THE HIGH COURT

[2023] IEHC 571

[Record Number.] 2022 3755 P

Electricity Supply Board and ESB Networks DAC

Plaintiff

-v-

Richmond Homes and Arkmount Construction Limited

Defendant

Judgment of Mr. Justice Dignam delivered on the 13th day of October 2023.

Introduction

1. This is my judgment in respect of the plaintiffs' application for what is commonly known as a "*Norwich Pharmacal*" Order to compel the defendants to disclose certain information.

2. The first-named plaintiff is the well-known corporation established by statute. It is the owner of the distribution and transmission systems used to provide electricity to homes and businesses in the State. The second-named plaintiff is the distribution system operator that operates the electricity distribution systems. Employees of the first-named defendant ("*the ESB*") work on the maintenance and upkeep of that distribution system pursuant to agreements between the ESB and the second-named defendant. I will refer to the second-named defendant by its full name, "*ESB Networks DAC",* because, confusingly, the ESB employees who work on the maintenance and upkeep of the system work for a unit of the ESB called "*ESB Networks*".

3. The first-named defendant is a development company and the second-named defendant is a construction company. I understand the second-named defendant was building a number of housing developments on behalf of the first-named defendant. I will refer to the defendants as "*Richmond Homes*" and "*Arkmoun*t" respectively or, collectively, as "*the defendants*". Insofar as directly relevant to these proceedings they were developing sites at four locations in north Dublin:

(a) Streamstown Lands, Streamstown Wood/Park Avenue, Malahide;
(b) Oak Park, Kinsealy Lane, Malahide;
(c) Mariner's Way, Rush;
(d) The Coast, Baldoyle.

4. These proceedings were issued by Plenary Summons on the 27th July 2022 seeking:

> *"1. An Order pursuant to the inherent jurisdiction of this Honourable Court directing the Defendants and each of them, to provide full details of all payments made by either of them, their respective servants or agents, to any employee, agent, contractor and/or representative of the Plaintiffs, or either of them, other than on foot of invoices properly raised by the Plaintiffs, or either of them.*
>
> *2. Without prejudice to the generality of the foregoing, an Order directing the Defendants, and each of them to provide to the Plaintiffs, in respect of each such payment:*
>
> *(i) The name(s) of the person or persons who requested the payment;*
> *(ii) Details of what was to be done in consideration for the making of the payment;*
> *(iii) Details of the amount paid;*
> *(iv) The time and date upon which such payment was made;*
> *(v) The name of the person(s) to whom such payment was made;*
> *(vi) The method by which such payment was made;*
> *(vii) The place at which such payment was made; and*
> *(viii) The actions taken by the person(s) to whom such payment was made in connection with the payment.*

3. An Order directing the Defendants, and each of them, to provide all documentary evidence (electronic or physical) including (but not limited to) any ledger entries, cash book entries, bank withdrawal records, electronic banking records, email correspondence, text messages, WhatsApp messages, social media messages, or posts, telegram messages referring to or evidencing any of the matters set out at paragraph 2 ante."

5. By Notice of Motion issued two days later, on the 29th July 2022, the plaintiffs sought a number of directions relating to the trial of the action at paragraph 1. Paragraphs 2 – 4 were in identical terms to paragraphs 1 – 3 of the General Indorsement of Claim. For the purpose of this judgment, I will refer to the reliefs sought in the Notice of Motion and will use those paragraph numbers.

6. The parties were agreed that the hearing of this application on affidavit should be treated as the trial of the action and therefore I did not need to consider paragraph 1. The relief sought at paragraph 4 of the Notice of Motion has fallen away on foot of an Order made by consent of the parties on the 6th October 2022. On that date Stack J ordered that the "*Defendants provide to the Plaintiffs all documents (including any communications) generated between 1 June 2020 and 31 July 2022 concerning evidencing or recording the making of the alleged payments or the alleged possibility of making payments to any employee agent contractor and/or representative of the Plaintiffs or either of them (other than on foot of invoices properly raised by the Plaintiffs or either of them) in connection with the carrying on of any works at or in connection with following sites:*

(a) Streamstown Lands Streamstown Wood/Park Avenue Malahide
(b) Oak Park Kinsealy Lane Malahide
(c) Mariner's Way Rush
(d) *The Coast, Baldoyle*"

7. The documents were provided on the 25th October 2022 and then by letter of the 30th November 2022 the defendants confirmed that those documents were the entirety of the documents encompassed by that Order. It is also important to note that there was a parallel Garda process which I will refer to below.

8. Thus, this judgment is only concerned with the reliefs sought at paragraph 2 and 3 of the Notice of Motion (1 and 2 of the General Endorsement of Claim).

Background

9. The general background to the proceedings is as follows.

10. I refer to the representatives and staff of Richmond Homes and Arkmount and any alleged wrongdoers by initials because that is how they were referred to during the hearing and because their names are not relevant to the legal issues to be considered in this judgment. At the hearing an issue arose about whether there were or should be any reporting restrictions and an application was made by a bona fide member of the press for an opportunity to make submissions if I was considering imposing any such restrictions. There was a separate hearing on this two days later (10th February) on which occasion an application was made on behalf of Mr. A, one of the persons who is alleged to have received payment(s) the details of which are sought in the Notice of Motion for reporting restrictions. I gave an *ex tempore* ruling that evening refusing to impose such restrictions on the basis that the important considerations raised on behalf of Mr. A were not sufficient to outweigh the requirements that justice be administered in public and that any departure from that principle should be very clear and the circumstances pressing.

11. It seems that in early May 2022, a senior representative of Arkmount, Mr. M, told an employee of the ESB that staff in the ESB Networks unit were seeking cash payments from developers and/or construction companies, including Arkmount, in exchange for preferential treatment in the form of immediate or expedited completion of works. The ESB employee then told his line manager and the line manager informed the relevant Area Manager.

12. That Area Manager spoke with Mr. M and Mr. M confirmed that insofar as Arkmount was concerned, the allegations were true.

13. On the 13th May 2022, a Mr. Brian Tapley, Customer and Project Delivery Manager with the ESB, spoke with Mr. M and with the Operations Director of Richmond Homes, Mr. S. Mr. S confirmed that he was aware of demands having been made by ESB employees to employees/representatives of Richmond Homes and/or Arkmount for cash payments to perform routine works on an expedited basis. In the replying affidavit sworn on behalf of the defendants by their solicitor, it is deposed that Mr. S had contacted the CEO of the ESB on the 5th May 2022 and the relevant email correspondence is exhibited. The suggestion seems to be that this contact was about the payments but no flesh is put on this. If that was intended to be the case, the correspondence was extremely oblique

and it is certainly not apparent on the face of the correspondence. Nor is it expressly stated in the replying affidavit sworn on behalf of the defendants to have been the purpose of the contact. In any event, nothing turns on this.

14. On the 17th May 2022 Mr. Tapley, Mr. M and Mr. S met by agreement. Mr. Tapley was accompanied by Mr. Brendan Kennedy, Customer and Projects Delivery Manager with ESB Networks DAC. At that meeting Mr. M provided further and more specific details of various payments. Mr. Tapley prepared a note of this meeting and this was exhibited to his grounding affidavit for this motion. No dispute has been raised about the accuracy of this note as a record of the meeting, other than an oblique comment in the defendants' solicitor's affidavit to "*Leaving aside the accuracy of these minutes*". If the accuracy of the note of the meeting was being put in dispute, an affidavit would have to have been sworn by either Mr. M or Mr. S, who attended the meeting, particularly given that this was the trial of the action. Indeed, in submissions, Senior Counsel for the defendants relied on the contents of this note. I therefore accept it as being an accurate note of this meeting. The contents of this meeting are central to the position adopted by parties and I therefore quote from this note at some length.

15. It was noted that the meeting was set up in response to issues raised by Mr. M (of Arkmount) with the ESB Area Manager and by Mr. S (of Richmond Homes) with Mr. Brian Tapley. Attached to this note were two emails which recorded the initial information which had been provided by Mr. M and Mr. S respectively. In the first (written by the ESB Networks Area Manager), Mr. M is recorded as telling a representative of ESB Networks that "*…there was a practice on sites in Dublin North whereby a develop/construction company needed to pay cash to ESB staff to get various works completed*". It is also recorded that DM subsequently told the Area Manager in a telephone call about a "*…practice that was occurring on sites that he had been working on*" and stated that "*…he and others had to pay cash to ESB staff to get various works completed on time...that the "going rate" is €50/meter installed."* It further recorded "*He told me that it felt like it was getting to the stage where a cash payment was required every time an ESB staff member visited site. He mentioned cable pulling but did not go any further with details on this. He said he had to pay €240 recently to get 30 metres connected on time. I asked him if this was only at NT level and he stated that it went higher than that. I tried to press him on this but he wasn't willing to provide any further information. I tried to press him for some names but he wasn't willing to give me any but stated that it should be easy enough for me to figure out.*" It was also recorded that Mr. M said that it was by no means all ESB staff that were involved and he had high praise for ESB in general. In the second email (from Mr. Tapley to Mr. Kennedy) it was

recorded that he, Mr. Tapley, had spoken to Mr. M and Mr. S and that Mr. S had told him of situations where his team was requested by ESB Networks staff in Dublin North to pay €1000 to have a substation dropped off at site, to pay €50-€80 to have meters installed and to pay more than €1000 to have a lower cost design produced. It was noted that specifics in terms of names or site locations were not given but that a meeting had been arranged. This was the meeting which occurred on the 17th May 2022.

16. The note of that meeting records, inter alia:

"Baldoyle Shoreline site (2000 Units)

- [Discussion of Richmond Homes' concern that units would be available in June but not connected by ESB Networks until October.]
- *Mr. S & Mr. M stated they (sic) their foreman John was told on site that "if they kept ringing ESBN that they would be put back to the back of the queue"*
- *Mr. M recalled that ESBN installed 6 meters on the Baldoyle site in March 2022 and that his foreman John had to pay €75 per meter. Mr. M also recalled that prior to his involvement that Richmond Homes had paid individuals in ESBN for meter installation on this site.*
- *Mr. M stated that no requests for payment were received* from [named individual] *who was responsible for designing this job.*
- *Mr. S recalled being told that one of their site engineers was told by an ESB NT on site that* "[That named individual] *really likes golf". Mr. S didn't elaborate further other than to state that this was reported to him but that nothing was done or paid on foot of this comment.*

Rush Mariners Way site

- [Mr. S out the timeline for the project]
- *Mr. M recalled that ESBN's, Mr. B, UG Construction,* [specified grade with ESB Networks] *arrived at the site at the end of 2021 to inspect the customer civil works and determine whether ESBN cable pulling and substation work could progress. Mr. M stated that he gave Mr. B €500 and gave the ESBN cable pulling contractors €300 on site. Mr. M stated that he believed that these payments resulted in the eventual delivery and installation of the substation.*
- *Mr. M stated that it is normally his foreman John who deals directly with ESBN on site. John reported to Mr. M that he was requested by Mr. B to pay €50 per meter on the Rush site. Mr. M stated that John was given a*

mobile number by Mr. B which belonged to ESBN NT Mr. C to call. Mr. M stated that John paid NT Mr. C, Metering NT to install 8 metres.

- *Mr. S stated that these requests for payment have increased significantly in the last 12-18 months.*
- *Mr. M stated that "we have attracted this as we gave into it"*
- *Mr. M stated that no requests for payment were received from* [named individual] *responsible for designing this job.*
- *Mr. M stated that during the week beginning 2nd May their foreman John reported that he was asked by ESBN NTs to pay for UG construction work to be completed. Mr. M quoted his foreman as saying "hope you left a few quid for the lads or did Mr. B get it all?"*
- *Mr. S stated that their foreman John was recently asked by Mr. B for €1000 to deliver a 2nd substation to site.*

Kinsealy Oak Park site

- [Set out a timeline of this project]
- *Mr. S confirmed that the 38kV EO was Mr. A*
- *In early 2021 Mr. M recalled that he met Mr. A EO on site and that Mr. A "pulled him aside and asked would be sorting him out for a few quid." Mr. M recalls that Mr. A explained to him that he could design a "cheaper" 38kV diversion option. Mr. M recalls that the cheaper option reduced cost by approximately €150,000. Mr. M recalls that Mr. A asked for €35,000 to design a "cheaper" diversion. Mr. M recalled that he asked Mr. A what he needed the money for and Mr. A told him it was for a "new car and that he was getting close to retirement". Mr. M stated that he "bargained" Mr. A down to €10,000 and subsequently paid him €5000 in the middle of 2021. Mr. M stated that he still "owed Mr. A €5000 as he wasn't going to pay the full amount until the full diversion was complete"*
- *Mr. M also stated that Mr. A suggested that the diversion could still face further delays, indicating that the 38kV line was still live. It turned out subsequently that the line was de-energised at this point.*
- *Mr. M recalled that there was some suggestion by Mr. A that the line diversion might have been unnecessarily positioned on land belonging to … a local farmer. Intimation was that this would have been to the benefit of [the local farmer]. BK asked whether Mr. A engaged with the landowner…and if so what was involved?*

- *Mr. M stated that in February 2022 that he requested meters to be installed for an April connection date. He was informed to talk to the NTs "on the ground". Mr. M's foreman contacted NT Mr. D who told him to pay the metering NTs €50 per meter.*
- *Mr. M recalled that Mr. D asked their site foreman for the site tiler to do work in his house. Mr. M stated a tiler was provided and completed work in Mr. D's house and charged him €200. Mr. M indicated that that (sic) this was probably well below cost for the job completed.*
- *Mr. M didn't recall the names of the metering NTs that completed metering at this site. He recalled that meters were installed on only two specific times and on both occasions the NTs were paid per meter. When asked Mr. M stated that the cable pullers on site were not paid to pull cables, because "enough was enough"*

Meeting Closing

- *BT asked Mr. M and Mr. S whether the issues outlined were happening on other sites outside of Dublin North. Mr. S stated that they had sites in South Dublin, Dublin City and Louth but had no reports of similar issues. Although their Richmond Homes own construction company Arkmount wasn't managing these sites.*
- *Although Mr. S didn't have direct evidence of similar practices in other parts of Dublin, he expressed clear belief that though Dublin North was far worse, that such practices were probably common and longstanding in other areas. He mentioned an anecdote of an individual recently interviewed for a site management job with Richmond, who when asked about his relationship with Utility Companies, explained that he "knew what it took to get things done."! Indicating this is a common view in the industry.*
- *BK asked Mr. S would Richmond Homes be willing to make a formal written complaint about these issues. Mr. S asked for time to consider this with the company directors and agreed to revert.*
- *Mr. M raised concerns about how NTs on site would treat Richmond Projects in the future if they made a formal complaint. BK and BT reassured Mr. M and Mr. S that ESBN would investigate this issue and would ensure that Richmond Homes projects would not be impacted if these decided to make a formal complaint.*

- *BT agreed to share the relevant Regional Manager and Area Manager contact details with Mr. S following the meeting with a view to ensuring proper and efficient progression of Richmond Homes Projects."*

17. I have amended this quote to ensure consistency in how Mr. M, Mr. S, and Messrs. A, B, C, and D are referred to throughout this judgment. I have also used a pseudonym for the foreman who is referred to in the note.

18. On the 30th May 2022, Mr. S said in an email to Mr. Tapley that he was hoping to catch up with Mr. Tapley in person to follow-up on some of the points discussed at the meeting and asked that Mr. Tapley suggest some dates/times. There appears to have been no answer to this other than an automated out-of-office reply. It is averred by the defendants' solicitor that Mr. S also followed up with several calls to Mr. Tapley but did not receive any response.

19. On the 1st June 2022, the plaintiffs reported the fact and substance of the allegations to the Gardaí.

20. Notwithstanding the assurance given by Mr. Kennedy and Mr. Tapley at the meeting that ESB Networks would investigate the issue, the plaintiffs did not carry out any inquiry or investigation. Mr. Tapley states on affidavit that they resolved not to take any action which might prejudice the Garda investigation and therefore waited until the subjects of the investigation were aware that they were being investigated before conducting any investigation.

21. Mr. Tapley says on affidavit that the plaintiffs apprehended that the defendants were unlikely to furnish the information sought in the proceedings on a voluntary basis and therefore decided to issue proceedings. He also says that an Order of the Court would grant important protections to all of the parties in terms of the accuracy and completeness of the information and restrictions on the use to which it can be put. He does not give the basis for his apprehension at that stage that Richmond Homes and Arkmount were unlikely to furnish the information voluntarily. Certainly, in the context of the defendants having been the one to bring the fact of these payments to the plaintiffs' attention one would at least have expected an explanation as to why the plaintiffs held this apprehension.

22. In any event, on the 27th July 2022 the plaintiffs notified Richmond Homes and Arkmount of their intention to issue these proceedings and then did so on the same day. The plaintiffs then applied to O'Moore J on the 28th July 2022 for liberty to issue and serve a Notice of Motion and the motion was issued on the 29th July 2022 returnable for 10th August 2022.

Post-institution of the proceedings

23. On the 8th August 2023, following the issuing of the proceedings and the motion, the defendants were served with an order by An Garda Síochána pursuant to section 15 of the Criminal Justice Act 2011 to produce documentation. The defendants' solicitor deals with the process of complying with this order in great detail in the replying affidavit. It is sufficient to note that the defendants engaged with the Gardaí in this process, including engaging a firm who specialises in forensic and electronic legal discovery services, who carried out searches and collated documents in accordance with search terms and a methodology which had been notified to the Gardaí. A difficulty was identified with the "*production order*" by the defendants and the Gardaí withdrew that order on the 29th August 2022. It was replaced with a revised order on the 25th October 2022.

24. Parallel to this process, the parties to these proceedings were engaging with each other in relation to discovery. Ultimately, the parties agreed that on the 10th August 2022, the plaintiffs' motion, including for discovery, would be adjourned until the 6th October 2022 on the basis that the defendants would furnish the plaintiffs with a category of discovery by the 21st September 2022 which at least in part was to mirror the documents to be provided to An Garda Síochána under the production order. Disagreement arose between the parties as to precisely what had been agreed.

25. On the 6th October Stack J ordered discovery on consent in the terms set out above. This is said to have been broader than the production order and therefore additional searches had to be carried by or on behalf of the defendants.

26. Ultimately, the defendants made discovery on the 20th October 2022. The Gardaí served a revised production order on the 25th October and, because it expanded one category, additional searches were carried out but those searches did not identify any additional documents which required to be discovered and the defendants' solicitors

confirmed on the 30th November 2022 that this was the entirety of the relevant documentation.

Relief Sought

27. It seems that the plaintiffs are satisfied that the defendants have complied with the Order for Discovery and this resolves the relief at paragraph 4 of the Notice of Motion. This discovery process was always stated to be subject to the plaintiffs' right to pursue the other relief if the discovery did not satisfy their stated needs; for example in letters from the plaintiffs' solicitors of the 9th August and 27th September 2022. By letter of the 1st December, the plaintiffs' solicitor informed the defendants that they would be proceeding with the application to seek the balance of the reliefs sought in the Plenary Summons and the Notice of Motion on the basis that the documents provided did not provide "*the basic information*" required by the plaintiffs. The balance of the reliefs were those in paragraphs 2 – 3 of the Notice of Motion.

28. Before considering that relief it may be helpful to set out the legal framework in respect of the Norwich Pharmacal jurisdiction, its scope and its application.

Legal Framework

Origin of the jurisdiction

29. The modern genesis of the remedy is the eponymous *Norwich Pharmacal Co & Ors v Customs and Excise Commissioners [1874] AC 133* in which Lord Reid said at page 175:

> *"My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the Appellants, and I am particularly impressed by the views expressed by Lord Romilly M.R. and Lord Hatherley LC, in Upmann v. Elkan 1871 LR 12 Eq. 140. They seem to me to point to a very reasonable principle, that, if through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability, but he comes under a duty to assist the person who has been wronged, by giving him full information and disclosing the identity of the wrongdoers. I do not think it*

matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

30. In that case the plaintiff had initially sought information over and above the names and addresses of alleged wrongdoers but by the time the case reached the House of Lords that had been abandoned and all that was sought was an order to compel the Customs and Excise Commissioners to disclose the names and addresses of the consignees of a certain chemical compound which had been imported into the UK allegedly in breach of the licence held by the plaintiff over one of the ingredients. It was alleged that this was a wrongful act and thus, what was sought, was the names and addresses of the alleged wrongdoers.

31. The genesis of the availability of Norwich Pharmacal-type relief in this jurisdiction is *Megaleasing UK Ltd and ors v Barrett and ors [1993] ILRM 497*. The plaintiffs claimed that in the years 1989 and 1990 four invoices were raised by some of the defendants against Megaleasing UK Ltd and were authorised for payment by servants or agents of Megaleasing UK Ltd and were paid. In these circumstances, the plaintiffs alleged that the defendants had either wittingly or unwittingly become involved in the tortious acts of others so as to facilitate wrongdoing and were therefore under a duty to assist the plaintiffs, the injured parties, by giving the plaintiffs full information in relation to the events surrounding the wrongdoing, so as to enable the plaintiffs to proceed against the wrongdoers.

32. The plaintiffs issued proceedings against the defendants seeking extensive information and Costello J in the High Court made an Order directing the defendants to disclose to the plaintiffs inter alia *"full details of all facts and matters or information within their knowledge concerning"* specified invoices *"including without prejudice to the generality of the foregoing (a) on whose instructions each of the said invoices was prepared; (b) the transaction to which each of the said invoices related; (c) when and in what manner payment was received in respect of each of the said invoices; (d) the whereabouts of and what has become of sums paid pursuant to each of the said invoices; (e) on whose instructions sums paid pursuant to each of the said invoices were disbursed and for what purpose; (f) any involvement of any of the following [named people] in any of the said facts or matters; (g) any communications had with the persons named in (f) or any of them relating to any of the payments…; (h) any contract*

involving the first to seventh defendants or any of them and any third party, in any way relating to the issue of the said invoices, the transactions to which each of them relate and the payments made in respect of each of them."

33. Finlay CJ (all members of the Court agreeing), having considered the various judgments in *Norwich Pharmacal*, held:

> *"I conclude from these speeches that the granting of an order for discovery in an action of sole discovery prior to the institution of proceedings against any defendant is a power which for good reasons must be sparingly used, though, where appropriate it may be of very considerable value towards the attainment of justice. What does seem clear is that in the Norwich Pharmacal case considerable stress was laid upon the very clear and unambiguous establishment of a wrongdoing. Similar considerations apply to the case of Orr v.Diaper, where the issue arose on a demurrer and was, therefore, based on an assumption of the establishment of the wrong.*
>
> *Counsel on the hearing of this appeal, both of whom assisted the Court with very full arguments, were unable to identify any case in which upon a claim of prima facie proof as to the probability of the commission of a wrong, relief by way of discovery was granted. It would also appear that the case of the Bankers Trust Company v. Shapiro 1981 WLR 1274, was a case of clearly established forged cheques in which the order for discovery was made against a bank which was already a party to the action, and with whom had been lodged the proceeds of the forged cheque which the plaintiffs were seeking to recover. Although the decision of Lord Denning MR, granting the discovery refers to the decision in Norwich Pharmacal Company v. The Customs and Excise Commissioners, it would appear that different considerations apply to such a case than do to the instant case, where the sole remedy being sought against these Defendants is discovery, and where no substantive action exists in which they are Defendants, and no substantive action exists in which any person is a defendant in relation to the alleged wrongdoing.*
>
> *I am, accordingly, driven to the conclusion that the existing authorities upon which the judgment of the High Court are largely based, which are authorities of the English courts, do in fact confine the remedy to cases where a very clear proof of a wrongdoing exists, and possibly, so far as applies to an action for discovery alone prior to the institution of any other proceedings, to cases where*

what is really sought is the names and identity of the wrongdoers, rather than factual information concerning the commission of the wrong.

A consideration of the terms of the order made in the High Court in this case very clearly indicates that a most wideranging inquiry of all the facts and circumstances surrounding the transactions which are involved in the invoices, quite apart from the mere ascertainment of the names and addresses of the eventual beneficiaries of the payments made in pursuance of the invoices is required."

34. McCarthy J agreed with Finlay CJ and also said:

"*Whilst the rules of Court no longer make express provision for an action for discovery, I have no doubt but that the jurisdiction of the High Court must extend, where appropriate, to granting such relief. It is a jurisdiction to be sparingly exercised…"*

35. He went on to say:

"*A procedure of this kind is plainly open to abuse which the Courts must be alert to prevent. The procedure requires a balancing of the requirements of justice and the requirements of privacy."*

36. O'Flaherty J also agreed with the judgment of Finlay CJ and added:

"…Historically the action *for discovery has been confined to ascertaining the names of wrongdoers where wrongdoing has been established. The case that held the centre of the stage in this area of law until recent times – it is still good law – was Orr v Diaper (1876) 4 Ch D 92…*

The action for discovery is of ancient origin and, there is no doubt, that it may prove to be a valuable instrument in the search for justice. I would, for the present, confine it to a requirement to disclose names where wrongdoing is established. The High Court order authorised a roving inquiry of a very far-

reaching kind which goes far beyond anything that was permitted in the past. This case affords no grounds for extending the remedy to any degree.

If the scope of this type of action is ever to be widened it will require the fullest disclosure on the part of applicants so that all information is laid before the Court at the earliest possible moment. Details of the alleged wrongdoing should be put before the Court with a degree of precision and it should be made clear how it is suggested that the defendants may be able to help."

Scope of the Jurisdiction

37. The parties fundamentally disagree about the scope of the *Norwich Pharmacal* jurisdiction in Irish law. The defendants submit on the basis of *Megaleasing* and subsequent High Court cases that the jurisdiction in Ireland is limited to directing discovery of documents, or possibly disclosure of information, which will identify or allow the plaintiff to identify the alleged wrongdoers to enable the plaintiff to institute proceedings against them and that I am bound to follow those cases (*Re Wordport Ireland Ltd [2005] IEHC 189*). Alternatively, they submit that any extension of the jurisdiction must be incremental. The plaintiffs submit that the jurisdiction is in fact broader than that and describe one of the High Court judgments (*Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Limited [2021] IEHC 287* as "*an overly narrow reading of the decision in Megaleasing".* Alternatively, they argue the jurisdiction should be extended.

38. As is clear from the quote from *Norwich Pharmacal* the Order that was made was for the disclosure of information related to the identity of the alleged wrongdoer(s). It must, of course, be remembered that by the time it reached the House of Lords that is all that was being sought by the plaintiffs and therefore the House of Lords did not have to determine the scope of the relief and whether it should extend beyond identity. However, the *Norwich Pharmacal* jurisdiction has undoubtedly been extended in England and Wales in various ways since that starting point: for example, the courts have shown themselves willing to order disclosure of a broader range of information/documentation, i.e. beyond just the names of alleged wrongdoers; and they have also been willing to order disclosure for purposes other than the institution of legal proceedings.

39. In *P v T Ltd [1997] 1 WLR 1309* it was not clear whether a tort had in fact been committed against the plaintiff. The plaintiff suspected that he had been defamed or the

subject of a malicious falsehood. Richard Scott VC noted the difference between *Norwich Pharmacal* (where it was clear that a wrong had been done but it was not known by whom) and the plaintiff's position in *P v T* and said "*In the Norwich Pharmacal case the plaintiff was able to demonstrate that tortious infringements of patent rights were being committed. It did not know by whom. It did not know whom to sue. But that there was tortious conduct against it was not in question. In the present case it is in question whether a tort has been committed against the plaintiff. He believes that it has…It seems to me that in the circumstances of the present case justice demands that the plaintiff should be placed in a position to clear his name if the allegations against him are without foundation. It seems to me intolerable that an individual in his position should be stained by serious allegations, the content of which he has no means of discovering and which he has no means of meeting otherwise than with the assistance of an order of discovery such as he seeks from me. It seems to me that the principles expressed in the Norwich Pharmacal case, although they have not previously been applied so far as I know to a case in which the question whether there has been a tort has not clearly been answered, ought to be applicable in a case such as the present.*"

40. In *Ashworth Security Hospital v MGN Limited [2002] UKHL 29* Lord Woolf (with whom the other members of the House of Lords agreed) said "*New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its appropriate use will continue to arise is illustrated by the decision of Sir Richard Scott VC in P v T Ltd [1997] 1 WLR 1309 (where relief was granted because it was necessary in the interests of justice albeit that the claimant was not able to identify without discovery what would be the appropriate cause of action)*".

41. In *Carlton Film Distributors Ltd v VCI Plc [2003] EWHC 616* the plaintiff established that there were reasonable grounds for supposing that there was a breach of contract and infringement of copyright by VCI but they did not have sufficient information to put an allegation or to sign a statement of truth. They sought an order based upon the principles in *Norwich Pharmacal* for VCI's manufacturing records. Thus, it differed from a traditional Norwich Pharmacal-type application which is directed towards establishing the identity of the wrongdoer. As Jacob J put it "*This case is different. Carlton knew who the wrong-doer is (if wrong-doer they be) namely VCI. They say there are reasonable grounds for supposing VCI have broken the contract and, Mr. Wesselberg*

added, perhaps infringed copyright…but Carlton do not have quite enough to start the action." Jacob J went on to say:

> *"In its time Norwich Pharmacal was ground-breaking. It was argued, indeed, that it was a very special case, virtually unique, because how often does one know that one has had a wrong done to one, not know who did it but know a man who does? However, things have moved on. The jurisdiction of equity to assist in the attainment of justice has been seen to apply to other kinds of cases too. Thus, similar orders are now made pursuant to the jurisdiction established in Bankers Trust v Shapiro.*
>
> *Most pertinently as far as this case is concerned is the decision of Sir Richard Scott VC in P v T Ltd [1997] 1 WLR 1309*."

42. Jacob J went on to say:

> *"So Norwich Pharmacal is not limited simply to the case of finding out the name of a wrong-doer. It also extends to cases where there is a good indication of wrong-doing but not every piece of what the claimant needs to plead a case is fully in position."*

43. In *Mitsui v Nexen Petroleum [2005] EWHC 625* Lightman J refused relief under the Norwich Pharmacal jurisdiction on the basis that pre-action disclosure was available under the Civil Procedure Rules and relief under that jurisdiction was therefore not necessary. He did, however, note that the "*application of the basic principle*" had been extended since *Norwich Pharmacal* and said "*[T]he jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing…; and is not limited to cases where the identity of the wrongdoer is unknown. Relief can be ordered where the identity of the claimant is known, but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw…Further the third party from whom information is sought need not be an innocent third party: he may be a wrongdoer himself…*" He went on to note Woolf LJ's statement in *Ashworth Hospital*. He also noted the statements of McGonigal J in *Aoot Kalmneft v Denton Wilde Sapte [2002] 1 Lloyds Rep 417*, where McGonigal J said "*In Norwich Pharmacal the information required was the identity of the wrongdoer (the applicant knew what wrong had been done but not who had done it) but I see no reason why the principle is limited to disclosure of the identity of an unknown wrongdoer and does not*

extend to information showing that he has committed the wrong." He then set out three conditions to be satisfied for the court to exercise its power: (i) a wrong must have been carried out, (ii) there must be a need for an order to enable action to be brought against the wrongdoer, (iii) and the person from whom the order is sought must be mixed up in the wrongdoing and be able to provide the information necessary to enable the ultimate wrongdoer to be sued. The potential necessity identified by him was whether the claimant needed further information before it could fully and properly plead a breach of contract and sign on the pleading the Statement of Truth required by the Civil Procedure Rules confirming that the facts pleaded are believed to be true. Interestingly, Lightman J said that the jurisdiction extends beyond the identification of the wrongdoer to cover situations where the claimant "*requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires the missing piece of the jigsaw."* In fact, this was considered by the UK Supreme Court in *R(Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 1) [2008] EWHC 2048* to be a potential tightening of the jurisdiction away from a test of necessity to a higher test (and was rejected by the Supreme Court) (see para 93-94)

44. In the *Mohamed* case (referred to in *Rugby Football Union v Consolidated Information Services Ltd [2012] UKSC 55*) Thomas LJ on behalf of a divisional High Court said:

> *"106. It was argued by Mr Saini QC that what was in effect being sought by BM was evidence and that it was clear from the authorities, summarised in Hollander at paragraphs 5-18 to 5-19, that under Norwich Pharmacol it was only possible to obtain information essential to bring proceedings and not evidence in support of them. We do not accept the submission that what is being sought is evidence; what the Foreign Secretary holds is information essential to a fair consideration of BM's case and a fair trial. As we have set out, BM has not been given by the United States authorities any information about his custody, treatment or location in the period April 2002 to May 2004. Without the information held by the UK Government, BM cannot have his case fairly considered by the Convening Authority or have a fair trial as he will not be able to try to establish the only answer he has to the confessions -namely that they were involuntary and abstracted from him by wrongful treatment. The information is as essential to a fair trial in which he is the defendant as it would be if he were pursuing a claim. Our further reasons are set out in the closed judgment.*

107. But is that sufficient within the principles so far developed in the application of Norwich Pharmacal? There is plainly no precedent, as it would not be possible to proceed with a prosecution in the United Kingdom if information of the type held by the Foreign Secretary was not provided by the prosecutor. However in the unique circumstances of this case, we see no reason why a person facing such serious charges and who claims to be the victim of torture and cruel, inhuman or degrading treatment should not be entitled to information capable of providing the only real answer, in the light of the confessions, to the charges made, and thus affording him a fair consideration of his case and a fair trial in accordance with long established principles to which we refer at paragraph 147.v).

…

133. It seems to us, therefore, that although the action cannot be one used for wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information, and the court must always consider what is proportionate and the expense involved, the scope of what can be ordered must depend on the factual circumstances of each case. In our view the scope of the information which the court may order be provided is not confined to the identity of the wrongdoer nor to what was described by Lightman J in Mitsui & Co Ltd v Nexen Petroleum UK Ltd [2005] EWHC 625 (Ch) at paragraph 18 as "the missing piece of the jigsaw". It is clear from the development of the jurisdiction in relation to the tracing of assets that the courts will make orders specific to the facts of the case within the constraints made clear in Norwich Pharmacol and the cases to which we have referred."

45. In *Rugby Football Union v Consolidated Information Services Ltd [2012] UKSC 55* the Rugby Football Union were seeking disclosure of the identity of those who had advertised for sale or sold tickets for the autumn international and Six Nations rugby matches. Lord Kerr, who gave judgment for the UK Supreme Court, noted the scope of the jurisdiction as described in the well-known quote from Lord Reid and went on to note that "*Later cases have emphasised the need for flexibility and discretion in considering whether the remedy should be granted…It is not necessary that an applicant intends to bring legal proceedings in respect of the arguable wrong; any form of redress (for example disciplinary action or the dismissal of an employee) will suffice to ground an application for the order."* He also went to say that "*[T]he need to order disclosure will be found to exist only if it is 'necessary and proportionate response in all the circumstances"*". He also said that the "*essential purpose of the remedy is to do justice.*

This involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various factors have been identified in the authorities as relevant."

46. The plaintiffs also referred me to a number of other English cases in which the English courts exercised their jurisdiction under the *Bankers Trust* jurisdiction to order wide disclosure (eg. *London and Counties Securities Ltd v Caplan (Unreported, High Court of England and Wales, 1st December 1978*, *Marc Rich v Krasner [1999] EWCA Civ 581*, *Aoot Kalmneft v Denton Wilde Sapte [2002] 1 QB 417*, and *Kyriakou v Christie's [2017] EWHC 487*). In circumstances where the Supreme Court in *Megaleasing* drew a distinction between the *Norwich Pharmacal* and *Bankers Trust* jurisdictions – and indeed the plaintiffs acknowledge that they are separate and from a distinct line of authority - I do not find these cases to be of direct assistance as to the scope of the Norwich Pharmacal jurisdiction. The relevance of these cases is that both remedies are equitable in nature and are directed towards the attainment of justice and the English courts (i) were prepared to exercise the *Bankers Trust* jurisdiction to order wide disclosure and (ii) in some instances based the extension of the *Norwich Pharmacal* jurisdiction on the *Bankers Trust* jurisdiction.

47. It seems to me that some caution must be exercised in interpreting how much of an extension of the jurisdiction was brought about by these decisions and the nature of any such extensions. For example, in *Ashworth* the Court was dealing, not with the scope of the material which could be ordered to be disclosed under the Norwich Pharmacal jurisdiction, but with the questions of the purpose for which disclosure could be sought and of whether there was a requirement that the person from whom disclosure is sought must be a wrongdoer. In fact, the information that was sought by the hospital authority was information relating to the identity of the alleged wrongdoer. In *Carlton Film Distributors*, while the Court was dealing with an application for information other than information relating to the identity of the wrongdoers, what was being sought was simple discovery of documents, ie. manufacturing records. This was an important factor in the case. Jacob J, when dealing with the fact that the order would constitute an intrusion on VCI, said that *"[I]n this case there is not a suggestion that the degree [*of intrusion*] is significant. There are almost certainly precise records on a computer somewhere."* In *Mohamed* a central factor in the case were the unique circumstances and the nature of the rights involved. It must also be noted that the Civil Procedure Rules played a part in the evolution of the jurisdiction.

48. Nonetheless, the jurisdiction has undoubtedly been extended in a number of respects.

49. There has been no such development in this jurisdiction, save perhaps for a very slight extension in *Blythe v The Commissioner of An Garda Síochána*. In *Megaleasing*, as is clear from the quotes set out above, the Supreme Court were unwilling to order the disclosure sought because it went beyond information relating to the identity of the alleged wrongdoers. It is important to note that the relief was primarily refused on the grounds that the plaintiffs had failed to establish wrongdoing to the required standard (Finlay CJ), and that the plaintiffs had settled their employment differences with their former employees without requiring them to furnish what may well be the appropriate information and therefore the court should not provide assistance to the plaintiffs (McCarthy J) (this is a point emphasised by the plaintiffs in this case). However, that the breadth of the disclosure being sought was a central factor is also clear from the judgments of Finlay CJ and O'Flaherty J. Finlay CJ said " *I am not satisfied, therefore, that, having regard to that fact, and having regard to the breadth and scope of the inquiries which the plaintiffs seek and which they obtained in the High Court, that it is an appropriate development of this discretion, which I am satisfied does exist in the courts, to apply it to the facts of this particular case."* O'Flaherty J said "*The High Court order authorised a roving inquiry of a very far-reaching kind which goes far beyond anything that was permitted in the past. This case affords no grounds for extending the remedy to any degree.*"

50. In all save one of the Irish cases to which I was referred the courts have subsequently stated (or, perhaps more precisely, have proceeded on the basis) that Norwich Pharmacal-type relief as adopted by the Supreme Court in *Megaleasing*, is limited to information relating to the identity of the wrongdoer(s).

51. Laffoy J in *Doyle v The Commissioner of An Garda Síochána [1999] 1 IR 329* (referred to in the passage from Delany & McGrath to which the Court was referred) was more concerned with whether wrongdoing had been established but she said that "*even if the plaintiff had adduced very clear proof of such a violation, it is doubtful, on the authority of the decision of the Supreme Court in Megaleasing, whether this Court's inherent jurisdiction would extend to making the order sought by the plaintiff which is aimed at obtaining disclosure of factual information concerning the commission of the alleged wrong."* She had earlier noted that "*The obiter dicta in Megaleasing suggest that the relief which the court can afford to a plaintiff in an action for discovery is limited to compelling disclosure of the names and identity of the wrongdoers…*"

52. In *Portakabin Ltd & anor v Google Ireland Ltd [2021] IEHC 446* and *Parcel Connect Ltd v Twitter International Company [2020] IEHC* Allen J said that the

jurisdiction to make an order directing disclosure of information which would identify (or assist in identifying) the alleged wrongdoer was "…*well-established. It was recognised by the Supreme Court in Megaleasing UK Ltd v Barrett [1993] ILRM 497. Finlay C.J., in a judgment in which all of the members of the court concurred, noted that Viscount Dilhorne in Norwich Pharmacal had traced the jurisdiction back to Orr v Diaper (1876) 4 Ch D 92. McCarthy J traced the jurisdiction in Ireland back to the Supreme Court of Judicature (Ireland) Act 1877. The court was unanimous that the power to make such an order was one which is to be exercised sparingly…"* In *Parcel Connect* (paragraph 22) he said "*The jurisdiction invoked by the Plaintiff on this application is a very specific one. It is a jurisdiction to order the disclosure of information as to the identity of an alleged wrongdoer for the specific purpose of allowing the Plaintiffs to institute proceedings against him or her or them…*"

53. Simons J said in *Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Ltd [2021] IEHC 287*:

> *"26. An excellent discussion of the jurisdiction to make disclosure orders of this type is to be found in a very recent article written by Mr. David Culleton, Solicitor: Culleton, "The Law Relating to Norwich Pharmacal Orders", 2021 01 The Irish Judicial Studies Journal 20. The nature of the jurisdiction is summarised, correctly, as follows (at pages 20/21).*
>
> > *"A Norwich Pharmacal Order is a particular type of disclosure order where the only cause of action is discovery. Essentially, the order compels a defendant, who has become mixed up in the alleged wrongdoing of a third party in some manner, either knowingly or innocently, to disclose information that would assist to identify this third party wrongdoer to the plaintiff. The purpose of the order is therefore to place a plaintiff in a position to identify and seek redress against a previously unknown wrongdoer.*
> >
> > *The authority to grant Norwich Pharmacal relief is founded on the court's equitable jurisdiction, derived from a 'contemporary incarnation of the equitable bill of discovery'.*
> >
> > *Therefore, it is a versatile remedy, granted at the discretion of the court, when deemed to be a proportionate and necessary response in all of the circumstances of a matter."*

27. The use of the term "Norwich Pharmacal Orders" to describe such disclosure orders is a nod to the eponymous decision of the House of Lords in Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] A.C. 133. This is the first modern authority from England and Wales in which an action for discovery alone was allowed in order to identify wrongdoers…

28. The classic statement of the nature of the jurisdiction is that of Lord Reid as follows (at page 175 of the reported judgment).

> *"[…] if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."*

29. For ease of exposition, I propose to use the more self-explanatory term "disclosure order" in preference to "Norwich Pharmacal Order".

30. The jurisdiction to grant relief in an action for discovery alone was first recognised, in modern times, by the Irish Courts in Megaleasing UK Ltd v. Barrett [1993] I.L.R.M. 497 (Supreme Court, 20 July 1992) ("Megaleasing"). The Supreme Court accepted, in principle, that the High Court has jurisdiction to entertain an action for discovery alone, prior to the institution of other proceedings against the as yet unidentified wrongdoers. ***The Supreme Court indicated that the remedy is confined to cases where what is really sought are the names and identity of the wrongdoers, rather than factual information concerning the commission of the wrong."*** [emphasis added]

54. Sanfey J said at paragraph 61 of his judgment in *Moore v Harris [2022] IEHC 677* that "*the remedy is limited to cases where the names and identity of the wrongdoers are sought, rather than factual information regarding the commission of the alleged wrongdoing (Finlay CJ in Megaleasing UK Limited v Barrett & Ors (No. 2) [1993] ILRM 497."*

55. However, it must be noted that the question of the possible scope of *Norwich Pharmacal* relief was not an issue in these cases and thus the courts were not engaging with or determining the question of whether the scope of the relief was confined to the names and identity of the wrongdoers or whether it was broader than that.

56. In *Blythe v The Commissioner of An Garda Síochána [2019] IEHC 854* Humphreys J indicated that the jurisdiction is broader. He said:

> *"8. The conclusion that inevitably follows both from the inherent nature of the scope of the judicial power and from the right of access to the court and to an effective remedy, whether taken separately or in conjunction, is that in principle and in general there is jurisdiction to direct discovery or disclosure that is in aid of, and will facilitate the institution of, an anticipated action by a third party against someone else: see also para. 14 of MacEochaidh in O'Brien v. Red Flag. Nonetheless the court would need to be satisfied of the appropriateness of such an order on the particular facts of the given case. In his judgment in O'Brien v. Red Flag [2017] IECA 258 (Unreported, Court of Appeal, 13th October, 2017), Ryan P. made the point that just because the jurisdiction exists doesn't mean it is appropriate to exercise it in any particular case.*
>
> *…*
>
> *11. The court's jurisdiction to direct disclosure of discovery cannot be viewed as limited to requiring disclosure of just the identity of the wrongdoer. Having regard to the general considerations of the imperative of doing justice and the right of access to the court and to an effective remedy, it would be arbitrary to impose such a limitation as a matter of absolute principle. Nonetheless the distinction needs to be drawn between information needed to launch the action and information needed to prosecute or advance the action. All the plaintiff needs at the pre-action stage is the information necessary to launch the action. If there is a case for access to further documents which are in the possession of the Garda Commissioner but not in the possession of defendants against whom the plaintiff intends to proceed substantively, that can be dealt with by way of third-party discovery at a later stage. Admittedly, there is a certain duplication involved in that process, but that appears to be the current state of the law."*

57. Thus, while Humphreys J held that the jurisdiction is limited to ordering the information necessary to launch the action, it is not limited to the names or identity of the alleged wrongdoer. In that case, the plaintiff was seeking the identity of the alleged

wrongdoers and the published material. However, that was in the particular context where the claim could not be brought without that information. In defamation there is a particular requirement to plead the statement(s) which each individual defendant is alleged to have published. Thus, the case could simply not be brought without the plaintiff knowing and being able to plead what each wrongdoer did. Humphreys J said:

> *"12. Anyway, the plaintiff in this case doesn't seek anything more than material related to the wrongdoers of the minimum nature to enable him to bring proceedings. He wants their names and addresses and details of the portions of the defamatory material in relation to which each of them was concerned in publishing. That is information that has to be pleaded if the plaintiff is to be in a position to institute his proceedings. It is limited to material he needs to institute the proceedings and is a workable order. It does leave a certain threshold to be overcome in the sense that a third party such as the Garda Commissioner doesn't have to disclose these details where there is nothing more than mere suspicion of wrongdoing, and I will now turn to the question of whether there is a requirement for clear and unambiguous evidence."*

58. In my view, the jurisdiction established in *Megaleasing* was limited to permitting the making of an order compelling the disclosure of information to identify the alleged wrongdoers. That is clear from the judgments in *Megaleasing* themselves but even if there was some uncertainty about this, *Megaleasing* has come to be interpreted in this way in a number of decisions of the High Court since 1999. *Blythe* was decided in a very particular context.

59. Thus, any Order which goes beyond the names or information relating to the identity of the alleged wrongdoers or beyond the purpose of instituting the proceedings would amount to an extension of the jurisdiction. However, I am equally satisfied that neither *Megaleasing* nor those High Court cases preclude an order directing broader disclosure being made in an appropriate case, i.e. an extension of the jurisdiction. That is clear from the express terms of the judgments in *Megaleasing*. It also arises from the rationale behind the relief.

60. Both Finlay CJ (with whom the other members of the Court agreed) and O'Flaherty J (he also agreed with Finlay CJ) expressly left open the possibility of a widening of the type of disclosure that may be ordered. Finlay CJ said "*I am, accordingly, driven to the conclusion that the existing authorities upon which the*

judgment of the High Court are largely based, which are authorities of the English courts, do in fact confine the remedy to cases where a very clear proof of a wrongdoing exists, ***and possibly****, so far as applies to an action for discovery alone prior to the institution of any other proceedings, to cases where what is really sought is the names and identity of the wrongdoers, rather than factual information concerning the commission of the wrong*." [emphasis added]. Finlay CJ was satisfied to state definitively that the English authorities meant that the remedy is only available where there is clear proof of wrongdoing and would only say that it was **possibly** confined to cases where what was sought is the names and identity of the wrongdoers rather than the factual information in relation to the wrongdoing. O'Flaherty J said *"I would,* ***for the present****, confine it to a requirement to disclose names where wrongdoing is established. The High Court order authorised a roving inquiry of a very far-reaching kind which goes far beyond anything that was permitted in the past.* ***This case affords no grounds for extending the remedy to any degree.***" [emphasis added]. Thus, the Supreme Court, while in that case deciding to confine the remedy to the names and identities of alleged wrongdoers, left the door open to the breadth of the remedy being extended in an appropriate case.

61. That they did so was expressly mentioned by Laffoy J in *Doyle v The Commissioner of An Garda Síochána [1999] 1 IR 329*. She said "*The obiter dicta in Megaleasing suggest that the relief which the court can afford to a plaintiff in an action for discovery is limited to compelling disclosure of the names and identity of the wrongdoers…"* However, she went on to say "…***there are hints in the judgments of Finlay CJ and O'Flaherty J that the jurisdiction is not "set in stone" and may be developed in the future****. However, there is no suggestion in the judgments of the Supreme Court that the court's inherent jurisdiction could be developed into an inherent jurisdictional equivalent of O.31, r.29 of the Rules of the Superior Courts, 1986, which empowers the court to order discovery against a non-party to a cause or matter before the court."* [emphasis added]

62. In the Supreme Court, Barrington J with whom all of the other members of the Court agreed, upheld Laffoy J's decision. He did not disagree with Laffoy J's comment that the judgments in *Megaleasing* hinted that the jurisdiction was not '*set in stone*' and that it may be developed in the future. In this regard it is important that O'Flaherty J, who had given judgment in *Megaleasing*, agreed with Barrington J's judgment. It is, of course, important to note that the focus of the judgment in *Doyle* was not in fact the breadth of the relief sought and therefore it was not necessary for the Supreme Court to engage with this point.

63. It is also important to recall that Finlay CJ's decision in *Megaleasing* was based on the English authorities at the time. He stated that he was driven to the conclusion *"that the existing authorities upon which the judgment of the High Court [were] largely based, which [were] authorities of the English courts, do in fact confine the remedy … possibly ….to cases where what is really sought is the names and identity of the wrongdoers, rather than factual information concerning the commission of the wrong."* The authorities referred to there were *Orr v Diaper*, *Norwich Pharmacal* and *Bankers Trust Co v Shapira [1980] 1 WLR 1274*. As discussed above, there has been development in English law and the courts have shown themselves open to making much broader *Norwich Pharmacal* orders. Given that the decision in *Megaleasing* was expressly based on the state of the English authorities at that time and Finlay CJ left open the possibility of development in Irish law, it seems to me that the jurisdiction may be extended by the making of a broader type of order in an appropriate case. This, however, must be qualified to some extent by the fact that the law in the United Kingdom and its evolution had a different starting point. In *Norwich Pharmacal* (the modern starting point) the only application before the court by the time it got to the House of Lords was for an order for the names and addresses of the alleged wrongdoers. The House of Lords held that the courts had jurisdiction to make such an order. It did not have to determine whether the jurisdiction was confined to that or was in fact broader. The starting point in Irish law was *Megaleasing* in which the Supreme Court had to determine an application for additional information over and above the identities of the alleged wrongdoers and declined to do so.

64. The ability of the Court to make an order for discovery/disclosure which is broader than just the names or identities of the wrongdoers also seems to me to be consistent with the purpose and rationale of the jurisdiction itself and with the equitable nature of the jurisdiction. The jurisdiction is to aid in the attainment of justice. O'Flaherty J in *Megaleasing* described it as "*of ancient origin and, there is no doubt, that it may prove to be a valuable instrument in the search for justice."* That the relief is a tool which is available to the court to seek to achieve justice is also implicit in the statement of McCarthy J that the "*…procedure requires a balancing of the requirements of justice and the requirements of privacy.*" Humphreys J expanded on the rationale behind the relief in *Blythe v The Commissioner of An Garda Síochána* where he said:

> "*6. The jurisdiction of the court to make an order for disclosure or discovery, whether against a party or a non-party, derives from two related but congruent and mutually consistent sources. Firstly, it is inherent in the judicial power that,*

at least as a general proposition, the court can require interested parties to assist the doing of justice; and secondly, the constitutional right of access to the courts and the related EU and ECHR right to an effective remedy, which is also perhaps a better way to phrase the unenumerated constitutional right, implies that the court must have the jurisdiction to make such orders as are necessary to vindicate the right to effective access to the court and to an effective remedy at the end of the day. In cases such as the present one, where a plaintiff is unable to sue because a holder of information about the proposed defendants in the defamation action is not prepared to part with that information, to refuse the order would deprive the plaintiff of that right to an effective remedy. Both of those factors, while mutually consistent, are relevant, and the fact that the scope of the judicial power is engaged by discovery and disclosure orders takes the matter beyond one of being a purely human rights issue."

65. Thus, there seems to me to be ample basis for concluding that it is open to the Court to make a broader disclosure order in an appropriate case even though the jurisdiction recognised at that time by the Supreme Court was more limited. Of course, it would not be open to this Court to do so if the Supreme Court had not acknowledged the possibility of development in the law. Nor would it be open to this Court to do so if previous High Court decisions had had to consider and determine the issue. While previous judgments undoubtedly state that *Megaleasing* confined the remedy to the names of alleged wrongdoers they did not in fact have to determine the issue of the scope of the remedy. I also accept that any such extension must be incremental.

66. However, the question remains whether the court should do so. As Ryan P put it in *O'Brien v Red Flag [2017] IECA 258*, just because a jurisdiction exists doesn't mean it is appropriate to exercise it in any particular case.

Principles and Factors

67. Irrespective of the debate about the scope of the relief that might be granted, the overarching preconditions to the granting of relief is (i) that the plaintiff has established very clear proof of wrongdoing and (ii) the disclosure sought is necessary. As Thomas LJ put it in *Mohamed* "*The intrusion into the business of others which the exercise of the Norwich Pharmocol jurisdiction obviously entails means that a court should not, as Lord Woolf in Ashworth made clear, require such information to be provided unless it is necessary"*. Woolf LJ had said in *Ashworth* that "*[T]he Norwich Pharmacal jurisdiction is*

an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised." If those tests are met the Court must then consider whether it should grant the relief. It is absolutely clear that the jurisdiction (whether it is limited to the identity of the wrongdoers or not) is one which "*for good reasons must be sparingly used*…" (Finlay CJ in *Megaleasing*). McCarthy J in the same case said "*[I]t is a jurisdiction to be sparingly exercised*". In determining whether or not to grant the relief the Court must conduct a careful balancing exercise (McCarthy J in *Megaleasing*). In *Muwema v Facebook Ireland Ltd [2018] IECA 104* the Court of Appeal said "*[W]here the Court is satisfied that the applicant's right to disclosure of the information is outweighed by some countervailing right or interest of the person sought to be identified, it may refuse to make the order sought. In such cases the Court must carry out a careful balancing exercise to see where the balance of justice lies. Each case will be considered on its own facts and circumstances*" and described it as a procedure which is "*plainly open to abuse which the Courts must be alert to prevent. The procedure requires a balancing of the requirements of justice and the requirements of privacy*." A central part of that balancing exercise is an assessment of the proportionality of the relief. Thomas LJ in *Mohamed* usefully captured the nature of the exercise where he said *"[T]he need to order disclosure will be found to exist only if it is 'necessary and proportionate response in all the circumstances"* and "*the essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various factors have been identified in the authorities as relevant."*

68. Sanfey J very recently considered the principles applying to Norwich Pharmacal applications in *Moore v Harris & Twitter International Company [2022] IEHC 677* Sanfey J said at paragraphs 60 and 61:

> *60. In Board of Management of Salesian Secondary School v Facebook Ireland [2021] IEHC 287, Simons J, having approved and adopted the passage from Mr Culleton's article quoted at para. 58 above, summarised at paras. 27 to 38 of his judgment the general principles emerging from the Irish case law with admirable clarity and concision. I gratefully adopt this summary as an accurate and perceptive analysis of the law to date.*
>
> *61. The following general principles relating to Norwich Pharmacal orders are of particular note:-*
>
> - *The remedy is limited to cases where the names and identity of the wrongdoers are sought, rather than factual information regarding the*

commission of the alleged wrongdoing (Finlay CJ in Megaleasing UK Limited v Barrett & Ors. (No. 2) [1993] ILRM 497);

- *the remedy is confined to cases where "a very clear proof of a wrongdoing exists" (Finlay CJ in Megaleasing). However, in Grace v Hendrick [2021] IEHC 320, Hyland J was prepared, in the particular circumstances of that case, to make a disclosure order pursuant to the inherent jurisdiction of the court in circumstances where no clear evidence of wrongdoing had been established;*
- *the procedure "requires a balancing of the requirements of justice and the requirements of privacy" (Finlay CJ in Megaleasing);*
- *"where the court is satisfied that the applicant's right to disclosure of the information is outweighed by some countervailing right or interest of the person sought to be identified, it may refuse to make the order sought. In such cases the court must carry out a careful balancing exercise to see where the balance of justice lies. Each case will be considered on its own facts and circumstances" (judgment of the Court of Appeal, Muwema v Facebook Ireland Limited [2018] IECA 104 at para. 3).*

…"

69. Earlier in his judgment, at paragraphs 58 – 61 Sanfey J, had quoted from the article by David Culleton (quoted by Simons J in *Salesian College*) and went on to say:

> *"59. In Rugby Football Union v Consolidated Information Services Limited (Formerly Viagogo Limited) (in liquidation) [2012] 1 WLR 3333, the UK Supreme Court (Lord Kerr JSC) identified the following* matters as relevant to the exercise of the court's jurisdiction: -
>
> *(i) the strength of the possible cause of action contemplated by the applicant for the order;*
>
> *(ii) the strong public interest in allowing an applicant to vindicate his legal rights;*
>
> *(iii) whether the making of the order will deter similar wrongdoing in the future;*
>
> *(iv) whether the information could be obtained from another source;*

(v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing;

(vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result;

(vii) the degree of confidentiality of the information sought;

(viii) the privacy rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed;

(ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed;

(x) the public interest in maintaining the confidentiality of journalistic sources."

70. There was no real dispute between the parties about these general principles as outlined by Sanfey J other than where he stated that the "*remedy is limited to cases where the names and identity of the wrongdoers are sought, rather than factual information regarding the commission of the alleged wrongdoing*." That, of course, is a fundamental difference between the parties. There was also no dispute about the applicability of the factors referred to by Sanfey J from the *Rugby Football Union v Consolidated Information Services Limited (formerly Viagogo Limited) (In Liquidation) [2012] 1 WLR 333* when the court is considering Norwich Pharmacal-type relief. The parties were also in agreement that on the facts of this case some of these factors were not of significant relevance (for example, paragraph (i), (vii), (viii), (ix) or (x) above). The factors identified by Sanfey J are, of course, not exhaustive because the Court must have regard to all the circumstances of the particular case. They do, however, provide a useful framework.

Relief Sought

71. As discussed above, the reliefs being sought by the plaintiffs and which remain in dispute are:

"2. *An Order pursuant to the inherent jurisdiction of this Honourable Court directing the Defendants and each of them, to provide full details of all payments made by either of them, their respective servants or agents, to any employee, agent, contractor and/or representative of the Plaintiffs, or either of them, other than on foot of invoices properly raised by the Plaintiffs, or either of them.*

3. Without prejudice to the generality of the foregoing, an Order directing the Defendants, and each of them to provide to the Plaintiffs, in respect of each such payment:

(i) The name(s) of the person or persons who requested the payment;
(ii) Details of what was to be done in consideration for the making of the payment;
(iii) Details of the amount paid;
(iv) The time and date upon which such payment was made;
(v) The name of the person(s) to whom such payment was made;
(vi) The method by which such payment was made;
(vii) The place at which such payment was made; and
(viii) The actions taken by the person(s) to whom such payment was made in connection with the payment."

72. These are expressed as separate reliefs with the specific items of information sought at paragraph 3 stated to be without prejudice to the generality of paragraph 2. However, at the hearing, Senior Counsel for the plaintiffs stated that the "*full details*" sought in paragraph 2 are in fact the details which are specified in paragraph 3. This must mean that the information sought in paragraph 2 (and, indeed) in the application is limited to the information sought in paragraph 3 and I have therefore approached the application on this basis. This is somewhat inconsistent with some of the submissions that were made on behalf of the plaintiffs where it was stated that the plaintiffs were looking for the identity of the person(s) who made any payments. This is not sought in paragraph 3 of the Notice of Motion and therefore would appear to have been sought under paragraph 2. Thus, on the face of it, the relief sought in paragraph 2 seemed to be broader than the specific information sought in paragraph 3.

73. It was also accepted by Senior Counsel for the plaintiffs that there should be a temporal and geographical limitation on the disclosure – it should be limited to the four sites and limited to when those sites were in operation. In my view, Senior Counsel was absolutely correct to accept that such limitations should apply but it is not satisfactory that these were only addressed at the hearing rather than in the terms of the relief sought in the first place or at least in advance of the hearing. This is particularly so where no realistic warning was given prior to the plaintiffs issuing the proceedings and the motion. In fact, these concessions only arose at a very late stage in the hearing in response to questions from the court.

74. I should observe that in an application of this nature, which is brought under an exceptional jurisdiction which must be sparingly exercised, the relief that is being sought should be specified with precision in order for the respondent and the Court to know what is in fact being sought.

75. I have considered whether these issues are sufficient to dismiss the application but I do not believe they are. They may, of course, be relevant to the question of costs.

76. One of the complaints made by the defendants during the course of this application is that it is not clear what is being sought by the plaintiffs and some of the points which I have just discussed fed into that. There were a few limbs to this complaint and I touch on some of them as I consider the relief but now that it has been clarified that "*full details*" means the specific categories of information in paragraph 3, overall I do not consider that there is a lack of clarity about what is being sought, other than in relation to the precise mechanism by which the information is to be delivered which I consider later in this judgment.

77. Finally, before dealing with the merits of the reliefs, it is the defendants' position that the Court either has to grant or refuse the relief in its entirety and can not tailor or amend the relief. As Senior Counsel for the defendants put it "*the plaintiff stands or falls on those two paragraphs*". The plaintiffs have decided, in the context of an exceptional jurisdiction, what they require and the Court should be slow to interfere with that. I do not accept that the position can be stated in such absolute terms. It is a long-established practice for a court when dealing with a discovery motion or even an application for an injunction, for example, to grant relief in different terms to those sought. There are, of course, significant differences between such applications and the current proceedings. The first difference is, of course, that this is the trial of the action and not an interlocutory application. Secondly, in those applications, for the most part, the respondents are also the defendants in the substantive proceedings. Thirdly, the

jurisdiction being invoked in this application is an exceptional jurisdiction which must be used sparingly. Nonetheless, the Court always has jurisdiction to grant part of the relief sought or to grant it in amended terms even at the end of the substantive proceedings. Of course, that can never be done in such a way or to such an extent as to do an injustice or unfairness to the respondent/defendant. Such an absolute position as is adopted by the defendants is also inconsistent with the equitable nature of the jurisdiction and its objective being the attainment of justice and to ensure meaningful access to the Courts and an effective remedy. That said, it would be inappropriate to overly-parse the relief sought.

78. Nonetheless, a distinction can be drawn between two types of information sought by the plaintiffs: the identity of person(s) who sought and/or received payments on the one hand and the other information in paragraph 3 on the other. This distinction arises from the authorities referred to above. I will therefore consider the application under the headings "Names of the persons who sought and received payments" (paragraph 3(i) and (v)) and "Other information" (paragraph 3(ii), (iii), (iv), (vi), (vii) and (viii)).

Names of the persons who sought and received payments

79. The Court clearly has jurisdiction to order disclosure of the identity of alleged wrongdoers if it is satisfied that wrongdoing has been established, the disclosure is necessary and that disclosure should be made having regard to all of the circumstances including the factors referred to by Sanfey J.

80. The essence of the defendants' submission in relation to the application for disclosure of the names of alleged wrongdoers is that the defendants have already provided the names of four alleged wrongdoers, there is no evidential basis upon which the Court could safely conclude that the plaintiff has established to the required standard that there was wrongdoing by any other person(s) and therefore an Order is unnecessary. It was submitted on behalf of the plaintiffs in their written submissions that the defendants are opposing disclosing the names of the wrongdoers. Senior Counsel for the defendants said that this statement is untenable because they provided these four names at the meeting.

81. In part this feeds into the defendants' complaints about a lack of clarity about what is being sought. They ask what the plaintiffs are looking for when they, the defendants, have already provided names. They point to the fact that the plaintiffs never reverted to them with any further queries, such as whether there were any other names,

or with any concerns about the adequacy of the information given at the meeting, with a request for that information to be given in writing, or for written confirmation that the names which had been given were the only persons who had sought or received payments. They point to the fact that even now it is unclear whether the plaintiffs are looking for documents or for the information to be provided in an affidavit or in a letter or witness statement. They submit that these are particularly significant features where the jurisdiction is one to be exercised sparingly and with great care.

82. In my view, the disclosure of four names can not in itself render the relief sought unnecessary, unless, possibly, the disclosure of those names was accompanied by confirmation that they were the only alleged wrongdoers. No such confirmation was given (I return to the fact that it was not sought by the plaintiffs at the time or by follow-up shortly). In fairness to the defendants their argument was more sophisticated and nuanced than simply saying that because four names were given it is unnecessary to obtain any further names. Their point was that the defendants gave the four names and there is no sufficient evidence of wrongdoing by any other individual(s) to support the making of an order by the Court. In short, they say that the only evidence of wrongdoing is by those four individuals, those names have already been given and therefore there is no basis for an order compelling the defendants to provide names.

83. The defendants correctly point out that this is the trial of the action and that it must be determined on the evidence. This is a basic principle. Barrington J stated in *Doyle v An Commissioner of An Garda Síochána*:

> *"Moreover it is necessary to emphasise that the action for sole discovery is a plenary action. It is not like an interlocutory motion for discovery which can rely on assertions or hearsay. It must proceed on the basis of evidence or agreed facts..."*

84. It is firmly-established that before the Court can exercise its jurisdiction, there must be clear proof of wrongdoing (Finlay CJ in *Megaleasing*). As noted by Sanfey J in *Moore v Harris*, Hyland J, in *Grace v Hendrick [2021] IEHC 320*, was prepared, in the particular circumstances of that case, to make a disclosure order pursuant to the inherent jurisdiction of the court in circumstances where no clear evidence of wrongdoing had been established. However, there was no disagreement between the parties in this case that wrongdoing had to be established and I proceed on that basis.

85. I am satisfied that there is clear evidence of wrongdoing by persons other than the four persons whose names have already been provided by the defendants. We must turn to the note of the meeting of the 17th May 2022 which is quoted at length above.

86. At the meeting, the representatives of the plaintiffs and the defendants discussed the four separate sites. In respect of the Baldoyle Shoreline site, it records that Mr. M recalled that "*his foreman John had to pay €75 per meter*" and that "*prior to his Mr. M's involvement…Richmond Homes had paid individuals in ESBN for meter installation on this site*." In respect of the Rush Mariners Way site there was specific discussion of payment(s) to Mr. B but also to payments having been made to ESBN pulling contractors. That these were separate from each other is clear from the note of the meeting where, importantly, Mr. M himself, says that *"he gave Mr. B €500 and gave the ESBN cable pulling contractors €300 on site."* The note also records Mr. M saying that his foreman, John, reported in the week of the 2nd May that *"he was asked by ESBN NTs to pay for the UG construction work to be completed*" and saying to Mr. M *"hope you left a few quid for the lads or did Mr. B get it all?*" In relation to the Kinsealy Oak Park site the note of the meeting records detailed discussion of payment(s) to Mr. A. However, it also records Mr. M informing the meeting that his foreman on that site contacted Mr. D and he, Mr. D, told the foreman to "*pay the metering NTs €50 per meter*". Mr. M is also recorded as telling the meeting that "*meters were installed on only two specific times and on both occasions the NTs were paid €50 per meter*." Thus, on the basis of what Mr. M and Mr. S told the plaintiff, there is clear evidence that payments were made in respect of the Baldoyle Shoreline site and none of the four named persons were linked with payments in respect of that site. There is also evidence of separate payments to ESB cable pulling contractors on the Rush Mariners Way site and demands for payments by ESB Networks NTs on the same site and demands for payments for the metering NTs on the Kinsealy Oak Park site.

87. Furthermore, there is evidence in the documentation that was provided by the defendants in discovery to reach the conclusion that the plaintiffs have established possible wrongdoing by persons other than the four named individuals. As will be recalled, the discovery that was ordered on consent was that the "*Defendants provide to the Plaintiffs all documents (including any communications) generated between 1 June 2020 and 31 July 2022 concerning evidencing or recording the making of alleged payments or the alleged possibility of making payments to any employee agent contractor and/or representative of the Plaintiffs or either of them (other than on foot of invoices properly raised by the Plaintiffs, or either of them) in connection with the carrying on of any works at or in connection with the*" four sites. Any documentation

provided must be presumed to be considered by the defendants to fall within this category. The documents included an email of resignation from an individual in Arkmount to Mr. S of the 2nd March 2022. It said:

> *"As discussed please see attached my letter of resignation from my role as … at Project Shoreline.*
>
> *I would like to thank you, Arkmount Construction & Richmond Homes for the opportunities you have given me during the course of my employment. I enjoyed the challenge of my role, and I was very pleased to help the team complete Phase 1 of Project Shoreline last year and welcome the first homeowners to Bay View.*
>
> *I apologise for the sudden departure, please let me know if there is anything I can do to make the transition easier, I have attached handover notes, a project directory and my contact details are below also if you need anything.*
>
> *Also attached are some expenses from January 2022 for your approval (ESB split into 3no. withdrawals - €600 to connection team and €200 to meter install man)."*

88. The documents also included a letter of resignation from the same employee in very similar terms but without the paragraph referring to expenses and payments to ESB personnel.

89. The discovery documents also included transaction details of what appear to be ATM withdrawals from an outlet in Baldoyle (two withdrawals of €300 each on the 27th January 2022 and one of €200 on the 28th January 2022). Project Shoreline was in Baldoyle.

90. It is important to note that the documents also include an expenses sheet which claims €300 for a factory visit in Monaghan on the 27th January 2022, €300 for a factory visit on the 28th January 2022 and €200 for a factory visit on the 31st January 2022. Nonetheless, the emailed letter of resignation refers to payments made to ESB personnel. This is the same aggregate amount as the amount stated in the resignation letter and as the ATM withdrawals. I am satisfied that this is clear evidence of payments having been made.

91. As noted above, the information given at the meeting did not link any of the four individuals who were named at the meeting with the Baldoyle Shoreline site and therefore this is evidence that payments were made to another person or people.

92. In my view, this is ample to satisfy the threshold of establishing evidence of wrongdoing by persons other than the four named persons. However, there is an added element to the defendant's argument which is that the evidence must link wrongdoing with a particular individual, whose identity is not yet known to the plaintiff, and general evidence of wrongdoing is not sufficient. It was submitted on behalf of the defendants that what is required is evidence of alleged wrongdoing by a specific individual(s) whose identity or identities are unknown to the plaintiff. I do not accept that this is a part of the test. It will often be impossible for an injured party to be able to point to an individual who committed the wrong in order to demand their name. Rather, it is sufficient for an injured party to satisfy the evidential burden to say a wrong has been done to me; I do not know who did it, but you know or have information which would allow me to identify who did it. In any event, there is evidence that wrongdoing was committed by specific individuals. There is evidence that payments were made for cable and meter installation on the Baldoyle Shoreline site, to pulling contractors on the Rush Mariners site and that demands for payments were made for NTs for underground work on that site and for metering NTs on the Kinsealy Oak Park site. In this case, there is evidence that some person(s) within relatively narrow categories engaged in wrongdoing and it seems to me that this satisfies the evidential burden.

93. I am therefore satisfied that there is clear proof of wrongdoing by persons other than the four named individuals and that they are within distinct categories of persons.

94. Those names are clearly necessary. The purpose of a Norwich Pharmacal order is to make it possible for the party seeking the relief to bring proceedings against the wrongdoer(s). The plaintiff wishes to proceed against all alleged wrongdoers and they therefore need the names of the persons who are alleged to have received improper payments. The position may be different if the defendants had clearly stated at the meeting, in correspondence, or in the exchange of affidavits that the four persons whose identities have already been provided are or are believed to be the only persons who received improper payments but they have not done so.

95. That does not resolve the matter, however. Even where the Court is satisfied that the information sought is necessary, it must still decide whether the defendant, in the exercise of the Court's discretion, should be compelled to disclose that information having regard to the factors identified by Sanfey J and the need for proportionality.

Governing any such consideration must be the principles that the jurisdiction is an exceptional one which must be exercised sparingly and that its objective is to aid in the administration of justice.

96. It seems to me that there are a number of key factors in the circumstances of this case. I am not constrained by the factors identified by Sanfey J, which I do not understand to have been intended by him as an exhaustive list of relevant factors, but they are of considerable assistance.

97. There is a strong public interest both in allowing the plaintiffs to vindicate their legal rights and in deterring similar wrongdoing in the future. The nature of the alleged wrongdoing – and I emphasise that I make no finding about the allegations – is of a very grave nature in any economy which is underpinned by law. Demands for improper payments relating to public utilities such as electricity are particularly grave. In this case, the plaintiffs are statutory bodies. The first-named plaintiff has a particular place in the hearts and minds of Irish society since the construction of the Ardnacrusha power station and the establishment of the ESB in 1927 and the subsequent rural electrification scheme. There is no place in a society or economy which is based on the rule of law for employees in such statutory bodies to seek payment in order to provide a service which they are required to provide anyway or to give preferential treatment to the person or body who is willing to pay or to pay the most. It is utterly unacceptable. I emphasise that I am making no finding as to whether what is alleged in fact occurred but the seriousness of the allegations in the context of a statutory body means that there is a significant public interest in ensuring that the employer, who is a public body, is able to vindicate its legal rights through appropriate proceedings and in ensuring, by such action being taken, that similar wrongdoing is deterred in the future. In very many cases improper payments such as are alleged in this case will be made secretly and unless it is known that they can be discovered there will be little legal deterrence to others from engaging in such behaviour.

98. The defendants argued that in fact the deterrence that would arise if the Court were to make the Order sought would be a deterrent to others from reporting wrongdoing to the ESB. They point to the fact that the defendants brought this to the attention of the plaintiffs and, as a consequence, have had to deal with a Garda Production Order and this application (and possibly having to comply with a very wide-ranging order) in circumstances where the plaintiff did not even revert with queries, did not seek the information sought in the motion prior to the institution of the proceedings, and did not carry out their own investigations. I accept that on a practical level, having to deal with such matters may act as a deterrent to raising wrongdoing but I do not

believe that it outweighs the imperative of a deterrent to others who might contemplate seeking and taking such payments or, indeed, the importance of the employer being able to take action against the alleged wrongdoers.

99. One of the factors identified by Lord Kerr and Sanfey J is whether the defendants knew or ought to have known that they were facilitating the alleged wrongdoing. A particularly contentious issue arose at the hearing as to whether (a) the alleged payments were authorised by the defendants and (b) whether it was even claimed by the plaintiffs that the payments were authorised by the defendants. In fact, this was a dispute which has no bearing on the outcome of this application and I do not need to resolve it. It is clear from the authorities that the relief is available whether or not the person from whom the information is sought is a wrongdoer or is also being sued. Furthermore, the factor identified by Lord Kerr and Sanfey J is whether the defendant knew or ought to have known that he was facilitating the wrongdoing and does not require that the wrongdoing be authorised. The information given by the defendants' representatives themselves at the meeting of the 17th May 2022 tends to show that the defendants were aware or should have been aware that they were facilitating the making of improper payments, ie. the arguable wrongdoing. It is not necessary to refer to the note of the meeting in detail as it is quoted almost in full above. Some examples will suffice to illustrate the point. Mr. M is recorded as having stated in relation to the Rush Mariners site that he "*gave Mr. B €500 and gave ESBN cable pulling contractors €300 on site*". Mr. S is recorded as having stated that "*these requests for payment have increased significantly in the last 12-18 months"* and that "*we have attracted this as we gave into it".* Mr. M is also recorded as having said that he "*bargained*" Mr. A down from a demand for €35,000 to €10,000 and paid him the first €5000 in the middle of 2021. Furthermore, a transcript of a recorded conversation apparently between Mr. A and Mr. M (though that has not been determined) was provided in discovery. It is difficult to interpret the conversation, in which there is reference to having to "*ease money out*" of sites as meaning anything other than that the defendants were facilitating the making of payments. Mr. M and Mr. S were senior representatives of the defendants. I am of the view that this factor is of particular significance because, leaving aside the question of whether payments were authorised, the payments were to the benefit of the defendants and senior representatives of the companies, on the basis of what they themselves said at the meeting, were aware of or made some of the payments.

100. One of the other factors identified by Lord Kerr and Sanfey J is whether the information could be obtained from another source. It is easy to see how it could be said to be disproportionate to compel a defendant to go to the trouble of making disclosure (particularly where, as in this case, they have already made discovery) if the plaintiffs

could obtain the information from another source including internal sources. This is a point upon which the plaintiffs placed very great emphasis. It is reflected in *Megaleasing*. Finlay CJ noted in that case that the plaintiffs had carried out a full investigation of the impugned transactions. McCarthy J specifically referred to the fact that the plaintiffs saw fit to "*settle their employment differences with their former representatives without requiring them to furnish what may well be the appropriate information…"* when rejecting the application.

101. The defendants point to a number of defaults on the part of the plaintiffs in respect of their obligation to try to obtain the information from other sources other than by way of an order of this court. I have adverted to some of them previously. The plaintiffs did not follow up the meeting of the 17th May 2022 with any further queries or concerns; for example, they did not ask for the names of any of the NTs or cable pulling personnel referred to at the meeting; nor did they ask for any further details (such as are sought in this motion) of the payments to the four named individuals. More particularly, they did not respond to a suggested follow-up by the defendants (Mr. S's email of the 30th May 2022). I am not convinced that this in itself is of any great weight in circumstances where the defendants have not provided any further information in response to the motion. They did of course make discovery which is an important factor to which I return, but the plaintiffs' failure to follow up would be of greater weight if, for instance, the defendants had reverted on receipt of the motion or when the plaintiff indicated that they were going to seek the balance of the reliefs with some suggestion or offer as to information that they might be willing or able to provide. Particular emphasis was laid on the fact that the plaintiffs assured the defendants at the meeting that they would investigate the matters raised but did not do so. They reported the matter to An Garda Síochána and imposed what was described by Senior Counsel for the defendants as a "*self-imposed stay*" on themselves which they were not entitled to do while at the same time bringing an application against the defendants.

102. It seems to me that in circumstances where proceedings were issued essentially out of the blue with no follow-up and no meaningful warning letter and with no real explanation for such urgency there is some significant weight to the defendants' point. The defendants' representatives at the meeting identified relatively small categories of persons to whom payments were made or by or for whom demands for payments were made. It must have been within the plaintiffs' knowledge with the minimum of investigation or inquiry in their own records to have ascertained which employees fell within those categories; for example, the plaintiffs must know who worked as an NT on the Baldoyle Shoreline site. There is no evidence of the plaintiff having taken the basic step of compiling such a list. Of course, that would only take the plaintiffs so far.

However, they could have, for example, interviewed those individuals. They did not take any such step. As against that, there is no evidence that every individual falling within the categories referred to at the meeting were involved in the taking of payments and such an exercise could have involved innocent persons. Regard must be had to this fact. Nonetheless, there is an obligation to seek to obtain information from other sources and there is no evidence of any such steps being taken. Mr. Tapley, on behalf of the plaintiffs, explained in his affidavit that they decided to wait until the subjects of the Garda investigation were aware that they were being investigated before conducting their own investigation. Assuming this is a reasonable and proper explanation up to a certain point, it is nonetheless difficult to see how that can be a proper reason for not conducting inquiries once this application was going to be made or why nothing appears to have been done since then and there is no evidence of any subsequent inquiries having been taken by the plaintiffs since the subjects became aware of the Garda investigation.

103. The fact that the defendants made discovery essentially on a voluntary basis is an important relevant factor to which some weight must be given in assessing whether an Order is proportionate or should be made. They did so by consenting to the Order of Stack J but that was in circumstances where the plaintiffs had not afforded them an opportunity to do so prior to issuing the proceedings or the motion. This discovery process was extensive, as outlined in the replying affidavit of the defendants' solicitor. The weight to be attached to this factor is reduced somewhat by the fact that the plaintiffs had at all times made it clear that they reserved their rights to seek the balance of the reliefs if the discovery did not provide the information they were seeking. Secondly, while it is clear that the process of collecting the relevant documentation was extensive, it is also important to note that the defendants were obliged to undergo much of this work in response to the Garda production order in any event. Thirdly, the fact of making discovery can not be given too much weight in circumstances where the records disclose little or nothing about the payments which the defendants' representatives disclosed in a general way at the meeting of the 17th May 2022. In short, those representatives acknowledged that payments were made by employees of the defendants (and the payments stood to the benefit of the defendants). However, the companies' records have almost no information about those payments. Weight has to be given for the fact that discovery was made on a voluntary basis but that weight can not be too significant in those circumstances.

104. A further factor of some significance is the mechanism and nature of disclosure. The plaintiffs do not specify how they say the information that is sought should be

provided. This also part of the defendants' complaint about a lack of clarity as to what was being sought by the plaintiffs. What is clear is that the plaintiffs are not seeking discovery of documentation. That the *Norwich Pharmacal*/*Megaleasing* jurisdiction encompasses the disclosure or provision of information is clear from the authorities referred to above. For example, in *Parcel Connect* Allen J made an Order requiring the defendant to provide to the plaintiffs by email "*any details which it holds relating to the identity of the*" alleged wrongdoer. In *Portakabin*, he directed the defendant to provide by email "*the substantive information and sign-up IP address and associated time stamps associated with*" a named Gmail account. However, this means that the obligation which would be imposed on the defendants goes beyond merely providing relevant documentation and would essentially involve gathering information which of itself may involve some sort of inquiries being made by the defendants with its own employees.

105. At first blush this seemed to me to be potentially of great significance and might go directly to the question of proportionality. It differs from the type of steps which might be required to be taken by the defendants in *Parcel Connect* and *Portakabin*. That information was technical information which, one would imagine, would be readily available. Furthermore, it begged such questions as how onerous a burden it might impose on the defendants; what would they be required to do; what would happen if an employee or former employee who had relevant information declined to provide it to the defendants, what would be the case if the defendants gave incorrect information or were themselves given incorrect information and passed that on. They all seem to me to be valid and, indeed, potentially very significant matters to be considered by any court asked to make a Norwich Pharmacal order, but in fact they are not determinative in this case. They simply do not arise on the evidence. The defendants, who correctly emphasised the requirement that the application must be determined on the evidence, have at no stage claimed that they would not be able to provide the names (or indeed the other information) or that they would have difficulty in ascertaining or would not be able to ascertain the names (or the other information) or indeed that they would even experience any difficulty in doing so.

106. Thus, while I accept that it is possible that the nature of the exercise might be different than in the cases of *Parcel Connect* and *Portakabin*, there is no evidential basis upon which I could conclude that the granting of relief would be disproportionately burdensome or onerous because it *may* require inquiries to be made and the defendants would face any difficulties in obtaining information.

107. It may well be that they will not be able to ascertain or provide some names (or other information). There may be a variety of reasons for this: the person who made the payments may not have known or might not remember the name(s) of the person(s) who received payments; there might be no records; he may not be willing to give the information; or, for example, it may be that payment was given to one person to be divided with another or others. However, no evidence along those lines has been given and cannot therefore be a basis for refusing the relief but may have to be addressed at a subsequent stage.

108. Furthermore, some of the same difficulties can also be encountered when making discovery of documents but that in itself is not a reason not to make an order for discovery.

109. It seems to me that when all of these factors are weighed together with the imperative that any Order must be proportionate and that the jurisdiction must be exercised sparingly, the balance favours the making of an Order that the defendants disclose to the plaintiffs the names of any individual(s) who demanded or received payment. I will return to the precise terms of the Order.

Other Information

110. I am not satisfied that the plaintiffs have established that disclosure of all of the other information is necessary, other than the date and amount of any payments.

111. As discussed above, an overarching principle governing the jurisdiction is that the disclosure must be necessary. Even in the jurisprudence of England and Wales extending the jurisdiction, necessity remains a governing principle. In some of those cases it has been held that it is not a requirement that the disclosure be necessary for the purpose of bringing of civil proceedings and, for example, disciplinary proceedings may be sufficient (see *Ashworth*) but nonetheless the courts have emphasised the key role that necessity plays in the court's jurisdiction. In *Mohamed*, Kerr LJ said *"[T]he intrusion into the business of others which the exercise of the Norwich Pharmacol jurisdiction obviously entails means that a court should not, as Lord Woolf in Ashworth made clear, require such information to be provided unless it is necessary."* (see also *Mitsui*)

112. In this case, the claim made by the plaintiffs is that the information is necessary to allow the bringing of civil proceedings against the alleged wrongdoers and so

therefore the only question before this Court is whether disclosure of the information is necessary for that purpose. The plaintiffs have not specifically said what proceedings, if any, they envisage issuing against any of the wrongdoers other than Mr. A (this is dealt with in an affidavit of the plaintiffs' solicitor sworn on the 1st December 2022). The defendants submitted that in circumstances where the plaintiffs have not said that they will issue proceedings against other alleged wrongdoers there is an insufficient basis for making an Order. However, it seems to me to be legitimate to say they need the information necessary to bring proceedings in order to decide whether to bring the proceedings. They have said what proceedings they are going to issue against Mr. A. It seems to me that I can proceed on the basis that the proceedings against others, if brought, will be the same or very similar in circumstances where the nature of the alleged wrongdoing is the same. The evidence on behalf of the plaintiffs is that the plaintiffs intend to issue proceedings against Mr. A (and, it must be presumed, other persons who received payments) for a "*declaration that his conduct…amounts to a repudiatory breach of his contract of employment, an order compelling him to disgorge the payments he received from the Defendants and to make full disclosure of any other such payments received by him.*" It was not stated in evidence but it was submitted that the claim against Mr. A (which must mean the claim just described) will allege fraud. This was not disputed by the defendants and I therefore proceed on that basis.

113. It was submitted that because the claim against Mr. A will allege fraud the plaintiffs are under an obligation to provide full particulars and what is necessary must be assessed according to that obligation. This obligation was not disputed by the defendants; rather they say that the plaintiffs have sufficient to initially plead and what is being sought is evidence. The plaintiffs rely on the long-established principle that full particulars of fraud must be pleaded and on Order 19 rule 5(2) of the Rules of the Superior Courts provides:

> "*In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings.*"

114. Of course, these obligations refer to what must be pleaded rather than what is required to institute proceedings. Humphreys J touched on this in *Blythe v The Commissioner of An Garda Síochána* where he said "*…the distinction needs to be drawn between information needed to launch the action and information needed to prosecute or advance the action. All the plaintiff needs at the pre-action stage is the information necessary to launch the action.*" He went on to say "*If there is a case for access to*

further documents which are in the possession of the Garda Commissioner but not in the possession of defendants against whom the plaintiff intends to proceed substantively, that can be dealt with by way of third-party discovery at a later stage. Admittedly, there is a certain duplication involved in that process, but that appears to be the current state of the law." Clarke J in *National Education Board v Ryan [2007] IEHC 428* also noted that there may be two stages to pleading a fraud case where he said:

> "*It is in the very nature of fraud (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to defence (and, thus, discovery) would be to create a classic Catch-22. The case will be narrowed. Discovery will be directed only towards the case as narrowed. Undiscovered aspects of the fraud or the consequences of the fraud will, as a natural result, never be revealed. This would, in my view, be apt to lead to an unjust solution.*"

115. I am satisfied that once the defendants provide the names of any other persons who demanded or received payment(s) the plaintiffs will have sufficient information to enable them to institute proceedings against them. They will have sufficient information to know the wrong, the identity of the wrongdoer and the relief that they will be seeking. On the basis of the *Norwich Pharmacal/Megaleasing* jurisdiction as it currently stands in Ireland that is all that the plaintiffs are entitled to.

116. However, I am satisfied that in the specific instance of fraud, where there is such a specific obligation in relation to pleading, the *Norwich Pharmacal/Megaleasing* jurisdiction ***may***, on the facts of a specific case, be extended to compel disclosure of the minimum information which is necessary to comply with that obligation. This is analogous to the cases of *Mitsui* and *Carlton Film Distributors* where the courts referred to the need to plead the case properly or to comply with the Civil Procedure Rules. It seems to me that this would be a relatively minor extension of the jurisdiction and would be consistent with its rationale. The entire rationale of the equitable jurisdiction is to aid in the attainment of justice and it seems to me that it would be illogical and inconsistent with that rationale if the jurisdiction were limited in such a way as to prevent a plaintiff from being able to obtain the minimum information to bring their case in accordance with the Rules of Court. In the absence of the bare minimum information which is required to be pleaded in a Statement of Claim the ability of a plaintiff to institute proceedings may in fact be artificial because if they deliver the Statement of Claim with

inadequate particulars, and their ability to obtain further particulars is impaired, the claim is vulnerable to being struck out and the rationale of the *Norwich Pharmacal/Megaleasing* jurisdiction would be entirely undermined. So also, would the right of access to the courts and the right to an effective remedy.

117. I accept that on the level of general principle this risks conflating what is required to institute proceedings and what is required to properly plead the case. In very many cases this may mean that the court should not make an order. However, on the particular facts of this case it seems to me be warranted. In this case discovery has already been made by the defendants and it is clear therefore that non-party discovery will not be of any assistance. This means that the plaintiffs will not be able to avail of non-party discovery to provide the minimum required particulars, i.e. will not be able to avail of the second stage of pleading adverted to in *National Education Board* and *Blythe.* Furthermore, of importance is the nature of the alleged wrongdoing and what is already known. In very many cases where Norwich Pharmacal relief is sought, the plaintiff will have the specifics of the wrongdoing but will not know the identity of the person who committed the wrong so once they obtain the name, they will at least be able to comply with the minimum requirement in respect of pleading. In this case, all the plaintiffs know is that unidentified persons (within certain categories) at unknown times received payments in unknown amounts. That creates a particular information deficit in this case and it seems to me is a unique feature of the case.

118. Turning to the specific information sought adopting this approach, I am satisfied that disclosure of a number of the items sought is unnecessary for the proper institution of the proceedings.

119. Senior Counsel for the defendants submitted that there is no evidential basis for the application for any of this other information. He points to paragraphs 8 to 11 of Mr. Tapley's grounding affidavit in which Mr. Tapley says that they need the information "*for the purpose of identifying the ESB Networks personnel alleged to have been involved in this alleged conduct*" (paragraph 9) and "*…the information sought is necessary to enable the Plaintiffs to identify those responsible for making such demands so that they can commence legal proceedings and/or take appropriate action against such persons*" (paragraph 10). He says this is the only evidence of why the plaintiffs need the information, i.e. to identify the wrongdoers, and there is therefore no evidence of any other necessity. It seems to me that this is an overly-restrictive reading of the evidence. Of course, information is necessary to identify those responsible but that can not foreclose information other than identity also being necessary or, at least, that conclusion being reached.

120. In reality, much of the information is directed towards the plaintiffs putting themselves in a position to prove their case against individual wrongdoers, including towards gathering the necessary evidence to do so. I have previously referred to counsel for the plaintiffs emphasising the fundamental importance of obtaining the name(s) of the person(s) who made any payments. Apart from the fact that this information is not sought as part of the relief, the reason given as to why this information is necessary is for the purpose of gathering evidence. Senior Counsel said during the course of submissions that "*…in terms of the precision of the order of particular importance…in this case in terms of the information, the de minimis information, are the persons who made the payments, because obviously…in any proceedings that are brought ESB would have to subpoena witnesses to prove the making of the payments and that can only be done if the ESB knows who made the payments.*" He also said "*…if we knew who the people who were alleged to have made the payments were, even if they wouldn't give the dates, we could subpoena them to give evidence at the trial…*" It is also clear from correspondence exchanged after the issue of proceedings that at least part of the plaintiffs' focus was on obtaining evidence. In a letter from the plaintiffs' solicitor of the 29th September there are several references to "evidence." For example, it is stated that the "*object of the proceedings is to obtain evidence and information in relation to those allegations…so that the ESB can assess how best to address the situation in line with its statutory obligations as both a public body and an employer.*" It is clear from the authorities referred to above that the gathering of evidence is not a proper basis for the Court to exercise this jurisdiction (see for example *Mohamed*). Similarly, it is impossible to see how the time (paragraph 2(iv)), as distinct from the date, or place (paragraph 2(vii)) at which or the method (paragraph 2(vi)) by which payment was made could be said to be necessary for the institution of proceedings or to plead the case adequately in the first instance.

121. I am therefore not satisfied that the plaintiffs have established that the information as to the time, place or method of payment is necessary.

122. I am also not at all satisfied that disclosure of the consideration for the payments or the actions taken in return for payment is necessary in light of the discussion at the meeting of the 17th May 2022. There is ample information for the plaintiffs to be able to institute proceedings on the basis that their employees demanded and/or took payments in consideration of providing services to the defendants which they were already under an obligation to provide under their contracts of service. Indeed, Mr. Tapley in his grounding affidavit feels able to set out the alleged wrongs. He states, "*The solicitation of the payments and the making of the payments is alleged to have occurred in connection with the giving of preferential treatment to the Defendants*" and "*…the*

Defendants have made allegations to ESB that ESB Networks personnel have asked the Defendants for cash payments in exchange for the facilitation or provision of works" and *"[T]he import of the allegations is that the ESB Networks personnel are personally benefitting from those payments notwithstanding that the payments relate to work that they are required to carry out and do carry out in the course of their normal duties."*

123. It seems to me that I must therefore refuse an Order requiring disclosure of the consideration and the actions taken.

124. I am satisfied that in a case which is based on the making and receipt of improper payment(s) the date and amount of each payment is the bare minimum required to enable the plaintiffs to bring proceedings in accordance with the Rules (Order 19 rule 5(2) specifically refers to a requirement to provide dates) and for the reasons set out above disclosure of those details is necessary.

125. As discussed above, even where the Court is satisfied that disclosure is necessary it must also consider proportionality and the factors referred to by Sanfey J and Lord Kerr. I have considered these in detail above and it seems to me that the discussion applies here also. It is not necessary to repeat what I say above. Issues such as the public interest in ensuring that the plaintiffs can vindicate their legal rights and in ensuring that others are deterred from acting improperly and the defendants' knowledge of the payments are significant factors tending to support the grant of the relief sought while the question of the plaintiffs not having carried out their own investigation or following up with the defendants, the fact that the defendants brought the matter to the plaintiffs' attention, that they made discovery, and the possible imposition of a burden of inquiry on the defendants, lean against the granting the relief. However, it seems to me that the balance favours making the Order.

Conclusion

126. I therefore propose, subject to appropriate undertakings being given, to make an Order directing the defendants to disclose the date and amount of each payment. It seems to me that the requirement that any order should be proportionate means that there should be temporal and geographic limitations on the Order. These should have been included in the relief sought in the Notice of Motion. The Order will be limited to the four sites and must be limited from the date, not when the defendant started on site but when ESB commenced, up to the date when the defendants first raised the issue with the plaintiffs. While it was first raised prior to the meeting on the 17th May 2022, that seems to me to be the appropriate end-date.

127. This information should be provided by letter by or on behalf of the defendants. There was some discussion during the course of the hearing as to whether the defendants should provide an affidavit or a witness statement but I see no basis for making such an order. I will hear from the parties in relation to an appropriate time period for the delivery of the information.

128. The Court also had a Notice of Motion before it seeking to vary the Order of Stack J of the 6th October 2022 so as to replace the undertaking given in that Order not to make any use of the information save for the purpose of the plaintiffs' internal consideration as to how to proceed without further Orders of the Court with an undertaking that the plaintiffs will not make any use of the material or information obtained on foot of these proceedings save for the purpose of initiating proceedings in connection with the wrongdoing the subject matter of the allegations referred to in the note of the meeting of the 17th May 2022.

129. What this means is that the plaintiffs will be entitled to issue court proceedings without coming back to court to do so but will not be entitled to use the information for the purpose of other proceedings, such as disciplinary proceedings, without the leave of the Court. This seems to me to be consistent with the basis upon which I have decided I should make the proposed Order provided the proceedings are of the nature discussed above and I will therefore vary the said Order to reflect this new undertaking. I should say that I would not make the Order in the absence of that undertaking.

130. I have indicated the nature of the Order which I propose to make and I will put the matter in for mention two weeks after the date of electronic delivery of this judgment for the parties to prepare a draft Order including the matters set out above. I will also hear from them on the question of costs on that date.