

COMMENTS OF
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ON
THE EUROPEAN COMMISSION’S WHITE PAPER ON DAMAGES ACTIONS
FOR BREACH OF THE EC ANTITRUST RULES

1. INTRODUCTION:

The purpose of this paper is to consider certain selected aspects of the EC Commission’s White Paper on Damages actions for breach of the EC antiTrust rules¹ and to evaluate them critically from the perspective of whether they are advances or, if implemented, would regress the existing Irish legal position from the point of view of Plaintiffs. The paper is naturally focused on the interaction between EC law and Domestic Irish law.

The selected topics are (1) disclosure, (2) the proposed binding effect of Decisions by National Competition Authorities and (3) the scope and nature of available damages to include loss of profit, exemplary damages and interest.

2. DISCLOSURE:

2.1 INTRODUCTION:

The White Paper (as a matter of Irish Law) set outs the context in which disclosure i.e. Discovery of documents must be considered. The White Paper notes that key evidence to allow a party to prove a case may often be “concealed” or held by the Defendant or a third party.² To this end, the Commission proposes

¹ 24.2008 Com (2008) 165 Final.

² P4. Directive 2004/48 EC.

across the EU a minimum level of disclosure inter-partes. Specifically, it proposes to build on the approach set out in the Intellectual Property Directive³ which approach comprises a requirement that access to evidence should be based on fact pleading, judicial control and the plausibility of the claim and the proportionality of the Discovery request.

Before going on to consider the proposed conditions for a Discovery Order as set out in the White Paper, it might be instructive to look at what was proposed in the Intellectual Property Directive and how that Directive has been implemented into Irish law.

INTELLECTUAL PROPERTY DIRECTIVE:

The above Intellectual Property Directive, in a delineated sphere of application, proposes that Member State Judicial authorities should have or should adopt measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights in accordance with that Directive. Article 2 of the Directive provides that the measures, procedures and remedies provided for in the Directive are without prejudice to either Community or National legislation insofar as "...those means may be more favourable for rightholders...".

2.2.1 ARTICLE 7 OF THE INTELLECTUAL PROPERTY DIRECTIVE:

Article 7 is directed to measures for preserving evidence and provides:

“(i) Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective

³ Directive 2004/48/EC

provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detail description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked, or confirmed.”

I think it is fair to describe the remedy here in substance as being what we in Ireland and in the United Kingdom would call an Anton Piller Order. According to Courtney in *Mareva Injunctions and related Interlocutory Orders*⁴:

“An Anton Piller Order is almost invariably a mandatory ex-parte Order which, subject to certain conditions, directs a Defendant to permit a Plaintiff to enter upon and inspect the Defendant’s premises for the purpose of seizing evidence and assets in circumstances where it is apprehended that there is a likelihood that such evidence and assets would otherwise be destroyed by the Defendant. The paradigm scenario where Anton Piller relief would be sought by a Plaintiff is where he alleges that

⁴ 1st Edition p 402 para 10.39

the Defendant is infringing his copyright or other intellectual property rights by making unauthorised “bootlegged” or “pirated” copies of the Plaintiff’s goods.”

As a matter of Irish law, it would appear the evidence (or proofs) which are required at an ex-parte Application hearing include that the Plaintiff must satisfied the Court that he has an “extremely strong prima facie case” against the Defendant.⁵ In *Anton Piller KG v Manufacturing Processes Limited*⁶ Ormrod L.J. identified one of the pre-conditions to granting an Anton Piller Order was that “*there must be an extremely strong prima facie case*”. In discharging an Anton Piller Order in *Lock International v Beswick*⁷ Hoffman J (as he was then) held that *the “evidence came nowhere near disclosing an “extremely strong prima facie case...”*

2.2.2 IMPLEMENTATION OF DIRECTIVE INTO IRISH LAW:

The Intellectual Property Directive has been implemented into Irish Law by way of European Communities (Enforcement of Intellectual Property Rights) Regulations 2006⁸. In the explanatory note to the said Statutory Instrument, it is explained that the Regulations are proposed to transpose into Irish Law those aspects of the Intellectual Property Directive “which are not currently available under Irish Law”. The Statutory Instrument is brief and only appears to provide additional remedies in respect of disclosure of information: orders for removal, removal or destruction; and provision for the publication of judgments as a means of enforcing the Judgment. In particular, the Statutory Instrument makes no reference whatsoever to the provisions of Article 7 relating to measures for preserving evidence. This is presumably on the basis that the Irish State takes the

⁵ Courtney para 10.49

⁶ [1976] 1 ALL ER 779

⁷ [1989] 3 ALL ER 373

⁸ SI 360 of 2006

position that the existing Anton Piller remedy satisfies the requirements of the Directive.

I am not convinced that this is the case. It seems to me that there is a difference between an evidential threshold described as “an extremely strong prima facie case” and the alternative that the Plaintiff should have “presented reasonably available evidence to support its claims”. These seem to me to be different and that the evidential requirement imposed by the Directive is a lesser burden than the existing common law or case law requirement for securing an Anton Piller Injunction on an ex-parte basis.

If I am correct in identifying a failure to implement properly a Directive, what are the consequences? In the first place, it seems to me that the remedies derived from the Judgment of the European Court of Justice in *Francovich & others v Italian Republic*⁹ may be suitable in certain circumstances. In that case, the European Court of Justice held that: “a Member State is, in certain circumstances, obliged to make good damage to individuals arising from non-implementation of a Directive”.

Alternatively, it may be that the existing case law must be construed in the light of the “wording and purpose of applicable Community Law Provisions”. I am conscious of the line of Authorities beginning with *Marleasing*¹⁰ and concluding with *Testa*¹¹. Those cases involved the improper implementation or ambiguous implementation into Domestic Law of EC Directives. For example *Faccini Dori*¹² concerned the failure of the Italian State to implement at all the Provisions of the Directive 85/557 regarding the protection of consumers in the case of contracts negotiated away from business premises. The case of *Dorsch*¹³ was a failure by the German Government to implement the provisions of Directive 92/50 relating

⁹ C-6,9/90 [1991] ECR I- 5357

¹⁰ [1990] ECR 4135

¹¹ C-356/00

¹² [1994] ECR I-3325

¹³ Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH C-54/96.

to the procedures for the award of public service contracts. The *Testa* Judgment concerned the question of whether or not the Italian authorities had properly implemented Directive 93/22 which covers the Regulation of Investment Services. In that case, the Court noted¹⁴:

“that, when applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and purpose of that directive so as to achieve the result pursued by the directive, and thereby comply with the third paragraph of Article 249-EC”

2.3 PROPOSED PRE-CONDITIONS FOR DISCOVERY:

2.3.1 INTRODUCTION:

According to the White Paper, there are a number of pre-conditions for a Disclosure/ Discovery Order which should include that the Clamant has:¹⁵

- “- presented all the facts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;*
- shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, otherwise to produce the requested evidence;*
- specified sufficiently precise categories of evidence to be disclosed;*
and
- satisfied the court that the envisaged disclosure measure is both relevant to the case and necessary and proportionate;”*

¹⁴ Para 43

¹⁵ P5

I propose to deal with each of these in turn.

2.3.2 MEANS OF EVIDENCE AND PLAUSIBLE GROUNDS:

It seems to me that the White Paper proposes the introduction of an evidential threshold which does not presently exist in Irish Domestic Law. Depending on how such a proposal was implemented, it might mean that a Plaintiff would need to present evidence before the Court regarding his claim rather than simply relying on his pleadings. Moreover, it seems that it would not be sufficient for a Plaintiff to swear simply a verifying Affidavit. A Plaintiff would be required not merely to verify the facts pleaded in his Statement of Claim but would also have to show what witness or witnesses would prove, what facts and what documents or other evidence is available to him. The requirement to identify “means of evidence” and the requirement to show “plausible grounds” which can in combination only mean that a Plaintiff is required to identify evidence (which is not currently a requirement in the pleading system existing under the Rules of the Superior Courts) but also to establish, and this could be done only by way of evidence, that there are plausible grounds to support the claim in the first place.

It would be difficult to see how these pre-conditions could be met without either the introduction of evidential material into pleadings combined with a verifying Affidavit and/or an Affidavit which would present a prima facie case on behalf of the Plaintiff.

If there is to be an extensive Affidavit relating to the Plaintiff’s evidence then, almost as night follows day, there will be a responding Affidavit on behalf of the Defendant. The risk from a procedural and Court efficiency point of view must be that a hearing to decide on Discovery will also have to inquire into whether the Plaintiff has both “means of evidence” and has also satisfied an evidential threshold of proving that it has a “plausible” case. It is not clear exactly when a

“plausible” case is established but it might be something akin to the fair question or “serious issue” requirement in an Interlocutory Injunction Application.

In *American Cyanamid Company v Ethicon Limited*¹⁶ the House of Lords rejected the pre-existing view that it was necessary for a Plaintiff to establish that he had a “prima facie case” or that he would probably succeed in the trial. Similarly in *Campus Oil Limited v The Minister for Industry and Energy*¹⁷, the High Court granted an Interlocutory Injunction and applied the “serious question” test as propounded by Lord Diplock in *American Cyanamid*

The requirement that a party seeking Discovery should achieve a low evidential threshold and should also be able to identify its “means of evidence” does not seem, in principle, a completely objectionable requirement. However, if implemented as a matter of Irish Law, it would represent an additional impediment for a party seeking Discovery in a Competition Law case.

Perhaps the ultimate answer to these difficulties is that any future Directive or other legislative measure might only apply, in this regard, where it was affording a Plaintiff/Claimant more favourable rights than exist under Irish Law.¹⁸

2.3.3 THE PLAINTIFF IS “UNABLE” WITH REASONABLE EFFORTS, “OTHERWISE TO PRODUCE THE REQUESTED EVIDENCE”

Given the terse nature of the White Paper it is not clear with precision as to what is intended here. This may mean that the Plaintiff would be required to establish, presumably on evidence, that he is unable to produce or access a relevant document or relevant category of documents and that he is unable by other evidence to prove his case.

¹⁶ [1975] AC 396

¹⁷ [1983] IR 88

¹⁸ See Article 2 of Directive 2004/48 EC on the enforcement of Intellectual Property Rights

It would be a relatively straightforward matter for a Plaintiff to be able to say and depose to the fact that he does not have a particular document or category of documents and further that he does not have access, as a matter of right or otherwise, to a particular document or category of documents.

However, it may be that the White Paper intends to impose a pre-condition that a Plaintiff must not only establish that he does not have a particular document or particular category of documents but must establish that he has no other evidential means of establishing the fact or allegation which he contends for.

It seems to me that we may well be into the disputed territory of what “necessary” within the meaning of Order 31 of the Rules of the Superiors Courts (as amended) means. This is dealt with more fully below. For the moment it is sufficient to say that this was the subject of, and continues to be the subject of litigious controversy. In *Ryanair Plc v Aer Rianta CPT*¹⁹ Fennelly J addressed the meaning of necessity in the context of Discovery:

“In order to establish that discovery of particular categories of documents is “necessary for disposing fairly of the cause or matter,” the applicant does not have to prove that they are, in any sense absolutely necessary.”

The principles enunciated in *Ryanair* may be compared (if not contrasted) with the present approach of the Master of the High Court. It might well be argued that the Master of the High Court takes a contrary view.

While the binding effect of the Supreme Court on lower Courts is not in issue, the approach that the Master takes nonetheless is helpful in elucidating some potential actual difficulties which could arise if this particular pre-condition was implemented.

¹⁹ [2003] 4 IR 264

The case of *Dowling v Dunnes Stores*²⁰ involved a security manager who slipped and fell on oil at the Defendant's shop in Limerick. Discovery was sought of documents relating to the cleaning system in place at the shop, both generally and specifically on the day of the accident as well as any report into or video of the incident. The Master explained his approach as follows:

“Processing Discovery Applications is easy enough. First, peruse the pleadings to identify the cause of action. It is necessary to know this because Discovery will be ordered in connection with only those facts which are legal ingredients of the pleaded claim: the material facts.

.....

Next eliminate any of the above which is pleaded in such general terms that Discovery in respect of same would be a “fishing expedition” as was done in the Supreme Court in Framus Limited & Others v CRH Plc & Others....

Particular attention should be paid to the Defence. Even if the Plaintiff has no particular evidential difficulties in proving his case, he may be faced with a specific allegation in the Defence which suggests that the Defendant intends to push a particular line... Is the Plaintiff entitled... to any documents that the Defendant may have to support such allegations? There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the Applicant or damage the case of his or her opponent...”

In respect of particular recurring categories of documents, the Master takes the view that he would only make Discovery of, for example, an accident report form where there is some question or doubt raised as to the ability of the Plaintiff or other witnesses to give evidence as to what occurred. In *Dowling v Dunnes Stores*

²⁰ Unreported Master Honohan 20th January 2006.

Discovery of the video was refused because “*the Plaintiff has not only himself, but two other witnesses as to the grease on the floor*”.

As regards training records, where an accident occurs at work and the Plaintiff pleads that he was not properly trained the Master is not disposed to make Discovery of training records to support the Plaintiff’s own evidence as to training received. In *Farnon v Dunnes Stores Dundalk Limited*²¹ the Master explained his approach and suggested that Discovery of documents would prejudice a Defendant’s ability at trial to damage the Plaintiff’s case:

“In fairness to the defendant, if a plaintiff, for example, alleges he was not trained and the defendant pleads that he was, a plaintiff ought to face cross-examination on that point in ignorance of what documentary evidence the defendant may put to him: otherwise he enjoys the luxury of withdrawing his allegation before the trial if he becomes aware that the defendant can prove him to be lying. The defendant, having such evidence, is entitled to deploy it, sight unseen, to damage the plaintiff’s evidence on this point and perhaps consequently on other points also. It is unfair to the defendant to deprive him of that opportunity. Instead of seeking discovery, the plaintiff should opt for giving his evidence truthfully.”

A critical evaluation of the recent Discovery Decisions of the Master of the High Court is beyond the scope of this paper. Nonetheless it may not be fair or satisfactory for a Court to say to a Plaintiff that probative evidence, and perhaps determining evidence, such as a DVD or Video of the incident, should not be made available to the Plaintiff because there are other means of evidence available to him. If a Plaintiff contends the surface in the shop was defective and if the Defendant, by his Defence, denies that, then it seems to me that the Plaintiff should be able to assemble all reasonably available evidence to support his claim including evidence such as a DVD or Video in the possession of the Defendant. It

²¹ Unreported, Master Honohan, 23rd June 2005

does not seem to me to be satisfactory to say that the Plaintiff can give evidence. Clearly, if the Defence has denied the fact of the defect, the Plaintiff can and should anticipate a dispute. The existence of one or more witnesses to support the Plaintiff's claim does not negate the possibility that the Defendant may be able to call witnesses supporting his Defence. This is all the more the case where the Defendant makes a positive plea in his Defence, (though it seems to me that he would not be obliged to) and similarly more the case where the Defendant has verified such a plea on Affidavit as he would now be required to do in personal injury action.

For my part, I think it would be a retrograde step for contemplated EC Disclosure Rules to require a Plaintiff to rest his case on one particular seam of evidence where other valuable documentary or other evidence may be available.

2.3.4 PRECISE CATEGORIES:

There should be no difficulty in relation to the requirement to provide precise categorises of documentation. This would seem to be in accordance with amended version of Order 31 of the Rules of the Superior Court which requires both the letters seeking voluntary Discovery and the Notice of Motion seeking Discovery to specify the "precise category of documents in respect of which Discovery is sought."

2.3.5 RELEVANCE,NECESSITY AND PROPORTIONALITY:

2.3.5.1 PURPOSE OF DISCOVERY

An analysis of the legal principles applicable to Orders for Discovery should be informed by an appreciation of the purpose of Discovery. This was set out by Finlay C.J. in *AIB Banks Plc v Ernst & Whiney*²² in the following terms:

²² [1993] 1 IR 375, 390

“The basic purpose and reason for the procedure of Discovery...is to ensure as far as possible that the full facts concerning any matter in dispute before the Court are capable of being presented to the Court by the Parties concerned, so that justice on full information, rather than on a limited or partial revelation of the facts arising in a particular action, may be done.”

Bingham L.J. in *Ventouris v Mountain*²³ identified the function of Discovery:

“Our system of civil procedure is founded on the rule that the interests of justice are best served if parties to litigation are obliged to disclose and produce for the other party’s inspection all documents in their possession, custody or power relating to the issues in the action.”

A contextualisation of the Discovery process within an overarching requirement of reasonableness, explicitly as to time and expense, is noted by Fennelly J in *Ryanair Plc v Aer Rianta CPT*²⁴:

“The change made... in 1999 exemplifies, however, growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the Courts arising from excessive resort to automatic blanket Discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.”

2.3.5.2 ORDER 31 RULE 12:

²³ [1991] 1 WLR 607, 611

²⁴ [2004] 1 ILRM 241

Order 31 Rule 12 (as amended by the Rules of the Superior Courts (No.2)) (Discovery) 1999)²⁵ in its substantive parts provides:

“(1) Any party may apply to the Court by way of notice of motion for an order directing any other party to any cause or matter to make Discovery on oath of the documents which are or have been in his or her possession or power, relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery...”

(2) On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or is not necessary at that stage of the cause or matter, or by virtue of non-compliance with the provisions of subrule4(1), or make such order on terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes or documents as may be thought fit.

*(3) An order shall not be made under this rule if and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the cause or the matter or for saving costs.
.....”*

Order 31, Rule 12 requires the Applicant for Discovery to demonstrate that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs. Fennelly J in *Ryanair Plc v Aer Rianta CPT*²⁶ explained the position in the following terms:

²⁵ S.I. 233 of 1999

²⁶ (2004) 1 ILRM 241,251

“The Applicant must, under O.31,r12 , discharge the prima facie burden of proving that the Discovery sought “is necessary for disposing fairly of the cause or matter”.

“This is not a mere formalistic requirement; the affidavit must, in addition, “furnish the reasons why each category of documents is required.” In context, there is no meaningful distinction between the words, “necessary” and “required”. The latter term is implicitly referable to the objective of the fair disposal of the cause or matter”.

2.3.5.3 RELEVANCE:

The starting point for a consideration of what is meant by relevance is to be found in the Judgment of Brett L.J. in the *Peruvian Guano* case²⁷ where the issue of what documents will be relevant was addressed:

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information, which may – not which must- either directly or indirectly enable the party requiring the Affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly” because, it seems to me, a document can properly be said to contain information which may enable the party requiring the Affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences.”

²⁷ [1882] 11 Q. D 55

The above definition has been accepted as *the “universally accepted test of what is the primary requirement for discovery, namely the relevance of the documents sought...”*²⁸

The definition of Brett L.J. was further considered by Murray J (as he was then) in *Aqua Technolgie v NSAI*²⁹ :

“There is nothing in that statement which is intended to qualify the principle that the documents sought in Discovery must be relevant directly or indirectly to the matters in issue between the parties in the proceedings. Furthermore, an Applicant for Discovery must show it is reasonable of the Court to suppose that the documents contain information which may enable the Applicant to advance his own case or to damage the case of his adversary. An Applicant is not entitled to Discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition.”

The Supreme Court in *Framus Ltd v CRH Plc*³⁰ approved the principles enunciated by McCracken J in *Hannan v Commissioner of Public Works*³¹ where he set forth the appropriate approach to relevance:

“

- (i) *The Court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the Court to order Discovery simply because there is a possibility that documents may be relevant.*

²⁸ Fennelly J in *Ryanair Plc v Aer Rianta* CPT [2004] 1 IRM 241,251

²⁹ Supreme Court 10th July 2000

³⁰ [2004] 2 ILRM 439

³¹ Unreported 4th April 2001

- (ii) *Relevance must be determined in relation to the pleadings in the specific case. Relevance is not to be determined by reason of Submissions as to alleged facts put forward in Affidavits in relation to the Application for Further and Better Discovery, unless such Submissions relate back to the pleadings or to already discovered documents. It should be noted that Order 31 Rule 12 of the Superior Courts specifically relates to Discovery of documents “relating to any matter in question therein”.*
- (iii) *It follows from the first two principles that a party may not seek Discovery of a document in order to find out whether the document may be relevant. A general trawl through the other parties’ documentation is not permitted under the Rules.*
- (iv) *The Court is entitled to take into account the extent of which Discovery of documents might become oppressive, and should be astute to ensure the procedure of Discovery is not used in a tactic in the war between the parties.”*

2.3.5.4 NECESSITY:

The Applicant for Discovery must satisfy the Court that the category of documents being sought is necessary or required for disposing fairly of the cause or matter or for saving costs. The burden of establishing necessity rests with the Applicant and it is not a merely “formalistic requirement”³² On the other hand Fennelly J. makes it clear that the Applicant does not have to prove that the documents sought are in any sense “absolutely necessary”.

³² See *Ryanair Plc v Aer Rianta CPT* above.

In *Ryanair Plc v Aer Rianta CPT*³³ Fennelly J. dealt with the issue as to what is meant by this concept of necessity by reference to the Decision of Kelly J. in *Cooper Flynn v Radio Telefis Eireann*³⁴ where he adopted the statement of Lord Bingham M.R. in *Taylor v Anderson*³⁵ :

“The crucial consideration is, in my judgment, the meaning of the expression “disposing fairly of the cause or matter.” Those words direct attention to the question of whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgement, is the test.”

Fennelly J in *Ryanair Plc v Aer Rianta CPT*, having referred to the above passage, went on to say

“It may not be wise to substitute a new term of art, “litigious advantage”, for the words of the rule. Nonetheless, the discussion gives guidance as to the context in which the matter has to be considered. Within that context, the Court has to reach a conclusion as to the likely effect of the grant or refusal of the discovery on the fair disposal of litigation.

.....

³³ See above

³⁴ [2000] 3 IR 344

³⁵ [1195] 1 WLR 447,452

The court in exercising the broad discretion conferred upon it by Order 31 Rule 12 (2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant. These may, no doubt, include the possible service of notices to admit facts or documents. But there are two sides to litigation. The behaviour of the opposing party is relevant. That party may, for example, have made or may offer to make admissions of facts, and thus persuade a court that discovery on some issues is not necessary. That is, perhaps, axiomatic. Those facts will no longer be in issue.”

Similarly, the Supreme Court in *Taylor v Clonmel Healthcare Ltd*³⁶ held:

“The purpose of the amendment (to Order 31 Rule 12) was so that the Master or the Court as the case may be and the respective parties would focus on what documents were really needed for the purpose of advancing the case of the moving party or defending as the case may be.”

2.3.5.5 PROPORTIONALITY:

In *Framus v CRH PLC*³⁷ Murray J. (as he was then) held:

³⁶ [2004] 1 IR 169

³⁷ See above

“It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out the critical question is whether discovery is necessary for “disposing fairly of the cause or matter.” I think it follows there must be some proportionality between the extent or the volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial. This is not to gainsay in any sense that the primary test is whether documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.”

The recent jurisprudence of the Superior Courts in relation to the concept of necessity have been summarised by Delaney and McGrath in *Civil Procedure in the Superior Courts*³⁸:

*“The Supreme Court has confirmed that Discovery of documents should only be ordered where it is necessary for disposing fairly of the action. Although the Applicant must now discharge the prima facie burden of proving that the Discovery sought is necessary for disposing fairly of the cause or matter, as Fennelly J noted in *Ryanair Plc v Aer Rianta CPT* apart from this the amendments “did not change the parts of the Rule dealing with the necessity for Discovery” and sub-rules (2) and (3) which deal with necessity are taken unaltered from the old Rules. In his view, as already state,*

³⁸ 2nd Edition para 10 -35 p 279

neither Morris P in Swords v Western Proteins Ltd nor Keane CJ in Burke v Director of Public Prosecution in approving the former's dictum, expressed any intention of introducing a new or higher standard of proof of some objective necessity as a precondition to the grant of an Order for Discovery."

2.3.6 DISCOVERY IN COMPETITION CASES:

There is nothing in either the Competition Act 2002 or in Order 63 B³⁹ which alters the established tests for the availability of Discovery.

In *Framus Ltd v CRH Plc*⁴⁰ Murray J. noted that the Appellants had argued for special consideration for their Application for Discovery by reason of the fact that the claim in the substantive proceedings was based on unlawful anti-competitive practices by the Defendants. Murray J held:

"This was in large part based on the premise that in such cases plaintiffs must seek to establish conduct and practices which of their nature are likely to be concealed. However, the plaintiffs expressly acknowledge in their submissions that they were not making the case that different rules apply in relation to discovery in competition cases. That, in my view, is the correct position in law. At the outset of my conclusions, I express the view that where discovery is sought in a case where the wrongful acts alleged against the defendants are likely to be acts peculiarly within his or her knowledge and are ones which the plaintiff would be unlikely to have knowledge of because of a propensity to conceal them, that this was a factor to be taken into account in determining the categories of documents in respect of which discovery may be

³⁹ As introduced by the Rules of the Superior Courts (Competition Proceedings) 2005 SI No: 130 of 2005

⁴⁰ [2004] 2 IR 20, 47

granted. I am reassured in this view by the statement of McCracken J. in Ryanair Plc v Aer Rianta cpt ...where he stated at page 255 “the situation in a competition case is very different from that in a personal injuries action, and any reference to precision in categories of documents must be considered in the light of the particular cause of action and the likely knowledge of the party claiming discovery as to what documents exist”. Thus as previously indicated, this is a factor to be taken into account but no more than that.”

Similarly, as to an argument made by the Appellants in that case that the principles governing the grant of an Order for Discovery in proceedings grounded on alleged anti-competitive practices contrary to Articles 81 and 82 of the EC Treaty should be applied having regard to the principle in Community Law that national rules and remedies must meet the principles of effectiveness and equivalence, the Court should in order to be compatible with community law Murray J. held:

“The principles relating to the discovery of documents apply equally to proceedings in which it is sought to enforce rights under national law or community law. The fundamental principles governing the making of an order for discovery are set out in Order 31 Rule 12 whereby discovery is granted in respect of documents relevant to the issues in the proceedings and which are necessary for disposing fairly of the cause or matter or for saving costs. Having regard to these principles, the plaintiffs have been granted an order granting them extensive discovery of documents. They are not discriminatory and I do not see any basis whatsoever for suggesting that the application of the relevant principles could be considered as rendering the remedies available to the plaintiffs in these proceedings “virtually impossible or excessively difficult”.

2.3.7 POWER WITHIN MEANING OF ORDER 31: EVASION MECHANISMS:

It seems to me that the White paper does not address what is a potential lacuna in existing Irish (and also perhaps U.K.) law in relation to Discovery. A detailed analysis of existing Irish law is set out below. There is a substantial risk that in Irish law a subsidiary company based in Ireland will not be required to make Discovery of documents belonging to a parent company or a subsidiary of a parent company on the basis that the subsidiary does not have a enforceable legal right to obtain a particular document. The leading authority is *Johnson v Church of Scientology in Ireland*⁴¹. This is analysed below. While the below analysis suggests that the source case for this Rule i.e. Lonrho, is perhaps less emphatic than it is presented in later Irish cases, there does seem to me to be a real risk of a parent company being able to hold documents “off shore” and be able to conduct litigation in Ireland without the full picture being available to the other side.

In *Bula Limited v Tara Mines Limited*⁴² O’Flaherty J noted the formulation contained in Appendix C Form 10 of the Rules of the Superior Courts, in respect of the precedent Affidavit as to Documents, at paragraph 7 and noted the repeated use of the formulation “possession, custody or power. In these circumstances, he held:

“I believe that the three concepts come into play, viz possession, custody and power and they are to be considered disjunctively”.

2.3.7.1 POWER:

It might in the first place be noted that certain decisions appear to have used the words “power” and “procurement” interchangeably. The Supreme Court noted the

⁴¹ [2001] 2ILRM 110, 117

⁴² [1994] 1 ILRM 111, 113

criticisms of Counsel for the Church of Scientology in *Johnson v Church of Scientology in Ireland*⁴³ wherein Counsel criticised the use, both by Finlay P (as he was then) and Barron J of the use of the word “procurement”. Denham J noted that Counsel for the Church of Scientology argued:

“that Barron J appeared to think that “procurement” was a distinct head of control for the purpose of the rules, additional to “possession or power”.

The most recent Supreme Court Judgment that addresses the concept of “power” as used in the Superior Courts Rules is the Decision of the Supreme Court in *Johnson v Church of Scientology in Ireland*.⁴⁴ The case concerned a personal injury claim against the Church of Scientology. In the course of her trial she looked for Discovery from the U.K. Church of Scientology. In the Court’s Decision, Denham J after referring to *Bula Limited v Tara Mines Limited*⁴⁵ and *Quinlivan v Conroy*⁴⁶ concluded:

“Documents which are in the possession, custody or power of a party must be discovered. A document is in the power of a party, when that party has an enforceable legal right to obtain the document.

The documents in issue in this case are not in the possession, custody or power of the defendants and the defendants have no enforceable legal right to obtain them. Accordingly, the plaintiff is not entitled to the discovery sought.”

⁴³ [2001] 2ILRM 110, 117

⁴⁴ ???

⁴⁵ [1994] 1 ILRM 111 at 113

⁴⁶ [1999] 1 IR 271 at p 281

Among the facts that the Court relied on in holding that the Defendants had no “enforceable legal right to obtain the relevant documents” were the following:

- (a) The first named Defendant i.e. the Church of Scientology, Mission of Dublin Limited was a separate corporate body to the English Church of Scientology Corporation.
- (b) It was not established that the English Corporation acted as an Agent for the first named Defendant in relation to the documents at issue.
- (c) The documents in issue between the parties originated in England, were created by the English Church of Scientology and had never been in Ireland.
- (d) It was not established by the Plaintiff that the English Corporation created or had custody of those documents as the Agent of the first named Defendant.
- (e) The evidence was that the English Corporation acted independently and not as an Agent for the other in respect of the documents.
- (f) The fact that the English Corporation may have acted as an Agent of the first named Defendant in other specific situations does not confer on the said first named Defendant an enforceable right to obtain the documents in question.

Denham J also observed that:

“A party is only obliged to disclose documents in his possession, custody or power. To this Rule there may be rare exceptions. However, these rare exceptions are examples of the judge, in his or her discretion in the circumstances of a particular case, making a determination on the facts. Such exceptions may be seen in the case of Northern Bank Finance Ltd v Charlton... and Yaets v Ciba

Geigy Agro Limited.... However, the facts of neither are on all fours with the facts of this case and may be distinguished.”

The formulation advanced by O’Flaherty J in *Bula Ltd v Tara Mines Ltd* and endorsed by Denham J in *Johnson v Church of Scientology* is remarkably succinct. To better understand the principles underlying such a succinct, if not bare, formulation it would be worthwhile to consider the relevant Authorities from which this formulation is extracted.

2.3.7.2 LONRHO LIMITED V SHELL PETROLEUM COMPANY LIMITED.⁴⁷

The starting point for any consideration for what is meant by “power” within the meaning of Order 31 Rule 12 is the Judgment of the House of Lords in *Lonrho v She⁴⁸*. The facts, appropriate to the swashbuckling and enthusiastically litigious Plaintiff Company, are colourful. The Plaintiff owned an oil pipeline in Rhodesia (not Zimbabwe). After Rhodesia declared its Unilateral Declaration of Independence (“UDI”) the United Nations imposed a prohibition, by way of sanctions, on the use of the Lonrho owned pipeline for importing oil into Rhodesia until such time as UDI ceased.

The Plaintiff maintained that the Defendants, Shell & B.P. and their wholly owned or partly owned local subsidiaries in Rhodesia and neighbouring countries, prolonged UDI by unlawfully trading with the Rhodesia.

Discovery was sought from Shell and B.P. which in turn required each of these Companies to obtain documents from their Subsidiaries in Rhodesia, South Africa and Mozambique.

⁴⁷ [1980] WLR 627

⁴⁸ [1980] 1 WLR

In the course of his Judgment, Lord Diplock set out the obstacles which militated against the Court making any Order for Discovery requiring either Shell or B.P. to obtain documents from their subsidiaries in these Countries.

Among the obstacles was the necessity for BP and Shell to change the Articles of Association of several of their subsidiaries. Further the Discovery sought to be obtained from South Africa and Rhodesia would have exposed the subsidiaries to criminal sanction if they complied with the request from their parent Company. In his Judgment Lord Diplock held:

“The phrase, as the Court of Appeal pointed out, looks to the present and the past, not to the future. As a first stage in discovery, which is the stage with which the subsidiaries appeal is concerned, it requires the party to provide a list, identifying documents relating to any matter in question in the cause of matter in which Discovery is ordered.(sic) Identification of documents requires that they must be or have at one time been available to be looked at by the person upon whom the duty lies to provide the list. Such is the case when they are or have been in the possession or custody of that person; and in the context of the phrase “possession, custody or power” the expression “power” must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons, it is not possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future.”

It is interesting to note that the judgment of Lord Diplock in *Lonrho v Shell* is expressly said to be on its own special facts and expressly not considered to be relevant to one person Companies. He held:

“In dismissing the subsidiaries appeal on its own special facts, I expressly decline any invitation to roam any further into the general law of discovery. In particular, I say nothing about one-man companies in which a natural person and/or his nominees are the sole shareholders and directors. It may be that, depending upon their own particular facts, different considerations may apply to these. “

I might highlight a further passage from the Judgment:

“Identification of documents requires that they must be or have at one time been available to be looked at by the person upon whom the duty lies to provide the list. Such is the case when they are or have been in the possession or custody of that person;...”

2.3.7.3 NORTHERN BANK V CHARLTON⁴⁹

The above proceedings concerned a claim and counterclaim arising out of a proposed takeover of a Company called J.G. Mooney & Company Ltd (“Mooney”) by a group of investors and part financed by the Plaintiff Company.

The Discovery request concerned letters of acceptance of the takeover offer which were not in the immediate possession of the Plaintiff Company but were in the possession of Mooney. It transpired that, at the time of the hearing, Mooney was under the control of Directors who were in turn nominees of the Plaintiffs. It was noted by Finlay P that:

⁴⁹ High Court Unreported 26th May 1977

“These nominees, it should be emphasised, are collectively and individually highly reputable business and professional people with an independent approach to their obligations as Directors of that Company but they do hold their shares qualifying them as Directors as nominees of the Plaintiffs who are the registered owners of the shares for the purpose of securing the advances which they allege they made.”

In respect of the issue of whether the documents could fairly be said to be within the “procurement” of the Plaintiff Company Finlay P held;

“I accept the contention that the Directors of J.G. Mooney & company must discharge faithfully and truly in the interest of that Company their duties as Directors and that they cannot do anything against the interests of that Company merely because they hold their shares and to that extent their qualification as Directors as nominees of the Plaintiffs. I cannot however conceive that the handing over by J.G. Mooney & Company of these letters of acceptance (on a undertaking they would eventually be returned) for the purpose of a claim brought against the Plaintiffs by way of a counterclaim could be in any way at variance with the interests of J. G. Mooney & Company. Furthermore, having regard to the existing extent of the advances made and what I am informed is the reality of the value of the shares in J. G. Mooney & Company which are registered in the Plaintiff Company the interests of J. G. Mooney & Company must be closely equated with the interests of the Plaintiff Company. I am therefore satisfied that within the meaning of the principle applicable to an Affidavit of Discovery I must at this stage at least decide prima facie that these documents are within the procurement of the Plaintiff Company

and that there is not any reason to believe that if the Plaintiff Company in pursuance of the obligation of the Directors of J. G. Mooney & Company properly have to them as their nominees requested the handing over even though it might be on a returnable basis of these documents that that request would be refused. If it is a further Application may have to be made to me and different considerations may apply depending upon the grounds for that refusal.”

Northern Bank Finance stressed the coincidence of interests between Mooney and the Plaintiff and the absence of any evidence to the effect that it would be against the interest of that Company to make Discovery and the possibility of a further Application, if that were to arise.

In these circumstances, the above Judgment would appear to be authority for the proposition that a document may be in the power of Company A even though it is in the physical possession of Company B provided that there is, on the basis of shareholdings or other factors, a close identity of interest between Company A and Company B, that the Discovery sought is not at variance with the interests of Company B and, by way of a condition subsequent, there is no reason to anticipate refusal by Company B.

2.3.7.4 YATES V CIBA GEIGY.

In *Yates v Ciba Geigy Agro Limited*⁵⁰ an Application for Discovery concerned a Defendant Company which operated as a sales arm for a Swiss Company. The Court accepted that the products in question, in respect of which a claim was brought by the Plaintiff, were developed by the parent Swiss Company and that all the research and development was similarly carried out in Switzerland.

⁵⁰ [1986] WJSC-HC 1947

The High Court held:

“Possession alone is not the test of documents that may be in the power or procurement of a party even though they are not in his possession. That argument must therefore fail. An example of documents being in the power of a party though in the possession of another occurs in family matters where the main asset of one of the parties is a business operated through a Company. In such circumstances, Discovery may be ordered of Company documents, the extent of such Discovery being dependent on many factors including the extent of the spouses control over the affairs of the Company: see B v B 1979 1 All England Reports 81.

Documents not being in the power of a party may still be within his procurement: See Northern Bank Finance Corporation v Charlton & Others an Unreported Judgment of Finlay P as he as then was delivered on 26th May 1977. In that case, there was an issue as to whether the representation made on behalf of the Plaintiff as to a particular shareholding in a particular Company was true. The Directors of the latter Company held their shares as nominees of the Plaintiff. It was held that documents in the possession of that Company bearing on the issue of ownership of its own shares were in the procurement of the Plaintiff upon the basis that if such documents were sought by the Plaintiff from the Directors of the Company there would be no reason to believe that, having regard to the position of such Directors as nominees of the Plaintiff, that they would refuse such a request. In the present case, this and other documents of which Discovery are sought are all relevant to the issues raised in the pleadings. In the present case, there is no reason to suppose that a request for such documents by the Defendant would be refused. Indeed Counsel for the Defendant

has admitted that they will be made available to him for the purposes of the Trial and that they have already being made available for the purpose of the preparation of the Defendant's Defence. Prima facie such documents must be regarded as being available to the Defendant if they are requested. Many of them are in the possession of the parent Company solely because the facilities to carry out investigations in relation to complaints against group products are only available in its laboratories. If the parent Company alleges that it would be prejudiced in any way by such disclosure then this would be a matter in which the Court would then be obliged to take into consideration and to adjudicate upon. Similarly, if privilege is claimed for any of these documents then again any such claim must be adjudicated upon."

In the second paragraph above, he appears to make a distinction between power on the one hand and procurement on the other. I would suggest that this is in fact a typographical error and that the Court intended to make a distinction between possession on the one hand and power or procurement on the other. It is suggested that the Court used the words power and procurement interchangeably.

Secondly, I note the basis on which the High Court determined the documents were in the "procurement" of the subsidiary Company, namely that they would be delivered up if so requested. At least that was presumed. In fact, *Northern Banks Finance Corporation v Charlton* identified that as being an additional factor rather than the basis for the Decision. The basis for the Decision in *Northern Bank Finance* was the coincidence of interest between Company A and Company B and the absence of any evidence it would have against the interest of Company B.

2.3.7.5 B V B [1978] WLR 62

The proceedings here concerned Discovery in relation to Family Law proceedings. Discovery was sought not only against the husband but also against a Company in which he had an involvement. The facts were that the Board of the relevant Company consisted of the husband and six other Directors. The relevant Company was 75% owned by a holding Company which in turn was 51% owned by the husband with the majority of the remaining shares being held by members of his family. As set out above, Dunn J addressed the issues arising in relation to custody or possession. He held:

“How do these general principles apply to the Director of a company in relation to company documents, that is, to documents which are in the possession of the Company in the sense that the Company has the sole legal right to their possession? If they are or have been in the custody or physical possession of the Director, even if he only holds them or holds them as servant or agent of the Company or in his capacity as an officer of the Company then they must be disclosed. Whether such documents are or have been in his custody is a question of fact in each case. It is a matter at the discretion of the Court whether they should be produced.”

As to power, the Court formulated that issue in the following terms:

“but what of relevant Company documents which are not and never have been in the custody of the Director who is a party to the proceedings to which the Company is not a party? Are such documents within the power of the Director?”

Dunn J addressed the issues as follows:

“Without the consent of the Company, he has no right to inspect documents, much less to take copies of them or remove them from the premises of the Company for his own purposes unconnected with the business of the Company. Because, in his capacity as a Director, he has the right to inspect the Company documents, it does not follow that in his personal capacity he has an enforceable right to inspect or to obtain possession or control of them so that the documents can be said to be in his power, it is a question of fact in each case whether or not a Director has such an enforceable right; much will depend upon the share structure of the Company. In cases of a one man Company, where a Director owns all or substantially all the shares and any minority or not adverse to him, then the inference may be drawn that the Company, although a separate legal entity, does not control him, but he controls the Company in such manner as to make it his other person or alter ego. In such a case, where the Director controls the Company and nominates the other Directors, all the documents of the Company are within his power in the sense that in truth and in fact he is able to obtain control of them.”

He described the elements to be taken into account and the factors to be weighed in the following terms:

“At the other end of the scale there is the case where the Director who is involved in litigation cannot be said to control the Company at all. The documents of such a company would not be in the power of the Director without the consent of the Board of Directors. Then there are cases, in which this case is an example falling somewhere between the two. In such cases the Court will consider the extent of the shareholding of the husband; whether it amounts to control of the Company; or whether the minority

shareholders are adverse to him; how the Board of Directors is constituted; and whether there is any objection by the Board to disclosure of any documents sought.”

2.3.76 Bula Limited v Tara Mines Limited

The issue in the above case was whether the Minister should make Discovery of a document in the possession of his Solicitors, Accountants, and Banks regarding the issues in the proceedings. The Discovery sought was explicit in that it did not seek internal memos or drafts prepared by professional advisors for their own purposes as distinct from final drafts or advices prepared for the purpose of giving same to the Minister.

O’Flaherty J cited a number of Authorities. However, the substance of the Judgment did not really concern the issue about “power” at all but rather whether the work of professional advisors was their own product and therefore not discoverable and at what point did it become the property of the Client. He held that everything other than final documents were “in the area of being preparatory and, therefore, personal to the advisor and, as such, is not discoverable.

It would appear that the jurisprudence of the Courts in the above cases provides the intellectual foundation for the baldly stated proposition that a document is within the power of a party in circumstances where he has “an enforceable legal right” to obtain, from whomever actually holds the document, inspection of it without the need to obtain the consent of anyone else.

That formulation, given its terseness, begs the question as to what is meant by “an enforceable legal right”.

On the basis of the Authorities cited above, it may be that, leaving aside the exceptional and extraordinary circumstances here, that a document is in the

possession of Company A if the Company, or its servants or Agents, either had possession of it or would have been given possession of it if so requested. This is derived from *B v B*.

Secondly, as regards power, a document in the possession of Company B is in the power of Company A where the ownership of Company A and B is such that there is a coincidence of interests between Company B and that one is effectively the “alter ego” in substance of the other. Secondly, an additional factor is that there is no evidence before the Court that the documents being sought which are in the physical possession of Company B had not been refused to be disclosed by Company B and that there is no reason to think that they would be disclosed by Company B.

Thirdly, there is no evidence that Company B who has physical possession of the document has a different interest than Company A.

An alternative basis for Discovery against a connected but non-party is that the Discovery sought, nonetheless falls within identified and existing, though rare, exceptional case where such Discovery ought to be discovered.

Ultimately a party may rely on the Judgement of the Supreme Court in *Murphy v Minister for Local Government* where Walsh J held:

“Under the Constitution the administration of justice is committed solely to the Judiciary in the exercise in their powers in the Courts set up under the Constitution. Power to impel the attendances of witnesses and the production of evidence is an inherent part of the judicial power of Government of the State and is the ultimate safeguard of justice in the State.”

2.4 OTHER BASES (OR MEANS OF ACCESS TO DOCUMENTS)

2.4.1 NON PARTY DISCOVERY:

Order 31 confers a power on a Court to make Discovery against a non-party. In *Fusco v O'Dea*⁵¹ the Court held, in part relying on *Matthews & Malek* (1992) Edition, that non-party Discovery rules did not confer a jurisdiction on the Court to make a Discovery Order on a party outside the jurisdiction.

This would appear to present a legal “brick wall” that will be difficult to surmount.

2.5 CO-OPERATION BETWEEN COURTS:

Regulation 1206/2001 (in force since 1st July 2001) provides a scheme whereby for example an Irish Court in respect of existing judicial proceedings is entitled to request a Court of another Member State directly to take evidence, which would include the inspection of documents.

The scheme of the Regulation envisages a “requesting Court” to transmit a “request” to the “requested Court”. Details of the request contemplated by the Regulation include the “...documents to be inspected...” The process is, subject to correct procedures, to be completed within ninety days. There are provisions for the participation of the parties and Court Officers.

The above Regulation now has accompanying Rules of the Superior Court set out in S.I. 13 of 2007. The Rules contemplate the lodging of a draft Application in the Central Office and an Application being made to the Court by way of Notice of Motion and Affidavit.

⁵¹ [1994] 2 IR

The procedure pursuant to the above Regulation is noted as being available to the English Courts in *Matthews & Malek* on Discovery. While the authors concede that the Court has jurisdiction i.e. the English Court to issue a letter of request concerned only with the production of documents, they continue “*a letter of request should not be used as a mechanism of getting general discovery from a non-party abroad. The purpose of a letter of request is to seek evidence; hence the jurisdiction in respect of documents is exercisable when the request is confined to particular documents which are admissible in evidence and directly material to an issue in the action. The Court must be satisfied that the documents exist or did exist and is likely to be in the possession of the person from whom production is sought.*”

See *Panayiotou v Sony Music Entertainment (U.K.) Limited*⁵². The above inter Court co-operation procedure, is a procedural mechanism which may supplement existing and contemplated Discovery procedures.

2.6 REGULATION 1 OF 2003:

Regulation 1 of 2003 replaces Regulation 17 of 1962.

Article 15 provides that in proceedings for the Application of Article 81 or Article 82 of the Treaty, the Courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the Application of Community Competition Rules.

There is certainly nothing stopping a party seeking the material seized in “dawn raids” carried out by the Commission

2.7 FAILURE TO MAKE DISCOVERY:

⁵² [1994] CH 142

The White Paper contemplates deterrent sanctions for those who destroy relevant evidence or refuse to comply with a Disclosure Order. The White Paper instances the possibility of a Court drawing “adverse inferences” in civil proceedings.

The sanctions available to a Court under the Rules of the Superior Courts are more robust. Order 31 Rule 21 provides that where a party was ordered to make Discovery and fails to do so, may be liable to attachment. Further, if a Defendant fails to make Discovery in accordance with a Court Order, he is liable to have his Defence struck out and the Plaintiff would be able to proceed to Judgment without the Defendant being able to participate either as to liability or as to quantum. This jurisdiction ought to be exercised sparingly.⁵³ Also, the Courts may choose to sanction a defaulting party by recourse to costs Orders, including Orders for costs in favour of the innocent party on the highest possible scale.⁵⁴

There can be no doubt that the sanctions available against a party who has failed to make proper Discovery is, as a matter of Irish law sufficiently deterrent. The Court may also in respect of a failure to make Discovery make an award of exemplary damages. It may draw adverse inferences from the failure to make Discovery and it may deal with the matter on the basis of Orders for Costs.

I might make the following observations. The sanctions available to a Court are so penal that the Courts are either reluctant, or perhaps unwilling to use them. There might be something to be said for the elaboration of a codified and calibrated scheme of sanctions related to particular levels of failure to comply with Discovery Order.

2.8 COSTS:

⁵³ *Mercantile Credit Company v Heelan* [1998] 1 IR 8; *Murphy v O’Donoghue*[1996] 1 IR 123

⁵⁴ *Decospan v Benhouse* [1995] 2 ILRM 620; *Geaney v Elan Corporation* 17th April 2005

Practitioners should be conscious that Order 63 (B) Rule 36 of the Rules of the Superior Courts provides:

“Upon the determination of any interlocutory application by a Judge, the Judge shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.”

The effect of these costs orders may be reduced by the practice, certainly existing in the Commercial Court where a similar Order is in place, that there would be a stay on execution of the costs Order pending the conclusion of the proceedings.

2.9 SECURITY IN RESPECT OF MAKING DISCOVERY:

Order 31 Rule 12 (2) provides:

“On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter or by virtue of non-compliance with the provisions of subrule 4(1), or make such order on terms as to security for the costs of the discovery or otherwise and either generally or limited to certain classes of documents as may be thought fit.”

This Rule confers on the High Court, when making an Order for Discovery discretion, having regard to all the circumstances of the case, as to whether an Order for security of costs should be made, as well as the nature and extent of such an Order.

In other situations where security of costs may be provided for where a Plaintiff is resident outside the jurisdiction of the State or the jurisdiction of the EU or is

insolvent, there may be a basis for an Order for security of costs. In *Framus v CRH Plc*⁵⁵ Murray J addressed the issue here:

“As regards the circumstances in which the party seeking to resist such an application on the ground that they are impecunious and that this impecuniosity has been caused or substantially contributed to by the wrongful acts of the other party which are the subject matter of the proceedings, I agree the such impecuniosity must be established as a matter of probability. Where an application is made for security of costs on the basis that the other party would be unable to meet the relevant costs because of its impecuniosity in the event that the Applicant being successful in the substantive proceedings and satisfies the Court of that fact, may be sufficient to establish impecuniosity without the other party having to call evidence. As already indicated, the next step for the party resisting application for security for costs, is to show that the impecuniosity was caused by the wrongful acts of the applicant. The learned High Court Judge was correct in stating that this causal connection should be established prima facie and not simply by mere assertion.”

2.10 THE WHITE PAPER IS SILENT AS TO WHICH PRIVILEGE MIGHT BE ASSERTED OVER DOCUMENTS TO AVOID DISCLOSURE.

This will have to be clarified.

3. BINDING EFFECT OF DECISIONS BY NATIONAL COMPETITION AUTHORITIES:

3.1 PROPOSALS IN WHITE PAPER:

⁵⁵ [2004] 2 ILRM at 469

The White Paper on damages actions begins its section dealing with the binding effect of National Competition Authority decisions by reciting what is the position in respect of the decisions of the EC Commission. It proposes in effect that the decisions of National Competition authorities should have the same binding effect in actions for damages as decisions of the EC Commission. It is suggested that the National Court should be prohibited from taking “decisions running counter” to any such decision by any National Competition Authority. The proposal is circumscribed by two conditions, namely that the Defendant has exhausted all available avenues of appeal and that the decision relates to the “same practices and same undertakings” as the National Court has to address.

3.2 BINDING EFFECT OF EC COMMISSION DECISIONS:

3.2.1 INTRODUCTION:

It might be illuminating for the purposes of offering a critique of the proposal regarding decisions of National Competition Authorities to review the genesis of the proposition that EC Commission Decisions are binding on National Courts and the precise scope and limits of this rule. In carrying out this exercise, it is hoped that the significance and challenges contained in the radical EC Commission proposal might be evaluated.

3.2.2 RELEVANT CASE LAW:

In *Delimitis v Henninger Brau*⁵⁶ the European Court of Justice was referred a number of questions for interpretation in circumstances where a German Court was being invited by a tenant in a tied house agreement to hold that his tied tenancy was an infringement of Article 81. The potential for conflict between a decision of the German Court in inter-partes proceedings arose by virtue of the fact that the impugned decision did not have to be notified to the Commission under Regulation 17/62 and there was always the possibility that the Commission

⁵⁶ Case C-234/89 [1991] ECR I-935

might grant a retroactive exemption which would conflict with any judgement in the tenant's favour by the German Court. In these circumstances, the Court of Justice advised:

“If the conditions for the application of Article 81(1) are clearly not satisfied and there is, consequently scarcely any risk of the Commission taking a different decision, the National Court may continue the proceedings and rule on the agreement in issue. It can do the same if the agreement's incompatibility with Article 81 (1) is beyond doubt and, regard had to the exemption regulations and the Commission's previous decisions the agreement may on no account be the subject of an exemption decision under Article 81(3).

If the National Court....considers in the light of the Commission's rules and decision- making practices, that the agreement may be the subject of an exemption decision, the National court may decide to stay the proceedings or to adopt interim measures pursuant to its national rules of procedures. The stay of proceedings or the adoption of interim measures should be envisaged where there is a risk of conflicting decisions in the context of the application of Articles 81 (1) and (82). (the Treaty number has been updated.

In these circumstances the European Court of Justice clearly envisaged that if the Commission decided that an agreement infringed Article 81 (1) a National Court would be obliged to follow that decision and, if such a decision was pending, it should stay its own proceedings until the Commission had made its decision.

The Judgment in *Delimitis* prompted the Commissions to issue a “Notice on Co-operation” between National Courts and the Commission which specifically addressed the issue of the possibility of conflict between a National Court and a Decision of the Commission in the following terms:

“The National Court should ascertain whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission. Such statements provide National Courts with significant information for reaching a Judgment, even if they are not formally bound by them”.

In *Iberian U.K. Ltd v BPB Industries*⁵⁷ the Chancery division of the English High Court addressed the question of, in circumstances where a complainant to the EC Commission successfully persuade the Commission that a number of entities had been guilty of an abuse of a dominant position, what evidential advantages does that complainant enjoy in a subsequent action to recover damages.

Between 1984 and 1987 Iberian imported plasterboard into the United Kingdom where B.P.B. Industries, and a subsidiary, was the dominant supplier of plasterboard to the United Kingdom market. Iberian complained about the alleged abusive practices by B.P.B. to the EC Commission and in 1988 the Commission issued a decision that B.P.B. Industries and its subsidiary had abused their dominant position and imposed fines on them. Appeals to both the Court of First Instance and the European Court of Justice failed.

In proceedings brought in the United Kingdom, Iberian alleged that the Defendants held a dominant position in the market for the supply of plasterboard in the United Kingdom and they had abused that dominant position. In its Statement of Claim, it particularised the abuses of the dominant position by reference to the Decision of the EC Commission.

In their defence the Defendants denied that either of them had abused a dominant position and further denied that the findings of the Commission were admissible in evidence or that the Plaintiff was entitled to rely on them. On the contrary, the Plaintiff alleged that the conclusions of the Commission’s Decision were conclusive as to whether there had been an abuse of a dominant position and

⁵⁷ [1997] 1 I.C.R. 164

further alleged that the findings of facts set out in the Decision were conclusive evidence of those facts in those proceedings and that the Plaintiff was entitled to rely on those findings of fact as such. The issues before the High Court revolved around whether the Decisions of the Commission and thereafter the Court of First Instance and the Court of Justice were admissible, whether the findings of fact were admissible, and if admissible, whether the Decision and/or the findings of fact were conclusive.

Laddie J undertook a review of the relevant EC case law and concluded:

“In my view, these cases reinforce and support the following propositions.

- (i) the Courts here should take all reasonable steps to avoid or reduce the risk of arriving at a conclusion which is at variance with the decision of or on appeal from, the Commission in relation to Competition Law.*
- (ii) Except in the clearest cases of breach or non-breach, it would be a proper exercise of discretion to stay proceedings here to await the outcome of the Community proceedings.*

Two other conclusions can be drawn. First what the Courts here are obliged to do is to try to avoid a decision which are inconsistent with a decision of the Commission. As it happens, the decided cases are all concerned with pre-emptive measures to stop that happening. That is to say measures to decide to allow the lead authority, the Commission, to come to its decision first. But logically the same public policy objective of avoiding inconsistency must apply after the Commission (or the Court of First Instance and the Court of Justice on Appeal) has reached a decision. It would make no sense to oblige or encourage National Courts to stay proceedings here to await the outcome of the Commission’s deliberations

and then to hold, as the Defendants here suggest, that the results of such deliberations or not even admissible.

This leads to the second conclusion, if English or other National Courts are encouraged to stay proceedings pending the resolution of Community Competition proceedings, but then are obliged by a national rule of procedure to take no notice of the results, the consequences will be to add years to the duration of the litigation here for no good reason. I said earlier in this Judgment, in many cases the result would be the subject of the litigant to a decade or more litigation for no benefit. It seems to me that this course would be contrary to public policy. Indeed the whole rationale of staying National proceedings to await the outcome of the Community proceedings must be that the result of those proceedings shall have a major impact on the proceedings before the National Court... I can see no point in there being a stay.”

Later in his Judgement Laddie J addressed the binding nature of the Commission decision as an alternative view:

“This brings me to the final way in which the Plaintiff puts its case. Even if principles of res judicata do not apply in this case, it is said that the Defendants are bound by the Community Decisions. They were the direct addressees of them. It is not open to them to assert that those decisions are wrong in any National Court. This argument is not dependant on the stance of the Plaintiff. It would apply in the present proceedings even if the Plaintiff had made no complaint to the Commission and played no part in those proceedings. To use English legal terminology for the Defendants to deny the correctness of the Plaintiff’s allegations of abuse of a dominant position amounts to an abuse of process since it would involve a collateral attack on binding decisions of the Commission, Court of First Instance and Court of Justice.”

The approach of Laddie J in *Iberian Trading* was authoritatively endorsed by the Court of Justice in *Masterfoods Limited v H.B. Ice Cream Ltd*⁵⁸. In that case, Masterfoods and H.B. Ice Cream Limited were in dispute as regards the exclusivity terms of H.B.'s ice cream Freezer Agreements. According to H.B. the freezer exclusivity term merely vindicated its property rights and had no anti-competitive object or effect. It brought proceedings against Masterfoods to restrain it from allowing its product to be placed in H.B.'s freezers. A counterclaim was brought by Masterfoods where it alleged that the freezer exclusivity term which was in the contracts was an infringement of Article 81 and was also an abuse of the dominant position. The dispute was first ventilated in the High Court in Ireland where the High Court held that H.B. was correct, that there was not any infringement of Competition Law on the part of H. B. and that Mars ought to be restrained by way of an injunction from allowing its product to be allowed to be placed in H.B.'s freezers. A complaint to the EC Commission was made time prior to the Decision of the Irish High Court but the Decision of the Commission was only made after the handing down of the Judgment of the High Court but before the Judgment of the Supreme Court.

The EC Commission held that H.B.'s practices were anti-competitive and ought to be, at least as regards smaller retailers, terminated.

With an impending Appeal before the Supreme Court in respect of the original High Court Judgment and with an Appeal against the Decision of the Commission to the Court of First Instance having been commenced and with further Appeal to the Court of Justice within contemplation, the Irish Supreme Court referred the matter to the Court of Justice for its view in relation to how the Court should proceed and how and which entity ought to be given pre-eminence and what procedures ought to be followed.

Part of the questions addressed to the Court of Justice included the following terse issue:

⁵⁸ Case C-344/98 Judgment of the Court 14th December 2000

“ Does a decision of the Commission which is addressed to an individual party that which is the subject of an application for annulment and suspension by that party to clearing such party’s freezer cabinet agreement to be contrary to Article 85 (1) and/or Article 86 of the EC Treaty thereby prevent such party from seeking to uphold a contrary Judgment of the National Court in that party’s favour on the same and similar issues falling under Articles 85 and Article 86 of Treaty where that Treaty where the decision of the National Court is appealed to the National Court of Final appeal?”.

The Court concluded that:

“It is also clear from the case-law of the Court that the Member States’ duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the Authorities of Member States including, from matters within their jurisdiction, the Courts...

Under the fourth paragraph of Article 189 of the Treaty, a decision adopted by the Commission implementing Articles 85... or Article 86 of the Treaty and to be binding in its entirety upon those to it is addressed.

The Court has held, in paragraph of Delimitis, that in order not to breach the general principle of legal certainty, the National Courts, must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Articles 85.... and 86 of the Treaty.

It is even more important that when National Courts rule on agreements or practices, which are already the subject of Commission they cannot

take decisions running counter to that of the Commission, even if the latter's decision conflicts with the decision given by a National Court of First Instance.”

3.2.3 REGULATION 1 OF 2003:

The above case law is now been codified in Council Regulation (EC) no.1/2003, Article 16 provides:

“ (i) when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with the decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

(ii) When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot decisions which would run counter to the decision adopted by the Commission.”

3.2.4 LIMITATIONS ON THE BINDING EFFECT OF COMMISSION DECISIONS:

The Judgment of the House of Lords in *Crehan v Inntrepreneur*⁵⁹ demonstrates the practical limitations which may arise for litigants in inter-partes litigation seeking to rely on existing decisions of the Commission.

In *Crehan* the Claimant leased two public houses from the Defendant. The leases contained ties which obliged him to buy his beer from an identified company at list prices. The Claimant alleged that his business failed because he could not compete with other public houses which were able to buy cheaper beer. He brought proceedings for damages against the Defendant alleging that his losses had been caused by a tie agreement which was contrary to Article 81 of the EC Treaty.

In a previous case, the EC Commission had held that beer supply agreements of the kind between Mr Crehan and Inntrepreneur infringed Article 81 if two conditions were met and the United Kingdom beer market satisfied the first of those two conditions. In these circumstances, the Claimant argued that the trial Judge should merely address whether or not the second condition was satisfied.

In particular, there had been a decision of the Commission in *Whitbread* which concluded that one of the conditions in *Dilimitis* had been met. On this basis, as set out above, *Crehan* argued that the Court should only examine whether or not the other condition in *Dilimitis* was satisfied. The High Court was not satisfied with this approach and heard evidence. He disagreed with the Commission findings in *Whitbread* and held that the *Dilimitis* condition one was not satisfied.

Lord Hoffman concluded:

“ The correct position is that, when there is no question of a conflict of decisions in the sense which I have discussed, the decision of the Commission is simply evidence properly admissible before the English

⁵⁹ [2006] 4 ALL ER 465

Court which, given the expertise of Commission, may well be regarded by that Court as highly persuasive. As a matter of law, however, it is only part of the evidence which the Court will take into account. If, upon an assessment of all the evidence, the Judge comes to the conclusion the view of the Commission was wrong, I do not see how, consistently with the judicial oath, he can say that as a matter of deference he proposes nevertheless to follow the Commission. Only a rule of law, in the nature of an issue estoppel which obliges him to do so, could produce such result and the Court of Appeal accepted that there was no such rule.”

The Judgment of the House of Lords in *Crehan* makes explicit the ambit of the binding effect of a decision of the Commission. It is only binding between the same party and on the same subject matter.

It might be added that there must be a distinction between a decision of the National Court which does not run “counter” to the decision of the Commission and one which is identical with it. There is a difference between not being inconsistent and being the same. Similarly, as regards subject matter, there must be a risk that a National Court would be invited to hold that a decision of the Commission in respect, for example, of abusive practices is looking at a different time period than the matters at issue in any given inter-partes litigation.

3.2.5 BINDING EFFECT OF NATIONAL COMPETITION AUTHORITY DECISIONS:

3.2.51 RADICAL INNOVATION:

The proposal that National Competition Authorities in other member states, including administrative bodies, would be capable of issuing decisions or determinations which would be binding on a National Competition Authority in Ireland, including the Irish Courts, might appear to be objectionable in principle. It would certainly appear to be, on its face, a radical innovation. For example, the

Hungarian Competition Authority might reach a conclusion in respect of a cartel which has effects in Ireland. The Irish Courts are obliged to follow the Decisions as far as it relates to the same practices and undertakings.

The objection to this is clear. Perhaps it is partly a political concern rather than a legal objection, but there may well be concerns, which in turn might be justified, that an administrative body should be capable of binding a Court. Further, there may be concerns that the National Administrative Body may not be as well resourced as a National Court and there may be concerns that the rights of the Defence may not be vindicated as well in a National Administrative Body as opposed to in a Court. In a Court, of course, the Judge is entirely neutral where as in an Administrative Body, the Body itself is a collector of evidence, prosecutor, fact finder and decision maker.

However, it may well be that this proposal is less radical than it seems. We need to remind ourselves that foreign Judgments are directly enforceable in Irish Courts pursuant to Regulation 44/2001.

3.2.5.2 A DECISION OF A UNITED KINGDOM COURT:

Let us assume a concrete example. There is a cartel between all suppliers of shampoo selling in the United Kingdom and Ireland. The cartel arrangements provide that bottles of shampoo of a certain size are not to be sold below €5.00 and with appropriate pricing for different size bottles. The cartel is exposed and the Office of Fair Trading in the United Kingdom brings proceedings in the English Courts against the participants in the cartel.

It seems to me, if the law of England and Wales is the same as the law in Ireland it would be open to a National Competition Authority such as the Office of Fair Trading to bring proceedings in its own Courts in respect of infringements of competition law perpetrated outside the U.K.

Assuming that the English law is the same, it is conceivable that there could be findings by English Court to the effect that suppliers in Ireland and the U.K. collectively infringe Competition Law.

Such a decision could be considered to be a decision of a National Competition Authority and under the White Paper proposals would be binding on an Irish Court provided the subject matter and the parties were the same.

In these circumstances, we might envisage the possibility that a supermarket buyer or buyers could seek to recover damages against a distributor domiciled in Ireland. The Irish Courts would have jurisdiction on the basis of Article 2 of Regulation 44/2001 on the jurisdiction of courts and enforcement of judgements. Alternatively, it might be that the Irish Courts would have jurisdiction, on a special jurisdiction basis, by virtue either of Article 5 (1) relating to contracts or Article 5 (3) relating to Torts insofar as the harmful event may have occurred in Ireland or on the basis that either the cartel was operated out of Ireland, (if that was the case) or alternatively that effects were sustained in Ireland. Thereafter other Defendants could be included in the Irish proceedings on the basis of being necessary and related parties pursuant to Article 6 of the Convention.

In those circumstances, and if the White Paper proposals were implemented, it seems to me that none of the Defendant Companies, if they were all the subject matter of the U.K. proceedings could deny either the fact of the cartel or the infringement of Article 81. An Irish Court would not be entitled to take a decision running counter to the decision of the U.K. Court.

In fact, it would appear that, apart from arrangements between Competition Authorities regarding foregoing cases, it would be open to the Irish Competition Authority to bring proceedings in Ireland to establish a breach of Competition Law which had no effect whatsoever in Ireland.

3.2.5.3 HOPE:

In passing, we might observe that there is necessarily a distinction between a Decision which is “running counter” and an “identical Decision”. This might certainly be an area for hope for a Defendant.

4. NATURE AND SCOPE OF RECOVERABLE DAMAGES:

4.1 PROPOSALS IN THE WHITE PAPER

In its White Paper, the Commission identifies the present State of EU Case Law in relation to the nature and scope of recoverable damages for an infringement of EU Competition Law, relying on the Judgment of the Court of Justice in *Manfredi*⁶⁰

Arising out of what the Commission says is the present state of EU Case Law, it makes two proposals. First, it proposes there should be a community legislative instrument which could set out the present legal condition regarding the scope of damages that victims of anti-trust infringements can recover; a codification proposal. Second to facilitate the calculation of damages the Commission proposes that it should draw up a framework of guidelines for the quantification of damages by means of approximate methods of calculation or simplified rules on estimating loss and guidelines on the calculation of damages.

4.2 THE NATURE AND SCOPE OF RECOVERABLE DAMAGES IN CLAIMS FOR INFRINGEMENT OF EU COMPETITION LAW:

As set out above the leading case is *Manfredi*⁶¹ the Italian Competition Authority declared as anti-competitive and unlawful an agreement between a number of Italian Insurance Companies in respect of compulsory motor vehicle insurance. The agreement declared to be unlawful permitted those Insurance Companies to

⁶⁰ [2006] ECR I-6619

⁶¹ Op. Cit

increase the price of their premiums. Mr Manfredi and others sought the repayment of the increase to them.

The investigation carried out by the Italian Competition Authority revealed that the average price in the market place was 20% higher than would have been the case if there had not been anticompetitive practices. In the application for damages case the National Court took the view that the anticompetitive agreement infringed both National Law and Article 81. Issues regarding limitation period, costs, and the amount of damages available pursuant to National Law all arose in the proceedings. Two of the questions submitted to the Court of Justice pursuant to Article 234 were in the following terms:

“2. Is Article 1 EC to be interpreted as meaning that it entitles third parties who have the relevant legal interest to rely on the invalidity of an agreement or practice prohibited by that Community provision and claim damages for the harm suffered where there is a causal relationship between the agreement or the concerted practice and the harm?”

.....

4. Is Article 81 EC to be interpreted as meaning where the National Court sees that the damages that can be awarded on the basis of National Law are in any event lower than the economic advantage gained by the infringing party to the prohibited agreement or concerted practice, it should also award of its own motion punitive damages to the injured third party, making the compensatable amount higher than the advantage gained by the infringing party in order to deter the adoption of agreements or concerted practice prohibited under Article 81 EC,”

As regards the availability of compensation for a loss arising out of an anti-competitive agreement, the Court set out its well established position:

“...Article 81(1) EC produces direct effects in relations between individuals and creates rights for the individuals concerned which the National Courts must safeguard.

59. It follows that any individual can rely on a breach of Article 81 EC before an National Court (see Courage and Crehan...) and therefore rely on the invalidity of an agreement or practice prohibited under that Article.

60. Next, as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81 (1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.....”

However the Court continued to describe the nature and scope of the recoverable damages at the end of his Judgment:

“92. As to the award of damages and the possibility of an award of punitive damages, in the absence of Community Rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed.

In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community Competition Rules, if such damages may be awarded pursuant to similar actions founded on domestic law.....

94. However, it is well settled case-law that Community Law does not prevent National Courts from taking steps to ensure that the protection of

the rights guaranteed by Community Law does not entail the unjust enrichment of those who enjoy them....

95. It follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest.

96. Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community Law, since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible

As to the payment of interest the Court pointed out in paragraph 31 of Case C271/ 91 Marshall [1993] ECR I-4367 that an award made in accordance with the applicable national rules constitutes an essential component of compensation.”

As can be seen from the above extracts from the Judgment, it is clear that the White Paper does not fully reflect the full scope of the damages that may be recoverable for a National Court for an infringement of EU Competition Law. Not only is there a right to damages and a right to claim in respect of loss of profits and interest, where appropriate, but also insofar as National Competition Law provides for exemplary or punitive damages, then such exemplary or punitive damages should similarly be made available in respect of infringements of EU Competition Law, save to the extent that it may give rise to an unjust enrichment of a Claimant.

4.3 THE COMPETITION ACT 2002:

Under the Competition Act 2002, an aggrieved person may bring a claim for damages, including exemplary damages, arising out of an infringement of either

Section 4 or Section 5 of the Act. The right to damages, including exemplary damages is provided for. However, it then becomes a matter of statutory interpretation, given the absence of the definition of damages or any indications to the scope of recoverable damages, as to what is the nature, scope and extent of recoverable damages, as a matter of domestic Irish law, for an infringement of the Competition Act.

In accordance with paragraph 93 of the *Manfredi* Judgement, it would appear that the existence of exemplary damages as part of the 2002 Act would of itself provide a basis for exemplary or punitive damages for infringements of EU law .

While an analysis of the circumstances in which the Irish Courts are willing to contemplate awards of damages in the nature of aggravated or exemplary or punitive damages is beyond the scope of this paper, it might nonetheless be noted that the availability of such damages, as a matter of domestic Irish law, is very limited and the Courts are in principle and in practice reluctant to award damages which might amount to over-compensation of a Plaintiff.

4.4 AGGRAVATED OR EXEMPLARY DAMAGES

There is a jurisdiction to amend pleadings in the course of a Trial to include a claim for aggravated or exemplary damages. In *W. (F.) v BBC*⁶² the Plaintiff claimed damages for personal injury arising out of a broadcast. It emerged that a Psychologist retained by the Defendant had been guilty of misconduct and gross negligence in his examination of the Plaintiff. Barr J acceded to an Application to amend the Statement of Claim by including a claim for aggravated damages. Aggravated damages were awarded.

⁶² 25th March 1999

Similarly, in *Conway v INTO*⁶³ Murray C.J. referring to *Broom v Cassell & Co Ltd*⁶⁴ identified an exception to the general rule that a party should know the case being made against it. The exception was that “for example, in relation to aggravated damages in respect of matters which might only arise at the Trial or at the stage of the preliminary proceedings subsequent to the filing of the Statement of Claim”.

In *Philip v Ryan & Others*⁶⁵ aggravated damages were awarded to the Plaintiff on foot of their conduct before and during the Trial. The Doctor told (according to the Supreme Court) his legal advisors about the matter in advance but the Plaintiff was not told (nor his legal advisors).

The availability of aggravated and/or exemplary damages is set out in *Connolly & Short v Commissioner of Garda Siochana*⁶⁶

4.5 THE NATURE AND EXTENT OF RECOVERABLE DAMAGES ARISING FROM THE COMMISSION OF A CIVIL WRONG:

The leading Irish text books on the law of Torts are curiously silent in relation to the nature and scope of recoverable damages for what might be termed as commercial losses. *McMahon and Binchy on the Law of Torts* and *Healy on The Principles of Irish Tort Law* are, perhaps understandably focused on the abundant and diverse aspects of the damages available for personal injury for individuals. Healy does briefly treat of the remedy of an account of profits but does not make any excursus into what kind of damages or what headings of damages might be available for particular Torts. In passing, it might be noted that one of the early paragraphs in *McMahon & Binchy* appears to draw a distinction between the nature and the scope of damages available arising from the Commission of Tort

⁶³ 1991

⁶⁴ [1972] AC 1027

⁶⁵ [2004] IESC 105

⁶⁶ Supreme Court 2007

and the nature and scope of damages available in respect of a breach of contract and asserts that “loss of profit” damages are recoverable in the latter category but not in the former category.

4.6 IRISH COURTS DO AWARD DAMAGES IN RESPECT OF LOSS OF PROFITS ARISING FROM THE COMMISSION OF TORTS:

A painstaking review of Irish Case law in relation to what kinds of damages are awarded in respect of particular Torts is far beyond the scope of this paper. Similarly, an analysis of existing case law or practices, from a stand point of legal principle, is also beyond the scope of this paper. Having said that, I would assert, with some confidence that practitioners and Courts anticipate and make respectively Court awards of damages to include loss of profits in respect of Torts as diverse as breach of confidence, negligent misstatement and/or misrepresentation, fraudulent misrepresentation, inducing breach of contract, trespass to goods and/or property and in respect of negligently inflicted injury to a business by way of nuisance.

For example, in *William Egan Limited v John Sisk*⁶⁷ the Court considered a claim in negligence by a Plaintiff against a Defendant. The facts of the case were that the Plaintiff’s warehouse which was full of sales brochures was flooded and the brochures were destroyed. As a result of the prepared glossy brochures were a complete right off, he was unable to get replacement brochures printed in time for the Christmas market, he had to refund customers, he lost goodwill arising from dissatisfied customers and he incurred interest charges.

The Court held that in circumstances such as these, where the goods could not simply be replaced, then the Plaintiff was entitled to compensation in respect of the economic loss including loss of profit. There does not appear to be any legal Authority, cited one way or the other in the Judgment but the Court had no hesitation in finding that it had jurisdiction to make an award of damages

⁶⁷ [1985] IEHC 151 Judgment of Ms Justice Carroll delivered 6th May 1985

including loss of profits in respect of damage occasioned to a Plaintiff by reason of negligence.

The only limiting factor, as far as the Court was concerned, was whether the damage occasioned to the Plaintiff, including the loss of profits, were either too remote or whether they were, on the contrary, foreseeable. The Court characterised the issue thus:

“So the question is whether the damage flowing from the loss of brochures was foreseeable. The Defendants say no one could have anticipated that the loss of brochures would have resulted in such a large claim for loss of profits and none could have foreseen that the Plaintiff would not have succeeded in getting he brochures reprinted within the timescale necessary to exploit the Christmas market....

All of these consequences could have been foreseen by a person with the knowledge of the mail order business with the loss of the brochures was known. It seems to me that the Doctrine of Foreseeability does not extend to expect a Defendant to foresee the type of goods that which might be in a warehouse. If a Defendant through its negligence injures property in a warehouse, he must take the responsibility for damaging whatever goods are there. They might be expensive furs, old masters, priceless antiques first editions etc. It is also foreseeable because a warehouse is part of the world of commerce, there will be economic loss and possible loss of profits. If the goods can be replaced at cost, so much the better for the Defendant; if the goods cannot be replaced, then the economic loss, including loss of profits, is foreseeable.”

Similarly, there are available English precedents which proceed on the basis that damages, including loss of profits, are recoverable arising from negligence. For

example, in *Watermoor Meat Supply Ltd v Walker*⁶⁸ the Court dealt with a damages claim, including a loss of profit claim in respect of a fire to the Plaintiff's premises, arising from the Defendant's negligence, such negligence having been admitted. However, in *Oats v Pitman & Company*⁶⁹ the Court of Appeal considered a negligent misstatement/ misrepresentation claim whereby the Estate Agents had represented to the Plaintiffs that the property could be let as holiday lettings. The Court accepted that it could award damages on foot of what it described as the "diminution in value rule" but was not willing to make an award of damages in respect of loss of profits. In this regard they relied on the Judgment of Lord Hoffman in *Banque Bruxelles*⁷⁰ where Lord Hoffman held:

"The measure of damages in an action for breach of a duty to take care to provide accurate information must also be distinguished from the measure of damages for breach of a warranty that the information is accurate. In the case of a breach of a duty of care, the measure of damages is the loss attributable to the inaccuracy of the information which the Plaintiff has suffered by reason of having entered into the transaction on the assumption that the information was correct. One therefore compares the loss he has actually suffered with what his position would have been if he had not entered into the transaction and asks what happens to this loss is attributable to the inaccuracy of the information. In a case of a warranty, one compares the Plaintiff's position as a result of entering into the transaction with what it would have been if the information had been accurate. Both measures are concerned with the consequences of the inaccuracy of the information but that Tort measure is the extent to which the Plaintiff is worse off because the information was wrong where as the warranty measure is the extent to which he would have been better off if the information has been right".

4.7 DAMAGES AVAILABLE IN RESPECT OF BREACH OF CONTRACT:

⁶⁸ Judgment of Mackay J dated 19th October 2007

⁶⁹ 7th May 1998

⁷⁰ [1997] AC 191

4.7.1 INTRODUCTION

The theoretical basis for a difference between the damages which ought to be recoverable in a Tort claim and the damages which ought to be recoverable in a breach of contract claim is that Tort damages are designed to compensate for the loss occasioned to the injured party where as damages for breach of contract are designed to compensate the claimant for the loss of his contract and to ensure that he is no worse off than if the contract had been performed. This is expressed in *Brennan & Hennessey in Forensic Accounting*⁷¹:

“The Plaintiff in seeking to recover for the loss of a commercial opportunity is entitled to have the damage assessed by reference to the chance that the opportunity would otherwise have been successfully exploited had the wrong not been committed. Theoretically, this differs from the objective in contract actions in which a Plaintiff may recover “expectation losses” so as to put him in the position in which he would have found himself had the contract been performed.”

The purpose of an award of damages for breach of contract is that such an award is to put the Plaintiff in the same situation as if the contract had been performed. In the words of Parke B⁷² :

“ The rule of the Common Law is that, where a party sustains a loss by reason of a breach of the contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages as if the contract had been performed.”

This principle has been endorsed in Irish case Law. For example, in *Kinlan v Ulster Bank*⁷³ Kennedy C.J. stated that:

⁷¹ Para 1706

⁷² *Robinson v Harman* (1848) 1 EX 850 at 855

⁷³ [1928] IR 171

“The measure of damages is reasonable compensation for non-performance of the contract”.

4.7.2 SCOPE OF AWARD ON DAMAGES:

The extent of damages which may be recovered by a successful Plaintiff has been a matter of much debate by the English and Irish Courts over approximately a century and a half. In *Hadley v Baxendale*⁷⁴ the Court held, regarding an aspect of recoverable damages that the Plaintiff might recover damages that may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it, can be recovered.

The facts of *Victoria Laundry v Newman*⁷⁵ are instructive. In that case, the Plaintiffs operated a laundry. They wanted to expand. They ordered a boiler. They purchased a boiler from the Defendant Company and it was agreed the boiler would be delivered on a particular date. In fact the boiler was not delivered until several months later. The Defendant knew that the Plaintiffs were operating a laundry and they knew that the boiler was to have been put to immediate use.

The Plaintiff sought loss of profits arising from an intended expansion of the business in the relevant period of months and also loss of contracts which the Plaintiffs claim would have been accepted. In those circumstances, the English Court of Appeal held *inter alia* as follows:

“..... (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at that time of the contract reasonably foreseeable as liable to result from the breach.

⁷⁴ [1854] 9 EX 341

⁷⁵ [1949] 2 KB 528

(3) *What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events by the party who later commits the breach.*

(4) *For this purpose, knowledge “possessed” is of two kinds- one imputed the other actual. Everyone as a reasonable person is taken to know the “ordinary course of things” and consequently what loss is liable to result from a breach in that ordinary course. This is the subject matter of the “first rule” in Hadley v Baxendale, but to this knowledge which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the “ordinary course of things” of such a kind that breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the “second rule” so as to make additional loss also recoverable.*

(5) *In order to make the contract breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate, not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that this loss in question was liable to result.....*

(6) *Nor, finally, to make a particular loss recoverable, may it need to be proved that on a given state of knowledge the Defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough that if he could foresee it was likely so to result. It is indeed enough.... if the loss (or some factor without which it would not have occurred) is a “serious possibility” or a real danger”. For short we have used the word “liable” to result. Possibly the colloquialism “on the cards” indicates the shaded meaning with some approach to accuracy”.*

As a matter of result, the Plaintiffs were entitled to recover for the loss of use of the boiler but not for the loss of contracts. It was held that the Defendants did not know of the possibility of such contracts.

4.7.3 LOSS OF BARGAIN AND CONSEQUENTIAL LOSS

The claim for damages for breach of contract endeavours to compensate the Plaintiff in the first place for “loss of bargain”. The Plaintiff’s financial position as a result of a breach of contract has to be contrasted with what would have been its position “but for” the breach of contract.

Further, a “head of damages” included in breach of contract claim is one for “consequential loss”. In *Superwood Holdings Plc v Sun Alliance*⁷⁶ the Supreme Court did not consider it necessary to define the term consequential loss and dealt with it in its ordinary and natural meaning. Consequential losses can be taken to meet those losses resulting from the event in question, other than such losses as flow directly from the event.

4.8 MEASURE OF DAMAGES IN TORT:

The general contours of recoverable damages for a Tort have been described authoritatively in *Halsbury’s Laws of England*⁷⁷. Foreseeability is the key limiting factor:

“In the Torts of negligence and nuisance(whether or not negligence is an ingredient in the nuisance), the wrongdoer is only responsible for any type of damage which should have been foreseen by reasonable person as being something which there was a real risk, even though the risk would only actually occur only in very exceptional circumstances, or in the most

⁷⁶ [1995] 3 IR 303

⁷⁷ Damages Vol 12 (1) Measure of Damages on Tort General Principles para 852

unusual case, unless the risk was so small that the reasonable person would feel justified in neglecting it or pushing it aside as far-fetched. The magnitude of the risk, namely the likelihood of occurrence and the gravity of potential results must be weighed against the expense of eliminating it.

The availability of damages in respect of loss of profits first arose in respect of damaged chattels such as vessels. The Plaintiff may be entitled to recovery in respect of the profits that would have been earned but for the chattel not being available during a reasonable period of repair. Alternatively, some for the reasonable hire of a substitute vessel may be allowed and damages may be recoverable not only in respect of existing contracts but also future contracts which cannot be fulfilled.⁷⁸

In respect of damages for nuisance, it has been established that loss of profits or other consequential expenses of the wrongful act are recoverable⁷⁹.

There is no over-arching theory of recoverable damages in respect of torts. The availability of damages and their nature and scope depends on the nature of the individual Tort and the limiting factors developed by the Courts. An exhaustive delineation of the circumstances in which loss of profits may be included in an award of damages in respect of a given Tort is beyond the scope of this paper.

4.9 POWER ON COMPETITION LAW:

In the first edition of *'Power on Competition Law in Ireland'*, the author was unable to cite any Authority to establish the proposition that the Irish Courts should award damages for an infringement of Article 18 and/or Article 82. He was unable either to describe the nature and scope of recoverable damages arising in respect of the Competition Act.

⁷⁸ The Soya [1956] 2 ALL ER 393; The Specific Concord [1961] 1 ALL ER 106; World Beauty [1970] P 144; Naxos [1972] Lloyd's Rep 149.

⁷⁹ Hunter v Canary Wharf Ltd [1977] 2 ALL ER 426

4.10 APPROACH OF THE IRISH COURTS TO DAMAGES ARISING OUT OF INFRINGEMENTS OF THE COMPETITION ACT AND/OR EU COMPETITION LAW:

The leading Irish Authority is the Judgment of the Supreme Court in *Donovan v Marshall (Killarney) Limited*⁸⁰.

In this case, the Plaintiffs were electrical contractors who declined to participate in the self regulatory regime called RECI in respect of the provision of electrical contracting services. The Plaintiffs alleged that the RECI scheme together with the strength of the ESB in the market place amounted to an abuse of the dominant position and a breach of the Competition Act 1991. In the Appeal to the Supreme Court, the Appellants argued that the definition of the market place by the high Court was incorrect and also that the Plaintiffs should not, in any event, be awarded damages. As regards the award of damages the Supreme Court held:

“The Court has jurisdiction to award damages in an action probably brought under Section 6 of the Competition Act. This means it must award damages in an appropriate case. Its function is to compensate inter-partes for damage suffered as a result of the abuse complained of. It is not concerned with the motives or the intentions of the party in default unless the question of exemplary damages arises. It awards damages on the same basis as it would award them in a case of any Tort or Civil wrong. In the present case the damages recoverable are damages for the loss of the Plaintiffs in respect of the abuse complained of committed by the ESB in the period from 1st September 1992 until 2nd November 1992.”

The case of *Callinan v VHI* concerned the relationship between a private hospital in Mullingar and the VHI.

The next relevant case *Chanelle Veterinary Ltd v Pfizer (Ireland) Limited*. The claim advanced against *Chanelle* concerned the “d-listing” of a wholesale

⁸⁰ [1998] WJSC –SC 1287

distributor by a multi national pharmaceutical company. Chanelle maintained that its business would be damaged if it were not able to access the full range of Pfizer products. Chanelle argued that it should be appointed a distributor on the same terms as the other appointed wholesale distributors. The claim was rejected with the High Court holding that the economic evidence did not establish that a separate market existed for particular pharmaceutical market.

The case was dismissed on that basis.

4.11 POSITION IN THE UNITED KINGDOM:

In *Courage Limited v Crehan*⁸¹ the Court of Justice held at paragraphs 26 and 29 respectively:

“The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”.

“However, in the absence of Community Rules governing the matter, it is for the domestic legal system of each Member State to designate the Courts and Tribunals having jurisdiction and to lay down the detailed procedure and rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and do they not render it practicably impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).”

The approach of the English Courts has been to identify the equivalent domestic action as being that of a breach of statutory duty see: *Garden Cottage Foods*

⁸¹ C-453 99 [2002] QP 507

*Limited v Milk Marketing Board*⁸² and *Sempra Metals Limited v England Revenue*⁸³. As regards effectiveness, the Court of Appeal has held that a Claimant may be entitled to a broader spectrum of loss than would be awarded under an equivalent domestic statute see; *Crehan v Inntrepreneur Pub Company*⁸⁴.

In *Devenish Nutrition Limited v Sanofi-Aventis S.R.* the Court proceeded on the principle that compensatory damages were available for a breach of EU Competition law:

*“It is common ground at least for the purpose of this trial of preliminary issues, that the Claimants are entitled to compensatory damages.”*⁸⁵

4.12 CONCLUSION IN RESPECT OF AVAILABILITY OF LOSS OF PROFITS:

Given the Judgment of the European Court of Justice in *Manfredi*, it would appear that many of the uncertainties which may have existed in relation to the recoverability of damages and their scope for infringements of competition law have now been estimated. In these circumstances, it might well be that the broad and confident assertions in *Brennan* and *Hennessy on Forensic Accounting* regarding the recoverability of damages for loss, including for loss of profits are sustainable:

“Businesses can incur economic damage as a result of actions by other parties. If the damage can be shown to have been caused by the wrongful conduct of another party, such damages may be recoverable by the injured party. Damages comprise the compensation in money for the detriment suffered from the unlawful act or omission of another. Recoverable economic damages usually consist of the profits lost to the damaged

⁸² [1984] AC 130

⁸³ [2007] 3WLR 354

⁸⁴ [2004] 3 EGLR 128

⁸⁵ P 646 of Judgment

*business. Damages are the discounted sum of projected profits but for the alleged action, minus projected profits including the effects of the action.*⁸⁶

Regarding the availability of damages in respect of loss of profits, it is clear from the Competition Act that damages are recoverable in respect of breach of the Act. Such a breach would be a breach of statutory duty. It seems to me, now by analogy with EU Case Law and given the fairly generous reasoning of the Irish Courts in respect of the availability of damages for other Torts, that damages for breach of the Competition Act must include damages for loss of profit. Similarly, it follows that the Irish Courts must recognise an entitlement to damages for an infringement of Articles 81 and 82 and it is clear, if not otherwise, as a result of *Manfredi* that these damages now may include damages in respect of loss of profits and interest.

What is not entirely clear is now those damages might be calculated and what other limiting factors such as foreseeability/remoteness and/or duty to mitigate might effect the scope of recoverable damages.

4.13 AVAILABILITY OF INTEREST:

Under the Debtors (Ireland) Act, 1840 the High Court can award interest on damages, apart from any contractual interest. In respect of a breach of contract, the question of interest between the date of accrual of the cause of action and the date of judgment is at the discretion of the Court.

This is provided for by the Courts Act, 1981⁸⁷ which provides:

“ Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages) the judge concerned may, if he thinks fit, also order the payment by the person

⁸⁶ Para 1707

⁸⁷ Section 22(1)

of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840 on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the Judgment.”

In general the Courts endeavour to use this statutory power to provide appropriate compensation for a successful Plaintiff where the award of damages would not otherwise be sufficient. However, and conversely, it would appear that a Court, if it is persuaded that it has fully compensated a Plaintiff, either on the basis of damages simpliciter or contractual interest, then it does not operate any “topping up” exercise. For example in *Bob Bushell Limited v Luxel Varese SAS*⁸⁸ O’Sullivan J in respect of a breach of contract to supply the Plaintiff with light fixtures held as follows:

“The award of interest on any sum appears to be at the discretion of the Court. After set-off the question arises whether the balance in favour of the Plaintiff should carry interest. In my view it should not. The amount claimable by the Plaintiff is an amount in general damages that must be subject to some degree of estimation. I consider that interest should run from the date of the decree only.”

It would appear that the Court declined to award interest because the Plaintiff had been adequately and properly compensated.

The rate of which interest can be awarded by the Court under Section 22 of the Courts Act 1981 is specified as the rate per annum specified for the time being for the purposes of Section 26 of the Debtors (Ireland) Act. This rate was fixed at 11% per annum by Section 19 of the Courts Act 1981 and changed by SI 1989 to 8% per annum.

⁸⁸ Unreported High Court 20th February 1998

Where a contract or other arrangement applies for interest in the circumstances given rise to the dispute, the Court Act 1981 precludes the Court from making an award of interest.

In addition to damages for loss and profits, interest is awarded to compensate Plaintiffs for the loss of the use of those profits. In *Amstrad v Seagate Technology Inc*⁸⁹ it was successfully argued that interest should be based on the after tax loss of profits.

4.14 PENALTY DAMAGES:

Parties to a contract sometimes agree that in the event of a breach of contract a specified sum of money might be payable. Such clauses are only enforceable if they do not amount to a penalty. We believe that the principles are also a test which the clauses in respect of contractual interest would have to pass before they can be enforced.

It seems to us that, given the purposes of an award of damages and given the rules in respect of penalty interest, that any damages and any award in respect of interest –contractual interest – must reflect the compensatory nature of damages and must not result in gross overcompensation or an unjust enrichment of the Plaintiffs. The principle had been set out in respect of penalty clauses in *Dunlop v New Garage & Motor Co*⁹⁰ where Lord Dunedin held:

“(a) The sum will be held to be a penalty clause if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that conceivably be proved to have followed from the breach.

(b) The sum will be a penalty if the breach consists only in paying a sum of money, the sum stipulated being greater than the sum which ought to have been paid.

⁸⁹ [1997] 86 BL R 34

⁹⁰ [1915] AC 79

(c) There is a presumption that a clause is penal when a single lump sum is payable on the occurrence of one or more or all of several events, the events occasioning varying degrees of loss.

(d) If the consequence of breach are difficult to estimate in financial terms this, far from being an obstacle to the validity of the clause , will point in favour of upholding it, the Courts taking the view that it is better for the parties themselves to estimate the damages that will result.”

Barron J in the Supreme Court in *O’Donnell v Truck & Machinery Sales*⁹¹ approved of the above test.

4.15 CALCULATION OF DAMAGES:

4.16 4.15.1 INTRODUCTION:

The appropriate approach to the calculation of loss of profits involves relatively sophisticated and potentially difficult calculations and accounting judgments regarding the estimation of turnover, the loss of turnover, the decline in variable costs arising from loss of turnover, the attribution of costs as between variable costs and fixed costs and the projection of what are contended to be “but for” profits into the future. The focus on turnover and the requirement to take into account variable costs and fixed overheads has been set out in *Brennan and Hennessy on Forensic Accounting*⁹²:

“Reduction of turnover is a reliable index for measuring the proportionate effect an insured on earnings. Loss of turnover is not the same as loss of profits. When turnover falls, variable production costs will also fall. The loss to be compensated therefore should only take into account indirect, fixed overheads (e.g. factory rent, factory manager’s salary, depreciation of production machinery) and the related loss of net profit

⁹¹ [1998] 4 IR 191 at 204

⁹² Para 9 -73

An alternative (and more logical) way of approaching the calculation is the turnover less variable costs approach is as follows:

Loss of profit equals fallen turnover minus variable costs”

4.15.2 THE PERIOD TO BE TAKEN INTO ACCOUNT:

The period in to which loss of profits should be calculated in to the future may be difficult. The Courts are conscious that as projections into the future are made, there is greater uncertainty and speculation in any such estimation according to *Brennan and Hennessy in Forensic Accounting*⁹³:

“The further into the future one forecasts, the greater is the uncertainty surrounding the forecast. Accordingly, Courts may not award damages for the full period of the contract. As a result, losses will only be recoverable within the time period to in which they can be shown with a reasonable certainty. In the United States case, the Court ruled that, as a general principle “loss of future profits are deemed to speculative to allow a recovery for their loss unless the Plaintiff presents sufficient proof to bring the issue outside the realm of conjecture, speculation or opinion on unfounded on definite facts.””

4.15.3 COMPUTING LOSS OF PROFIT:

According to *Brennan and Hennessy* the computation of lost profits involves four steps. First, it is necessary to estimate “but for” revenue. Second, it is necessary to estimate associated costs. Third, it is necessary to examine fixed costs and further, one computes loss of profits.

⁹³ Para 17-10

According to *Brennan and Hennessy* the relevant equation is the following⁹⁴:

“The computation of damages can be expressed as follows:

Lost profits equal loss of sales revenue minus savings in variable costs due to reduced output plus extra costs due to the injury.”

There is a scattering of support for these approaches in Irish and U.K. case law. For example, in *William Egan Ltd v John Sisk*⁹⁵ Carroll J deducted 10% from the net profit so as to take account of normal business risks in the following terms:

“That figure takes no account of the vicissitudes of business. No business venture is completely safe and predictable e.g. an assumption I am not prepared to make is that the Waterford Glass in stock would have corresponded exactly with the orders from customers. A good business man would know his market but not to the extent of forecasting with 100% accuracy what the customers are going to buy. There were bound to be no orders for some stock and over ordering for other. I propose to deduct 10% of the net profit in respect of normal business risks which would leave a total of IR£140,307.00.”

Similarly, in *Irish Telephone Rentals v ICS Building Society*⁹⁶ Costello J followed some of the principles expounded in *Brennan and Hennessy*:

“The Plaintiff has not produced its profit and loss accounts so I do not know what it chose. But I am entitled to apply the knowledge of financial affairs which is available to every reader of the daily press from which companies’ as a percentage of their turnover is shown for an extensive range of different class of business. These can of course, vary widely. In the retail trade a net profit 10% of turnover is an average figure. In

⁹⁴ Para 17-15

⁹⁵ [1985] WJSC-HC

⁹⁶ [1992] 2 IR 525

manufacturing companies it can, may be, considerably less or considerably more. A net profit of 71% of turnover would be a staggeringly large one in any business and in the absence of proof that this is what the Plaintiff earned I am driven to the conclusion that the estimate of loss contained in Clause 11 is not a genuine pre-estimate but is a penalty.”

In *Hickey & Company v Roches Stores (Dublin) Ltd*⁹⁷ Finlay P, the President of the High Court held:

“With regard to the dispute which arose as to the proper method of ascertaining from a gross profit the net profit lost to the Plaintiff during this period. I have come to the conclusion that with qualifications and amendments the incremental costs saved method of approach presented on behalf of the Plaintiffs is more likely to yield a just result. I am not satisfied that the allowance made on behalf of the Defendants for an increase in what might be the overall or average expected net profit percentage figure to make allowance firstly for the fact that these were the top of the sales and therefore clearly running at higher net profit figure and secondly, for the fact that the Plaintiffs were not only retailers but wholesalers as well as sufficient. Equally, I am not satisfied that there is any satisfactory method established before me of calculating or estimating any other percentage net profit figure with regard to these particular additional sales lost.”

Similarly, in *Watermoor Meat Supply Ltd*⁹⁸ the Court presented a method of calculation of profit:

⁹⁷ 7th May 1980

⁹⁸ High Court Queens bench division 19th October 2007

“so the two sides put their calculations of loss of profit – which is agreed to be, for these purposes, gross profit margin(the difference between the sales achieved and the cost of those sales) – in this way. They start form a common base figure, which is agreed, as to the pre-fire turnover of £170,464.00. They agreed that the method should be a top down method which requires:

- (i) An estimation of the lost turnover*
- (ii) An assessment of the likely gross profit margin each year*
- (iii) A deduction for any saving achieved by virtue of the fact of the closure;*
- (iv) The addition of any other consequential costs attributable to it.”*

4.15.4 CALCULATION OF “BUT FOR” REVENUE

*Brennan and Hennessy deals with this as follows*⁹⁹:

“When a company has been damaged or forced out of business, the most reasonable measure of damages is generally lost profit. Lost profits claims typically rest on a comparison between the injured firm’s “but for situation” and its actual situation. The “but for” situation is a hypothetical construction of the facts as they would exist but for the wrongful conduct, a scenario based on the premise that the wrongful conduct never occurred. The difference between the “but for” and the actual is a measure of the firm’s loss – the extent to which the firm is worse off because of the wrongful conduct occurred...”

Determining the revenue that would have been received had the damage not occurred can be difficult. There are a number of methods the Plaintiff can employ to prove lost profits. Three distinctly economic loss models

⁹⁹ 17-32

can be used in varying types of commercial litigation cases. Lost profits are generally calculated using one or more of the following methods:

- (i) “Before and after” approach –business profits before, during and after the Defendant’s alleged act are examined to show specific loss suffered by the Plaintiff.*
- (ii) “Yardstick” approach –financial information about companies similar to the Plaintiff is obtained and used as a yardstick to estimate the profits the Plaintiff would have earned but for the wrong perpetrated by the Defendants.*
- (iii) “Market Model” approach – a model to project lost profits is developed using assumptions arising for the study of the industry and the Plaintiff’s operating results of the context of the industry.”*

4.16 CONCLUSION

The calculation of lost profits is likely to be a complicated and time consuming exercise in any litigation. Such evidence, given the expertise required, would be expensive. It would also require Discovery of underlying documentation. While codification and guidelines may assist, it is difficult to see how a proper forensic accounting exercise, including a real engagement on these issues before Court, can be avoided.

It might be that simplified rules for the calculation of damages might offer some agreed ground rules for the calculation of damages for lost profits and might avoid some debate over assumptions or methodologies.

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