for this common law is the interests of justice. Primor sets out a methodology. In applying that methodology, in analysing the facts of a case, the Court is required to consider all the circumstances of the case. Consequently, applying the principles described in Primor addresses the interests of justice of the case.*

Conclusion

47. *On the unique facts of this case, for the reasons given, I would allow the appeals."*
21. Fennelly J. thought the case should be permitted to continue despite the inordinate delay because of the "*special and unique circumstances of this case*". For Hardiman J., the uniqueness of the case was central to his conclusions as follows:

"This case is absolutely unique, without precedent or parallel in the ninety year history of the State. It will be profoundly worrying, indeed alarming, in its implications for Irish public administration if the allegations made by the plaintiffs turn out to be true. But the State defendants say that the action should be stopped here and now, without the merits being decided, on account of delay by the plaintiffs.

It is important to understand the uniqueness of the case. It is not merely unusual or odd. It is not simply a case of a kind rarely met with. It is unique - there is no precedent at all; I have never heard of anything like it in this jurisdiction. The quality of uniqueness is central to my analysis of the law applicable on the present

application. Because the case is unique, the decided cases merely supply the general principles to be applied, rather than providing a case directly in point, or a binding precedent. Equally, because it is unique, the present case is unlikely itself to be of much value as a precedent; I do not therefore intend to make general suggestions for the development of our jurisprudence on delay in this judgment. This case does not represent a new category of case: it is simply unique and sui generis."

22. McKechnie J. at paras 59 and 60 stated: -

"59. The nature and value of the underlying asset, namely the licence; the identity of its owners, namely the State; and the importance of the decision to dispose of it, presumably in the public interest; were all matters which demanded the highest level of integrity in the process established for this purpose. The reputation of prized institutions of the State, indeed the State itself and at a more general level, its people, were at stake. This was clearly recognised by the Houses of the Oireachtas and by an Taoiseach in the establishment of the Moriarty Tribunal to investigate, as a matter of public concern, the allegations of impropriety then suspected. Such allegations in most material respects were the same as those the subject matter of the instant proceedings.

60. It cannot be denied but that the conduct alleged by the plaintiffs as amounting to, amongst other things, misfeasance in public office and contravention of the Prevention of Corruption Act, 1906, is, if found to be true, of the most grave and appalling kind which can be mounted against any public office. It is of necessity by its very nature cloaked with deceit and concealed with vigour. It was strenuously denied by the State defendants who repeatedly reasserted the integrity of the process and those involved in it. Was it therefore reasonable for the plaintiffs to defer movement of their actions whilst such an investigation was on-going? In my view they were so entitled."

23. Clarke J. stated at para. 1.2: -

"It can, I think, be said that if the allegations which are made in these proceedings, and which formed the subject of the findings of the Moriarty Tribunal, were to be established in a court of competent jurisdiction, they would amount to amongst the most serious factual determinations made by a court in this jurisdiction since the foundation of the State. The allegations involve the assertion that the second named defendant in the Comcast proceedings ("Mr. Lowry"), who held the office of Minister for Public Enterprise at the time of the competition, was paid money by the fourth named defendant in the Comcast proceedings ("Mr. O'Brien") in order to influence the competition. It is alleged that such monies were paid both directly and indirectly and that Mr. Lowry, as Minister, did, in return for those monies, actually influence the competition in order to procure that Esat should win."

24. It is apparent from an examination of the Supreme Court judgments in *Comcast* that the fact the central claim was one of corruption of the process at the highest level played a central role in the reasoning of the judges in concluding that despite the inordinate delay, the balance of justice lay in permitting the proceedings to proceed.

Corruption: The Main Allegation in Proceedings?

25. While there is general agreement between the parties that alleged corruption is the central feature of these proceedings, there is no agreement that this is the only issue. In written submissions, the plaintiffs take issue with the submission by the State defendants that real questions in controversy were delineated by the Supreme Court. Thus, the plaintiffs point to the other causes of action, *e.g.* breach of contract, breach of duty etc., in submitting that “corruption” is simply a label of one key element of the claim. It is difficult to square this submission with the plaintiffs overriding submission that their basic claim remains the same and that there is an immense public interest in having the issues determined. It is simply not credible that there would be an immense public interest, or indeed any public interest in a legal sense, in some of the amendments. For example, there would be little or no public interest in a legal sense in a determination of whether an incorrect weighting was used (103 instead of 100) in the procurement process as set out at in the proposed amended statement of claim at para. 34(p)(xiii). That is an allegation of the type of error that might be found in any legal challenge to a procurement process.
26. An examination of the plaintiffs’ original statement of claim demonstrates that although the claims may have been framed under a variety of causes of action, the salient factor in each cause of action as set out therein was a corrupt interference with the process by the Minister. The plaintiffs are not willing to concede that certain of the amended pleas concern what might be termed ordinary challenges to procurements processes. In my view however, while there is a certain lack of clarity in the plaintiffs’ submissions in this regard, it appears that the main thrust of their submissions is that so-called process error constitutes the manner in which the corruption manifested itself. The defendants submit that even that type of clarity is missing from their pleadings. The defendants therefore submit that it would be grossly prejudicial to them to require them to defend the case on the basis of these new particulars of the claim. Therefore, it is necessary to examine in more depth the details of the pleadings and the proposed amendments.

The Proposed Amendments

27. The first part of the proposed amended statement of claim simply gives more particularisation of the parties and the tendering process. For example, the new paragraph 6 describes the fourth named defendant and how he came to be joined in the proceedings. The following paragraphs deal with the decision to issue the licence, the tender process and evaluation model and the terms of the competition and contract. These are in far more detail than was provided originally but there is no real dispute on this apart from a general plea that the entire process is too delayed.
28. The first paragraph of serious contention is para. 32. In general, there is a reasonably clear claim that it was the Minister who was abusing his public office and interfering in the tender process that was ultimately said to be in breach of the Prevention of Corruption

Act, 1906. The paragraph does however refer to broad concepts such as “unlawful means” and quite general principles of breach of EU law.

29. Para. 33 refers to the Minister, his servants or agents as: -

“[A]cting in purported exercise of their powers and functions and were purportedly acting in the best interests of the public and purportedly in the best interests of the First Named Plaintiff as a competitor, but, the Minister and his servants or agents acted unlawfully and maliciously, and committed an act or acts with targeted and prejudicial malice towards the Plaintiffs, and/or knowingly acted ultra vires or acted with reckless indifference and as such, deliberately or dishonestly abused the power conferred upon him, abused authority, and abused trust with the known consequences that it would cause injury and damage to the Plaintiffs and committed misfeasance in public office.”

30. In para. 34 under the “Particulars of Unlawful and Wrongful Acts” there are two subheadings “Interference by the Minister” and then “Further Interference and Unlawful Evaluation”. These are broken down in further subsections, which in themselves are further reduced. Most of the subsections set out under “Interference by the Minister” refer to straight forward allegations of corruption whether through bias, favouritism, or other actions. Some of these allege that “the Minister, his servant or agents” did certain actions. At para. 35 is it stated: -

“35. The purpose and effect of the acts of interference in the tender process by the Minister, his servants or agents, and the defects in the evaluation process, was to ensure that Esat Digifone would be declared the winner. Were it not for the said acts of interference and the said defects, Persona would have won the competition or, alternatively, would not have lost the chance of winning the competition.”

31. The main contested amendments are set out in paragraph 34 and in the particulars set out thereunder. Para. 34 states:

“34. As a result of the foregoing, the Plaintiffs and each of them have suffered and sustained significant financial loss and damage, including the loss of significant future profits and shareholder value. Had the wrongful acts not been committed, the First Named Plaintiff would have won the tender competition in respect of the Licence or, in the alternative, would not have lost the chance of winning it.

Particulars of Unlawful and Wrongful Acts

Interference by the Minister

[The particulars at (a) to (o) primarily give details of actions of the minister which are said to amount to interference in the process. In most respects these are not contentious. In some of the particulars however there are references to actions of “the Minister, his servants or agents...”]

Further Interference and Unlawful Evaluation

[Very lengthy particulars are set out under this heading. These are highly contentious as they refer in many places to the actions of the servants or agents who carried out the evaluation process for the tenders. There is little or no reference to corruption in the process and many of the allegations are of errors which may or may not be part of which might be termed as ordinary procurement process errors.]”

Amendments and delay

32. The first consideration is the argument that the amendments ought not to be permitted because of delay. The defendants take issue with the trial judge’s finding with respect to the characterisation of the delay. The State defendants referred to the very lengthy delay since the original statement of claim was delivered on the 21st April, 2006 and in particular the five and a half years since the Supreme Court overturned the order dismissing the proceedings for inordinate and inexcusable delay. On appeal they submitted that the trial judge erred in finding that this delay was not excessive and was in error in characterising it as “slippage”. The State defendants relied upon the decision of the Court of Appeal in *Quinn v. IBRC* [2016] IECA 21 to refuse the plaintiffs’ application to amend to include an entirely new claim never pleaded before. The Court of Appeal also refused the application on the ground of delay. It seems to me that little quarrel can be taken with a view that the delay from the original statement of claim was inordinate. That appears to have been accepted by the plaintiffs in 2012 (see Fennelly J. at para. 2 of his decision in *Comcast*). The delay up to that point was however ruled upon in the earlier proceedings. The issue now is whether the overall delay but in particular the delay since 2012 is such that the amendments to the statement of claim should not be acceptable.
33. The fourth defendant rightly submitted that the trial judge correctly stated at para. 9 of her judgment that “[i]t is clear that the amendments sought are substantial with the majority arising consequent upon the findings of the Moriarty Tribunal in March, 2011.” The fourth defendant also accepted that certain amendments were required in so far as he had applied to be joined as a co-defendant and was so joined.
34. The fourth defendant conceded that he could not claim delay prior to February 2014 as that was the point at which he was joined as co-defendant. He submitted that his entitlement to point to urgency was not impaired however. He pointed to the delays since he was joined as a defendant. He made particular complaint that the period between 2015 and 2018 during which the third-party funding claim was litigated, was being relied upon by the plaintiffs. He said that credibility issues arose as the work on the third party issue greatly exceeded the work that would have been required to draft and deliver the statement of claim. He did not point to any specific prejudice in relation to the delay.
35. In my view, in considering the delay since 2012, it is important to take into account the time it took for the issue of third-party funding to be resolved. This is so even where it now appears that the plaintiffs are in a position to proceed without that third-party funding. That was a weighty issue which the plaintiffs put forward as necessary at the time. It appears that in 2015, the amended statement of claim was ready (as per the affidavit of Mr. Fitzgerald, referring to an affidavit of Mr. Boyle of the plaintiff company

sworn on the 25th March, 2015). The trial judge has accepted the *bona fide* nature of the application for third party funding that took place between 2015 and 2017. Although no explanation is now given for how matters have resolved in that regard, in my view there is no basis for interfering with that finding of the trial judge and viewing the original application as anything other than necessary at that time.

36. The fact of the further delay especially following the earlier delay must still be a factor. A particular question is whether that delay must be viewed as so excessive that no amendments to the statement of claim may be allowed after this time. In that regard it is noteworthy that delay, in and of itself, does not appear to have been found to be a ground upon which an amendment must be refused. The decision of the Court of Appeal in *Quinn v. IBRC* at para.52 of the judgment refers to a delay found by the High Court that "*was not adequately explained and must be viewed as culpable in all of the circumstances*". In the present case, the High Court judge did refer to some "slippage" or delay in the chronology that had been set out. Crucially she did not find it excessive in the unique circumstances of the case.
37. In my view, the circumstances of the case are unique both in the nature and the complexity of the litigation, and those contributed to the necessity for the third-party funding application. In those circumstances, the delay is not such which of itself requires the amendments to be refused.
38. The question of prejudice must also be assessed. The only prejudice identified concerning the corruption claim is a general prejudice in defending proceedings so long after the alleged events. Insofar as the State defendants point to consequential prejudice from the allegations regarding particular identifiable persons specified in the proposed amended statement of claim, there is nothing by way of particular material prejudice in permitting the particularisation of the claim following on from the details of the Moriarty Tribunal report. These details will in general be helpful for determining the real questions in controversy between the parties. All of the parties played a role in the Moriarty Tribunal and therefore have a knowledge of the facts identified in the course of the Tribunal hearings and in particular, those referred to in the report. More particularly, the defendants have had the opportunity already of preparing and presenting their version of the procurement process for the purpose of the Tribunal. The trial judge correctly identified that in the related Comcast proceedings an amended statement of claim had been served without objection in 2015 and that it seems there would be a degree of duplication of witnesses. The State defendants have been on notice of the necessity for defending this aspect of the claim for some considerable time.
39. The only issues of real or actual prejudice identified concern the identification of **new** causes of action and that will be dealt with below. In all the circumstances, particularly where there is a real public interest in the these proceedings being heard, where there is no real or actual prejudice and no unexplained or culpable delay and insofar as and to the extent that the amendments are in ease of the defendants and ultimately the trial judge

as they particularise the claim, I am of the view that there is no reason to disallow the amendments on the sole ground of delay.

The Amendments and the Claim of Corruption

40. Although the plaintiffs framed their initial claims under a number of causes of action, a perusal of the detail in the original statement of claim and as indicated by each of the judges of the Supreme Court in their judgments in *Comcast*, the core factual claim made by the plaintiffs was corruption in high office. The primary consideration of this Court must be whether the amendments are necessary for the purposes of determining the real questions of controversy. The amendments which do so must be allowed.

41. The plaintiffs submit that their basic claim remains the same. In my view, that can only mean that this basic claim was about corruption of the process at the highest levels. It was not a claim about simple legal errors that can befall any tendering process. The case they had made was not about civil servants acting in a bona fide but unlawful manner. Indeed, it is not a case about civil servants acting corruptly in and of themselves. Allegations of corruption by individual civil servants were not made in the original statement of claim and it certainly has not been made expressly in the amended statement of claim. At para. 30 of the original statement of claim there is an example of an express claim that it was the actions of the Minister that were corrupt and had caused the losses: -

“the Defendants and each or any of them, their servants and agents, are jointly and severely [sic] responsible for the Plaintiffs said losses and they are vicariously liable to the Plaintiffs for the loss and damage occasioned by reason of the unlawful actions and activities on the part of the Minister.” [emphasis added]

42. By way of comparison, the differentiation at the proposed amended para. 34 between the particulars listed under the heading “Interference by the Minister” and the particulars under the heading “Further Interference and Unlawful Evaluation” is instructive. On its face this appears indicative of a separate claim of illegality going beyond a claim of corruption. Indeed, it may also appear to amount to a claim of corruption outside that of ministerial interference; that would be a new claim. Para. 35 of the amended statement of claim is also revealing. It distinguishes acts of interference from defects. It appears to imply that the purpose and effect of the interference is to be assessed separately from the defects in the process.

43. In my view, some of the amendments to the statement of claim, if permitted, would allow this case to proceed on an entirely different factual and legal basis to that which was central to the decision of the Supreme Court whereby the State defendants’ application to dismiss the proceedings was refused despite the inordinate delay up to that period. To allow that to happen now would be entirely contrary to the reasoning of the various judges of the Supreme Court. The repeated references to the uniqueness of this case captured the sense of public interest in permitting a claim of corruption at the highest level to proceed. It would be materially prejudicial to the defendants to permit an entirely different case to proceed at this very late stage. To require the defendants to defend

against errors of process which may or may not amount to an illegality is entirely different to defending a claim that errors of process were brought about by corruption. In the unique circumstances of the present case, to permit amendments that allow the case to proceed as a "process error" claim would be unjust.

44. Moreover, the Statute of Limitations has been relied upon by the defendants to submit that no amendment should be permitted where it amounts to a new claim as such a claim would be statute barred. The plaintiffs rely upon the approach in *Rossmore* that unless it is obvious that a claim is statute barred so that no useful purpose would be served in permitting the amendment, then the appropriate course of action is to permit the amendment while making it clear that the defendant is entitled to rely upon the Statute of Limitations. Insofar as the amendments would amount to a claim of ordinary irregularities in the evaluation process, I am satisfied that it would amount to a new claim to which the Statute of Limitations would apply and that no useful purpose would be served by permitting the amendment. On the other hand, insofar as these are particulars of the corrupting of the process, they must be permitted for the purposes of determining the real questions of controversy in the litigation.
45. Moreover, there is no prejudice to the defendants in permitting these amendments as they are similar in substance to those contained in the related *Comcast* proceedings. Indeed, some time was spent at the hearing discussing the fact that the State defendants had consented to amendments in the *Comcast* proceedings which were very similar to those put forward by the plaintiffs in this case. The State defendants are entitled to change their tactics from case to case as, for example, their exposure to liability may be different in each case. However, the fact that they had notice of the case being made against them in those proceedings is relevant to the consideration of prejudice.

The Fourth Defendant

46. A considerable focus of the fourth defendant at the hearing of the appeal was on what he claimed was the addition of two new claims, namely that of restitution for unjust enrichment and a claim for an account of profits. Despite having applied to be joined as co-defendant, the fourth defendant claimed that the plaintiffs were not at large to make any case against him in the amended statement of claim; the pleaded claims had to correlate with the claims made in the original statement of claim. As no claims had been made for restitution for unjust enrichment or for an account of profits, these new causes of actions could not be added now.
47. At para. 42 of the proposed amended statement of claim, the following is pleaded: "The Fourth Named Defendant was, at all material times, a director and shareholder in Esat Digifone (and/or in Communicorp, which was a shareholder in Esat Digifone) and he benefited and was enriched by the award of the Licence to Esat Digifone and the subsequent sale of the Licence for a sum of approximately €2.4 billion". At para. 46 it is pleaded: "As a result of the wrongful actions of the Fourth Named Defendant, Esat Digifone was awarded the Licence and the Fourth Named Defendant benefited and was enriched therefrom". In the prayer for relief, the plaintiffs seek as against the fourth named defendant, "restitution for unjust enrichment" and "an account of profits".

48. The fourth defendant submitted that the above radically changes the focus of the plaintiffs' action from the losses alleged to have been sustained by the plaintiffs as a result of the allegedly unlawful behaviour of the fourth defendant, to one focused on the alleged gains of the fourth defendant. He points to the seventeen year gap between the service of the amended statement of claim and the commencement of proceedings and the four year gap since the joinder of the fourth defendant as a defendant.
49. The fourth defendant submitted in reliance on *Rossmore, Woori* and *Potteridge* that where a claim was bound to fail then an amendment should not be permitted. Insofar as these were new claims it was submitted that they should not be permitted. There were objections on the basis of the Statute of Limitations and laches.
50. In relation to the claim for relief for unjust enrichment, the fourth defendant relied upon *HKR Middle East Architects Engineering LV & Ors v. English* [2019] IEHC 306 at paras. 394 – 395 in which McDonald J. summarised the relevant principles in the following terms: -

"It is clear from the decisions of the Supreme Court in East Cork Foods Ltd v. O'Dwyer Steel Co. [1978] I.R. 103, O'Rourke v. Revenue Commissioners [1996] 2 I.R. 1 and Corporation of Dublin v. Building and Allied Trade Union [1996] 1 I.R. 468 that Irish law recognises unjust enrichment as a cause of action where a defendant has received money or some other property of a plaintiff in circumstances where it would be unjust for him to retain it. In order to avoid the development of what Keane J. (as he then was) described as 'palm tree justice' in O'Rourke v. Revenue Commissioners, the courts have generally confined the cause of action to a number of clearly defined categories of case. These have been very usefully summarised by Barton J. in Vanguard Auto Finance Ltd v. Browne [2014] IEHC 465 at pp 22-23. In summary, these are: -

- (a) Where money has been paid under a mistake either of fact or law;*
- (b) Where the plaintiff seeks to recover a benefit that was to be conferred on him under the terms of a contract which has been discharged either by breach or frustration;*
- (c) Where a plaintiff seeks to recover a benefit provided by him to the defendant under a transaction which becomes unenforceable in law;*
- (d) Claims where a plaintiff has discharged a debt of the defendant; and*
- (e) A restitution for 'wrongs'. At p. 22, Barton J. explained that the wrong in question can be tortious, a breach of contract, a breach of fiduciary duty or a breach of confidence. That does not appear to me to be an exhaustive list. On the same page, Barton J. explained that there can be unjust enrichment by wrongdoing in circumstances where the enrichment of the defendant*

arises 'by virtue of the commission of legal or actionable wrong against the plaintiff'.

On p. 24 of his judgment, Barton J. identified that there are two essential preconditions to the unjust enrichment remedy. These are: -

- (a) enrichment of the defendant at the expense of the plaintiff; and*
- (b) that the enrichment in question is unjust.*

*This second precondition does not give the court a licence to apply some subjective notion of injustice. Barton J. cited in this context, the observation of Keane J. in *Dublin Corporation v. Building and Allied Trade Union* that total failure of consideration is one of the circumstances in which courts will accept that an injustice has arisen."*

51. The plaintiffs contend that because the fourth defendant was not a party to the original proceedings every claim against him is new. The plaintiffs contend that if the fourth defendant committed the wrongful acts alleged, then he is liable to account for the profits generated from those wrongful acts and is similarly required to make restitution for unjust enrichment. I view this latter submission as failing to take into account what was conceded by them – that the claim of unjust enrichment is a separate cause of action and not merely a remedy.
52. It is instructive to look at the decision of Ryan J. in joining the fourth defendant as a defendant to the proceedings. This occurred despite the objection of the plaintiffs. At para. 32 Ryan J. posed the following: "*The fundamental question is what is the just procedural decision in the circumstances of the case? Is it the case that Denis O'Brien ought to have been joined? Or is his 'presence before the Court necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter?'"*
53. Having identified the claim as being one alleging corruption by the Minister in conspiracy with Esat Digifone to ensure that the latter was awarded the GSM licence, Ryan J. stated: "*If Mr. O'Brien is not joined as a defendant and is left to stand by as the plaintiffs' claim is presented against the State defendants only, he and the Court will be observing a drama unfold in which he is the central participant but without any entitlement to intervene. The case alleging misconduct of the most serious nature will proceed without any involvement of the person alleged to be the major wrongdoer."* That was the primary basis on which Ryan J. held there were exceptional circumstances justifying the joining of the fourth defendant to the proceedings against the wishes of the plaintiffs.
54. The judgment of Ryan J. records counsel for the fourth defendant submitting that there was no possibility of his client relying on the Statute of Limitations. The possibility of such reliance had been raised by the plaintiffs as a practical objection to the joinder of the

defendant. Undoubtedly, that concession was a factor in the consideration of whether it was just in the circumstances to join the defendant.

55. The fourth defendant claims that no cause of action for unjust enrichments is made out in the pleadings and that what is pleaded is only a relief. If this was so then the amendment ought not to be allowed, based upon the dicta of Geoghegan J. in *Croke v. Waterford Crystal* [2004] 2 I.R. 383 that “[i]t is trite law that a cause of action merely mentioned by name in the prayer does not and cannot in any sense constitute the pleading of such cause of action. It is, therefore, necessary to look at the main body of the statement of claim.”
56. It seems to me however that included in the main body of the statement of claim is a plea that as a result of the wrongful actions of the fourth defendant, Esat Digifone was awarded the licence and the fourth defendant benefitted and was enriched therefrom. This plea follows a repetition of all of the earlier pleas against the State defendants and the particularisation of the claim of wrongful corruption against the fourth defendant. The wrongful acts included engagement in a conspiracy with the Minister and corrupt payments to the Minister for the purpose of ensuring or as a reward for ensuring that Esat Digifone would get the licence. It is claimed that he has been guilty of fraud and infringement of the plaintiffs’ constitutional rights. There is a claim that because of the wrongful actions of the fourth defendant, the plaintiff suffered loss and damage in losing the licence or the opportunity to be awarded the licence.
57. While this plea is less than ideally phrased, I am satisfied that it contains sufficient detail to amount to a claim that the fourth defendant has been enriched at the expense of the plaintiffs (based upon the commission of a legal or actionable wrong against the plaintiffs) and that the enrichment in question was unjust because it had come about through the wrongful corruption of the procurement process by the fourth defendant and at the expense of the plaintiff. Those are the necessary ingredients of a claim for unjust enrichment. Whether the plaintiffs will succeed in establishing factually the alleged wrongful actions or legally that the alleged wrongful actions amount to a commission of a legal or actionable wrong against the plaintiffs is solely a matter for the trial of the action. The claim has been sufficiently, if minimally, pleaded. Finally, while the pleadings do not contain the word “unjust”, in circumstances where the claim is one of enrichment expressly stated to be because of the alleged corrupt actions of the fourth defendant, there can be no doubting that the claim is for restitution for unjust enrichment. I am satisfied therefore that the remedy claimed in the prayer for relief is based upon the cause of action pleaded in the statement of claim.
58. The fourth defendant places heavy reliance on the fact that no claim for a remedy on account of the alleged unjust enrichment had been made in the original proceedings and that to include it now would have a substantial impact on the nature of the proceedings. I have identified above the main causes of action in the original pleadings. None of those included a claim for restitution for unjust enrichment but that is unsurprising as neither Esat Digifone nor the fourth defendant had been joined as defendants at that time *i.e.* the

beneficiaries of the GMS licence had not been joined. The fourth defendant maintained in his application to join him to the proceedings that it was both unjust and irrational not to join him as a defendant. This was based *inter alia*, on the centrality of the role he was alleged to have played, as well as the possibility that the plaintiffs might succeed against the State but that the fourth defendant could succeed in the State's claim for an indemnity against him. Those factors were obviously relevant to the decision whether he was entitled to be joined as a defendant at his own request, but they do not assist in determining the extent of the case that the plaintiffs could plead against him after his joinder as a defendant. This is for the reason that a) all claims to be made against him in an amended statement of claim would be new in the sense that they had not previously been made and b) in accordance with the principles set out in the case law referred to above, even radical amendments to a statement of claim may be permitted.

59. It is recognised however that the reference to "all claims against the fourth defendant being new" must be limited by the factual matrix of the case. In other words, an extraneous claim, unrelated to the central factual allegation of misconduct made out in the original pleadings, would not be appropriate.
60. The plaintiffs' claims against the fourth defendant as set out in the amended statement of claim are clearly based upon that central allegation of corrupt misconduct in the procurement process which caused loss to the plaintiff. The claim for restitution for unjust enrichment arises from that very allegation of misconduct and corruption at the heart of the original statement of claim. To pursue a claim for restitution for unjust enrichment against the alleged major beneficiary of that wrongdoing is a logical corollary, and is possible now because that alleged wrongdoer is a party. Therefore, I do not accept that simply because it was not claimed in the original proceedings that it cannot be claimed now. Nor do I accept that merely because it would make the claim more complicated or even confused that it ought not to be permitted. Indeed, any complication could be assisted by suitable case management.
61. A further but related objection of the fourth defendant was in respect of delay. I have dealt with and rejected a major aspect of this complaint, namely the delay because of the third-party funding litigation, above. Insofar as delay is claimed regarding the new cause of action of a claim based on unjust enrichment, I am of the view that the fourth defendant has not identified any particular prejudice brought about by the delay in the five years since he was joined as a defendant. His issue is primarily one of general prejudice by virtue of the efflux of time and the difficulties inherent in defending this new claim which will require substantial work given the period of time at issue.
62. In my view that issue of general prejudice is not sufficient to disallow the amendment of the statement of claim. As set out above, there is no difficulty with the length of time for preparation and there has been no evidence of any inability because of financial means to undertake the task involved. Being joined in the original claim meant an implicit acceptance that a claim for damages could be made.

63. Furthermore, in the original statement of claim “an order for the taking of accounts and the making of enquiries as to damages as [the High Court] may seem fit to direct” was sought, albeit against the then parties. The fourth defendant must have understood that a similar order would be sought against him for a taking of an account. This form of order would be necessary as an ancillary form of relief for a restitutionary remedy for unjust enrichment. The fourth defendant must have anticipated or ought reasonably to have anticipated a claim at a minimum for the taking of an account of profits in relation to him when he applied to be joined as a defendant. For all these reasons, I therefore reject his claim about delay.
64. The fourth defendant objected to the proposed amendment of the statement of claim on the ground that such issues as the Statute of Limitations and laches will inevitably arise if such a plea is permitted. An amendment to pleadings may be permitted unless it is clear that it is bound to fail. I have referred above to the manner in which the fourth defendant dealt with the issue of the Statute of Limitations at the joinder application. Even if the fourth defendant is correct that his concession as to the Statute only referred to the claims that had been clearly made on the original pleadings, it is not appropriate to rule on whether this cause of action concerning restitution for unjust enrichment would be caught by the Statute of Limitations and therefore bound to fail. That potentially complex issue will be a matter for the trial judge, as indeed will the issue of whether the concession covered all claims to be made against the fourth defendant relating the issue of corruption in the tendering process.
65. Different limitations principles on account of laches may apply depending on whether the argument that the plaintiffs are out of time to pursue the claim is based upon the statute or on equitable grounds. That is also a matter for the trial of the action. The claim cannot be said to be bound to fail.
66. In all those circumstances, I am satisfied that the addition of a claim for restitution for unjust enrichment should be allowed.
67. As regards the claim for an account of profits, this is a remedy which must be linked to a cause of action. In my view it is linked to the claim for restitution for unjust enrichment. It is also linked generally to the claim for damages including exemplary damages. The original statement of claim had also included a claim for the taking of an account in the context of the claim for damages. I do not accept that delay or prejudice prevents the amendment. I would therefore permit this amendment.

The Permitted Amendments

68. In accordance with the above findings, it follows that it is appropriate to disallow some of the proposed amendments. It is also necessary to make certain amendments to the proposed amendments. The most appropriate way to do so is by indicating in general terms in the course of this judgment the rationale for the types of amendments permitted to be made. The statement of claim as amended in accordance with this judgment will be attached in a schedule to this judgment.

69. As the central claim made by the plaintiffs has always been that the Minister allegedly corrupted the process, the amended statement of claim must reflect this. No amendments which bring the process outside that central feature and make claims arising from what may be termed "ordinary" procurement principles will be allowed. Careful consideration has been given to whether the detailed particulars set out from para. 34 sub para. (p) onwards should be allowed. Taken out of context these may have the appearance of being "ordinary" or "run of the mill" failings that could be found in any straightforward public procurement challenge. On that basis counsel for the State defendants strongly urged for their deletion in *toto*. On the other hand, the plaintiffs are making the case that these "errors" are evidence of the corruption of the process. Given that the case is one about corruption, the details of how that corruption was manifested must be permitted to be explored at trial. Therefore, the plaintiffs are entitled to plead these particulars insofar as they allegedly relate to evidence of corruption by the Minister. In those circumstances, it is appropriate to ensure that the subheadings under para 34. and subsequent other relevant headings in the amended statement of claim include the word "corrupt". The reference to "Unlawful Evaluation" in the subheading before particular (p) must be removed. A further sub-heading must be inserted after the new heading of "Further Corrupt Interference" as follows: "The Minister corrupted the process or caused the process to be corrupted as illustrated by the following:"
70. Further amendments to reflect the centrality of the claim being one based upon allegations of corruption by the Minister require at each point in the amendments where there is reference to "the Minister, his servants or agents", there should be a reference to "the Minister by himself or acting through his servants or agents".
71. For the avoidance of doubt and to ensure that the focus is on the deliberate corruption of the process, para. 34(s) should be amended by the deletion of the phrase "/or" in that part of the opening sentence which currently reads "[...] had the purpose and/or effect of favouring the tender submitted by Esat Digifone [...]."
72. A small number of other amendments to the proposed amended statement of claim have been made to ensure that the focus at trial remains on the Minister's alleged corruption of the tender and evaluation process. These amendments will ensure that the real issues in these proceedings have been identified.
73. In relation to the proposed amendments under the heading "Wrongful Corrupt Actions of the Fourth Named Defendant I would permit these amendments to be made. The additions of reliefs 17 and 18 are also permitted.

Conclusion

74. I have reached the conclusion that the trial judge was in principle correct to permit the proposed amendments to proceed but I have disagreed with her in respect of the breadth of all the amendments. Part of the difference in my findings is due to a submission by the State defendants that was not pursued with clarity at the hearing in the High Court despite having been identified by the trial judge herself. This submission is that the new amendments, if permitted, will turn this case into one resembling an ordinary challenge to

public procurement and therefore completely change the unique nature of the claim, namely that of corruption at high level. It was that unique feature which lead the Supreme Court to permit the case to proceed despite what was an inordinate delay by the time the appeal on the application to dismiss for want of prosecution reached the Court in 2012.

75. Despite the further passage of time, I consider that the amendments must be permitted to proceed provided there is greater clarity that it is a claim firmly anchored in corruption that is being pursued. Mere errors in the process that were not driven by corruption or reflective of corruption are not permitted.
76. In relation to the fourth named defendant, he makes particular criticism of the claim against him for unjust enrichment. For the reasons set out in the judgment, I will permit this claim to be made. I will also permit the claim in relation to the taking of an account of profits to proceed for the reasons set out in this judgment.
77. The amended statement of claim with the permitted amendments is scheduled to this judgment.
78. I would allow the appeals in part and the order of the High Court is varied in part.
79. Finally, it is appropriate to add that as soon as this amended statement of claim is served, it is beholden on all parties to act without any further lapse of time beyond what is permitted by the Rules of the Superior Courts.

SCHEDULE 1

**STATEMENT OF CLAIM WITH AMENDMENTS
PERMITTED BY THE COURT OF APPEAL**

THE HIGH COURT

BETWEEN/

**PERSONA DIGITAL TELEPHONY LIMITED AND
SIGMA WIRELESS NETWORKS LIMITED**

PLAINTIFFS

-AND-

**THE MINISTER FOR PUBLIC ENTERPRISE
IRELAND
THE ATTORNEY GENERAL AND
DENIS O'BRIEN**

DEFENDANTS

-AND-

MICHAEL LOWRY

THIRD PARTY

AMENDED STATEMENT OF CLAIM

PURSUANT TO ORDER OF THE COURT OF APPEAL DATED the 16th DECEMBER, 2019

Parties

1. The First Named Plaintiff is a single member limited liability company having registered offices at Sigma Wireless, Jamestown Business Park, Jamestown Road, Finglas, Dublin 11.
2. The Second Named Plaintiff is a limited liability company having registered offices at McKee Avenue, Finglas, Dublin 11.
3. The First Named Defendant (also referred to herein as the "Minister") is a corporation sole within the meaning of Section 2 of the Ministers and Secretary's Act, 1924 (as amended) and is named as the successor to the Minister for Transport, Energy and Communications

and has offices at 29-31 Adelaide Road Dublin 2. At all material times, Mr Michael Lowry TD was the Minister for Transport Energy and Communications and was responsible for and in charge of the Department of Transport Energy and Communications (the "Department')."

4. The Second Named Defendant is the juristic person answerable at law for the actions of the First Named Defendant, its servants or agents.
5. The Third Named Defendant is the law officer of the State designated by the Constitution of Ireland and is joined in these proceedings in a representative capacity and is joined for the purpose of effecting service upon the Second Named Defendant.
6. The Fourth Named Defendant is a businessman and at the material times to these proceedings was the Chairman of Esat Digifone. The Fourth Named Defendant applied to be joined to these proceedings as a defendant and was so joined pursuant to an Order made by Mr Justice Ryan of this Honourable Court which is the subject of a written ruling dated 21 February 2014, *Persona Digital Telephony Limited v Minister for Public Enterprise* [2014] IEHC 78. The Fourth Named Defendant was the principal shareholder of Communicorp Group Limited ("Communicorp") and thereby held an interest of between 37.5% and 40% in Esat Digifone, a consortium which was formed for the purpose of bidding for the licence the subject of these proceedings. The Esat Digifone Consortium consisted of Esat Telecom Holdings Ltd, Telenor Invest AS and IIU Nominees Limited. The Fourth Named Defendant was the chairman of Esat Digifone when it was awarded the licence.

Decision to issue the Licence

7. Pursuant to the provisions of Section 111 (1) of the Postal and Telecommunications Services Act, 1983, the Minister declared an intention to issue a single licence (the "Licence") to provide and operate, within Ireland, a public pan-European cellular digital land based mobile communications system (GSM) as described in the annex to Council's recommendation 87/371/EEC of 25th June 1987 in competition with the equivalent offering by Telecom Eireann at the relevant time.
8. The said intention to issue the Licence was made consequent upon a decision by the Government dated 2nd March 1995 (the "Government Decision"), which stated that the Government had approved the announcement of an open competitive bidding process with a view to granting the Licence on the basis that the bidding process would be promoted and controlled by the Minister and that a recommendation would be put by the Minister to Government in time for a final decision on the granting of the Licence to be made by 31st October 1995.

The Tender Process and Evaluation Model

9. Following the Government Decision, a Request for Proposals (the "RFP") was issued by the Department on 2nd March 1995 inviting applications for the Licence.

10. The successful applicant was to attain a right to the grant of the said GSM licence or in the alternative, a right to exclusively negotiate with the Minister for and in connection with the grant of the said GSM Licence.
11. The RFP stipulated certain conditions precedent, certain competition rules, the Minister's expectations and general competition requirements and the process envisaged the making of a decision of very considerable magnitude which, at the relevant time was of considerable importance to the interests of the State.
12. In particular, the RFP required that applicants give full ownership details for the proposed licensee and all entrants to the competition were expected to have a capability to discharge the minimum initial fee as prescribed, a capability to discharge the annual licence fee, and a capability to provide a minimum coverage requirement. Applicants were also required to indicate their intentions regarding initial tariffing of service, were required to demonstrate their financial capacity, technical expertise, capability to implement the system and were required to disclose a business plan for at least the first 5 years and further, to complete a technical proposal and satisfy certain other competition requirements. There were certain fundamental rules and certain rules subordinate thereto.
13. Further, the RFP provided for fundamental competition and contractual terms, in particular, a term which required the Minister to compare all applications on an equitable basis, subject to satisfaction as to financial and technical capability in accordance with the information required and specifically with regard to the list of evaluation criteria (the "Evaluation Criteria") as set forth below:
 - Credibility of business plan and applicant's approach to market development;
 - Quality and viability of technical approach proposed and its compliance with the requirements set out in the RFP;
 - The approach to tariffing by the applicant which had to be competitive;
 - The amount the applicant was prepared to pay for the right to the Licence;
 - The timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;
 - The extent of the applicant's international roaming plan;
 - The performance guarantee proposed by the applicant;
 - Efficiency of proposed use of frequency spectrum resources
14. The RFP contained a term – paragraph 23 – that each application be provided with a statement confirming the application content as to its validity for a period of 180 days from the closing date for receipt of applications. The process in its entirety was predicated

upon a condition that the successful competitor and the subsequent licence grantee, would, in terms of identity, compare and conform in all respects with the identity of such successful competitor or licence grantee as described or disclosed at the time of entry to the competition being the 4th day of August 1995 or thereafter. The Plaintiffs and each of them will rely upon the RFP for its full terms and effect.

15. An Information Memorandum was published in or around the same time as publication of the RFP.
16. Following the launch of the competition process, a project group (the "Project Group") was established within the Department, whose task was to manage and conduct the evaluation, in accordance with the competition rules as approved by Government.
17. At the first full meeting of the Project Group on 6th March 1995, it was agreed that expert consultancy services would be required to assist in the evaluation. In addition, a protocol was adopted to regulate contact between the Department and the applicants or potential applicants, that made clear that one-to-one meetings or social outings were to be avoided, that records should be kept of any meetings or conversations that did occur and that where any issue of import arose, it should be referred to the formal written procedures of the competition process. The said protocol was subsequently brought to the attention of the Minister by Mr John Loughrey, Secretary General of the Department.
18. On 11th April 1995, the Department appointed Andersen Management International ("AMI") as a consultant to advise the Project Group in carrying out the evaluation. The Department issued a press release announcing the appointment of AMI, stating that the major task of AMI's consultancy was to carry out a detailed evaluation of competing bids, and to assist in all other aspects of the competition process.
19. A supplemental information memorandum was issued by the Department for the assistance of potential applicants on 28th April 1995. This memorandum informed tenderers that that no supplementary material would be accepted after oral presentations made by tenderers in the tender process; that the Financial Capability Pre-condition would be assessed by reference to the financial structure of the company, the financial strength of consortia members and the robustness of the projected business plans; and that a Performance Bond would not be required from tenderers.
20. On 12th May 1995, the Department issued a further information memorandum, entitled "*Guidelines for submission of applications to become the second operator of GSM Mobile Telephony within Ireland.*" This included, inter alia, mandatory quantitative tables which applicants were required to complete for the purposes of the quantitative evaluation.
21. AMI produced a draft evaluation model dated 17th May 1995 (the "Evaluation Model") which explained how tenders would be assessed by reference to the evaluation criteria stated in the RFP.

22. AMI produced a revised Evaluation Model on or around 8th June 1995 which was adopted on 9th June 1995 by the Project Group.
23. The Evaluation Model explained how applications would be assessed by reference to the Evaluation Criteria. According to the Evaluation Model, both a quantitative and qualitative evaluation model were to be applied to the eligible applications. The eight Evaluation Criteria stated in paragraph 19 of the RFP were disassembled into eleven dimensions and it was the constituent indicators of these dimensions that were to be evaluated. Page 3 of the Evaluation Model set out a table under the heading, "*Dimensions assessed in the quantitative evaluation*", which listed the eight Evaluation Criteria; the dimensions linked to each Evaluation Criteria; and the Indicators for each of the dimensions.
24. The Evaluation Model provided that initially, the quantitative evaluation was to be conducted in order to score the applications and that this initial score would then form the basis for the presentation meetings and the qualitative evaluation. It was further provided that when the bulk of the qualitative evaluation had been performed, that evaluation would form the basis for a recalculation of scoring applied initially if mistakes, wrong information or similar incidentals could be documented. It was further provided that the results of both the quantitative and the qualitative evaluation would be contained in the draft report and annexes to be prepared by the Andersen team.
25. The Evaluation Model was amended following intervention by the European Commission, by reducing the weighting of the Fee Criterion from 14 to 11; by increasing the weighting of the Tariff Criterion from 15 to 18; and by imposing a cap of £15 million on the licence fee.
26. The Evaluation Model and weightings for the quantitative evaluation were finalized by the Project Group on or around 27th July 1995. The Project Group adopted weightings to be applied in respect of the quantitative evaluation as follows:

| Criterion | Dimensions | Indicators | Weighting |
|--|-------------------|---|------------------|
| Approach to tariffing | Tariffs | Competitiveness of an OECD-like GSM 2 basket | 18 |
| Amount payable for licence | Licence payment | Up front licence fee payment | 11 |
| Timetable for achieving minimum coverage | Coverage | Speed and extent of demographical coverage for class IV (2W) handheld | 7.5 |

| | | | |
|--|------------------------------|---|-----|
| | | terminals | |
| Extent of international roaming plan | International roaming plan | Number of international roaming agreements | 6 |
| Efficiency of proposed use of frequency spectrum | Frequency efficiency | Frequency Economy Figure | 3 |
| Credibility of Business plan | Market Development | Forecasted Demand | 7.5 |
| | Experience of applicant | Number of network occurrences in the mobile field | 10 |
| | Financial key figures | Solvency | 7.5 |
| | | IRR | 7.5 |
| Quality of technical approach | Radio network infrastructure | Number of Cells | 10 |
| | Capacity of the network | Reserve Capacity | 10 |
| Performance guarantee proposed | Performance guarantee | Blocking rate | 2.5 |
| | | Drop out rate | 2.5 |

27. The Evaluation Model provided that during the qualitative evaluation, the evaluators were to take the results from the quantitative evaluation into account, as a starting point. The Evaluation Model further provided that the dimensions would be re-grouped into aspects as set out on page 20: Marketing; Technical; Financial; Management; and Other.
28. The marking matrix for the qualitative evaluation did not make provision for the application of weightings.

Terms of the Competition and Contract

29. The First Named Plaintiff was a consortium which was made up of the Second Named Plaintiff, Motorola, Unisource Mobile and the Electricity Supply Board. The First Named Plaintiff duly submitted a tender for the Licence. Further to the publication of the tender,

issuance of the RFP and related documents and the purchase by the First Named Plaintiff from the Minister of the competition documents for £5,000, the Plaintiffs entered into a contract with the Minister, pursuant to which it was agreed that the Minister would evaluate the Plaintiffs' application in accordance with the competition terms and conditions and in accordance with the contract terms and conditions and on an equitable basis.

30. In order to induce the Plaintiffs to make and to complete the contract and to participate in the said competition, the Minister represented and warranted and the contract and competition necessarily contained express and/or implied terms and conditions as follows:
- a. That there was no predetermined successful competitor;
 - b. That the competition was bona fide and had as its primary object, the identification of the best candidate from the participants;
 - c. That upon purchase of the competition documents and submission of the application or tender bid, that the process would be fair and that all applications would be considered on an equitable basis;
 - d. That any change to the competition rules would be immediately notified to the applicants;
 - e. That an appropriate/professional method of evaluation and selection would be utilised in order to ascertain the identity of the most suitable candidate having regard to the magnitude of the decision to be taken and the importance of the decision to the State;
 - f. That an opportunity would be afforded to each applicant to compete on an equitable basis and with equality with other applicants;
 - g. That the Minister, by himself or acting through his servants or agents would not enrich or enhance the prospect of success of one candidate over the prospect of success of another by unfair means or by any means;
 - h. That the Minister would not influence or manipulate the competition, the selection process, any deciding body or official;
 - i. That the Minister would not encourage any particular applicant or provide for any particular applicant, information or knowledge to assist that applicant or such applicant without providing such information or knowledge to all other applicants;
 - j. That the competition would provide for a just and fair result;
 - k. That the Minister would observe the principles of transparency and equality of treatment of tenderers and in particular, would treat the Persona tender equally with other tenders;

- l. That the successful candidate would be selected in accordance with the competition rules and the procedures devised;
- m. That the procedures would not involve corrupt practices;
- n. That the Minister would not corrupt the competition or its procedures;
- o. That the Minister would not conspire with any applicant or any person connected therewith so as to ensure a successful result or inevitable result;
- p. That the Minister would not promote one applicant over the interests of another;
- q. That the Minister would abide by the principles of fairness, transparency and equal treatment of applicants;
- r. That the Evaluation Criteria would be properly applied;
- s. That the identity of applicants would conform in all respects to their respective identities as disclosed throughout;
- t. That the Minister would not accept a gift, a bribe or other financial incentive or promise or reward or a gift, bribe or financial incentive from any applicant or any person connected with such applicant;
- u. That no steps, actions or activities would be engaged in by the Minister which would have the effect of promoting one candidate over another;
- v. That upon the discovery of practices or procedures being corrupted or penetrated, that the selection or evaluation procedures would be abandoned in favour of another procedure;
- w. That the successful applicant would be chosen from the competition;
- x. That the Minister would ensure the identity of the successful applicant and compare the identity of the successful applicant with that identity as disclosed in the successful applicant's application;
- y. That following the imposition of the Minister's deadline for applications that no further or other applications would be received or considered;
- z. That any material change to the identity of an applicant would necessarily disqualify that applicant from further participation or consideration;
- aa. That the Minister would not engage in actions or activities which were criminal in character.

Duty of Care

31. Further, the terms of the contract outlined were also duties which the Minister owed to the tenderers and, in particular, to the Plaintiffs. Further, the Minister, his servants or

agents at all material times owed participants in the tender process, including the Plaintiffs, a duty of care.

Wrongdoing and Unlawfulness – General

32. On the basis of the matters particularised herein, in breach of contract, including the implied terms and conditions thereof, and in breach of the competition rules and procedures provided for and in breach of duty (including breach of statutory duty) and by reason of deceit, misrepresentation, fraudulent misrepresentation, undue influence, corrupt practices, conspiracy, fraud and in breach of the Plaintiffs' legitimate expectations and in breach of the Plaintiffs' constitutional and property rights and in breach of the laws of the European Community/European Union (by reason of the alleged corruption), including but not limited to the general principles of transparency, equal treatment, non-discrimination, good administration, competition, objectivity, proportionality and effective judicial protection, the Minister abused his public office and interfered with the tender process and abused his office to ensure that Esat Digifone would be awarded the Licence; he accepted payments and/or benefits made by or on behalf of the Fourth Named Defendant and/or Esat Digifone so as to ensure that Esat Digifone would be awarded the Licence and/or to reward the Minister for interfering in the process for the benefit of Esat Digifone and in so doing he breached the Prevention of Corruption Act 1906, as amended; while all the while representing that the tender process was fair.
33. The Minister, on his own or acting through his servants or agents, was acting in purported exercise of his powers and functions and was purportedly acting in the best interests of the public and purportedly in the best interests of the First Named Plaintiff as a competitor, but, the Minister acted unlawfully and maliciously, and committed an act or acts with targeted and prejudicial malice towards the Plaintiffs, and/or knowingly acted ultra vires or acted with reckless indifference and as such, deliberately or dishonestly abused the power conferred upon him, abused authority, and abused trust with the known consequences that it would cause injury and damage to the Plaintiffs and committed misfeasance in public office.
34. As a result of the foregoing, the Plaintiffs and each of them have suffered and sustained significant financial loss and damage, including the loss of significant future profits and shareholder value. Had the wrongful acts not been committed, the First Named Plaintiff would have won the tender competition in respect of the Licence or, in the alternative, would not have lost the chance of winning it.

Particulars of Unlawful and Wrongful Acts of Corruption

Corrupt Interference by the Minister

- (a) The Minister had an interest in the process, had interactions with parties at the most sensitive stages, obtained and used sensitive critical information, made his preference of applicants known, conveyed his views on how the financial weakness of Esat could be rectified, bypassed other Cabinet colleagues' considerations and influenced the result delivered on 25th October 1995.

- (b) The Minister, on his own or acting through his servants or agents conducted an evaluation process which was unfair, lacked transparency and did not treat tenderers equally and favoured the Esat Digifone consortium over other consortia in the competition.
- (c) The Minister let it be known that his preference was for Esat Digifone to win the competition and the Minister, by himself or acting through his servants and agents and those conducting the evaluation of tenders did so in such a way as to give effect to the Minister's preference and to favour Esat Digifone.
- (d) The Minister disfavoured the Persona consortium and the Minister let it be known that he so disfavoured Persona. In particular:
 - (i) The Minister stated at a Department meeting, in or around March 1995, that if the GSM licence was awarded to a certain consortium (i.e. the Persona consortium) it was rumoured that it would become the 'nest egg' of a Fianna Fáil politician.
 - (ii) At a meeting with An Taoiseach, John Bruton T.D., on 25th October 1995, the Minister promoted a rumour that the former Taoiseach, Albert Reynolds T.D., had promised the second GSM licence to a consortium containing Motorola, which was the Persona consortium
 - (iii) In or around mid-September 1995, the Minister conveyed to Mr. Fintan Towey, who was a member of the Project Group, his negative view of Persona and sought reassurance from Mr. Towey that the process had not concluded in favour of Persona.
- (e) The Minister sought and/or obtained information on the substantive evaluation process and the trends emerging from within the Project Group at a number of significant stages of the process, thereby subjecting the process to political interference. In particular:
 - (i) In or around early September 1995, on inquiry by him of Mr Fintan Towey, the Minister was informed of the identity of the three applicants then in contention.
 - (ii) Further, on a date in September 1995, Mr Martin Brennan informed the Minister of the three applicants in contention; of the fact that Esat Digifone and Persona were the two front-runners; and of the concerns regarding the financial capability of the Esat consortium.
 - (iii) In or around late September or early October 1995 and after meetings held in Copenhagen on or around 28th September 1995, the Chairman of the Project Group, Mr Martin Brennan informed the Minister of the outcome of the Copenhagen meetings and of the ranking of the top two tenderers at that stage, and the Minister was provided with further information regarding the main features of the evaluation. The Minister was also informed that the finances of the top ranked applicant, Esat Digifone, remained problematic.

- (iv) Further, in or around early October 1995 on a date which was on or after 4th October 1995, the Chairman of the Project Group, Mr Martin Brennan, discussed and provided information to the Minister about the draft evaluation report received by the Department on 4th October 1995, during which discussion, the Minister instructed that he did not want the report to undermine itself and that the project was 'bankable'.
 - (v) On a date in October 1995, which was before 25th October 1995, the Minister's programme manager, Mr. Colin McCrea was given access to the draft evaluation report of 3rd October 1995.
- (f) The Minister, by himself or acting through his servants or agents provided confidential information about or in relation to the tender process to Denis O'Brien and/or Communicorp and/or Esat Digifone, their servants or agents. In particular:
- (i) In or around 4th April 1995, after the tender process had been launched, the Minister proposed to Mr Denis O'Brien that France Telecom could be a potential partner in a consortium for the competition.
 - (ii) On a date in or around July 1995, a confidential draft letter concerning the tender process from Commissioner Van Miert of the European Commission to the Department, was provided to Denis O'Brien and/or Communicorp and/or Esat Digifone, and/or their servants or agents, which letter appeared in the files of Mr. Jarlath Burke and the first page of which was faxed by Mr. Burke to Mr. Mike Kedar in or around 24th July 1995.
 - (iii) The Minister, by himself or acting through his servants or agents disclosed to Denis O'Brien and/or Communicorp and/or Esat Digifone, and/or their servants or agents, confidential details of the evaluation methodology for the competition, as reflected in the letter of Owen O'Connell of William Fry Solicitors to Baker & McKenzie of 20th June 1995.
 - (iv) On 17th September 1995, the Minister met with Mr. Denis O'Brien at Croke Park and later at Hartigans pub on Leeson Street, Dublin and shared confidential information about the tender process with Mr. O'Brien, including that Esat Digifone was in pole position in the competition, but that the evaluators had reservations surrounding its financial capability, stemming from the financial vulnerability of Mr. O'Brien's element of the consortium. Further, Mr. O'Brien disclosed to Mr. Lowry the proposition that Mr. Dermot Desmond would join the Esat Digifone Consortium and would underwrite Mr. O'Brien's finances. Mr. Lowry provided comfort to Mr. O'Brien that notification to the Chairman of the Project Group of such an arrangement, in breach of the rules of the competition, would not impact adversely on Esat Digifone's prospects.

- (v) The Minister, by himself or acting through his servants or agents made it known to Esat Digifone and/or members of the Esat Digifone consortium and/or Denis O'Brien and/or their servants or agents, that the Minister intended to announce the result of the competition in late October 1995, at a time when the official date for the result of the competition to be announced was the end of November 1995.
 - (vi) The Minister by himself or acting through his servants or agents disclosed or caused to be disclosed the identity of the underwriter to the tender submitted by Cellstar Group to Esat Digifone and/or Denis O'Brien.
- (g) The Minister had, during the course of the tender competition, including the period during which tenders were being evaluated, improper contacts with persons who had an interest in the competition or who were participants in the competition or others, thereby compromising the integrity of the tender process. In particular:
 - (i) On 17th September 1995, the Minister met with Mr Denis O'Brien at Croke Park and then later, by arrangement, in Houricans public house on Leeson Street, Dublin 2. The Minister and Mr. O'Brien then repaired to Hartigans public house on Leeson Street and spent approximately 30 minutes together. On foot of these contacts, and the information and assurances conveyed by the Minister to Mr. O'Brien, Mr. Dermot Desmond and/or his investment vehicle, IIU, entered into an agreement or agreements on 18th September 1995 pursuant to which Mr. Desmond/IIU took a stake in Esat Digifone and/or underwrote the financial contribution to the consortium of Communicorp.
 - (ii) In or around 15th September 1995, when the Minister met with Mr Anthony O'Reilly at the official launch of the Galmoy mine, the Minister informed Mr O'Reilly that the consortium with which Mr. O'Reilly was associated, Irish Cellular, had performed poorly in its oral presentation on 14th September 1995.
 - (iii) On or around 16th October 1995, the Minister spoke with Mr. Mark Fitzgerald at a golf classic at the K Club, Straffan, Co. Kildare and told him that Mr. Denis O'Brien and/or Esat Digifone had made a good impression on the Department and that Mr. O'Brien/Esat Digifone had good sites and marketing.
- (h) In or around the first week of October 1995, the Minister, by himself or acting through his servants or agents interfered in the evaluation process by introducing a concept of 'bankability', whereby the financial capacity of tenderers could be assessed taking into account funds that would become available after the Licence had been granted.
 - (i) The Minister, by himself or acting through his servants or agents imposed a guillotine on the evaluation process, the effect of which was that the result of the tender process, with Esat Digifone as the winner,

was announced on 25th October 1995. This early conclusion of the process occurred despite the fact that the timetable for the process had envisaged the announcement of the successful tenderer taking place at the end of November 1995. This guillotine was imposed despite the fact that the Secretary General of the Department had granted, on 23rd October 1995, a one-week extension for the Project Group to continue with its evaluation of tenders. Accordingly, the Project Group did not have the opportunity to complete its evaluation.

- (j) The Minister made a public announcement on October 25th 1995 to the effect that the competition was won by Esat prior to the presentation of the Evaluation Report to the Department.
- (k) The Minister, by himself or acting through his servants or agents abandoned the pre-determined procedures for obtaining the Government's decision on which consortium should be declared the winner of the competition. At a meeting with the party leaders of the Government on 25th October 1995, at which the Minister obtained de facto Government approval to announce Esat Digifone as the winner of the process, the Minister misled the said party leaders by, inter alia, presenting Esat Digifone as a clear winner of the process; by presenting the outcome of the process as being clear; and by presenting Esat Digifone as being well ahead of the next-ranked consortium.
- (l) The Minister, by himself or acting through his servants or agents exercised improper influence over the evaluation process being carried out by the Project Group, including in the following ways:
 - (i) By letting it be known among officials in his Department, in particular Mr Martin Brennan and Mr. Fintan Towey, in or around early September 1995, that he wanted the evaluation process to be accelerated.
 - (ii) By letting it be known to officials in his Department, in particular Mr Martin Brennan and Mr. Fintan Towey, that the report of the Project Group should not undermine itself.
- (m) The Minister, by himself or acting through his servants or agents, in breach of the competition rules, ensured that Esat Digifone would be granted the Licence and proceeded to grant Esat Digifone the Licence despite the fact that its ownership structure was different to that which had been submitted in its tender.
- (n) The Minister, by himself or acting through his servants or agents evaluated tenders in a manner that was unfair, lacked transparency, breached the procedures which had been adopted for the purposes of evaluating tenders and discriminated in favour of Esat and against Persona.
- (o) As of mid-September 1995, the Minister was in possession of knowledge, contrary to the confidentiality which was meant to seal the process, to guard against external or political influence, and thereby to guarantee its fairness, independence

and impartiality. The particulars above, in particular at paragraphs (e) and (f) above, are repeated.

Further Corrupt Interference

The Minister corrupted the process or caused the process to be corrupted as illustrated by the following:

- (p) The Minister, by himself or acting through his servants or agents carried out an evaluation which departed from and failed to follow the Evaluation Model which had been adopted by the Project Group. The departure from, failure to follow, and discarding of, the Evaluation Model, occurred after the closing date for the receipt of tenders and during the evaluation phase of the competition and had the effect of distorting the outcome of the process and favouring Esat Digifone. In particular:
 - (i) The quantitative evaluation was discarded and was not used in the manner prescribed by the Evaluation Model.
 - (ii) Further, the overall ranking of tenderers was based solely on the basis of the qualitative assessments, rather than on the basis of a combination of the qualitative and quantitative assessments as had been prescribed in the Evaluation Model.
 - (iii) Three quantitative evaluations were conducted but the results of only the first quantitative evaluation were brought to the attention of the Project Group. Following the production of the first set of quantitative results, a corrected set of quantitative results was never provided to the Project Group and the second and third set of results produced by AMI were not provided to the Project Group.
 - (iv) Indications from the Quantitative Evaluations that Esat was in negative solvency were ignored.
 - (v) The discarding of the quantitative evaluation was carried out so as to favour Esat Digifone, which had ranked no better than third or fourth in the quantitative evaluations that had been carried out.
 - (vi) In evaluating tenders, the weightings applied to the evaluation criteria and elements of those criteria, were altered and were not the weightings that had been adopted by the Project Group prior to the closing date for the submission of tenders. The alteration of weightings favoured Esat Digifone.
 - (vii) Weightings different to those in the Evaluation Model were applied to the three constituent features of the premier criterion – Credibility of Business Plan and Applicants' Approach to Market Development. The Evaluation Model provided that weightings would apply to the dimensions of that criterion as follows: Market Development: 7.5; Financial Key Figures – 15; Experience of Applicant – 10. However, the evaluation used to arrive at the result of the competition applied weightings of 10/10/10 to these three dimensions.

- (viii) The weightings applied to indicators were altered as between the First Draft Evaluation Report and the Second Draft Evaluation Report, departing from the weightings adopted in the Evaluation Model.
 - (ix) The indicators and/or weightings actually applied favoured Esat Digifone.
 - (x) The weightings applicable to the Evaluation Criteria, adopted prior to the closing date of the process and recorded in the Evaluation Model, were altered as between the draft and final evaluation reports, thereby concealing that a set of weightings other than those adopted in advance had been applied in determining the result of the process.
 - (xi) The weightings applied to the four dimensions, Tariffs, Market Development, Coverage and International Roaming, differed from the weightings provided for in the Evaluation Model; and it is unclear what weightings were applied to these dimensions.
 - (xii) In carrying out the first quantitative evaluation, there was a failure to make adjustments in the weightings in the Evaluation Model to reflect the 3% shift in weighting from the Licence Fee criterion to the Tariffs criterion, approved on 27th July 1995 following an intervention by the European Commission.
 - (xiii) In carrying out the first quantitative evaluation, the incorrect weighting base was used (103, instead of 100) due to errors in the total weightings of the three indicators of the first ranked criterion.
 - (xiv) In carrying out the qualitative evaluation, indicators for dimensions, which had been selected by AMI in advance, were altered. In particular, in evaluating the dimension Tariffs, at the sub-group meetings held in Copenhagen on 19th and 20th September 1995, the indicators Consumer Graph and Business Graph were adopted in substitution for indicators which had been selected by AMI in advance.
 - (xv) The period for which the IRR indicator was to be calculated was altered from that provided for in the Evaluation Model (from 15 to 10 years) consequent upon Esat Digifone having supplied data in respect of this indicator for the incorrect years (1995 to 2009 instead of 1996 to 2010).
 - (xvi) Contrary to the Supplemental Memorandum—which indicated that a Performance Bond would not be necessary—the Performance Criterion was assessed in the Qualitative Evaluation by reference to whether a Performance Bond had been included, in circumstances in which only Esat Digifone and one other tenderer had included a Performance Bond.
- (q) In or around the first week of October 1995, the Minister, by himself or through his servants or agents introduced a concept of 'bankability' into the evaluation process, whereby the financial capacity of tenderers could be assessed taking into account funds that would become available after the Licence had been granted.

- (r) Despite the concept of “deep pockets” having been rejected by the Project Group as a factor or criterion in measuring the financial capability of tenderers, the concept of “deep pockets” was incorporated into the first draft evaluation report and also incorporated into the final evaluation report and was provided as a justification for Esat Digifone having established its financial capability as a tenderer.
- (s) The Minister, by himself or acting through his servants or agents committed manifest error in evaluating tenders with the purpose and effect of favouring the tender submitted by Esat Digifone and disfavouring the tender submitted by Persona. In particular:
- (i) The First Draft Evaluation Report, the Second Draft Evaluation Report and the Final Evaluation Report, in the section on Sensitivities, Risks and Credibility Factors, characterised Persona as having expressed “strong reservations” concerning the draft licence, when that matter had been addressed and clarified in Persona’s oral presentation.
 - (ii) In carrying out an assessment of financial risks, and in particular in conducting a sensitivity analysis in the case of Persona, AMI used cash flow sensitivity figures of another tenderer, Irish Cellular, instead of Persona. This manifest error had the effect that the computation of Persona’s worst case capital requirement produced a worse result than if the correct Persona figures had been used. This error occurred in Appendix 10 of the First Draft Evaluation Report and was never corrected in the Second Draft Evaluation Report or the Final Evaluation Report.
 - (iii) In the Second Draft Evaluation Report, in carrying out the analysis of Financial Risks in Appendix 10, the analysis in respect of Esat Digifone was fundamentally altered from that in the First Draft Evaluation Report, so that the extent of Communicorp’s worst case equity exposure was significantly reduced.
 - (iv) In respect of the qualitative evaluation of the dimension Market Development, Esat Digifone was ranked first with a grade of ‘A’, even though in the quantitative evaluation, in respect of the same dimension, it ranked fourth. Further, the persons carrying out the said qualitative evaluation failed to take account of, or failed to take adequate account of, the quantitative results for the said dimension.
 - (v) In carrying out the qualitative evaluation of the second-ranked dimension – Experience as a cellular operator - of the first criterion, Credibility of Business Plan and Applicant’s Approach to Market Development, numerical scores from the quantitative evaluation were translated into lettered grades. Esat Digifone was awarded a grade of ‘C’ even though its quantitative score was only ‘0.97’, which ought to have been translated to a grade that was lower than ‘C’. Further, in departure from the Evaluation Model and without any justification, the

indicator, Experience as cellular operator, was weighted at three times less than the other indicators for the dimension Management Aspects.

- (t) The marking of tenders was manifestly wrong and erroneous. East Digifone was awarded marks and grades which were manifestly higher than its tender merited; Persona was awarded marks and grades which were manifestly lower than its tender merited. In particular:
- (i) In Table 15 of the First Draft Evaluation Reports, Esat Digifone was awarded a 'B' for Financial Strength, when its tender did not merit more than a 'C'.
 - (ii) In Table 15 of the First and Second Draft Evaluation Reports, Persona was awarded a 'D' for Liquidity, when its tender merited at least a 'C'.
 - (iii) In the First Draft Evaluation Report, Esat Digifone was awarded a 'B' for the dimension Financial Key Figures, when its tender did not merit more than a 'C'.
 - (iv) In the Second Draft Evaluation Report, Persona was awarded a 'C' grade for the indicator Understanding of GSM Roaming Issues (within the dimension, International Roaming) when its tender manifestly merited a higher grade, in particular given the involvement in the Persona consortium of Telenor.
 - (v) In Table 18 of the Second Draft Evaluation Report, Persona ought, at least, to have been awarded a grade of 'B↑'.
 - (vi) In carrying out the qualitative evaluation of the dimension Tariffs, Esat Digifone was awarded more marks than its tender merited. In particular, in marking the indicator OECD-like basket, whereas East Digifone ought to have been awarded a grade of 'E' based on its quantitative score in this indicator of '1', it was awarded a 'D'.
- (u) The overall ranking of tenderers was determined by the subjective considerations of certain members of the Project Group, in particular, Mr. Martin Brennan and Mr. Fintan Towey, and/or representatives of AMI, and the Project Group was denied the opportunity to apply the Evaluation Model or to decide on the ranking of tenderers. Instead, the determination of the ranking of tenderers was decided upon by a subset of the Project Group and/or representatives of AMI, to the exclusion of the Project Group as a whole. Further, this small group of individuals departed from the Evaluation Model and applied criteria/sub-criteria which had not been disclosed and weightings other than those that had been adopted by the Project Group.
- (i) Mr Michael Andersen's memorandum of 21st September 1995 was not provided to members of the Project Group other than Mr. Martin Brennan and Mr. Fintan Towey and neither Mr. Brennan nor Mr. Towey involved any other member of the Project Group, or consulted with any of them, in connection with any element of what was contained in the said memorandum.

- (ii) Of the Project Group, only Mr. Martin Brennan and Mr. Fintan Towey were involved in the decision-making at meetings with Mr Michael Andersen and other representatives of AMI in Copenhagen on or around 28th September 1995. The decisions taken at that time included the determination of the Aspects sub-totals and of a grand total score for each of the tenderers, steps which were decisive to the ultimate outcome of the process. Neither Mr Brennan, nor Mr Towey, had been granted the authority to determine how an overall ranking in the qualitative evaluation should be arrived at; to determine how it should be presented; or to determine, without reference to the Project Group, that ranking. However, they proceeded to take these steps, in conjunction with AMI.
 - (iii) Members of the Project Group, other than Mr. Martin Brennan, Mr Fintan Towey and Ms Maev Nic Lochlainn, and Mr Billy Riordan and Mr Donal Buggy, were not provided with copies of the First Draft Evaluation Report in advance of the Project Group meeting on 9th October 1995. This was contrary to the procedure adopted by the Project Group on 14th September 1995, which made provision for written observations on the First Draft Evaluation Report.
 - (iv) The ultimate decision to declare Esat Digifone the winner of the competition was made without any consultation or reference to the Project Group. No vote and no decision was taken by the Project Group and the Project Group was not provided with the Final Evaluation Report in advance of the announcement by the Minister that Esat Digifone was the winner of the competition.
 - (v) The qualitative evaluation was carried out in a vague, impressionistic, imprecise and opaque manner and favoured Esat Digifone. By way of example, in discussing the First Draft Evaluation Report at the Project Group meeting of 9th October 1995, which identified the negative equity of the Communicorp element of Esat Digifone, Mr Brennan and/or Mr Towey made the following or like statements: that "no doubt that A5 will survive"; that "problem not unique to anyone"; that "more balanced statement" was "required".
- (w) The Evaluation Report failed to accurately reflect the actual process conducted.
 - (x) Best and/or accepted practice was not followed in the conduct of the tender process.
 - (y) In breach of the Evaluation Model, there was a failure to evaluate Other Aspects as part of the qualitative evaluation.
 - (z) Each of the drafts of the Evaluation Report sought to exaggerate the positive aspects and downplay the negative aspects of the Esat Digifone tender.

- (aa) Each of the drafts of the Evaluation Report sought to exaggerate the negative aspects and downplay the positive aspects of the Persona tender.
- (bb) The briefing documents prepared by the Department in order to brief the Minister on the outcome of the tender process were incorrect, inaccurate, erroneous and misleading and exaggerated the performance of Esat Digifone and provided a distorted presentation of the comparative performance of Esat Digifone and Persona.
- (cc) Each version of the Evaluation Report was misleading, opaque and lacking in transparency and failed to explain how the evaluation was in fact carried out.
- (dd) The process by which tenderers were evaluated and by which Esat Digifone was selected as the winning tenderer, was not documented or was not adequately documented but was conducted in an opaque and non-transparent fashion.
- (ee) The Minister, by himself or acting through his servants or agents, in breach of the competition rules, permitted Esat Digifone to make changes to its tender after the tender had been submitted, including in the oral presentation made by Esat Digifone. In particular, the Minister, by himself or acting through his servants or agents took into account an underwriting letter from IIU dated 29th September 1995 which stated that IIU had arranged underwriting on behalf of the Esat Digifone consortium for all of the equity not intended to be subscribed by Telenor.
- (ff) The Minister, by himself or through his servants or agents failed to verify, or adequately verify, the contents of the Esat Digifone tender and failed to seek clarifications which ought to have been sought. In particular,
 - (i) On receipt of a letter from International Investment & Underwriting Limited dated 29th September 1995, Mr Martin Brennan and and/or Mr Fintan Towey failed (i) to bring the said letter to the attention of any other members of the Project Group and (ii) failed to seek clarification from Esat Digifone as to whether what was conveyed in the letter regarding underwriting altered information which had been provided in the application submitted to the Department in the Esat Digifone tender submission and confirmed at the oral presentation on 12th September 1995 and which had been and continued to be subject to evaluation.
 - (ii) The Minister, by himself or acting through his servants or agents failed to verify and/or clarify the true position concerning the shareholding structure of the Esat Digifone consortium and, in particular, the shareholding structure of Communicorp.
- (gg) Compliance with the Evaluation Criteria and/or Dimensions and/or Quantitative Indicators was not verified and/or was not verified properly. In particular, during the evaluation of the Financial Key Figures Dimension, there was a failure to verify

inconsistencies between information provided by tenderers in the mandatory tables supplied and in their business plans;

- (hh) The Minister, by himself or acting through his servants or agents failed to disqualify the Esat Digifone consortium following the receipt of the IIU letter of 29th September and/or following the notification of the shareholding of IIU in Esat Digifone in April 1996.
- (ii) The Minister, by himself or acting through his servants or agents, conducted negotiations in the licence award phase on the basis that the licence would inevitably be awarded to Esat despite its changed ownership and material amendment to its tender submission and without consideration of whether it was lawful to award the licence to Esat.
- (jj) The Minister abused his position prior to the award of the licence by intervening with the ESB to ensure Esat Digifone would be permitted to erect masts on ESB pylons.

Purpose and Effect of Wrongdoing

35. The purpose and effect of the acts of corrupt interference in the tender process by the Minister, by himself or acting through his servants or agents, and the defects in the evaluation process, was to ensure that Esat Digifone would be declared the winner. Were it not for the said acts of interference and the said defects, Persona would have won the competition or, alternatively, would not have lost the chance of winning the competition.

Payments and Benefits conferred upon the Minister

36. The Minister was paid monies and/or conferred with benefits for the purpose of ensuring, and/or as a reward for ensuring, that Esat Digifone won the tender competition and was granted the Licence.

- (a) In or around 29 December 1995, and approximately two months after it was announced by the Minister that Esat Digifone had won the GSM competition, a donation of US\$50,000 was made by Telenor, on behalf of Esat Digifone, to Fine Gael, the then leading party in Government of which the Minister was a member. The donation was made whilst negotiations were continuing between Esat Digifone and the Department for the granting of the Licence.
- (b) In or around 21 October 1996, a sum of £147,000 was lodged into account number 023/01/01505 with Irish Nationwide (IOM) Limited in the Isle of Man, being an account held in the name of and for the benefit of the Minister. This payment was the proceeds of a payment made by Mr Denis O'Brien to the Minister, through the conduit of off-shore accounts in the name of Mr Aidan Phelan and Mr David Austin.
- (c) In or around March 1999 an acquisition of a property in Mansfield, Hill Top Farm, Chesterfield Road, Gapwell, Bolsover, England, England in the Minister's name was completed with funds transferred from a London bank account of Mr Denis O'Brien with Credit Suisse First Boston, the Minister's solicitors in the UK, for that purpose.

In particular, on or around 25 March 1999, the sum of Stg.£300,000 was debited from the said account of Mr O'Brien and transmitted directly to the client account of the Minister's solicitor, Mr Christopher Vaughan, where it was credited to the Minister. Mr Vaughan forthwith applied the preponderance of that sum to discharge the purchase balance in respect of the said property, in addition to smaller sums.

- (d) Monies from the Stg.£300,000 payment referred to in (c) were also applied by the Minister or on his behalf as a deposit on the purchase of a property at Cheadle, formerly St Columbus Church, Wilmslow Road, Handforth, Cheadle, England, on or around 14 September 1999. Further, Mr O'Brien provided support to or for the benefit of the Minister in respect of a loan of Stg.£420,000 from GE Capital Woodchester Bank, payment of which was made to the Minister's solicitor, Mr Christopher Vaughan on or around 21 December 1999, who duly completed the acquisition of the said property. The said loan was made to Catclause Limited, an investment vehicle of which the Minister was principal and of which the Minister and his daughter were directors. Despite it having been a condition of the loan that a guarantor would be provided, and also that a first charge would be taken out on the property, neither was insisted upon in circumstances where Mr Denis O'Brien was supporting the loan and/or let it be known that he was supporting the loan. Further, the agreed repayment date in the summer of 2000 passed by, without any repayment of principal or interest. The loan was known within GE Capital Woodchester Bank as a "Denis O'Brien" transaction and Mr Denis O'Brien's support of the loan had the purpose and effect of conferring a benefit or benefits on the Minister.
- (e) The Minister had an involvement in a transaction by which property at Doncaster Rovers Football Club premises at Belle Vue, Doncaster, England was purchased on or around 18 August 1998 by or on behalf of Mr Denis O'Brien, which involvement it was intended would entail a payment to, or the conferral of a pecuniary advantage on, the Minister by Mr Denis O'Brien.
- (f) In or around March and April 2002, Mr Kevin Phelan was paid a sum of approximately Stg.£65,000, by Vineacre Limited, a company of which the Minister was a director. The principal purpose of this payment was that of presenting a contrived falsehood to the Tribunal of Inquiry into Payments to Politicians and Related Matters (the "Tribunal"), entailing the withdrawal of assertions which had been made by Mr Kevin Phelan against the Minister's solicitor, Mr Christopher Vaughan, in connection with, inter alia, the provision to the Tribunal of falsified correspondence, which falsified correspondence had the aim of concealing the Minister's involvement in the UK property transactions referred to (i.e. Mansfield, Cheadle and Doncaster), and, at the same time, the furnishing by Mr Kevin Phelan to Mr Christopher Vaughan of an untrue innocent explanation of "long form" and "short form" correspondence. Further, in or around August 2002, a sum of Stg.£150,000 was paid to Mr Kevin Phelan by or on behalf of Mr Denis O'Brien, through Westferry Limited, the primary purpose of which was to ensure that Mr

Kevin Phelan would not further undermine the false version of the Minister's involvement in the UK properties already tendered in evidence to the Tribunal in 2001, and the false explanation already presented, with the complicity of Mr Kevin Phelan, for the existence and provision to the Tribunal of falsified "short form" correspondence.

37. The Plaintiffs reserve the right to update and expand upon these particulars in due course and at the trial of the action.

Consequences of Wrongdoing and Unlawfulness Acts of Corruption

38. By reason of the matters aforesaid, the First Named Defendant is guilty of:

- (a) Misfeasance in public office;
- (b) Breach of contract;
- (c) Breach of legitimate expectation;
- (d) Conspiracy;
- (e) Fraud;
- (f) Infringement of the Plaintiffs' constitutional rights;
- (g) Breach of duty, including statutory duty;
- (h) Breach of European Community/European Union law;
- (i) Negligence; and
- (j) Misrepresentation.

Joint and Several Liability/Vicarious Liability

39. As a result of the foregoing, the Plaintiffs have suffered loss and damage.

40. The First, Second and Third Defendants and each or any of them, their servants and agents, are jointly and severally responsible for the Plaintiffs' losses and/or they are vicariously liable to the Plaintiffs for the loss and damage occasioned by reason of the unlawful actions and activities on the part of the Minister.

WRONGFUL CORRUPT ACTIONS OF THE FOURTH NAMED DEFENDANT

41. The Plaintiffs repeat the allegations above.

42. The Fourth Named Defendant was, at all material times, a director and shareholder in Esat Digifone (and/or in Communicorp, which was a shareholder in Esat Digifone) and he benefited and was enriched by the award of the Licence to Esat Digifone and the subsequent sale of the Licence for a sum of approximately €2.4 billion.

43. The Fourth Named Defendant caused the payments and benefits referred to above to be made and/or conferred upon the Minister for the purpose of ensuring, and/or as a reward

for ensuring, that Esat Digifone won the tender competition and was granted the Licence. In so doing, he corruptly breached the rules of the tender competition and breached the provisions of the Prevention of Corruption Act 1906, as amended and also has been guilty of fraud and infringement of the Plaintiffs' constitutional rights.

44. Further, the Fourth Named Defendant engaged in a conspiracy with the First Named Defendant.
45. Further, the Fourth Named Defendant obtained the Licence on behalf of Esat Digifone and/or ensured that Esat Digifone would be awarded the Licence, on the basis of misrepresentations and breaches of the competition rules and by unlawful means.

Particulars

- (a) The Plaintiffs repeats the particulars above.
 - (b) In the oral presentation of Esat Digifone held on 12th September 1995, the Fourth Named Defendant stated and represented as fact that four named financial institutions had committed themselves collectively to taking a 20% interest in the licensee company, when this statement was untrue.
 - (c) Further, in the oral presentation of Esat Digifone held on 12th September 1995, the Fourth Named Defendant stated and represented that Advent had already invested a total of \$19,500,000 in Communicorp since October 1994, which statement and representation was false. Further, the Fourth Named Defendant stated and represented that there was an agreement, a commitment and a guarantee from Advent to provide £30 million of funding to Communicorp, when there was in fact no agreement in place to that effect, nor was there any commitment or guarantee of the type asserted.
 - (d) In breach of the competition rules, the Fourth Named Defendant procured the submission of the underwriting letter by IIU to the Department dated 29th September 1995, which letter stated that IIU had arranged underwriting on behalf of the Esat Digifone consortium for all of the equity not intended to be subscribed for by Telenor.
46. As a result of the wrongful actions of the Fourth Named Defendant, Esat Digifone was awarded the Licence and the Fourth Named Defendant benefited and was enriched therefrom.
 47. Further, as a result of the foregoing, the Plaintiffs have suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

- (a) Loss of the Licence to the Plaintiffs and/or the loss of the opportunity to have been awarded the Licence - full particulars of this loss will be furnished in due course.
- (b) Loss of profits in respect of the Licence and its operation - full particulars of this loss will be furnished in due course.

- (c) Cost of competition documents € 6,350.00
- (d) Costs incurred by the Plaintiffs in and about the promotion and presentation of their application (estimated) €6,350,000.00
- (e) Miscellaneous (to be ascertained)
- (f) Interest

AND THE PLAINTIFFS CLAIM

1. A Declaration that the decision announced on 25 October 1995 to award the Licence (as defined in this Statement of Claim) to Esat Digifone is unlawful, null and void and of no effect;
2. A Declaration that the tender process for the award of the Licence was conducted in a manner that was not fair and impartial and breached the Plaintiffs' legitimate expectations;
3. A Declaration that the tender process for the award of the Licence was conducted in manner which failed to respect and/or vindicate the Plaintiffs' constitutional rights and their rights to private property and due process;
4. A Declaration that the tender process and decision to award the Licence to Esat Digifone was in breach of the general principles of European Community/European Union law;
5. Damages (including exemplary damages) for misfeasance in public office;
6. Damages (including exemplary damages) for breach of duty, (including statutory duty);
7. Damages (including exemplary damages) for breach of contract;
8. Damages (including exemplary damages) for breach of the legitimate expectations of the Plaintiffs and each of them;
9. Damages (including exemplary damages) for breach of the constitutional rights of the Plaintiffs and each of them and in particular, their rights under Articles 40.3 and 43 of the Constitution of Ireland;
10. Damages, (including exemplary damages) for deceit;
11. Damages, (Including exemplary damages) for conspiracy;
12. Damages, (Including exemplary damages) for fraud;
13. Damages, (including exemplary damages) for misrepresentation including fraudulent misrepresentation;

14. Damages, (including exemplary damages) for dishonest assistance;
15. Damages, (including exemplary damages) for causing loss to the Plaintiffs by unlawful means;
16. *Damages (including exemplary damages) for breach of the rights of the Plaintiffs and each of them arising under the laws of the European Union;*
17. As against the Fourth Named Defendant, restitution for unjust enrichment;
18. As against the Fourth Named Defendant, an account of profits;
19. A Declaration that the European Communities (Mobile and Personal Communications) Regulations, 1996 contravene the laws of the European Union;
20. An Order for the taking of such accounts and the making of such enquiries as to damages as this Honourable Court may seem fit to direct;
21. *Interest.*
22. Such further or other Order or relief as to this Honourable Court may seem fit to grant;
23. The costs of and incidental to these proceedings.