APPROVED **[2022] IEHC 660**

THE HIGH COURT

2019 No. 6358 P

BETWEEN

KARL BROPHY
GAVIN O'REILLY

PLAINTIFFS

AND

MEDIAHUIS IRELAND GROUP LIMITED
LESLIE BUCKLEY

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 16 December 2022

INTRODUCTION

1. This judgment is delivered in respect of an application for an order directing the discovery of documents. The parties have, to their credit, been able to agree almost all of the terms of the proposed discovery. The two outstanding areas of disagreement are as follows. First, there is disagreement as to whether documents relating to an ongoing statutory investigation into the affairs of Mediahuis Ireland Group Ltd attract public interest privilege. Secondly, there is disagreement as to whether a temporal limitation should be imposed on the discovery which the second named defendant should be required to make.

APPOINTMENT OF THE INSPECTORS

2. The affairs of Mediahuis Ireland Group Ltd (formerly 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***" or "***the inspectorate process***"). 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).

3. 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***").

4. The principal judgment explains that the Director of Corporate Enforcement had identified a number of issues of concern, in reliance upon which he sought the appointment of inspectors by the court.

5. 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.

8. The inspectors subsequently delivered an interim report to the High Court on 11 April 2019. A number of interested parties then applied to be provided with a copy of the interim report. Kelly P. delivered his judgment on those applications on 30 July 2019: *Director of Corporate Enforcement v Independent News and Media plc* [2019] IEHC 589. This judgment has a potential significance for the application for the discovery of documents now before the court in that Kelly P. emphasised the importance which the inspectors attached to the confidentiality of the inspectorate process. See paragraphs 31 and 32 of the judgment as follows:

> "The principal matter of concern to me in the exercise of my discretion is the opposition registered by the Inspectors. Whilst they are opposed to the provision of the report in its totality, in reality it is to those parts of the report which deal with evidential material that they direct their opposition. I would be loath to take any step which might risk being a hindrance to the Inspectors making progress in their work. I fully appreciate that they gave a commitment of confidentiality to all of the parties with whom they spoke. That was regarded as a matter of some importance by those parties. Furthermore, the Inspectors inform me that it has been particularly productive in assisting in their work. They have been able to obtain the cooperation of individuals without the fear of material leaking into the public domain. It would be quite inappropriate for the court to take any step which might cut across that commitment given by the Inspectors and thus result in them being hindered in their important task. The court should not take any step which might impede the progress of the inspection or jeopardise in any way the integrity and progress of the inspection. That said, however, I do not see any objection to those parts of the report which do not deal with evidential matters being disclosed.
>
> It would, in my view, be an appropriate exercise of the court's discretion to direct the furnishing of the report to all

> of the Applicants given their respective interests but with appropriate redactions so as to fully take account of the Inspectors' concerns."

THE PRESENT PROCEEDINGS

9. The plaintiffs in the within proceedings, Messrs. Karl Brophy and Gavin O'Reilly, are both potentially affected by the data interrogation issue.

10. 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.

11. 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.

12. Prior to the institution of the within proceedings, the (then prospective) 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.

13. 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. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. The Company subsequently brought an application to stay these proceedings pending the conclusion of the statutory investigation. I refused the application for a stay for the reasons set out in a judgment delivered on 1 December 2021: *Brophy v. Independent News and Media plc* [2021] IEHC 713.

19. The pleadings in the proceedings are now closed. The proceedings are framed in terms of alleged breaches of the plaintiffs' right to privacy and of their rights under the data protection legislation; breach of constitutional rights; and a conspiracy to damage their interests.

20. Following a detailed exchange of correspondence on the issue of discovery, the plaintiffs issued motions seeking an order for discovery against the respective defendants. The parties, to their credit, have been able to reach consensus on almost all issues. The outstanding issues came on for hearing before me on 17 November and 25 November 2022.

DISCUSSION

ASSERTION OF PUBLIC INTEREST PRIVILEGE

21. There is a dispute between the parties as to whether documents relating to the ongoing statutory investigation should be discovered. It should be explained that there is no dispute in respect of documents which were provided by the Company or Mr. Buckley to the inspectors. Rather, the dispute is in relation to documents

travelling in the other direction, i.e. documents which have come into the possession of the defendants as a result of their having been provided to the defendants by the inspectors. These documents would include (a) documents which might be characterised as the work product of the inspectors, such as, for example, correspondence, transcripts of hearings, expert reports, and drafts of the statutory report to be furnished to the High Court; and (b) documents provided to the inspectors by third parties, copies of which had then been furnished to the defendants by the inspectors.

22. It appears to have been accepted, at least tacitly, by the defendants that documents which relate to the ongoing statutory investigation into the data interrogation issue meet the threshold of relevance and necessity for the purposes of Order 31 of the Rules of the Superior Courts.

23. Even in the absence of such an acceptance, I would be satisfied that the threshold is met. A useful summary of the applicable principles is to be found in the following passage from the judgment of the Court of Appeal in *O'Brien v. Red Flag Consulting Ltd* [2021] IECA 172 (at paragraph 27):

> "The parties before us were in general agreement as to the principles in discovery. It is not necessary to set out the well-known case law establishing that discovery must be both relevant and necessary. A document is relevant if it may reasonably form the basis of a line of enquiry which may lead to the discovery of information that will advance the case of the seeker and/or weaken that of the party against whom it is sought. It is sufficient that a document *may* contain such information. It is not necessary to prove that it *will*. Relevance is determined on the basis of the pleadings and not the evidence. A plea must be taken at its high watermark and it is generally not the role of the court to embark on an enquiry as to the strength of the case or the probability of proving a pleaded fact. However, it is not open to a party to submit a bare and unparticularised plea in the hope of using discovery to obtain evidence in support of a claim that is not particularised. In particular, a document cannot be sought for the purposes of demonstrating the existence of a claim

> where there is no other evidence to suggest that one exists. Discovery may be permitted for the purposes of evidencing a sparsely particularised claim where the impugned activity is alleged to have been committed in a surreptitious and clandestine fashion."

24. The reference to allegations of surreptitious and clandestine activity has a resonance with the pleadings in the present case. Here, the gravamen of the plaintiffs' case, as pleaded, is that the defendants engaged in a clandestine exercise involving the interrogation of data held by the Company. The plaintiffs will need to rely on the discovery of documents in an attempt to substantiate their allegations. The fact that the data interrogation issue is the subject of a statutory investigation makes it highly likely that the content of much of the documentation relating to the statutory investigation, which is in the possession of the defendants, will be directly relevant. Discovery will also be necessary in that, by definition, it would be difficult for the plaintiffs otherwise to substantiate their allegations. The plaintiffs lack the statutory powers of investigation available to the inspectors.

25. The defendants seek to resist making discovery by asserting a form of public interest privilege. More specifically, it is submitted that there is a public interest in ensuring the integrity of the inspectorate process and that this is best served by respecting the commitment to confidentiality given to the participating parties at the outset of that process. It is further submitted that the making of an order for discovery would not be in the public interest and would run the risk of undermining future inquiries or investigations. In this regard, the defendants have cited a number of judgments where a claim of privilege was asserted in the context of inquiries and investigations which are said to be analogous to the inspectorate process. These judgments include *Fitzpatrick v. Independent*

Newspapers Ltd [1988] I.R. 132; *Director of Consumer Affairs v. Sugar Distributors Ltd* [1991] 1 I.R. 225; *Skeffington v. Rooney* [1997] 1 I.R. 22; and *Leech v. Independent Newspapers (Ireland) Ltd* [2009] IEHC 259, [2009] 3 I.R. 766. Reliance was also placed, by analogy only, on *O'Callaghan v. Mahon* [2005] IESC 9, [2006] 2 I.R. 32. This latter judgment is not directly related to discovery.

26. Public interest privilege differs from legal professional privilege in that the former privilege is qualified not absolute. The court must engage in a balancing exercise whereby the asserted public interest is weighed against the public interest in the administration of justice. As explained by the Supreme Court in *Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211, the ability of a litigant to avail of the procedural mechanism of discovery makes a significant contribution to the administration of justice in that it improves the chances of the court being able to get at the truth in cases where facts are contested.

> "Cases in a common law jurisdiction are decided on evidence which is presented by the parties themselves and which can be tested for its veracity or reliability by cross examination or challenged by the presentation of competing evidence. For such a system to work well, it is necessary that parties have a reasonable opportunity to be in a position to present to the court any evidence which may bear on questions of fact which have the potentiality to influence the proper result of the case. Obviously, in many circumstances, a party may have access to much of the evidence which they would wish to present from within their own knowledge or resources. But there may be circumstances where a party does not have ready access to all material evidence without recourse to the various procedural measures which the rules of court permit. Discovery is clearly one such measure."

27. The countervailing public interest asserted in support of a claim for privilege must be sufficiently compelling to outweigh these considerations.

28. As discussed under the next heading below, the balancing exercise requires that the nature of the individual documents be considered: it is not permissible to assert a blanket privilege by reference to a category or class of documents.

29. A decision on whether a document can avail of public interest privilege is separate to the anterior question of whether the document meets the threshold of relevance and necessity for the purposes of Order 31 of the Rules of the Superior Courts. An adjudication on a claim of public interest privilege only arises for consideration where it has previously been determined that the threshold of relevance and necessity has been met. The logic of upholding a claim for privilege is that the production of a document, which would otherwise be regarded as necessary for the administration of justice, may be refused by reference to a countervailing public interest.

30. The point may be illustrated by comparing the difference in approach to be taken as between (i) a claim that a document is confidential, and (ii) the assertion of public interest privilege. The fact that a document may be confidential is something which goes to the question of whether an order for discovery is necessary. 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 (*Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211 (at paragraph 42)). A court will adopt appropriate measures to respect the importance of confidentiality by ensuring that it is only displaced when the production of confidential documentation proves truly necessary to the just resolution of proceedings (*ibid*, at paragraph 44).

31. The Court of Appeal has recently clarified the approach to be taken to confidential documents in two recent judgments. The first concerned commercially sensitive documents (*Ryan v. Dengrove DAC* [2022] IECA 155); the second family communications (*A.B. v. Children's Health Ireland at Crumlin* [2022] IECA 211).

32. The distinction between the two lines of case law appears to be that where public interest privilege is established, it prevails over considerations of relevance and necessity. By contrast, in the absence of a specific public interest, the fact that a document is confidential allows, at most, for a heightened application of the threshold of necessity.

TIMING OF ADJUDICATION ON PRIVILEGE CLAIM

33. 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 other party to apply for an order for inspection if they wish to challenge a claim of privilege.

34. This reflects the long-established principle that there is no blanket exemption from production available, i.e. the production of documents cannot be withheld merely by reference to the particular class within which they fall.

35. This principle was stated as follows in *Murphy v. Dublin Corporation* [1972] I.R. 215 (at 235/36):

> "Having regard to the nature of the powers of the courts in these matters, it seems clear to me that there can be no

> documents which may be withheld from production simply because they belong to a particular class of documents. Each document must be decided upon having regard to the considerations which apply to that particular document and its contents. To grant or withhold the production of a document simply by reason of the class to which it belongs would be to regard all documents as being of equal importance notwithstanding that they may not be. In my view, once the court is satisfied that the document is relevant, the burden of satisfying the court that a particular document ought not to be produced lies upon the party, or the person, who makes such a claim. It follows therefore that, before any claim can be made in support of the non-production of a document by the executive, a claim must be made in relation to the particular document or documents and the ground of the claim must be stated."

36. The principle was reiterated as follows in *Skeffington v. Rooney* [1997] 1 I.R. 22 (at page 35):

> "[…] As was made clear in the decisions of this Court to which I have already referred, an issue as to whether a claim for privilege has been made out or as to whether the public interest involved in the production of evidence in judicial proceedings should prevail over the aspect of public interest involved in the confidentiality of documents pertaining to the exercise of the executive power of the State must be decided by the courts. On occasions these issues can be resolved by the judge by reference to the description of the documents contained in the affidavit of discovery. More frequently it will involve an examination of some or all of the disputed documents. In any event the procedure to be adopted must depend to some extent upon the circumstances of each case and the nature and extent of the disputed documentation."

37. The Supreme Court has confirmed that a 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 [2013] IESC 22, [2013] 2 I.L.R.M. 145 (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."

38. 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.

39. The principles in *Keating v. Radio Telefís Éireann* have been recently applied in *Carey v. Independent News & Media plc* [2021] IEHC 229. 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 the claim will be upheld subsequently, once it has been fully argued at the next stage of the proceedings, and perhaps after the court has considered the documents.

40. 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."

41. 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.

42. I turn to apply these principles to the circumstances of the present case under the next heading below.

DOES CLAIM OF PRIVILEGE MEET THRESHOLD?

43. It is common case that the inspectors have imposed a confidentiality requirement throughout the inspectorate process. Confidentiality undertakings were sought and obtained from all of the individuals who have been involved. A commitment to confidentiality was given for the duration of the inspectorate process.

44. The defendants contend that there is a public interest in maintaining this confidence, especially in circumstances where the inspectorate process is ongoing, and the inspectors have not yet presented their final report to the High Court.

45. There is some force in these submissions. There is undoubtedly a public interest in ensuring the efficacy of statutory inspections under Part 13 of the Companies Act 2014. It can certainly be argued that individuals would be more willing to engage positively with an inspectorate process if they thought that their communications with the inspectors would remain confidential. As appears from the judgment of Kelly P. in *Director of Corporate Enforcement v Independent News and Media plc* [2019] IEHC 589, the inspectors have described the commitment of confidentiality as having been particularly productive in assisting in their work.

46. However, the extent to which a person who engages with an inspectorate process can have a legitimate expectation of confidentiality is limited by the statutory scheme. The Companies Act 2014 expressly envisages the possibility of an inspector's report being published at the conclusion of the investigation. A participant must be taken to have constructive notice of this possibility. See, by analogy, *Private Motorists' Provident Society Ltd v. P.M.P.A. Insurance Ltd* [1990] 1 I.R. 284 (at 287):

> "[…] Finally, since the Registrar has power to publish the inspector's report and since that report is admissible in legal proceedings as evidence of the opinion of the inspector, nobody interrogated by the inspector could be under any illusion that information obtained by the inspector would be confidential, and so the fact that the report, or documents referring to the report or its contents, might be discovered in proceedings such as this could not in any way affect their readiness to disclose information to the inspector. I think it is relevant also to note that a claim by the Registrar to privilege in respect of the inspector's report has already been rejected by an earlier order in these proceedings."

47. A further difficulty with the argument is that court-appointed inspectors have a broad range of statutory powers to compel the giving of evidence and the production of documents. This feature distinguishes an inspectorate process from the type of *ad hoc* investigations under consideration in much of the case law relied upon by the Company and Mr. Buckley. In many instances, the need to ensure confidentiality was a corollary of the need for the investigating entity to rely on the goodwill and voluntary co-operation of relevant parties.

48. There is a second, alternative basis for arguing that there is a public interest in maintaining the confidentiality of the inspectorate process as follows. It is at least arguable that the making of an order directing the production of documents could pre-empt a decision on whether to publish the final report. To elaborate: Section 759 of the Companies Act 2014 provides that the decision on whether or not to publish an inspector's report (in whole or in part) is a matter for the High Court. The legislation thus envisages that there will be circumstances where findings of an inspector should remain unpublished. This might be the position where, for example, there is a criminal prosecution pending or where the identity of a whistle-blower requires to be protected.

49. The making of an order for the production of documents prior to the finalisation of the inspectors' report might pre-empt the exercise of the High Court's

discretion. Notwithstanding the implied undertaking on the use of documents obtained by way of the discovery process, the contents of the documents may become public knowledge once the proceedings come on for hearing in open court.

50. As appears from this brief summary, there are respectable arguments to be made for saying that at least some of the documents relating to a statutory investigation under Part 13 of the Companies Act 2014 may attract public interest privilege. However, it would not be possible for a court to adjudicate on a claim of privilege in the abstract, without having the benefit of a description of the documents involved. Indeed, in some instances, it may be necessary for the court to inspect at least some of the documents itself.

51. It follows, therefore, that it would be premature for the court to rule upon the claim of public interest privilege asserted by the Company and Mr. Buckley. This is not one of those exceptional situations, as identified in *Keating v. Radio Telefís Éireann*, where the claim of privilege must inevitably succeed and accordingly the process can be short-circuited. Instead, this is a case where the default position applies.

52. Accordingly, the defendants will be directed to file an affidavit of discovery. The documents in respect of which privilege is being claimed should be described in the second part of the first schedule of the affidavit, and the basis of the claim explained. I will return to address the logistics of the discovery process under the concluding section of this judgment.

TEMPORAL LIMITATION

53. There is a second, separate area of disagreement which the court is required to rule upon. This disagreement arises as between the plaintiffs and Mr. Buckley and centres on whether a temporal limitation should be imposed on the categories of discovery.

54. The position maintained on behalf of Mr. Buckley in correspondence had been that a cut-off date of 30 April 2016 should apply to the categories of discovery. At the hearing before me, counsel submitted that this cut-off date might be extended to August 2017.

55. The rationale for proposing 30 April 2016 or August 2017 as the cut-off date is as follows. The data interrogation appears to have occurred over a period between the second half of 2014 and early 2015. Thereafter, invoices from the companies engaged in the data interrogation, namely TDS and DMZ IT, were raised between December 2015 and February 2016. It is submitted that a cut-off date of 30 April 2016 or August 2017 would allow a "*buffer*" post-February 2016, which is described as the "*real end date*" of the data interrogation incident and payments.

56. It is submitted on behalf of Mr. Buckley that the imposition of temporal limitations is generally governed by the test of relevance and necessity, with a requirement that the time period chosen must be within the terms of the pleadings. It is further submitted that to require discovery to be made without a temporal limitation would create a "*wholly disproportionate burden*".

57. For the reasons which follow, a cut-off date of 25 March 2020 will be imposed in respect of all categories of discovery, save in respect of documents related to the ongoing inspectorate process. The date of 25 March 2020 is the date upon

which the plaintiffs first threatened legal proceedings. Any documents created after that date will almost certainly benefit from legal professional privilege. The imposition of this cut-off date will spare Mr. Buckley's legal team the trouble of having to schedule, as part of the affidavit of discovery, such documents.

58. Neither of the two earlier dates proposed by Mr. Buckley, namely 30 April 2016 and August 2017, represent an appropriate cut-off date. This is because, as correctly contended by counsel for the plaintiffs, this is not a conventional case whereby temporal limits might meaningfully be set by reference to known events. There are many examples of types of cases where the use of temporal limits would be appropriate. In an employment dispute, for example, a cut-off date for discovery might be set by reference to the period of employment. In a personal injuries action, discovery of the injured party's medical records will typically be confined to a specified period of time, straddling the date of the incident giving rise to the claim. This allows a buffer zone either side of the incident.

59. By contrast, it is not possible in the present case to identify, at this stage of the proceedings, the period of time over which documents, which are relevant and necessary to the fair adjudication of the claim for damages, are likely to have been created. The gravamen of the plaintiffs' case, as pleaded is that the defendants engaged in a clandestine exercise involving the interrogation of data held by the Company. The plaintiffs cannot pinpoint the precise time at which this happened, nor can they say when relevant documents are likely to have been generated or received by Mr. Buckley.

60. The two cut-off dates proposed by Mr. Buckley would exclude documents relating to the engagement with the Office of the Director of Corporate

Enforcement. Such documents meet the threshold of relevance and necessity: the data interrogation was one of the issues being inquired into by the Director.

61. There is no cogent evidence before the court to the effect that the prolongation of the cut-off date from 30 April 2016 to 25 March 2020 would impose a disproportionate burden on Mr. Buckley. The affidavit evidence is vague in this regard: in effect, it does no more than assert that there is a considerable amount of documentation involved.

62. The court is entitled to take judicial notice of the fact that Mr. Buckley has retained the services of a leading law firm, and that much, if not all, of the documents created or received after the proposed cut-off date of 30 April 2016 or August 2017 are likely to have already been marshalled by that law firm for the purposes of the various inquiries and investigations. It seems likely, therefore, that the task of preparing an affidavit of discovery will be relatively straightforward.

CONCLUSION

63. The documentation relating to the inspectorate process meets the threshold of relevance and necessity. The terms of reference of the statutory investigation expressly contemplate that the inspectors are to investigate and report upon the data interrogation issue. It is, therefore, highly likely that the documents relating to this aspect of the statutory investigation would confer a litigious advantage on the plaintiffs.

64. There are respectable arguments to be made for saying that at least some of the documents relating to a statutory investigation under Part 13 of the Companies Act 2014 may attract public interest privilege. However, it would not be possible

for a court to adjudicate on a claim of privilege in the abstract, without having the benefit of a description of the documents involved. Indeed, in some instances, it may be necessary for the court to inspect at least some of the documents itself.

65. It follows, therefore, that it would be premature for the court to rule upon the claim of public interest privilege asserted by the Company and Mr. Buckley. The defendants will instead be directed to file an affidavit of discovery. The documents in respect of which privilege is being claimed should be described in the second part of the first schedule of the affidavit, and the basis of the claim explained.

66. I will discuss with counsel the precise wording of the order for discovery and the time to be allowed for the making of the affidavit of discovery. The proposed wording of the category to be discovered by the Company (referred to as "*Category 10*") will need to be revised to ensure that it is confined to the data interrogation issue. It may also be necessary to exclude documents which were already in the possession of the Company prior to the statutory investigation and are captured by other categories.

67. It is possible that, in some instances, the very act of describing a particular document might defeat any subsequent claim of privilege. For example, the inspectors may wish to assert that there is a public interest in protecting the identity of a particular person who provided information to them. It would pre-empt any adjudication upon the claim for privilege if that person's identity were disclosed by the description of a document in the affidavit of discovery. For example, the description of a document as a transcript of an interview with a named individual would, obviously, disclose that that person had participated in

the statutory investigation. Similarly, a description of a document as consisting of correspondence with a named individual would have the same effect. To guard against such a risk, I propose to give the parties liberty to apply. In the event that particular documents cannot be described without undermining a claim of privilege, I propose to adopt a protocol similar to that adopted by the High Court (Clarke J.) in *Murphy v. Independent Newspapers (Ireland) Ltd* [2006] IEHC 276, [2006] 3 I.R. 566. The relevant party will be directed to preserve the disputed documents, and to provide a list setting out a description of those documents directly to the court. This list will not be shared with the other parties unless the court so directs. I will also hear from the inspectors as to how they might be facilitated in ensuring that their views, on whether particular documents might be privileged, can be communicated to the court.

68. As to the second issue in dispute, a cut-off date of 25 March 2020 will be imposed in respect of all categories of discovery to be made by Mr. Buckley, save in respect of documents related to the ongoing inspectorate process.

69. I propose to list this matter, for mention only, on 29 January 2023 with a view to fixing a date for a directions hearing.

70. Finally, for the avoidance of any doubt, it should be emphasised that this judgment makes no finding on the substance of the claim for public interest privilege. Rather, it is confined to prescribing the procedure by which such a claim might be brought before the court for determination.

Appearances

Oisín Quinn, SC and Hugh McDowell for the plaintiffs instructed by Addleshaw Goddard (Ireland) LLP
Bairbre O'Neill SC and Eoin McCullough SC for the first defendant instructed by Matheson LLP
Sean Guerin, SC, Lorcan Staines, SC and Brian Gageby for the second defendant instructed by A & L Goodbody LLP
Nessa Cahill, SC for the High Court appointed inspectors instructed by Ferrys Solicitors LLP

Approved