



THE HIGH COURT

2019 No. 1000 P.

BETWEEN

DAVID WHITE

PLAINTIFF

AND

ARRABAWN CO-OPERATIVE SOCIETY LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 26 May 2021**

**INTRODUCTION**

1. This judgment is delivered in respect of an application for discovery in personal injuries proceedings. The proceedings arise out of an incident at the injured party's workplace. The incident is the subject of a criminal prosecution pending before the Circuit Criminal Court. This prosecution has been taken against the defendant company by the Health and Safety Authority.
2. The defendant company relies on the pending criminal prosecution as a reason to avoid making any discovery in these personal injuries proceedings. The defendant company invokes the privilege against self-incrimination in general terms, and submits that it is entitled to resist discovery without providing any explanation as to how it is said that the

individual documents are privileged. It is further submitted that this court cannot look behind the claim of privilege and cannot adjudicate upon same.

### **PROCEDURAL HISTORY**

3. These proceedings arise out of an accident said to have occurred on 28 April 2017. In brief outline, the injured party had been employed as an operative and shift supervisor at the defendant company's milk powder plant in Nenagh, Co. Tipperary. It is pleaded that the injured party received serious burns while in the process of removing a filter from a pipeline carrying very hot liquid milk. It is alleged that the filter cap on a parallel pipe had blown off and that hot milk from the pipe sprayed onto the injured party.
4. The pleas of negligence include *inter alia* an allegation that the defendant company (i) had failed to provide the injured party with adequate safety and health training; (ii) had failed to heed earlier warnings that the rubber around the filter cap or clamp required to be monitored more closely and/or replaced more frequently; and (iii) had failed to heed warnings that the shut-off valves were malfunctioning and appeared to be closed when they were not.
5. The personal injuries defence delivered on behalf of the company amounts to no more than a traverse of the injured party's claim. The only factual matters which are not denied are the descriptions and addresses of the parties; the plaintiff's date of birth and personal public service number, i.e. PPS number; and the fact that the Personal Injuries Assessment Board issued an authorisation to institute proceedings. It is expressly pleaded that the injured party was "entirely the author of his own misfortune" or was otherwise guilty of contributory negligence. These pleas are not particularised, notwithstanding the obligation to do so under the Civil Liability and Courts Act 2004.

I will return (at paragraph 35 below) to consider the implications of this perfunctory form of pleading for the discovery application.

6. Following a request for voluntary discovery, which was not responded to in correspondence by the defendant company, the solicitors acting for the injured party issued a motion seeking discovery on 28 September 2020.
7. Discovery is sought in respect of the following categories of documents. (The date of the accident has been corrected in some of the paragraphs below. This is indicated by the use of square brackets).
  - “1. Any notes or records (including accident or injury report forms) made by or on behalf of the Defendant recording the occurrence and circumstances of the accident.
  2. Records of any training given to the Plaintiff in relation to changing the filters on the said pipework or provision for personal protective equipment.
  3. Any standard operating procedures relevant to the task of changing or removing the filters from the pipework as referred to at paragraph 4 of the Personal Injury Summons herein.
  4. Records of any accident or near accident involving the same pipeline in the 24 months prior to the accident on [28 April 2017] (whether causing injury to an employee or worker or not).
  5. Records of any complaints or warnings or observations made by any persons of defects or malfunctions in the said pipework or of potential dangers involved in working with the said pipework.
  6. Records of any inspections or repairs carried out on the pipework involved in this accident in the 24 months prior to the accident on 28 April 2017.
  7. All risk assessments carried out by the Defendant ~~and each or either of them~~ pursuant to section 19(1) of the Safety, Health and Welfare at Work Act 2005 in respect of the Plaintiff’s place of work.
  8. All reviews of the risk assessment carried out under section 19(2) of the Safety, Health and Welfare at Work Act 2005 including reviews carried out after any previous accidents or malfunctions involving the same pipeline and the review carried out after the Plaintiff’s accident on 28 April 2017.

9. All safety statements prepared by the Defendant and each or either of them pursuant to section 20 of the Safety, Health and Welfare at Work Act 2005 in respect of the Plaintiff's place of work, being the powder area of the Defendant's milk powder plant in Nenagh.
  10. All correspondence and documents sent between the Health and Safety Authority and the Defendant in relation to the Plaintiff's accident on [28 April 2017]."
8. The defendant company responded to the motion by way of letter from its solicitors dated 27 January 2021. The letter notes that the incident the subject-matter of the personal injuries proceedings forms the substance of a pending prosecution on indictment by the Health and Safety Authority ("**HSA**"). The prosecution is taken against the defendant company and is pending before the Circuit Criminal Court.
  9. The letter further notes that a statement of evidence from the injured party appears in the book of evidence, and infers from this that the injured party will be a "key" witness for the HSA at the criminal trial.
  10. The letter then concludes as follows.

"Given the inextricable nature of the HSA Prosecution and these proceedings at this point in time, we must respectfully decline to make discovery of the documents you now seek on grounds that to do so would infringe on our client's right to avoid self-incrimination.

We therefore and accordingly respectfully call upon you to withdraw your motion for discovery by return. Should you fail to do so, this letter will be used in support of an application for the costs of said discovery motion."
  11. The solicitors acting on behalf of the injured party replied by letter dated 1 February 2021. The substance of the letter reads as follows.

"A claim of privilege in respect of a document does not exempt it from the discovery process. In order to claim the privilege against self-incrimination in respect of any document in the categories sought, the defendant is obliged to list the document in Part II of the First Schedule to an affidavit of discovery and object to producing it.

Please confirm that the defendant will comply with the rules in this regard and that the Order for discovery can be made on consent with costs to the plaintiff."

12. The chief executive officer of the defendant company, Mr. Conor Ryan, swore a short affidavit on 3 February 2021 confirming the factual content of his side's solicitors' letter.
13. The motion for discovery came on for hearing before me on 17 May 2021.

### **SUBMISSIONS OF THE PARTIES**

14. The solicitors on behalf of the injured party very helpfully furnished the court with a booklet of authorities in advance of the hearing. This booklet contains the leading cases which address the question of the *timing* of any claim of privilege, i.e. the appropriate point in proceedings at which a claim of privilege should be ruled upon by the court.
15. Counsel for the injured party submitted that a claim of privilege falls to be determined following the delivery of an affidavit of discovery, save in those exceptional cases where the court is satisfied that the claim of privilege is one which inevitably must succeed. Counsel referred me, in particular, to the very recent judgment of the High Court (Butler J.) in *Carey v. Independent News & Media plc* [2021] IEHC 229, and to the earlier judgment of the Supreme Court, per McKechnie J., in *Keating v. Radio Telefis Éireann* [2013] IESC 22; [2013] 2 I.L.R.M. 145.
16. Counsel is critical of the paucity of information provided in the affidavit filed on behalf of the defendant company. There is no detail, for example, of the criminal charges preferred. Nor is there any detail of the interaction between the company and the HSA.
17. Counsel draws attention to the statutory powers of the HSA, under sections 64, 70 and 72 of the Safety, Health and Welfare at Work Act 2005, to compel the production of information, records and documents. It is said that it is quite possible that the HSA itself has copies of much, if not all, of the documents sought by the injured party in his application for discovery. It would seem strange, for example, that the HSA would not have a copy of the accident report. Counsel submits that if the HSA, as prosecuting

authority, has a particular document in its possession, then it is difficult to understand the basis upon which privilege against self-incrimination can be claimed in respect of that document in these civil proceedings.

18. Counsel submits that it is doubtful whether the defendant company, as a non-natural person, can assert a privilege against self-incrimination, citing *McGrath on Evidence* (D. McGrath and E. Egan McGrath, Round Hall, 3<sup>rd</sup> edition, 2020) at §11-211. Given this doubt, it cannot be said, at this stage, that the claim of privilege is one which inevitably must succeed.
19. Counsel cites *In re National Irish Bank Ltd.* [1999] 3 I.R. 145 as authority for the proposition that it is a matter for the trial judge in the criminal proceedings to determine whether evidence which has been obtained under compulsion is admissible. This is said to represent a safeguard for a party against whom discovery has been obtained in parallel civil proceedings.
20. In response, counsel for the defendant company submits that this court cannot adjudicate on the claim of privilege in these proceedings. This, it is said, is not within the court's prerogative. Rather, it is a matter for the defendant company alone to decide what documents are relevant to its defence of the criminal proceedings. The defendant company has a privilege against self-incrimination, and it has the right not to provide documents to the prosecuting authority. It is further submitted that everything is "subsidiary" to the ability of the defendant company to defend the criminal proceedings.
21. In reply to a direct question from the court, counsel confirmed that his submission is that his client is entitled to resist discovery in these proceedings without providing any explanation as to how it is said that the individual documents are privileged. Counsel also confirmed that his submission is that this court is not entitled to adjudicate on the claim of privilege. No case law was cited in support of these startling propositions.

22. Counsel confirmed that no application has ever been made to stay the personal injuries proceedings pending the hearing and determination of the criminal proceedings.
23. Counsel accepted that the question of whether a non-natural person can assert the privilege against self-incrimination is “novel” and not the subject of authority. However, counsel draws attention to section 80 of the Safety, Health and Welfare at Work Act 2005. This section provides for the personal liability of a director, manager or other similar officer for the criminal actions of a company. More specifically, such persons may have criminal liability where the doing of acts, which constituted an offence on the part of a company, had been authorised, or consented to by, or is attributable to connivance or neglect on their part.
24. The implication of this submission appears to be that the privilege against self-incrimination is potentially “engaged” in that were the defendant company to be convicted in the pending criminal proceedings, then this might, in principle, be followed by related prosecutions against individual officers of the company who would be entitled to assert the privilege. As matters currently stand, however, criminal charges have only been preferred against the company.

## **DISCUSSION**

25. This application for discovery requires the court to address two, or, possibly, three issues. The first issue is whether the categories of documents sought reach the threshold of relevance, necessity and proportionality. The second issue is whether the claim that the documents are privileged should be adjudicated upon now. (The alternative would be to direct that an affidavit as to documents be sworn, and leave over the question of privilege to be addressed on a subsequent application for inspection). The third issue only arises in the event that this court decides that the claim of privilege should be determined now,

as part of the application for discovery *simpliciter*. It would then become necessary to consider the merits of the claim of privilege in detail.

26. Before turning to address the issues identified above, it may be convenient first to dispose of the jurisdictional objection raised by the defendant company.

## **JURISDICTIONAL OBJECTION**

27. As I understood the argument of counsel, the logic of the jurisdictional objection is as follows. The defendant company, as the accused in parallel criminal proceedings, is entitled to refuse to make discovery of any documents which it considers may affect its defence of the criminal proceedings. The defendant company is to be the sole arbiter of what documents are protected from disclosure by the privilege against self-incrimination. On this logic, this court cannot look behind the claim of privilege and cannot adjudicate upon same.
28. With respect, these arguments run counter to the established jurisprudence to the effect that it is impossible for the judicial power, in the proper exercise of its functions, to permit any other body or power to decide for it whether or not a document will be disclosed or produced (*Murphy v. Corporation of Dublin* [1972] I.R. 215 at 234).
29. This principle has recently been reasserted by the Supreme Court in *Keating v. Radio Telefís Éireann*. McKechnie J., in rejecting an argument on the part of the Revenue Commissioners that they should determine the public interest in disclosure, stated as follows at paragraph 39 of the reported judgment.

“In applying the above principles it is clear that the Revenue’s first line of resistance to the application under appeal cannot be allowed to succeed, for if it was, such would seriously trespass upon what is the lone province of the court in determining the underlying dispute between itself and RTÉ on the discovery issue. In effect, as a party to the motion, it seeks also to become a judge in the cause. This it cannot do: there is but one arbiter which has the authority to determine such a matter. That competence cannot be foreclosed upon



and neither by design nor default can it be assumed by any other. This simply reflects what the Constitution ordains. Thus, the only decision maker in this type of situation is the judicial power. Any other course would be to subvert the constitutional role of the courts, to distort the separation of powers and to step down the safeguards which these values seek to uphold. Accordingly, the suggested approach of the Revenue is incompatible with constitutional norms, as identified in the established case law and must therefore be rejected.”

30. For similar reasons, the defendant company’s jurisdictional objection must fail. Not only does this court have jurisdiction to determine a claim for privilege in proceedings before it, that jurisdiction is exclusive. A party to the proceedings is not entitled unilaterally to withhold relevant evidence from the court. At most, a party is entitled to advance a claim of privilege, but the court alone has competence to determine whether such privilege exists.

**(1). RELEVANCE, NECESSITY AND PROPORTIONALITY**

31. The principles governing an application for discovery have recently been restated by the Supreme Court in *Tobin v. Minister for Defence* [2019] IESC 57. Clarke C.J. commenced his analysis by emphasising that a court will only order a party to make discovery if it is satisfied that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs. The Chief Justice then identifies proportionality as a further consideration that is employed by the courts in order to avoid the imposition of excessive burdens on parties to litigation as a result of wide ranging orders for discovery. Whereas the principle of proportionality is often understood in terms of the scale of the discovery sought, it can also be engaged by the sensitive content of the documents sought to be discovered. For example, where an application for an order for discovery is made in respect of confidential documentation, the court should

only order discovery in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made.

32. Given the unusual approach adopted by the defendant company in the present proceedings, it may be helpful to cite those passages from *Tobin* which address the shifting burden in discovery applications. The position is summarised as follows at paragraphs 7.21 and 7.22 of the judgment.

“While the initial burden of establishing both relevance and necessity must lie on the requesting party, it can, for the reasons which I have sought to analyse, be taken that the establishment of relevance will *prima facie* also establish necessity. Where it is sought to suggest that the discovery of documents whose relevance has been established is not necessary, the burden will lie on the requested party to put forward reasons as to why the test of necessity has not been met. Those reasons should initially be addressed in the response of the requested party to the letter seeking discovery. In the event of a court being required to adjudicate on such matters, then, to the extent that the reasons for suggesting that discovery of any particular category of document is not ‘necessary’ is dependent on facts, it is for the requested party to place evidence before the courts to establish the relevant facts. To the extent that the opposition to discovery may be based on legal argument, then it is for the requested party to put forward its reasons as to why production is not necessary.

Thus the overall approach, both in letters of request and responses thereto and in applications before the Court, should be that it is for the requesting party to establish the relevance of the documents whose discovery is sought but it is for the requested party to establish, whether by facts or argument, that discovery is not necessary even though the documents sought have been shown to be relevant.”

33. Relevance is to be determined by reference to the pleadings. Clarke C.J. observed that defendants have to accept that, if they deny all elements of the plaintiff’s case or place the plaintiff on proof about even relatively uncontroversial elements of the plaintiff’s claim, then, inevitably, the scope of the issues which will arise for trial will be expanded and the potential for documents being relevant to issues which remain alive will be greatly increased (*Tobin*, paragraph 7.25).

34. In the present case, the defendant company has adopted the position that it has an absolute entitlement to assert privilege against self-incrimination. In consequence, it has not made any submissions at all on whether the categories of documents sought meet the threshold of relevance, necessity and proportionality. This is so notwithstanding that the burden shifts to it to explain why discovery is not necessary once the relevance of the documents has been established.
35. For the reasons which follow, I am satisfied that the threshold has been met. The discovery sought is justified because of the manner in which the defendant company has pleaded its case. The personal injuries defence amounts to no more than a traverse of the injured party's claim. The only factual matters which are not denied are the descriptions and addresses of the parties; the plaintiff's date of birth and personal public service number, i.e. PPS number; and the fact that the Personal Injuries Assessment Board issued an authorisation to institute proceedings. The defence puts everything else in dispute. It is expressly pleaded that the injured party was "entirely the author of his own misfortune" or was otherwise guilty of contributory negligence. These pleas are not particularised, notwithstanding the obligation to do so under the Civil Liability and Courts Act 2004. (As to the requirements for pleadings in personal injuries proceedings, see, generally, *Crean v. Harty* [2020] IECA 364).
36. The manner in which the defence is pleaded has the consequence that the range of factual issues in dispute in the proceedings—and hence the range of issues in respect of which discovery is relevant—is broad.
37. The categories of documents in respect of which discovery is sought can conveniently be grouped as follows. The first group is relevant to the plea that the injured party is guilty of contributory negligence. Documents in respect of the training provided to the injured party (category 2) and in respect of standard operating procedures (category 3) are

relevant and necessary. The plea of contributory negligence can only meaningfully be assessed by considering whether the injured party had acted in accordance with his training and in accordance with standard operating procedures.

38. The second group is relevant to the plea that the defendant company had failed to heed warnings that the shut-off valves were malfunctioning and appeared to be closed when they were not. This group includes records of accidents and near accidents (category 4); records of complaints, warnings or observations of defects or malfunctions (category 5); and records of any inspections or repairs carried out on the pipework (category 6). As discussed in *Jones v. Grove Turkeys Ltd* [2011] IEHC 152, past accidents involving other employees are often relevant to the question of the foreseeability of the injury; and the scope of the employer's duty of care may often, in practice, be calibrated by reference to its response to such incidents.
39. These three categories are limited in time, i.e. to the 24 month period prior to the date of the accident. This temporal limitation ensures that the discovery sought is proportionate and does not, for example, necessitate searching out historical records.
40. The third group consists of documents concerning compliance with certain statutory requirements under the Safety, Health and Welfare at Work Act 2005. This group includes the statutory risk assessments sought under categories 7, 8 and 9. These categories of documents are relevant to the pleas (at paragraph 6 of the personal injuries summons) that the defendant company had failed to carry out any adequate risk assessment within the meaning of section 19; had failed to provide any adequate safety statements within the meaning of section 20; and had failed to bring the terms of any relevant safety statement to the attention of the injured party. Having omitted to engage with these pleas in its personal injuries defence—by, for example, referring to the content

of any statutory assessment or statement relied upon—the defendant company must now discover these documents.

41. The fourth group includes records concerning the accident itself. This group includes documents recording the occurrence and circumstances of the accident (category 1) and correspondence with the HSA (category 10).
42. As the learned authors of Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (Round Hall, 3<sup>rd</sup> edition, 2019) observe at §33-75, it is difficult to see why discovery of accident report forms should be refused. Such material is clearly relevant to the circumstances of the accident, and it is necessary for the fair disposal of any case that all available evidence as to the circumstances of an accident be available to the court and the parties.
43. It is a separate question, of course, as to whether the report might attract litigation privilege. See *Kunzo v. Kepak Longford* [2021] IEHC 180.
44. The reason given for seeking category 10 is as follows.

“The documents in Category 10 are sought in order to assist in establishing that the system of work put in place by the defendant involved an unacceptable and foreseeable risk of injury and the HSA’s conclusions in this regard following the statutory investigation into the accident.”
45. These reasons are well founded, and this category of documents meets the threshold of relevance. As an aside, it might be observed that the fact that the category is confined to documentation which, by definition, will already have been seen by the HSA suggests that a claim of privilege over this category may not succeed.

**(2). TIMING OF ADJUDICATION ON PRIVILEGE CLAIM**

46. Having concluded that the documents sought meet the threshold of relevance, necessity and proportionality, the next issue to be considered is whether the claim that the documents are privileged should be adjudicated upon now.
47. The default position is that a claim of privilege falls to be determined after an affidavit as to documents has been sworn. If a party objects to the production of documents on the basis that the documents are privileged, then those documents must be specified in the affidavit as to documents. The affidavit must state upon what grounds the objection is made, and verify the facts relied upon. Thereafter, it is open to the party seeking discovery to apply for an order for inspection if they wish to challenge a claim of privilege.
48. The Supreme Court has confirmed that the court has an inherent jurisdiction to abridge the process, i.e. to refuse to direct the filing of an affidavit as to documents and simply dismiss the application for discovery, in the face of a privilege plea which inevitably must succeed. See *Keating v. Radio Telefís Éireann* as follows (at paragraphs 45 and 46).

“It is not suggested [...] that by simply asserting a claim for privilege, a person, either a party or non-party to litigation, is thereby excluded from the discovery process: that is not and never has been the situation, nor is it stated to be. Accordingly, the normal Rules of Court apply which means that all relevant documents must be listed in part two of the first schedule, if privilege is sought in respect of them. Having done that, the nature both of the asserted privilege and of the document the subject thereof, must be sufficiently particularised so as to permit the court to evaluate the claim. Generalised, non-specific details will not suffice: *O’Brien v Minister for Defence* [1998] 2 I.L.R.M. 156 at 159. In the vast majority of cases, it is only via this procedure that the privilege issue will be determined.

That being said however, there is also no doubt but that on a discovery motion the court has an inherent jurisdiction to refuse the application on the basis that its entire purpose, namely access to relevant evidence capable of aiding or defeating a particular claim, can never be achieved in the face of a privilege plea which inevitably must succeed. Before holding however that the normal process can

be abridged in this way and that privilege can ground a refusal for a discovery order as distinct from an inspection order, the court will have to be satisfied that such plea permits of no other possible result. For if it should or might, the court will not refuse to grant a discovery order on such grounds. To view the situation otherwise would be to conflate distinct steps in a two-tier process which involve addressing different questions and determining different issues. Accordingly, when the matter is raised at this stage of the process, the first enquiry must be to determine whether success on the plea is unavoidable. It is only if it is, that an affidavit as to documents will not be required.”

49. As appears, the default position applies in the vast majority of cases. This is because, in most instances, it will only be by the time that an affidavit as to documents has been filed that the court will have been properly apprised of the nature of the documents at issue and the grounds upon which the claim of privilege is being advanced. This is certainly true in the present case where the affidavit filed by the defendant company in response to the motion for discovery is short and remarkably uninformative.
50. The principles in *Keating v. Radio Telefís Éireann* have been applied most recently in *Carey v. Independent News & Media plc*. Butler J. stated that the proper approach where a claim of privilege is made in response to an application for discovery is for the court to carry out what is, effectively, a screening exercise. The claim of privilege should only be ruled on definitively, at that point in the proceedings, if it is self-evidently so strong that it will inevitably succeed. Of course, an interim finding that a claim of privilege is not so strong that it will inevitably succeed does not preclude the possibility that, when fully argued at the next stage of the proceedings, and perhaps after the court has considered the documents, the claim will be upheld.
51. Butler J. summarised the position as follows (at paragraph 65) of her judgment.

“Thus, the screening exercise to be performed where a requested party makes a claim of privilege at the initial discovery stage, screens out only the very exceptional cases where the evidence before the court establishes that the claim of privilege is one which must succeed. In all other cases an order for discovery should be made and the claim of privilege raised in normal course in the affidavit of discovery (assuming, of course, the application satisfies the tests of

relevance, necessity and proportionality). The making of an affidavit of discovery is important because it allows the requesting party to address and the court to adjudicate on the claim of privilege in respect of particular documents and in light of actual rather than abstract considerations.”

52. The judgment in *Carey* also cautions against delving too deeply into the claim of privilege at this initial stage of the proceedings lest it pre-empt the outcome of a subsequent hearing on the privilege issue in the context of an application for inspection. At the earlier stage of the application for discovery, the court should confine itself to the threshold issue of whether the claim of privilege is one which must inevitably succeed.
53. I turn now to apply these principles to the facts of the present case. For the reasons which follow, I am satisfied that the requisite threshold has not been met.
54. The claim of privilege is predicated on an argument that the provision of documents to the injured party, who is said to be a key witness in the criminal proceedings, will interfere with the defendant company’s privilege against self-incrimination. It is implicit in this argument that the injured party would, in breach of his undertaking not to use discovered documents other than for the purposes of the personal injuries proceedings, pass the documents on to the HSA. It is also implicit in this argument that “but for” the production of the documents by way of discovery, the prosecuting authority would not otherwise have access to the documents. It is not at all obvious that either of these implicit assumptions is justified.
55. In particular, the assumption that the HSA does not already have at least some of the documents is difficult to reconcile with the existence of extensive statutory powers on its part to compel the production of information, records and documents. As counsel for the injured party correctly observes, if the HSA, as prosecuting authority, already has a particular document in its possession, then it is difficult to understand the basis upon which privilege against self-incrimination can be claimed in respect of that document in



these civil proceedings. It is a separate matter whether that document is admissible at the criminal proceedings, and this is ultimately a matter for the trial judge to rule upon.

56. Moreover, certain categories of the documents sought by way of discovery refer to material which will, by definition, already be available to the HSA. Category 10, for example, consists of all correspondence and documents sent between the HSA and the defendant company in relation to the accident.
57. There is a further potential difficulty with the claim of privilege. On at least one view, the privilege against self-incrimination is primarily concerned with respecting the will of an accused person to remain silent, and does not extend to documents the existence of which is “independent” of the will of the person relying on the privilege. See judgment of the ECtHR in *Saunders v. United Kingdom* (Application No. 19187/91) at paragraph 68. (cf. O’Malley, *The Criminal Process* (Round Hall, 1<sup>st</sup> edition, 2009) at §§4-63 to 4-68).
58. It would appear that much of the documentation sought on discovery predates the accident and has not been created in the context of any statutory investigation by the HSA. For example, records in respect of training, standard operating procedures and earlier incidents all predate the accident the subject-matter of the criminal prosecution. It is at least arguable that an order requiring the company to disclose documents of this type does not offend against the privilege against self-incrimination. Those documents were not created under compulsion or against the “will” of the company. The position may be more nuanced in respect of documents created as the result of the exercise by the HSA of its statutory powers of investigation.
59. More generally, there is a question mark as to whether a non-natural person can invoke the privilege against self-incrimination at all. Reliance on the provisions in respect of the potential personal liability of officers of a company under section 80 of the Safety,

Health and Welfare at Work Act 2005 is not necessarily an answer to this. It does not follow as a corollary of the fact that individual defendants might be entitled to invoke the privilege against self-incrimination in any proceedings taken against them that the company should benefit from it too.

60. In summary, therefore, it cannot be said, at this point of the proceedings, that the claim of privilege must inevitably succeed. The court simply does not have sufficient information as to the nature of the documents involved. Nor does the court know whether any of the documents have already been made available to the HSA. A proper assessment of the claim of privilege will also require careful consideration of legal issues such as whether the privilege is available to non-natural persons and whether it extends to “independent” documents.
61. These are all matters which must await further consideration on an application to inspect the discovered documents, following the filing of an affidavit as to documents.

**(3). MERITS OF THE CLAIM OF PRIVILEGE**

62. Given my findings on the second issue above, the third issue does not arise for consideration in this judgment. Rather, any assessment of the merits of the claim of privilege falls to be carried out in the context of an application to inspect the discovered documents.

**CONCLUSION AND FORM OF ORDER**

63. The application for discovery is allowed. The categories of documents sought meet the threshold of relevance, necessity and proportionality. Insofar as the defendant company seeks to assert privilege against self-incrimination, it is far from obvious, at this stage of the proceedings, that the claim of privilege must inevitably succeed. (See paragraphs 53

to 61 above). There is no justification, therefore, for short-circuiting the usual procedure for asserting privilege. The defendant company is required to file an affidavit as to documents in the ordinary way. If the defendant company wishes to object to the production of certain documents on the basis that they are privileged, then those documents must be specified in the affidavit. The affidavit must state upon what grounds the objection is made, and verify the facts relied upon. Thereafter, it is open to the plaintiff to apply for an order for inspection if he wishes to challenge the claim of privilege.

64. The affidavit for discovery is to be sworn by Mr. Conor Ryan within six weeks of the date of perfection of the order.
65. Insofar as the allocation of costs is concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”

66. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been “entirely successful” in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order. Order 99, rule 2 of the Rules of the Superior Courts provides that the High Court, upon determining any interlocutory application, 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.

67. My *provisional* view is that the plaintiff should be entitled to recover his costs of the motion as against the defendant company. This is because the plaintiff has been entirely successful in the application for discovery. In circumstances where the only issue between the parties was in respect of the claim of privilege, the defendant company should have consented to the request for voluntary discovery and raised the issue of privilege in its affidavit as to documents. Had the defendant company adopted this reasonable course, the costs of the motion could have been avoided.
68. If the defendant company wishes to contend for a different form of costs order, then written submissions should be filed by Wednesday 9 June 2021. If submissions are filed, then the plaintiff will have two weeks thereafter to reply.

*Appearances*

Helen O'Mara for the plaintiff instructed by Holmes O'Malley Sexton LLP  
Michael Murray for the defendant instructed by Stephen MacKenzie & Co. Solicitors

Approved  
S. M. S.