THE HIGH COURT

[2019] IEHC 638
[2019 No. 3544 P.]

BETWEEN

LIDL IRELAND GMBH

PLAINTIFF

AND

BILO PROPERTY HOLDINGS LTD, CENTZ STORE 7 LTD & CENTZ STORE 9 LTD

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on 6th day of September, 2019

Introduction

1. In this application, the second and third defendants are seeking discovery of documents from the plaintiff. The action arose in the following way: the plaintiff was the owner of a shop unit at Martyr's Road, Nenagh, Co. Tipperary (hereinafter "the old Lidl store"). The first defendant was the owner of a site nearby at McDonagh Street, Nenagh, Co. Tipperary (hereinafter "the new Lidl store"). The first defendant agreed to sell the new Lidl store to the plaintiff. The plaintiff agreed to sell the old Lidl store to the first defendant.

2. In the contracts agreed between the plaintiff and the first defendant and in the subsequent Deeds of Transfer, the first defendant agreed to a restrictive covenant in favour of the plaintiff. Under this covenant the first defendant was prohibited from carrying out any *"restricted use"* in the old Lidl store. *"Restricted use"* was defined as meaning *"food retail and/or off–licence and/or any illegal or immoral use or noisy, noxious or offensive trade including but not limited to sex shop, methadone clinic, cattle market or abattoir"*.

3. On 2nd May, 2019 the second and third defendants became tenants to the first

defendant of the old Lidl store. The plaintiff has alleged that the second and third defendants openly engaged in the sale of food at this premises. They alleged that there were multiple and assorted food items for sale at the premises, including confectionery, pasta, multiple sauces, rice, stir fry pastes, condiments, biscuits, snacks, tinned soups, crisps, cereals, soft drinks, ready meals and crackers.

4. The plaintiff claimed that these activities constituted a breach of the restrictive covenant in the contracts. They sought interim relief against all three defendants. On the second day of the hearing of that application, the parties reached a compromise whereby, without prejudice, the second and third defendants agreed to stop selling any food products at the premises pending the trial of the action. In the substantive action, the plaintiffs are seeking a permanent injunction restraining the defendants from selling, or permitting the sale of food products from the old Lidl store in breach of the restrictive covenant.

The Defences of the First, Second and Third Defendants

5. In its defence, the first defendant has pleaded by way of preliminary objection, that it has now caused the third defendant to sign a lease which contains the necessary restrictive use provisions to the satisfaction of the plaintiff. Accordingly, it has pleaded that save for the issue of damages and costs, the plaintiff's action is now moot.

6. The first defendant admitted that it purchased the old Lidl store subject to the restrictive covenant set out in the third schedule of the Deed of Transfer and Conveyance dated 12th March, 2019.

7. The first defendant disputes the plaintiff's interpretation of the covenant, or its interpretation of the scope thereof. In particular, the first defendant has pleaded that the natural and ordinary meaning of the words *"for the use as a food retail and/or off-licence"* means that the premises as a whole cannot be used for food retail and/or off-licence. It pleads that the wording of the covenant does not restrict the sale of food on part of the premises, provided the premises as a whole does not constitute a food retailer. It is

admitted and accepted that the restrictive covenant excludes the plaintiff, or his successors in title, using the premises as a supermarket and/or off-licence.

8. The first defendant pleads that the intention of the parties in using the words *"use as a food retail and/or off-licence"* was to ensure that a competitive supermarket could not be set up in proximity to the new Lidl store. It further pleads that the restriction contained in the restrictive covenant was to ensure that a competitive supermarket could not set up in proximity to the plaintiff on the new Lidl store and was not for the purposes of excluding the sale of any item of food on the old Lidl store, provided the sale of such items of food did not amount to a food retailer.

9. The first defendant further pleaded that it had made the second and third defendants aware of the restrictive covenant prior to them entering into the lease. It has been pleaded that it was represented to the first defendant by the second and third defendants that a minimal range of chocolate bars would be sold at its premises, together with a minimal number of units of bottled water. The first defendant pleaded that it permitted the second and third defendants to enter into occupation of the premises on foot of this representation. The first defendant also denied that the sale of such items constituted a breach of the restrictive covenant.

10. In their defence, the second and third defendants pleaded that they are a mixed retail store and while retailing in confectionery, dried foods, soft drink and non-alcoholic beverages and tobacco, those items did not form the predominant offering of the defendants at their store.

11. The second and third defendants further pleaded that the restrictive covenant was not a valid restrictive covenant in circumstances where the covenant had not taken effect when the second and third defendants entered into a contractual agreement to enter into the lands. They pleaded that it amounted to a Restraint of Trade clause and was in breach of the Competition Act 2002 and did not provide for a dominant and servient tenement. They

denied that they were a food retailer. They pleaded that the restriction on food retail was intended to ensure that a direct competitor did not enter into occupation of the lands.

12. The second and third defendants pleaded that they are engaged in the market of low-cost mixed variety retail, offering for sale a large variety of products including homewares, kitchenware, appliances, children's toys and gadgets. They do not sell fresh meat, poultry, fish, fresh fruit and vegetables, frozen food and chilled foods, limiting their offering to confectionery, soft drinks and non-alcoholic beverages and dried foods. As such, it was denied that they were food retailers or off-licence operators contrary to the restrictive covenant.

13. The second and third defendants further pleaded that having regard to the size of the new Lidl store and having regard to the geographic market they were a dominant undertaking within that market. It was pleaded that by entering into a restrictive covenant with the first defendant they had engaged in an anti-competitive practice contrary to the Competition Act 2002. They further pleaded that as a result of this allegedly anti-competitive behaviour on the part of the plaintiff, they have suffered loss and damage. They claimed for this loss and damage in a counterclaim.

The Present Application

14. In this application the second and third defendants seek discovery of two broad categories of documents, which they say are relevant and necessary to their defence of the action. In particular, they argue that the documentation sought is relevant to their plea that the term *"food retail"* in the restrictive covenant does not cover the sale by them of very limited food products, such as chocolate bars, mineral water and some dried food products.

15. The second and third defendants maintain that as they are strangers to the contracts entered into between the plaintiff and the first defendant, and to the negotiations leading up to those contracts, they are entitled to see any documentation from the pre-contract stage which touches upon the meaning of the restrictive covenant and/or the meaning of the term

"food retail".

16. In support of this assertion counsel for the second and third defendants, Mr. Rowan B.L. referred to the decision of the Supreme Court in *Stapleyside Company v Carraig Donn Retail Ltd* [2015] IESC 60, and in particular to the dicta of Clark J. (as he then was) at paragraphs 6.2 and 6.3:

> *"[6.2] If I might digress, it is of some importance to emphasise that those engaged in commerce are often critical of what they might see as barriers placed in the way of doing sensible business by lawyers who are concerned with attempting to put arrangements agreed into a legally acceptable form. It must be accepted that there may be times when this can have the effect of slowing down the conduct of business. However, as this and many other cases amply demonstrate, the problem with arrangements not being adequately converted into a legally recognisable form is that significant problems can be encountered if things go wrong. In such circumstances, a court is required to do the best it can with the language used by the parties (the text) to be construed in the light of all the circumstances in which the agreement was entered into (the context). But it is important to acknowledge that both text and context are relevant in the proper interpretation of commercial documents.*
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> *[6.3] Those principles of interpretation (the 'text in context' method) apply to no lesser extent in the field of property documentation. To ignore context is to ignore the well accepted fact that words used in agreements would be seen by any reasonable person having knowledge of the surrounding circumstances as being potentially affected as to their meaning by the context in which the agreement was entered into in the first place. But equally, the text must be given all appropriate weight, for it is in the terms of that text that the parties have settled on their arrangement."*

17. Counsel also referred to the judgment of Clark C.J. in *Jackie Green Construction Ltd v Irish Bank Corporation in special liquidation* [2019] IESC 2 and in particular to paragraph 5.3 thereof, where Clark C.J. cited his earlier judgment in *Law Society v The Motor Insurers Bureau of Ireland* [2017] IESC 31 where he stated:

> *"To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence.*
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> *Perhaps it is fair to say that the main underlying principle is that a document governing legal rights and obligations should be interpreted by the Courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but will also interpret text in its proper context."*

18. Counsel also referred to paragraph 5.5 of the judgment where it was stated: *"In all cases the text is important, but part of the context in which that text needs to be considered is the manner in which that text was arrived at, and the circumstances which led to the text being required and/or agreed".*

19. Counsel submitted that as his clients had been strangers to the negotiations leading up to the conclusion of the contracts between the plaintiff and the first defendant, they could not present evidence as to the meaning of *"food retail"* in accordance with the *"text in context"* approach to interpretation of contractual terms, unless they were given

discovery of the documents sought at paragraphs A, B and C of the Notice of Motion.

20. It was submitted that the term *"food retail"* was a very broad term. It could prevent the use of the premises for any purpose which involved even the most incidental sale of food products, such as a cinema, or a children's play area, where tea and coffee and scones and popcorn might be sold. In these circumstances it was necessary to ascertain what was in the minds of the parties when they agreed to this very broad term. It was submitted that if the second and third defendants had been parties to the negotiation of the restrictive covenant, they would know what had been agreed in the negotiations leading up to the use of the term *"food retail"*. However, as they were strangers to those negotiations, they needed discovery of documents to establish the meaning of that term in the contracts. It was submitted that in these circumstances it was appropriate to grant the second and third defendants the discovery sought in paragraphs A, B and C.

21. Finally, Mr Rowan B.L. referred to the general principles set out in the recent Supreme Court decision in *Tobin v Minister for Defence, Ireland and the Attorney General* [2019] IESC 57. At paragraph 7.2 of his judgment, Clark C.J. pointed out that in many circumstances a party may have access to much of the evidence which they would wish to present from within their own knowledge or resources. But there may be circumstances where a party does not have ready access to all material evidence without recourse to the various procedural measures which the Rules of Court permit. Discovery is one such measure. Counsel submitted that in this case the second and third defendants were in the position whereby they did not have access to the documentation which surrounded the negotiation of the restrictive covenant in the contract. In such circumstances he submitted that discovery was both relevant and necessary to enable them to properly put forward their defence at the trial of the action.

22. He further referred to paragraph 7.3 of the judgment, where the Chief Justice had stated that for many years discovery had been seen as having a role in either strengthening

the discovery seeking party's case or potentially damaging their opponent's case. He went on to add that discovery can also play a role in keeping parties honest, because it could not be ruled out that some parties might succumb to the temptation to present a less than full picture of events to the Court, were it not for the fact that they know that any attempt to do so may be significantly impaired if there is a documentary record which shows their account either to be inaccurate or materially incomplete.

23. Counsel also referred to paragraph 7.13 of the judgment, where it was stated that while the key criteria governing the granting of discovery of documents remain those of relevance and necessity, there has in more recent times been a much greater scrutiny of the issue of necessity. The Court will consider whether making an order for discovery is in fact necessary, or whether there are other means of establishing the truth. This would certainly be the case where it can be shown that the cost of making discovery would be significant and would greatly outweigh the costs of pursuing some alternative procedural mechanism to establish the same facts. The Chief Justice stated that similar considerations apply when the likely true relevance of documentation may not become clear until the trial, but where the immediate disclosure of the documentation concerned would necessarily involve disclosing highly confidential information. Furthermore, the development of a proportionality test can itself be seen as a further refinement of the concept of *"necessity".*

24. Counsel submitted that in this case, while in response to the documentation sought at paragraph H, the plaintiff had stated that that request was onerous due to the fact that the plaintiff had entered into many land purchase transactions throughout the State, other than that bald assertion, the plaintiff had not provided any evidence to show that it would be unduly onerous or indeed unjust to require them to make the discovery sought in the Notice of Motion. He submitted that where it was clearly established that such documentation was necessary to enable the second and third defendants to properly put forward their defence at the trial of the action, their request for discovery should be

granted.

25. In response, Mr. Fitzpatrick S.C. submitted that it was well established that a Court cannot have regard to parol evidence when interpreting the terms of a written contract. The subjective belief of either party as to the meaning of a term in the contract, was irrelevant when interpreting the terms of a written contract. In support of that proposition he referred to the decision of Hogan J. in *Point Village Development Ltd (in receivership) v Dunnes Stores* [2017] IECA 159, and in particular to paragraphs 17 and 18, which stated as follows:

> *"[17] As I have already noted, the core of Dunnes Stores' case is that the reference to "tenants" in clause 11(c) is a reference to 'high-class' tenants for the purposes of a prestigious retail shopping centre such as they say was always envisaged. The meaning of clause 11(c) of the 2010 agreement will, however, ultimately be determined by the High Court employing standard interpretive techniques used in construing commercial contracts of this kind. One of these basic rules is the parol evidence rule which – subject admittedly to exceptions – precludes the Courts receiving evidence from the parties as to what their subjective beliefs as to the meaning of the agreement actually was. This is not some technical rule of evidence, but rather reflects the preference of the common law for the written word as the most straightforward way in determining the nature of the contractual bargain which the parties actually arrived at.*
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> *[18] Viewed thus, the latest engagement with actual or potential tenants could only be relevant to show what the subjective beliefs of PVDL regarding the scope and meaning of the reference to 'tenants' in clause 11(c) actually were. But since such evidence would – generally speaking, at least – be inadmissible at the trial for this purpose, the discovery sought in aid of this line of enquiry was also not to be relevant so far as any issues in these proceedings are concerned."*

26. Mr. Fitzpatrick also referred to the decision of Barnivlle J. in *Dunnes Stores v McCann* [2018] IEHC 123 and in particular to paragraph 51 where the learned judge stated: *"it is well established that evidence of the subjective intentions of the parties to a contract or their prior negotiations is not admissible."* The judge cited the following dicta of Fennelly J.: *"the exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract"*.

27. Counsel for the plaintiff made a further telling point. He stated that the defence filed by the first defendant was of significance. While it had challenged whether the activities of the second and third defendants fell within the terms of the restrictive covenant, they had not asserted that the term *"food retail"* should have any particular meaning, other than its ordinary and natural meaning. In particular, they had not pleaded that the parties had discussed what exact activities would be captured in that phrase. If there had been any such discussion, which had been recorded in correspondence or in an email during the negotiation phase, the first defendant, which had all the information which the second and third defendants complained they did not have, would have pleaded the matter and would probably have relied expressly on any such communication, yet they had not done so in their defence. It was submitted that in such circumstances the second and third defendants' application was purely a fishing expedition.

28. Mr. Fitzpatrick also relied on the case of *HSE v LAYA Healthcare Ltd* [2019] IEHC 502, where the judge dealing with the application held that the opinion of third parties regarding the interpretation of a particular section in an Act was irrelevant and accordingly he refused to grant the category of discovery of documents sought.

29. On the basis of the cases cited above, senior counsel submitted that in interpreting the restrictive covenant the Court cannot look at the subjective intentions or understanding of the parties, therefore the documentation sought in paragraphs A, B and C was not

relevant to the second and third defendants' defence of the action.

30. Also in contention between the parties was paragraph E in the Notice of Motion. This essentially sought any documentation relating to negotiation of the property price, documents evidencing the negotiation of the restrictive covenant, the minutes of any meetings at which consideration was given to the price paid and/or the terms and extent of the restrictive clause, any documents recording the consideration given to the effect and consequences of the restrictive covenant and the price paid having regard to other competing stores in the geographical area and any documents evidencing the accounting treatment of the value paid on the plaintiff's profit and loss accounts, and/or the plaintiff's interim and annual accounts.

31. The second and third defendants maintained that this category was relevant to the claim for damages contained in the plaintiff's statement of claim. It was pointed out that it was specifically pleaded by the plaintiff that without the restrictive covenants the plaintiff would not have entered into the contracts with the first defendant. It was further pleaded that the existence of the restrictive covenant was a factor in the purchase price agreed between the plaintiff and the first defendant for sale of the old Lidl store. In these circumstances it was submitted that it was relevant and necessary for the second and third defendants to have sight of this category of documents.

32. In response, it was submitted on behalf of the plaintiff that in its Replies dated 12th July, 2019, the plaintiff had made it abundantly clear that it was not pursuing any claim for damages as long as it was granted a permanent injunction. Damages would only become relevant should the Court come to the conclusion that while the plaintiff had established a breach of the restrictive covenant due to the activities carried out by the second and third defendants, damages were the more appropriate remedy. In such circumstances, the Court would adjourn the hearing to enable evidence to be called as to the financial loss suffered by the plaintiff. At that stage the second and third defendants may be entitled to some

limited discovery, because the plaintiff would have to provide particulars of its loss and establish by reference to expert evidence the extent of that loss; however any such entitlement to discovery did not arise on the pleadings as they currently stood.

33. In addition it was submitted that the terms of paragraph E were too broad. The second and third defendants were not entitled to the documents sought therein as it was irrelevant as to what discussions or views the plaintiff and its servants or agents had had as to what was a prudent price to pay for the insertion of the restrictive covenant into the contracts. The only relevant matter which might arise, was the loss which the plaintiff had suffered in the past and would suffer in the future by a breach of the covenant by the defendants.

34. Turning to categories F, G and H, these categories arise out of the counterclaim on behalf of the second and third defendants, that even if the restrictive covenant did cover the activities carried out by them, it was void having regard to the provisions of s.4 of the Competition Act 2002.

35. Counsel for the second and third defendant stated that category F was relevant to show that the plaintiff was engaging in anti-competitive practices in other rural locations. The plaintiff was a multinational supermarket chain. It would be relevant to the counterclaim being pursued by the second and third defendants to establish that the plaintiff had a practice of effectively attempting to restrict competition in other similar rural areas. In this regard it was relevant to note that the new Lidl store was a large structure of over 13,000 square feet, with no other similar retail unit within a 15/20 minutes' drive.

36. Counsel submitted that the documentation sought at paragraph G, would show that the plaintiff had engaged in anti-competitive practices. The documents were relevant and necessary to show the market share of the plaintiff in the retail and grocery market. They would identify the extent to which the plaintiff was dominant in the market. Such

information was also relevant and necessary for the purpose of preparing the report of the competition expert.

37. It was submitted that the documentation sought in paragraph H was necessary and relevant because it had been pleaded by the plaintiff that had it not been for the restrictive covenants, they would not have entered into the contract with the first defendant. They further pleaded that they would not have paid the consideration which they had paid, if the covenant had not been inserted in the contract. It was submitted that in such circumstances the assessment and documents relating to the consideration given for the restrictive covenant were relevant and necessary for the determination of the proceedings.

38. In response to this, Mr. Fitzpatrick submitted that having regard to the decision in *Sibra Building Company Ltd & Othrs v Ladgrove Stores*, a decision of the Supreme Court on 8th May, 1998, where it had been held by Barron J that the Competition Act had no relevance to restrictive covenants. He had stated: *"I have no doubt that the statute was not intended to deal with restrictive covenants. Its purpose was to deal with unfair trading."*

39. Mr. Fitzpatrick submitted that the documentation referred to at paragraph F was not relevant because even if the agreement between the plaintiff and the first defendant was capable of being contrary to the provisions of the Competition Act 2002, the fact that the plaintiff may have entered into similar arrangements in other parts of the State was irrelevant to the question of whether this agreement could be held to be invalid having regard to the provisions of the 2002 Act. The essential question would be what was the market in terms of the activity in question and the geographical area of that market. Whether that comprised the area around Nenagh, or County Tipperary, or even north Munster, that was a question for expert evidence. What agreements the plaintiff may have made with other landowners in other areas, such as in Letterkenny or Tralee, was simply not relevant.

40. In relation to categories G and H, counsel submitted that the documents sought

therein were not relevant to the competition issue raised by the second and third defendants. The subjective intentions or understanding on the part of the plaintiff, or any of its servants or agents, as to whether they held a dominant position in any particular market, was irrelevant. The only relevant questions were whether they had a dominant position, which would depend on expert evidence based on their factual position in the market, or whether they had engaged in any anti-competitive practices prohibited by section 4 of the 2002 Act. These were entirely objective questions. They did not depend on the subjective opinions of any servant or agent of the plaintiff. Accordingly, the documentation sought was not relevant.

Conclusions

41. Stripped to the essentials, this case is quite simple. The plaintiff maintains that it sold the old Lidl store to the first defendant subject to a restrictive covenant. The first defendant accepts that it purchased the property subject to that covenant. The dispute arises as to the interpretation of the words *"food retail"* in the covenant. The first, second and third defendants maintain that the activity carried on by the second and third defendants at the old Lidl store in May 2019, which involved the sale of chocolate bars, mineral water and dried food, did not constitute *"food retail"* within the meaning of the covenant.

42. In categories A, B and C, the second and third defendants are seeking a large range of documentation which they maintain would establish what was the intention of the parties when inserting the term *"food retail"* into the contracts.

43. While there is considerable case law which establishes that where the terms of a contract have been reduced to writing, one cannot admit evidence of either a parol nature, or of a documentary nature to establish what was the subjective intention of one of the parties in using that term, or as to their understanding of the term used in the contract. The second and third defendants have countered that argument by arguing that modern case law on the interpretation of contracts has explained that while the ordinary and natural meaning

of the written terms in the contract must be given great weight, it is permissible to interpret the *"text in context"*. It is submitted that this enables the Court to look not at the subjective intention or understanding of any one of the parties, but may have regard to any agreement which may have been reached between them during the negotiations as to the precise parameters of a term which is included in the contract.

44. While I accept Mr. Fitzpatrick's submission that evidence as to the subjective intention or understanding of a party during negotiations is not admissible, I am of opinion that Mr. Rowan is correct in his submission that if there was a document which showed what the parties agreed was meant by a particular term in a contract, that document would be admissible as evidence of the true interpretation of the term in the contract.

45. It seems to me that it is unlikely that such a document exists, because as pointed out by Mr. Fitzpatrick in argument, if there was a document which showed that the term *"food retail"* did not encompass the activity carried on by the second and third defendants, the first defendant would probably have pleaded such facts in its defence. Nevertheless, I am of opinion that the second and third defendants are entitled to some discovery under this heading. However, the range of documents sought in paragraphs A, B and C are far too broad and encompass categories of documents that go beyond what is permissible.

46. I am satisfied that the second and third defendants are entitled to have sight of any document or series of documents that would establish what was the agreement or understanding reached between the parties as to the scope of the restrictive covenant in relation to the selling of food products at the old Lidl store. Accordingly, I direct that the plaintiff is to make discovery of the following: any document, note or memorandum, either in hard copy or in electronic format, which records any agreement between the plaintiff, its servants or agents, and the first defendant, its servants or agents, as to the meaning or extent of the term *"food retail"*.

47. In relation to paragraph E in the Notice of Motion, I am not satisfied that this

category of documents is relevant to the issues that arise having regard to the state of the pleadings and in particular, to the fact that the plaintiff has abandoned the claim for damages, save in the event that the Court should decide that there was a breach of covenant, but that an injunction was not the appropriate remedy and proposed to award damages instead.

48. Even in these circumstances, the documents sought in paragraph E are not relevant to the determination of that issue. What internal discussions or decisions may have been made by the plaintiff in relation to the price it would pay for the restrictive covenant, is not relevant to the question of any loss it may have suffered, or may suffer in the future, due to a breach of the restrictive covenant by the defendants. Accordingly, I refuse to order discovery under this heading.

49. In relation to paragraph F, I accept the submission made by Mr. Fitzpatrick that this category of documents is not relevant to any issue that may arise at the trial of the action. What practices the plaintiff may have engaged in in other markets in other parts of the country are not relevant to the question of whether the agreeing of the restrictive covenant with the first defendant was a practice or agreement contrary to s.4 of the 2002 Act. I refuse the discovery sought under this heading.

50. In relation to the discovery sought at paragraphs G and H in the Notice of Motion, I accept Mr. Fitzpatrick's submission that the subjective views of the plaintiff, through its board of directors or other servants or agents, cannot affect the legality of the plaintiff's action from a competition law point of view. The agreement was either in breach of s.4 of the 2002 Act having regard to the market in question, the plaintiff's share of that market and the geographical extent of the market, or it was not. The existence of any of the documents sought in these paragraphs are not relevant or necessary to establish this part of the counterclaim raised on behalf of the second and third defendants. Accordingly, I refuse to direct discovery under these headings.

51. For the reasons set out above I have directed that the plaintiff make discovery in the terms outlined above, and also in the terms of paragraph D of the Notice of Motion, which category was agreed between the parties.