

THE HIGH COURT

[2023] IEHC 752

[2022 No. 4553P]

BETWEEN

LOC8 CODE LIMITED

PLAINTIFF

AND

**THE DEPARTMENT OF THE ENVIRONMENT, CLIMATE, AND
COMMUNICATIONS and CAPITA BUSINESS SUPPORT SERVICES IRELAND
LTD trading as EIRCODE, and AN POST**

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 20th December 2023.

SUMMARY

In this judgment I explain why I will strike out these proceedings as having been brought out of time under the Remedies Regulations. Even if they did not fall to be struck out under the Remedies Regulations, I would have struck them out as being out of time under O.84A RSC.

A. The Three Notices of Motion

1. By notice of motion of 17th January 2023, the Department has come seeking, among other matters, the following reliefs:

- (1) an order pursuant to O.19, r.28 RSC and/or the inherent jurisdiction of the court, dismissing and/or striking out in whole or in part the plenary summons and the statement of claim in these proceedings, and/or
- (2) an order dismissing the proceedings on the basis of having been brought outside the time limits applicable under the EC (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (SI 131/2010), as amended, and/or
- (3) an order pursuant to the inherent jurisdiction of the court and/or the Statute of Limitations and /or in the interests of justice, dismissing the proceedings on the basis of being statute barred and/or on the basis of inordinate delay and/or barred by laches, and/or
- (4) an order pursuant to O.124 RSC 1986, setting aside the proceedings for irregularity, in particular due to the plaintiff's failure to comply with the requirements of SI 131/2010 and/or O.84A RSC, as amended.

2. This notice of motion is supported by a grounding affidavit sworn by Mr Lawlor, an assistant principal in the Department.

3. By notice of motion of 16th January 2023, Capita has come seeking, among other matters, the following reliefs:

1. an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim on the grounds that it is improperly constituted and/or misconceived;
2. an order striking out the plaintiff's claim for failure to initiate same under the provisions of O.84A RSC;
3. an order dismissing the plaintiff's claim for want of jurisdiction as proceedings issued outside of the time limits prescribed by O.84A RSC;

4. an order pursuant to the inherent jurisdiction of the court, pursuant to the Statute of Limitations 1957, and in the interests of justice dismissing the plaintiff's claim on the grounds that same are statute-barred and/or the plaintiff is guilty of inordinate and inexcusable delay;
5. an order pursuant to the inherent jurisdiction of the court and on the balance of convenience on the grounds that the plaintiff's claim is barred by laches;
6. an order pursuant to O.124 RSC setting aside the plaintiff's proceedings for irregularity on the grounds that (a) the plaintiff failed to bring his action to challenge the matters of public procurement pursuant to the specific provision for such applications under O.84A RSC, (b) the plaintiff deliberately sought use of a plenary action to detect the procedural and temporal requirements of O.84A RSC and the 2010 Utilities Remedies Regulations, (c) the plaintiff failed and/or refused to bring an application pursuant to O.84A, r.4(2) RSC seeking leave to extend time and to demonstrate good reasons, nor under O.122, r.7 RSC, and (d) the plaintiff's proceedings are therefore a nullity and ought to be dismissed; and/or
7. an order pursuant to O.19, r.5(2) RSC and/or the court's inherent jurisdiction striking out the plaintiff's proceedings on the grounds that the allegation of conspiracy made therein against the Capita is inadequately pleaded and fails to particularise the conspiracy (with dates and items); and/or
8. an order pursuant to O.19, r.27 and/or r.28 RSC and/or the court's inherent jurisdiction, striking out the plaintiff's claim on the grounds that the pleadings are unnecessary and/or scandalous, and/or may tend to prejudice, embarrass or delay the fair trial of the action and/or that the pleadings are frivolous and/or vexatious and/or disclose no reasonable cause of action and/or are bound to fail.

4. This notice of motion is supported by a grounding affidavit sworn by Ms Chamberlain, the managing director of Capita.

5. By notice of motion of 16th January 2023, An Post has come seeking, among other matters, the following reliefs:

1. an order pursuant to O.19, r.28 RSC striking out the proceedings herein as against An Post on the grounds that they are frivolous and/or disclose no reasonable cause of action; and/or
2. an order pursuant to the inherent jurisdiction of the court striking out the proceedings as against An Post on the grounds that they are frivolous and/or vexatious and/or disclose no reasonable cause of action and/or are bound to fail and/or are an abuse of process;
3. an order pursuant to O.19, r.27 RSC striking out the proceedings herein as against An Post on the basis that they consist of pleadings which are unnecessary and/or scandalous and/or may tend to prejudice, embarrass, or delay the fair trial of the action;
4. an order dismissing the proceedings on the basis that they relate to the award of a contract subject to the EU public procurement regime or utilities procurement regime and have not been brought pursuant to Public Contracts Remedies Regulations, the Utilities Contracts Remedies Regulations, and/or in accordance with the provisions of O.84A RSC and that the time periods provided for under those regulations have expired;
5. an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim as against An Post on the grounds of inordinate and inexcusable delay in bringing same;
6. an order pursuant to O.19, r.5(2) RSC striking out the proceedings herein as against An Post on the basis that the allegation of conspiracy made against it is such as to require particulars (with dates and items) to be set out in the pleadings and no such particulars (or no such adequate particulars) are set out in the pleadings.

6. This notice of motion is supported by a grounding affidavit sworn by Mr Carroll, a solicitor within An Post's legal department.

B. The Grounding Affidavit of Mr Lawlor

7. In his grounding affidavit, Mr Lawlor avers, among other matters, as follows:

“3. *At the outset, I should say that...the Department is not a proper defendant to proceedings of this kind. The Minister...is a corporation sole and in any proceedings concerning the actions of this Department, the Minister is the proper defendant.*

[**Court Note:** I should perhaps note in passing that I respectfully accept this last averment to be correct as a matter of law.]

...

The Tender Process

7. *...[T]he proceedings concern a tender process which took place in 2011 for the award of a contract to develop, implement, maintain and promote the national postcode system, Eircode (the ‘Tender’ and the contract the subject of the tender, the ‘Contract’).*
8. *The plaintiff...makes complaint about the rules of the tender as set out in the pre-qualification questionnaire (PQQ) which was published in January 2011.... In particular, the plaintiff complains about the requirement that candidates or candidate members of tenderers were required to have €40m of turnover.*
9. *That requirement was applied in light of the high-cost nature of the project which was to cover a 10-15 year period. Economic operators with less than €40m of turnover were not precluded from participating in the tender. Such operators could join together and form a special purpose company, partnership or Joint Venture vehicle to participate as a candidate or candidate member in a consortium. Multiple economic operators applied to pass the PQQ stage of the procurement process and none raised an objection to the turnover requirement, nor were any eliminated because of the turnover requirement.*
10. *The plaintiff company raised the issue of the turnover requirement at the time of the tender and the Department engaged with it on this issue from Nov. 2010 to Feb.2011. The Department issued three responses to clarifications on the PQQ on the e-tenders website... and directly*

responded in detail to a range of questions raised by Mr Delaney, of the plaintiff, in early Feb.2011....

11. *On 24th Feb. 2011, the Department received a solicitor's letter issued on behalf of Loc8 seeking to have the tender process terminated. The letter claimed that the PQQ precluded Loc 8 [the plaintiff] from bidding due to the financial turnover limit. The Department responded to this letter on 6th April 2011, reiterating its stance on the financial turnover limit and informing the plaintiff that it would not terminate the tender process....*
12. *The Tender proceeded, with three operators passing the PQQ stage. The plaintiff did not tender and was not part of any of the bids that were submitted. After the tender evaluation stage, the Contract was awarded to second defendant [Capita] in December 2013. The Contract was for ten years, with an option on the part of the Minister to extend the contract for a further [up to] five years. The Contract will therefore be up for renewal in December 2023 and, in light of its importance...it is...of high importance that the Minister retains the right to extend the Contract.*

Importance of the Contract

13. *The operation of a contract which has the aim of developing, maintaining, operating, and promoting a national postcode system is of significant importance in the State.*
14. *In addition to postal benefits, such a contract has many non-postal benefits, including the delivery of improved efficiencies with regards to logistics (including emergency service response). Prior to the launch of the National Postcode System, Eircode, on 13th July 2015, Ireland was the only country in the EU and the OECD which did not have a national postcode system, along with having 35% of all properties in the state sharing an address with other properties, i.e. properties with non-unique addresses. This is the highest figure in the OECD, and has a particularly negative impact for people and businesses in rural Ireland who require better access to goods and services. Eircodes have benefits in supporting service delivery, strategy, planning and product development across both the public and private sector through connecting/linking data across the*

information economy. Eircodes can also improve the efficiency and accuracy of internal business processes by improving data management and analysis.

15. *I note that an allegation is made by the plaintiff that there has been some breach of 'the Postal Act 2011' and s.66 is referenced at para.12(i) of the statement of claim. The gist of the claim appears to be that it is not permissible for the Contract to be utilised for non-postal functions. This is patently wrong....[when one has regard to] s.66(2) of the Communications Regulation (Postal Services) Act 2011....*
16. *It is very clear from [s.66(2)]...that the use of the national postcode system is not limited to the provision of postal services. Consequently, there is clearly no basis for the claim that there is some breach of the Communications Regulation (Postal Services) Act 2011 or that the operation of the Contract does not have a statutory basis.*

The Proceedings are Manifestly Out of Time

17. *...[T]here are strict time limits that apply to the bringing of legal proceedings in the field of public procurement. In this case, the Tender was run pursuant to SI No. 50 of 2007 EC (Award of Contracts by Utility Undertakings) Regulations 2007. Consequently, the rules for bringing legal proceedings in relation to the Tender were set out in SI 131/2010...and O.84A RSC....*
18. *Regulation 7(2) of the Remedies Regulations provides that court proceedings concerning a decision in the procurement process are to be brought 'within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application.'*
19. *The proceedings must comply with the applicable time limits in the Remedies Regulations. While O.84A, r.4(2) makes provision for the time limit to be extended...that provision could have no application in this case, where the proceedings are brought many years too late.*
20. *Had Loc8 [the plaintiff] wished to bring legal proceedings in relation to the Tender, it was required to do so at the time. I understand that any*

challenge to the PQQ would have to have been brought within 30 days of the PQQ's publication. Any challenge to the award decision was required to be brought within 30 days of that decision.

21. *These proceedings were issued on 2nd September 2022, some eleven years and eight months after the publication of the PQQ. A pre-action letter was sent to the Department on 15th August 2022. This was the first indication that the plaintiff intended to bring proceedings.*
22. *...[T]he proceedings now brought by the plaintiff are manifestly out of time and are therefore bound to fail.*

Commission Complaint

23. *The plaintiff did make a complaint about the Tender to the European Commission in or around August 2012. The Department engaged openly with the Commission in respect of this complaint. I note that at para.11 of the statement of claim it is pleaded that '[the] ruling of the Commission was in favour of the plaintiff.' I do not know what 'ruling' the plaintiff refers [to], as there was no 'ruling' by the European Commission....[W]here a complaint of this nature is made to the Commission and the Commission believes that there are grounds for bringing proceedings against the member state in question, the Commission can institute proceedings before the CJEU. No such infringement proceedings were brought by the Commission.*
24. *The complaint was fully examined by the Commission which informed the Department in November 2013 that the matter had been closed on the basis that the Commission could not establish any breach of EU procurement law that would justify the opening of an infringement procedure. The Irish authorities, however, were requested to take measures in relation to the clarity of language to be used in relation to bids by consortia in future procurements....*
25. *The position was also then summed up by the then Commissioner for the Internal Market, M. Michel Barnier, in reply to a question from the European Parliament on the procurement process for the postcodes project, on 14th May 2014, as follows:*

'The Commission received a complaint regarding the tendering procedure in question. It conducted an investigation into the matter. After having received the requested clarifications from the Irish authorities, the Commission closed the file. Based on the available information, the Commission departments could not establish any violation of EU public procurement law that would justify the opening of an infringement procedure.'

...

27. *The State continued to make improvements in the field of consortium bidding and this was recognised by the Commission in its letter of 14th October 2015....The Commission noted that there were no grounds to re-open an investigation into the matter.*
28. *The fact that the plaintiff previously made a complaint to the Commission in relation to the matters which it now seeks to litigate in this case...underscores, I believe, the abusive and wholly meritless nature of these proceedings. It is remarkable that having gone down the road of making a complaint to the Commission more than a decade ago, the plaintiff should now seek to re-open these issues in legal proceedings which themselves are more than 10 years out of time.*
29. *The Department also refutes in the strongest terms, the allegation made in para.11 of the statement of claim that a Department official misrepresented the 'ruling' of the European Commission to an Oireachtas Committee. There is...no substance whatsoever to any such suggestion and the documents from the Commission speak for themselves.*

Alleged Revelation of a Decision in 2018

30. *At para.9(vii) of the statement of claim, the plaintiff pleads that at a Cabinet meeting held in October 2013, 'the Department decided that the post codes to be tendered would not have to be used primarily for post as required by the Postal Act 2011 and that the focus of the licence holder could directed in a different direction and for purposes other than as stated in the Tender documents (the 'Decision') contrary to reasons/provisions stated in those documents and the Postal Act'. The plaintiff goes on to plead...that this 'Decision' was not revealed to it until 2018.*
31. *The Department rejects any suggestion of some secret Cabinet decision or some decision of this kind supposedly made by the Department at a Cabinet meeting. In any event, had some decision been made which had the effect that the result of the Tender could be utilised for some purpose which had not been stated in the tender documents (which is the claim made at para.9(vii) of the statement of claim)...a legal challenge to any such decision would again be subject to the Remedies Regulations and [would] be required to be brought in accordance with O.84A and subject to the strict time limits that apply. I refer again to Reg.7(2) of the Remedies Regulations....Again, any claim is manifestly out of time.*

Other Parts of the Statement of Claim

32. *The statement of claim alludes to a number of other matters.*
33. *There are several references made to conspiracy....The alleged conspiracy is described at para.5 of the statement of claim as follows:*

'By reason of the matters hereinafter pleaded the plaintiff avers that the defendants conspired to harm the plaintiff in its business to its detriment causing it to suffer, loss, damage and expense, loss of opportunity and loss of reasonable expectation and damage to its reputation.'

34. *This, and the other references in the statement of claim to a ‘conspiracy’ are entirely vague and unclear. An allegation that the parties have entered into a conspiracy to damage a company such as the plaintiff is a serious one and...the statement of claim does not disclose a reasonable cause of action in conspiracy...[W]here a claim of conspiracy is made, particulars must be set out in support of that claim. This has not been done by the plaintiff. A vague claim is made that the defendants have conspired but no particular[s] are set out of an agreement or combination between the defendant[s] for the purpose of harming the plaintiff. As such...no basis for a claim in conspiracy has been put forward. Rather, it is, I believe, quite clear that these vague and unsubstantiated claims of a conspiracy are derivative of the public procurement challenge, which is what the claim is actually concerned with.*
35. *There are also unparticularised references to state aid...to competition law...and to claims that the Department has interfered to prevent the conclusion of contracts between the plaintiff and third parties....The points made are entirely vague and there is no pleaded basis for any of these claims, whether those of breach of state aid or competition rules, or interference to prevent the conclusion of contracts, or otherwise.*
36. *With respect, in particular, to the breach of competition law, while it is entirely unclear what claim is being made...the Department is not an undertaking for the purposes of competition law and...the competition rules in the Competition Act 2002 and Arts. 101 and 102 TFEU, do not apply to the Department....*
37. *It is patent when one looks at the case as set out in the statement of claim that the claim remains a public procurement challenge and that there is no substance, at all, to any of the claims made by the plaintiff. The vagueness in the claims also prejudices the Department in its ability to defend itself. Furthermore, and without prejudice to the Department’s contention that the entire proceedings fall to be dismissed for being brought outside the time limits applicable to public procurement proceedings, the plaintiff is guilty of inordinate and inexcusable delay in raising these various claims and/or barred by laches, insofar as equitable relief is sought. Furthermore, having regard to the importance of the Contract as explained above, any*

threat to its operation or impact on the Minister's ability to extend the Contract, if he decides to do so, would cause significant prejudice to the Department and more generally...".

C. The Grounding Affidavit of Ms Chamberlain

8. In her grounding affidavit, Ms Chamberlain avers, among other matters, as follows:

"Consideration of the Statement of Claim and Order 84A RSC

9[From]...*the statement of claim...it appears that the plaintiff's claim concerns, inter alia:*

- i. the procurement process for the tender to appoint a postcode management licence holder...*
- ii. the alleged conspiracy between the defendants regarding the tender procurement process and requisite qualification criteria to exclude the plaintiff from the tender...*
- iii. the alleged decision by the first-named defendant to vary the requirements and use of the postcode, in breach of the Communications Regulation (Postal Services) Act 2011...and the tender documents, in conspiracy with the second and third-named defendants, resulting in the illegal expenditure by the State under the 2011 Act...*
- iv. the alleged decision to repurpose the use of the postcode was a breach of competition law and discrimination against the plaintiff...*
- v. the misrepresentation by the first-named defendant to the Oireachtas of the decision of the EU Commission on the plaintiff's complaint thereto regarding the procurement process; the misuse of state aid in failing to comply with the requirements of the Communications Regulation (Postal Services) Act 2011, as amended...*

- vi. *the alleged illegal use of state aid to fund and support the second-named defendant's commercial enterprise, Eircode, under a public contract which has no statutory basis, and for the purposes of competing with the plaintiff's business...*
- vii. *the alleged breaches of statute, the contract for licence, the tender documents and the alleged illegal use of state aid, by the defendants in conspiracy, is a breach of competition law and discrimination against the plaintiff...*
- viii. *the alleged conspiracy thwarted the plaintiff's reasonable expectation to win the tender...*
- ix. *the alleged absence of appropriate regulation and oversight of the national postcode system by the first-named defendant, in breach of the Communications Regulation (Postal Services) Act 2011, as amended...*
- x. *the alleged breaches of EU directives, regulations and statutory acts has caused the plaintiff to suffer loss damage and expense to its business to the tune of almost €35m (...increased from €12m sought in the letter of claim), and loss of investments of €500k and interest (at 3%) by loans to the plaintiff by the State and by a private investor...*

...

11. *I say that the procurement process under which the contract to appoint the postcode management licence holder followed the negotiated procedure set out in SI No. 50/2007 – European Communities (Award of Contracts by Utility Undertakings) Regulations 2007, which gave effect to Directive 2004/17/EC. This is apparent from the Pre-Qualification Questionnaire...[T]hese Regulations were given effect by O.84A prior to its amendment under SI 420/2010.*

12 *...[T]he plaintiff's claim is clearly a matter falling into the scope of O.84A RSC. This Order...provides that applications to the court for orders concerning the award of public contracts shall be made in*

accordance with the provisions of O.84A. By issuing these proceedings under a plenary summons, the plaintiff has sought to circumvent the strict rules which apply to applications to the court concerning the award of public contracts.

13. *In its claim, the plaintiff seeks divers reliefs, including injunctive relief, seeking to restrain the second-named defendant in the performance of the public contract; to restrain the second-named defendant from operating outside its statutory and contractual mandate; to restrain the first-named defendant from financing such operations; to restrain the first-named defendant from the use of administrative resources to unlawfully promote the commercial activities of the second-named defendant; to restrain the first-named defendant from continuing the operation and use of the national postcode without effective and independent oversight, and to restrain the first-named defendant from extending or renewing its contract with the second-named defendant, at its expiration in December 2023.*
14. *It is clear from the foregoing that the plaintiff claims that the alleged infringements by the defendants in the award of the public contract to appoint a postcode management licence holder damaged the plaintiff's interests. By the injunctive reliefs sought, it is clear that the plaintiff seeks orders suspending the continuation of the performance and operation of the public contract by the first and second-named defendants.*
15. *...[I]n order to obtain the reliefs restraining the second-named defendant from operating outside its statutory and contractual mandate, and restrain the first-named defendant from financing such operations, the plaintiff will require the court to review the decision of the first-named defendant – the contracting authority – taken in the course of the award procedure.*
16. *...[I]n all the circumstances it is clear that the plaintiff was obliged to initiate its proceedings pursuant to O.84A RSC and thereby be bound by the time limitations and procedures prescribed therein.*

Procedure under O.84A RSC

17. ...Order 84A gives effect to the EC (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 SI 131/2010). The second-named defendant relies on these regulations for the purposes of this application (...the '2010 Utilities Regulations').

18. ...Order 84A, r.3(1) provides that any application under rule 2 shall be made by originating notice of motion grounded upon a statement containing 16 obligatory particulars of fact, as listed thereunder. The plaintiff has included certain required particulars in its statement of claim, either in full or in part. However, other mandatory particulars are omitted, including but not limited to:

- 3(1)(vi) – the date of the award of the contract, date of the decision to award a contract, or as the case may be, the date of the decision referred to in rule 2(c) which is complained of;
- 3(1)(vii) – the description of the procedure adopted by the contracting authority or contracting entity;
- 3(1)(x) – the date of the notification to the applicant of the alleged infringement;
- 3(1)(xi) – the date of notification by the applicant to the contracting authority or contracting entity of the alleged infringement and of the applicant's intention to seek review.

19. In addition to the above requirements, r.3(2) provides that the statement grounding an application under O.84A, r.2 must be verified by an affidavit sworn by or on behalf of the applicant verifying all of the facts relied upon. This is a significant distinction to the procedure adopted by the plaintiff, where no such affidavit of verification is required. It is the belief of the second-named defendant that in consideration of the spurious and misleading allegations made by the plaintiff in its pleadings, and discussed further hereunder, the absence of an affidavit of

verification as would be required if the correct procedure was followed by the plaintiff, is significant.

20. It is further clear from the notable absence of requisite particulars regarding dates of notification both to the plaintiff of the alleged infringement, and by the plaintiff to the contracting entity/authority of the alleged infringement and intention to seek review, that the plaintiff has issued a plenary action in lieu of following the correct procedure in an effort to avoid the time limitations imposed by the 2010 Utilities Remedies Regulations.

The Time Limits under O.84A and the 2010 Utilities Remedies Regulations

21. ...Order 84, rule 4(1) provides that an application under rule 2, in the case to which the 2010 Utilities Remedies Regulations apply, shall be made within the relevant period determined by Reg. 7 of the 2010 Utilities Remedies Regulations.
22. As appears from the provisions of Reg.7, an application under O.84A, r.2 shall be made within 30 calendar days after the applicant was notified of the decision or knew or ought to have known of the infringement alleged in the application.
23. It is clear from the plaintiff's own pleadings...that it received and considered the Pre-Qualification Questionnaire and so was aware of an alleged infringement at the first stage of the procurement process. This questionnaire was issued on 17th January 2011 and final responses were due on or before 25th February 2011. I say that the plaintiff did not notify the second-named defendant of any alleged infringement within 30 days or otherwise from the date of its knowledge of same, and the second-named defendant is not aware, nor made aware, of any notification made by the plaintiff within 30 days of the publication or the final response deadline. Moreover, I say that the second-named defendant is not aware, nor made aware, of any instance where the pre-qualification period was suspended to address any notification of an infringement or otherwise.

24. ...[O]n the contrary and as appears from the plaintiff's pleadings, at para.11 of its statement of claim, the plaintiff made a complaint to the EU Commission regarding an alleged infringement by the defendants in failing to comply with Art.47(3) of the European Directive 2004/18/EC and the first-named defendants' financial circular 10/10, concerning the required turnover figure and alleged prevention of the formation of consortia. The plaintiff fails to particularise the precise content of the complaint nor the date it was made. I say that the second-named defendant understands that the plaintiff made this complaint in or about August 2012 and that the complaint was examined by the Commission and no justification for the opening of an infringement procedure was found....[T]his finding was communicated to the first-named defendant in or about November 2013.
25. It is clear that even following notification of the determination of the European Commission in respect of the plaintiff's complaint in or about November 2013, the plaintiff did not take any step to pursue the action herein complained of, under O.84A RSC or otherwise. In addition, the plaintiff made no application to extend time in which to bring these proceedings, as provided under O.84A, r.4(2) RSC.
26. It is clear, however, that even if the plaintiff had brought such an application, it is unlikely that same would be successful in all the circumstances of significant delay demonstrated in this application, and to which the plaintiff has provided no explanation or justifiable excuse, why the time could or should be extended by several years. In fact, if so brought, the plaintiff would be looking for an extension of time by a factor of over 100 times, where the contract was signed on 21st December 2013 (104 months prior to the issue of proceedings) and by a factor of almost 140 in circumstances where the procurement process commenced on 17th January 2011 (139 months prior to the issue of proceedings)....[T]his is certainly at odds with the primary purpose of such strict time limitations, which is to ensure that unlawful decisions of contracting authorities are challenged and corrected as soon as possible after they become known.
27. This position is particularly so where the plaintiff has provided, in its own pleadings that instead of pursuing this action before the courts at

the material time, which it now seeks to do, the plaintiff in the alternative, pursued grievances before the EU Commission, the Broadcasting Authority of Ireland and before the Oireachtas. Even when such complaints were unsuccessful or did not necessitate further enquiry by the relevant body, the plaintiff did not at that stage seek to litigate its complaints....

28. *The plaintiff further claims...of a decision taken by the first-named defendant in or about October 2013, whereby it is alleged that the first-named defendant, in conspiracy with the second and third-named defendants, varied the requirements, use and operation of the postcode, in breach of the Communications Regulation (Postal Services) Act 2011 (as amended) and the tender documents, resulting in the illegal expenditure by the State under the 2011 Act. The plaintiff claims that it only became aware of this decision in or about June 2018.*
29. *I say that despite being on notice of this decision since at least June 2018, as claimed, the plaintiff took no step to issue proceedings within the time permitted, nor seek an extension of time in which to bring an action. The plaintiff now seeks to litigate this claim 9 years from the date the alleged decision was made, and 5 years from the time the plaintiff was aware or ought to have been aware of the decision and alleged infringement.*
30. *In addition to the foregoing, I further beg this...court to dismiss these proceedings for want of jurisdiction as sought at para.3 of the notice of motion herein and on the balance of justice as same were issued out of time: the time prescribed by O.84A RSC and 2010 Utilities Remedies Regulations of 30 days if these claims had been properly instituted, and/or the relevant time limitations prescribed by the Statute of Limitations...and in circumstances where no application for leave to extend such time has been brought by the plaintiff.*

...

Delay and the Statute of Limitations

33. *In the event that the plaintiff is permitted to continue its claim as a plenary action...such claims are barred by the Statute of Limitations...*
34. *...[T]he conspiracy...alleged occurred in or about January 2011. The plaintiff pleads that the defendants continued to conspire in or about October 2013 when the first-named defendant allegedly made a decision to vary the requirements, use and operation of the postcode, and in December 2013 when the postcode management licence holder contract was awarded. The plaintiff seeks to litigate these claims almost 12 and 9 years after they respectively occurred.*
35. *In addition, the plaintiff claims that the defendants acted in breach of contract, being the contract to appoint the postcode management licence holder. The plaintiff further claims that the first and second-named defendants failed to perform their contractual obligations thereunder. I say that the contract was signed on 17th December 2013. The plaintiff pleads that the alleged breach and failure by the first and second-named defendants to perform their obligations under contract occurred at the outset of same, which is nearly 9 years prior to the initiation of these proceedings.*
36. *Furthermore, the plaintiff claims that the defendants acted in breach of EU directives and Regulations during the initial procurement procedure at the Pre-Qualification Questionnaire stage of the process, being almost 12 years prior to the issue of these proceedings.*
37. *In addition to the foregoing, the plaintiff claims that the defendants acted in breach of the Communications Regulation (Postal Services) Act 2011 (as amended) and such breach amounts to the alleged illegal use of state aid. I say that this statutory breach, as alleged, is claimed to have occurred by the decision of the first-named defendant in or about October 2013, and prior to the commencement of the contract between the first and second-named defendants, being almost 9 years prior to the commencement of proceedings.*
38. *The plaintiff further claims that the defendants by their actions have acted in breach of the Competition Act 2002, by alleged*

misrepresentations of the invitation to tender, the contract appointing the postcode management licence holder which allegedly occurred following the decision of the first-named defendant in October 2013. I say that this statutory breach, as alleged, occurred in October 2013, being almost 9 years prior to the initiation of these proceedings.

39. *The plaintiff also claims that the defendants continued to interfere with the plaintiff's business by unlawfully targeting navigation markets instead of a postcode system. In this regard, the plaintiff pleads that the public service announcements on RTE concerning emergency services referred to the services offered by the second-named defendant but failed to include the services offered by the plaintiff causing damage to the plaintiff's reputation and credibility.*
40. *I say that these public service announcements aired in or about July/August 2016, I say that the plaintiff, through Mr Gary Delaney, lodged a complaint with the Broadcasting Authority Ireland on or about the material time same were aired, on the basis inter alia that they were purely commercial undertakings to the benefit of the second-named defendant, and not in the interest of public safety. Mr Delaney further claimed that Eircode can help [emergency services] identify an address more quickly, but has no influence on emergency calls to non-postal addresses. The complaint was responded to by RTE. The Broadcasting Authority Ireland published its determination in May 2017, rejecting the complaint....*
41. *I say that as appears from the foregoing, the plaintiff was first aware of the public service announcements and alleged action of the second-named defendant to interfere with the plaintiff's business in or about July 2016. The plaintiff lodged a complaint regarding same in or about that time, but took no action before this...court in respect of same. The plaintiff seeks to litigate this claim in these proceedings, which issued over 6 years after the event as alleged occurred.*
42. *...[T]hese matters referred to hereabove fall foul of the time limitations imposed by the Statute of Limitations....*

Laches and the Equitable and Injunctive Reliefs

43. *...[T]he plaintiff's claim is guilty of inordinate and inexcusable delay, and...barred by laches.*
44. *The plaintiff claims a number of equitable reliefs in the form on injunctive relief, as follows: injunctions (i) restraining the second-named defendant from operating outside its statutory and contractual mandate and restraining the first defendant from financing such operations; (ii) restraining the first defendant from the use of State political and administrative resources to unlawfully promote the commercial activities of the second-named defendant to the detriment of the plaintiff's business; (iii) an injunction restraining the first defendant from allowing any operation or use of the national postcode (Eircode) without effective and independent oversight; (iv) an injunction restraining the first defendant from renewing or extending the licence holder contract of the second-named defendant for the national postcode (Eircode) on or about 20th December 2023 or until after the conclusion of this action, whichever is the later.*
45. *It is clear from the foregoing paragraphs that the plaintiff is seeking injunctions to effectively stop the first and second-named defendants from performing their functions pursuant to contract, which said contract was signed and has been in effect and operation since 21st December 2013.*
46. *The plaintiff further seeks an injunction to prevent the first defendant from using state political and administrative resources to promote the commercial activities of the second-named defendant to the detriment of the plaintiff's business. In this regard, the plaintiff refers at para.17 of the statement of claim, to the public service announcements which first aired on RTE in July/August 2016. The plaintiff further alleges, at para.12(iii) of the statement of claim, that the first-named defendant used illegal state aid to promote Eircode to the market to compete with the plaintiff and giving the second-named defendant an unlawful privilege by using state aid to do so. The plaintiff further claims that Eircode is a commercial coding system, allegedly using a technical code design*

specified and supported by the third-named defendant and recommended for use by the second-named defendant.

47. *I say that the events giving rise to the position now complained of by the plaintiff occurred in October 2013, when the alleged decision was taken by the first-named defendant to vary the requirements use and operation of the postcode, and on 21st December 2013, when the contract was entered into between the first and second-named defendants for the postcode management licence. No claim was brought seeking relief in respect of same prior to the institution of these proceedings.*
48. *The plaintiff also seeks an injunction to restrain the first-named defendant from operating or using the national postcode without effective and independent oversight. The plaintiff grounds this relief on matters pleaded at para.17(iii) of the statement of claim, wherein it claims that the regulation of the national postcode system was initially overseen by the Commission for Communications Regulation, but that this institution was removed as regulator by the amendment of the Communications Regulation (Postal Services) Act 2011 in 2015.*
49. *The correctness of this claim is unsubstantiated. Nevertheless, the plaintiff is clearly grounding this relief on the amendments to the Communications Regulation (Postal Services) Act 2011 in 2015. The Communications Regulation (Postal Services) (Amendment) Act 2015 came into effect on 6th July 2015. This is some 7 years prior to the initiation of proceedings and the claim for injunctive relief now sought by the plaintiff in respect of the regulation of the national postcode. I say that this relief should be refused on the bases that the plaintiff is guilty of laches and acquiescence in failing to vindicate its alleged rights under the application of the Communications Regulation (Postal Services) (Amendment Act) 2015 before now, being many years after the events occurred or are alleged to have occurred.*
50. *I say that the plaintiff is further seeking to restrain the second-named defendant from renewing or extending its contract as postcode management licence holder which is due for renewal/extension in December 2023. It is remarkable that the plaintiff issues these proceedings at the end of the period of the initial contract, which has*

been operating for 9 years to date. I say that this is clearly an effort to cause significant loss [,] damage and harm to its business and reputation of the second-named defendant and such equitable relief ought to be refused.

51. *In addition to the foregoing injunctions, the plaintiff claims the breach of EU Directive and Regulations in the initial stages of the procurement process, together with the decision taken by the first-named defendant in or about October 2013 which is alleged to have altered the parameters of the contract, thwarted the plaintiff's reasonable expectation of being awarded the contract to be appointed as postcode management licence holder. Once again, the events giving rise to these alleged claims occurred nearly 12 and 9 years prior to the initiation of these proceedings.*
52. *I say that the injunctive and equitable reliefs sought ought to be refused on the grounds that the plaintiff is guilty of laches and/or has acquiesced in the conduct or actions now complained of by failing to bring an action within a reasonable time after such events are alleged to have occurred....[T]hese events allegedly giving rise to the plaintiff's causes of action occurred several years ago.*
53. *I say that such delay has caused prejudice to the second-named defendant in its ability to have a fair trial of the issues. Commercially, the second-named defendant is also likely to suffer damage the longer these proceedings are in being....[T]he balance of convenience favours the refusal of the reliefs in circumstances where the second-named defendant is performing an important service in the maintenance support and management of the national postcode. It is clear that serious and significant damage would be done to both members of the public, commercial enterprises, as well as postal and other services. If the contract under which the second-named defendant is performing such duties was brought to an abrupt end, of which the plaintiff is very much aware. Such events would damage the second-named defendant's reputation and the public confidence in the postcode system. In addition to the foregoing, I say that the second-named defendant would suffer significant financial loss if the injunction were granted, in particular if it*

was restrained from renewing or extending its current contract with the first-named defendant upon the expiration of its original duration in December 2023.

...

Application to Strike Out the Plaintiff's Claims Pursuant to O.124, r.1 RSC

55. *I sat that in the event this...court is not minded to dismiss the plaintiff's action on the grounds as set out hereabove, the second-named defendant applies to set aside these proceedings on the grounds of irregularity and failure to comply with the rules of this...court by issuing a plenary action in an effort to circumvent the requirements and strict time limitations prescribed by O.84A and the 2010 Utilities Remedies Regulations given effect to therein.*

56. *I say that the requirements and time limitations applicable to applications under O.84A RSC are fully set out in the preceding averments to this affidavit.*

57 *...[T]he court has a wide discretion to set aside proceedings for irregularity. However, in the circumstances of this case, I beg this...court to dismiss these proceedings on the grounds that same are improperly constituted and are a nullity in a context where a specific procedure to litigate the claims herein complained of is already prescribed by the RSC, at O.84A thereof, and is the correct procedure in matters concerning issues of public procurement and review of the award of public contracts.*

58 *...[I]t is very clear that given the lengthy delays in the occurrence of the events and actions herein complained of by the plaintiff, that the procedure herein adopted by the plaintiff is an abuse of process. The plaintiff took a deliberate decision to utilise the wrong procedure in an effort to obtain a procedural advantage by largely more significant time limitations. I say that such deliberate failure on the part of the plaintiff has caused significant prejudice to the second-named defendant, who has been acting on foot of the said occurrences since January 2011 to date,*

in circumstances where it was successful in tender[ing] to secure the appointment and contract as postcode management licence holder.

59. *...[T]he irregularity and deliberate defect in the originating procedure adopted cannot be cured by an amendment. In addition, the time for bringing such applications pursuant to the correct and mandatory procedure cannot be extended by this...court in the absence of an application by the plaintiff to do so, which has not been done.*

60. *In this regard and for the avoidance of doubt, I say that the second-named defendant has not taken any fresh step after the knowledge of the defect, which was brought to the attention of the plaintiff in initial correspondence dated 10th November 2022 and which was further brought before the court at the hearings of motion to enter these proceedings to the Commercial List and subsequently the Competition List, where leave was granted to bring an application to dismiss the plaintiff's claim on the grounds that same is misconceived.*

...

Application to Strike Out the Plaintiff's Claims Pursuant to O.19, rr. 5, 27 and 28 RSC

62. *Further and in the alternative to the foregoing, the second-named defendant seeks to strike out the plaintiff's claim on the grounds that (i the plaintiff makes a general allegation of conspiracy without the necessary particulars thereof, (ii the pleadings are frivolous and/or vexatious and/or disclose no reasonable cause of action and/or are bound to fail and an abuse of process, and (iii the pleadings are unnecessary and/or scandalous and...may tend to prejudice and/or embarrass the second-named defendant or delay the fair trial of the action.*

63. *Concerning the allegation of conspiracy, as provided in the second-named defendant's correspondence to the plaintiff's solicitors dated 10th November 2022, the second-named defendant noted that the plaintiff's claim of conspiracy was inadequately pleaded and failed to provide*

particulars of any agreement between the defendants to engage in unlawful acts or do a lawful act by unlawful means....

64. *Following receipt of the statement of claim the plaintiff refers to an alleged and unspecified conspiracy....[T]he statement of claim remains devoid of adequate particulars to substantiate the claim that: there was agreement between the second-named defendant and the other defendants, that the second-named defendant intended to cause harm to the plaintiff, and that the intentional actions of the second-named defendant caused harm or damage to the plaintiff. Moreover, I say that the matters to which the plaintiff pleads formed part of the conspiracy are the alleged 'Decision' of the first-named defendant at or around the time of publication of the tender, and the alleged 'Decree' by the first-named defendant in or about October 2013. It is clear that the second-named defendant was not a party to these events.*

65. *In all the circumstances...an allegation of conspiracy...obliges plaintiffs to provide particulars (with dates and items if necessary) of such types of claims. I say that the statement of claim does not comply with this obligation.*

...

67. *In respect of the application to strike out the plaintiff's claim pursuant to O.19, rr; 27 and 28 on the grounds that the pleadings are unnecessary and/or scandalous and which may tend to prejudice and/or embarrass the second-named defendant, or delay the fair trial of the action....*

68. *I say that in circumstances where these proceedings are manifestly statute-barred and contrary to the procedure for matters of public procurement provided by O.84A RSC and European procurement legislation, the timing they are now being brought is remarkable. As previously deposed, the contract between the first and second-named defendants is due to expire on 19th December 2023. It is clear that these proceedings have been issued at this time in an effort to impair the process to extend this contract or to issue a fresh tender, to bring the first-named defendant, and by extension the second and third-named*

defendants into disrepute, and to scandalise and embarrass the second-named defendant.

69. *I further say that the distinct lack of particulars concerning the allegation of conspiracy, together with unsubstantiated and vague claims surrounding allegations of a ‘Decree’ and a ‘Decision’ by the first-named defendant, prejudices the second-named defendant from properly defending these claims against it.”*

D. The Grounding Affidavit of Mr Carroll

9. In his grounding affidavit, Mr Carroll avers, among other matters, as follows:

- “4. *The development of a postcode system in the State had been a government policy since the mid-2000s.*
5. *In its capacity as the USP, An Post engaged with the then Department for Communications, Energy and Natural Resources, now the Department of the Environment, Climate and Communications (i.e. the first-named defendant) since 2010 in respect of the Department’s project for the implementation of a system of postcodes in Ireland (the ‘Postcode Project’).*
6. *This engagement included the following: (i) regular meetings commencing in or about August 2010 between the Department and An Post to discuss issues such as (a) the categories of information which An Post would need to provide to the postcode management licence holder (the ‘PMLH’) once appointed, such as addressing information; (b) the functional requirements of the postcode; (c) the information which An Post would be required to provide to organizations wishing to tender for appointment as the PMLH; (ii) An Post submitting, in July 2011, at the Department’s request, a document containing information about An Post’s postal operations and mail sortation systems for circulation to organizations participating in the process to select the PMLH.*
7. *Part 3 of the 2011 Act had made provision inter alia for the ‘national postcode system’ and for the Minister to enter into a contract ‘for the development, implementation and maintenance’ of that system.*

8. *In 2011, the Department commenced a procurement process (the 'Procurement Process') to appoint a PMLH for an initial period of ten years, to design, provide, disseminate and maintain a national postcode system. Capita...was successful in the procurement process and was appointed as PMLH. Capita's appointment commenced on 31st December 2013 for a period of ten years, extendable for a further five years.*
9. *An Post had no role in the conduct or organization of the procurement process and had no means to influence same. In fact, An Post itself was an unsuccessful tenderer in the procurement process.*
10. *Following Capita's appointment as PMLH, there was engagement commencing in January 2014 between An Post, in its capacity as USP, and Capita, in its capacity as PMLH, in respect of the potential design of the postcode.*
11. *The postcode system (known as 'Eircode') was ultimately launched in July 2015.*

Pre-Action Correspondence

12. *The first An Post became aware of the plaintiff's...claim was by way of a letter dated 15th August 2022 (the 'CCD Letter') from the plaintiff's solicitors, Charles C Daly & Co ('CCD').*
13. *In that letter CCD alleged inter alia that:*
 - (i) *there had been some form of unspecified conspiracy involving the defendants to harm the plaintiff's business and reputation causing 'loss, damage, and expense over many years to date and continuing';*
 - (ii) *the Department had shown 'unlawful bias' against the plaintiff in respect of the conduct of the procurement process, of which An Post had allegedly been aware;*
 - (iii) *the Department 'changed the criteria for compliance with the postcode licence pursuant to a secret Cabinet decision made 2 months before the granting of the licence to*

- [Capita]’ in breach of the 2011 Act, of which An Post had allegedly been aware;*
- (iv) this change enabled and supported Capita ‘with the assistance of An Post’ to compete with the plaintiff ‘in the arena of navigation markets’ while being financed by ‘State aid’. I note that neither the nature of the ‘assistance’ alleged to have been provided by An Post or the nature of the alleged ‘State aid’ was explained in the CCD letter;*
 - (v) the Department had used its ‘political, departmental, governmental, media (including RTE) and financial influence’ to harm the plaintiff, of which An Post had allegedly been aware;*
 - (vi) the Department ‘via successive Ministers, failed to regulate appropriate use of Eircode as required by statute’ thereby causing harm to the plaintiff, of which An Post had allegedly been aware;*
 - (vii) An Post itself ‘advanced the conspiracy’ through (a) ‘interacting with the Department, ministers and other politicians to influence the outcome of the tender for the national postcode licence to An Post’s limited competitive profile to suit its commercial needs’; (b) ‘failing to be truthful about An Post’s intentions for the use of Eircode and misleading a committee of the Oireachtas in order to justify selection as a postcode’. This would appear to have been a reference to an appearance by Mr Liam O’Sullivan, An Post’s then mail operations director, before the Oireachtas Committee on Transport and Communications on 19th November 2014; (c) ‘failing to use Eircode primarily for postal services as required by statute, the licence-holder contract with Capita and other official documentation’; (d) ‘unduly influencing PA consulting and the Department to ensure that the plaintiff would not be considered for the postcode licence holder process’. PA Consulting was an organization engaged by the*

Department to provide consultancy services to the Department in respect of the postcodes project.

14. *An Post's legal department responded to CDD by letter dated 25th August 2022 in which it inter alia noted that: (i) the CDD letter did not refer to a single date in respect of the allegations made in it; (ii) the CDD letter failed to identify the most essential details regarding the allegations made and An Post sought specific details in this regard; (iii) as best An Post could understand the matters addressed in the CD Letter, any cause of action on the part of the plaintiff would be long statute-barred and that this would particularly be the case in respect of matters relating to the conduct of a tender competition pursuant to the relevant EU procurement legislation which has a particularly tight limitation period; (iv) as best An Post could understand the matters addressed in the CCD Letter, the plaintiff wished to advance complaints in respect of actions taken by the Department and Capita and that it was not at all clear how any such complaints were relevant to An Post. In this regard, An Post noted that whereas CCD's approach appeared to be to seek to link An Post to such alleged actions by making a vague and unparticularised allegation that An Post was party to some form of 'conspiracy' with the Department and/or Capita, no explanation was provided as to what engagements between An Post and the Department and/or Capita were relied on in this regard or on what basis it was alleged that any such engagement was conspiratorial; (v) that to the extent that injunction proceedings were threatened as against An Post relating to the 'Post Code Licence', this could only refer to an agreement between the Department and Capita and as such did not concern An Post...*
15. *No reply was received to this letter from CCD.*

The Proceedings

16. *The proceedings were issued by the plaintiff on 2nd September 2022....*

17. *In the plenary summons, the plaintiff seeks damages for conspiracy, including exemplary and punitive damages. The plaintiff also seeks injunctions:*

- (i) *restricting Capita from ‘operating outside its statutory and contractual mandate and restraining the [Department] from financing such operations’;*
- (ii) *restraining the department ‘from the use of State political and administrative resources to unlawfully promote the commercial activities of [Capita] to the detriment of [the plaintiff’s] business’;*
- (iii) *restraining the Department from ‘allowing any operation or use of the national postcode (Eircode) without effective and independent oversight’;*
- (iv) *restraining the Department ‘from renewing or extending the licence holder contract of [Capita] for the national postcode (Eircode) on or about the 20th December 2023 or until after the conclusion of this action whichever is the later.’*

18. *I note that the plaintiff seeks no injunction against An Post.*

...

20. *The statement of claim was served on An Post on 9th December 2022....*

21. *In the statement of claim, the plaintiff alleges, inter alia, that:*

- (i) *there was a conspiracy between the defendants ‘to harm the plaintiff in its business’....*
- (ii) *in conducting the procurement process, the Department made a ‘decree’ that Art.47(3) of European Directive 2004/18/EC (which the plaintiff says allowed tenderers to ‘put in combined tenders in consortia with others to ensure that the combined*

financial turnover of any such consortia exceeded €40m (the tender qualifying turnover figure) would be disapplied in respect of tenderers in the procurement process....

- (iii) this 'decree' formed part of the alleged conspiracy...*
- (iv) the Department added '[a]t a Cabinet meeting held in or about October 2013' that that postcodes 'would not have to be used primarily for post as required by the Postal Act 2011 and that the focus of the licence holder could be directed in a different direction and for purposes other than as stated in the tender documents', to which the plaintiff refers as the 'decision'...*
- (v) the 'decision' formed part of the alleged conspiracy...and was in breach of tender documents related to the procurement process, the contract awarded (or to be awarded) to the PMLH and the 2011 Act...*
- (vi) the effect of the 'decision' was to render the Department's expenditure under the 2011 Act (presumably limited to expenditure in respect of the postcode project) unlawful as state aid...*
- (vii) but for the alleged conspiracy, the plaintiff had a 'reasonable expectation' of being appointed as the PMLH....*

22. *There are only minimal references to An Post, either individually or collectively in conjunction with the other defendants in the statement of claim....*

23. *[E]ven taken at its height, the plaintiff's case against An Post as pleaded in the statement of claim does not disclose any stateable cause of action, or if it does, does not disclose one which is not bound to fail. In those circumstances...the court has jurisdiction pursuant to O.19, r.28 RSC to strike out the proceedings. In this regard, I would note the following.*

24. *Obviously, nothing in the matters referred to in §§22(i) or 22(v) above disclosed any alleged wrongdoing on the part of An Post.*
25. *Equally, the matters referred to in §§22(iii) and 22(iv) above are effectively allegations that An Post was favoured by the Department which, again, do not disclose any alleged wrongdoing on the part of An Post.*
26. *The matters referred to in §§22(vi) and (vii) are unparticularised references to An Post not using Eircode. However, nowhere is it pleaded in the statement of claim that this is itself unlawful and, in any event, the plaintiff's claim as set out in the plenary summons is one based on conspiracy and not, for example, on any alleged breach of statutory duty on the part of An Post in respect of its use of (or failure to use) Eircodes.*
27. *That leaves the matters referred to in §22(ii) and (viii) which are framed as an allegation of conspiracy.*
28. *While I say and am advised that the law of conspiracy is a matter to be addressed by way of legal submission rather than affidavit...any form of actionable conspiracy requires at least the following: (i) agreement or combination between two or more parties; (ii) intention to injure the plaintiff; (iii) that the actions of the defendants have caused loss to the plaintiff.*
29. *Nowhere in the statement of claim is it pleaded that there was any agreement between An Post and the Department or Capita nor is there any pleading as to operation of any combination between An Post and the Department or Capita. Nor is it ever pleaded that there had been intent on the part of An Post to injure its plaintiff or its business. To the extent that the plaintiff pleads matters which 'formed part of' the alleged conspiracy, the statement of claim refers to the 'decree' which on the plaintiff's own account was a decree by the Department and An Post was not a party to same. Further, the statement of claims refers to the 'Decision' which on the plaintiff's own account was a decision by the Department and An Post was not a party to same.*
30. *In this regard and without prejudice to the generality of the foregoing...O.19, r.5(2) RSC imposes a particular obligation on plaintiffs to set out 'particulars (with dates and items if necessary)' in its pleadings*

in respect of certain categories of allegation and that it has been held that this includes allegations of conspiracy.

31. *Furthermore, in very large part, if not in its entirety, the plaintiff's complaint relates to the conduct and outcome of the procurement process...those are matters which the plaintiff cannot pursue outside of the regime provided for under the...Public Contracts Remedies Regulations...or the Utilities Contracts Remedies Regulations...and the provisions of O.84A RSC.*
32. *In addition to these proceedings not having been brought pursuant to the Public/Utilities Contracts Remedies Regulations...they have been brought far outside the strict time periods applicable under those Regulations. For these reasons alone...the proceedings should be dismissed.*
33. *Furthermore, in circumstances where these proceedings have been brought at least nine years after the procurement process and the award of the licence to which they primarily relate and an even longer period after certain of the events complained of, there has very clearly been inordinate and inexcusable delay on the part of the plaintiff in bringing these proceedings.*
34. *As set out above, the proceedings do not disclose any stateable case against An Post. However, in the event that the proceedings are not dismissed, An Post will have no choice but to prepare to defend them. Given the passage of time, the natural diminution of memory of the individuals involved, the fact that certain key personnel have left An Post in the intervening period, the difficulty which An Post anticipates having in collating relevant documentation from the period (since certain documentation which An Post will have had will no longer be held by An Post)...An Post would be seriously prejudiced if it were required to defend the proceedings. In these circumstances...the court has an inherent jurisdiction to dismiss the proceedings as against it.*
35. *In the alternative and having regard to the totality of the matters set out above...this...court has an inherent jurisdiction to strike out the proceedings as against An Post on the grounds that they are frivolous and/or vexatious and/or disclose no reasonable cause of action and/or are bound to fail and/or are an abuse of process.*

36. *In addition, it would appear to An Post that in circumstances where, ultimately, the plaintiff's complaint is in respect of the conduct and outcome of the procurement process, that complaint cannot be advanced other than under the Public/Utilities Contracts Remedies Regulations; and that complaint is, in any event, manifestly statute-barred, the plaintiff has sought to broaden its complaint to An Post by way of unparticularised and un-stateable allegations so as to scandalise and prejudice An Post.*
37. *...[T]he allegations are scandalous or unnecessary insofar as (i) they are intended to embarrass and scandalise An Post, (ii) they are unrelated to and unnecessary in the context of the plaintiff's true complaint, which is against the Department and Capita.*
38. *...[T]he pleadings are prejudicial to An post inter alia on the basis that the vagueness and lack of particularity with which they are pleaded prejudices the ability of An Post to defend itself.*
39. *...[T]he timing of these proceedings is extremely curious in that the various allegations made are manifestly statute-barred. The plaintiff advances various complaints regarding the procurement process which commenced in 2011 and the appointment of Capita as PMLH which took effect on 31st December 2013. As noted above, the licence between the Department and Capita is due to expire on 31st December 2023 unless extended. Absent a more convincing explanation for the timing of the proceedings, it would appear that the proceedings are intended (at least in part) to bring the Department's process in respect of the extension of that licence or a fresh tender into disrepute and, equally, to bring An Post and Capita, as parties which may have a role in that process, equally into disrepute. In these circumstances...the court has jurisdiction pursuant to O.19, r.27 RSC to strike out the proceedings.*

Correspondence with the Plaintiff in respect of this Application

40. *By letter dated 24th December 2022, An Post called on the plaintiff to indicate its intention to discontinue the proceedings against An Post by close of business on Friday 6th January 2023, in which case An Post would not seek to pursue its costs in the proceedings. The letter made clear that*

in the event that the plaintiff did not provide such an indication. An Post reserved the right to issue this application.

41. *In that letter, An Post noted that:*

- (i) to the extent that the statement of claim disclosed any legal complaint at all, that complaint clearly related to the Department and not An Post;*
- (ii) there were, in fact, very few references to An Post in the statement of claim at all and that none disclosed any stateable cause of action;*
- (iii) there were at a number of points in the statement of claim, references to a ‘conspiracy’ but nowhere was it pleaded, inter alia, either (a) what mechanism An Post was alleged to have participated in combination with other parties which amounted to a conspiracy; or (b) what unlawful means were used by An Post to pursue the objects of the alleged conspiracy;*
- (iv) to the extent that any motives for the alleged ‘conspiracy’ were discernible from the statement of claim at all, they clearly related to matters which An Post, inherently, would not have the means to effect or influence; and*
- (v) while not necessarily a matter for a potential strike out application, to the extent that the matters claimed in the statement of claim could ever disclose a cause of action against any party, any such claim was manifestly and grossly statute barred....*

42. *No reply has been received by An Post to that letter. In those circumstances, An Post has had no choice but to issue this application.”*

E. The Affidavit of Mr Delaney

10. By affidavit of 27th January 2023, Mr Delaney, the CEO of Loc8 avers, as shown below. I note that Mr Delaney's affidavit raises issues that go beyond what is pleaded in his statement of claim.

11. Insofar as Mr Delaney makes allegations of wrongdoing, I emphasise that none of these allegations have ever been tried, let alone established to exist, before a court of law. Thus they are, at this time, and may forever be, unproven allegations. As should be clear from my consideration of the other affidavit evidence before me, all allegations of wrongdoing are completely denied by the defendants.

12. Mr Delaney avers, amongst other matters, as follows:

- “3. *By way of training, education and experience, I am an expert in geospatial science, technology & practice and, in particular, the science of navigation. My expertise has [been] and continues to be relied upon by An Garda Síochána and other security agencies in Ireland and abroad to provide geospatial forensic analysis and testimony in criminal cases....*
4. *My expertise and experience is relevant to this case as it in part concerns the comparative geospatial and navigation capacity and functionality of all the national postcode system (NPS), Eircode, and Loc8 code. Specifically, and in addition to other matters stated herein, the geospatial and navigation capacity and functionality of the NPS is limited by specification and appropriateness of use, person and purpose as laid out in the Communications Regulation (Postal Services) Act 2011, as amended...and Eircode (as a result of the final design report for Eircode which will be referred to in more detail later, as agreed in consultation with the third defendant, An Post), all militate towards a lack of geospatial capacity and navigation functionality, but in various ways. Loc8 Code does not have these limitations.*

...

6. *I have had verifiable personal experience of matters relating to the national postcode (NPS) since 2006 when I was interviewed by consultants to the National Postcode Project (NPB)....*

9. ***The Statement of Claim***

With reference to the statements of Ms Gillian Chamberlain in para.45 of her affidavit....Mr Daniel Lawlor, in para.5 of his affidavit for the first defendant...and...Mr Paul Carroll, in para.39 of his affidavit...it is important to state that the statement of claim lodged on the 12th December 2022 does not seek to interfere with or harm the activity of the...NPS...or try to rerun the related procurement process. Instead it alleges a conspiracy which has delivered Eircode and not the NPS as specified in the Communications Regulation (Postal Services) Act 2011, as amended...and includes other confirmed issues to do with the procurement process as well as other continuing events which have combined to undermine and harm the legitimate business interest and efforts and reputation of the plaintiff.

10. *...[T]he plaintiff has made repeated efforts since 2014 to seek...agreement and cooperation [in relation to the matters raised in the present claim], particularly in the interest of public safety as seen from the letter to [a stated Minister]...[which] remains unanswered to this day and there are many other similar examples over the years which were either unanswered or where requests for a meeting were declined.*
11. *It should be noted that in spite of seeking meetings in relation to this matter with [stated] Ministers...since 2007, no such meeting has ever been acceded to. In fact the diary secretary to [a named Minister]...told me in a phone call on 6th August 2020 that the Minister would not meet with me 'at any time'. This was contemporaneously noted and raised with the Minister a few days later in a letter....No response to this letter or denial has been received to date.*

12. *In November 2014, the plaintiff met with representatives of the first defendant and indicated at that time that it was not meeting with the view to undermining or legally challenging Eircode but instead to acknowledge Eircode's intended role as the NPS and to indicate that the plaintiff was interested in developing complementary services in relation to public safety, e.g., ring buoys and wind farms, especially since the NPS was limited by An Post to postal addresses. The first defendant published and forwarded its minutes of this meeting in which other matters of concern to the plaintiff were also raised and the Department committed to...follow-up actions....*
13. *The plaintiff spent one year after that, firstly trying to make the small corrections to the minutes and then trying to make contact with the Department in relation to the promised follow-up. No response at all was received until in March 2016 when the plaintiff was told that the minuted follow-up would not be honoured....*
14. *Furthermore, the minutes show that at the meeting in November 2014 the first defendant made no mention of the fact that the Department has made a political decision in October 2013...to refocus the purpose of the Eircode away from its primary postal services requirement as stipulated by the Act and towards predominantly non-postal service purposes, being some of those areas of interest that the plaintiff had stated it was planning to develop. This fact was revealed to the plaintiff in June 2018 in a letter [to a named TD]....In that letter it was revealed for the first time that this political decision, recorded as a numbered Government decision, took place on 4th October 2013, and that it was now being used to justify why An Post was not using the NPS as required by the Act.*
15. *So it was that an Oireachtas Committee stated that the first defendant had made a political decision which acknowledged that Eircode was not fulfilling the requirements of the NPS defined for it by the Postal Services Act 2011, by ministerial authorisation, by contract and by procurement documents but that instead Eircode had been rolled out in July 2015 to complete as a navigation code, using state aid, in a market in which the plaintiff had already been operating formally for 5 years since July 2010.*

16. *In this regard it is important to note that the plaintiff had only begun to commercialise a precise navigation-oriented solution as a position orientated navigation code (PON Code) when given an assurance in writing by [a stated Minister]...that the NPS would be a non-precise, area-based design (also known as the ABC123 model) as recommended by the National Postcode Project Board in 2006 and that this would not be reviewed...*
17. *Since June 2018 the plaintiff has tried to gain sight of the letter referred to by [a named TD]...in order to confirm its content, from the Oireachtas, from the first defendant and via other competent agencies of the State but, to date, without success. In early-2021, frustrated by refusals to release the document which was used to excuse An Post's failure to use Eircode as the intended NPS even though An Post had specified its design, the plaintiff made a related complaint to the Competition and Consumer Protection Commission and then, by the Commission's own recommendation, a follow-up illegal state aid related complaint to DG Competition in the EC. It being only because the DG Competition then indicated that its workload was such that an investigation would be slow because of limited resources and the effects of the COVID-19 pandemic, that the plaintiff commenced these legal proceedings. The DG Competition has not since indicated any progress in its investigation relating to the use of illegal state aid for the promotion of Eircode...*
18. *Therefore, these proceedings are a last resort after many verifiable efforts over a long period of time seeking to redress significant competition and procurement related issues. In part these proceedings seek to restrain and refocus the defendants to operating the NPS in accordance with what was defined for it by the Postal Services Act 2011, ministerial authorisation, contract, and procurement documents, as well as what is appropriate for its geospatial capability. The plaintiff also requires the three defendants to operate in compliance with competition law and for the NPS to operate under an effective regulatory mechanism which would be normal if the NPS was considered to be a public utility. The plaintiff has been unable to resolve any of the above issues by other significant, verifiable, and honourable efforts as its first course of action. Prior to initiating these*

proceedings for a long time the plaintiff envisaged a situation where both the NPS and Loc8 code would cooperate to serve all of the related needs in Ireland and believed that this would have been possible if the above matters had been resolved.

19. Background in relation to An Post

I respectfully ask the court to evaluate the statements of Mr Paul Carroll in para.9 of his affidavit...and in para.37...against the following facts:

- i. Under an EU Directive, Irish authorities were required to liberalise the postal market and the enactment of the...Act of 2011 (the 'Act') sought to open the market as required....*
- ii. Because of the difficulties associated with the lack of precision of Irish property addresses and the advantage enjoyed by the third defendant...because of its related influence and long established local knowledge, the playing field would have to be levelled. Accordingly it was determined that a postcode should be introduced to address these matters and the new 2011 Act provided for a NPS for the first time.*
- iii. Discussions in relation to a suitable postcode began in 2003 and COMREG...hosted a symposium on postcodes on 24th November 2002. At that symposium...[the] commercial director for An Post stated in his presentation that 'Post Codes are the application of 1960's technology to a 21st century problem'....[The said commercial director] also suggested that the technology already used at that point by An Post was state-of-the-art and 'with modern technology a postcode is neither necessary not particularly useful for purpose of mails*

- processing’....Clearly this indicated that An Post was against the concept of a national post code system.*
- iv. *In September 2009, the Communications Workers Union (CWU) stated that [the] ‘postcode plan will be late, won’t save money and will damage post office’....This demonstrated that the postal workers were also against a NPS.*
- v. *In October 2010, PA Consulting (consultants to the first defendants in relation to the NPS) after discussions with An Post, produced a briefing document for the first defendant which detailed An Post’s requirements for a postcode and stated that the Loc8 code should not be considered as it could not fulfil An Post’s requirements. The court is asked to note that the plaintiff was not consulted on the veracity of this statement or if it could modify its coding system to suit and was not aware of the statement or document until after the procurement process (from which the plaintiff had been excluded) had begun. This document, therefore, is considered by the plaintiff as one where it was unfairly targeted and blocked from participation in the procurement process on the basis of unilateral, uniformed and untrue statements from An Post....*
- vi. *After the procurement process had begun in January 2011, An Post was requested by the first defendants to produce a briefing document on its operational requirements for the NPS to ensure that the NPS resulting from the procurement could be fully integrated and used. An Post provided this but, without being requested, added an additional document which gave its recommendations as to what the design of the NPS should be. It referred to this as the ‘Post-town Based Postcode Approaches’. This*

document effectively specified the design which later became Eircode and it was different to that recommended by the National Postcode Board, namely the 'ABC123' model recommended in 2006 and which formed the main reference for the procurement PQQ and was also different to that specified in the...Act [of] 2011. This design recommendation from An Post was included by the first defendant as 'Appendix E4' to their 'Invitation to Participate in Dialogue (ItPD) for the appointment of a postcode management licence holder (PMLH)' issued on 26th July 2011 and 'Invitation to Submit Final Tender (ItsFT) for the appointment of a postcode management licence holder (PMLH)' issued on 28th June 2013. As an Post was also a bidder for the licence, the inclusion of its own design recommendation was clearly irregular and a breach of the procurement process....

- vii. *In October 2012, whilst a bidder for the National Postcode System and in spite of postal market liberalisation and the need to resolve the advantage enjoyed by An Post through its influence over property addressing as previously mentioned. An Post won a High Court action which supported it maintaining that influence. The judgment allowed An Post to alter property addressing into a 'postal address' form in order to suit its own operational needs, but which gave confusing geographic (geospatial) clues for other organisations (e.g., couriers which are An Post's competitors in the parcel market) who might also want to sort and deliver to the address. The judgment makes no reference to the overdue advent of a postcode or the EU requirement for postal liberalisation sought in the 2011 Act....*

viii. *In May 2014, the third defendant, Capita, completed the NPS design report which exclusively consulted with An Post. On page 15/6, para.2.5 of that document, An Post, the universal service provider (USP) is quoted as follows: 'Furthermore, the USP has confirmed that structure/hierarchy within the last four characters of the postcode will not improve mail delivery and so would not be desirable. The USP does not require hierarchy/sequencing of the unique identifier for manual sortation purposes, and it is expected that VAR services will provide IT solutions to other organisations to assist any alternative manual sortation method they may have. For these reasons, we recommend that the unique identifier is randomly allocated...'. This statement is at the point at which the last four characters of An Post's recommended postcode design contained in the Appendix E4 mentioned above became random – again by An Post's recommendation. The Appendix E4 recommendations by An Post were at that point, with the support of the second defendant and the later approval of the first defendant, further refined by An Post, to include a substantial random element, into what is now known as Eircode. This random design was later excused away by the first and second defendants in public statements which do not stand up to close examination in terms of identifying delivery addresses for other users. The effect of this imposed random design was not only to ensure that An Post itself could not practically use the resulting Eircode for manual sorting and delivery operations (as stipulated and required by the procurement process) but most importantly not by 'other organisation to assist any alternative manual sortation method'*

either. The majority of courier firms in Ireland (An Post's competitors in the parcel market) depend on 'manual sortation' and could not achieve this by reference to the critical random elements of Eircode. If they were to try to use Eircode for this then they would have to invest in Eircode 'VAR (value added resellers appointed by the second defendant) services' and their 'IT Solutions'. This of course put couriers and others at a disadvantage since An Post can sort manually using the well-recognised and long-established local knowledge of their postal operatives and their ownership of the 'postal address' adjustments acknowledged by the High Court judgment referred to above. This design also conflicted with the requirements set out in the Act and served to assist in the refocus of the postcode in accordance with the Department's government/political decision of the 4th October 2013 referred to above, and helped to deliver Eircode rather than the NPS intended by the Postal Services Act 2011....

- ix. In November 2014, the Freight Association of Ireland (FTAI) gave evidence to an Oireachtas Communications Committee that its members (which included/includes couriers, they being An Post's parcel delivery competitors) would have difficulty using Eircode because of the random design specified by An Post...*
- x. In June 2015 in an interview with RTE Primetime...[the] then owner of the courier firm 'Nightline' stated that 'An Post were the only people telling us we didn't need a postcode for the last 10 or 20 years. And that was really a protectionist stand.'*

- xi. In February 2016, 7 months after Eircode was rolled out, one of the second defendant's (Capita's contractors for the delivery of Eircode, a previous reseller of Geodirectory for An Post and a VAR (a value-added reseller) appointed by Capita (a company by the name of 'Autoaddress) designed a new code to fix the problems caused by the random elements of Eircode specified by An Post and approached...FTAI, and offered its related IT solution....*
- xii. In evidence to the Oireachtas Communications Committee in August 2017...[the] company secretary for An Post, confirmed that Eircode (at that point 3 years after Eircode was launched) was not used in its delivery operations. Evidence in this public domain confirms that this situation remains unchanged....*

20. I suggest that the above facts make clear that Mr Carroll's assertion in his affidavit that An Post had no control over the procurement process or its outcome is unsupported and untrue. Furthermore, it is clear that An Post, with the agreement of the first and second-named defendants, specified the design of Eircode, to suit the October 2013 political decision, moving the focus of the postcode to market areas in which the plaintiff was involved...and gave itself an advantage over its competitors, ensuring the playing field remained skewed contrary to the provisions of the Postal Services Act and the postal liberalisation which the Act required.

21. Further examples of An Post's role in the alleged conspiracy.

In addition to the matters referred to above, An Post further engaged in the conspiracy against the plaintiff, as follows:

- i. In April 2009, then acting for GPS Ireland and having produced a beta test version of Loc8 Code, then called PON Code , I sought to license An Post's*

Geodirectory address database product both to help develop PON Code's commercial capability and to prepare for the possibility of the postcode procurement process, expected at around that time. PON Code was later to become Loc8 Code. The licence was refused by An Post's Geodirectory and I made a complaint to The Competition Authority which it then investigated. The Competition Authority deemed that An Post had no case to answer in a decision letter of 12th December 2012....However, in the light of new information available since this decision, the basis for the decision, especially in relation to 'indispensability' has proved to be wrong.

ii. After that I also approached and met with [the]...sales and marketing manager of Autoaddress in its offices...on 2 occasions. Autoaddress was a Geodirectory value added reseller at the time. (Autoaddress later became a Capita appointed Eircode contractor and VAR as mentioned previously). I sought to get access to Geodirectory by means of a joint venture with Autoaddress. Autoaddress declined to support this proposed initiative after the second meeting. It was later revealed that Autoaddress was a contractor for Capita, helping to deliver Eircode as designed by An Post.

iii. From 2012 to 2014, Data Ireland, an An Post-owned subsidiary which was tasked with adding business related value to the Geodirectory, licensed the use of Loc8 Code for one of its customers....I had my own sole trade consultancy, Global Position Intelligence (GPI) and GPI would invoice Data Ireland for the service so that direct reference to Loc8 Code was not made....During that period, a meeting was held with

my contact in Data Ireland...who was its data consultant. The meeting was held in Data Ireland's offices and myself and [another named person]...of the plaintiff and more senior representatives from Data Ireland/An Post were in attendance. On behalf of the plaintiff at the meeting I was seeking further cooperation including direct access to Geodirectory. The feedback was that Data Ireland really should not be dealing with the plaintiff and further cooperation, including direct Geodirectory access, would not be possible. Data Ireland was acquired by Autoaddress in 2019. Autoaddress was a contractor to Capita for the delivery of Eircode and is currently Eircode's most significant value added reseller (VAR), as appointed by Capita. [My onetime contact in Data Ireland]...is now Autoaddress's account director. I also tried to make contact with QAS/Experian, who were also Geodirectory resellers, on several occasions, again in order to access Geodirectory, but without any success.

- iv. On behalf of the plaintiff, I tried again in early-2014 to license Geodirectory directly from Geodirectory but was denied once again....The Comptroller & Auditor General report on Eircode of October 2015 makes it clear that it was planned to use Geodirectory for the NPS since 2006 and related negotiations had begun in 2010....The Department of Communications (the first defendant) was promoting the use of Geodirectory by potential postcode management licence holders (PMLH)....A draft licence agreement between An Post Geodirectory and the PMLH was available from 11th June 2013....Geodirectory was deemed key and indispensable infrastructure to support the delivery of the NPS and, in the end,*

Eircode. In spite of all of this, An Post Geodirectory refused to license to the plaintiff for a similar purpose.

- v. *In October 2014, when Eircode had been launched for several months. Geodirectory made contact with the plaintiff and advised that it could now license its product to the plaintiff....This was clearly not a bona fide act by An Post Geodirectory and suggests that they were very much aware of the 'indispensability' of their product [to] which they had denied access up to that date. The plaintiff raised this with the Competition Authority which, in February 2015, acknowledged the inherent issue but advised that since all they could do was insist that the product was licensed to the plaintiff and since that was now being offered, there was nothing further they could do....The action of An Post Geodirectory from 2009 to 2014 was protectionist and clearly designed to inhibit the plaintiff's market progress whilst negotiations were ongoing between all 3 defendants; An Post, the Department of Communications and Capita (the prospective PMLH). The plaintiff will show that this conspiratorial action contributed to the loss of a lucrative and potentially game-changing contract with a large courier company in 2011.*

22. ***Background in Relation to Capita.***

In her affidavit for the second defendant...Ms Gillian Chamberlain states [as she states] in para.34 [quoted above].... This statement must be considered against the following background:

- i. *As previously stated, Capita,...in January to May 2014 exclusively consulted the third defendant, An*

Post, in relation to the design report for the NPS, thereby allowing An Post to specify the design knowing that it would not support its own use for postal service delivery operations as required by the Act and by the contract signed between Capita and the first defendant...Furthermore, as detailed previously herein, Capita also permitted An Post to specify a random nature of the design which would make it difficult for An Post competitors to use without additional cost and infrastructure, thereby affording An Post a considerable and unfair advantage even though the market was required to be liberalised by the Act and the playing field was supposed to be levelled. On completion of the design report it was recommended to the first defendant who approved, adopted and launched it as Eircode....

- iii. 'Eircode' is the registered business name of Capita in Ireland....It is also the registered trademark of Capita in the UK....As such, all activities under the name of Eircode, including those complained of as part of a conspiracy in this case are the direct responsibility of Capita. They are done in its name and with its authority.*

23. *Example of Capita's Role in the Alleged Conspiracy.*

Taking the above facts into account and the claim by Ms Gillian Chamberlain in para.40 of her affidavit [quoted above]....the following related example of direct evidence of Capita's involvement in the alleged conspiracy must be considered:

- i. the second defendants...trading as Eircode, commissioned an advertising video about the Ambulance Service's emergency navigation use of*

- Eircode....The Eircode Division of the Department of Communications then used the Department's own established control and governance over public service announcements (PSA) in general to approve the advert as a PSA for free broadcast on RTE networks without any independent oversight.*
- ii. *RTE did not apply independent oversight either....Whilst it appears that the Ambulance Service did allow Capita's contracted producers to have access for filming, it did not appear to exercise any editorial control. Neither the first defendants, the Department of Communications, nor its Eircode Division have any direct responsibility for the National Ambulance Service in Ireland.*
- iii. *As far as I am aware, the advert was not produced by the National Ambulance Service itself. Subsequent but related advertising and imagery makes it clear that there was direct political interest and involvement by [a stated Minister]...in the push to promote the Ambulance Service's use of Eircode....The video advert has been run annually on RTE networks mainly in the period January to March (approximately) since 2017 (and in 2016 in July/August). The advert has consistently failed to mention the Ambulance Service's simultaneous use of Loc8 Code for emergency navigation in the broadcasts from 2018 to 2022....This failure was in spite of the plaintiff requesting the Minister for Communications to intervene to include Loc8 Code as a code also supported by the Ambulance Service on several occasions....*
- iv. *This was also in spite of the...Advertising Authority of Ireland (ASAI)...finding that the Capita advertising was in breach of 4 sections of their Code in November*

2016 and recommended that 'the complaints should be upheld'....

- v. *This represents the misuse of a State apparatus for free broadcast capability in order to give commercial advantage to Capita and Eircode over the plaintiff....*

24. ***Irish Times Article, 4th January 2011***

An article with the title 'Postcode could be introduced across State by year's end' written by Harry McGee was published in the Irish Times on the 4th January 2011....This was 14 days before issue of the...Pre Qualification Questionnaire PQQ...for the NPS on 17th January 2011 by the first defendant. Ms Gillian Chamberlain states in the chronology [in]...her affidavit on behalf of the second defendant. 'This article is referred to in the plaintiff's statement of claim delivered on 9th December 2022. The plaintiff alleges at para.9(v) thereof that this article states 'Garmin and, by inference Loc8 Code would not be successful in any bid for the [postcode management] licence', This is an inaccurate and misleading description of the article'....This statement must be considered against the following facts:

- i. *The article also refers to 'a departmental briefing paper'....Therefore it is clear that Mr McGee was using a briefing paper as a reference, which I say is the only such briefing paper in the public domain....At the top it states that it is a 'Secretary General Briefing Note – PIN'. It is a briefing note for the first defendant produced by PA Consulting after discussion with An Post....The date written by hand on the top is 'Oct 2010' and to the best of my knowledge, this is as it was when released into the public domain by the first defendant. It refers to a 'PIN', meaning a 'Prior Information Notice', which is normally issued in advance of a procurement process to give advance*

warning and relevant detail. As the date of dispatch for the PIN related to the postcode procurement is recorded as '3.11.2010' meaning 3rd November 2010, the handwritten date of October 2010 on the briefing note is credible. For this reason, it is reasonable to deduce that the 'Departmental Briefing Paper' referred to in the article is the 'Briefing Note' which is hand-dated 'Oct 2010'...and that it was being used as a reference for his article by Mr McGee.

- ii. That briefing document states, (inter alia), as follows:
'Whilst not of direct relevance to the main objective of this note, it is believed beneficial to briefly present an overview of the difference between location codes and postcodes as there is currently a good deal of discussion and debate associated with the relative merits of a 'postcode as recommended by the national postcode project board in 2006 (the baseline for the current work)' versus a 'GPS based location code' as currently offered by companies such as Loc8Code and Go-Code'.
- iii. It is worth noting the following at this point: a. Loc8Code is not 'GPS based' but based on Geodetic coordinates which make it very easy to be adopted and used by GPS navigation receivers such as those used by Garmin and others. b. Go-Code was the product of...a member of the National Postcode Project Board mentioned in the article . He is also mentioned in the statement of claim and he is recorded as having led the Capita bid for the NPS.
- iv. The briefing note goes on to say 'What is less well communicated or understood...is the fact that it is only the postcode system as currently defined by NPPB that can be fully integrated with the existing and future mails sortation (automatic, video coding

- and manual) solutions, and thus fulfil the first objective of the NPS as summarised above.'*
- v. *And later it says, 'The GPS-based location code' on the other hand, simply converts a set of eastings and northings into an alpha-numeric string....it provides little (if any) added value....that is required for mail sortation'. a. I say that this is completely inaccurate for Loc8 Code and as Loc8 Code was not aware of this statement or the content of the briefing note until much later on and, because Loc8 Code was blocked from participation in the procurement, it was afforded no opportunity to respond or to demonstrate why it was completely inaccurate.'*
- vi. *And then it says, 'As such, it is our firm recommendation that the conclusions and recommendations of the NPPB with regards to the format of the postcode continue to be followed...'*
- vii. *It is clear, therefore, that this briefing document, using information from An Post, the third defendant, was recommending that the plaintiff should not be considered for the national postcode system as it would not be able to satisfy An Post's automatic, video coding and manual sorting solutions. I say that, aside from the fact that the plaintiff was never given the opportunity to demonstrate to the contrary, it is now clear that An Post is unable to use Eircode as stated as a requirement in the above-mentioned briefing note either.*
- viii. *As the plaintiff had launched to the market with Garmin earlier in 2010 and since, between the formation of the briefing note in October 2010 and the Irish Times article on 4th January 2011, Garmin had carried out a marketing campaign to promote its support of Loc8 Code on its navigation devices,*

Garmin was being clearly associated with Loc8 Code and for some reason was used, instead of Loc8 Code in the article which said 'Several companies developing global positioning technology – notably Garmin – have devised all-Ireland digital address codes that provide precise addresses. Whilst these codes will not provide the basis for the national system, the Department of Communications said these companies were free to tender'.

- ix. *Knowing that the origin of the article is the Briefing note;- it is reasonable to deduce that the article was saying that Loc8 Code/Garmin could tender but would not be successful, contrary to Ms Gillian Chamberlain's statement in the chronology. The article and the statement were, therefore, prejudging the outcome of the proposed procurement process which was about to begin 2 weeks later.*
- x. *However, the potential impact of the article also had more immediate significance and as stated in my letter to [a stated TD]...on 10th July 2018...it had the potential to cause the following significant adverse outcomes for Loc8Code: a. undermine support from Enterprise Ireland; b. undermine support from private investors; c. undermine support from banking institutions; d. undermine support from Garmin; e. undermine negotiations with others like Garmin; f. undermine contracts/negotiations with existing and new customers; g. make it difficult to raise new debt/investment; h. create divisions within the board of management; i. block growth and development of the Loc8 Code SME enterprise; j. block the conduct of normal commercial activity.*
- xi. *None of this could be construed as 'inaccurate' or 'misleading' from the prospective of a small start-up*

company which needed the full support of all its partners to progress;- as is suggested by Ms Chamberlain in her affidavit.

- xii. *The first defendant...at no point sought to correct or clarify the article publicly, Mr McGee never contacted Loc8 Code for comment beforehand or to clarify afterwards and the first defendant never made contact with the plaintiff to clarify what was stated in the article.*
- xiii. *I say that this is part of the conspiracy, associated with the procurement, and in which both [the] first and third defendants had an input. Clearly the plaintiff was being victimised behind the scenes and a huge negative profile was being created.*

25. ***EC Investigation of the Procurement Conditions Set By the Department***

In his affidavit for the first defendant, Mr Daniel Lawlor states [as he states] at para.8 [quoted above]... In the following paragraphs and in para.24, Mr Lawlor seeks to suggest that there was nothing wrong with the [PQQ] related stipulations other than the 'clarity of language'.

- i. *This is a misleading mischaracterisation. The matter is well settled. It was investigated by the EC between May 2012 and October 2013 and, as well as other written reports, the DG EC Internal Market wrote to the Irish authorities via the Irish ambassador in Brussels on 8th April 2015, and stated: '[T]he error in question relates to a pre-qualification requirement which did not allow economic operators to combine their economic and financial standing. Article 47(3) of the Directive 2004/18/EC specifically allows economic operators to form consortia in order to rely on each other's strengths in a procurement process.*

This scheme enables smaller economic operators to compete in tendering procedures which they would otherwise find difficult to access. The pre-qualification conditions set by the Irish contracting authorities in this particular case in effect prevented potential bidders from forming consortia....

ii. *I say that nowhere in this or other documents from the EC relating to its investigation of this matter is there any reference to a problem with 'clarity of language' as suggested by Mr Lawlor:*

iii. *In 2017, when this matter was considered by [an]...Oireachtas...Committee, the head of the Eircode division for the first defendants...equally sought to mislead the chair of the Committee...by editing a statement from the Commission so as to suggest that no issue was found by the EC....*

iv. *The matter is settled because: a. It was confirmed by the Comptroller and Auditor General in his special report on Eircode in October 2015...where it states 'Some aspects of procurement associated with the project were unsatisfactory including EU concerns with the qualifying criteria in the licence holder tender' and...where it states 'The Department should ensure that all procurement processes are fair, transparent and in line with national and EU guidelines' to which the Department's Accounting Officer's response was 'agreed'.... b. At a Public Accounts Committee meeting on 26th January 2016 in an exchange between [a named TD]...and the first defendant's secretary general [who]...stated that 'We have done that' when asked by [the named TD]... 'I presume...[he] accepts what the Comptroller and Auditor said in this regard. Is it not the case that the European Commission also stated that the Irish*

authorities were requested to adopt measures to avoid similar errors in future and to inform the Commission of those measures?’....

- v. *Accordingly, contrary to Mr Lawlor’s statement, it is without doubt that the Commission raised issue with one of the PQQ requirements, the first defendant had to take documented steps to ensure [that] the matter was not repeated in the future and both Comptroller and Auditor General and [the Department’s secretary general] have accepted this.*

26. ***Suitability of Mr Daniel Lawlor as a Deponent***

On a wider point, since Mr Lawlor’s statement about ‘clarity of language’ cannot be substantiated from any of the documents available from the EC on the subject, this raises questions about Mr Lawlor’s knowledge and insight on the subject of the NPS. Furthermore in paras. 8 and 9 of his affidavit with reference to the PQQ he suggests that the procurement ran without complaint or difficulty. I have just outlined how there was a verified complaint to the EC and it is also the case that the procurement did not run as intended. The PQQ contained...an ‘indicative procurement timetable’....It will be noted as an example that the planned contract commencement was projected for 1/09/2011. In reality, this was not even nearly indicative as the contract between the first and second defendants was not signed until 31st December 2013 – more than 2 years late[r]. This significant delay has never been accounted for or explained.

[Mr Delaney moves on to query whether Mr Lawlor is the appropriate person to have sworn up affidavits for the first defendant based on the fact that (i) Mr Delaney has not previously encountered Mr Lawlor in his dealings with the Department; and (ii) Mr Lawlor is not in the Department’s senior management team. As will be seen later below, Mr Lawlor avers that he is a member of the senior management team (though I do not accept in passing that the affidavit could only be sworn by a senior

member of the management team; another staff member for whatever reason might be considered more appropriate). The fact that Mr Delaney has not previously encountered Mr Lawlor in Mr Delaney's dealings with the Department seems to me to be, with every respect, an irrelevance. The Department is clearly satisfied that Mr Lawlor is a suitable deponent and I see no reason why he is not a suitable deponent.]

...

28. ***Regulations Governing the Procurement of the National Postcode System***

In relation to the regulations governing the procurement of the NPS, in his affidavit for the third defendant...in para.31 Mr Paul Carroll cites the EC (Public Authorities' Contracts) Regulations 2010 (S.I. No.130 of 2010) and the EC (Award of Contracts By Utility Undertakings) (Review Procedures) Regulations 2010 (S.I. 131 of 2010), and the provisions of O.84A RSC...and Ms Gillian Chamberlain and Mr Daniel Lawlor in their affidavits for the second and first defendants respectively refer to the same or similar. I say that the provisions of the Communications Regulation (Postal Services) Act 2011....also use statute and ministerial authority to govern the procurement of the NPS.

- i. *The Act states at s.66(2) 'The Minister may, with the prior consent of the Minister for Public Expenditure and Reform, enter into a contract with one or more than one person for the development, implementation and maintenance of a system (in this section referred to as the 'national postcode system') for the allocation of, or relating to the provision of postal services and the use of the national postcode system by other persons for such other purposes as the Minister considers appropriate.'*

- ii. *Therefore, in accordance with the Act, the prior consent of the Minister for Public Expenditure and Reform was required to complete the procurement process for the NPS and to award a related contract. It is a matter of the Oireachtas record that this consent was given by [a stated Minister]....*
- iii. *The ministerial consent was provided on the understanding that: a. the procurement was conducted in accordance with public procurement requirements; b. that the winning tender represented value for money; c. that the contract complied fully with the requirements of the Act; d. that the costs could be met within voted allocations of the first defendant.*
- iv. *In the light of the facts set out in this affidavit, a, b, and c were not achieved. Also none accept or allow for secondary political or ministerial involvement in the conclusion of the procurement by the Government decision, cited as 'S180/20/10/0382' made on the 4th October 2013, which is quoted in a letter for [a stated TD]...on 11th June 2018....Though sought through several channels, the quoted Government decision has been withheld and, therefore the full detail of the decision cannot be understood in the context of completing the procurement of the NPS in accordance with all regulations.*
- v. *Furthermore, the Act in s.66(1) gives the meaning of the 'national postcode' system as "'postcode' means a code consisting of numbers or other characters or both numbers and other characters that identifies the locality of an address and, where appropriate, the geographic location of an address'. As the ministerial consent referenced above requires that the contract for the NPS complied fully with the Act, the*

procurement process was required to deliver to the contract a postcode design which complies with the above meaning. I say that to the best of my knowledge and by reference to documents in the public domain the contract does not specify the details of such a postcode. Paragraph 2.2.4 of the contract states 'the outcome of the design phase shall be a detailed programme of work for the next phase of the project and the postcode format design itself' and in its definition of the NPS at p.105 of the same contract it makes no reference to the requirements in s.66(1) of the Act. Furthermore, I say that the code which was subsequently designed in the NPS Design Report...a few months after the contract was signed, and now known as 'Eircode' does not comply with the meaning of the postcode in the Act, as quoted above. I say that, Eircode does not 'identify the locality of an address' and it always, rather than 'where appropriate' identifies, using the assistance of a database, the 'geographic' location of an address'.

- vi. For these reasons, it seems that neither the procurement process nor the related contract complying fully with the Act as required by ministerial consent, have been concluded.*
- vii. Since the procurement for the NPS has yet to be completed, in the meantime, and as a result of a political/government decision of the first defendant on 4th October 2013 a separate and non-compliant commercial coding system has been delivered to the market using public money.*
- viii. I say also on this matter that whilst the defendants in their affidavits have referred in one way or another, by reference to regulations, to the procurement of the NPS as the procurement of a 'utility', Eircode is not*

regulated in a manner similar to national utilities. National utilities are regulated by either COMREG or the Commission for the Regulation of Utilities (CRU) but Eircode is regulated by neither of these agencies.

29. ***Use of the NPS for Non-Postal Services Purposes***

Mr Daniel Lawlor, in his affidavit for the third defendant...states [as he states] in para.16 [quoted above]. Aside from the questionable statutory basis for Eircode raised in the previous paragraphs relating to the regulations governing the NPS, s.66(2) requires that the postcode be used 'for the purposes of or relating to, the provision of postal services and the use of the NPS by other persons for such other purposes as the Minister considers appropriate '. In considering this provision the following should be noted:

- i. In the first instance, the postcode must be used for and relating to postal services. As previously mentioned...[the] then company secretary of...An Post...stated in his evidence to [an]...Oireachtas...Committee on 29th August 2017, that Eircode was not then being used in its delivery operations and evidence in the public domain suggests that this has not changed since....*
- ii. In the letter for [a stated TD]...dated 11th June 2018...it is stated that 'The Committee also recognises that the new postcode system would primarily be used by An Post...'. Therefore it would be necessary that this requirement is proven and that the benefits to An Post claimed of it in the first defendant's capital plan in 2011 and in their Assistant Secretary's statement to the Public Accounts Committee in June 2014 as referenced in my own*

- letter to the Oireachtas Communications Committee on 10th July 2018 have been satisfied and achieved....*
- iii. *It is only if the above requirements can be satisfied that the provisions of the rest of the section in relation to the use by 'other persons for such other purposes as the Minister considers appropriate' can be considered.*
- iv. *In relation to this, it will be noted that use must be considered in relation to each person and each purpose so there is no blanket appropriate use afforded by the Act.*
- v. *It will also be noted that it is required that the Minister for Communications is the one who must consider appropriateness, and to do so in the case of each person or purpose, the Minister would have to fully understand all related pros and cons and make judgments on that basis. Such consideration would include matters of privacy (GDPR), as covered also for the postcode in the 2015 amendment to the Act, and in relation to the potential reputational damage to the NPS of any use/purpose/person, as stated in para.1.4.7 of the Postcode Design Report, as agreed by the first and second defendants and after exclusive consultation with the third defendant....That paragraph states [that] 'The NPS must be optimised for the fulfilment of...requirements associated with postal addressing. This is not to say, however, that the postcode cannot potentially be used for additional purposes, but this must be a secondary consideration and approved in all instances by DCENR in advance to avoid potential reputational damage to the NPS.'*
- vi. *I say also that the appropriate use would also take into account, the code's ability to satisfactorily fulfil the intended purpose and if there would likely be*

issues, those issues would be identified in related testing and if still to be used , then mitigation provisions would be applied to minimise any impact of those issues. This would imply in the case of the use of Eircode for emergency response with the national ambulance service, the potential for technically predictable ‘misrouting’ and delaying ambulances which has since been confirmed by detrimental experience during emergency calls would have been identified in advance and mitigating efforts, including warnings in related PSA’s would have been undertaken. This has not occurred.

vii. In all cases, where these matters were to be considered and appropriateness identified by the Minister, then related records and decisions would be documented and accessible to ensure verifiable compliance with the Act.

viii. I also respectfully suggest that it would never be appropriate that the Minister would consider that use of the NPS as specified in the Act, for purposes to compete directly with a navigation code, operated by an Irish company and already in the market 5 years before Eircode was rolled out and 1 year before the Act was enacted – one of the complaints pleaded in the statement of claim.

30. I say also that any suggestion that the first defendant’s political/government decision on 4th October 2013 which is referred to in the June 2018 letter for [a stated TD]...and the detail of which has not been seen to date...gives advance and blanket consideration and approvals as appropriate for non-postal uses/purpose and persons, cannot be sustained for the following reasons:

- i. *The contract with all supporting terms and conditions for the postcode had not then been awarded or signed.*
- ii. *The NPS Design Report undertaken by the second defendant in exclusive consultation with the third defendant and approved by the first defendant and in which there were restrictions as to use and concerns regarding reputational damage, had not been completed.*
- iii. *The 2015 amendment to the Act to include consideration of the code for privacy (GDPR) considerations had not yet been conceived;- nor had the privacy impact assessment (PIA) which informed the said amendment to the Act and caused the DPC to recommend a national public awareness campaign for Eircode and related privacy impacts been completed by the first defendant. As an aside, to date this campaign has not been undertaken and it would be difficult to understand how a Minister could find any non-postal service purpose or person appropriate knowing that the public had not yet been made aware of privacy implications.*
- iv. *And since, the emergency services are specifically mentioned in reference to the political/government decision identified in the letter for [a stated TD]...it has since been revealed by [the] secretary general...of the first defendant, in his first engagement with [an Oireachtas]...Committee on 28th January 2016...that the ambulance service was not consulted on the design of the NPS during the period 2006 and 2013. [The secretary general]...stated 'While the National Ambulance Service would not necessarily have been consulted as part of the consultation processes that occurred as the design of the postcode system evolved between 2006 and 2013, when a contract was*

awarded, there were extensive consultations with both the HSE and the Department of Health at various stages, including on the design of Eircode or the postcode itself' it will be noted that the HSE and the Department of Health are not specifically the emergency response specialists in the National Ambulance Service. So an advance and blanket consideration and finding as appropriate use/person/purpose for the Ambulance service would not have been possible in October 2013 and afterwards. There is also no evidence in in the public domain to suggest consultations with any other elements of the emergency services had taken place either. Neither is there any evidence that the first defendant or the Minister ever considered the NPS or Eircode capabilities by comparison to the proven emergency navigation capabilities of Loc8 Code known since years earlier and made decisions of appropriateness based on such a comparison.

31. *Mr Lawlor's statement in relation to this in his affidavit and similar suggestions in Ms Chamberlain's affidavit are, therefore, deeply flawed and invalid.*

32. ***Claim that Loc8 Code Action is Vexatious and Frivolous***

This claim is made in all 3 affidavits and is unjustified. The verifiable detail give in this affidavit shows without doubt that the statement of claim has raised significant issues which all have merit. Efforts have been made through competent Irish & EC authorities/agencies to resolve these issues, which extend right up to date and remain unresolved, as legal action was

never considered to be the first course of action. Cooperation in the market was the preferred outcome and continuous efforts to meet with Ministers to achieve this were undertaken but were ignored or dismissed. It was then only when it became obvious by reference to a government/political decision taken in October 2014 but only revealed for the first time in June 2018 that there were political and other issues afoot and other events that interfered with the normal course of Loc8 Code business, previously looked on with suspicion, became conspicuously part of a wider conspiracy. It was clear that Loc8 Code was blocked from participation in the NPS procurement and ever since blocked in developing its business as a navigation code both through acts of conspiracy and direct competition from the combined efforts of the defendants, using the benefit of illegal state aid.

...

33. *Accordingly, therefore, claims by all three defendants that the content of the Loc8 Code statement of claim is 'vexatious' or 'frivolous' or that it is designed solely to do damage, as is also suggested, are roundly and resolutely refuted.*

34. Matter of Misinterpretation

In her affidavit, Ms Chamberlain states [as she states] at para.48 [quoted above.]

- i. *I believe this to be a misinterpretation of what is stated [in]...the statement of claim. Regulation of all matters postal in the postal act has always been for COMREG. But when the 2011 Act was enacted and when reference to a postcode was first inserted, regulation by COMREG for the NPS was not applied when in para.66(2) the Minister was empowered to consider what are appropriate non-postal services uses, purposes and persons. It could be taken that*

*COMREG should still regulate postal uses of the NPS
but they say they have no input.*

35. ***Motive for the Conspiracy***

In addressing the main issues raised by the 3 defendants, this affidavit has also presented motive for the alleged conspiracy. That motive is to ensure the success of its protectionist agenda for An Post in the face of liberalisation. The plaintiff, whose technology is more capable than either the NPS or the Eircode were allowed to be, represented a threat to An Post's ability to exercise control and limitations in relation to that which is available to its competition and also in respect of how much levelling of the playing field took place when it came to property addressing in Ireland. That control also meant that An Post's address database product, Geodirectory, was required and depended on.

36. *This protectionism by An Post is being facilitated by the first defendant, the Department and exercised and maintained by the second defendant.*

37. *The result of this is less liberalisation in the market as intended, the maintenance of control of one player, and less value for money for the public purse;- not only in relation to the exchequer spend on the NPS, but also in terms of mail and parcel delivery in Ireland. As a result of the navigation capability and functionality limitations applied, the public also got less value for the other uses Eircode is applied to, like ambulance/emergency response where a second code is needed to help fulfil requirements.*

38. *For the plaintiff, Loc8 Code, it means that not only was it blocked from the NPS procurement but its legitimate business efforts in the wider navigation markets were also interfered with and continue to be right up to date."*

E. The Replying Affidavit of Mr Lawlor.

13. In a replying affidavit of 13th February 2023, Mr Lawlor avers, amongst other matters, as follows:

- “7. *At paras.26-27, Mr Delaney questions my suitability to swear an affidavit on behalf of the Department. I reject this entirely. I am an Assistant Principal officer in the Department and a senior manager with direct responsibilities for Eircodes. I am therefore part of the senior management team with responsibility for the matters that are addressed in these proceedings. My affidavits are sworn on behalf of the Department and I have liaised with other members of my team in respect of the matters addressed by me. It is therefore entirely appropriate that I would swear affidavits on behalf of the Department in the context of this application.*
8. *As to the remainder of Mr Delaney’s affidavit I would make the following short number of points.*
9. *Mr Delaney alleges that An Post do not use Eircodes. For the avoidance of doubt, in advance of the Eircode launch, An Post integrated Eircodes into their automated and manual mail sortation systems across their network. An Post have advised the Department that Eircodes have now been fully integrated into the national automated parcel hub (DPH) systems and An Post actively encourage the use by mailers of a full postal address including Eircode.*
10. *Mr Delaney repeatedly argues that there has been a breach of legislation because the NPS is used for purposes other than the provisions of postal services. I have already addressed this issue....[S]ection 66(2) of the Communications Regulation (Postal Services) Act 2011 expressly provides that the use of the NPS is not limited to the provision of postal services.*
11. *While Mr Delaney alleges various faults in the procurement process, these are all disputed by the Department. More fundamentally, however,...I am advised that it is not open to the plaintiff to maintain such complaints due to the lapse of time.*
12. *Mr Delaney also misrepresents various communications and correspondence in his affidavit. By way of example only, Mr Delaney seeks to give the impression that the European Commission decided that the tender in 2011 was unlawful. I have already addressed this....[T]he Commission closed the file and did not bring any infringement proceedings against Ireland. The Department also refute, in the strongest terms, the*

allegation made that a Department official misrepresented the ‘ruling’ of the European Commission to an Oireachtas Committee.

13. *Another example of Mr Delaney misrepresenting documents can be seen in what he says at para.16 of his affidavit about a letter from [a stated TD]...dated 31st October 2007....He says the letter gave an assurance that the NPS would be a non-precise area based design. However, this is not at all what the letter says. The letter simply notes , ‘[I]t is not currently my intention to review the model that was recommended by the National Postcode Project Board.’ At no stage did the Minister give any assurances that this decision would not be reviewed.*
14. *Finally, while I do not intend to go through all of Mr Delaney’s affidavit to critique what he says and point out the selective and inaccurate interpretation that he attempts to ascribe to various documents...I wish to emphasise that if the plaintiff were granted the injunctive relief sought by it, it would effectively cease the operation of the NPS which would have a considerable negative impact on delivery of services, especially to those 35% of households that share an address, business, government agencies including the CSA who use Eircodes as part of their statistical analysis and key services such as the National Ambulance Service, Fire Brigade, An Garda Síochána and emergency first responders.”*

F. The Replying Affidavit of Ms Chamberlain

14. In a replying affidavit of 13th February 2023, Ms Chamberlain avers, amongst other matters, as follows:

- “3. *The purpose of this application appears to have gotten quite lost in the reply of the plaintiff. To reiterate the application before this court is to dismiss the plaintiff’s proceedings on various grounds, essentially that they are misconceived, inadequately pleaded and manifestly out of time.*

4. *The nub of the issue is that the proceedings relate to matters of public procurement and ought to have been brought by way [of] application under O.84A RSC. The affidavit of Mr Delaney does not controvert this position. On the contrary, at the end of para.9, Mr Delaney admits that the statement of claim “alleges a conspiracy which has delivered Eircode [...] and includes other confirmed issues to do with the procurement process...”. Further, at para.18, Mr Delaney admits that ‘these proceedings are a last resort [...] seeking to redress significant competition and procurement related issues’. In addition, as provided in my grounding affidavit, the plaintiff raised complaints with various authorities over many years from 2010. It is very clear from copies of the letters and documents exhibited in the replying affidavit of Mr Delaney that these complaints expressly concern matters of public procurement...*
5. *Moreover, the plaintiff acknowledges that the claim concerning matters of public procurement is statute-barred. This is apparent from the letter dated 10th July 2018...where in writing to [a stated TD] about matters complained of in these proceedings, Mr Delaney states...’One of the recommendations of the EC investigation report to me was for me to consider legal action. By the time the EC reported, I was advised by senior counsel that such action, though merited, was already statute-barred’.*
6. *It is clear that the plaintiff was aware of this position in or about October 2013, when the European Commission responded to his complaint about the procurement process....It is clear from page.5 of the decision that the plaintiff was advised at that time of his options for legal redress before the national courts, and further advised that the specific EU directives on remedies in the field of public procurement were applicable.*
7. *It is also clear that the plaintiff accepted this position and no legal action was brought. Indeed, in his added commentary on the document, Mr Delaney has noted ‘[A]s it is now the intention of Loc8 Code to seek redress within the national system as recommended, and as the investigation has already gone on for 18 months, no further information was provided to the Commission and Loc8 Code let the investigation phase close.’ It is perplexing that the plaintiff seeks to litigate these issues in*

2022/2023 despite knowledge in or about October 2013 that they were already statute-barred at that stage.

8. *...The dates of the alleged incidents giving rise to the plaintiff's claim are not controverted. In fact the plaintiff in its replying affidavit makes a series of admissions regarding the occurrence or its date of knowledge of events upon which it grounds its claims herein....*
9. *...[I]t is clear that the plaintiff is unable to controvert any matters and facts raised by me in the grounding affidavit. The replying affidavit of Mr Delaney fails to respond to my grounding affidavit in any meaningful way at all. In fact, in its 46 pages of reply (and almost 600 pages of exhibits) Mr Delaney refers to my grounding affidavit on 7 occasions only [at paras. 9(i), 22, 23, 24, 28, 30 & 31, and 34 [these have been quoted previously above and I do not reconsider them here]....*
10. *I say that not only has the plaintiff failed to respond to the matters at issue in this application – that its proceedings are manifestly out of time, that the procedure adopted in initiating its claim is fundamentally flawed, and that the claims made as to conspiracy are detrimentally inadequate – the plaintiff has used this affidavit as a platform to embellish its substantive claim against the defendants. In addition to the new allegations referred to above, the plaintiff further endeavours to expand its plea of conspiracy and has used this affidavit to provide the particulars of the alleged conspiracy which...are lacking in the statement of claim....[I]f the plaintiff wished to rely on these facts, they ought to have been pleaded.*
11. *In addition, the plaintiff further attempts to introduce reliance on the Communications Regulation (Postal Services) Act 2011 to suggest that non-compliance with same, as alleged, renders the procurement process incomplete and the time limitations under the EU Remedied Regulations are not applicable....[I]f the plaintiff wished to rely on this allegation, this ought to have been pleaded in the statement of claim. It appears that the plaintiff is now attempting to fundamentally alter the basis of its claim to circumvent the strict time limitations under the Remedies Regulations.*
12. *Furthermore, the plaintiff introduces...new allegations concerning non-compliance with the Postal Act 2011, and raises further claims against the first-named defendant. This new claim does not concern the second-named*

defendant save insofar as the plaintiff claims...that alleged issues when using Eircode for emergency response with the National Ambulance Service ought to have identified and mitigated against. It is not clear to whom this is addressed, but it is clear that this claim was not made in the statement of claim.

13. *In addition to the foregoing, it is clear that a number of documents exhibited by Mr Delaney in his replying affidavit are clearly altered from their original forms, in some cases with commentary added thereon, and I ask the court to draw such inferences from same, as appropriate”.*

G. The Replying Affidavit of Mr Carroll

15. In a replying affidavit of 13th January 2023, Mr Carroll avers, amongst other matters, as follows:

“The Matters in Mr Delaney’s Affidavit Support An Post’s Application

8. *By way of an overarching comment in respect of Mr Delaney’s affidavit and as explained further below, the matters addressed by Mr Delaney in his affidavit support An Post’s application insofar as they evidence the fact that whereas the claim which Loc8 seeks to advance against An Post in the proceedings is one ostensibly based on the alleged conspiracy (essential aspects of which have not been pleaded) his real grievances relate to:*
- (i) the conduct and outcome of the procurement process which...cannot be litigated outside of the...Procurement Remedies Regime;*
 - (ii) alleged breaches of EU state aid law which Mr Delaney has brought to the attention of the European Commission which saw nothing in them to warrant the prompt investigation which Mr Delaney apparently felt appropriate; and*
 - (iii) alleged breaches of competition law which Mr Delaney brought to the attention of the...CCPC...which saw nothing in them to warrant further investigation at all.*

9. *Loc8 chose not to litigate any of these matters at the relevant time and they have all been manifestly statute-barred for many years....a point of which Mr Delaney has been aware for some time. On page 5 of his letter to [a stated TD]...dated 10 July 2018....Mr Delaney sets out various grievances in respect of the procurement process and then acknowledges 'I was advised by senior counsel that such [legal] action, though merited, was already statute-barred.'*
10. *...[T]his acknowledgement by Mr Delaney in 2018 and the matters set out in his affidavit evidence that these proceedings are a clear abuse of process whereby Loc8 has let its various grievances (whatever their merits) against the defendants become statute-barred and now has sought (many years after the relevant events) to repackage those grievances into an unstateable and unparticularised allegation of conspiracy against the defendants.*

Mr Delaney's Purported Explanation for the Timing of the Proceedings

11. *In §.17 of Mr Delaney's affidavit he suggests that Loc8 brought the proceedings when it did because it was indicated to him by the European Commission by letter dated 3rd November 2021...that his complaint to them would not be pursued as expeditiously as Mr Delaney appeared to wish.*
12. *...[I]t is the practice of the European Commission not to pursue complaints the subject matter of which forms part of, or touches on, proceedings issued by the complainant before national courts....*
13. *In §.17 Mr Delaney indicates [what he indicates; this has been considered previously above]....*
14. *Accordingly it would appear that as recently as 2021 Loc8's grievance was there had been a breach of either EU or Irish competition law or EU state aid law....[T]he appropriate respondent to any allegation of a breach of EU state aid law would be the Irish State rather than An Post but...such matters can be litigated in the Irish courts.*
15. *However, it is notable that in these proceedings Loc8 does not make any claim based on a breach of either EU or Irish competition law or EU state*

aid law. It is further notable that whatever the merits of the matters which Loc8 put before the CCPC/European Commission, they were not such as for either agency to consider that they merited action (...at a pace satisfactory to Mr Delaney)....[I]t would appear that the most likely explanation for Mr Delaney not advancing such claims is that he is well aware that they have been manifestly statute-barred for many years.

16. *Mr Delaney again suggests in §.18 of his affidavit that the defendants (including An Post) have failed to 'operate in compliance with competition law' without explaining how, precisely, he says that this was the case. However, in any event...there is no claim advanced in the proceedings that An Post has breached competition law.*

Mr Delaney's Narrative of the 'Background in Relation to An Post'

17. *In §§.19-21 of his affidavit, Mr Delaney sets out what he describes as a 'Background in Relation to An Post' against which he contends that the court should 'evaluate' the position which I set out in my first affidavit that 'An Post had no role in the conduct and organisation of the procurement process and had no means to influence same' and that 'Loc8's true complaint' was against the Department and Capita. However...none of the matters set out by Mr Delaney in this regard suggest that An Post had any responsibility for the conduct and organisation of the procurement process. Furthermore, to the extent (if at all) that those matters suggest that Loc8 has ever had any grievance with An Post, such grievance relates to a point which Loc8 has not actually pursued in these proceedings and which would be manifestly statute-barred at this stage.*
18. *In §.19(v) of Mr Delaney's affidavit he refers to a briefing document...the PA Briefing Note...which he acknowledges was prepared by PA Consulting 'after discussions with An Post' and not by An Post. The only direct reference in the PA Briefing Note to any view on the part of An Post is at the bottom of the second page where it is stated as follows:*

'Position of An Post

An Post have committed to commence the incorporation of postcodes into their mails process as soon as the technical specification of the NPS is finalised and the postcode address database developed and subsequently to commence its use as soon as required.'

19. *Despite the above being the only reference to any view or position held by An Post, Mr Delaney avers that 'This document, therefore, is considered by the plaintiff as one where it was unfairly targeted and blocked from participation in the procurement process on the basis of unilateral, uninformed and untrue statements from An Post.'*
20. *Furthermore, Mr Delaney states that the PA Briefing Note 'stated that Loc8 Code should not be considered as it could not fulfil An Post's requirements'. Nowhere in the PA Briefing Note is that in fact stated at all.*
21. *A number of points should be made in this regard.*
22. *First, PA Consulting were...as acknowledged by Mr Delaney...engaged by the Department to provide consultancy services to it in the context of the postcodes project. Accordingly and unsurprisingly, An Post's engagement with the Department...involved engagement with PA Consulting, including in respect of the functional requirements of the postcode....[N]othing in the statement of claim or Mr Delaney's affidavit discloses any suitable cause of action for Loc8 against An Post arising from that engagement.*
23. *Second, given that the PA Briefing Note was produced by PA Consulting and not An Post, to the extent that Loc8 wished to take issue with its contents, that would have been a matter for it to take up with PA Consulting and not An Post.*
24. *Third, Mr Delaney's contention that the PA Briefing Note had the effect of having Loc8 'blocked from participation in the procurement process on the basis of unilateral, uninformed and untrue statements from An Post' is (aside from being factually untrue and not based on any evidence) par excellence a further instance in which it is laid bare that Loc8's grievance in this regard is with the conduct and outcome of the procurement process which grievance...Loc8 cannot litigate outside of the Procurement Remedies Regime.*

25. *Fourth, to the extent that Mr Delaney seeks to contend that An Post's engagement with PA Consulting was part of any alleged 'conspiracy' I would note that Mr Delaney himself...characterises the statements allegedly made by An Post to PA Consulting as 'unilateral' which...would not be consistent with an allegation of conspiracy.*
26. *In §19(vi) of his affidavit, Mr Delaney appears to contend that certain documents prepared by An Post for the Department in respect of the functional requirements and design of the postcode were somehow inappropriate. In this regard I would note the following.*
27. *First it is again clear that this is a complaint in respect of the conduct of the procurement process. As Mr Delaney himself acknowledges, one of these documents...which Mr Delaney describes as having 'effectively specified the design which later became Eircode' formed part of the documents provided to bidders in the procurement process in 2011 and 2013. Again this is a matter which could only be litigated within the context of the Procurement Remedies Regime.*
28. *Second, this is equally the case in respect of Mr Delaney's contention that it was 'clearly irregular and a breach of the procurement process' that An Post was a bidder (ultimately an unsuccessful one) in the procurement process. Furthermore, the fact that An Post was the source of certain information provided as part of the tender documents in the procurement process of an equal and transparent basis to all bidders was entirely obvious at the time. For instance, the document referred to in the paragraph directly above is written on An Post headed paper.*
29. *For the avoidance of doubt, there was nothing irregular or contrary to procurement rules about An Post's participation in the procurement process (in which, I must again emphasise, An Post was not successful)...I would note that this was done on the basis of an internal separation in An Post regarding An Post's bid to become the postcode management licence holder (PMLH) and An Post's responsibility to provide information to parties bidding for the PMLH contract. An Post established a Postcode Integration Project and a PMLH Bid Project with separate project boards governing the work of each team. The teams had no members in common. An Post put 'ethical walls' arrangements in place to ensure that each*

project team worked independently of the other and to ensure physical, IT and administrative ring-fencing of each project. These ethical walls remained in place until the successful bidder was appointed as PMLH.

30. *In §.19(viii) of his affidavit, Mr Delaney appears to contend that the NPS Design Report...prepared by Capita which set out its proposed design for the postcode evidenced some form of conspiracy involving An Post in respect of the design on the postcode.*
31. *Consistent with what I have already explained in §.5 of my first affidavit, it was necessary and inevitable that An Post, in its capacity as USP, would be asked for its views in respect of the design of the postcode. While Mr Delaney contends that Capita in preparing the NPS Design Report 'consulted exclusively with An Post'. I simply do not know if this is the case or not, Ultimately it is a matter for Capita who it consulted with in this regard.*
32. *In any event, the NPS Design Report was produced by Capita and not by An Post. As such, to the extent that Loc8 takes issue with its contents that is a matter for Capita, not An Post.*
33. *Mr Delaney's contention in §.20 of his affidavit that An Post 'specified the design of Eircode' is simply factually incorrect and is contradicted by the very documents on which Mr Delaney relies. In particular, as I have noted already, the NPS Design Report was produced by Capita and not An Post.*

Mr Delaney's 'Further Examples of An Post's Role in the Alleged Conspiracy'

34. *In §21 of Mr Delaney's affidavit he sets out what he describes as 'Further Examples of An Post's role in the alleged conspiracy'. However, what is clear from Mr Delaney's own narrative is that it does not support an allegation of conspiratorial misconduct on the part of An Post with its co-defendants but rather sets out a series of allegations of breach of competition law which are not pleaded in the statement of claim (and if they were would be manifestly statute-barred) and which the then Competition Authority (now the CCPC) on at least two separate occasions did not consider to warrant further investigation.*

35. *In §21(i) of his affidavit, Mr Delaney makes an allegation of what appears to be an unlawful refusal by An Post GeoDirectory DAC (APG) (which is not a wholly owned subsidiary of An Post but rather a separate entity jointly owned by An Post and Ordnance Survey Ireland) to licence the...GeoDatabase...to Loc8. However, in the letter from the Competition Authority to Mr Delaney dated 12th December 2012...the Competition Authority is very clear that it did not consider the alleged conduct on the part of An Post to be unlawful. Furthermore in that letter, the Competition Authority expressly pointed Mr Delaney to Loc8's right to litigate this matter if it wished pursuant to s.14 of the Competition Act which it chose not to do.*
36. *In §. 12(ii) and (iii) of his affidavit, Mr Delaney makes further such allegations. However, in the case of §.12(ii) the allegation appears to relate to an independent third party. Autoaddress, for whom An Post has no responsibility or liability. In the case of §12(iii), the allegation appears to relate to Data Ireland, a former subsidiary of An Post and to be based on a vague description of 'feedback' received during a meeting which is not evidenced in writing.*
37. *In §12(iv) of his affidavit, Mr Delaney suggests...that Loc8, in 'early 2014' was being 'denied' a licence by APG. However, most of the chain of emails exhibited...in fact relates to engagement between An Post and APG from 2009. The engagement from 2014 involves only two emails from...APG. In the first dated 31 March 2014, [the author]...summarises what would appear...to have been a reasonably detailed and technical discussion between APG and Loc8 as to Loc8's proposed use of the Geo Database in respect of which [the author]indicates that he will need to take legal advice. In the second dated 28 May 2014...[the author] indicates that having taken legal advice, the specific use proposed by Loc8 was not consistent with the form of licence then available in respect of the GeoDatabase.*
38. *However, as acknowledged by Mr Delaney in §.21(v) of his affidavit, within five months of that latter email, APG...had contacted Loc8 in respect of a new form of licence that as [the author of the emails]...describes it 'seems more likely to enable Loc8 to use the Geo Directory in [the way] in which I understand that you need'. Mr Delaney*

suggests without explanation that this was not a ‘bona fide’ act. However...a review of the exhibited correspondence...evidences nothing more than the usual cut and thrust of commercial negotiation. Again Mr Delaney’s allegations of anti-competitive conduct in this regard are fatally undermined by the fact that, as he acknowledges in §19(v) of his affidavit, he brought a complaint in this regard to the CCPC which declined to act.

39. *Accordingly, contrary to what Mr Delaney suggests, nothing identified by him in §21 of his affidavit suggests any form of unlawful ‘conspiracy’ involving An Post nor any form of anti-competitive conduct, including in circumstances where not one but two complaints in this regard were rejected by the Competition Authority/CCPC.*

Mr Delaney’s Contentions In Respect of the Status of the Procurement Process

40. *...[I]n §28 of his affidavit, Mr Delaney contends that because (as he sees it) the procurement process was not ‘conducted in accordance with public procurement relations’...the procurement process has not ‘been concluded’...and ‘has yet to be completed’....This would appear to be no more than a very obvious attempt by Mr Delaney to ground a contention that he is not out of time to litigate issues relating to the procurement process which...has no basis in law. In fact, Mr Delaney’s averments in this regard make clear that his underlying contention is that the procurement was not ‘conducted in accordance with public procurement regulations’...[T]his is a matter which Loc8 cannot pursue outside of the Procurement Remedies Regulations and is, in any event, statute-barred for many years.”*

H. A Summary Chronology

16. There is rather a lot in the foregoing and it may be useful to incorporate into my judgment a version of the summary chronology which appears in Ms Chamberlain’s first affidavit:

| Date (d/m/y) | Event |
|--------------|-------|
|--------------|-------|

| | |
|---|---|
| 4.1.11 | Article of H McGee in <i>Irish Times</i> |
| 11.1.11 | Publication of Invitation to Tender. PQQ circulated. |
| 25.2.11 | Final Responses to Questionnaire Due. |
| Circa. the time the PQQ was published (?) | Alleged 'decree' of the 1 st -named defendant that consortia for tender prohibited. |
| Circa Aug.2012 (?) | Plaintiff makes complaint to European Commission |
| Circa. Oct.2013 (?) | Alleged decision of 1 st named defendant to vary the requirements use and operation of the postcode, in breach of statute. |
| 8.10.13 | 2 nd named defendant informed of success in tender |
| 8.10.13 | Announcement on RTE News that the 2 nd named defendant had won the tender. |
| Nov. 2013 | Decision of European Commission making recommendations to the Irish authorities to adopt certain measures but no infringement procedure opened. |
| 21 Dec. 2013 | Contract signed by 1 st and 2 nd named defendants. |
| Jul/Aug 2016 | Public Service Announcements air on RTE |
| Sometime between Aug 2016 and May 2017 | Complaint lodged with BAI. BAI Determination published in May 2017. |
| May 2017 (?) | Plaintiff complains to Oireachtas that 3 rd named defendant not using postcode as designed. |
| July 2018 | Plaintiff allegedly becomes aware of decision taken to vary the requirements use and operation of postcode. |
| 15.8.22 | Plaintiffs solicitors deliver letter of claim. |
| 2.9.22 | Plenary summons issues. |
| 12.9.22 | Plenary summons served. |
| 21.11.22 | Motion to enter Commercial List issues. |
| 28.11.22 | Motion transferred to Competition List. |
| 30.11.22 | Admission to Competition List. Initial Directions given. |

I. Consideration of Issues

17. These proceedings have been commenced very considerably out of time. In essence, the plaintiff's claim is for breach of public procurement law. It has been years late in commencing these proceedings. There are also claims concerning conspiracy, breach of competition law, breach of state aid rules, and interference with the conclusion of contracts. These other claims are vague and inadequately particularised, but, perhaps even more significantly, they are inextricably connected with and indeed derivative to the public procurement claim that is at the heart of these proceedings; they have likewise been brought years out of time.

18. At the heart of these proceedings is a tendering process that was conducted in 2011. Regulation 7 of the Remedies Regulations provides that:

“An application referred to in subparagraph (a) or (b) of Regulation 8(1) shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application.”

19. The PQQ in this case issued in January 2011. So the effect of reg.7 was that a challenge to same ought to have been brought sometime in February 2011. The plenary summons in this case issued over a decade later. The plaintiff claims that it only became aware in June 2018 that an alleged decision had been made in 2013 to allow the contract to be used for services other than post. I do not fully understand what this has to do with a tendering process back in 2011. But even if I took June 2018 as the starting-point from which to measure delay, the reg.7 one-month timeframe would again apply, action ought to have been brought by sometime in July 2018 and was not commenced (for no clear reason) until September 2022. On any version of events (and I consider the earlier timeframe to apply) these proceedings are very considerably out of time.

20. My attention has been brought to a series of cases which are concerned with the importance of strict time limits in procurement proceedings, *e.g.*, *Dekra Éireann Teo. v. Minister for the Environment and Local Government* [2003] 2 I.R. 270, *Veolia Water UK plc & Others v. Fingal County Council* [2007] 1 I.R. 690, *Copymoore Ltd & Others v. Commissioners of Public Works of Ireland* [2014] IESC 63, [2014] 2 IR 786, *Forum Connemara Ltd v. Galway County Local Community Development Committee* [2016] IECA 59. However, the delay here is so protracted, without any clear reason for same, that even if those tight time constraints did not apply (and they do) there is simply no basis on which I could properly tolerate the delay presenting and allow these proceedings to continue.

21. Even if these proceedings fell to be decided by reference not to the Remedies Regulations (which is the applicable legislation) but for some reason fell to be decided under O.84 RSC (and they do not) then, having regard to either the earlier or later of the two just-mentioned timeframes (and again I consider the earlier one to be the correct one) the proceedings have been commenced very considerably outside the three-month time limit that arises under O.84 RSC. No application has been made under O.84A RSC for an extension of time and even if it had been (ignoring for a moment that the Remedies Regulations are the applicable legislation) it would be doomed to fail: there is simply no basis for granting any extension, let alone an extension of the type which I would be called upon to countenance.

22. As to the plaintiff's efforts to recast elements of its claim as something other than a procurement-related claim (and, as I stated above, in essence, the plaintiff's claim is for breach of public procurement law) it has been clear since at least the time of the decision in *BAM PPP Ireland Ltd and Balfour Beatty Ireland Ltd v. National Roads Authority* [2017] IEHC 157 that the courts will not countenance attempts to re-characterise public procurement challenges as something other than public procurement challenges when that is what they are.

23. As mentioned above, the claims of conspiracy, breach of competition law, and breach of the state aid rules are inextricably connected with, and indeed derivative to, the public procurement claim that is at the heart of these proceedings. As a consequence, the entirety of the proceedings fail as being completely out of time, being in whatever shape or form or limb one has regard to, a public procurement challenge to which the reg.7 time limits apply.

24. I will grant an order dismissing the proceedings on the basis of their having been brought very considerably out of time under the Remedies Regulations. Even if they did not fall to be struck out under the Remedies Regulations, I would have struck them out as being out of time under O.84 RSC.

25. I am conscious that this judgment will come as a disappointment to the plaintiff, and I suspect to Mr Delaney, and I am sorry that this is so. Nonetheless, I consider that I am obliged by law to make the just-mentioned order.