



THE HIGH COURT

[2025] IEHC 33

Record No. 2001/9223P

BETWEEN

**PERSONA DIGITAL TELEPHONY LIMITED AND
SIGMA WIRELESS NETWORKS LIMITED**

PLAINTIFFS

AND

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

DEFENDANTS

AND

MICHAEL LOWRY

THIRD PARTY

**JUDGMENT of Ms. Justice Emily Egan delivered on the 27th January, 2025, amended
on the 20th February, 2025**

Introduction

1. This is my second judgment in these veteran but important proceedings. It concerns the plaintiffs' application for further and better discovery (or for inspection) of a substantial number of documents falling within the scope of an agreed order for discovery made by this court on 4th May 2023. The fourth named defendant Mr. Denis O'Brien ("Mr. O'Brien") has refused to discover these documents because they were provided to him in confidence by the Moriarty Tribunal of Inquiry into Payments to Politicians and Related Matters ("the Tribunal").

2. The plaintiffs' claim arises from the tender process for the award of the second GSM mobile phone licence in Ireland, announced on 2nd March 1995, by the notice party, Mr. Michael Lowry T.D., then Minister for Transport, Energy and Communications ("Mr. Lowry"). There were six tenders for the licence, including one by the consortium with which the plaintiffs were associated and another one by Esat Digifone ("Esat"), the consortium with which Mr. O'Brien was associated. On 25th October 1995, Mr. Lowry announced that the licence would be awarded to Esat which duly occurred on 16th May 1996, at the end of the licence award phase. The award of the licence was investigated by the Tribunal. The Tribunal had been established to inquire into *inter alia*, whether any substantial payments had been made directly or indirectly to Mr. Lowry during his period in public office, in circumstances giving rise to a reasonable inference that the motive for payment was connected with that office; and whether Mr. Lowry did any act or made any decision in the course of his Ministerial office to confer any benefit on any person making such payment or procured or directed any other person to do so. On 22nd March 2011, the Tribunal published its report into the award of the licence ("the Tribunal Report"). The Tribunal found that Mr. Lowry "*secured the winning*" of the tender process for Esat. It found that "*payments and other benefits, ... were furnished by and on behalf of Mr. Denis O'Brien to Mr. Michael Lowry, and that these were demonstrably referable to the acts and conduct of Mr. Lowry in regard to the GSM process, that inured to the benefit of Mr. O'Brien's winning consortium, Esat Digifone.*"

3. The plaintiffs' claim is that the tender process was corrupted by Mr. Lowry, who abused his public office, accepted payments and/or benefits from or on behalf of Mr. O'Brien or Esat, interfered with the tender process, and secured the award of the licence to Esat. They contend that were it not for this, they would have won the tender competition. There is substantial overlap between the plaintiffs' claim and the matters investigated by the Tribunal. Many of the factual allegations in the amended statement of claim concern topics on which the Tribunal

heard extensive evidence and made extensive findings. Likewise, much of the plaintiffs' claim is based on portions of the Tribunal Report.

4. For context, I must briefly explain how the Tribunal performed its functions. It commenced its substantive investigations in May 2001, by requesting the Department of Public Enterprise to produce all files held in relation to the GSM tender process. On receipt, the Tribunal analysed approximately 30,000 pages of documentation to piece together how the competition had been conducted and concluded that there was sufficient evidence to warrant pursuing inquiries in public sittings. Accordingly, all material information was marshalled and the relevant documentation, as it then appeared to the Tribunal, was identified. Voluntary statements, or alternatively, memoranda of intended evidence, were requested. Where not forthcoming, memoranda of the information sought were prepared. Public sitting books were assembled and circulated confidentially prior to the commencement of public sittings to ensure that fair procedures were afforded to affected persons. The initial set of public sitting books distributed in the latter part of November 2002, comprised eighteen lever arch files of documentation. As further witnesses and material documentation were identified during the public sittings, additional public sitting books were generated. In all, upwards of forty public sitting books were assembled and distributed to affected persons.

Mr. O'Brien's affidavit of discovery

5. By consent, on 4th May 2023, this court ordered Mr. O'Brien to make discovery on oath of 22 different categories of documents prior to 28th September 2023 ("the discovery order").

6. By affidavit of discovery of 20th October 2023, Mr. O'Brien purported to make discovery pursuant to the discovery order.

7. At para. 7 of his affidavit of discovery Mr. O'Brien avers as follows:

"I have in my possession additional documentation relating to the matters in question which come within the relevant categories of documents which were provided to me by

the Tribunal ... during the course of its investigation. This documentation was provided on the express basis that it was confidential and should not be disclosed to any person, save as was necessary to enable me to assist the Moriarty Tribunal with its investigation. As a result, this is not documentation that I am in a position to discover pursuant to the Order of the High Court because it is not within my possession, power or procurement notwithstanding that I have actual physical custody of the documents.”

8. All of the documents over which Mr. O’Brien asserts confidentiality were included in the public sitting books distributed by the Tribunal prior to the commencement of public sittings in respect of the module concerning the GSM licence.

Inter partes correspondence

9. The plaintiffs maintain that Mr. O’Brien is in breach of the discovery order. On 15th December 2023, this court set out a time-table for the exchange of detailed correspondence and any necessary motions in relation, *inter alia*, to Mr. O’Brien’s discovery.

10. By letter of 9th February 2024, the plaintiffs’ solicitor queried the adequacy of Mr. O’Brien’s discovery of an “*unspecified number of admittedly relevant documents*” on the grounds that they were “*allegedly provided to him by the Moriarty Tribunal during the course of its investigation.*” The letter observed that Mr. O’Brien had not only refused to produce this material but had also refused to discover it by identifying the relevant documents in a schedule to his affidavit. The plaintiffs were entirely in the dark in relation to the material which Mr. O’Brien had refused to discover. For example, it was unclear whether Mr. O’Brien had refused to discover even documents which had been produced as appendices to the report of the Tribunal.¹ It was asserted that Mr. O’Brien could not unilaterally decline to comply with the discovery order, that he should swear a supplemental affidavit discovering this material and that he should confirm that he had not withheld any material which he held independently of having received it from the Tribunal.

¹ It transpires that at that time this was indeed the case.

11. By letter of 20th February 2024, Mr. O'Brien's solicitors essentially re-stated his position as set out in para. 7 of his affidavit of discovery.

Mr. O'Brien's second affidavit of discovery

12. By supplemental affidavit of discovery of 1st March 2024, Mr. O'Brien maintained his claim to confidentiality over documents provided by the Tribunal as follows:

“[I]nsofar as I have possession of any additional documentation relating to the matters in question which were provided to me by the Moriarty Tribunal but which I do not otherwise hold independently of having received it from the Tribunal, I maintain that such documentation was provided on the express basis that it is confidential and should not be disclosed to any person, save as was necessary to enable me to assist the Tribunal with its investigation...

.... I maintain that any such documents as were provided to me by the Tribunal were provided on a confidential basis and expressly on the basis that they would not be disclosed save as was necessary to assist the Tribunal with its inquiries. As a result, I am not in a position to discover this documentation.”

13. It is clear from Mr. O'Brien's two affidavits of discovery that the documents over which confidentiality is claimed (“the documents in dispute”) fall within the scope of this court's discovery order. Indeed, this is common case. However, no further detail was provided as to the nature of the documents in dispute. The affidavits of discovery do not provide a description of these documents by document type, such as for example: memoranda, hand-written note, letter, telephone conversation, attendance at meeting, witness statement, etc. Nor are the dates, authors, or recipients of the documents in dispute set out. There is no indication of the category of discovery (category 1 to 22) into which each such document falls. The affidavits of discovery do not even indicate the number of documents in dispute.

Plaintiffs' motion seeking further and better discovery

14. On 8th March 2024, the plaintiffs issued a motion seeking an order directing Mr. O'Brien to make further and better discovery of all documents within his possession, power or procurement falling within the court's discovery order.

Mr O'Brien's replying affidavit

15. By replying affidavit of 15th March 2024, Mr. O'Brien's solicitor averred that although confidentiality does not operate as an absolute bar to discovery in the same manner as privilege, a court may refuse to direct discovery if the interests in protecting confidentiality outweigh the interests favouring disclosure. The court should only order discovery of confidential documents where it is clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made. The plaintiffs, it was asserted, have not demonstrated that discovery of the documents in dispute is necessary for the fair disposal of the action. Further, it was asserted that the plaintiffs already have access to documents appended to the Tribunal Report and could, in any event, obtain the documents in dispute by way of non-party discovery from the Tribunal itself or from the authors or recipients of the relevant documents. All of this was said to militate against an order for further and better discovery.

Mr. O'Brien's schedule of the confidential documents

16. The plaintiffs' motion for further and better discovery against Mr. O'Brien was listed with certain other motions in these proceedings (which are not of present concern) on 29th, 30th and 31st October 2024. On 29th October 2024, Mr. O'Brien provided the plaintiffs with a schedule of the 1,424 documents which were provided to Mr. O'Brien confidentially by the Tribunal. For the first time, it was revealed that the Tribunal had also furnished further documents to Mr. O'Brien which had either been authored by Mr. O'Brien and/or Esat or which

were otherwise held independently of having been received from the Tribunal. A further affidavit of discovery would be sworn discovering these documents .

Mr. O'Brien's third affidavit of discovery

17. Accordingly, on 30th October 2024, Mr. O'Brien swore a second supplemental affidavit of discovery of a further 348 documents which, although provided to him by the Tribunal, were authored or received by him or by Esat, their servants or agents, and therefore were independently in his possession.

Mr. O'Brien's updated schedule of confidential documents

18. At the opening of the plaintiffs' motion, Mr. O'Brien indicated the following through his counsel:

- a. confidentiality is no longer asserted over 56 documents appended to the Tribunal Report (or to its rulings);
- b. confidentiality is not asserted over document extracts expressly referred to in the Tribunal Report (or in its rulings), but confidentiality is asserted over the remaining parts of such documents;
- c. confidentiality is not asserted over document extracts opened in the public sittings of the Tribunal, but confidentiality is asserted over the remaining parts of such documents;
- d. save as aforesaid, and save insofar as not otherwise independently in the power, possession or procurement of Mr. O'Brien or Esat, their servants or agents, confidentiality is asserted over the remaining documents.

19. As I understand it, Mr. O'Brien has not fully identified the relevant document extracts at (b) and (c) above. He submits that identifying these documents would be an onerous and costly task and that, although such documents are relevant, such an exercise is not necessary

or proportionate. It is therefore possible, indeed likely, that document extracts over which confidentiality continues to be asserted by Mr. O'Brien were referred to in the Tribunal Report (or in its rulings) or were opened in the course of the public sittings.

20. Mr. O'Brien delivered a further updated schedule of confidential documents dated 30th October 2024, listing the documents over which confidentiality continues to be maintained. Mr. O'Brien confirmed, through his counsel, that all of the documents in dispute were included in the public sitting books circulated to him by the Tribunal prior to the commencement of public hearings in respect of the module concerning the GSM licence. This is not apparent from either of the schedules of confidential documents. Nor has this yet been averred to in any of Mr. O'Brien's affidavits of discovery.

The documents in dispute

21. The updated schedule of confidential documents lists 1,239 documents which are said to be confidential. It identifies each such document by its document type, author, recipient, date and by reference to the category of discovery into which it falls. A significant number of the documents in dispute comprise minutes of meetings, memoranda, letters and other documents either authored by, or furnished to, officials of government departments, primarily the Department of Transport, Energy and Communications but also the Department of Foreign Affairs and the Department of Finance. A further number of the documents in dispute were authored or received by various identified government Ministers, by the Government secretariat, by the office of the Attorney General and the Department of An Taoiseach. Thus, of the 1,239 disputed documents, roughly 470 of such documents appear to either have been authored by, or directed to government departments, government officials, government Ministers or the office of the Attorney General. The remaining documents in dispute are not susceptible of easy exposition or categorisation. Some comprise letters to and from the

European Commission; others comprise letters to and from Persona or Sigma, the plaintiffs herein. There is also a great number of documents authored by Andersen Management International, the Government's lead consultant in the tender process. Still other documents are described as special conditions, schedules, selection criteria, weightings, reports, invitations to tender, and documents authored by the GSM project group. Press releases are also included in the documents listed as confidential. There is a substantial tranche of legal correspondence and handwritten memoranda of various firms of solicitors. In addition, there is a cache of correspondence to and from other persons featured in the Tribunal Report, whom it is not necessary to name here. In respect of many other documents, the author or recipient is not identified, and the documents are simply described as transcripts, memoranda, meeting notes, lists, handwritten notes, briefing notes or summaries.

Mr. O'Brien's correspondence with the Tribunal

22. By the return date of the plaintiffs' present motion, Mr. O'Brien had yet to contact the Tribunal to ascertain its views on whether the documents in dispute could be disclosed. On 30th October 2024, Mr. O'Brien's solicitor wrote to the solicitor charged with winding down the Tribunal, outlining the position and asking whether the Tribunal would waive its confidentiality and permit Mr. O'Brien to discover the documents in dispute.

23. An affidavit sworn by Mr. O'Brien's solicitor exhibits the Tribunal's prompt response also dated 30th October 2024, which states as follows:

- 1. In conducting its inquiries, the Tribunal adopted a policy of confidentiality in respect of documentation submitted to it in the course of its work, recognising that persons who submitted documents or who were referred to in documents submitted by other parties had a legitimate interest in ensuring that confidential or sensitive information (whether of a commercial or other nature) which was not relevant to the Tribunal's inquiries would not be made public or available for public scrutiny.*
- 2. The Tribunal determined that appropriate security procedures would be put in place in relation to the retention of documentation and sought to reassure all persons who provided assistance or appeared before the Tribunal that it would only utilise any*

- documentation provided to it for purposes strictly consistent with its terms of reference. The Tribunal provided an express undertaking in its early public hearings to this effect.*
3. *Furthermore, insofar as documents were provided to the Tribunal on the basis of its powers to order disclosure or discovery, the Tribunal also gave an implied undertaking not to use the documents or information contained in them for any purpose unconnected with the proper conduct of the Tribunal's proceedings.*
 4. *Accordingly, it was Tribunal policy that documentation circulated to interested persons was provided on a confidential basis and the Tribunal's correspondence was usually marked "Strictly Private and Confidential, Addressee Only." Save to the extent that documentation was opened in the course of the Tribunal's public hearings or referred to in its public rulings or reports, the Tribunal treated all documentation in its possession as confidential.*
 5. *Persons who provided documentation to the Tribunal thus did so on the basis of the Tribunal's undertaking, both express and implied, that such documentation would only be used by the Tribunal for the purpose of its inquiries and would not otherwise be disclosed.*
 6. *The Tribunal has concluded its inquiries and has published its reports. The Sole Member of the Tribunal has retired. The only task remaining is the conclusion of the wind down process....*
 7. *...For the avoidance of doubt, no part of this response entails any waiver of confidentiality in respect of any of the documents which are confidential.*

24. To illustrate the Tribunal's approach to confidentiality, this affidavit also exhibits several letters from the Tribunal circulating the public sitting books to Mr. O'Brien. These letters, dated between 21st May 2001 and 22nd November 2002, are all worded slightly differently. Essentially they communicate that Mr. O'Brien would already be familiar with some of the material in the public sitting books, much of which had already been the subject matter of the Tribunal's public sittings; that for ease of access this documentation was re-circulated in a more convenient format together with additional material not previously the subject matter of public sittings; that Mr. O'Brien "*should bear in mind that the additional material, which has not been the subject matter of public sittings, is confidential and should not be disclosed ... to any other person save to the extent to which this may be necessary to enable your client to assist the Tribunal;*" that the Tribunal may not choose to circulate all of the documents sent to him, in the course of the public sittings; that "*to the extent therefore to which that material is not ultimately disclosed in public I will require your confirmation that,*

pending the completion of the Tribunal's work it will be retained by you on a strictly confidential basis and will not be disclosed to any third party, save for the purposes of assisting your client with his responses to the Tribunal and, if disclosed to any third party for that purpose, will be disclosed under a Seal of Confidence;" and that after the conclusion of the Tribunal's inquiries into aspects of its work impacting Mr. O'Brien, he would return all of the relevant material to the Tribunal.

25. It is common case that the documents in dispute were ultimately included in the Tribunal's public sitting books;² that Mr. O'Brien and other persons to whom the public sitting books were circulated were at liberty to circulate the material to their legal team, within their own organisations and to such third parties as might be in a position to assist them in their preparation for the public sittings; and that insofar as Mr. O'Brien appears to still have these documents in his possession, he did not return them to the Tribunal at the conclusion of its inquiries.

Opportunity afforded to the Tribunal to make submissions

26. I directed the plaintiffs to write to the solicitor charged with winding down the Tribunal to inquire whether it wished to make submissions to the court concerning the confidentiality of the documents provided by it to Mr. O'Brien. In response, the Tribunal's solicitor stated that he could not put matters any further than as set out in the letter dated 30th October 2024, and that the Tribunal did not therefore propose to make further submissions. As a courtesy to the court the Tribunal instructed counsel to appear before me to confirm the foregoing, which he did.

² I have been provided with no information, however, as to which of the documents in dispute were provided to the Tribunal voluntarily and which were provided on the basis of its powers to order disclosure or discovery.

Plaintiffs' request for non-Party discovery

27. On 26th September 2024, the plaintiffs' solicitor requested the Tribunal to make voluntary discovery of the public sitting books furnished to 43 different persons, including Mr. O'Brien. The solicitor for the Tribunal stated that it was not in a position to agree to make the voluntary discovery requested. He further noted that in light of their centrality to the Tribunal's inquiries, both Mr. O'Brien and Mr. Lowry were provided with all of the public sitting books and that in the ordinary way, the plaintiffs ought to seek discovery thereof from either or both of these defendants rather than from the Tribunal itself.

Consideration of the plaintiffs' application for further/and better discovery

"Possession, power or procurement"

28. Mr. O'Brien accepts that he has not discovered documentation within his physical custody falling within the scope of the discovery order.

29. However, Mr. O'Brien's affidavit of discovery appears to maintain that although the documents in dispute are physically in his possession or custody, he does not have a legal right to their possession and is therefore not obliged to make discovery thereof.

30. This approach does not accord with the observations of the Supreme Court in *Thema International Fund Plc v. HSBC Institutional Trust Services (Ireland) Ltd* [2013] I.R. 274 ("*Thema*") in which Clarke J. stated as follows at para. 5.19:

"The position adopted in most of the common law jurisprudence to which reference has been made and also adopted under the former rule in this jurisdiction under Johnston v. Church of Scientology [2001] 1 I.R. 682 has, in my view, the considerable merit of certainty. A party either has documents in its possession or has the legal entitlement to require possession. In those circumstances the document must be discovered. In all other circumstances, the document does not have to be discovered."

31. The Supreme Court went on to conclude that the amendment to O.31 of the Rules of the Superior Courts introduced in 2009 had not altered this position. The above passage in *Thema* therefore continues to delineate Mr. O'Brien's discovery obligations.

32. Insofar as there is a distinct concept of a legal right to possess a document, in the sense that the document is within a parties' power or procurement, as opposed to their having actual physical custody of it, this is an expanding factor, not a limiting factor, in the obligation to make discovery. Subject to any claim of confidentiality therefore, Mr. O'Brien ought to have made discovery of the documents in dispute.

Requirements of an affidavit of discovery

33. A party must provide in their affidavit of discovery "*an individual listing of the documents with the general classification of privilege claimed in respect of each document indicated in such fashion by enumeration as would convey to a reader of the affidavit the general nature of the document concerned in each individual case together with the broad head of privilege being claimed for it*" (*Bula Ltd v. Crowley* [1991] 1 I.R. 220 at p.222). This has likewise been described by Mahon J. in *Irish Bank Resolution Corporation Limited (in Special Liquidation) & Ors v. Quinn & Ors* [2015] IECA 84 at para. 50, as a requirement to provide a meaningful narrative containing a sufficient description of the document to allow for a reasoned judgment as to whether privilege may be maintained.

34. In light of the limited information in all three of Mr. O'Brien's affidavits of discovery, this obligation has not been discharged.

Does the confidentiality asserted excuse Mr. O'Brien's non-compliance with his discovery obligations?

Documents independently within the possession, power or procurement of Mr. O'Brien or Esat

35. Even on his own logic, there could be no justification for Mr. O'Brien's failure to discover documents which, although furnished to him by the Tribunal, were independently in his possession (or that of Esat).

36. It is unnecessary for this court to direct further and better discovery to address this specific concern as Mr. O'Brien has now discovered 348 such documents in his third affidavit of discovery sworn on 30th October 2024. It is however regrettable, that, after a delay of more than one year, Mr. O'Brien only regularised his position during the hearing of the plaintiffs' application for further and better discovery.

Documents which are not independently within the possession, power or procurement of Mr. O'Brien or Esat

37. For the reasons set out below, it was not appropriate for Mr. O'Brien to fail to discover - as opposed to produce for inspection- the documents in dispute. Whether or not the plaintiffs are entitled to require production or inspection of the documents thus listed is a distinct issue.

38. Where discovery (or indeed inspection) is sought of confidential documents, the court must engage in a balancing exercise to determine whether the requirements of the interests of justice and full disclosure outweigh any duty of confidence. This exercise requires a sufficient description of the documents in dispute and specification of the factual basis for the confidentiality asserted. Mr. O'Brien should have listed the documents in dispute (under their applicable categories) in his affidavit of discovery; advanced an appropriate objection to inspection on grounds of confidentiality; placed before the court evidence supporting the claim to confidentiality, such as the Tribunal's covering letters now exhibited; identified which documents were in his possession (or in Esat's possession) independently of having received them from the Tribunal; and clarified that all of the documents in dispute were circulated by

the Tribunal in its public sitting books. In short, he should have set out his position as indicated at para. 18 above and made discovery accordingly.

39. I cannot accept Mr. O'Brien's submission that this would be to impose upon him a disproportionate or excessive requirement. This is substantial and important litigation. Discovery of documents is a formal step in the preparation of a case for trial which places documents on the court record for the use and benefit of both the parties and the trial judge. The rules regarding the content of an affidavit of discovery are required to be observed.

40. Further, all of this should have been attended to well before now. Mr. O'Brien's confidentiality argument can scarcely be described as being of recent origin. It was first advanced by Mr. O'Brien over five years ago in resisting discovery of broadly similar documents furnished to him by the Tribunal which were sought by the plaintiffs in related litigation, *Comcast International Holdings Inc. & ors v. The Minister for Public Enterprise & ors* ("Comcast").

41. Allen J.'s discovery judgment in *Comcast*, [2019] IEHC 720 (which was upheld in material part by the Court of Appeal, [2022] IECA 249) is of particular significance. This judgment ("the *Comcast* judgment") framed the scope of the discovery sought in the present litigation, informed each parties' response thereto and shaped this court's discovery order. The *Comcast* judgment is also relied upon by Mr. O'Brien in resisting the plaintiffs' current application.

42. The *Comcast* judgment considers an application for discovery of "the Moriarty Tribunal documents." Allen J. noted that the purpose of the discovery request, which was resisted by both Mr. O'Brien and Mr. Lowry, was to gather evidence and to capture not only the contemporaneous documents, correspondence and records in the possession of the defendants since the time of the competition but also any material provided to those defendants in the course of the Tribunal's investigation. Despite the assertion of confidentiality, Allen J.

noted that no evidence had been put before the court as to the basis upon which documents had been provided to Mr. O'Brien or Mr. Lowry by the Tribunal.

43. Allen J. referred to *Cork Plastics (Manufacturing) v. Ineos Compounds U.K. Ltd.* [2011] 1 I.R. 492 where at p. 501 Clarke J. stated:

“... I adopt the proposition stated in Matthews and Malek, Disclosure (3rd ed., 2007) that the existence of an obligation not to make collateral use (or an implied undertaking to the same effect) does not prevent the disclosure, as opposed to the production, of the documents concerned. The documents are in the ‘possession or power’ of the party concerned. It is the production which is not, without further action, possible. In those circumstances any documents in respect of which an appropriate obligation exists should be referred to in the affidavit of discovery concerned but, if desired, an appropriate objection to production can be made.”

44. Whilst acknowledging there may be issues “down the road” as to the production of the documents, Allen J. was not satisfied that any of the defendants had established that listing documents obtained from the Tribunal would be a breach of confidentiality. This evidential deficit was not remedied by Mr. O'Brien until after the present application was well underway.

45. In resisting the *Comcast* discovery application, Mr. O'Brien also advanced a related argument that the principles described by Finlay C.J. in *Ambiorix v. Minister for the Environment* [1992] 1 I.R. 277 at p. 286, applied by analogy to “the Tribunal documents”. He argued that the implied undertaking of confidentiality prohibited him from making any use (or providing any description) of such documents otherwise than for the purposes of the Tribunal's inquiries. As a result, it was argued that “the Tribunal documents” could not even be listed by Mr. O'Brien in his affidavit of discovery. Allen J. did not accept this submission:

“I do not understand the Supreme Court to have meant that the prohibition against making any use of any description of discovered documents is necessarily a prohibition on describing the documents. I do not see any inconsistency between what was said by the Supreme Court in Ambiorix and what Clarke J. said in Cork Plastics.”

46. I fail to see how Allen J.'s judgment excuses Mr. O'Brien failure - five years later - to list and describe the documents in dispute in his affidavit of discovery and to place evidence before the court supporting his assertion of confidentiality.

47. As Mr. O'Brien points out, there is precedent for postponing the court's adjudication on a claim to confidentiality until an application for production/ inspection is before the court (e.g. *Cooper Flynn v. Radio Teilifís Éireann* [2000] 3 I.R. 344). However, this does not generally relieve the party making discovery, of their obligation to individually list the relevant documents withheld from discovery.

48. On the contrary, if a party who is requested to make discovery objects to making discovery in the usual way (by listing documents which are contended to be confidential in the affidavit of discovery) then this objection to discovery ought to be raised at the voluntary discovery stage prior to the agreement to make discovery, and *a fortiori*, prior to either a consent or a contested discovery order.

49. Despite his familiarity with the confidentiality issue, Mr. O'Brien elected not to take this course. Proceedings as protracted as these should not be unnecessarily further delayed. Against that background it is unfortunate that Mr. O'Brien:

- failed to object on confidentiality grounds (of which he was fully aware) to the plaintiffs' request for voluntary discovery dated 4th August 2022;
- consented to an order directing him to make discovery by 28th September 2023;
- thereafter declined, on confidentiality grounds, to list or describe a very substantial number of omitted documents which fall within the scope of that discovery order;
- when challenged, refused for many months to swear an affidavit of discovery listing and describing the documentation omitted;
- when challenged, failed for many months to place before the court any evidence to substantiate the claim to confidentiality;
- delayed until the second hearing day of a motion for further and better discovery at the end of October 2024 and then placed before the court only an unsworn schedule of

confidential documents together with letters from the Tribunal dating back to 2001, which are said to substantiate the claim to confidentiality.

Should the court direct further and better discovery?

50. As observed in *Delany and McGrath on Civil Procedure* (5th Ed., 2023) at para. 10.229, the Rules of Superior Courts do not specifically provide for an order for further and better discovery. However, it has long been accepted that the courts have an inherent jurisdiction to so order.

51. A party seeking further and better discovery must do more than simply aver that the party making discovery has additional documents in his “*possession, power or procurement*” relevant to the action. Rather, the applicant must raise a reasonable suspicion that the respondent has other documents relating to the matters in question, in their possession. This generally means that the applicant bears the onus of proving that there are documents which the respondent was required to discover, but has not discovered; or that the respondent has misunderstood the issues in the action or that their view as to whether documents fall outside their discovery obligation was wrong.

52. A court will order further and better discovery where it is satisfied from the pleadings, the affidavit of discovery already filed, the documents referred to in the affidavit of discovery or from an admission by the party making discovery, that documents are within their “*possession, power or procurement*” relating to the issues in the action which have not been disclosed by their affidavit of discovery.

53. In the present case, I am so satisfied. Quite apart from the 348 documents now discovered in Mr. O’Brien’s third affidavit of discovery, it is clear that a substantial number of other documents in his possession, relating to the issues in the action and forming the subject matter of this court’s order for discovery, remain undiscovered.

54. Mr. O'Brien has furnished three sequential affidavits of discovery which do not discharge his obligation to individually list and describe the documents withheld. Rather, the documents in dispute are listed (and most are described) in unsworn schedules of confidential documents. This ought to be remedied and I direct it be attended to by way of a supplemental affidavit of discovery.

55. The key question is how the court from both a procedural and substantive standpoint, should decide the confidentiality issue.

Agreed Approach: treat the present application as a motion for production/inspection

56. The plaintiffs submit (but not with any particular vigour) that it is now too late for Mr. O'Brien to raise the issue of confidentiality, particularly as he has long since been aware of it. Counsel for Mr. O'Brien accepts that an objection on grounds of confidentiality ought to have been raised in response to the plaintiffs' request for voluntary discovery and prior to the discovery order. However, he observes that although unsworn, the updated schedule of confidential documents now individually lists each of the documents over which confidentiality is asserted and that any prior information deficit has, to a large extent, been remedied.

57. Whilst the plaintiffs, with justification, criticise Mr. O'Brien's failure to comply with his discovery obligations, an order that he merely discover the documents in dispute is of course only part of the battle. What the plaintiffs now require is production and inspection of the documents over which confidentiality is asserted pursuant to O.31 R.18. Although more usually deployed in response to an assertion of privilege, it is well established that an application for inspection can also be used to challenge an assertion of confidentiality. In such applications, the court has a broad discretion which is exercised on the facts of any given case. The potential difficulty, from the plaintiffs' perspective is that such relief is not sought in their present motion.

58. To short circuit matters, both parties ultimately request this court to deal with the plaintiffs' current application for further and better discovery as if it were an application for inspection: a constructive and practical solution. Despite prior procedural inelegance on both sides, the court is now in a position to adjudicate upon the confidentiality issue.

Legal principles governing applications for discovery and production/inspection of confidential documents

59. Applications for discovery and production/inspection of confidential documents require special scrutiny. Although confidentiality is not an absolute barrier to disclosure, it is an important consideration in the court's assessment of whether to direct discovery/inspection and as to its appropriate scope (per Collins J.in *Ryan v. Dengrove* [2022] IECA 155).

60. The question for the court in any application for discovery or production/inspection is whether such an order is necessary for disposing fairly of the cause or matter or for saving costs. The burden lies on the party seeking discovery or production/inspection to show that it is necessary for the fair disposal of the action.

61. As in an application for discovery, the starting point in an application for production/inspection is to establish what is relevant in the *Peruvian Guano* sense (*Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55) as, absent relevance, a document will not be disclosable (per Collins J.in *Ryan v. Dengrove*).

62. Where production/inspection is sought of a document, which is the subject of an agreement to make discovery, or of an order for discovery (whether contested or on consent), there is a strong presumption that the document is relevant in the *Peruvian Guano* sense: an agreement to make discovery of a category of documents is a clear and binding acceptance that documents within that category are *prima facie* relevant.

63. On the other hand, establishing the relevance of a confidential document in the *Peruvian Guano* sense gives rise to no more than a rebuttable presumption that discovery or production/inspection of that document is necessary. This “*default position*” that production should be considered necessary is not absolute and may be displaced (per Collins J. in *Ryan v. Dengrove*).

64. In particular, the confidential character of a document is a legitimate, and often significant, countervailing factor weighing against an order for discovery or production/inspection. Where the document at issue is confidential, its discovery should be directed only where it is clear that the interests of justice in ensuring the fair disposal of the proceedings outweigh any duty of confidence, such that disclosure is necessary.

65. This requires the court to carry out a balancing exercise to determine whether the interests of justice in bringing about a fair result of the proceedings outweigh any duty of confidence. The court must determine whether, in light of the particular confidentiality claimed, the description of the documents, their likely relevance to the matters at issue between the parties, and any other relevant matters, the interests of justice in ensuring the fair disposal of the proceedings makes an order for discovery necessary.

66. The general purpose of the rule that discovery and inspection shall be granted if necessary for the fair disposal of the action is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of the production, or non-production, of the document in question. If such unfairness arises, then the interests of justice in bringing about a fair result in the proceedings will generally outweigh any duty of confidence. To this end, the courts have developed the concept of legitimate litigious advantage to the party seeking inspection. The question will be whether or not denying the party an entitlement to inspect the relevant document would be conducive to the fair disposition of the action. The party seeking discovery/inspection must show that they will gain a litigious

advantage, rather than an unfair and unnecessary tactical advantage, from the disclosure of the material. The litigious advantage must relate in some way to an issue between the parties, whether in the substantive proceedings or in an interlocutory application.

67. Access to the courts and the right to a fair determination of civil rights and obligations are fundamental values under the Constitution, the ECHR, and the Charter of Fundamental Rights of the European Union. The right to obtain discovery and production/inspection of documents is part of a constitutionally guaranteed right to fair procedures and the withholding of relevant documentation inevitably impairs a parties' ability to make out their case.

68. It is recognised that a balance has to be struck between the likely materiality of the documents in dispute to the issues likely to arise in the proceedings and the degree of confidentiality attaching thereto. As Collins J. states in *Ryan v. Dengrove* at para. 67, the more material the document appears to be – the greater the likelihood that the document will have “*some meaningful bearing on the proceedings*” - the more clearly the balance will be in favour of disclosure.

69. Such an assessment necessarily requires the court to look beyond the threshold test of *Peruvian Guano* relevance. A court may refuse to direct the discovery of a relevant document on the basis that it is confidential and that in the particular circumstances, the interest in protecting its confidentiality outweighs the interest favouring its disclosure (per Collins J. in *Ryan v. Dengrove*). Where, however, it appears that a document “*is really of some significance to the fair determination of proceedings*”, and where accordingly refusal of discovery would produce “*a risk of an unfair result*”, the interests favouring disclosure will ordinarily outweigh any legitimate confidentiality interests (though in such circumstances, a court might still be required to consider whether to adopt measures to mitigate the effects of disclosure) - see *Ryan v. Dengrove* [2022] IECA 155 citing Clarke J. in *Independent Newspapers (Ireland) Limited v. Murphy* [2006] IEHC 276, [2006] 3 I.R. 566 (“*Independent v Murphy*”) and *Telefonica O2*

Ireland Limited v. Commission for Communications Regulation [2011] IEHC 265 (“*Telefonica*”).

70. In *Ryan v. Dengrove*, Collins J. noted that contested issues of discovery and production/inspection are almost always addressed in advance of trial when it would be difficult to confidently predict the extent to which a document or category of documents (which, generally, the court will not have reviewed) will bear upon the resolution of any of the issues in dispute. The court should adopt the approach that involves the least risk of injustice. Accordingly, where there appears to be any material risk that refusing discovery or production/inspection could give rise to unfairness, the court should generally err in favour thereof (if necessary, on terms).

Application of legal principles

Consideration of the confidentiality asserted

71. Where, as here, confidentiality is disputed by the party seeking discovery/inspection, then the party asserting confidentiality ought to bring forward sufficient evidence to permit the court to understand the nature and scope of the duty of confidentiality. Although Mr. O’Brien failed to do this prior to the return date of the motion, sufficient evidence is now to hand to interrogate the nature and scope of the confidentiality asserted.

72. The confidentiality of information gathered by Tribunals of Inquiry was considered in *O’Callaghan v Mahon* [2005] IESC 9, [2006] 2 I.R. 32. The Mahon Tribunal had been set up to investigate irregularities in the planning process. The applicant, a businessman against whom certain serious allegations had been made by a Mr. Gilmartin, sought all documents recording prior oral and written statements given by Mr. Gilmartin to the Mahon Tribunal during the course of its private investigations so that he could be cross-examined in relation to inconsistencies between his prior statements and his oral evidence. The Mahon Tribunal

resisted, arguing that these prior statements had been furnished to it in confidence. The Supreme Court held that the Mahon Tribunal was obliged to ensure its procedures allowed for the vindication of a person's good name. In circumstances where wild allegations were being made against the applicant, of which he had no prior notice, it was essential that the documents being sought for the purpose of carrying out a worthwhile cross-examination, were produced.

73. In so holding, Hardiman J. stated that the Mahon Tribunal could not by the unilateral adoption of a policy, confer on any material absolute confidentiality subject to waiver only by the Tribunal. Even statements made to the Mahon Tribunal at its private investigative stage benefitted from a limited form of confidentiality only, such that they should not be revealed until the parties impugned had had an opportunity to deny and confront their accuser. Furthermore, even this limited confidentiality was grounded on the interests of constitutional justice and not the interests of the Mahon Tribunal itself or those of the witnesses before it.

74. Likewise, Geoghegan J. stated:

*“The tribunal relies on an understanding of confidentiality. It is not suggested, however, that the confidentiality was absolute nor could it have been. The tribunal could not possibly ensure absolute confidentiality relating to information, which, for instance, might turn out to be highly relevant to the very matters that it was investigating. Any such confidentiality must necessarily be limited to information, in the event found not to be necessary to be used at an oral hearing. If, however, the information becomes absolutely essential for the purposes of a cross-examination pursuant to a right enumerated in *In re Haughey* [1971] I.R. 217, then the tribunal is not entitled to maintain the confidentiality.”*

75. There is no doubt that a tribunal set up under the Tribunal of Inquiry (Evidence) Act 1921, is perfectly entitled to formulate a policy of confidentiality and indeed the execution of its work requires that there be such a policy. As Geoghegan J. notes in *O’Callaghan v. Mahon*, a Tribunal of Inquiry is also perfectly entitled to conduct separate hearings of separate modules, some private and some public, provided it ensures as far as possible, compliance with constitutional rights and obligations.

76. However, as *O'Callaghan v. Mahon* makes clear, there is a distinction between the investigative stage and the public hearing stage of Tribunals of Inquiry, such as the Moriarty Tribunal itself. Any undertaking of confidentiality given by the Tribunal at the investigative stage is subject to appropriate use being made of the document or information at a public hearing. There could be no expectation of absolute confidentiality by persons furnishing material to the Tribunal or by the Tribunal itself in so far as it concerns information highly relevant to the very matters investigated by the Tribunal and to information “*used at the oral hearing.*”

77. How does the above bear upon the nature and scope of the confidentiality asserted in the present case?

78. Ultimately, it is clear that the confidentiality asserted by the Tribunal does not fit neatly into the traditional type of case concerning obligations of confidence between private individuals. In harmony with this observation, both parties submit that the confidentiality in issue here is that of the Tribunal and not that of any third party who may have submitted material to the Tribunal in confidence. As Hardiman J. noted in *O'Callaghan v. Mahon*, the confidentiality asserted is of a unilateral sort. The confidentiality asserted is based solely on the Tribunal's policy and could only exist as a form of public interest confidentiality or something analogous.

79. Thus analysed, what must be weighed against the interests favouring disclosure in this case, the most crucial of which are the interests of justice in ensuring the fair disposal of these proceedings, is not any duty of confidentiality per se, but the possibility that ordering disclosure of the documents in dispute will negatively impact the public interest in the proper and efficient running of the Moriarty Tribunal, or of Tribunals of Inquiry generally. In this sense, the confidentiality asserted in cases such as this may be regarded as a necessary, but not a sufficient

basis, to conclude that disclosure/inspection is contrary to the public interest in the proper and efficient running of the Tribunal, or of Tribunals of Inquiry generally.

The balancing exercise -the public interest in preserving the Tribunal's confidentiality

80. As discussed at para. 71 *et seq.* above, in *O'Callaghan v. Mahon*, the Supreme Court directed the disclosure of draft statements gathered during the course of the private inquiries of the Mahon Tribunal. Mr. O'Brien emphasises that disclosure of these documents was essentially to protect the applicant's *re Haughey* rights, which are not in issue here.

81. However, sight must not be lost of two factors. First, as the plaintiffs submit, the public interest in preserving confidentiality over the documents in dispute, which had been widely circulated by the Tribunal prior to its public sittings, must *a fortiori* be significantly less compelling than the public interest in preserving the claim to confidentiality over the draft statements in *O'Callaghan v. Mahon* (which were gathered at the private investigative stage and not disseminated). Second, although the present proceedings do not engage the plaintiffs' *re Haughey* rights, the public interest in the proper administration of justice is nonetheless of high constitutional significance.

82. In resisting inspection/production, Mr. O'Brien relies upon *Leech v. Independent Newspapers Ireland Limited* [2009] 3 I.R. 766, in which the plaintiffs brought a claim for defamation against the defendants arising from articles concerning the manner in which public contracts were awarded to the plaintiffs' company, which had been the subject of an *ad hoc* public inquiry resulting in the publication of a report. The defendants sought non-party discovery from the Department of An Taoiseach of certain documents generated by it in the course of this inquiry. The Department refused to produce these documents on the grounds of public interest privilege, specifically on the basis that the documents came into existence in the context of a confidential, State sponsored inquiry.

83. In *Leech*, O’Neill J. noted that the obligation of confidentiality to the individuals who participated in the inquiry could not, of itself, outweigh the public interest in full disclosure being made. However, there would be cases where upholding confidentiality was in the public interest because it underpins the effectiveness and viability of *ad hoc* tribunals, which are useful, if not essential to public administration. O’Neill J. observed that in order for *ad hoc* inquiries to function, confidentiality will invariably be essential. He held that the viability of such inquiries, where confidentiality had been sought from and granted by the person conducting the inquiry, would almost certainly be compromised if there was a risk of disclosure. In contrast, he held that the public interest in the administration of justice would not be defeated by the denial of the contested documents.

84. Three factors distinguish the present case from *Leech*. First, *Leech* was concerned with documents that did not exist prior to the inquiry, which were generated by the inquiry itself. Denying disclosure did not deprive the defendant of material existing when the newspaper reports were published. Rather, the defendant was denied a windfall resulting from the inquiry. In the present case, it is clear from the schedule of confidential documents, that the vast majority of the documents in dispute existed prior to the Tribunal. Discovery of the documents in dispute could not be described as a windfall for the plaintiffs. Instead, the opposite is the case. To deny the plaintiffs disclosure of the documents in dispute, which are within the scope of this court’s discovery order, would place an unwarranted obstacle in the plaintiffs’ path. Second, the inquiry in *Leech* took place in private and the documents in issue were gathered in that context. Confidentiality may well be an essential element of an *ad hoc* confidential inquiry. This may also generally apply at the private investigative stage of a Tribunal of Inquiry. The position is different in respect of the documents circulated for the purpose of a Tribunal of Inquiry’s public hearings. The weight to be given to confidentiality, one aspect of the public interest in the proper and efficient running of the Tribunal, and of Tribunals of Inquiry

generally, is significantly less in the case of material such as this. Third, in *Leech*, O’Neill J. was concerned that disclosure of the documentation would deter persons with relevant evidence from cooperating with inquiries which lack the legal power to compel the attendance of witnesses or the production of documents. That concern does not arise here since the Tribunal, and other Tribunals of Inquiry, are conferred with full powers to subpoena witnesses and documents.

85. No compelling argument has been made that the public interest in the proper execution of the functions of the Tribunal, or of Tribunals of Inquiry generally, requires non-disclosure of the documents in dispute. Since the decision of the Supreme Court in *O’Callaghan v. Mahon*, it has been clear that Tribunals of Inquiry cannot guarantee absolute confidentiality, even in respect of documents gathered at the private investigative stage. How can it therefore be said that disclosure of documents, included in the Tribunal’s public sitting books and circulated widely to a range of parties with possibly varying interests in the outcome of the Tribunal’s inquiries, creates a current and subsisting risk of detriment?

86. Any such detriment to the public interest is hypothetical and remote. Here, the vast majority of the documents in dispute over which confidentiality is asserted, are decades old. They relate to a tender process that was concluded in 1996 and a Tribunal of Inquiry that is all but concluded, save for some winding down procedures. Disclosure of the documents in dispute could involve no conceivable chilling effect on the Tribunal’s continued operations.

87. The Tribunal has carried out its inquiry and, as summarised by McKechnie J. in *Comcast International Holdings Incorporated v. Minister for Public Enterprise [2012] IESC 50* at para. 5., it has concluded that “... Mr. Michael Lowry, T.D. (or “the Minister”), exerted “insidious and pervasive influence” on the evaluative process thereby undermining its integrity and independence. Improper payments and other benefits were found to have been furnished by or on behalf of Mr. Denis O’Brien...to Mr. Michael Lowry, T.D. in relation to the

conduct of the latter in securing the award of the GSM licence to Esat Digifone. Such conduct included: inappropriate interaction with Esat Digifone and Mr. O'Brien, specifically during sensitive stages; acquiring inside information which in turn he disclosed to Mr. O'Brien; making known his preference for awarding the licence to Esat Digifone, conveying his views on how to address Esat Digifone's financial weakness by considering them curable by the granting of the licence; thereby rendering financial capability ultimately immaterial, contrary to Government policy; curtailing the work of the Project Group with decision-making power, by instead, centring such on a small subset of the group segregated from the expert consultants; and circumventing meaningful consideration by his Cabinet colleagues. This, it was found, resulted in the implementation of a process plagued with inadequacies and deficiencies, and in the creation instead of a distorted, renegade version of the originally planned evaluation process."

88. It would be ironic if this court were to hold that the public interest in the proper and efficient running of the Tribunal requires that parties, who contend that they were damnified by the very process inquired into by the Tribunal, may not access documents deemed highly relevant by the Tribunal, in order to prosecute proceedings for the vindication of their rights. Such a decision would be even more incomprehensible in circumstances where the documents in dispute, accepted as being relevant to the matters at issue in these proceedings, are the subject of an uncontested order for discovery made by this court and where, in all likelihood, they have been furnished by the Tribunal to the plaintiffs' opponents in these proceedings.

The balancing exercise-the public interest in the proper administration of justice

89. In cases such as this, the relevance of the information sought to the issues in the case, is used as something of a proxy for an assessment of whether the interests of justice in bringing about a fair result of the proceedings outweigh any duty of confidence.

90. There is a strong presumption that the documents in dispute are relevant in the *Peruvian Guano* sense, and I do not understand Mr. O’Brien to argue to the contrary. This gives rise to a rebuttable presumption that disclosure is necessary, subject to confidentiality as a countervailing factor. Where, as here, a *prima facie* case is made out for disclosure, the court may examine the documents involved to ensure that inspection is necessary, or to see if the loss of confidentiality could be mitigated. Whether or not inspection is required depends upon the facts of the particular case, the pleadings, the stage of the legal proceedings, the legal arguments advanced for and against disclosure and the amount of documentation involved.

91. In the present case, there are well over a thousand documents in dispute. Neither party urges the court to inspect the documents. Instead, the court is invited to take a principled approach having regard to the general descriptions of the documents, their likely relevance, the nature of the confidentiality claimed, the extent of the circulation of the documents in dispute and the nature of Tribunals of Inquiry such as the Tribunal itself.

92. I agree that it is unnecessary for this court to review the documents in dispute in order to determine the present application. This is not a case where confidentiality is sought to be maintained due to the particular content of the document, for example, sensitive commercial information of the party resisting disclosure. Rather confidentiality is asserted essentially on a “class basis” arising from the manner in which the party objecting to discovery obtained the document in question. Where confidentiality of the latter kind is invoked, there is no absolute requirement for the court to examine each of the documents to ascertain the likely impact of disclosure on the interests of the party who asserts confidentiality.

93. Likewise, in the unusual circumstances of this case, it is not necessary for the court to examine the disputed documents in order to infer that, to cite Clarke J. in *Telefonica*, they are “*really of some significance to the fair determination of proceedings*”, or to deduce that refusal of inspection would produce “*a risk of an unfair result*” (per Clarke J. in *Independent v*

Murphy). It is clear from a cursory examination of the description of the documents in dispute and of the categories of discovery into which Mr. O'Brien's schedule of confidential documents now places each document, that they all relate to the conduct of the tender competition which lies at the heart of the plaintiffs' case.

94. All of the documents in dispute were included by the Tribunal in the public sitting books. This is material which the Tribunal culled from a much wider suite of documentation precisely because it was adjudged to be of sufficient relevance to circulate in advance of public sittings in large part devoted to analysing the same broad issues as arise for determination in these proceedings. It is reasonable to conclude, that the Tribunal considered the documents in dispute to be "*highly relevant to the very matters that it was investigating*" (per Geoghegan J. in *O'Callaghan v. Mahon*).

95. Of course, it goes without saying that the conclusions reached by the Tribunal on foot of those investigations and hearings are inadmissible before the court. It may well be, for example, that Mr. O'Brien believes that the Tribunal's interpretation of the documents in dispute, or the importance given to them, was flawed and that the court ought to take an entirely different view of such material. Mr. O'Brien may question the authenticity or admissibility of some of the documents in dispute, or assert that other relevant material was overlooked, or given insufficient weight, by the Tribunal in reaching its conclusions. Mr. O'Brien will have an opportunity to make any such arguments, or to place such documentary material or oral evidence before the court as may be appropriate, at the trial of these proceedings. But it is difficult to credit an argument that the documents in dispute are not likely to be highly relevant to the matters to be determined in this case. As such, any public interest consideration supporting the confidentiality of the documents in dispute must be weighed against the conflicting interest of the plaintiffs to have access to such documents as may be necessary to enable them to fairly and properly prosecute this action.

96. It can be inferred that the State, its legal advisors, Mr. O'Brien, his legal advisors and Mr. Lowry and his legal advisors, all of whom are separately legally represented, were furnished by the Tribunal with a copy of the public sitting books containing the documents in dispute in the course of its inquiry into the very matters which are the subject matter of this litigation. I find it hard to conceive of how depriving the plaintiffs of access to documentation furnished by the Tribunal to all the other parties to these proceedings will not place the plaintiffs at a significant litigious disadvantage and result in an unfair hearing.

97. I am satisfied that the discovery and production of these documents is likely to have some meaningful bearing on these proceedings and that the plaintiffs will gain a litigious advantage from the disclosure of these documents. It would not be conducive to the fair disposal of these proceedings for this court to hold that the Tribunal's policy of confidentiality requires that such material be withheld from the plaintiffs and from this court. As importantly, I am satisfied that to decline to order disclosure would be to confer on the other parties in this litigation an unfair and unnecessary tactical advantage.

Summary and Conclusions

98. In summary, I find that the wide circulation of the public sitting books, which include the documents in dispute, substantially lessens the weight to be attached to any subsisting confidentiality they enjoy. There is a public interest in ensuring that Tribunals of Inquiry can conduct their investigations in private. However, the efficient conduct of Tribunals of Inquiry does not require that confidentiality is afforded in perpetuity to documents circulated in the public sitting books. There is no reason to suppose that the public interest in the effective and efficient running of Tribunals of Inquiry will be impeded by the disclosure in these proceedings of the documents in dispute. I am satisfied that any confidentiality residing in the Tribunal in the interests of the proper execution of its functions is outweighed by the public interest in the

administration of justice in bringing about a fair result in these proceedings. Ultimately, therefore the confidentiality asserted must yield to the interests of justice.

99. The doctrine of proportionality means that inspection or disclosure will generally not be viewed as necessary for disposing fairly of the cause or matter if the information sought would otherwise be available to that party. Although Mr. O'Brien contends that the plaintiffs ought to seek the documents in dispute directly from the Tribunal, it is clear that non-party discovery ought not normally be sought until the party seeking it has exhausted *inter-partes* discovery. In any event, the Tribunal has declined to furnish the documents in dispute and suggested that the plaintiffs obtain them from Mr. O'Brien or the State defendants.

100. I am satisfied that there is no lack of proportionality or oppressiveness in the discovery and inspection order which this court intends to make. The documents in question are already in Mr. O'Brien's custody. He has already confirmed that they fall within the scope of the discovery order and has categorised them.

101. Having said all of the above, whilst I criticise Mr. O'Brien's failure to comply with his discovery obligations,³ it would not have been unreasonable for him to seek the comfort of a court order before production of the documents in dispute for inspection.

102. In conclusion, I find that any confidentiality persisting in relation to the documents in dispute is outweighed by the interests of the administration of justice in their production and inspection. I order that Mr. O'Brien furnish a supplemental affidavit of discovery of the documents in dispute and, further order that same are produced for inspection.

Addendum

103. An earlier version of this judgment has been corrected pursuant the court's inherent jurisdiction as per my *ex tempore* judgment of 20th February, 2025.

³ As per para. 49 above.