THE COURT OF APPEAL
CIVIL

Neutral Citation Number: [2020] IECA 36

Record Number: 2017/551

Faherty J.
Haughton J.
Power J.

BETWEEN/

BRIAN MURPHY

APPLICANT/APPELLANT

- AND –

THE REVENUE COMMISSIONERS AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS/CROSS-APPELLANTS

JUDGMENT of Mr. Justice Haughton delivered on the 27th day of February, 2020

Introduction

1. This an appeal from an order made by Ní Raifeartaigh J. on 3 November 2017 granting limited discovery under two categories on foot of the appellant's application for discovery in judicial review proceedings in which the appellant seeks orders restraining the respondents from further prosecuting the appellant for a number of Revenue offences on foot of summonses issued on 18 February 2014 and 12 October 2015. The appellant seeks discovery of five categories as originally sought. The respondents have cross appealed and oppose all the discovery sought.

2. As the Statement Required to Ground Application for Judicial Review and the Statement of Opposition are the pleadings that must frame any order for discovery, it is necessary to refer at the outset to the core pleas.

3. In the Statement of Grounds at (e) the main grounds pleaded by the appellant are as follows: -

> "(1) The Applicant and First Respondent entered into terms of settlement including a payment schedule on the basis that enforcement action would not be initiated, existing prosecutions would not continue and no new prosecutions would be initiated, and the Respondents have contravened same.
>
> (2) It would be unjust and inequitable to permit the prosecutions proceed given the agreement between the Applicant and the First Respondent.

(3) The Respondents have a duty to adhere to the agreements of the First Respondent compromising revenue liabilities, which the Respondents have failed to do.

(4) The First Respondent represented and [sic] and/or adopted a position, such as amounted to promises or representations, express or implied, not to take enforcement action, that prosecution in being would not continue and that prosecutions would not be initiated, addressed to the Applicant, which formed part of a transaction or series of transactions definitively entered into, or a relationship between the Applicant and First Respondent, such as created an expectation, as was intended by the First Respondent, reasonably entertained by the Applicant, that the Respondents, and each of them, would abide by the representations and promises and of such an extent that it is unjust to permit the Respondents to resile from the same. The Applicant has a legitimate expectation that enforcement action would not be initiated, existing prosecutions would not continue and no new prosecutions would be initiated, which expectation has been contravened.

(5) The Code of Practice for Revenue Audit and the Revenue Customer Charter establish clear, fair and equitable set of guidelines to be followed by the First Respondent. The Applicant has a legitimate expectation that the Fist Respondent will adhere to the said Code and Charter when dealing with the Applicant. Without prejudice to the generality of the foregoing, under the Code Revenue has an duty to:-

(i) provide the necessary information and all reasonable assistance to enable the applicant to clearly understand his obligations and entitlements
(ii) administer the law fairly, reasonably and consistently
(iii) fairly administer tax law recognising certain basis rights
(iv) collects taxes and duties efficiently which have been contravened.

(6) The First Respondent has failed to act transparently and clearly in its dealings with the Applicant.

(7) The First Respondent has, with regard to the applicant, exercised its discretionary powers inconsistently, unfairly and capriciously, such that it would be unjust and inequitable to permit the prosecutions proceed."

4. In the Statement of Opposition, the respondents in paragraph 1 assert that the claims made are not justiciable, and in paragraph 2 it is pleaded that in the alternative, the Statement of Grounds discloses no sufficient grounds upon which the court could grant judicial review. The pleas most relevant to the discovery sought are as follows:

"2. The criminal proceedings commenced against the Applicant in October 2015 do not relate to the tax liabilities the subject of the Instalment arrangement offered by the First Respondents ("Revenue") on 31 August 2015 and subsequently purportedly accepted by the Applicant (though, according to him on a mistaken basis as to its effect). Rather, these criminal proceedings relate to the Applicant's income tax for

the years 2008-2012. The separate criminal proceedings that had already been commenced against the Applicant in February 2014, relate to wholly separate VAT liabilities. The Applicant unsuccessfully sought to prohibit this 2014 prosecution in a separate judicial review. There is no relationship between the Proceedings in respect of which Pierse Fitzgibbon were instructed by Revenue or the instalment arrangement upon which the Applicant seeks to rely in support of this application for judicial review and the impugned prosecutions in respect of the summonses dated 18 February 2014 and/or 12 October 2015.

It is denied that the Applicant and Revenue entered into settlement terms including a payment schedule on the basis that enforcement action would not be initiated, existing prosecutions would not continue and no new prosecutions would be initiated. No such agreement was ever made by Revenue and no representation to that effect was made to the Applicant by Revenue or on its behalf and no such agreement or representation is disclosed or identified in the Applicant's Statement of Grounds or in the Verifying Affidavit sworn by him.

3. By letter of 31 August 2015, Revenue, through its solicitors, indicated to the Applicant that Revenue was prepared to suspend legal proceedings entitled "The High Court, Revenue, Record No. 2015/195R, Between Michael Gladney, Plaintiff and Brian M. Murphy, Defendant" – seeking judgment in the total sum of €341,657.31 for the benefit of the Central Fund in respect of the Applicant's liability for Income tax and interest for the period 1 January 2013 to 31 December 2013 and VAT for the period 1 January 2015 to 28 February 2015 "("the Proceedings") – provided that the Applicant adhered to a specified instalment arrangement as set out in the letter. The said letter expressly stated that, in the event of the arrangement breaking down, the Proceedings would be resumed immediately.

4. Revenue did not represent to the Applicant and/or adopt a position (addressed to the Applicant) that it would not take enforcement action, the prosecution in being would not continue and that prosecutions would not be initiated, whether as alleged by the Applicant in the Statement of Grounds or at all. On the contrary, it was at all times made clear to the Applicant (and the Applicant at all material times was or ought to have been aware) that any instalment arrangement entered into in relation to the Proceedings was without prejudice to, and did not affect, any other Revenue enforcement action and/or prosecution in relation to the applicant.

5. Revenue did not create any expectation (and the Applicant did not reasonably entertain any such expectation), that Revenue would not take enforcement action, the prosecution in being would not continue and that prosecutions would not be initiated, whether as alleged by the Applicant in the statement of grounds or at all.

6. It is denied that the Applicant has the alleged or any legitimate expectation that enforcement action would not be initiated, existing prosecutions would not continue and no new prosecutions would be initiated, whether as alleged by the Applicant in the Statement of Grounds or at all. Insofar as the Applicant had any such

expectation (which is denied) it was not a reasonable one and derived not from any representation made to him but rather from a mistake on the part of the Applicant and it would be wholly contrary to the interests of justice, and contrary to the public interest, to enforce or give effect to any such expectation in the manner sought by the Applicant or at all.

7. If the Applicant has any expectation arising out of the negotiation and conclusion of an instalment arrangement with Revenue on the terms set out in the letter of 31 August 2015, it is confined to an expectation that Revenue would not proceed with or progress the Proceedings provided that the Applicant adhered to the payment terms are set out in the letter of 31 August 2015. Revenue has not acted in a manner contrary to any such expectation.

8. In the course of negotiations culminating in the Applicant's acceptance of the arrangement set out in the letter of 31 August 2015, the Applicant had sought, as part of any such arrangement as might be agreed, the inclusion of some conditions, assurance or agreement from Revenue that it would not continue any existing prosecution and would not commence any new prosecution or enforcement action against him. On multiple occasions throughout June and July of 2015, the Applicant's requests for such a condition or representation were rejected unequivocally by Revenue. Revenue's final position on these requests as made by the Applicant were set out in an e-mail of 16 July 2015 (from Pierse Fitzgibbon Solicitors), which stated clearly that "*Revenue cannot agree to the exclusion of the non-prosecution clause in the terms and conditions of the instalment arrangement.*" The Applicant did not seek to challenge or question Revenue's position so stated at any time up to and including his acceptance of the instalment arrangement set out in the letter of 31 August 2005 [2015]."

Further pleas in the Statement of Opposition join issue with the balance of the appellant's claims.

The discovery process

5. By letter dated 19 July 2016 the appellant's solicitors wrote to the Revenue's solicitors seeking voluntary discovery of five categories of documents: -

(1) All documents evidencing, referring to or touching upon the agreement of the parties of the 31st August, 2015 and in particular concerning the initiation or continuation of prosecutions and the inclusion/exclusion of a prosecution clause in the agreement (and previous drafts thereof).

(2) All documents evidencing, referring or touching upon conversations between the applicant and Pierse Fitzgibbon concerning the prosecution of the Applicant by way of summons served on the 27th October, 2015.

(3) All documents evidencing the date the decision to prosecute in 2015 was recommended or decided and evidencing whether the Agreement (or drafts thereof)

or the removal of the prosecution clause was considered by the investigating or professional officer when recommending or deciding to initiate a prosecution of the Applicant.

(4) All documents referred to in the affidavit of Mr. Lester of the 21st June, 2016 but not exhibited:

(a) the witness statement referred to in paragraph 3 of his affidavit
(b) the contract between the respondents and Pierse Fitzgibbon referred to by Mr. Lester at paragraph 11 of his affidavit.

(5) All documents touching upon or concerning any review of the file by the respondents or by Pierse Fitzgibbon on their behalf.

The letter set out reasons for the discovery sought under each category, and made clear that the term "documents" included "all materials in written, printed or electronic form, within the power, possession or procurement of the Plaintiffs [sic] and includes all drafts of documents including any tracked changes and comments boxes, and all audio or digital recordings".

6. The Revenue's solicitors replied on 13 October 2016 declining to make any of the discovery sought, suggesting that discovery was not appropriate since the case "concerns criminal proceedings", and stating that "… so far as the categories in your letter encompass working or any other preparatory papers of Pierse Fitzgibbon as advisers to the first named Respondent, such documents are not within the possession power or procurement of the first or second named Respondents." Reasons for declining discovery specific to each category were then given.

7. In their reply of 27 October 2016, the appellant's solicitors expressed surprise at the refusal to make discovery and also the suggestion that documents held by Pierse Fitzgibbon were not within the possession, power or procurement of the respondents, and indicated that a motion would be brought. By a further letter of 27 October 2016 addressed directly to Pierse Fitzgibbon Solicitors they asserted that relevant documents held by Pierse Fitzgibbon "would be manifestly in the power of procurement and control of the respondents ordinarily", and requested that pending bringing a motion the documentation be retained and preserved, and "unequivocal commitment in this regard" was sought. In particular, an undertaking was sought that Pierse Fitzgibbon would "preserve and retain all potentially relevant documents in particular all audio-recordings of conversations with our client".

8. A motion seeking discovery of the said five categories of documents was issued on 23 September 2016 and there was an exchange of affidavits – sworn by Paul O'Brien solicitor on behalf of the appellant on 8 November 2016 and 6 March 2017, and by Mary Kiely assistant solicitor in the office of the Revenue Commissioners, on behalf of the respondents on 20 December 2016 and 27 March 2017. The motion was heard by Ní Raifeartaigh J. on 2 November 2017. She delivered an ex tempore judgment on 3

November 2017, and as appears by the Order of 3 November 2017, she ordered that the Respondents make discovery of two categories of documents: -

"(i) Emails, letters and notes of telephone calls between the Applicant and Pierse Fitzgibbon Solicitors between the 1 May 2015 and to 31 October 2015 excluding any review conducted by the Pierse Fitzgibbon materials, limited to exchanges occurring as between the Applicant and Pierse Fitzgibbon Solicitors and excluding documents already exhibited in the affidavits exchanged in the proceedings.

(ii) Documents created before or on 31 August 2015 in the possession of Pierse Fitzgibbon Solicitors or the Revenue Commissioners regarding the inclusion or non-inclusion clause that the agreement was without prejudice to existing or future prosecutions of the Applicant."

9. Category (i) as ordered equates approximately to category 2 as originally sought. Category (ii) as ordered equates approximately to category 1 as originally sought. The High Court was not required to adjudicate on category 4 as sought because this had been agreed in advance and the documentation had been furnished. The order effectively refused categories 3 and 5, save of course to the extent that what was sought might be encompassed by the two categories that were granted.

10. The learned trial judge's thinking in granting this limited discovery emerges from the note of her *ex tempore* decision where she states: -

> "… I am influenced by the parameters of the pleadings, and what seems to me in the overall parameters of the case. As I say, the two main planks in the case seem to be, one, the agreement, the meaning of the agreement, and second is legitimate expectation. And it seems to me that logically both aspects of that case has to be centrally founded on the communications between them, not necessarily simply the letter of the 31st August, although, I don't know, perhaps the Court that ultimately deals with this will say the only relevant matter is the letter of 31st August. But even taking it … at its height from the point of view of the applicant, if there was a chain of negotiations culminating in the letter of 31st August, and that's all held to be relevant to interpreting what agreement was between them and what legitimate expectation he had formed on the basis of that, it's still communications between them that seems to me to be at the heart of the case. So, in general terms, what the Revenue were thinking internally, which they didn't share with him in any way, could not ground a legitimate expectation or could not be said to be part of an agreement. It has to be what they said to him. Also, that - when I say what they said to him, also what they may not have said to [him]. For example, he's relying on a silence or on an omission, as it were. But even taken at its broadest, it seems to me it has to be about the communication between them fundamentally. That being so, it seems to me that the categories of discovery sought are extremely wide and far too wide for the Court to grant discovery in relation to them."

11. The Grounds of Appeal are short and seek an order for discovery under all five categories (even though the documentation under category 4(a) and (b) had already been furnished), on the basis that it is relevant and necessary and will advance the applicant's case or assist in meeting the opposition or "may fairly lead to a train of enquiry which may have either of those consequences", and that there "is a credible basis for believing that there are or relevant documentation in existence".

12. The Grounds of Opposition contends that the learned trial judge should have refused the discovery sought in its entirety, and opposes the grant of *any* of the categories (even category 4 (a) and (b) where it is said the respondents had already agreed to furnish the documents) and pleads that the appellant has failed to identify any specific mistake of law or fact in the decision of the learned High Court judge. It is pleaded that the High Court judge did not err in law, and was correct in refusing discovery of categories 3, 4 and 5. It is pleaded that the discovery could not be relevant in circumstances "where the appellant explicitly makes his case in legitimate expectation and must, as a matter of knowledge know and be able to adduce his own evidence of the basis upon which the alleged legitimate expectation was engendered in him". It is further pleaded that the discovery sought at categories 3, 4 and 5 cannot be relevant to the interpretation of the written agreement of 31 August 2015 (the instalment arrangement in relation to certain outstanding liabilities). It is also pleaded that the learned High Court judge was correct in determining that communications between the appellant and Pierse Fitzgibbon touching upon events occurring *after* 31 August 2015 could not be relevant. It is further pleaded that the High Court was correct in determining that discovery sought of the internal views or communications of Revenue could not be relevant to the matters in issue concerning an agreement to which the appellant was a party. It is pleaded that the appellant is engaged on a "trawling exercise".

13. This court, as did the learned trial judge, has considered the appellant's grounding affidavit verifying the facts in the Statement of Grounds, and the affidavits of Anna Lynch and Timothy Lester sworn to verify the Statement of Opposition. This court also had the benefit of written and oral legal submissions. Certain correspondence and recent affidavits arising since the appeal was lodged and all addressing the deletion of telephone recordings held by Pierse Fitzgibbon were also considered and will be mentioned later in this judgment.

The applicable legal principles

14. Although the principles relating to discovery are well established, it remains the case that in granting discovery and framing the terms of discovery the court retains a discretion. Accordingly as the subject of this appeal is essentially discretionary, the correct approach to it is that set out by the Supreme Court in *Lismore Builders Ltd (in receivership) v Bank of Ireland Finance Ltd* [2013] IESC 6, where MacMenamin J stated: –

> "[4] Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are

fundamental. This is clear from the judgement of Geoghegan J in *Desmond v. MGN* [2009] 1 IR 737."

15. The effect of Order 31 rule 12 of the Rules of the Superior Courts (as amended by the Superior Courts (Discovery) 2009 – S.I No.93 of 2009), and in particular subrules (1) and (5), is that the court should order discovery if it is satisfied that the categories of documents sought by the moving party "[relate] to any matter in question" and are "either necessary for fairly disposing of the cause of matter or for saving costs." For brevity lawyers refer to the twin requirements of relevance and necessity.

16. The definition of relevance is contained in the well- worn judgement of Brett LJ in *Compagnie Financiere at Commerciale du Pacifiqaue v Peruvian Guano* (1882) 11 QBD 55, applied in this jurisdiction in *Sterling-Winthrop Group Ltd v Farbenfrabriken Bayer AG* [1967] IR 97 and authoritatively adopted by Murray J speaking for the Supreme Court in *Framus v CRH* [2004] 2 IR 20. Brett LJ stated as follows, at page 62 – 63:

> "It is seems to me that every document [relating] 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"

At page 63-64 Brett LJ. stated that in order to determine whether documents were relevant and had to be discovered, "it is necessary to consider what are the questions in the action: the court must look not only at the statement of claim in the plaintiff's case but also at the statement of defence and the defendant's case". In judicial review proceedings it is the Statement of Grounds and Statement of Opposition to which the court must have regard to ascertain the issues.

17. Brett LJ used the phrase "reasonable to suppose" in the context of relevance, but the manner in which the test is applied in Irish law indicates that the bar has been raised. This is addressed in *Discovery and Disclosure* (Second Edition Abrahamson et al):

"Refinement of the Peruvian Guano Test

6 – 12: While the wording of the test that must be met in establishing the relevance of a document has remained more or less constant since Peruvian Guano, the manner in which that test is applied by the courts has been refined. The standard of proof that must be discharged in making that test has been raised. Whereas in Peruvian Guano, Brett LJ held the documents would be relevant where it was "reasonable to suppose" they would contain information which would enable the applicant to advance his or her case, in *Hannon v. Commissioners of Public Works* [1967] IR 97 McCracken J applied a higher standard:

> "The Court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court

> to order discovery simply because there is a possibility that documents may be relevant."

It follows that if a document is *probably* relevant then it is *prima facie* discoverable if it *may* directly or indirectly advance the case made by the party seeking discovery, or damage the case of their adversary.

18. There can be no doubt that discovery may be awarded in judicial review proceedings. Finlay Geoghegan J recognised this in *KA v Minister for Justice* [2003] 2 IR 93, approving the test articulated by Bingham M.R. in *R v Secretary of State for Health ex p London Borough Council* (Unreported, Court of Appeal 29 July 1994 at p.19) in the following terms:

> "Have they raised a factual issue of sufficient substance, or adduced evidence which grounds a reasonable suspicion of unlawfulness, such that the application cannot be fairly resolved without discovery?"

See also Laffoy J in *Fitzwilton Limited & Ors v. Judge Alan Mahon and Ors* [2006] IEHC 48.

In refusing discovery in *KA*, Finlay Geoghegan J. observed (at p. 100) that it is –

> "In the nature of judicial review that the necessity for discovery will be more difficult to establish than in plenary proceedings. This follows from the fact that in judicial review what is at issue is the legality of the decision challenged. In many instances the facts are not in dispute".

In a similar vein, Geoghegan J in the Supreme Court in Carlow Kilkenny radio Ltd v Broadcasting Commission [2003] 3 IR 528, at p.531 noted that –

> "[I]t is trite law that judicial review is not concerned with the correctness of a decision but rather with the way that the decision is reached. It follows that the categories of documents which a court would consider were necessary to be discovered will be much more confined than if the litigation related to the merits of the case."

And at p.537 he observed:

> "Where discovery will be necessary is where there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application…"

It is also clear that the suggestion in the respondent's letter of 13 October 2016 that discovery is not appropriate in the present case merely because "it concerns criminal proceedings", cannot be correct. These proceedings are a challenge to an administrative process/decision to pursue/initiate criminal proceedings, based on an agreement or a legitimate expectation, and they are not a criminal proceeding *per se*.

19. Ryan P usefully addressed the principles governing discovery in *BAM v NTMA* (Court of Appeal, 6 November, 2015). Although that was a public procurement challenge, the following principles apply equally to the present proceedings:

> "29. It may be convenient to summarise these principles as they are applicable to this case.
>
> 1. The primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.
>
> 2. Relevance is determined by reference to the pleadings. O31, r.12 specifies discovery of documents relating to any matter in question in the case.
>
> 3. There is nothing in the Peruvian Guano test which is intended to qualify the principle that documents sought on discovery must be relevant, directly or indirectly, to the matter in issue between the parties on the proceedings.
>
> 4. An application for discovery must show it is reasonable for the court to suppose that the documents contain relevant information.
>
> 5. An applicant is not entitled to discovery based on speculation.
>
> 6. In certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse.
>
> 7. As Fennelly J pointed out in *Ryanair plc v. Aer Rianta cpt* [2003] 4 IR 264, the crucial question is whether discovery is necessary for "disposing fairly of the cause or matter."
>
> 8. There must be some proportionality between the extent of volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial.
>
> 9. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties."

Ryan P also noted the following, which is of relevance to this appeal:

> "33. Discovery cannot be used merely to test averments. In *Shortt v Dublin County Council* [2003] 2 IR 69 Ó Caoimh J stated (at pp. 88 – 89) as follows: –
>
> > "… Having regard to the nature of judicial review proceedings, and in particular, the onus that lies on an applicant at the leave stage to furnish to

the court evidence supporting the grounds advanced… In the absence of material suggesting that the averments in the affidavits filed on behalf of the respondent are untrue, to direct discovery of documents in circumstances where they can only be brought to impugn the integrity of the deponent would, in general, be oppressive."

34. Similarly, *in McEvoy*, McDermott J emphasised (at p. 25) that:

"[A]n applicant is not entitled to go behind an affidavit by seeking discovery to undermine its correctness unless there is some material outside that contained in the affidavit to suggest that in some material respect the affidavit is inaccurate. It is inappropriate to allow discovery the only purpose of which is to act as a challenge to the accuracy of an affidavit."

20. Two further points should be made as they have some relevance to the present appeal. Firstly, unless the discovery is based on speculation, the case being made by the applicant for discovery should be taken at its height, and should be assumed to be true, rather than accepting the case being made by of the party from whom discovery is sought even if it seems the more credible. Secondly, generally the court should not concern itself with issues of admissibility when determining whether or not to order discovery – admissibility is a matter for the trial judge. Mathews in *Disclosure* (5th Ed.) at p.163 states:

"(e) Inadmissible evidence

Documents could relate to matters in question and be discoverable, even though they were inadmissible in evidence, so long as they might throw light on the case. That a document would not be admissible in evidence was never in itself a ground for refusing discovery."

The issues

21. In my view the primary issues as they emerge from the pleadings are the following: –

(1) Was it a term of the settlement entered into between the parties on or about 31 August 2015 that enforcement action would not be initiated, existing prosecutions would not continue and no new prosecutions would be initiated so long as the appellant complied with the instalment payment arrangement?

(2) Did the first named respondent make promises or representations, express or implied, and/or adopt a position not to take enforcement action, and/or that a prosecution in being would not continue, and/or that new prosecutions would not be initiated by the respondents, such as created a legitimate expectation, intended by the first named respondent and reasonably entertained by the applicant, that enforcement action would not be initiated, existing prosecutions would not continue and no new prosecutions would be initiated?

While other issues might be formulated, for example in relation to pleas concerning the Code of Practice for Revenue Audit/the Revenue Customer Charter, or absence of

transparency, in my view these do not give rise to stand alone issues, and are pleaded in support of the primary issues as I have framed them.

22. In my view the learned Trial Judge identified these two primary issues, and correctly observed that the appellant's case is essentially founded on the chain of communications between the parties leading to the letter of 31 August 2015, but not limited to that letter.

23. It is useful here to identify the test to be met in a case grounded in legitimate expectation. In *Glencar Explorations v. Mayo County Council* [2002] 1 IR 84, at p.162 Fennelly J stated:

> "Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of the transaction definitively entered into or relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

24. Thus the case that the appellant makes based on legitimate expectation necessarily relies on a position adopted by the respondents, or on promises/representations, of which the appellant was actually aware. This point is made by the respondents in their submissions, arguing that the terms of the alleged agreement and the exchanges between the parties in the lead up to 31 August 2015 have been fully traversed in the affidavit evidence, and that a legitimate expectation cannot be based on some document or communication internal to the respondents or their agents.

The Affidavit evidence

25. The background relates to the appellant's tax affairs, and is usefully set out in the affidavit sworn by Mr. Lester, from the Revenue Investigations and Prosecutions Division, sworn on 21 June 2016. From this it emerges that in 2014, Revenue commenced an investigation into the appellant's affairs for the years 2008 – 2012. In November 2014, the appellant filed his income tax return with the Collector General for the tax year 2013. The balance of income tax due for that year was €302,811, and this became due and payable on 31 October 2013.

26. Separately, in December 2014 the appellant's solicitors submitted to Revenue a disclosure in respect of the appellant's tax affairs, disclosing an additional liability to tax for the years 2008 – 2013 in the amount of €539,640. The disclosure was made to the Revenue High Wealth Individual Business Revenue house in Cork and included a proposal to pay the tax arrears over a period of years. Revenue High Wealth replied on 13 March 2015 rejecting the proposal, advising that the Collector General had been advised to pursue collection of the tax due for the year 2013, and that the case was being referred to

Investigation and Prosecutions Division to consider whether there had been an offence committed. The writer, Mr. Duffy, indicated that his department would continue to deal with the "civil aspect of the case and work towards agreement as to the correct tax liability for the years 2008 – 2012."

27. A letter then issued on the same date – 13 March 2015 – to the appellant from Investigations and Prosecutions Division signalling that they were taking up the investigation.

28. A final demand for the 2013 income tax liability was issued from the Collector General to the appellant on 16 March 2015. At this point the appellant emailed Ms. Mary Moloney in the Collector General's office requesting time to deal with this 2013 income tax liability and indicating that he was unable to immediately discharge the debt in full. As the Collector General could not secure payment, on 15 May 2015 the matter was referred to Pierse Fitzgibbon Solicitors to collect the debt for the tax year 2013 through the legal process. At paragraph 7 Mr. Lester explains the provenance of the summons issued on 18 February 2014: -

> "Part of the initiation of the Revenue investigation by letter dated 6th October, 2014 Mr. Murphy had previously been a subject of investigation by the Investigations and Prosecutions Division, Ashtown Gate, Navan Road, Dublin in connection with him consenting or conniving in the submission of an incorrect VAT return containing a substantial VAT repayment claimed by Securemed Limited, a recruitment company for medical personnel, and the submission of supporting documentation in connection with that return. Mr. Murphy was a director of Securemed Limited, subsequently resigning on 31st August, 2011. He was also tax agent for that company. A summons issued in respect of Mr. Murphy dated 18th February, 2014 containing offences pursuant to section 1078, Taxes Consolidation Act, 1997. Mr. Murphy issued judicial review proceedings in respect of the summons of 18th February, 2014 which proceedings were heard by the High Court (Noonan J.) on the 2nd and 3rd July, 2015 and in which judgment issued on 4 November 2015. The Court found that Mr. Murphy is not entitled to the orders sought in those proceedings which are now under appeal to the Court of Appeal."

29. In paragraph 8 Mr. Lester clarifies the position with regard to the second summons dated 12 October 2015, where he states that: -

> "This latter summons relates to the submission by Mr. Murphy of incorrect income tax returns for the tax years 2008 and 2012, the submission of incorrect information to Revenue and Mr. Murphy claiming an income tax repayment to which he was not entitled."

30. It is against this background that the appellant asserts that it was agreed between him and the Revenue Commissioners that he would not be subject to *any* form of enforcement, including prosecution, in respect of any aspect of his tax affairs, provided he adhered to the terms of phased payments regarding his income tax liability for the year

2013 (with a self-declared balance of €302,811), notwithstanding that the disclosed arrears for 2008 – 2013 amount to €539,640.

31. In his verifying affidavit the appellant traces the course of communications between him and Revenue and/or Revenue's solicitors Pierse Fitzgibbon which he maintains culminated in an agreement on or about 31 August 2015 for instalment payments in respect of his 2013 income tax liability, which he asserts was on the basis that legal proceedings would be suspended and he would not be further prosecuted. He refers to email exchanges with Ms. Malone in Revenue from 24 March 2015, and subsequent engagement by Irish Insolvency Solutions, debt specialists, on his behalf. From 15 May 2015, onwards, the appellant refers to correspondence by letter and email with Joanne Carmody of Pierse Fitzgibbon, the solicitors engaged by Revenue to pursue the 2013 income tax liabilities. By email of 15 June 2015 the appellant made proposals for a down payment of 25% and monthly payments by direct debit over sixty months of €3,000 per month, and an annual bill of payment of €17,000, and clearance of all VAT for January/February 2015. By email of 25 June 2015, Pierse Fitzgibbon on behalf of Revenue rejected the appellant's proposals but made counter proposals in respect of the income tax due for year 2013. They proposed 25% upfront and payment of €75,697.26, annual bill of payments of €17,000 payable by 15th December in each year, and monthly direct debit payments of €5,000 and per VAT liability at €1,734.21 to be paid up front. This would have led to a discharge of the 2013 liability by the end of 2018, but was conditional on current taxes being maintained going forward. The penultimate paragraph in the email states: -

> "This agreement, if entered into, is without prejudice to any other enforcement action or prosecution action in being or yet to be initiated in relation to the investigation or collection of tax debts."

32. The appellant responded on 26 June 2015 indicating acceptance on a number of points but suggesting compromise of the monthly direct debits at €4,000 per month, with the shortfall being made up by increasing the annual bill of payments to €20,000 each, and a balance of €27,000 at 15 December 2018. The appellant added that "Critically it has to assume that I can continue to generate income by continuing to work professionally unhindered by prosecution", and sought confirmation of his proposal. This stance, which the appellant says he consistently maintained with the respondents/their solicitor, is regarded by him as key evidence in the claims that he makes.

33. Ms. Ann Lynch of Pierse Fitzgibbon responded by email of 29 June 2015. The second paragraph states that: -

> "Please note that as stated in our letter of 25th June, 2015, the arrangement relates only to tax and to interest liability for income tax in the year ending 31st December, 2013. This agreement, if entered into, is without prejudice to any other enforcement action or prosecution action in being or yet to be initiated".

The letter accepted a monthly payment of €4,000 per month.

34. By email of 29 June 2015 the appellant sought clarification on the "without prejudice to any other enforcement action or prosecution" statement. He wrote: -

> "As I explained, I cannot commit to a payment plan with Revenue where any prosecution would have a very significant impact on my ability to earn professionally and therefore discharge the amounts due. A solution here is a position whereby we draw a line under any judicial review proceedings taken by me, prosecutions in being or yet to be initiated so that I can have the certainty of making full payments to you."

35. On 6 July 2015 a different solicitor in Pierse Fitzgibbon, Ms. Larkin emailed a response, which repeated that if there was to be agreement it would be "without prejudice to any other enforcement action or prosecution action in being or yet to be initiated".

36. By an email of 16 July 2015 Ms. Lynch informed the appellant that Revenue had now issued her with instructions to proceed with enforcement, and the appellant avers that he was informed that Revenue "cannot agree to the exclusion of the non-prosecution clause and the terms and conditions of the instalment agreement." The appellant says (para. 40 of his affidavit) that he spoke to Ms. Lynch on 16 July 2015, and followed that by email of 5 August 2015 in which he affirmed his commitment to the €4,000 per month payment and asked to be given until 31 October 2015 to pay the initial instalment of €75,000. He refers to further "various communications between Anna Lynch and I between 5th August, 2015 and 31st August, 2015, finalising the timing of making the various payment". The following averments then appear: -

> "43. By letter dated the 31st August, 2015 I was then informed by Pierse Fitzgibbon Solicitors that the Revenue were '*prepared to suspend the legal proceedings in relation to the abovementioned taxes on the following basis*'. The terms agreed were then set out in the letter and set out the payment schedule for the years 2015, 2016, 2017 and 2018.
>
> 44. The new agreement furnished by the first respondent excluded the right to prosecute proceedings in being and yet to be initiated, but now included a term that '*In the event that the arrangement breaking down proceedings will be resumed immediately*'. The agreement that was duly executed by me, sent to Ms. Lynch and the payment schedule commenced."

37. When one looks at the letter of 31 August 2015 it is notable that it refers in the heading to income tax for the year 2013, and VAT for the period 1st January 2015 – 28th February 2015. It does indeed state in the first paragraph –

> "Our clients are prepared to suspend the legal proceedings in relation to the *abovementioned* taxes on the following basis:" [Emphasis added]

It then sets out the agreement/instalment terms, and then in the last two lines stipulates that –

"The current taxes to be maintained going forward (including the income tax 2014 liability) In the event of the arrangement breaking down proceedings will be resumed immediately."

This is the document a copy of which was duly executed by the appellant and sent to Ms. Lynch, and pursuant to which the appellant confirms "The payment schedule commenced." It is on its face an agreement to make instalment payments for income tax for 2013 and VAT for January/February, 2015, with a commitment "to suspend legal proceedings" in relation to these taxes - and not any others - and subject to the proviso that current taxes are "maintained going forward". It does not, on its face, contain any commitment by the respondents not to continue any existing prosecution, or not to issue summonses relating to other periods or other taxes in respect of which the appellant may have been in default.

38. The appellant in his affidavit expresses surprise at the receipt of the summons dated 12 October 2015 which he avers was served on him on 27 October 2015, charging him with six offences under s.1078 of the Taxes Consolidation Act, 1997 related to income tax, returns and repayments in the period 2008-2012 inclusive. On receipt of this he avers that -

"46. I immediately rang the office of Pierse & Fitzgibbon. I had a number of conversations with both Anna Lynch and Yvonne Carmody during the course of the 27th and 28th October 2015. I outlined on each of these calls that Revenue had breached their agreement as they had issued me a Summons. I reminded them that I had told them several times that I could only afford to enter into the agreement if I could continue to earn unhindered by prosecution, and the Revenue had removed the disputed clause from our agreement. I again sought clarification and asked them to confirm that this was the position. I informed them that I had entered into the agreement because the threat of prosecution had been removed. I told them that I had outlined that position very clearly on numerous occasions and nobody could be in doubt about it.

47. They fully understood the position. Both Ms. Lynch and Ms. Carmody were very surprised that Revenue had issued any summons to me after the agreement letter was signed and returned. At no point did Ms. Carmody or Ms. Lynch disagree. They indicated that they would take instructions and revert."

Following this, the appellant received an email on 28 October 2015 in which Ms. Lynch confirmed that she had heard from Revenue and they had confirmed that there was to be no deviation from the original instalment arrangement which was put in place on 31 August 2015. On 29th October the appellant wrote again to Ms. Lynch and indicated that he was suspending payment of the first lump sum due on 30th October, 2015 pending review, but indicating that he would continue to pay the monthly instalments.

39. In paragraph 53 of his affidavit the appellant avers –

"In the circumstances I say that I have an agreement with Revenue which was entered into in good faith, with onerous (but not unfair) terms, on the basis that the existing prosecutions would not continue and no new prosecutions would be initiated. The first respondent has a duty to adhere to its agreements."

In paragraph 55 he further avers that he has "a legitimate expectation that the Revenue deal with me, in a clear and transparent way" and he refers to the Code of Practice for Revenue Audit Revenue Customer Charters.

40. The affidavits sworn on behalf of the respondents join issue with the contention that there was any such agreement as alleged by the appellant in paragraph 53, or that the appellant had any legitimate expectation that existing prosecutions would not continue and no new prosecutions would be initiated. Ms Lynch in her affidavit confirms emails sent by her on 31 August 2015 setting out the terms of the agreed instalment arrangement, to be completed by the appellant and returned within 14 days, and she avers that this was signed by the appellant on the same day and returned. It is contended by both Ms Lynch, and Mr Lester from Revenue, that the agreement of 31 August 2015 was clear in its terms and unambiguous. Ms Lynch avers that on 25 September 2015 the appellant paid the first monthly payment of €4000, and a receipt was issued. Both she and Mr Lester confirmed that the 12 October 2015 summons relates to the income tax years 2008 – 2012 and has no connection or relationship to the income tax debt proceedings, or the criminal proceedings commenced in October 2014, or the February 2014 criminal proceedings commenced in respect of VAT liabilities. As to the telephone calls in late October 2015, Ms Lynch avers: –

"35. Subsequent to his emails of 23 and 26 October, Mr Murphy telephoned the office on 27 October and twice on 28 October 2015. On 27 October, I told Mr Murphy that I had been out of the office and that I would forward his email to Revenue and revert when I had instructions. I had still not heard from Revenue at the time of the first call on the 28 October 2015 and told Mr Murphy this. During the second call, Mr Murphy claimed that he signed the instalment agreement with Revenue as it did not state that it was without prejudice to any other enforcement action of prosecution action in being yet to be initiated in relation to the investigation or collection of tax debts. As a statement to this effect was not included, his view was that no proceedings should have been issued. I said that I would not agree with that but that I would have to talk to Revenue first. He also raised the time. He wanted Revenue to agree for the payment of his 2013 income tax liability. He said he had no choice but to get onto the Ombudsman. I should make it clear in this context that I do not agree with Mr Murphy's account of my part in this conversation are set out in paragraph 47 of his Affidavit save insofar as it acknowledges that they indicated that I would take instructions and revert."

Categories of Discovery sought

Category 1: All documents evidencing, referring to or touching upon the agreement of the parties of 31 August 2015 and in particular concerning the initiation or

continuation of prosecutions and the inclusion / exclusion of the prosecution clause in the agreement (and previous drafts thereof).

41. The appellant pleads, and asserts on affidavit, that he entered into the instalment terms of settlement on the basis that enforcement action would not be taken, and existing prosecutions would not continue, and no new prosecutions would be initiated, so long as he made payments in accordance with its terms. There was reference in the application for discovery and in submissions to "previous drafts" of the agreement that would support his position, but this is not borne out on affidavit or by any exhibited documentation, and in my view this is mere assertion and speculation and does not form a basis for an order specific to the discovery of drafts. Insofar as there were any prior drafts there is no evidence that they were communicated to the appellant; and if there were prior drafts that were internal to the respondents or their solicitors Pierse Fitzgibbon they are not relevant as they are neither evidence of the terms of any agreement nor representations that could form the basis of any legitimate expectation. The argument that this is a matter of admissibility to be determined by the trial judge does not overcome the simple fact that such drafts (if any), while they might demonstrate the Revenue's deliberations or intentions at a particular point in time prior to 31 August 2015, could never be relevant to the existence otherwise of (1) a different agreement to that signed by the appellant on or about that date, or (2) a legitimate expectation.

42. I find more difficult the question of whether the claim sounding in legitimate expectation warrants discovery under this heading, particularly in light of the approach taken by this court in *Sarlingford Limited v. Appeal Commissioner, Kelly and Ors* [2016] IECA 396, where Ryan P decided that at paragraph 24. –

> "…it is the letter that gives rise to the claim of legitimate expectation, whether it is soundly based or not. There is nothing to be discovered in order to make the case. It does not require any other documents to support the claim. The existence or non-existence of other materials relating to the background to the letter is irrelevant in my view."

Thus, the respondents argue that only the promises or representations actually communicated to the appellant can be relevant to legitimate expectation. In my view such an approach does not recognise the appellant's wider case that the position adopted by the Revenue over the course of negotiations and in response to his own emails/communications, taken together with Revenue's obligations to act transparently, justly and equitably, and in accordance with its own Code and Charter, led him to the expectation for which he contends. In particular he relies on his repeated statements in the course of negotiations with Pierse Fitzgibbon to the effect that it was not going to be possible to honour the terms of *any* agreement on repayments unless he was able to continue to work professionally, and his repeated requests for a promise of non-prosecution, which in effect he claims underpinned the entire arrangement. The submission also fails to take into account the involved negotiations and exchanges, some in writing, some by email and some oral, between the appellant and the Revenue, involving different divisions/personnel, and their solicitors Pierse Fitzgibbon, in the lead up to 31 August 2015. The Supreme Court in *Keating v. RTE* [2013] IESC 22 confirmed

that the moving party for discovery must "disclose some information upon which the pleas is based". I am satisfied that the appellants' affidavit does depose to information as to a factual matrix that is sufficient to warrant discovery of documents relevant both to the terms of agreement actually reached and to the issue of legitimate expectation. In my view it is probable that the respondents or their agents will hold documents relating to the inclusion or otherwise of terms relating to existing or possible future prosecutions for tax offences/ enforcement proceedings in any agreement to be reached with the appellant, and "the position adopted by the respondents", and that any such documents may enable the appellant to advance his case on legitimate expectation.

43. In order to dispose fairly of these proceedings I have come to the view that discovery should be ordered in respect of Category 1, but with modified wording. Firstly, it can only be emails, records of conversations with the appellant, or other documents leading up to the agreement of 31 August, 2015 that could be relevant to what terms were or were not to go into the agreement, or to the issue of legitimate expectation which crystallised at that time. Secondly, the words "(and any previous drafts thereof)" should be deleted as that specific reference is based on mere assertion/speculation. That is not to say that if such drafts do exist that they are not discoverable within this category if they are relevant; they would be embraced by the words "All documents etc. ...created before or on 31 August, 2015". Also if such drafts exist and are relevant they may be covered by privilege, but they would still be discoverable.

44. Thirdly, there may be documents falling within this category which are not the respondents' documents or within their possession but which are within the possession or control of Pierse Fitzgibbon, including records of conversations between the appellant and legal executives Ms Anna Lynch or Ms. Yvonne Carmody, and Ms. Martina Larkin or solicitors in that firm. While this is not an application for non-party discovery directed to Pierse Fitzgibbon, the respondents are bound to use their best endeavours to obtain all documents within a category that are within their possession, power or procurement, and this would involve taking all reasonable steps to obtain relevant documents from solicitors who acted on their behalf at material times. The modified version of this category that was ordered by the High Court reflects this, requiring discovery of:

> "(ii) Documents created before or on 31 August 2015 in the possession of Pierse Fitzgibbon Solicitors or the Revenue Commissioners regarding the inclusion or non-inclusion of a clause that the agreement was without prejudice to existing or future prosecutions of the Applicant."

However this wording is open to the criticism that it is not wide enough to capture all documents that may fairly relate to promises or representations or the adoption of a position said to form the basis of the claim in legitimate expectation.

45. Accordingly I would order discovery in a recast Category 1 as follows:

Recast Category 1:

All documents including emails, letters and records of telephone calls created before or on 31 August 2015 in the possession or control of the respondents or Pierse Fitzgibbon solicitors evidencing referring or touching upon the agreement of 31 August 2015 and in particular (but without prejudice to the generality of this category) concerning the continuation of existing prosecutions or the initiation of future prosecutions and the inclusion/exclusion of a clause that the agreement was without prejudice to existing or future prosecutions of the Applicant.

Category 2: All documents evidencing referring or touching upon conversations between the applicant and Pierse Fitzgibbon concerning the prosecution of the Applicant by way of summons served on the 27 October 2015

46. The appellant pressed for this category on the basis of his averments in paragraphs 46-49 of his verifying affidavit, and in particular his averment in paragraph 47, that in telephone conversations which he had with Pierse Fitzgibbon on 27 and 28 October 2015, shortly after he was served with the summons on 27 October 2015 –

> "Both Ms. Lynch and Ms. Carmody were very surprised that Revenue had issued any Summons to me after the agreement letter was signed and returned. At no point did Ms. Carmody or Ms. Lynch disagree. They indicated they would take instructions and revert."

It was argued that this expression of surprise and the absence of disagreement lent evidential support to the existence of the contended for legitimate expectation, and that as this was contested in paragraph 35 of Ms. Lynch's affidavit ("...his view was that no proceedings should have been issued. I said that I would not agree with that but that I would have to talk to Revenue first") discovery should be made of all records of the telephone calls in question. It was argued that a relevant document can concern events in the past, but come into existence after those events, and still be discoverable, and that this category should not be time constrained to 31 October 2015, but should extend to any later documents.

47. In the Affidavit of Paul O'Brien solicitor sworn on 8 November 2016 grounding the application for discovery the documents/records the target of this category are identified thus:

> "24. There is a credible basis for believing that there is relevant documentation. All persons calling Pierce Fitzgibbon are warned electronically and that their telephone calls are recorded and that was so on the 27th and 28th of October. Ms Lynch and the Respondents have access to these recordings but the Applicant does not. No attendances are exhibited by Ms Lynch or Ms Carmody concerning the conversations – and though certain other attendances are exhibited elsewhere in support of the respondent's opposition. Pierce Fitzgibbon relayed the Applicant's complaint to Revenue and Revenue communicated a response to Pierce Fitzgibbon all of which would have summarised in the Applicant's conversations with Pierce Fitzgibbon."

48. I do accept in principle that documents created after an event, such as an incident or an agreement, may be discoverable, in that their content may reflect back in a relevant way on what occurred, or may be relevant to the content or meaning of the agreement. However for the reasons already given in respect of Category 1, and expressed in *Sarlingford*, the same does not apply to a claim based on legitimate expectation where the representations recorded on or prior to the relevant date – in this case 31 August 2015 - are critical to the claim. Moreover the substantive affidavits and those grounding the application for discovery do not disclose a factual dispute of sufficient substance to warrant this category of discovery. The appellant's claims relate to matters culminating with the Agreement of 31 August 2015, which, to state the obvious, was some two months before the conversations on 27/28 October. I am not satisfied as a matter of probability that conversations held, not with Revenue or with their solicitors, but with legal executives in Pierse Fitzgibbon, in late October 2015, are relevant, particularly as it is not suggested that such conversations gave rise to anything in the nature of a waiver of rights or an estoppel. Even if they could be regarded as relevant, it is necessary to go on to consider the manner in which it is suggested such documents might advance the appellant's case, or damage the respondents' opposition. I accept that whether or not Ms. Lynch and/or Ms. Carmody were indeed "very surprised" in the course of these phone calls appears to be disputed, but taking the appellant's case at its height this is not a dispute of fact that relates in any real way to the core factual or legal issues to be determined, as I have identified them earlier in this judgment, nor is it a dispute that emerges from the pleadings. As Ryan P cautioned in *BAM* "Discovery cannot be used merely to test averments". Moreover it is common to the accounts of both the appellant and Ms. Lynch that Ms. Lynch/Ms. Carmody said they would "take instructions and revert", and that Ms. Lynch did take instructions and revert, indicating that the Revenue would not deviate from the agreement of 31 August 2015. Indeed in their written submission on behalf of the appellant at paragraph 41 it is noted that "Pierse Fitzgibbon in their dealings with the Appellant always took time [to] take instructions from their clients". This undermines any suggestion that mere expressions of surprise in the telephone conversations, or demur at what the appellant was saying, is a sufficient basis for discovery of this material. Further for reasons given previously that emphasise the importance of 31 August 2015 as the critical cut-off date, I do not find any sound basis for ordering discovery of later documents – see further below in respect of Category 5.

49. I would therefore refuse this category of discovery, notwithstanding that it was ordered by the learned trial judge (her reworded category (i)), and that notes of the conversations on 27/28 October 2015 were proffered on a "without prejudice" basis in the High Court.

50. However before moving on some reference should be made to the materials that would be covered by Category 2. Although it must be noted that the order in the High Court did not include the telephone recordings themselves, it will be recalled that the plaintiff's solicitors wrote on 27 October 2016 to Pierse Fitzgibbon asking that firm to preserve and retain all potentially relevant documents "in particular all audio – recordings of conversations with our client" and noted: –

> "If you are aware that relevant material has been lost, or you would not [be] in a position to fully comply with any Order that may be granted, you should indicate this now and the attendant circumstances."

Clearly tape recordings are "documents" for the purpose of discovery – see *Grant v. Southwestern and County Properties Limited* [1975] Ch. 185, and now O.31 r.12(13) RSC.

In her affidavit sworn on 20 December 2016 Ms Mary Kiely of Revenue opposed discovery under this category but stated that: –

> "Without prejudice to the foregoing, I have been furnished with contemporaneous file notes of telephone calls between Mr Murphy and Ms Lynch on 27 and 28 October 2016 and the Revenue Commissioners is prepared to make discovery of those documents on the basis that while privilege is *not* waived in respect of those documents they are nevertheless being provided strictly for the purposes of discovery in these proceedings."

51. Notwithstanding that the High Court had not ordered discovery of telephone call recordings themselves, in correspondence furnished to this court it emerged that on 12 December 2019, Revenue wrote to the plaintiff's solicitors informing them that Pierse Fitzgibbon, pursuant to their Data Deletion policy of deleting all calls after 18 months, had automatically deleted the relevant recordings, although it appeared a detailed note of each call was kept that provided "a reliable audit trail".

52. This prompted a series of affidavits sworn on 17 December 2019 by Ms. Kiely, Ms. Martina Larkin, a partner in Pierse Fitzgibbon, and Ms. Lynch, explaining the full circumstances in which the deletion occurred. Counsel for the appellant commented that these affidavits failed to identify who, if anyone, listened to the recordings, and that there was no IT expert opining as to the prospects of recovering the recordings. While undoubtedly Pierse Fitzgibbon had a professional duty to retain and preserve the recordings, I am satisfied from these affidavits that the deletion was entirely accidental, and that the respondents did not become aware of the deletions until November 2019. These conclusions are strongly supported by a number of facts: detailed contemporaneous notes of telephone calls were kept by Pierse Fitzgibbon staff, and indeed one of these is exhibited by Ms. Lynch in her substantive replying affidavit. At exhibit "AL14"; contemporaneous file notes of calls with the appellant were proffered on a "without prejudice" basis in the High Court; Pierse Fitzgibbon created and maintained notes of calls on their case management system; and Revenue did not discover the deletions until, in preparation for this appeal, they contacted Pierse Fitzgibbon to ascertain if recordings or transcripts of the telephone calls were available, only to learn from them on 27 November 2019 that the recordings had been deleted. I am satisfied that the omission of not intervening in the automated Date Deletion policy operation to isolate and retain the audio recordings was not deliberate. In the circumstances even if discovery of Category 2 was ordered I do not believe that the appellant would have suffered prejudice by the deletions, and the criticisms of the recent affidavit evidence presented to this court is rejected. In conclusion

the deletion is moot as Category 2 is refused, and I am of the view that the accidental deletion of the recordings should not attract any adverse comment or have any repercussions in relation to this appeal.

Category 3: All documents evidencing the date and the decision to prosecute in 2015 was recommended or decided and evidencing of whether the Agreement (or drafts thereof) or the removal of the prosecution clause was considered by the investigating or professional officer and recommending or deciding to initiate a prosecution of the applicant.

53. I cannot see how this category can have any relevance to the core issues that fall to be determined in these proceedings, or how it could be said to be necessary. The appellant either had a reasonable basis for his alleged belief that entering into the agreement of 31 August 2015 would result in non-continuation of existing prosecutions and initiation of no fresh prosecutions, or he did not. The date and decision to prosecute in 2015 are not relevant to this. I wholly agree with the observation of Ms Kiely that the views of the Director of Public Prosecutions or the Investigating Officer of the Revenue Commissioners are not relevant to the appellant's belief and understanding, and could not have influenced it.

54. In the reasons given for seeking this category reliance is also placed on the Code requiring the Revenue to deal with the appellant consistently and clearly (Ground 5 of Statement of Grounds), and to act transparently and clearly in its dealings (Ground 6), and not to exercise its discretionary powers inconsistently, and fairly and capriciously (Ground 7). I am not satisfied that these Grounds render relevant to the core issues the consideration by Revenue officers, whether in Investigations and Prosecutions Division, the Collector General's Office, or Revenue solicitors, or by the DPP, of the prosecution of the appellant, or the timing of any prosecution, or the state of knowledge or understanding of those officers or solicitors. I would refuse this category.

Category 4: All documents referred to in the affidavit of Mr Lester of 21 June 2016 but not exhibited:

(a) the witness statement referred to in paragraph 3 of his affidavit

(b) the contract between and the respondents and Pierse Fitzgibbon referred to by Mr Lester at paragraph 11 of his affidavit.

55. This category no longer arises for consideration as these documents have been furnished to the appellant's solicitors.

Category 5: all documents touching upon or concerning any review of the file by the respondents or by Pierse Fitzgibbon on their behalf.

56. The reason given for seeking this category is that "the Respondents have indicated that a review of what occurred between the Pierse Fitzgibbon and the Applicant was being carried out."

57. The court was informed that this review was undertaken by Revenue in April 2016, and the fact of such a review was not disputed. I am satisfied that such a review cannot be relevant to the core issues, and this request is in the nature of a fishing exercise. I would refuse discovery for this category.

58. In summary the only category discovery of which I would be prepared to order is Category 1 reworded as follows: –

Recast Category 1

All documents including emails, letters and records of telephone calls created before or on 31 August 2015 in the possession or control of the respondents or Pierse Fitzgibbon solicitors evidencing referring or touching upon the agreement of 31 August 2015 and in particular (but without prejudice to the generality of this category) concerning the continuation of existing prosecutions or the initiation of future prosecutions and the inclusion / exclusion of a clause that the agreement was without prejudice to existing or future prosecutions of the Applicant.

59. This is an appeal in respect of which it is appropriate to repeat the words of Irvine J in this court in *Lawless v Aer Lingus plc* [2016] IECA 234, at paragraph 23:

> "…all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application *de novo* in the hope of persuading this Court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion."