THE COURT OF APPEAL

Court of Appeal Numbers: 2020/24
2020/25

Costello J.
Faherty J.
Binchy J.

Neutral Citation Number [2022] IECA 249

BETWEEN/

COMCAST INTERNATIONAL HOLDINGS INCORPORATED, DECLAN GANLEY, GANLEY INTERNATIONAL LIMITED AND GCI LIMITED

PLAINTIFFS/
RESPONDENTS

- AND -

THE MINISTER FOR PUBLIC ENTERPRISE, MICHAEL LOWRY, ESAT TELECOMMUNICATIONS LIMITED, DENIS O'BRIEN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 4th day of November 2022

1. This is a judgment in an appeal from a decision of the High Court (Allen J.) on two separate motions for discovery in two separate but closely connected sets of proceedings. The first proceedings in time were issued on 15th June 2001 (High Court record number 9288P), and by those proceedings the plaintiffs seek a declaration that "the decision of 16th June 1995, whereby the deadline of 23rd June 1995 for the receipt of tenders for the award of the second GSM Mobile Telephony Licence (the "licence") was extended, is null and void and of no effect". The plaintiffs also seek damages for breach of statutory duty,

misfeasance in public office, breach of, or procuring the breach of, the Prevention of Corruption Act 1906, fraud, deceit, breach of duty and breach of contract.

2. The second proceedings in time were issued on 10th October 2001 (High Court record number 15119P0, and by these proceedings the plaintiffs seek a declaration that the decision, announced on October 25th, 1995 to award the Licence to Esat Telecommunications Limited is unlawful, null and void and to effect. By these proceedings, the plaintiffs seek damages under the same headings as in the first proceedings, and as set out above.

3. Statements of claim were delivered in each of the proceedings on 3rd June 2005. The statements of claim are substantially identical, and to the extent that they differ, those differences are not material to the applications for discovery leading to the judgment of Allen J., which were, in each case, identical. Amended statements of claim were later served, to which I refer below.

4. In May 2006, the first, fifth and sixth defendants (who are the appellants in this appeal and who are referred to in the judgment of Allen J. as the "State defendants") made application to dismiss both proceedings, and also other proceedings issued by Persona Digital Telephony Limited and others against the same defendants in connection with the same subject matter (the award of the Licence to Esat Telecommunications Limited) on the grounds of inordinate and inexcusable delay. While those applications were successful in the High Court, the Supreme Court unanimously allowed the plaintiffs' appeals (and also the appeal in the Persona proceedings) See: *Comcast and Ors v Minister for Public Enterprise and Ors , and Persona and Ors v Minister for Public Enterprise and ors [2012] IESC 50*). The appellants place considerable reliance upon the decision of the Supreme Court for the purpose of this appeal, for reasons which will be explained later.

5. At this point it is sufficient to say that the delay in the progression of the proceedings was accepted by the Supreme Court as being as a result of the ongoing investigations by the Moriarty Tribunal into the circumstances leading to the award of the Licence to Esat Telecommunications Limited. Following the publication of the final report of the Moriarty Tribunal, the respondents served amended statements of claim, on 28th October 2014, pursuant to an agreed order (in each case) of the High Court (Keane J.).

6. Following service of notices for particulars, and delivery of replies thereto, the appellants filed their defences in July 2016, and a reply to the defence in each case was delivered on 21st October 2016. On 24th October 2016, the solicitors for the respondents wrote to the Chief State Solicitor requesting voluntary discovery of 22 categories of documents which they claimed are relevant and necessary for the fair disposal of the proceedings, for the reasons provided in the letter. While the appellants engaged with the request, no agreement was reached and motions for discovery were issued on 16th March 2017.

Decision of the High Court

7. At the beginning of his judgment, the trial judge summarises the background to the proceedings and at paras. 5-11, he provides a very helpful summary of the tender process leading to the award of the Licence, which may usefully be repeated here:

> *"5. A very complicated tender process was put in place. That process was divided into two phases. The object of the first phase, which has been referred to as the evaluation phase, was to select from among those who might bid for the licence the winning tender. The object of the second phase, which has been referred to as the licence award phase, was, as it was put, the interrogation of the winning bid and the making of a final decision as to the award of the licence.*

6. The first phase saw the establishment of a Project Group; the development of an evaluation model; the advertisement for requests for proposals ["RFP"s], which were required to address the prescribed evaluation criteria; and the appointment of external consultants, Andersen Management International ("AMI") to conduct an evaluation of the tenders. The evaluation criteria were weighted, and proposals were to have been subjected to qualitative and quantitative evaluation. An information memorandum which was circulated at the start of the process was twice supplemented. The evaluation model was twice amended.

7. The declared object of this process was that it should be impermeable to political influence.

8. What was called the evaluation model was developed and amended during the evaluation phase and the model was eventually finalised on 27th July, 1995.

9. There were six tenderers or bidders for the licence, including a consortium called the Cellstar Group, with which the plaintiffs were associated, and Esat Digifone ("Esat") with which Mr. Denis O'Brien, through a company of which he was the principal shareholder, Communicorp Group Ltd. ("Communicorp") was associated.

10. On 25th October, 1995 the minister announced that the second GSM Mobile telephony licence would be awarded to the Esat Digicom Consortium.

11. On 6th May, 1996, at the end of the licence award phase, the licence was awarded to Esat Telecommunications Limited."

8. The trial judge then proceeded to summarise the plaintiff's claims in the proceedings. He then refers to the establishment of the Moriarty Tribunal and also to the decision of the Supreme Court reversing the decision of the High Court to dismiss the proceedings, and then summarises the pleadings before proceeding to address the respondents' motions for discovery. In his summary of the pleadings, the trial judge goes in to some detail to

summarise the claim as originally made in the statement of claim in each case, and as amended by the amended statements of claim. In summary, he noted that the claim as originally made alleged wrongdoing, under four headings, on the part of the second named respondent, in his capacity as Minister, in the tender process leading to the award of the Licence . However, the amended statement of claim, he considered, introduced a general challenge to the award of the Licence on public procurement grounds. At para. 33. He stated: *" In as much is the case now encompasses a general challenge to the award of the licence on public procurement grounds, it does not appear to me to be the same case, or a refinement or development of the case, which the Supreme Court allowed to proceed but I must deal with this discovery application on the basis of the case as it has been pleaded"*. At the hearing of this appeal, the appellants argued, forcefully, that the trial judge erred in stating that the proceedings now encompass a challenge to the award of the Licence on public procurement grounds, and that this conclusion in turn led him into error in his treatment of some of the categories of discovery sought by the respondents. I address this argument in due course.

9. The trial judge then proceeds to address the request for voluntary discovery, which, as already mentioned, was made by letter from the respondents solicitors' to the Chief State Solicitor dated 24th October 2016, seeking 22 categories of documents. He addresses the response to that request, which he observes engaged with the substance of the request, and included an offer to make discovery by reference to a reformulation of categories. He refers to the issue of the motion for discovery, on 16th March, 2017, and the affidavits sworn on behalf of the parties, Ms. Fiona O'Sullivan, solicitor, on behalf of the respondents, and Mr. Donal McGuinness, solicitor on behalf of the appellants. The trial judge addresses some of the issues raised by the affidavit sworn by Mr. McGuinness in objection to the application. He observes that the first general objection to the request for

voluntary discovery was that it sought a manifestly disproportionate and oppressive number of categories (which he noted comprised 22 categories and 61 subcategories) many of which were said to be general in nature, and that there was significant duplication. While noting that it would be necessary to examine each of the categories of discovery, the trial judge rejected the general objection, observing that complex litigation will give rise to myriad issues and the number of categories necessary will be dictated by the number of issues arising on the pleadings.

10. The trial judge then addressed himself to the legal principles applicable to applications for discovery. At paras. 52 and 53 of his judgment he stated:

> *"52. The general principles of law applicable to an application for discovery are well settled. The starting point is that the documents must be relevant to the issues disclosed by the pleadings. Secondly, the discovery must be necessary for the fair disposal of the action. As was explained by Fennelly J. in Ryanair plc v. Aer Lingus cpt [2003] 4 I.R. 264, the requirement of relevance does not mean absolutely necessary, but the court will consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. Thirdly, on the authority of Framus Ltd. v. CRH plc [2004] 2 I.R. 20, there must be some proportionality between the extent and volume of the discovery and the extent to which the documents are likely to advance the requesting party's case or damage the requested party's case. It is settled law that once the requesting party establishes relevance and necessity, the onus will be on the requested party to establish that the discovery would be disproportionate.*
>
> *53. The parties were agreed that the principles were usefully summarised in the judgments of the Court of Appeal in BAM v. National Treasury Management Agency*

[2015] IECA 246 and O'Brien v. Red Flag Consulting [2017] IECA 258. BAM is also clear authority for the proposition that there are not special rules for different kinds of legal proceedings, specifically that no special rules apply to public procurement claims."

11. The trial judge then addressed an argument advanced that the court is entitled to take into account the particular challenge facing a plaintiff seeking to prove covert conduct, in the context of formulating the categories of documents required, and concluded that this did not arise in this case, because of the findings made by the Moriarty Tribunal which enabled the respondents to particularise their case and to formulate the categories of discovery sought with reasonable precision.

12. At para. 57, the trial judge observed:

"While there was some debate in relation to the additional principles which the court was urged to take into account, the case was made and answered by reference to the core issues of relevance, necessity, reasonableness and proportionality …"

13. Finally, as regards general principles, the trial judge made reference to the decision of the Supreme Court in *Tobin v. Minister for Defence* [2019] IESC 57, delivered just a few months previously, observing that that decision *"re-establishes the orthodox position that the starting point, in relation to which the onus is on the requesting party, is whether the documents sought are relevant. Relevance is to be determined by reference to the pleadings. Once the documents are shown to be relevant, the default position is that production is necessary. If it can be demonstrated that compliance with the obligation would be particularly burdensome, that is a factor that the court can take into consideration. The onus of establishing that compliance would be a real problem is on the requested party, and the requested party must set out in reasonable detail why it is said to be so. To the extent that the objection is grounded on legal argument, the requested party*

must set out the argument. To the extent that the objection is grounded on fact, the requested party must put before the court the evidence which is said to establish the asserted facts."

14. It is not contended by the appellants that there was any error on the part of the trial judge in his summary of the applicable legal principles. Rather, it is the appellants' case that the trial judge erred in the application of those principles to the categories of discovery sought

15. Before addressing each individual category of discovery, the trial judge referred to some of those objections of the appellants of a general nature that were of relevance to most, if not all of the categories of discovery sought. One of these was the general claim that the request was disproportionate and oppressive, which he noted he had already addressed (and rejected). Another significant objection related to the absence of any time limit . He rejected this argument on the basis that the appellants had failed to lead any evidence by which he could assess the extent to which the burden of making the discovery sought would be lessened by the imposition of a cut off date. This conclusion gave rise to one of the grounds of appeal of the appellants, but as will become apparent, this has since been resolved. The trial judge then went on to consider each individual category of documentation in respect of which discovery is sought by the respondents, and made Orders for discovery in relation to all categories of documentation, with just minor modifications in some cases.

Scope of Appeals

16. In their Notices of Appeal (which are identical in each case) of 15th January 2020, the appellants set forth eight grounds of appeal. While on page 2 of the Notices of Appeal, it

is stated that the appeal is from orders for discovery of 22 categories, and ancillary orders, the Notice of Appeal in each case refers specifically to just four of the 22 categories, those being categories 8,9,13 and 22. During the course of the hearing of the appeal, there was some uncertainty as to the scope of the appeal, arising out of which the court heard submissions from the parties. Having considered those submissions, the court ruled that categories 15-21 formed no part of the appeal. So far as categories 1-14 were concerned, the court noted that counsel for the appellants had informed the court that, with the exception of categories 8,9 and 13, the only ground of appeal in relation to those categories (i.e categories 1-7, 10-12 and 14) was the absence of any temporal limit in the Order of the High Court. That issue aside, the grounds of appeal relating to categories 8,9,13 and 22 fell to be decided by the court. It also remained for the court to adjudicate upon ground 7 of the notices of appeal, which was applicable to all categories of documentation, and by which the appellants claimed the trial judge erred by requiring the State defendants to make discovery of the scale ordered within six months

17. Following upon the hearing of this appeal, the court was informed by the parties that they had entered into further negotiations. These negotiations enjoyed some significant measure of success, and the court was informed that the following matters had been agreed:

1. That the Minister for the Environment, Climate and Communications (as successor to the Minister for Public Enterprise and the Minister for Transport, Energy and Communications) (hereinafter referred to as the "the Department") will make discovery on oath on behalf of that Ministry/Department and on behalf of the following Ministries/Departments – the Minister for Finance, the Minister for Public Expenditure and Reform (as successor to the Minister for Finance), the Minister for Social Welfare (and any successor department), the Department of an

Taoiseach, the Minister for Enterprise and Employment (and any successor department) which together said Departments comprise the fifth named defendant.

2. The discovery sought in relation to all categories of documents is to apply to documents generated between 1st January 1990 and 31st December 2002.
3. The Department is to make discovery within six months from the date of the Order of this Court.
4. The parties agreed that the following matters remain for decision by this Court:
   (a) Grounds of appeal 1,2,3,4 and 5, being described as the "general public procurement grounds". And,
   (b) Categories 8,9,13 and 22.

I interpret this as meaning that the appeal of the order of the High Court , so far as concerns categories 8,9,13 and 22 remains to be decided by this Court and is to be decided by reference to grounds 1,2,3,4 and 5 of the Notice of Appeal. In an appeal from an order for discovery, there can obviously be no question of deciding a ground of appeal independently of a category of discovery.

18. The letter to the Court then continued to identify those categories of discovery in respect of which the parties has reached full agreement, those being categories 1,2,3,4,5,6,7,10,11,12, and 14-21.

The Decision of the trial judge regarding categories 8,9,13 and 22

19. I set out below each of categories 8,9,13 and 22, the decision of the trial judge thereon and the grounds of appeal relating to each.

Category 8

20. By category 8, the respondents seek discovery of: "All documents relating to the review and/or assessment and/or evaluation of tenders, including but not limited to all documents relating to guidelines and/or guidance and/or policies and/or instructions

relating to same, to internal communications relating to same, to minutes of meetings relating to same and/or to reports relating to same".

21. In the usual way, the solicitors for the respondents wrote to the solicitors for the appellants seeking voluntary discovery, providing reasons for each category of discovery sought. In response to the request for voluntary discovery of this category, the appellants volunteered to make discovery of: "*All reports and minutes of meetings coming into existence on or before 25th October 1995 evidencing the review and/or assessment and/or evaluation of tenders."*

22. The trial judge dealt with this category at paras. 108 – 113 of his judgment. At paras. 110 -111 he held:

> *"110. I accept the argument of the plaintiffs that discovery in relation to the review, assessment or evaluation of tenders would be of significantly limited value without the guidelines and policies by reference to which that review was to have been carried out.*
>
> *111. This category is tied back to para. 28 of the amended statement of claim which introduced a challenge to the tender process on general procurement grounds, which enormously expanded the nature of the challenge"*.

23. In other words, the trial judge was satisfied that this category, in the format requested by the respondents, was relevant having regard to the pleadings, and specifically paragraph 28 of the amended statement of claim (the relevant parts of which are addressed later in this judgment). All of the allegations in paragraph 28 are denied by the appellants, both generally (at paras. 79 and 98) and, in many cases, specifically. The trial judge therefore ordered discovery of this category in the terms sought by the respondents. The appellants contend that the trial judge erred in stating that paragraph 28 of the amended statement of claim *"introduced a challenge to the tender process on general procurement*

grounds" and that his decision to order discovery on this basis is, as a consequence , also in error. This is the appellants' first and principal ground of appeal in relation both to this category and category 9.

24. The basis of this ground of appeal is the decision of the Supreme Court, of 17th October 2012, whereby it allowed the appeal of the respondents from the dismissal of the proceedings, on grounds of inordinate delay, expressly so that what Hardiman J. in his judgment described as the *"truly exceptional"* and *"unique"* claims of the respondents of *"corruption at the highest levels of government and public administration"* should be determined , and not, the appellants submit , a wider procurement appeal. Relatedly, the appellants argue that the trial judge erred in ordering discovery beyond the pleaded case (ground 2) insofar as he made orders on the basis that the proceedings disclosed a general public procurement challenge.

25. By ground number 3 of their notice of appeal, the appellants further claim that this category of discovery is impermissible on the basis that it amounts to "fishing".

Category 9

26. By this category the respondents sought discovery of: *"All documents relating to the identification and qualifications of all those involved in the evaluation of tenders."*

27. This category of documentation was sought on the basis that the evaluation of tenders was conducted without reference to and/or consultation of the necessary expertise. In support of this category, the respondents referred to and relied upon paragraph 28(c)(iii)(14) of the amended statement of claim. By this paragraph it is pleaded:

" The Qualitative Evaluation and in particular the evaluation of the Financial Key Figures Dimension was conducted without reference to and/or consultation of the necessary expertise".

28. This plea is denied by the appellants in their defence, by way of general denial of each and every allegation of wrongdoing set out in paragraph 28 of the amended statement of claim, at paragraphs 79 and 98 of the defence, and somewhat more specifically at para.87 of the defence , where there is a denial of the allegations made in paragraph 28 (c) (iii) of the amended statement of claim

29. The appellants refused this category asserting that it is both irrelevant and unnecessary. The appellants contend that the plea relied upon by the respondents is a vague allegation unrelated to the substantive allegation in the proceedings of unlawful interference in the tender process. They point to the fact that it is not alleged that the Minister interfered with the tender process to the extent that inexperienced people were selected to assess the tender. They contend that this category is a fishing exercise.

30. The trial judge addressed this category at paras. 114 -120 of his judgment. He noted that the amended statement of claim introduces a number of new paragraphs, a number of new particulars and a large number of elements in those particulars. He noted that the substance of the original statement of claim was abuse of public office and corruption, which plea was made in paragraph 5 of the original statement of claim. He noted that the amended statement of claim introduced a new paragraph, immediately following what had been paragraph 15, which pleads further and alternatively that the tender process was vitiated by alleged breaches of European Communities law, breach of the plaintiffs' legitimate expectations and constitutional rights to private property and due process. He noted that the new paragraph is followed by the heading: *"Particulars of wrongdoing on the part of the Minister"* and that paragraph 28(c)(iii)(14) appears as one of 25 elements constituting the allegation that the tender evaluation methodology was modified from that set out in the request for proposals and/or the evaluation model. At para. 119 he said:

"119. The exquisitely detailed challenge to the procurement process is a million miles away from the unique and unprecedented case that survived the challenge of delay. The challenge to the expertise of the persons who made the qualitative evaluation, albeit that it is a plea in the alternative, sits very uneasily with the core case that the process was allegedly subverted and corrupted. I can easily understand the State defendants' view that this is a fishing exercise, but the prohibition on fishing is directed to the use of nets rather than lines. With some misgivings I have come to the view that the category has been sufficiently tied back to the pleadings."

On that basis, the trial judge ordered the discovery sought, without amendment.

Category 13

31. By this category, the respondents seek discovery of: *"All documents relating to the licence award phase"*.

32. The respondents gave as the reasons for this category that the Minister proceeded to award the licence to Esat Telecommunications Limited even though there had been a change of ownership in Esat since it had submitted its tender submission, contrary to the request for proposals, and notwithstanding the precarious financial state of Communicorp. At this point it is appropriate to mention that there are a number of different entities referred to in the pleadings as using the trade name *"Esat"*. In para. 8 of the amended statement of claim it is stated ; *"For the purpose of this statement of claim, Esat Telecommunications Limited , Esat Telecom Holdings Limited and Esat Digifone will be referred to as "Esat"* . For the purpose of this judgment, save where otherwise appears , *"Esat"* shall have the same meaning. It is the respondents' case that the Minister proceeded during the licence award phase on the basis that the licence would inevitably be awarded to Esat , and in so doing, that he acted unlawfully.

33. The appellants resisted this category on the grounds that it was extremely broad and was not supported by reasons and/or the pleaded case. The respondents also contended that the licence award phase was not part of the tender process, and further contended that the category is a fishing exercise.

34. The trial judge addressed this category at paras. 134 – 139 of his judgment. He noted that the respondents relied on paragraph 28(c) of the amended statement of claim, and specifically subparagraphs 28(c)(xiii), (xiv) and (xv). I set these paragraphs out below at para. 75, but for present purposes it is sufficient to say in general terms that the central allegation in this part of the amended statement of claim is that the Minister unlawfully interfered with the tender process and/or conducted the tender process contrary to the rules in such a manner as to favour Esat While noting the submission that the tender process ended on 25th October 1995 (when it was announced that Esat Digifone Limited was to be awarded the exclusive entitlement to bid for the Licence), and that the licence award phase thereafter was a separate phase, the trial judge considered the point to be pedantic. In the view of the trial judge, this category engages with the pleadings relied upon by the respondents, and he was satisfied that the respondents had made out the relevance and necessity of the category, and ordered discovery of the same in the terms sought.

35. Ground of appeal number 4 relates to this category. It is again contended that the discovery sought is impermissible and/or fishing being as it is in respect of the entire licence award phase, where the key issue pleaded is specific i.e. a change in the ownership of Esat during this phase.

Category 22

36. By this category the respondents seek discovery of: "*All documents relating to the investment of Advent International in Communicorp.*"

37. The reasons given by the respondents for this category of documentation is that it is alleged that the fourth named defendant made representations to the project group during the course of the tender process relating to the level and extent and conditions of investment of Advent International in Communicorp, and the documents sought are necessary in order to enable the respondents to prove the falsity of these representations. The respondents rely upon paragraph 29 of the amended statement of grounds by which they plead:

" 29.Further, the third and fourth named defendants owed a duty to the plaintiffs and each of them not to engage in wrongful actions designed to interfere with the integrity of the tender process and to ensure that the licence was, in breach of the rules governing the tender process, awarded to Esat and/or to reward the Minister for having intervened to ensure the awarding of the licence to Esat. In breach of the said duty the third and fourth named defendants engaged in unlawful actions as particularised hereunder…."

38. The appellants contend that the allegations in paragraph 29 of the amended statement of grounds are made as between the third and fourth named defendants and are not directed to the first named defendant. Accordingly it is the appellants' contention that discovery of this category is neither relevant or necessary to the proceedings as between the respondents and the appellants.

39. The trial judge addressed this category at paras. 150 – 152 of his judgment. While acknowledging that the reasons given in support of the category are rather general, he went on to hold that:

> *"…part of the plaintiffs' case is that there was no, or no adequate, assessment of the financial strength and capacity of the Esat Digifone consortium, of which Communicorp was a member. It seems to me that this category goes to the issues as*

to the assessment of the financial capacity of Esat Digifone in the evaluation process, and whether the issue was revisited or not in the licence award stage"

and for this reason the trial judge ordered discovery of this category.

40. Ground of appeal number 5 relates to this category. It is contended that this category arises solely out of the pleaded case between the respondents and Mr O'Brien (the third named respondent having been released from the proceedings). It is also contended that this category is duplicative of category 1 (3) whereby discovery was sought (and ordered by the trial judge) of *"all documents evidencing notes of any oral presentations made by tenderers"*.

Standard of review

41. In *Waterford Credit Union v. J & E Davey* [2020] IESC 9, Clarke CJ made the following observations on the proper approach to be followed by an appellate court in the consideration of an appeal from an order for discovery made by a court of first instance:

"6.1 It is appropriate to start with a consideration of the point made by Waterford as to the proper approach which should be adopted by an appellate court where there is an appeal in respect of an application for discovery in which questions of necessity and/or relevance arise. It should first be said that many of the issues which potentially arise on a discovery application involve questions of degree. While there may well be categories of documents where the court is satisfied that the documents in question could not be relevant or, at the other end of the scale, would be manifestly relevant, nonetheless there are many points in between those two extremes. All judges have experience of the fact that, of the documents discovered, many are not actually deployed at the trial because they turn out to be of little value to the resolution of the issues. However, the problem is that, without sight of the

documents in advance, it can be very hard to tell exactly how relevant a document is likely to be. In such cases a first instance court must exercise a degree of judgment as to the likelihood of any document or documents being relevant, and must factor that into its overall conclusion.

6.2 Likewise, a court considering whether the disclosure of relevant documents may nonetheless not be necessary having regard to the principle of proportionality, may also have to make a judgment call, on the basis of whatever materials may be before the court, both as to the degree of relevance of the documents in question and the burden which their disclosure might be likely to place on the requested party. Many other examples could be given.

6.3 In my view, when a first instance court exercises a judgment of that type, it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court. Clearly, if the appellate court takes the view that documents whose discovery had been ordered were not relevant at all, then it should have little difficulty in overturning an order which directed that they be discovered. A similar approach should be adopted where clearly relevant and necessary documents were refused. However, the fact that the appellate court takes a somewhat different view from the trial court as to the degree of relevance should not lead to the overturning of the decision of the trial court unless the appellate court considers that the trial judge's assessment of the weight to be attached to relevance was clearly wrong and, as a result, he or she made an order which was outside the range of any order which could reasonably have been made."

42. It is long established that the question of whether or not a document or category of documentation is *"relevant"* is determined by reference to the pleadings. As already

mentioned , the trial judge made reference to and took account of the decision of the Supreme Court in *Tobin v. Minister for Defence, Ireland and The Attorney General*. In his judgment in that case, Clarke CJ considered the principles applicable to establishing relevance and necessity and at para. 7.21 stated:

> *"While the initial burden of establishing both relevance and necessity must lie on the requesting party, it can, for the reasons which I have sought to analyse, be taken that the establishment of relevance will prima facie also establish necessity. Where it is sought to suggest that the discovery of documents whose relevance has been established is not necessary, the burden will lie on the requested party to put forward reasons as to why the test of necessity has not been met. Those reasons should initially be addressed in the response of the requested party to the letter seeking discovery. In the event of a court being required to adjudicate on such matters, then, to the extent that the reasons for suggesting that discovery of any particular category of document is not "necessary" is dependent on facts, it is for the requested party to place evidence before the courts to establish the relevant facts. To the extent that the opposition to discovery may be based on legal argument, then it is for the requested party to put forward its reasons as to why production is not necessary."*

43. At paras 7.25 - 7.27, Clarke CJ went on to consider further the issues of relevance and necessity, as well as resistance to discovery on grounds of proportionality:

> *"7.25 I should also make one final point of general application. Relevance is, as has been pointed out, determined by reference to the pleadings. Importantly, therefore, the scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to plead their case. A plaintiff can hardly be heard to complain that they are required to make overbroad discovery if the reason for the*

scope of the discovery sought is because of a "kitchen sink" approach to pleading the case. Likewise, defendants have to accept that, if they deny all elements of the plaintiff's case or place the plaintiff on proof about even relatively uncontroversial elements of the plaintiff's claim, then, inevitably, the scope of the issues which will arise for trial will be expanded and the potential for documents being relevant to issues which remain alive will be greatly increased.

7.26 On that basis, it does seem to me to be appropriate for a court to take into account the manner in which the case is pleaded, not only for the purposes of determining relevance, but also to assess the extent to which a party who objects to making discovery, on the grounds that it is excessively burdensome, has contributed to that situation by the manner in which they have pleaded their case.

7.27 As the application of the above principles is one for judges dealing with the preparation of cases and since issues as to relevance, necessity and proportionality involve an adjudication based on a detailed understanding of the case, in general decisions as to discovery should involve a significant measure of appreciation by any appellate court reviewing a decision at first instance. Where litigation is under case management by a judge with an intimate knowledge of the issues involved, those considerations heighten. In any event, where an order made on a consideration of affidavit evidence and pleadings is appealed, the burden of demonstrating as a probability that the decision made is wrong rests on the appellant from the original High Court order; see Ryanair Ltd. v Biligfleuge.de GmbH [2015] IESC 11 at paras. 5-8."

44. As regards discharging the obligation to prove that compliance with the request for discovery would be overly burdensome, Clarke CJ observed, at 7.23, that: *"... it is for the*

requested party to explain initially why it is said that the application would be particularly burdensome and to put forward evidence and argument to support that contention."

45. With those principles in mind, I turn now to consider the categories of documentation discovery of which remains in dispute between the parties. Although they have already been set out above, for ease of reference, I will again set out the categories of discovery sought which remain subject to appeal.

Category 8

46. All documents relating to the review and/or assessment and/or evaluation of tenders, including but not limited to all documents relating to guidelines and/or guidance and/or policies and/or instructions relating to same, to internal communications relating to same, to minutes of meetings relating to same, and/or to reports relating to same.

47. In their letter seeking voluntary discovery, the solicitors for the respondents provided no less than four pages of reasons grounding the request for this category. The second reason states: *"It is contended by the plaintiffs that the evaluation methodology was modified from that set out in the RFP and/or the Evaluation Model and that tenders were not actually evaluated in accordance with the RFP and the Evaluation Model"* and reference is made in this regard to the amended statement of claim, paragraph 28(c)(iii), which commences with a general statement to this effect and is then followed by no less than 25 sub paragraphs of further and detailed particulars of this allegation.

48. In their third reason, the respondents claim that there were a number of significant frailties in the evaluation of tenders, as particularised also at paragraph 28(c)(iii) of the amended statement of claim, in particular sub-paragraphs 1,3-10, 15,17,20,21 and 22. It is claimed that the modifications to the tender process were carried out so as to favour Esat in

the tender process, reference being made in this regard to paragraph 28(c) (iv) of the amended statement of claim.

49. In the fourth reason, it is stated that discovery of this category of documents is essential to enable the plaintiffs to demonstrate that modifications were made to the tender evaluation methodology and that those modifications were made by reason of the interference of the Minister.

50. In the tenth reason it is stated that the plaintiffs plead at paragraph 28(c)(xii) of the amended statement of claim that although the Minister was aware of the involvement of IIU (a shareholder in Esat Digifone, the latter being described in the amended statement of claim as a consortium formed for the purpose of submitting a bid for the Licence) in the tender prior to the award of the Licence, the Minister failed to take any steps to assess the financial capacity of the Esat consortium to the detriment of the other contenders, and that no or no adequate assessment of the financial standing of Esat generally or of IIU in particular was carried out prior to the signing of the licence agreement by the Minister .

51. There are also other specific allegations regarding the conduct of the Minister. The respondents claim that for these and all the other reasons advanced, the question as to how tenders were evaluated is critical to the determination of the proceedings.

52. In their response to requests for voluntary discovery, the appellants contended that the request was extremely broad and was not supported by the reasons given or the pleaded case. They say that all of the pleadings relied upon in the reasons for this category emanates from paragraph 28(c), and that when this level of particulars is examined (by which I understand them to refer to particulars of wrongdoing) a single theme is at issue, i.e. alleged interference by the Minister. They then volunteer, without prejudice, to offer the following amended category of discovery, in lieu of the category 8: *"All reports and*

minutes of meetings coming into existence on or before 25th October 1995 evidencing the review and/or assessment and/or evaluation of tenders."

53. In their written submissions on this category, the appellants express great concern that in arriving at his decision on this category, the trial judge erred in considering that the category is relevant because the amended statement of claim expanded the original proceedings, being proceedings grounded entirely on allegations of corruption on the part of the Minister, so as to include a claim grounded upon an allegation of breach of general public procurement principles. The appellants laid great emphasis on the judgment of the Supreme Court of 17th October 2012 from which it is clear, they submit, that the Supreme Court allowed the appeal striking the proceedings out on grounds of inordinate and inexcusable delay because of the unique and exceptional nature of the proceedings and the public importance of there being a judicial determination on the allegations of corruption by a Minister of Government, not a failure in the procurement process simpliciter.

54. The appellants also relied upon the decision of Donnelly J., in this Court in *Persona Digital Telephony Limited (& Ors.) v. Minister for Public Enterprise, Ireland & Others,* [2019] IECA 360 which concerned an appeal from a decision of the High Court on an application to amend a statement of claim in other proceedings in which the same or broadly similar allegations are made against the same parties as in these proceedings, also arising out of the award of the licence. While allowing the amendments, Donnelly J. did so on the basis that they should be framed so as to provide greater clarity that the claim is one *"firmly anchored in corruption"* and that *"mere errors in the process that were not driven by corruption or reflective of corruption are not permitted"*. In so deciding, Donnelly J. observed that*: "It was that unique feature [the allegation of corruption at a high level] 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."

55. There is no dispute between the parties that the category of documentation sought is grounded upon detailed allegations set forth in paragraph 28(c)(iii) of the amended statement of claim. Significantly, the statement of claim was amended with the consent of the appellants, and in that respect this appeal is readily distinguishable from the appeal before the Court in *Persona*. The observations of Donnelly J. relied upon by the appellants therefore have no relevance to this appeal, and the trial judge was correct in his observation at para.33 of his judgment that he was required to deal with the application before him on the basis of the case as pleaded.

56. In the opening of paragraph 28 of the amended statement of claim it is pleaded:

> *"Further or in the alternative, and without prejudice to the foregoing, the tender process was vitiated by: breach of the general principles of [then] European Communities [now] Union law including but not limited to, the principles of equal treatment, non-discrimination, transparency, competition, proportionality, objectivity and effective judicial protection, unlawful delegation, breach of the plaintiffs' legitimate expectations and breach of the plaintiffs' constitutional rights to protection of private property and due process. "*

57. This plea is denied at paragraph 79 of the defence on behalf of the first, fifth and sixth named defendants, and again at paragraph 98 when addressing separately allegations of wrongdoing against the Minister.

58. Immediately following upon paragraph 28 of the amended statement of claim is a heading: *"Particulars of Wrongdoing on the part of the Minister".* There then follows no less than 21 pages of further particulars under subheadings (a) – (d). Subheading (a) states: *"The Minister compromised the integrity of the tender process by breaching the*

guidelines for communications with bidders and/or allowing the process to be subjected to political interference", particulars of which are furnished in three sub subparagraphs.

59. Subheading (b) states that the Minister, his servants or agents disclosed or caused to be disclosed confidential information in relation to the bid process to Esat, and this is followed by four paragraphs of particulars. Subheading (c) states that the Minister, his servants or agents modified the terms of and unlawfully interfered with the tender process and, as previously mentioned, 25 sub-paragraphs of further and detailed particulars of this alleged interference are provided. These particulars are expressly denied at paragraph 86 of the defence.

60. It is the appellants' submission that the trial judge read the amended statement of claim as advancing a parallel claim in respect of process errors (relating to procurement) which interpretation is reflected in the breadth of discovery that he ordered, and, in particular, in his decision to direct discovery of categories 8 and 9. In so doing, the appellants submit, the trial judge erred. The appellants refer to para. 111 of the judgment of the High Court in which the trial judge stated that paragraph 28 of the amended statement of claim *"enormously expanded the nature of the challenge"* by introducing a general public procurement challenge to a tender process. This conclusion, the appellants submit, was erroneous and caused the trial judge, erroneously, to direct discovery of categories 8 and 9.

61. However, in considering this motion for discovery, it is, in my view, immaterial how the trial judge characterised the new pleas in the amended statement of claim, and his comments in this regard may be considered *obiter* .Whether or not the respondents have impermissibly purported to expand the scope of proceedings which the Supreme Court, for very clear and specific reasons, considered should proceed to trial in spite of inordinate delay, is a matter for another day. All that requires determination now is whether or not the

discovery ordered by the trial judge was within the range of judgment calls reasonably open to him to make, to be decided by reference to the pleadings.

62. The respondents submit that the pleas in paragraph 28(c) of the amended statement of claim which underpin this category are all concerned with unlawful interference by the Minister with the tender process, and even on the appellants' case, the pleas are sufficient to make out a case of corruption. Counsel for the respondents relied on pleas that the evaluation process was conducted in a subjective, impressionistic, imprecise and opaque manner; that the qualitative evaluation failed to keep adequate documentary records of the said evaluation and/or meetings at which the said evaluation took place (para.28(c)(iii) (11) - and that the results of the qualitative evaluation were adopted to determine the outcome of the tender process, even though the said results did not reflect the results of the quantitative evaluation (para. 28(c)(iii)(4). Therefore, even if the appellants are correct in their submission that the case ought properly to be confined to a claim of corruption and not expanded to a process claim, nonetheless this category of discovery is relevant to this issue.

63. There are other just as serious, if not more serious, allegations. For example, at para. 28(c)(iii)(19) it is pleaded that *"Esat was permitted to make material amendments to its tender during the tender process and after submissions of tenders in breach of the tender process rules"*. It is also pleaded that the evaluation report failed to accurately reflect the actual process conducted. All of these pleadings are denied.

64. There is surely merit in the submission made on behalf of the respondents that these allegations, if proven, would be supportive of a case of corruption every bit as much as they are of a case grounded on breach of public procurement principles. But more fundamentally, however one may characterise the pleas relied upon by the respondents, the

fact is that they are pleadings in the case upon which the appellants are entitled to rely for the purposes of moving an application for discovery.

65. The documents sought in this category are relevant to the respondents' case as pleaded , however the proceedings or these allegations are characterised. That being so, the onus shifts to the appellants to persuade the Court that they are not necessary, but all of their arguments were directed at relevance, not necessity. Having regard to all of the foregoing, I am of the view that the decision of the trial judge to direct discovery in the terms sought by category 8 was, to paraphrase Clarke CJ in *Waterford,* well within the range of judgment calls which were open to the first instance court. I would therefore dismiss the appeal from the order directing discovery of this category of documentation.

Category 9

66. By this category, the respondents seek discovery of: **All documents relating to the identification and qualifications of all those involved in the evaluation of tenders.**

67. I have addressed above, at paras. 27 – 29 the reason this category was sought by the respondents, and the reason it was refused by the appellants.

68. The trial judge granted this category of discovery *"with some misgivings"* for the simple reason that he found that it had been *"sufficiently tied back to the pleadings"*. There is no gainsaying this conclusion.

69. At para.28 (c)(iii)(14) of the amended statement of claim there is an express plea that the evaluation of tenders was conducted without reference to and/or consultation of the necessary expertise. This allegation is denied in the appellants defence, by way of a general plea denying all allegations in para. 28 of the amended statement of claim. Accordingly, this category is clearly relevant to the resolution of that dispute.

70. The appellants however contend that discovery of this category is unnecessary because it is not alleged that the Minister interfered with the tender process to the extent

that inexperienced people were selected to assess the tender. Here again the appellants in their written submissions contend that the allegation relied upon does not relate to the allegations of corruption and as such it has no relevance to the substantive claim that is being advanced by the respondents.

71. However, in discussions with the court, counsel for the appellants very fairly conceded that this category arises more in the context of the alleged wrongdoings of the Minister, rather than in the context of public procurement. In opposing this category at the hearing of this appeal, counsel instead relied exclusively on what he submitted was an inconsistency of treatment by the trial judge as between category 9 on the one part and categories 6 and 7 on the other, but this is not a ground in the notice of appeal.

72. In any case, by categories 6 and 7, the respondents had sought, *inter alia*, discovery of the qualifications and/or experience of the members of the Project Group and the representatives of AMI who participated in the tender process, and the trial judge refused these categories on the grounds that the qualifications and experience of those personnel was not relevant to their participation in the tender process. The trial judge explained the difference in treatment between these categories and category 9 on the basis that the latter was focused specifically on those involved in the evaluation of tenders, rather than members of the Project Group or representatives of AMI generally. The trial judge explained that he had reflected on the compatibility of the decisions made in relation to each category, but he considered there were distinctions to be drawn leading to different conclusions.

73. Given that that category 9 arises directly out of an allegation in the statement of claim which is expressly denied by the appellants, documents falling within this category are clearly relevant to the dispute between the parties on this issue. Other than a comparison with the decision of the trial judge regarding categories 6 and 7, no argument

was advanced by the appellants as to why discovery of this category is not necessary. The trial judge explained why he treated the categories differently, and his explanation is reasonable, even if the appellants do not agree with it. In any case, it is doubtful if a difference in treatment by a trial judge as between similar but not identical categories of discovery could of itself be a ground of appeal, especially where the trial judge explains the difference in a rational manner grounded on the pleadings. For all of these reasons, in my view it is difficult to see how it could be said that the trial judge was *"clearly wrong"* in ordering this category of discovery, or that it was a category that was outside the range of any order which could reasonably have been made. For much the same reasons as with category 8, I am of the view that this is not an order with which this Court should interfere, and the appeal in respect of this category should also be dismissed.

Category 13

74. By this category the respondents seek discovery of "**all documents relating to the licence award phase**".

75. At paragraph 34 above, I have summarised the decision of the trial judge in relation to this category. It is apparent that he had regard to the pleadings, and specifically subparagraphs 28(c)(xiii), (xiv) and (xv) of the amended statement of claim. These paragraphs are in the following terms:

> *"(xiii) Following the conclusion of the tender process and during the licence award phase, the Minister, his servants or agents proceeded to award the licence to Esat in or around May 1996 even though the ownership of Esat was different from that notified in Esat's tender submission and/or even though awarding the licence to Esat when its ownership was different from that notified in Esat's tender submission breached the RFP (my emphasis) ;*

(xiv) The Minister, his servants or agents conducted the 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(my emphasis) and without consideration of whether it was lawful to award the licence to Esat at all;

(xv) The Minister his servants or agents failed to give any and/or any adequate consideration to the precarious financial state of Communicorp and/or failed to take any/or any adequate steps to address same."

76. The appellants contend that these allegations are all tied back to the central allegation at the beginning of paragraph 28(c) in which it is alleged *"The Minister, his servants or agents, modified the terms of and unlawfully interfered with the tender process"*, and that they are, therefore, unrelated to the licence award phase.

77. The trial judge considered this distinction between the *"tender process"* and the *"licence award phase"* to be somewhat pedantic. I agree with this observation of the trial judge. After all, the use of the word *"phase"* clearly implies that the licence award phase is part of a larger process, and it must be the case that the licence award phase was part of or a continuum of the tender process. In ordinary parlance at least, it is difficult to see how it could be said that a tender process is concluded until the relevant contract has been awarded, or the process has otherwise been brought to an end.

78. The appellants also protest that this category is very broad, to the point of being a fishing exercise. There is no doubt that the category is broad, although it has not been suggested that it is disproportionate or oppressive, and no evidence was offered to this effect (as required by *Tobin*, if it is intended to reply on oppression/proportionality).

79. There are express pleas regarding the conduct of the Minister during this period, and these pleas are denied. That being the case, the documents are relevant. However, the

question arises as to whether the category as sought goes further than the pleadings require. It is apparent from the pleadings underlined above that the focus of the respondents in seeking this category of discovery is on the ownership structure of Esat during the Licence award phase of the tender process i.e. from 26th October 1995, up until the Licence was awarded to Esat on 6th May 1996, as well as the financial strength or standing of Communicorp during the same period.

In my view, the discovery ordered by the trial judge goes somewhat further than is necessitated by the pleadings, as it captures all documents during the Licence award phase, and not just those relating to the ownership of Esat and the financial standing of Communicorp. Accordingly, I propose to modify the discovery ordered so as to bring it into closer alignment with the pleadings, which will have the effect of narrowing the category sought. I will therefore direct that discovery be made by the appellants of : All documents relating to the ownership structure of Esat and the financial strength or standing of Communicorp, during the period between 26th October 1995 and 6th May 1996.**Category 22**

80. By this category, the respondents seek discovery of: **All documents in connection with the investment of Advent International in Communicorp**.

81. As mentioned earlier, this category is sought on the basis of the allegations made by the respondents at paragraph 29 of the amended statement of claim. These are in the following terms:

> *"29.Further, the third and fourth named defendants owed a duty to the plaintiffs and each of them not to engage in wrongful actions designed to interfere with the integrity of the tender process and to ensure that the licence was [sic], in breach of the rules governing the tender process, awarded to Esat and/or to reward the Minister for having intervened to ensure the awarding of the licence to Esat. In*

breach of the said duty the third and fourth named defendants engaged in unlawful actions as particularised hereunder…."

82. The particulars furnished include an allegation that, on 12th September 1995, at Esat's oral presentation, the fourth named defendant stated that Advent International had already invested a total of *"19.5million"* [the currency was not stated, but is not relevant for present purposes] in Communicorp since about October 1994. It is claimed that this was a false representation as Advent had invested only $10million for a 34% stake in Communicorp in or around October 1994 and a further $5million bridging loan in or around July 1995. It is also claimed that the fourth named defendant stated that Advent had given a binding commitment to advance IR£30million to Communicorp to fund the equity commitment required of Communicorp, and it is also claimed that the fourth named defendant stated that control of Communicorp would nonetheless remain with its Irish shareholders.

83. The allegations set out in paragraph 29 of the amended statement of claim are expressly denied at paragraphs 103 – 105 of the defence of the appellants, insofar as they are relevant to the appellants, and it is denied that the respondents are entitled to any relief as against the appellants in respect of the matters alleged therein. The respondents' contention before this Court is that the appellants do not plead that they are strangers to the allegations made in paragraph 29 of the statement of claim; they say that the appellants simply deny the allegations and as such the documentation sought is relevant and necessary for the determination of an issue raised by the pleadings.

84. However, in paragraph 101 of the defence, the appellants plead as follows:

"101. Further or in the alternative and without prejudice to the defence herein, the first, fifth and sixth named defendants are strangers to the plaintiffs' allegations that the third and fourth named defendants owed a duty to the plaintiffs and each of them

not to engage in wrongful actions designed to interfere with the integrity of the tender process and to ensure that the licence was, in breach of the rules governing the tender process, awarded to Esat and/or to reward the Minister for having intervened to ensure the awarding of the licence to Esat and the allegation that in breach of the alleged duty the third and fourth named defendants engaged in unlawful actions as alleged in the particulars of unlawful actions allegedly engaged in by the third and fourth named defendants and pleaded in the plaintiffs' amended statement of claim and the particulars thereof are not admitted, and the plaintiffs are put on full proof thereof."

85. While, regrettably, this paragraph of the defence does not refer expressly to any paragraph in the amended statement of claim, nonetheless it is apparent that the third to sixth lines of this paragraph are directly referable to paragraph 29 of the amended statement of claim, and so therefore the reference further down in the paragraph to the third and fourth named defendants engaging in unlawful actions as alleged in the particulars of unlawful actions ,is also a reference to the particulars of unlawful actions engaged in by the third and fourth named defendants as set forth in paragraph 29 of the amended statement of claim. That being so, I think it is reasonably clear that the appellants have in fact pleaded in paragraph 101 that they are strangers to the allegations made in paragraph 29 of the amended statement of claim, including the particulars of unlawful actions engaged in by the third and fourth named defendants. However, in the respondents' reply to the defence, at para. 30 thereof, the appellants are put on full proof that they are strangers to the matters referred to in paras 101-102 of their defence(s), and so on the pleadings, that too is a matter of dispute between the parties.

86. In deciding upon this category, the trial judge appears to have concluded that the documentation sought is relevant to the respondents' case that there was no or no adequate

assessment of the financial strength and capacity of the Esat Digifone consortium. That may well be so, but the documentation has not been sought in that context or for that reason, and it is clear from the reasons given by the respondents that they seek these documents in order to be able to prove the falsity of the representations made by the third and fourth named defendants to the Project Group and/or AMI, or, in other words, to prove their allegations of wrongdoing as against the third and fourth named defendants. As already observed, the appellants have pleaded that they are strangers to these allegations, although they are on proof of this plea.

87. It is apparent from the above that the plea relied upon by the respondents in support of this category is a plea made by the respondents not as against the appellants, but as against the third and fourth named defendants. The plea relates to alleged wrongdoing on the part of those defendants, and not the appellants. Even though the documents requested might, if available, be of some relevance to the case made by the respondents against the appellants (and it was on this basis that the trial judge ordered their discovery) their discovery has been sought on an altogether different basis, being the alleged wrongdoing of the third and fourth defendants. In short, the respondents are seeking an order of discovery as against the appellants not in relation to the case they make against the appellants, but in relation to the case they make against their co-defendants.

88. This is a somewhat unusual situation. For the reasons just discussed, the application for this category of documentation is more akin to an application for discovery by a non-party. But since the appellants are parties to the proceedings, they can only advance the application on an *inter partes* basis. If such a technical view is taken to its logical conclusion, it could lead to the anomalous situation where the respondents are unable to obtain an order for discovery of documentation which is relevant to the determination of

their claims against the third and fourth named defendants. The court received no submissions addressing this conundrum.

89. In addition to opposing this category on the grounds that the documents sought had no relevance to pleas advanced against the appellants, the appellants also argued that this category is unnecessary because it overlaps with category 1(3), by which the respondents sought and obtained an order directing the discovery of *"all documents evidencing notes of any oral presentations made by tenderers"*. However, the respondents submit in reply that this category would not capture any documents evidencing the consideration given to the representations made, and so discovery in the broader terms of category 22 is required.

90. It seems to me that the best way of addressing the issue in order to do justice between the parties is to treat with it in the same way that it would be treated with if it were an application for non-party discovery. Provided that the court is satisfied that the documents sought are relevant and necessary for the resolution of the dispute between the respondents and the third and fourth named defendants, then discovery of the documentation sought should be ordered on the same terms that it would be ordered as if it were an application for non-party discovery i.e. the respondents should indemnify the appellants against the costs incurred by them in making discovery of this category.

91. As to whether this category is relevant and necessary for the resolution of the dispute between the respondents and the third and fourth named defendants, the same category of documents was sought by the respondents from the fourth named defendant, Mr O'Brien. This is addressed at paras. 238-242 of the judgement of the trial judge. At paragraph 241, it is stated that in his answers to interrogatories and the notice to admit facts, Mr O'Brien admitted that he made the representations, so the issue, the trial judge said, is as to their alleged falsity. He therefore directed Mr O'Brien to make discovery of: *"all documents*

relating to the accuracy of the representations made by Mr O'Brien to the Project Group or AMI on 12th September, 1995".

92. While it is tempting to make an order in similar terms as against the appellants, it seems to me that they are in a very different position to Mr O'Brien in relation to the category sought, and the same refinement of the category in the case of the appellants may be unhelpful. In any case, it was not suggested. On balance, I think it better to affirm the order of the High Court directing discovery of this category but with the significant qualification already mentioned above i.e. that since this is equivalent to non-party discovery, the respondents shall indemnify the appellants against all costs incurred in complying with this part of the order to be made by the Court. The Court will hear submissions regarding the precise format of final orders, the period for compliance with the orders proposed above, and costs.