THE HIGH COURT

[2023] IEHC 404

[2001/9223P]

BETWEEN

PERSONA DIGITAL TELEPHONY LIMITED AND

SIGMA WIRELESS NETWORKS LIMITED

PLAINTIFFS

AND

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

DEFENDANTS

AND

MICHAEL LOWRY

THIRD PARTY

JUDGMENT of Ms. Justice Emily Egan delivered on the 12th day of July, 2023

Introduction

This is a ruling on two motions for discovery. The first is brought on behalf of the plaintiffs seeking orders for discovery by the first, second and third named defendants ("the State"). The second is brought on behalf of the State seeking orders for discovery by the plaintiffs. The plaintiffs and the fourth named defendant ("Mr. O'Brien") have reached reciprocal agreement in respect of discovery.

Background

1. On 2nd March 1995, the then Minister for Transport, Energy and Communications, Mr. Michael Lowry T.D. ("the Minister") announced a bid process for the award of the second

GSM mobile phone licence in Ireland. A detailed tender process was put in place which was intended to be fair, impartial and impermeable to political influence. That process was divided into two phases; first, the evaluation phase, pursuant to which the winning tender who might bid for the licence was selected and second, the licence award phase, pursuant to which the winning bid would be interrogated, and a final decision made as to the award of the licence. A request for proposals ("the RFP") was issued by the Department for Transport, Energy and Communications, ("the department") on 2nd March 1995 inviting applications for the licence. The RFP stipulated certain conditions precedent, certain competition rules, the Minister's expectations and general competition requirements. The RFP required that applicants give full ownership details and demonstrate financial capacity, technical expertise and capability to implement the system. The RFP identified the evaluation criteria. An information memorandum ("the Information Memorandum") was also circulated at this time which explained the provisions of the RFP. Following the launch of the competition process, a project group was established composed of civil servants from within the department augmented by outside expertise to manage and conduct the evaluation. A protocol was adopted to ensure that contact between the decision makers and interested parties occurred only in a formally controlled way.

2. The department also appointed Anderson Management International ("AMI") to advise the project group in carrying out the evaluation. A supplemental information memorandum ("the Supplementary Memorandum") was issued by the department for the assistance of potential applicants on 28th April 1995 which informed tenderers, *inter alia,* that no supplementary material would be accepted after oral presentations, and that the financial capability condition would be assessed by reference to specified criteria. On 12th May 1995, the department issued a further information memorandum ("the Second Supplemental Memorandum") providing mandatory tables to be completed for the purposes of carrying out

a quantitative evaluation of the tenders based on the evaluation criteria specified in the RFP. Prior to the submission of tenders, an evaluation model ("the Evaluation Model") was developed by AMI explaining how applications would be assessed. AMI subsequently produced a revised Evaluation Model which was adopted by the project group. This explained how applications would be assessed by reference to weightings for each criterion identified in accordance with the terms of the RFP. The revised Evaluation Model provided that both quantitative and qualitative evaluation would be conducted. Quantitative evaluation would be used to generate an initial score to the applicants which would form the basis for the presentation meetings on the qualitative evaluation. The Evaluation Model was further amended in certain respects following intervention by the European Commission. The Evaluation Model, including the weightings for quantitative evaluation, was finalised by the project group on 27th July 1995. The Evaluation Model provided that during the qualitative evaluation, the evaluators were to take the results from the quantitative evaluation into account as a starting point. The marking matrix for the qualitative evaluation did not make provision for the application of weightings.

3. The ultimate design of the evaluation phase was thus the subject of several iterations over the course of the period 2nd March 1995 to 27th July 1995. During this period, the Information Memorandum was supplemented on two occasions and the Evaluation Model was twice amended.

4. There were six tenders for the licence, including the consortium with which the plaintiffs were associated and Esat Digifone ("Esat") with which Mr. O'Brien, through a company of which he was the principal shareholder, Communicor Ltd ("Communicor") was associated and the Salstar Group, with whom Comcast International Holdings Incorporated, Declan Ganley, Ganley International Ltd and CGI Ltd were associated. Persons associated with the Comcast tender are plaintiffs in two related sets of proceedings in relation to the award of

the GSM licence entitled (*Comcast International Holdings Incorporated, Declan Ganley, Ganley International Limited and GCI Limited v The Minister for Public Enterprise, Michael Lowry, ESAT Telecommunications Limited, Denis O'Brien, Ireland and the Attorney General* [2001] 15119P & [2001] 9288P) ("the *Comcast* proceedings"), to which further reference will be made below. On 25th October 1995, the Minister announced that licence would be awarded to Esat ("the decision"). On 6th May 1996, at the end of the licence award phase, the licence was awarded to Esat Telecommunications Ltd.

The plaintiffs' claim

5. The plaintiffs' claim is that the tender process was compromised and corrupted by the Minister, the notice party herein, who abused his public office, accepted payments and/or benefits from or on behalf of Mr. O'Brien or Esat, interfered with the tender process and secured the award of the licence to Esat. The plaintiffs' claim that were it not for this, the first named plaintiff would have won the tender competition in respect of the licence or in the alternative would not have lost the chance of winning it.

6. Thus on 15th June 2001, the plaintiffs issued the plenary summons in these proceedings seeking damages, including exemplary damages, for *inter alia,* misfeasance in public office, breach of contract, breach of duty, breach of legitimate expectations, breach of constitutional rights and breach of European Union Law.

7. At roughly the same time, the plaintiffs in the *Comcast* proceedings also issued two sets of plenary summonses claiming a declaration that the decision to extend the deadline for the receipt of tenders and the decision of 25th October 1995 to award the licence to Esat were unlawful, null and void and of no effect and claiming damages.

8. Neither the present proceedings nor the *Comcast* proceedings were progressed to any appreciable extent and the State applied for orders dismissing the actions on grounds of

inordinate and inexcusable delay. These applications succeeded in the High Court [2007] IEHC 297 but the Supreme Court unanimously allowed the appeals [2012] IESC 50. The Supreme Court accepted that these cases were unique that the plaintiffs had not been in a position to prosecute their claims in any informed way in advance of the investigative hearings of the Moriarty Tribunal.

The funding application

9. In March of 2015, the plaintiffs in these proceedings issued a motion seeking orders that, by entering into a litigation funding agreement ("the funding agreement") with Harbour Fund (III) Ltd Partnership ("HFIII") they were not engaged in an abuse of process and/or were not contravening rules on maintenance and champerty ("the funding application"). The defendants sought disclosure of the funding agreement between the plaintiffs and HFIII on grounds that it was necessary to allow the court rule on the funding application. The plaintiffs resisted the discovery application on grounds of confidentiality, litigation privilege and the litigation advantage it would confer on the defendants. The High Court, per Donnelly J ordered disclosure of a redacted version of the funding agreement ([2015] 1 IR 124). In so doing, Donnelly J. noted that the funding application was an entirely novel application, and it was therefore appropriate that both the court and the other parties to the proceedings should have sight, in general terms at least, of the funding agreement. Redacted disclosure was ordered so that the other parties could see the general layout of the funding agreement and the wording of the commitments each party to it had made. On 23rd May 2017 the Supreme Court ([2017] IESC 27), confirming Donnelly J. ([2016] IEHC 187], upheld the torts of maintenance and champerty and the strict prohibition on third party litigation funding. The funding agreement by HFIII, who had no connection with the plaintiffs to fund the plaintiffs' case was thus held to be a champertous agreement. Although it might well be appropriate to develop a modern

law on champerty and third party litigation funding, this was a matter for the legislature. Therefore, although both Denham C.J. and Clarke J. (as he then was) expressed concerns that the defendants - who had vigorously opposed the plaintiffs' motion - would be beneficiaries if the case did not proceed, the court was not prepared to grant the declaratory order sought. Despite the above, the plaintiffs were nonetheless in a position to proceed with this case.

The amended statement of claim

10. As with any discovery application, the current applications fall to be analysed by reference to the pleadings of the parties, to which I now turn.

11. In February 2018, the plaintiffs sought to serve an amended statement of claim seeking, *inter alia*, a declaration that the decision of 25th October 1995 to award the licence to Esat was unlawful, null and void and of no effect and claiming damages. The defendants objected on the grounds that many of the amendments sought advanced new claims which, it was contended, went beyond the claims of corruption which had informed the decision of the Supreme Court to permit the proceedings to continue despite the plaintiffs' prior inordinate delay. Pilkington J. granted the plaintiffs permission to amend their statement of claim ([2019] IEHC 295).

12. The defendants appealed this order to the Court of Appeal ([2019] IECA 360). Delivering the court's judgment on 16th December 2019, Donnelly J. noted that the central claim by the plaintiffs had always been that the Minister allegedly corrupted the licence application process and that the statement of claim must reflect this. No amendments which brought the proceedings beyond this central feature or advanced claims arising from what may be termed "ordinary" procurement principles could be allowed. Donnelly J. observed that many of the proposed particulars of wrong in the amended statement of claim (such as, for example "departing from the agreed evaluation model" or "committing errors in evaluating tenders") might at first sight resemble "ordinary" "run of the mill" pleas to be found in any

straightforward public procurement challenge. On the other hand, as the plaintiffs' case was that these "errors" were evidence of corruption of the process, the details of how the corruption was manifested must be permitted to be explored at trial. Pleas of "departures from the evaluation model" or "manifest errors in evaluating tenders" were therefore relevant but only to the extent that same were corrupt and occurred for the purpose and effect of favouring the tenders submitted by Esat. So circumscribing the permitted amendments would ensure that the case did not lose its unique feature, which uniqueness had led the Supreme Court to permit the case proceed despite inordinate delay.

13. The amended statement of claim fully particularises the details of the tender process and Evaluation Model as broadly described at paras. 1 and 2 above. Thereafter at paras. 29, 30 and 31 of the amended statement of claim, the plaintiffs plead that together the tender documentation provided fundamental competition rules and contractual terms informing tenderers of the Minister's expectations and of general competition requirements and the process envisaged. All of this, it is pleaded, induced the plaintiffs to make a bid, *inter alia* on the understanding that the Minister would abide by the published competition rules which ensured fairness, transparency and equal treatment of all applicants.

14. Para. 32 pleads that the Minister abused his public office, accepted payments by or on behalf of Mr O'Brien or Esat and interfered with the tender process to ensure Esat would be awarded the licence.

15. Para. 34 (a) to (jj) advance particulars of corrupt interference by the Minister in the tender process including: having improper interactions with parties in the tender process at the most sensitive stages thereof; obtaining and using sensitive critical information and disclosing same to Mr. O'Brien, Communicorp and/or Esat; making known his preference for Esat and his disfavour of Persona; conveying his views on how the financial weaknesses of Esat could be rectified; by-passing other cabinet colleagues' consideration and influencing the result

delivered; permitting Esat to make changes to its tender after submission; disclosing to Mr. O'Brien confidential details of the evaluation methodology; introducing the concept of "bankability" into the evaluation process whereby the financial capacity of tenderers could be assessed taking into account funds that would become available after the award of the licence; denying the project group the ability to apply the Evaluation Model; intervening with Electricity Supply Board ("ESB") to ensure that Esat would be permitted to erect masts on ESB pylons; ensuring that Esat would be granted the licence despite the fact that its ownership structure was different to that which had been submitted in its tender; and otherwise in a number of ways interfering with the evaluation process to ensure that Esat would emerge as the successful bidder.

16. Para. 34 (p) sets out details of "further corrupt interference" and pleads that the Minister by himself or acting through his servants or agents carried out an evaluation which departed from the evaluation model which had been adopted by the project group.

17. Para. 34 (s) pleads that the Minister committed manifest error in evaluating tenders with the purpose and effect of favouring the Esat tender. Five different particulars are provided such as mischaracterising the extent of Persona's reservations concerning the draft licence, incorrectly analysing Persona's cashflow sensitivity and significantly reducing the extent of Communicorp's worst case equity exposure.

18. Para. 34 (t) pleads that the marking of tenders was manifestly wrong and erroneous. Six particulars thereof are set out such as that Esat were awarded marks and grades which were manifestly higher than its tender merited and Persona awarded marks and grades manifestly lower than its tender merited.

19. Para. 34 (u) pleads that the overall ranking of tenders was determined by the subjective considerations of certain members of the project group and that the project group was denied the opportunity to apply the Evaluation Model and particulars are provided.

20. Para. 34 (v) pleads that the qualitative evaluation was carried out in a vague, impressionistic, imprecise and opaque manner and favoured Esat. It is pleaded that the evaluation report failed to adequately reflect the actual process conducted; that best practice was not followed; and that Esat was permitted to make changes to its tender after the tender had been submitted including an oral presentation.

21. It is important to note that the amended statement of claim has received the imprimatur of the Court of Appeal. There is no question but that the plaintiffs are fully entitled to advance claims to the effect that the evaluation process was not followed or that there were manifest errors in evaluating and marking of tenders provided that these pleas are understood as contending that the purpose and effect of same was to favour the Esat tender. Although this is not a technical procurement challenge, the plaintiffs are entitled to rely upon technical points provided same are linked to the purpose and effect of favouring Esat.

The State's defence

22. The State's defence dated 9th October 2020 is a comprehensive traverse. The defence commences with a number of preliminary objections to the effect that the claims are statute barred; that they ought to have been brought by way of judicial review within the time limit specified by O. 84; that the proceedings represent a collateral challenge to the prior decision of the Government made on 2nd March 1995 which has not been challenged; that any challenge to the award of the licence ought to have been brought by way of statutory appeal; that the plaintiffs have been guilty of delay and laches and that the plaintiffs have *"no entitlement to maintain the proceedings"* (upon which specific plea I will comment further below).

23. The defence challenges the plaintiffs' description and characterisation of both the tender evaluation phase and the licence award phase, and *seriatim* the particulars of alleged wrongdoing on the part of the Minister. It is also denied that the plaintiffs have suffered loss

and damages as alleged, and it is denied that any wrongdoing on the part of the defendant was causative of any loss.

The *Comcast* discovery order

24. The plaintiffs in these proceedings seek that the State provide it with broadly the same discovery as it provided to the *Comcast* plaintiffs, whether by agreement or by ultimate order of the Court of Appeal.

25. Similarly, with one notable exception, the State also seek similar discovery to that which the *Comcast* plaintiffs provided. It is therefore pertinent to outline how discovery was dealt with in the *Comcast* discovery proceedings.

26. In October 2016, the *Comcast* plaintiffs sought voluntary discovery from the State of twenty two categories of documents. When correspondence did not produce agreement, the plaintiffs issued a motion for discovery pursuant to which Allen J. ordered the State to make discovery in relation to all categories of documentation sought with minor modifications in some cases ([2019] IEHC 720). In so doing, Allen J. characterised the *Comcast* proceedings as now involving a challenge based on general procurement grounds which he viewed as being "*a million miles away from the unique and unprecedented case that survived the challenge of delay.*"

27. In appealing this order for discovery, the State contended, *inter alia*, that Allen J. had erred in his characterisation of the *Comcast* proceedings. In its judgment of 4th November 2022 the Court of Appeal per Binchy J. ([2022] IECA 249) determined that it did not have to resolve this particular issue, stating:

> *"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.."*

28. In the period intervening between the High Court and Court of Appeal judgments, agreement was reached in respect of certain of the appealed categories. The Court of Appeal affirmed the High Court order in respect of two of the disputed categories, modified the discovery order in respect of one category and, in respect of category 22 – ("all documents in connection with the investment of Advent International in Communicor") – ordered that the State make discovery on condition that the plaintiffs indemnify the State against costs incurred in making discovery of this category.

Legal principles

The governing legal principles applicable to an application for discovery are well settled. First, the discovery sought must be relevant to the issues disclosed by the pleadings. The *locus classicus* in considering the relevance requirement is of course the decision of the English Court of Appeal in *Compagnie Financière du Pacifique v. Peruvian Guano Company*. [1882] 11 Q.B.D 55 in which Brett L.J. stated:

> *"… the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action; The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may–not which must–either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly,' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences …."*

29. Notwithstanding the breadth of this passage, it is clear that the respective applicants for discovery must not only establish that the documents sought may either advance their own case or undermine that of their opponent; they must also show that the issue to which the documents relate is of relevance to the cause of action pleaded in these particular proceedings (and not merely to the *Comcast* proceedings). Relevance must be determined in relation to the pleadings

in this case, not by submissions as to alleged facts put forward in affidavits, unless such submissions relate back to the pleadings. Relevance is to be determined by reference to the pleadings as they stand at the date of the application for discovery regardless of whether an amendment is contemplated.

30. In cases of fraud or other clandestine activities the court may allow the plaintiff to plead their case in broader terms pending discovery. However, I agree with Allen J.'s comment that, although this case relates to corruption, having regard to the extensive information which the plaintiffs obtained by dint of the Moriarty Tribunal, they have been able to advance very specific pleadings. Therefore, the latitude given to parties in respect of cases of fraud or other clandestine activities is not therefore a particular consideration in this case.

31. Secondly, discovery must be necessary for the fair disposal of the action. In *Tobin v. The Minister for Defence* [2020] 1 IR 211, Clarke C.J. stated that whilst the initial burden of establishing both relevance and necessity must lie on the requesting party, the establishment of relevance would generally *prima facie* also establish necessity. Where it is sought to suggest that 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. To the extent that these reasons are 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, it is for the requested party to put forward its reasons as to why production is not necessary. It is also for that party, at least initially, to suggest any alternative means of obtaining the relevant information which are said to be less burdensome but potentially equally effective. Furthermore, the court may consider 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 grounds that

it is excessively burdensome, has contributed to that situation by the manner in which they have pleaded their case.

The plaintiffs' application for discovery against the State

32. By letter dated 13th October 2021 the plaintiffs' solicitors wrote to the Chief State Solicitor stating that the plaintiffs "*will obviously require discovery from the State".* Noting that the Court of Appeal judgment in the *Comcast* proceedings was awaited and "given that the two cases cover precisely the same subject matter," the plaintiffs envisaged agreeing that the State provide the same discovery. The State indicated that it was not in a position to respond until after delivery of the Court of Appeal judgment. Accordingly, very shortly after this judgment was delivered the plaintiffs' solicitors requested discovery in similar terms to that ordered in *Comcast*.

33. By letter of response dated 20th December 2022 the State disputed that these proceedings covered precisely the same subject matter as the *Comcast* proceedings. The State nonetheless responded to the request for discovery with reference to the categories agreed/ordered in the *Comcast* proceedings. Further, it was stated that any agreement on discovery would be subject to the same conditions as pertained in relation to the *Comcast* discovery, namely the identity of the juristic person to swear the affidavit on behalf of the Minister, the "backstop date" (which is a reference to the fact that discovery agreed/ordered in relation to all categories of documents in *Comcast* applied to documents generated between 1st January, 1990 and 31st December, 2002) and the time to make discovery (being six months from the date of the order).

34. The plaintiffs' solicitor issued a motion for discovery on 24th January 2023. The State advanced a preliminary objection on grounds of non-compliance with O. 31, r. 12(6) of the Superior Court Rules ("the Rules"). It is averred that the plaintiffs' reliance on *Comcast* is

misconceived as the two cases do not cover precisely the same subject matter. It is therefore inappropriate and presumptuous to conflate the two proceedings when contentious matters pertaining to discovery are concerned.

35. The plaintiffs' solicitor swore a replying affidavit rejecting the State's argument that the plaintiffs' application is irregular and misconceived and advancing the plaintiffs' position in relation to the disputed categories. Legal submissions were also exchanged between the parties.

36. Agreement was reached in respect of 19 of the 22 categories of documents sought. The applications for discovery have been case managed by this court in the context of general case management of these proceedings and the *Comcast* proceedings.

Preliminary objection of the State

37. The State maintains that the plaintiffs' application for discovery is not properly before the court as they failed to comply with the strict requirement to seek voluntary discovery. In this regard O. 31, r. 12(6) of the Rules provides:

> "*(6) An order […] directing any other person to make discovery shall not be made unless:*
> *(a) the applicant for same shall have previously applied by letter in writing requesting that discovery be made voluntarily:*
>
> *(i) specifying the precise categories of documents in respect of which discovery is sought,*
> *(ii) furnishing the reasons why each category of documents is required to be discovered,*
> *(iii) where the discovery sought includes electronically stored information, specifying whether the applicant seeks the production of any documents in searchable form and if so, whether for that purpose the applicant seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested, and*
>
> *(b) a reasonable period of time for such discovery has been allowed, and*
> *(c) the party or person requested has failed, refused or neglected to make such discovery or has ignored such request.*

> *Provided that in any case where by reason of the urgency of the matter or the consent of the parties, the nature of the case or any other circumstances which to the Court seem appropriate, the Court may make such order as appears proper, without the necessity for such prior application in writing.* [Emphasis added]

38. The State argues that O. 31, r. 26 represents a jurisdictional bar on the court granting discovery save in accordance with its terms and relies on *Michael Swords v. Western Proteins Ltd* [2001] 1 I.R. 324, in which Morris J. stated:

> *"The new rule was brought into being to ensure in the first instance that the party against whom discovery was being sought would, upon receipt of the preliminary letter, be in a position to know the document or category of documents referred to and be able to exercise a judgment on whether the reasons given for requiring these documents to be discovered was valid. He would then be in a position to know if he was required to comply with the request. If he disputed his obligation to make discovery the court would know by reference to this letter precisely why the moving party sought the documents in question and the grounds upon which the moving party believed that the documents sought to be discovered, might help to dispose fairly of the cause or save costs.*
> *In my view if the letter of application does not comply with the Rules then the issue is not identified and there is no power vested in the Master of the High Court to make a determination on any issue. This is so even where an elaborate affidavit is filed in support of the application. I am satisfied that in the particular circumstances in which this Statutory Instrument came into existence that the Master derives his jurisdiction to determine the issues which arise between the parties from the identification of the issues in the applicant's originating letter or letters."*

39. The State submits that the present proceedings are entirely distinguishable from the *Comcast* proceedings. The present proceedings are not procurement proceedings and are confined to allegations of corruption. In contrast, although it appears that the State will dispute *Comcast's* right to pursue a general public procurement or process errors case, this has yet to be determined in those proceedings. As a result, the State argues that the categories of discovery of relevance to the issues in *Comcast* are different to and wider than those of relevance to the present proceedings.

40. This argument of distinction between the respective proceedings is made only in the most general terms. The State has pointed to no specific or relevant distinctions between the pleadings in the respective cases. Nor has the State even attempted to illustrate how any particular distinctions might impact upon the relevance of the disputed categories. I have been

directed to no particular pleading in *Comcast* which it is contended provided essential foundation to the discovery ordered and which is not in substance mirrored in these proceedings.

41. Of course, there are certain obvious distinctions between the two sets of proceedings. For example, whereas there are two sets of *Comcast* proceedings, one challenging the decision to extend the deadline for receipt of tenders and one challenging the decision to award to Esat the right to negotiate for the license, there is only one in the present case. There is also some difference between the parties to the respective proceedings. In *Comcast* the Minister is a defendant, whereas in the present proceedings , he is third-party. However, notwithstanding these distinctions, the proceedings are undoubtedly quite similar. Both proceedings advance essentially the same contentions in relation to the design and makeup of the evaluation phase. Both claim that the tender process was compromised and corrupted by the Minister's actions in favouring Esat and advance broadly similar allegations of alleged wrongs on the part of the Minister.

42. In any event, in its judgment of the discovery application, the Court of Appeal did not clearly endorse the view that the *Comcast* litigation includes a public procurement challenge. Rather, it was satisfied that the documents in question were relevant to the plaintiffs' case as pleaded, regardless of whether the case is grounded on a breach of public procurement principles, or solely in allegations of corruption.

43. The same is the position here. Whilst a claim of breach of public procurement principles may not be advanced in these proceedings, the plaintiffs may nonetheless point to interference with the tender process, departure from the agreed evaluation method or indeed manifest errors as evidence of actions taken to favour Esat. If the plaintiffs are in a position to demonstrate a deliberate attempt to benefit Esat, then many of the allegations of breach of public procurement principles if proven might equally be supportive of a case of corruption. Further, irrespective

of how one characterises the legal basis for the pleas in the present case, if a plea is made, it is one on which the plaintiffs are entitled to rely on for the purposes of moving an application for discovery.

Preliminary objection of the State – analysis and decision

44. Following the delivery of the Court of Appeal judgment, the plaintiffs should, in compliance with O. 31, r. 12(6), have issued an appropriate preliminary letter listing each of the categories of discovery ordered in *Comcast* and fashioned a specific reason referable to the specific pleadings in *this* case as to why the categories of discovery sought were relevant and necessary. The court must be very slow to exempt a party seeking an order for discovery from the requirement of a preliminary letter.

45. However, the State's submission that the court lacks jurisdiction to make any order for discovery in favour of the plaintiffs entirely ignores the proviso to O. 31, r. 12(6), which provides for derogation from the requirement of a preliminary letter on grounds of urgency, consent, the nature of the case or any other circumstance which to the court seems appropriate.

46. Given the long running nature of both this case and of the *inter partes* correspondence regarding discovery, urgency cannot justify the plaintiffs in motioning for discovery before sending a letter seeking voluntary discovery. I further accept that although the State engaged with the plaintiffs in relation to the categories sought, it reserved its position on the plaintiffs' non-compliance with the Rules. There is therefore no consent to the plaintiffs' approach.

47. On the other hand, for the following reasons - some of which have already been touched on above - there are other circumstances which would render it entirely inappropriate to strike out the plaintiffs' application *in limine* for failure to provide a letter seeking voluntary discovery:

- The requirement in the Rules to seek voluntary discovery is framed in mandatory terms and provides that "an order .. directing any party .. to make discovery shall not be made unless" a preliminary letter has issued. However, the jurisdiction to order discovery flows not from the existence of a valid preliminary letter but from compliance with O. 31 r. 12(6) as a whole. Such compliance may take the form of a preliminary letter seeking voluntary discovery or may flow from the occurrence of one or more of the factors listed in the proviso.
- The purpose served by the preliminary letter, as outlined by Morris J. in *Swords,* is to ensure that the party against whom discovery is sought would be in a position to know the documents of which discovery is sought and exercise a judgment on whether the reasons given for requiring these documents to be discovered are valid. In the present case the plaintiffs' solicitor's letter of 17th November 2022 informs the defendant of the categories of documents in respect of which discovery is sought- i.e. the documents forming the subject matter of the *Comcast* discovery. Although no express reasons for seeking such discovery are included, one can infer that the reasons for which the plaintiffs sought each category of discovery, are essentially those articulated by Binchy J. in the Court of Appeal (in respect of those categories appealed in *Comcast*) and Allen J. in the High Court (in respect of those categories which were not).
- Insofar as it might query whether these reasons are insufficient due to distinctions between *Comcast* and the present case, the State - also a defendant in *Comcast* - is uniquely placed to fully understand and articulate not merely such distinctions but also how they impact upon the rationale for the discovery orders in *Comcast*. Yet no specific distinctions were invoked. Nor, by reference to any specific

pleadings, was the relevance of the putative public procurement case in *Comcast* to the discovery ordered in that case demonstrated.

- This court and the parties have the benefit of the judgments of the Court of Appeal and High Court in the *Comcast* proceedings. Together these comprise a detailed examination of each category of discovery sought, a decision in relation thereto and a clear enunciation of the rationale for that decision. These are persuasive judgments in the present proceedings which, although not identical, are similar in the factual allegations they advance against the Minister and consequently, the State. Aside from emphasising that the present proceedings include no public procurement challenge, no specific relevant differences in the pleadings between these two cases which render the *Comcast* discovery judgments inapplicable, have been set out by the State.
- In respect of its own discovery request (upon which I shall comment further below), the State urges this Court to adopt the same approach as was agreed by the *Comcast* plaintiffs.
- The approach adopted by the plaintiffs has been practical and effective. It has avoided duplication of debate between the parties and duplication of consideration by the court of the categories already forming the subject matter of the judgments of the Court of Appeal and the High Court in *Comcast.* It has also achieved resolution of the vast majority of the categories sought. This is unlikely to have been achieved if the plaintiffs had sought different categories of discovery to those ordered/agreed in *Comcast.* I suspect that even slight differences in wording or temporal limit of the categories of discovery sought might have rendered agreement difficult or even impossible.

48. The mischief towards which the rule is directed has not occurred in this case and the State’s argument that the application for discovery ought to be struck out *in limine* for failure

to comply with the Rules is unduly formalistic. By reason of the circumstances identified above, it is appropriate to determine this application without the necessity for a formal letter seeking voluntary discovery having issued at the commencement of this process.

49. None of this means that this court will automatically apply the *Comcast* discovery rulings to this application. Still less will this court be bound by – or indeed particularly influenced by the categories of discovery which were agreed as between the parties in *Comcast.* It remains incumbent upon the plaintiffs and the State in the context of their respective discovery applications to demonstrate the relevance of the categories of discovery sought by reference to the pleadings in this case.

Disputed categories of discovery sought by the plaintiffs

Categories 2 and 3

50. Categories 2 and 3 seek discovery of:

> *"All documents generated between the 1st January 1990 to the 31st December 2002 relating to the design and/or drafting of the RFP, and/or the Information Memorandum, and/or the Supplemental Memorandum and/or the Second Supplemental Memorandum and/or the Evaluation Model and/or the design and/or drafting of any amendments thereto."*

51. No argument arises as to the necessity or proportionality of this category. What is in issue is relevance.

Pleas relied upon as establishing relevance

52. In its initial response of 20th December 2022, the State argued that relevance and necessity had not been demonstrated and, rather curiously also asserted that the pleas advanced in this case "seem to be based on process error/procurement law alone". I am unclear of how this could be the case in the wake of the judgment of the Court of Appeal, per Donnelly J.,

confining the permitted amendments of the statement of claim to those necessary to advance a claim rooted in corruption.

53. In reply the plaintiffs' solicitor fully accepted that they were not running a procurement or process error claim. However, he contended that the manner in which the tender process was both designed and departed from was central to the case. Documents in this category were therefore relevant to the case as pleaded. By way of example only the defendant was referred to para. 34 (b) of the amended statement of claim in which it is pleaded that the Minster on his own or acting through his servants or agents conducted an evaluation process which was unfair, lacked transparency, did not treat tenderers equally and favoured the Esat consortium over the other consortia in the competition.

54. The State's replying affidavit observed that on a plain reading of this plea, it had nothing to do with the design and drafting of the tender documentation. It was said that the evaluation of the tenders by reference to the finalised tender documentation (which the plaintiffs have) is a separate issue from the design thereof.

55. In addition to relying upon para. 34 (b) of the amended statement of claim, the plaintiffs also rely upon para. 34 (p) which, under the main heading "Further corrupt interference" pleads that the Minister corrupted the process or caused the process to be corrupted *inter alia* as follows:

> *"The Minister, by himself or acting through his servants or agents carried out an evaluation which departed from and failed to follow the Evaluation Model which had been adopted by the Project Group. The departure from, failure to follow, and discarding of, the Evaluation Model occurred after the closing date for the receipt of tenders and during the evaluation phase of the competition and had the effect of distorting the outcome of the process and favouring Esat Digifone."*

56. Thereafter, sixteen particulars are provided including for example, discarding quantitative evaluation criteria, basing the overall rankings solely on qualitative assessments, altering the weightings as between the first and second draft evaluation reports such as to waiver Esat and concealing the weightings actually adopted.

57. It is evident that the pleas at paras. 34 (b) and 34 (p) relate to actions occurring considerably after the design and drafting of the documents of which discovery is now sought. Counsel for the plaintiffs accepted that the discovery sought related to a stage in the process, which was "*one step away*" from that impugned, namely the conduct of the evaluation. It is also apparent that no corruption is alleged in the drafting or design of the process.

58. However, the plaintiffs argue that the designers and drafters of the process were conscious of the need to ensure that the process was, and was seen to be, free from political influence. As the tender process was designed with that in mind, it is therefore reasonable to anticipate that documents relating to design and drafting of the RFP, Information Memorandum and Evaluation Model would discuss and explore the rationale for the particular overall evaluation method ultimately selected.

59. In addition, the plaintiffs plead that the Minister departed from the agreed process during the evaluation stage of the competition and that this had the effect of distorting the outcome of the process and favouring Esat. They argue that in order to demonstrate both that the process was departed from and why this occurred, it is necessary to interrogate the design and purpose of the process. For example, the plaintiffs will contend that the quantitative evaluation criteria were discarded with the object and effect of favouring Esat and of concealing that preference. Documents demonstrating the purpose and importance of the quantitative evaluation criteria might demonstrate why the Minister might have, in pursuit of a corrupt agenda, departed from these criteria during the evaluation phase of the competition.

Analysis and decision in relation to categories 2 and 3

60. These proceedings engage issues as to how the project group was supposed to conduct its business as well as the manner in which it did so. The plaintiffs have pleaded that the tender process was designed in a particular manner and for a particular purpose. The pleas in relation

to the design, purpose and legal effect of the competition process are all denied in the State's defence, and it is likewise denied that same were binding terms of the competition. The parties have therefore joined issue on design, purpose and legal effect of the competition process. The category of documents sought are likely to contain relevant material either supporting or undermining the plaintiffs' contentions in relation to the design and purpose of the tender process.

61. Furthermore, the plaintiffs' case is that the process of the evaluation of the bids and the award of the licence was subverted and corrupted to favour Esat. The defendants' case is that it was not. This engages an assessment of how the process ought to have been conducted as well as how it was conducted. Discovery of documents in relation to the review, assessment or evaluation of tenders would be of significantly limited value without full information in relation to the guiding principles and policies by reference to which that review was to have been carried out.

62. Although no allegation of corruption is made in relation to the design and construction of the tender process, the corruption alleged to have occurred later may be evident from departures from particular aspects of the envisaged tender process, particularly if those aspects were designed with the prevention of corruption in mind.

63. I do not fully understand the State's objection that the documents sought may be relevant to a procurement claim but are not relevant to a corruption claim. The guiding principles and policies by reference to which the tender process was designed are just as likely to be relevant to a corruption claim as a public procurement claim.

64. I will order the State to make discovery of the documents sought at categories 2 and 3. The State made no argument in relation to the limitation of the timeframe from that set out in the request (1st January 1990 to 31st December 2002). This was also the timeframe permitted in respect of all documents in Allen J.'s judgment in *Comcast*. I agree with Allen J. that, once

it is recognised that the plaintiffs' case is that the process was allegedly subverted and the project group and consultants side-lined, it can readily be appreciated that documents which may have come into existence after the date of announcement might be relevant. I therefore see no reason to limit the time period in a manner different to that specified in the request for voluntary discovery.

Category 22

65. Category 22 seeks discovery of:

> "*All documents generated between the 1st January 1990 to the 31st December 2002 relating to the investment of Advent International in Communicorp.*"

66. Once again, no argument arises as to the necessity and proportionality of this request. What is in issue is relevance.

Pleas relied upon as establishing relevance

67. The plaintiffs rely upon para. 45 of the amended statement of claim which pleads that the award of the licence to Esat was on the basis of, *inter alia*, misrepresentations. Para. 45 (c) pleads that on 12th September 1995 at Esat's oral presentation, Mr. O'Brien stated that Advent International had already invested a total of €19.5 million in Communicor since about 1994, which statement and representation was false. It is also claimed that Mr. O'Brien stated that Advent had given a binding commitment to advance €30 million to Communicor to fund the equity commitment of Communicor when there was in fact no agreement in place to that effect nor any commitment or guarantee of the type asserted. These allegations are expressly denied at para. 129 of the State's defence.

68. The State's response to the discovery request is that para. 45 (c) does not relate to any actions on the part of the State and that the State is a stranger to the allegations made. The State

refers to the judgment of the Court of Appeal in relation to this category in *Comcast*, in which per Binchy J. stated:

> *"Even though the documents requested might, if available, be of some relevance to the case made by the [plaintiffs] respondents against the [State](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 [Esat Digifone] and [Mr O'Brien]. In short, the [plaintiffs] are seeking an order of discovery as against the [State] not in relation to the case they make against the [State], but in relation to the case they make against their co-defendants. 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."*
> *"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 [plaintiffs] shall indemnify the [State]against all costs incurred in complying with this part of the order to be made by the Court."*

69. The State does not object to the court ordering discovery of this category of documents on the same basis. The plaintiffs are not agreeable to furnishing an indemnity along the lines directed by the Court of Appeal in *Comcast.*

<u>*Analysis and decision in relation to category 22*</u>

70. In the High Court in *Comcast*, Allen J. concluded that the documentation sought in this category of discovery was relevant to the respondent's case that there was no or no adequate assessment of the financial strength and capacity of the Esat consortium. On appeal Binchy J. stated that that might well be so but that the documentation had not been sought in that context and for that reason. Rather, it was clear that the documents were sought in order to be able to prove the falsity of the representations made by Esat and Mr. O'Brien to the project group and to AMI. The same is true here. Even in its written submissions to the court, the plaintiffs state:

> "*The objection of the State defendants in relation to this category appears to be based on a contention that the category seeks non-party discovery. That is certainly not* so [as] [the State] *is only required to make discovery of documents that come within the category and are within its own possession power or procurement. This is clearly a relevant category and paragraph 45(c) of the Amended Statement of claim directly concerns the claim of an investment by Advent in Communicorp which, it is claimed, was a false claim by Mr O'Brien. If the [State] does not have documents that come*

> *within the category, so be it, but that is not a basis upon which to refuse to make the discovery sought."*

71. I see no distinction between the plea grounding the request for discovery of this category of documents (para. 45(c) of the amended statement of claim) and the equivalent paragraph considered by the Court of Appeal in the *Comcast* proceedings. I view the issue of the relevance and necessity of this particular category of discovery as having been authoritatively established by the Court of Appeal judgment.

72. In so far as concerns the indemnity, the plaintiffs have advanced no argument as to why this court ought to depart from the judgment of the Court of Appeal on a precisely similar category of discovery sought on the basis of pleadings which, on this point, are indistinguishable from *Comcast*.

73. Like Binchy J., this court will decline to take a technical view resulting in the anomalous situation whereby the plaintiffs would be unable to obtain an order for discovery of documentation relevant to the determination of their claims against Mr. O'Brien. I adopt the approach indicated by Binchy J. at para. 90 of his judgment and hold that the best way of addressing the issue in order to do justice to the parties is to treat this part of the application as non-party discovery. As therefore I am satisfied that the documents sought are relevant and necessary for the resolution of the dispute between the plaintiffs and Mr. O'Brien, the discovery sought should be ordered on the same terms that it would be ordered if it were an application for non-party discovery – i.e. the plaintiff should indemnify the State against the costs incurred by them in making discovery of this category.

The State's application for discovery against the plaintiffs

74. By letter dated 22nd November 2022, the State sought discovery from the plaintiffs of twelve categories of documents, many of which included sub-categories. Four categories of discovery have been agreed. Of the categories remaining in dispute, only category 2 is fully in

dispute. The other categories, 4, 5, 7, 8, 9, 10 and 11, involve a dispute limited only to the temporal scope of the appropriate order for discovery. I will consider each in turn.

Category 2

75. Category 2 seeks discovery of:-

> *"All documents relating to the arrangements by which the Plaintiffs, or any of them, brought and/or bring the within proceedings, including but not limited to:*
> *(i) any authority(s) and/or assignment(s);*
> *(ii) any agreement(s) and/or contractual document(s); and*
> *(iii) any heads of agreement."*

Pleas relied upon as establishing relevance

76. The State's letter requesting voluntary discovery cites para. 29 of the amended statement of claim which pleads that:- *"The first named plaintiff was a consortium which was made up of the second named plaintiff, Motorola, Unisource Mobile and the Electricity Supply Board."*

77. The State's defence pleads at paras. 16 to 19 that the plaintiffs are not the legal entity which submitted a tender for the GSM licence or which participated in the process and have no entitlement to maintain these proceedings or to the reliefs claimed in these proceedings; that by virtue of the plea made at para. 29 of the amended statement of claim the plaintiffs are precluded from maintaining these proceedings against the State; and that the plaintiffs have no or no proper authority to act in place of and/or on behalf of the entity which submitted a tender.

78. At para. 135 the State somewhat cryptically pleads that "*if and insofar as the plaintiffs are entitled to damages (which is denied), such damages are extinguished or limited by reference to the agreement(s) underpinning the entity which submitted the tender*".

79. The plaintiffs join issue with these pleas in their reply to the defence. The plaintiffs deny that they have no entitlement to maintain these proceedings as the first named plaintiff is the legal entity which submitted a tender for the licence and the second named plaintiff is and

was a shareholder in the first named plaintiff and has suffered loss and damage owing to the actions of the defendants. The plaintiffs plead that the first named plaintiff was the legal entity which submitted the tender and, regardless of the make-up of its shareholding, remains the same legal entity and is not precluded from maintaining these proceedings or obtaining relief.

80. The plaintiffs also deny at para. 21 that any entitlement of the plaintiffs to damages is distinguished or limited by reference to an agreement or agreements underpinning the entity which submitted the tender.

81. The plaintiffs raised a notice for particulars concerning these pleas in the defence. At particular 2, the plaintiffs' solicitors requested the State to provide particulars of the claim that the plaintiffs are not the legal entity which submitted a tender or participated in the process. The State was asked to specify which legal entity or entities they assert did submit a tender. The State's response was that this was particularised in the defence but that, without prejudice, the identity of the relevant parties was within the knowledge of the plaintiffs. Otherwise, this was stated to be a matter for legal argument. This is slightly expanded upon in the response to particular 3 stating that the amended statement of claim does not explain the basis on which the plaintiffs – "which do not on the pleadings constitute the pleaded "consortium"" – are in a position to maintain the proceedings.

82. At particular 5, the State was requested to particularise the claim that the plaintiffs did not have proper authority to act in place and/or on behalf of the entity which submitted the tender. The reply of the State to this was that the agreement(s) underpinning the entity which made the tender and the existence (if any) of any authority to act in place of and on behalf of the entity which submitted a tender are within the knowledge of the plaintiffs. The State reserved the right to plead further upon receipt of discovery.

83. At particular 8, the State was also requested to provide particulars of the plea at para. 135 of the defence that any damages to which the plaintiffs are entitled are extinguished or

limited by reference to the agreements underpinning the entity which made the tender. The State was asked to provide particulars of the material facts relied upon for this plea. The response was that this was a matter for legal argument by reference to the agreements underpinning the entity which made the tender which are peculiarly a matter within the knowledge of the plaintiffs. Once again, the State reserved the right to plead further upon receipt of the discovery.

84. In light of all of the above pleadings, the State contends that the documents sought at category 2 are relevant to the matters in question as they relate to the entitlement of the plaintiffs to maintain these proceedings and/or the entitlement to the reliefs claimed in these proceedings.

85. In reply to the State's request for discovery of 22nd December 2022, the plaintiffs' solicitor expressed puzzlement as to what standing or related issue is sought to be raised by the State. The plaintiffs' solicitor pointed out that the pleas in the State's defence that neither of the plaintiffs were the legal entity that submitted the tender are patently wrong. Although therefore the State appear to place reliance on the description of Persona as a consortium, this is no more than a shorthand description of the fact that different entities were shareholders in Persona as identified in para. 29 of the amended statement of claim. The plaintiff was nonetheless prepared to make discovery of the documents sought at categories 1 and 2 up to 31st December 2002.

86. The State make much of this agreement to make discovery on the part of the plaintiffs, but it is clear that the plaintiffs' initial agreement was premised on a misapprehension as to the precise documents which the State sought. Thus, the plaintiffs had no difficulty with disclosing the arrangements by which they have authority to bring the proceedings on behalf of the "Persona consortium" but did not understand the State to be requesting documents directed

towards some other purpose, namely the seeking of information in relation to how the plaintiffs were funding the litigation.

87. The first inkling that the plaintiffs had that category 2 might be directed towards funding arrangements emerged from the State's letter of 25th January 2023 in which it is stated that no date limitation should apply in respect of category 2 since the arrangements by which the plaintiffs brought and/or bring the proceedings could have been changed or modified after the cut-off date proposed by the plaintiffs.

88. By letter dated 7th February 2023 the plaintiffs' solicitor responded that there is no plea in the defence that there has been a change or modification concerning the arrangements by which the plaintiffs brought and/or brings the proceedings and that there is therefore no justification for a temporal scope beyond 31st December 2002.

89. By letter dated 27th February 2023 the State's solicitor observed that the plaintiffs had agreed the wording of category 2 and that only the date restriction remained at issue. The plaintiffs' solicitor responded on 1st March 2023 stating that they had understood that the category related to documents relating to the arrangements between the plaintiffs, Motorola, Unisource Mobile ("Unisource") and the ESB concerning the bringing of the proceedings. It was therefore suggested that in order to avoid any ambiguity category 2 be rephrased as follows:

> "*all documents relating to the arrangements between the plaintiffs or any of them and between any of the plaintiffs and any of Motorola, Unisource Mobile and the Electricity Supply Board relating to the bringing of the proceedings including but not limited to*
> *(i) any authority(s) and/or assignment(s);*
> *(ii) any agreement(s) and/or contractual document(s); and*
> *(iii) any heads of agreement.*"

90. If this category was adopted, then the plaintiffs in turn would agree that no temporal limit would apply to the category.

91. The State issued its motion for discovery the following day. In its grounding affidavit, it is averred that the plaintiffs' reformulation of the wording of category 2 "*defeats the purpose*

of the category". The State has specifically pleaded that the plaintiffs have no entitlement, including no continuing entitlement, to maintain the proceedings which is reflected in the wording of category 2 which seeks the discovery of the arrangements by which the plaintiffs "brought and/or bring the proceedings". Reference is made to the judgment of the Supreme Court on the funding application to the effect that third party litigation funding by an entity with no independent interest in the underlying proceedings is prohibited under Irish law. It is averred that, as recently as 2015 (thirteen years after the 2002 cut-off date proposed by the plaintiffs), the plaintiffs had entered into a third party litigation funding agreement in order to maintain the proceedings. In particular, the plaintiffs had sought (and it appears procured subject to court approval) the financial backing of Harbour Fund III LLP an exempted limited partnership under the laws of the Cayman Islands. It was contended that no date limitation ought to be imposed on this category as it is known that arrangements by which the plaintiffs "brought and/or bring" the proceedings changed in 2015 and must have changed after the judgment of the Supreme Court in 2017 holding that the 2015 litigation funding agreement was champertous and hence unlawful.

92. The plaintiffs' solicitors replying affidavit of 31st March 2023 avers that, as a consequence of the judgment of the Supreme Court in the funding application, no funding arrangements were entered into with Harbour Fund III LLP or any other third party funder. It is averred that the plaintiff companies have sought and obtained additional capital in order to continue with the prosecution of the proceedings. Mr. Tony Boyle and Mr. Michael McGinley (being the shareholders of the second named plaintiff) each agreed to invest €200,000 for a 10% interest in the first named plaintiff. In order to provide for the 10% interest agreed with Mr. Boyle and Mr. McGinley, new shares were allotted to the second named plaintiff which is the ultimate parent company of the first named plaintiff and to Mr. Boyle and Mr. McGinley, respectively. The new allotment of shares resulted in the share capital of the first named

plaintiff being held as follows: Sigma Wireless Networks Ltd (second named plaintiff): eight ordinary shares representing 80% of the issued share capital of the first named plaintiff; Mr. Tony Boyle: one ordinary share (representing 10% of the issued share capital of the first named plaintiff); Mr. Michael McGinley: one ordinary share (representing 10% of the issued share capital of the first named plaintiff). The requisite filings have been made in the companies registration office. It is the intention of the plaintiff companies to seek and if possible, obtain additional capital funding by means of equity investment from other parties. It is contended that investment by means of equity capital into the plaintiffs' companies does not constitute third party litigation funding and is neither an abuse of process nor a breach of the rules on maintenance and champerty.

93. Essentially, the defendant's present contention is that category 2 is relevant to the issue of whether and how the plaintiffs have the capacity to continue to maintain the proceedings and also to the issue of whether any arrangement or proposals in funding this litigation will breach the principles of champerty and maintenance. The Sate submits that discovery of this category of documents ought to be without limitation as to time or as to the identity of any third parties. The State observes that any agreement underpinning the arrangements with Mr. Boyle and Mr. McGinley would not be caught either by the plaintiffs' reformulated category or by the temporal limitation proposed by the plaintiffs in respect of the original wording of category 2.

Analysis and decision in relation to category 2

94. The relevance of this category of documents is to be determined by the pleadings. Do the pleadings establish that the financial capacity of the plaintiffs to continue to maintain the proceedings is in issue? Do the pleadings put in issue the question of whether such agreements

or proposals as may have been or are now in place in relation to the funding of the proceedings breach the principles of champerty and maintenance?

95. Fairly construed and in their natural and ordinary meaning, the pleas relied upon by the State in its defence do not put these matters in issue.

96. The generic pleas that the plaintiffs have no entitlement to maintain the proceedings or to the reliefs claimed against the State could not lay the groundwork for this category of discovery. The plea that the plaintiffs are not the legal entity which submitted the tender for the licence or participated in the process has nothing whatsoever to do with funding but raises the issue of the authority of the plaintiffs to act on behalf of the entity which submitted the tender. This is made entirely apparent by the repeated reference to para. 29 of the amended statement of claim and by the pleas that the plaintiffs have no proper authority to act on behalf of the entity which submitted the tender.

97. Entitlement to act on behalf of the tenderer is therefore the issue raised in the defence. The defence does not raise any issue in relation to the financial capacity of the plaintiffs to continue these proceedings or as to whether any funding arrangements are in breach of the rules of champerty and maintenance.

98. Notwithstanding the fact that the plaintiff launched the funding application on 25th March 2015 and made (redacted) disclosure of the then extant funding arrangements on foot of the order for discovery of Donnelly J. of 30th June 2015, the State's defence includes no plea in relation to the plaintiffs' funding arrangements. Further, the State's defence, delivered three years after the Supreme Court judgment on the funding application, could have included appropriate pleas in this regard.

99. Not only are such pleas not advanced in these proceedings, but in this particular respect, the State's defence is in precisely the same terms as in *Comcast*. Thus, in the absence of any question of outside funding, the State also denies the entitlement of the *Comcast* plaintiffs to

maintain the pleadings or obtain relief against the State. Similarly, the State pleads that the *Comcast* plaintiffs are not the legal entity which submitted the tender for the licence; that by virtue of a plea on the part of the *Comcast* plaintiffs as to the make-up of the Salstar consortium (similar to that at para. 29 of the amended statement of claim in the present proceedings) the *Comcast* plaintiffs are precluded from maintaining the proceedings; and finally that the *Comcast* plaintiffs lack authority to act in place of and on behalf of the entity which submitted the tender for the licence.

100. In the *Comcast* proceedings the State has sought and obtained (on consent) identical discovery to that now sought from the Persona plaintiffs. Although the *Comcast* plaintiffs did not seek to impose a time limit on the discovery sought, this cannot bind the *Persona* plaintiffs to do likewise, particularly as it appears that the purpose of the present discovery request is quite different to that in *Comcast.*

101. It is only fair to the plaintiffs to observe that I have been referred to no authority suggesting that where the original wronged party is a corporate entity, it is impermissible for the shares in that entity to be transferred to a third party so that the ultimate beneficial interest in the proceeds of the cause of action will in substance transfer. Indeed, dicta from the decision of Clarke C.J. in *SPV Osus Ltd v. HSBC Institutional Trust Services (Ireland) Ltd* [2019] 1 IR 1 suggest that there is a reasonable argument to be made that the arrangements entered into by the plaintiff companies for obtaining additional capital are not such as to amount to champerty and maintenance.

102. The present application for discovery may be contrasted with the position that pertained at the time of the plaintiffs' funding application. Donnelly J. ordered disclosure of the funding agreement with redactions of the funding budget timeline and other matters. This was of course because, in the context of the funding application, the funding agreement was a matter in issue, and it was clearly appropriate that the court would have some appreciation of the broad

parameters of same. Such matters are not, however presently in issue in the proceedings as currently pleaded.

103. For the reasons set out above, the question of the plaintiffs being non-suited by reason of champerty and maintenance is not presently in issue in these proceedings. The State cannot obtain an order for discovery merely because pleas to this effect might potentially have been included. Nor, it scarcely needs to be said, can discovery be requested on the basis that the State might in due course amend its defence. A discovery application is assessed on the basis of the pleadings as they stand at the time of the application.

104. The State also argues that there is a genuine question not just as to financial capacity and third party litigation funding but as to the entitlement of the plaintiffs to bring and maintain the current proceedings. It is argued that it is relevant therefore to interrogate changes in the makeup of the consortium over time and that documents touching upon such changes, - as would be encompassed by the category 22 request without time limitation- are therefore relevant.

105. I cannot agree. Whilst there may well have been changes to the consortium over time, the pleas in the State's defence are in relation to the plaintiffs' authority to maintain the proceedings on behalf of the original tenderer. The genesis for this plea in the State's defence is the plea in para. 29 of the plaintiffs' amended statement of claim that the entity which submitted the tender, the first named plaintiff, was a consortium including not only the second named plaintiff but also Motorola, Unisource and the ESB.

106. Issue has been joined in relation to whether the current plaintiffs have authority to act on behalf of the entity which submitted the tender. The plaintiffs' response is that the entity which submitted the tender - the first named plaintiff - is a corporate entity, the identity of which has not changed regardless of its shareholding. However, as the State has put in issue the authority of the plaintiffs to act on behalf of the entire original consortium - including not

only the second named plaintiff but also Motorola, Unisource and the ESB- it is appropriate that the plaintiff make discovery of documents relating to this issue. Such documents are adequately identified in the plaintiffs' draft amended category at set out at para. 89 above. In terms of temporality, as the State has made it clear that it disputes the authority of the plaintiffs to act on behalf of the initial tenders both at the time of the institution of the proceedings and continuing to date, it is appropriate that there be no time limitation on this discovery of this category.

Temporal scope in respect of categories 4, 5, 7, 8, 9, 10 and 11

107. The categories sought are set out in full at the appendix to this judgment. In summary, they are as follows:

Category 4 –seeks documents relating to the allegation that, the Minister abused his public office and interfered with the tender process and abused his office to ensure that Esat Digifone would be awarded the Licence and that he accepted payments and/or benefits in that regard and in so doing he breached the Prevention of Corruption Act 1906, as amended; while all the while representing that the tender process was fair

Category 5 –seeks all documents relating to the allegation that the Minister acted unlawfully and maliciously and committed acts with targeted and prejudicial malice towards the plaintiffs, knowingly acted ultra vires with reckless indifference and as such, deliberately or dishonestly abused the power conferred upon him, abused authority, and abused trust with the known consequences that it would cause injury and damage to the plaintiffs and committed misfeasance in public office.

Category 7 –seeks all documents relating to the allegation that, had the wrongful acts not been committed, the first named plaintiff would have won the tender competition in respect of the Licence or, in the alternative, would not have lost the chance of winning it."

Category 8 –to the extent not captured by other categories seeks all documents relating to the alleged "particulars of unlawful and wrongful acts of corruption" pleaded in the amended statement of claim.

Category 9 –seeks all documents relating to the allegation that the purpose and effect of the acts of corrupt interference in the tender process by the Minister and the defects in the evaluation process, was to ensure that Esat Digifone would be declared the winner.

Category 10 –seeks all documents relating to the allegation that the Minister was paid monies and/or conferred with benefits for the purpose of ensuring, and/or as a reward for ensuring, that Esat Digifone won the tender competition and was granted the licence.

Category 11 –seeks all documents relating to the allegations that:

(i) Mr O'Brien caused the payments and benefits referred to above to be made and/or conferred upon the Minister for the purpose of ensuring that Esat Digifone was granted the Licence

(ii) Mr O'Brien engaged in a conspiracy with the Minister;

(iii) Mr O'Brien obtained the licence on behalf of Esat Digifone on the basis of misrepresentations and breaches of the competition rules and by unlawful means; and

(iv) as a result of the wrongful actions of Mr O'Brien and the Minister, Esat Digifone was awarded the licence and Mr O'Brien benefited and was enriched therefrom."

108. The plaintiffs have agreed to make discovery of the documents falling within these categories and relevance and necessity are therefore not in issue. What is in issue is temporal scope. The plaintiffs maintain that the same temporal scope ought to apply to its obligations to make discovery to the State as that which applies in relation to the State's obligation to make discovery to the plaintiffs, in other words, between 1st January 1990 and 31st December 2002.

109. The State points out that there was no temporal scope in the discovery agreed with the *Comcast* plaintiffs. However, little weight can be attached to this.

110. In response to the plaintiffs' contention that an equivalent reciprocal temporal limitation ought to apply, the State proposed that the plaintiffs confirm that they would not rely at trial on any documents other than those generated between 1st January 1990 and 31st December 2002 in support of the allegations identified in categories 4, 5, 7, 8, 9, 10 and 11. If so, then the State would accept the proposed time limitation. The plaintiffs have rejected this proposal.

Analysis in relation to temporal limitation

111. The plaintiffs have effectively conceded relevance in respect of the documents sought. Having reviewed the categories of documents requested, I agree that same are relevant to the matter in issue between the parties. The plaintiffs maintain that it would be unfair and disproportionate to proceed on the basis of asymmetry of temporal scope as between the plaintiffs' discovery obligations and those of the State. However, once documents are adjudged to be relevant (and in this case are accepted as such), then the burden will lie on the requested

party to put forward reasons as to why discovery ought not be directed. The plaintiffs do not aver to any particular facts with a view to demonstrating that discovery of these categories of documents without temporal limit is not necessary, is not proportionate or would be unduly burdensome.

112. I do not accept the plaintiffs' argument that, merely because they have agreed discovery from the State defendant on the basis of a particular temporal limit, they ought necessarily to be entitled to confine their own discovery to that temporal limit. The plaintiffs could have pursued discovery as against the State without temporal limit or on the basis of an alternative temporal limit but chose not to do so (save in respect of one category of documents only, namely category 3). The argument based on asymmetry cannot confine the scope of the State's entitlement to discovery, as a substantial aspect of this asymmetry was within the plaintiffs' own control.

113. The plaintiffs have submitted that discovery spanning a 30-year period is self-evidently disproportionate. This is insufficient to demonstrate that the discovery is unduly harsh or burdensome. The plaintiffs must detail such searches as have been carried out or will require to be carried out to comply with the discovery order and to demonstrate that compliance with the order would entail excessive costs or use of resources. It is clear that complying with discovery as agreed and ordered in this case will be a difficult and detailed process for all parties. However, in the context of extremely complex, sensitive and difficult proceedings this cannot justify an arbitrary temporal limit.

114. I will list this matter for final orders and costs at 11.00am on Friday 21st July, 2023.

<u>Appendix</u>

Category 4 –
"All documents relating to the allegation at paragraph 32 of the Amended Statement of Claim that, on the basis of the matters particularised in the Amended Statement of Claim, in breach of contract, including the implied terms and conditions thereof, and in breach of the competition rules and procedures provided for and in breach of duty (including breach of statutory duty) and by reason of deceit, misrepresentation, fraudulent misrepresentation, undue influence, corrupt practices, conspiracy, fraud, and in breach of the Plaintiffs' legitimate expectations and in breach of the Plaintiffs' constitutional and property rights and in breach of the laws of the European Community/European Union (by reason of the alleged corruption), including but not limited to the general principles of transparency, equal treatment, non-discrimination, good administration, competition, objectivity, proportionality and effective judicial protection, the Minister abused his public office and interfered with the tender process and abused his office to ensure that Esat Digifone would be awarded the Licence; he accepted payments and/or benefits made by or on behalf of the Fourth Named Defendant and/or Esat Digifone so as to ensure that Esat Digifone would be awarded the Licence and/or to reward the Minister for interfering in the process for the benefit of Esat Digifone and in so doing he breached the Prevention of Corruption Act 1906, as amended; while all the while representing that the tender process was fair."

Category 5 –
"All documents relating to the allegation at paragraph 33 of the Amended Statement of Claim that the Minister, on his own or acting through his servants or agents was acting in purported exercise of his powers and functions and was purportedly acting in the best interests of the public and purportedly in the best interests of the First Named Plaintiff as a competitor, but, the Minister acted unlawfully and maliciously, and committed an act or acts with targeted and prejudicial malice towards the Plaintiffs, and/or knowingly acted ultra vires or acted with reckless indifference and as such, deliberately or dishonestly abused the power conferred upon him, abused authority, and abused trust with the known consequences that it would cause injury and damage to the Plaintiffs and committed misfeasance in public office."

Category 7 –
"All documents relating to the allegation at paragraphs 34 and 35 of the Amended Statement of Claim that, had the wrongful acts not been committed, the First Named Plaintiff would have won the tender competition in respect of the Licence or, in the alternative, would not have lost the chance of winning it."

Category 8 –
"To the extent not captured by Categories 4 to 7 inclusive above, all documents relating to the alleged "particulars of unlawful and wrongful acts of corruption" pleaded in the Amended Statement of Claim."

Category 9 –
"All documents relating to the allegation at paragraph 35 of the Amended Statement of Claim that the purpose and effect of the acts of corrupt interference in the tender process by the

Minister, by himself or acting through his servants or agents, and the defects in the evaluation process, was to ensure that Esat Digifone would be declared the winner."

Category 10 –
"All documents relating to the allegation at paragraph 36 of the Amended Statement of Claim that the Minister was paid monies and/or conferred with benefits for the purpose of ensuring, and/or as a reward for ensuring, that Esat Digifone won the tender competition and was granted the Licence."

Category 11 –
"All documents relating to the allegations at paragraphs 41, 42, 43, 44, 45 and 46 of the Amended Statement of Claim inter alia that:

(i) the Fourth Named Defendant caused the payments and benefits referred to above to be made and/or conferred upon the Minister for the purpose of ensuring, and/or as a reward for ensuring, that Esat Digifone won the tender competition and was granted the Licence and that in so doing, he breached the rules of the tender competition and breached the provisions of the Prevention of Corruption Act 1906, as amended and also has been guilty of fraud and infringement of the Plaintiffs' constitutional rights;

(ii) the Fourth Named Defendant engaged in a conspiracy with the First Named Defendant;

(iii) the Fourth Named Defendant obtained the Licence on behalf of Esat Digifone and/or ensured that Esat Digifone would be awarded the Licence, on the basis of misrepresentations and breaches of the competition rules and by unlawful means; and

(iv) as a result of the wrongful actions of the Fourth Named Defendant, Esat Digifone was awarded the Licence and the Fourth Named Defendant benefited and was enriched therefrom."