

**APPROVED**

**[2021] IEHC 713**



THE HIGH COURT

2019 No. 6358 P

BETWEEN

KARL BROPHY  
GAVIN O'REILLY

PLAINTIFFS

AND

INDEPENDENT NEWS AND MEDIA PLC  
LESLIE BUCKLEY

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 1 December 2021**

**INTRODUCTION**

1. This judgment is delivered in respect of an application to stay the within proceedings pending the conclusion of an investigation under Part 13 of the Companies Act 2014. The investigation is being carried out by two court appointed inspectors.
2. The application for a stay has been brought by the first named defendant, Independent News and Media plc. The application is advanced on the basis that there is a significant overlap, if not complete identity, between the legal issues which supposedly fall to be “*determined*” by the inspectors, on the one hand, and by the High Court in the within proceedings, on the other.

NO REDACTION REQUIRED

## APPOINTMENT OF THE INSPECTORS

3. The affairs of Independent News and Media plc (“*the Company*”) are the subject of an ongoing investigation under Part 13 of the Companies Act 2014 (“*the statutory investigation*”). The High Court (Kelly P.) had, by order dated 6 September 2018, appointed Mr. Sean Gillane, SC, and Mr. Richard Fleck, CBE, as inspectors pursuant to Section 748 of the Companies Act 2014 and Order 75B, rule 3(1) of the Rules of the Superior Courts (as amended).
4. The application to appoint the inspectors had been initiated by the Director of Corporate Enforcement by originating notice of motion dated 23 March 2018. The application had been strongly opposed by the Company. The application was heard over three days in July 2018, and Kelly P. delivered a detailed written judgment on 4 September 2018, *Director of Corporate Enforcement v. Independent News and Media plc* [2018] IEHC 488; [2019] 2 I.R. 363 (“*the principal judgment*”).
5. The principal judgment explains that the Director of Corporate Enforcement had identified a number of issues of concern, and in reliance upon which he sought the appointment of inspectors by the court. One of these issues is referred to in the principal judgment by the shorthand the “*data interrogation*” issue. The issue is described as follows at paragraphs 19 to 23 of the principal judgment.

“In 2014, back-up tapes of computer data were removed from the company’s premises. They were taken to the premises of a company outside the jurisdiction. There, that data was interrogated over a period of some months. This operation was directed by Mr. Buckley. Other members of the board were not aware of this operation at that time. It is alleged that Mr. Buckley expressly instructed the company’s head of I.T. not to disclose the matter to Mr. Pitt. During the course of the interrogation, tapes and associated data appear to have been accessible to and accessed by a range of individuals who are external to the company. These

individuals have business links with Mr. Buckley, with each other and appear also to have links with Mr. O'Brien.

This exercise was, according to Mr. Buckley in responses which he gave to the Director on foot of statutory demands for information, part of a cost-reduction exercise in respect of a contract which the company had with Simon McAleese Solicitors, for the provision of legal services. Under the terms of that contract, Mr. McAleese was guaranteed an annual fee of approximately €650,000 and the contract had a five-year duration. It was due to expire in 2016. The chairman indicated he thought that that was a very significant fee and an open-ended contract. Because he said he found it difficult to obtain information on the contract, he felt that he needed to access emails and documentation stored on the company's system.

During the course of the interrogation, data appears to have been searched against the names of no fewer than 19 individuals. They included the journalists Rory Godson, Maeve Sheehan, Brendan O'Connor and Sam Smyth; two members of the Inner Bar, Jeremiah Healy S.C. and Jacqueline O'Brien S.C.; former board and staff members of the company including Joe Webb (former chief executive of the company's Irish division), Karl Brophy (former director of corporate affairs of the company), Mandy Scott (former personal assistant to the chief executive), Vincent Crowley (former chief executive of the company), Donal Buggy (former director and chief financial officer of the company) and the late Mr. James Osborne (former chairman of the company). Also included were Messrs. Andrew Donohue, Mark Kenny, Jonathan Neilan, Harriet Mansergh, Jenny Kilroy, Nick Cooper and Ann Marie Healy.

It is difficult to see what the interrogation of information concerning at least some of those persons had to do with a cost-reduction exercise in respect of the legal services being provided by Mr. McAleese. The Director points out that both senior counsel who were the subject of the interrogation acted for several years as counsel to the inquiry into payments to politicians and related matters presided over by Mr. Justice Moriarty. That tribunal was involved in investigations into allegations relating to the awarding of the second GSM licence to Esat which is an entity controlled by Mr. O'Brien. Indeed, in their letter of 30 April 2018 to Mr. Buckley the company's solicitors described the names of those searched against as persons who may be regarded as having acted adversely to Mr. O'Brien. The rights and entitlements of some or all of these 19 people may have been transgressed in a most serious way by this activity.

The costs of this data interrogation exercise were not discharged by the company. The bills for it were presented to an entity controlled by Mr. O'Brien called Island Capital and were paid by an Isle of Man company called Blaydon Ltd. Mr. O'Brien is the beneficial owner of Blaydon Ltd. The company does not know why Blaydon Ltd. discharged the costs associated with this data interrogation. According to Island Capital, Blaydon Ltd. acts as paying agent for Mr. O'Brien and his companies."

6. The nineteen individuals identified in the principal judgment have come to be referred to by the shorthand "*the INM 19*". The names of these nineteen individuals appear on a spreadsheet discovered by the Office of the Director of Corporate Enforcement as part of its own investigations, i.e. prior to the appointment of the two inspectors by the High Court. This spreadsheet has been exhibited as part of the affidavit of Mr. Ian Drennan sworn on 23 March 2018.
7. The inspectors are required, as part of their terms of reference, to investigate the data interrogation issue. In particular, the inspectors are to investigate and report upon:
  - (i). the fact of and circumstances concerning the data interrogation;
  - (ii). the reasons for and the purposes of the data interrogation;
  - (iii). the knowledge of the company's directors (the directors) of the data interrogation;
  - (iv). the results of the data interrogation;
  - (v). payment for the data interrogation;
  - (vi). the persons for whose benefit the data interrogation was conducted;
  - (vii). the adequacy of the directors' response to notification of the data interrogation, including their investigation of the same and engagement with the Data Protection Commissioner.

## THE PRESENT PROCEEDINGS

8. The Plaintiffs in the within proceedings, Messrs. Karl Brophy and Gavin O'Reilly, are both potentially affected by the data interrogation issue.
9. Mr. Brophy had worked as a journalist with both the *Irish Examiner* and *Independent Newspapers*. Between January 2011 and October 2012, Mr. Brophy had been employed as the Company's director of corporate affairs. Mr. Brophy is one of the nineteen individuals subject to the "*data interrogation*" exercise.
10. Mr. O'Reilly had worked in a number of roles within the Company. Mr. O'Reilly had become the chief executive officer of the group of companies in 2009, and had remained in that position until April 2012. Although Mr. O'Reilly is not one of the so-called INM 19, his former personal assistant, Ms. Mandy Scott, is one of the nineteen individuals subject to the "*data interrogation*" exercise.
11. Prior to the institution of the within proceedings, the (then intended) Plaintiffs brought an application in 2019 seeking to be allowed to use the documentation, which they had received in the context of the application to appoint the inspectors, for the purpose of other proceedings.
12. Kelly P. delivered a written judgment on this application on 27 June 2019, *In the matter of Independent News and Media plc* [2019] IEHC 467 ("***the documentation judgment***"). It is explained in the judgment that Messrs. Brophy and O'Reilly wished to bring proceedings against the Company, and possibly other parties, arising from the data interrogation. The intended proceedings would be framed in terms of alleged breaches of their right to privacy and of

their rights under the data protection legislation; breach of constitutional rights; and a conspiracy to damage their interests.

13. Kelly P. considered that the application to use the documentation for the purpose of the intended proceedings should be determined by reference to principles analogous to those that govern the use of documents which have been obtained by way of discovery in legal proceedings. A party who gains access to documentation by way of discovery is subject to an implied undertaking to use that documentation only for the purpose of those particular proceedings. A court has discretion to release a party from this implied undertaking in special circumstances.
14. Kelly P. held that there were special circumstances which justified allowing the use of the documentation, and that to refuse leave to do so would result in an injustice to the moving parties. In exercising his discretion to allow the use of the documentation in the intended proceedings, Kelly P. placed reliance on the following factors.
15. First, the refusal of leave to use the documentation in the intended proceedings would put the moving parties at a disadvantage. At a very minimum, they would be obliged to seek discovery of the very material that they already have. From a public interest point of view that would be wasteful of the scarce time and resources of the court, as well as increasing the costs and delaying the litigation in question.
16. Secondly, the moving parties would not obtain an improper litigation advantage were leave to use the documentation to be granted. The moving parties merely sought to utilise material, the contents of which is already known to them. There was no question of a party seeking to “*fish*” for information on a speculative

basis in order to maintain a cause of action. The case law on pre-litigation discovery relied on by the Company—which included *Gayle v. Denman Picture Houses Ltd* [1930] 1 K.B. 588, *Law Society of Ireland v. Rawlinson* [1997] 3 I.R. 592, and *Craddock v. RTE* [2014] IESC 32—was distinguished on this basis.

17. Kelly P. emphasised that, in giving leave to use the documentation, the court was not conferring any special evidential status on the documents in question. See paragraph 58 of the documentation judgment as follows:

“It should be pointed out in this context that by giving the permission sought, the court is not conferring any special evidential status on the documents in question. If any of them are sought to be introduced in evidence in the contemplated litigation, they will have to be proved in the ordinary way. In that context they are no different to documents disclosed on discovery.”

18. Messrs. Brophy and O’Reilly subsequently instituted the within proceedings on 9 August 2019. The Company has since issued a motion seeking to stay the proceedings pending the conclusion of the investigation under Part 13 of the Companies Act 2014. No officer of the Company has sworn an affidavit in support of the stay application. Instead, the affidavits have, somewhat surprisingly, been sworn by an external solicitor without direct knowledge of the relevant matters. The “*stay*” motion came on for hearing before me on 11 November 2021 and judgment was reserved to today’s date.
19. The Plaintiffs have issued their own motion seeking judgment in default of defence as against the Company. It had been agreed that the order on that motion should await the outcome of the stay application.

## EVIDENTIAL STATUS OF AN INSPECTOR'S REPORT

20. As discussed presently, the Company places emphasis on the evidential status of an inspector's report. It may assist the reader in better understanding the discussion in that regard to pause here, and to set out the relevant statutory provisions.
21. Section 881(4) of the Companies Act 2014 provides as follows:
- “(4) A document purporting to be a copy of a report of an inspector appointed under Part 13 shall be admissible in any civil proceedings as evidence—
- (a) of the facts set out in it without further proof, unless the contrary is shown, and
- (b) of the opinion of the inspector in relation to any matter contained in the report.”
22. The meaning and effect of a similarly worded provision under the Companies Act 1990 (section 22) had been considered by the High Court (Laffoy J.) in *Countyglen plc v. Carway* [1998] 2 I.R. 540. Laffoy J. held that the word “*facts*” means primary or basic facts clearly expressed as such in the report, and does not extend to include secondary or inferred facts. The words “*without further proof*” indicate that what the legislature intended was that facts which would be provable by witnesses in the ordinary way, and not deductions from facts found or admitted, should acquire the status of proven facts under the section.
23. Laffoy J. emphasised that the findings of fact in an inspector's report are not afforded any special probative value: see page 551 of the reported judgment in *Countyglen plc* as follows:
- “Section 22 [of the Companies Act 1990] does not prescribe that facts thereby given the status of proven facts have any special probative value or that any particular weight should be attached thereto. Accordingly, the ordinary rules apply in determining whether an application for a direction should be



acceded to at the end of the plaintiff's case and in determining the issues of fact when all the evidence is in."

24. The judgment in *Countyglen plc* has been cited with approval in a number of subsequent decisions, including *In re Bovale Developments Ltd* [2007] IEHC 365 and *Director of Corporate Enforcement v. Brennan* [2008] IEHC 132.

### **DISCRETION TO STAY PROCEEDINGS**

25. The parties are in broad agreement as to the principles governing an application to stay parallel sets of civil proceedings. Both parties relied upon the judgments in *Kalix Fund Ltd v. HSBC Institutional Trust Services (Ireland) Ltd* [2009] IEHC 457; [2010] 2 I.R. 581 ("**Kalix Fund**") and *Avoncore Ltd v. Leeson Motors Ltd* [2021] IEHC 163 ("**Avoncore**").
26. In the latter judgment, McDonald J. provides a most useful summary of the principles governing an application for a stay. The following considerations are of especial relevance to the present case (see judgment in *Avoncore* at paragraph 29):

- “(c) In ordering its business, the court has a discretion to ensure that scarce court resources and the resources of parties to litigation are not inappropriately wasted by an unnecessary duplication of litigation. In addition, it is important that measures are taken to minimise the risk of any inconsistent determinations arising from different proceedings. For the latter reason, cases can be linked with a view to ensuring that a particular series of cases (which share common factors) are assigned to a single judge who will determine all relevant issues across the range of cases concerned;
- (d) As part of its power to manage the conduct of a series of cases in which there is either a significant factual or legal overlap, the court should aim to bring about a just and expeditious trial while, at the same time, seeking to minimise costs and to ensure that scarce court resources are not wasted;

- (e) Among the factors to be borne in mind in assessing how a series of cases are to be managed are the following:–
- (i) The fact that each individual plaintiff is entitled to have the proceedings determined in an expeditious manner ‘*subject only to ensuring that there is no disproportionate added expense or drain on court time imposed*’;
  - (ii) Consideration should be given as to the extent to which the first case to be tried is likely to bind all other cases in whole or in part;
  - (iii) It is important to ensure that any measures adopted which have the effect of preventing a case from progressing in the ordinary way must be no more than is necessary and proportionate to achieve the end of preventing unnecessary expense or use of court time.”

27. I respectfully adopt the foregoing as a correct statement of the law.

28. McDonald J. emphasises that the default position is that a plaintiff is entitled to have their proceedings determined in an expeditious manner, subject only to ensuring that there is no disproportionate expense or drain on court time imposed. See paragraph 38 of the judgment in *Avoncore* as follows:

“[...] It is clear from the judgment in *Kalix* that the default position is that each individual plaintiff is entitled to have its proceedings determined subject only to ensuring that there is no disproportionate expense or drain on court time imposed. It would, of course, be disproportionate (both in terms of wasted costs and wasted court time) if two actions between substantially the same parties and raising substantially similar issues were to proceed in parallel without any attempt being made to case-manage them in a way which ensures that unnecessary duplication is avoided and which also seeks to ensure that there are not two wholly separate trials addressing the same issues. As explained by Clarke J., such an approach would also carry the risk of giving rise to conflicting outcomes.”

29. The dispute between the parties in the present case centres on the extent, if any, to which these principles can be translated across to an application to stay civil proceedings pending the outcome of a non-judicial process.

## **SUBMISSIONS IN SUPPORT OF A STAY**

30. The application to stay the within proceedings is predicated on the assumption that the existence of a statutory investigation under Part 13 of the Companies Act 2014 is analogous to the existence of parallel legal proceedings. On this assumption, it is said that the granting of a stay on the within proceedings would have benefits similar to those arising where one or more sets of legal proceedings are stayed pending the outcome of other related litigation.
31. The principal benefits of a stay, as perceived by the Company, are as follows. First, it is submitted that the outcome of the statutory investigation should be “*determinative*” of the issues in the within proceedings. It is said that to progress these proceedings further would undoubtedly cause a waste of costs. Secondly, it is submitted that the grant of a stay would avoid the risk of inconsistent determinations arising from the statutory investigation, and the within proceedings, respectively.
32. The position is put as follows at §31 of the Company’s written legal submissions:

“In the instant case, the factual and legal issues to be addressed in both the investigation and report of the High Court Inspectors and the present proceedings are virtually identical. Accordingly, if the High Court Inspectors’ report is available first, then the findings on the issues therein, particularly on the factual background to the 2014 Data Security Incident, should be determinative of the same issues in these proceedings.”
33. It is further submitted that the findings of the inspectors will carry significant evidential weight in downstream civil proceedings, and will be admissible in the within proceedings by virtue of section 881(4) of the Companies Act 2014. This factor is relied upon as follows (at §35 and §36 of the written submissions):

“[...] This militates in favour of allowing the High Court Inspector’s investigation to conclude, prior to progressing these proceedings. At that stage, the report and answers given to the Inspectors, both [of] which have special evidentiary statutory weight, would be available to the parties and to the Court in these proceedings.

The findings of the High Court Inspectors will allow the pleadings and any discovery to be tailored accordingly, and may narrow the issues and the scope of discovery. Further, there is a significant volume of documentation already under review by the High Court Inspectors, meaning that their ultimate findings are likely to be of significant value to the parties. That being so, and extensive discovery exercise to be conducted in the within proceedings could very well prove to be a waste of time, resources and costs.”

34. In reply, counsel for the Plaintiffs disputes the Company’s characterisation of the statutory investigation. It is submitted that the High Court inspectors are not a specialist tribunal pronouncing on legal issues. Rather, they are primarily inquisitorial finders of fact who report to the High Court. The inspectors are not adjudicating upon the legal rights or obligations of the parties to this litigation. The inspectors would not reach a binding determination on any relevant point of law which is of assistance to the within proceedings, and the court ultimately hearing these proceedings would be at large to reach different conclusions of law and fact than those of the inspectors.

## **DISCUSSION AND DECISION**

35. The default position is that a party, who has invoked their constitutional right of access to the courts to seek redress for an alleged wrong, should be entitled to progress their proceedings. The right of access to the courts implies a right to have one’s claim heard and determined within a reasonable period of time. (See, for example, *Donnellan v. Westport Textiles Ltd* [2011] IEHC 11 (at paragraph 30)).

36. The claim in the within proceedings arises out of events which are alleged to have occurred as long ago as 2014. The Plaintiffs are said to have been unaware of the alleged wrongdoing until 2018. The within proceedings were instituted promptly thereafter in 2019, following a successful application to rely on materials from the application to appoint the inspectors.
37. In the ordinary course, the Plaintiffs would not only be entitled to, but would be expected to, bring the proceedings on for hearing within a reasonable period of time. The placing of a stay on the further progress of the proceedings would only be justified if the benefit of so doing were proportionate to the disbenefit suffered by the Plaintiffs in delaying the progress of their proceedings.
38. The case law discussed earlier identifies a number of potential benefits to regulating the sequence in which related legal proceedings are heard and determined. The benefits include a more efficient use of scarce judicial resources, and a minimisation of the legal costs incurred by the parties to the various proceedings. One approach which is sometimes adopted is to identify a lead case which will be brought on for hearing before other related cases. This is done where it is anticipated that the outcome of the lead case will determine a common legal issue in a way which will, in substance, bind all subsequent cases.
39. The same rationale does not extend to an application to stay legal proceedings pending the outcome of a non-judicial process, such as an investigation under Part 13 of the Companies Act 2014. This is because the outcome of such an investigation does not have binding legal effect. Neither a finding of fact nor an opinion stated in an inspector's report is intended to be binding on the parties to, still less on the court adjudicating upon, subsequent civil proceedings.

40. As a matter both of statute law and constitutional law, the High Court is unconstrained by the findings of the inspectors. The High Court has full original jurisdiction to reach its own conclusions in relation to the matters advanced in plenary proceedings brought before it, irrespective of any finding of fact contained in an inspector's report.
41. The most that section 881 of the Companies Act 2014 does is to provide that a copy of an inspector's report shall be admissible in any civil proceedings as evidence of the facts set out in it without further proof, unless the contrary is shown. Section 881 regulates the *admissibility* of the content of the inspector's report. The legislation merely provides for the admission of what would otherwise be inadmissible evidence. But for this statutory provision, the content of an inspector's report could not be relied upon as evidence: see, by analogy, *In Re Bovale Developments Ltd* [2011] IESC 24; [2011] 3 I.R. 278.
42. Section 881 does not prescribe that findings of fact contained in an inspector's report are to have any special probative value, nor that any particular weight should be attached thereto. Accordingly, the trial judge ultimately hearing the Plaintiffs' claim for damages will be required to apply the ordinary rules in determining the issues of fact when all the evidence is in (*Countyglen plc v. Carway* [1998] 2 I.R. 540 (at 551)).
43. An inspector's report is not analogous to the delivery of a judgment in a lead case, determining legal issues common to a number of other cases. There would be little or no practical advantage in making an order restraining the Plaintiffs from progressing the within proceedings pending the conclusion of the statutory investigation.

44. The English competition law cases cited by the Company are distinguishable. The judgment in *Synstar Computer Services (UK) Ltd v. ICL (Sorbus) Ltd* [2002] ICR 112 concerned circumstances where the plaintiff in the relevant legal proceedings had made a parallel complaint to the Director General of Fair Trading. There was a right of appeal against the Director General's decision to a *specialist judicial body*, namely the Competition Commission. Crucially, decisions of fact arrived at by the Director General were capable of binding the parties, if not appealed or if confirmed on appeal. As already explained, an inspector's report does not have a similar binding effect.
45. The Company has advanced an alternative argument to the effect that to allow the within proceedings and the statutory investigation to progress in parallel presents a risk of inconsistent decisions. For reasons similar to those outlined above, this argument is misconceived. The rationale for regulating the sequencing of parallel legal proceedings is to ensure constancy in judicial decision-making. It would be unsatisfactory if two different trial judges came to different conclusions on cases arising out of the same set of circumstances. As explained in *Kalix Fund* (at paragraph 43), this risk can be removed by assigning related legal proceedings to the same judge so that all issues in all cases will ultimately be determined by that judge.
46. This rationale does not apply to potential discrepancies between the determination reached in legal proceedings and an opinion or a finding of fact stated in an inspector's report. The mischief is not the same: the court and the inspectors are not coordinate decision-makers and the inspectors are not engaged in the administration of justice. The Companies Act 2014 envisages that the determination reached in subsequent civil proceedings might well be different

from the facts found by, or an opinion expressed by, an inspector in their report. Such an outcome is not an unwelcome aberration to be avoided at all costs; if necessary, by restraining an individual plaintiff from progressing their civil proceedings. Rather, it is the inevitable consequence of the distinction in status between the administration of justice, on the one hand, and an investigation under Part 13 of the Companies Act 2014, on the other.

47. The final argument advanced in support of a stay is that the issues in dispute between the parties may be narrowed following the publication of the inspectors' report. It is suggested that the parties will tailor their pleadings and any request for the discovery of documentation in accordance with the findings of the inspectors' report. It is said that were an extensive discovery exercise to be conducted in the within proceedings, it could very well prove to be a waste of time, resources and costs.
48. This argument is made against a background where, to date, the defendants have failed to deliver a defence, still less have the parties formulated and exchanged requests for voluntary discovery. Even at this very early stage in the proceedings, however, it seems unrealistic to anticipate that awaiting publication of the inspectors' report would result in any significant saving in costs. The Company will, presumably, already have marshalled and assembled such documentation as it has relevant to the data incident for the purpose of its engagement with the inspectors. The Company also has a number of specific reports in its possession in connection with the data interrogation incident, including reports from Deloitte. In the event that an order for discovery were to be made against the Company in the within proceedings, then the additional work involved in collating the assembled documentation for that particular



purpose is unlikely to be significant. Moreover, as emphasised by the Supreme Court in *Tobin v. Minister for Defence* [2019] IESC 57; [2020] 1 I.R. 211 (at paragraph 57), the extent of the documentation which will be required to be discovered in any proceedings is determined by the way in which the parties choose to plead their case. Defendants have to accept that, if they deny all elements of a 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.

49. At all events, any possible benefit to the Company in postponing the discovery process until after the publication of the inspectors' report would be out of all proportion to the disbenefit suffered by the Plaintiffs. The Company would merely have been put to an additional expense, which it could expect to recoup from the Plaintiffs, by way of costs order, were it ultimately to be successful in the defence of these proceedings. By contrast, the Plaintiffs would have been constrained in the exercise of their constitutional right of access to the courts.
50. As to the possibility of the amendment of pleadings, this would only arise in the event that the within proceedings were put on hold pending the publication of the inspectors' report. Conversely, if the Plaintiffs are allowed to progress their proceedings, then the case is likely to be heard and determined in advance of the publication of the report and the question of an amendment of pleadings will not arise.

**NO PREJUDICE TO DEFENCE OF PROCEEDINGS**

51. For completeness, it should be explained that the Company did not seek to argue, at the hearing before me, that it would be unable to defend the within proceedings until such time as the statutory investigation has been completed. In response to a question from the court, counsel on behalf of the Company confirmed that no specific prejudice is alleged in this regard.
52. No officer of the Company has gone on affidavit to say that the Company lacks information in respect of the data interrogation issue, nor that the Company is awaiting the outcome of the statutory investigation to learn what happened. Indeed, the Company had resisted the appointment of the inspectors in 2018 on the basis that civil litigation, with the full panoply of procedural measures under the Rules of the Superior Courts, is the “*best way*” to identify precisely what happened. (See affidavit of Leonard O’Hagan).
53. Moreover, it appears that the Company now has the benefit of a (further) report from Deloitte and the final report in respect of the Data Protection Commissioner’s investigation into the data interrogation issue. Neither of these reports has been made available to the Plaintiffs, despite request.
54. The position of the Company has thus moderated somewhat from that stated on affidavit. There had been some suggestion in the second affidavit filed in support of the stay application that the Company would be put at a disadvantage in defending the within proceedings without the benefit of the inspectors’ report. It is baldly asserted that it has been “*widely acknowledged*” that the Company has “*no actual own knowledge*” of the events surrounding the data interrogation. Even allowing that this is an interlocutory application, this vague and unsubstantiated assertion has no probative value. The affidavit has been sworn

by an external solicitor, not by a member or officer of the Company with direct knowledge of the relevant matters.

55. The affidavit then goes on to refer to statements, made in the context of the 2018 application to appoint the inspectors, to the effect that the board of directors of the Company appeared to have been unaware contemporaneously of the data interrogation incident. With respect, whatever may have been the position at the time the data interrogation incident occurred in 2014, there is no admissible evidence before this court to the effect that the Company has been unable since then to obtain relevant information in respect of the incident. The point being made in the context of the application to appoint the inspectors had been that the decision in 2014 to carry out the data interrogation exercise had, seemingly, been made without reference to the then board of directors. Since then the Company has had the benefit of several reports into the data interrogation incident, including reports by Deloitte.

#### **CONCLUSION AND PROPOSED FORM OF ORDER**

56. For the reasons stated above, the application to stay the proceedings is refused. In brief, the moving party, Independent News and Media plc, has failed to put forward any countervailing factor which would justify interfering with the Plaintiffs' constitutional right of access to the courts. The Plaintiffs are entitled to have their proceedings heard and determined within a reasonable period of time. The alleged wrongs are said to have occurred more than seven years ago, i.e. in the year 2014, and the Plaintiffs are entitled to bring their claims on for hearing and to have them adjudicated upon.

57. The statutory investigation currently being carried out by the inspectors is not a surrogate for the within proceedings. The objectives of the statutory investigation and of the within proceedings, respectively, are not the same. Moreover, the findings ultimately reached by the inspectors will not be binding upon the parties nor determinative of the issues arising in these proceedings.
58. The Companies Act 2014 envisages that the determination reached in subsequent civil proceedings might well be different from the facts found by, or an opinion expressed by, an inspector in their report. Such an outcome is not an unwelcome aberration to be avoided at all costs; if necessary, by restraining an individual plaintiff from progressing their civil proceedings. Rather, it is the inevitable consequence of the distinction in status between the administration of justice, on the one hand, and an investigation under Part 13 of the Companies Act 2014, on the other.
59. The second motion before the court, namely the Plaintiffs' motion for judgment in default of defence, remains outstanding. My provisional view is that the Company should now be afforded an extension of time of forty-two days within which to file their defence. (The period proposed is slightly longer than normal to reflect the fact that the more usual twenty-eight day period would expire during the Christmas holiday period). In accordance with the recent amendments to the Rules of the Superior Courts, the proposed order will be in the form of an "*unless*" order, i.e. unless the defence is delivered, and a copy of such defence is filed in the Central Office, within that forty-two day period, judgment shall be entered for the Plaintiffs in the Central Office without any further application to the High Court.

60. As to legal costs, a court is obliged under the Rules of the Superior Court to rule upon the costs of an interlocutory application at the time, i.e. rather than to reserve those costs to the trial judge, save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. (See Order 99, rule 2). My provisional view is that the Plaintiffs, having been entirely successful in resisting the application for a stay, should recover the costs of both motions as against the first named defendant, Independent News and Media plc. The execution of the proposed costs order will be subject to a stay pending the determination of the within proceedings. Such costs to be adjudicated upon in default of agreement.
61. If either party wishes to contend for a different form of order than that proposed above, then that party should notify the registrar within seven days of today's date to arrange to have the matter relisted before me on Friday, 17 December 2021 at 10.30 AM. If no such notification is received within seven days, a final order will be drawn up along the lines indicated above.

*Appearances*

Oisín Quinn, SC (with Hugh McDowell) for the plaintiffs instructed by Eugene F. Collins

Barbara O'Neill (with Eoin McCullough, SC) for the first named defendant instructed by Matheson

Brian Gageby for the second named defendant instructed by A & L Goodbody

Approved  
Gemma S. Mans