APPROVED [2020] IEHC 384

THE HIGH COURT

2018 No. 124 COS

IN THE MATTER OF INDEPENDENT NEWS AND MEDIA PLC

AND IN THE MATTER OF SECTION 748 OF THE COMPANIES ACT 2014

AND IN THE MATTER OF AN APPLICATION

BETWEEN

JENNIFER KILROY, HARRIET MANSERGH, JONATHAN NEILAN, MARK KENNY, SAM SMYTH, ANDREW DONAGHER, AND SIMON MCALEESE

DONAL BUGGY, ANNEMARIE HEALY AND MANDY SCOTT

VINCENT CROWLEY

MOVING PARTIES

AND

THE DIRECTOR OF CORPORATE ENFORCEMENT
INDEPENDENT NEWS AND MEDIA PLC
LESLIE BUCKLEY

RESPONDENTS TO THE MOTIONS

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 September 2020

INTRODUCTION

1. This judgment is delivered in respect of applications made by a number of individuals to be allowed to use material, which they have received in the context of the within proceedings, for the purposes of *other* proceedings. The material consists of affidavits and exhibits which had been filed as part of an application to appoint inspectors to Independent News and Media plc pursuant to the Companies Act 2014. I will refer to these affidavits and exhibits as "***the disputed material***" throughout this judgment. The moving parties seek to use the disputed material for the purposes of proceedings which they intend to pursue against Irish News and Media plc and/or Mr Leslie Buckley. These other proceedings allege that an exercise, which involved the detailed examination or "interrogation" of data held by the company relating to the moving parties, entailed a breach of the moving parties' rights, including, in particular, their right to privacy.

2. This judgment also addresses related applications by other individuals, who have not previously received the disputed material, to be furnished with that material and then to be allowed use it for the purposes of other proceedings.

3. As discussed presently, the legal principles which arise on these various applications have already been the subject of a detailed judgment by the then President of the High Court (Kelly P.), *In the matter of News and Independent Media plc* [2019] IEHC 467. Much of the debate at the hearing before me on 28 July 2020 centred on whether this earlier judgment should be distinguished.

PROCEDURAL HISTORY

4. The applications currently before the court arise in the context of an ongoing inspection of the affairs of Irish News and Media plc ("***the Company***") by two court-appointed inspectors. 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 1986 (as amended).

5. 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***"). As explained in the principal judgment, notwithstanding that there was little dispute between the parties as to the existence of the underlying facts, a large number of affidavits and exhibits had nevertheless been exchanged in advance of the hearing of the application. The present judgment is concerned with the entitlement, if any, of the moving parties to rely on these affidavits and exhibits for the purposes of *other* proceedings.

6. Prior to the hearing in July 2018 of the application to appoint inspectors, a number of individuals had sought to have sight of the affidavits and exhibits. This was so notwithstanding that these individuals were not formally parties to the application. An agreement had then been reached between the Director of Corporate Enforcement and the Company whereby the material would be furnished subject to certain redactions. As

indicated earlier, this documentation will be referred to in this judgment as "***the disputed material***".

7. This agreement had subsequently been expressly approved of by Kelly P. by order dated 24 April 2018. The relevant part of the order reads as follows.

> "The Court DOTH APPROVE of the agreed arrangement to furnish the documentation requested as outlined in the aforesaid letter and schedule dated 23rd of April 2018 and given that the agreement as reached relates only to the affidavit of Ian Drennan doth direct that all replying affidavits (12 to date) and any further affidavits to be filed in the within proceedings be also furnished subject to relevant redaction to the requesting parties while noting that the requesting parties reserve their position and are at liberty to apply to the Court on motion if dissatisfied with the documentation received – such available documentation to be furnished electronically 48 hours after the making of the within order with email addresses of the requesting parties to be supplied to McCann Fitzgerald Solicitors to facilitate such delivery and the Court requiring application on notice to all parties to the proceedings if any documentation received is sought to be used by any party other than for the purpose of the within proceedings."

8. (A slightly different form of wording is used in a subsequent order of 5 July 2018 which authorised the furnishing of papers relevant to the data protection issue to Mr Jonathan Neilan, Mr Mark Kenny, Mr Rory Godson, and Mr Vincent Crowley. Those individuals were directed "to hold the material confidentially" and "not to use the material for any purpose outside the proceedings". They were, however, given liberty to apply).

9. As appears, it is implicit in the order that, save with the leave of the court, the interested parties were only entitled to use the disputed material for the purposes of the application to appoint the inspectors. The effect of this part of the order has since been described as follows by Kelly P.

> "One important restriction was placed upon the recipients of the said material. They were precluded from using the documentation provided to them for any purpose other than use in these proceedings. Should they wish to use the material disclosed for any other purpose they were required to apply to court for leave to do so. […]"

10. This observation had been made by the President in his judgment delivered in respect of an application for leave to use the disputed material, *In the matter of News and Independent Media plc* [2019] IEHC 467. (Where convenient, this judgment will be referred to by the shorthand "***the Brophy/O'Reilly judgment***").

11. Before turning to consider that judgment, however, it may be convenient to explain first the nature of the "data interrogation" allegations, which are central to all of the requests to use the documentation for other proceedings.

12. The principal judgment indicates 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.
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> 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.
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> 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."

13. The nineteen individuals identified in the principal judgment have been referred to in the papers before me by the shorthand "***the INM 19***". Where convenient, I will adopt the same shorthand. 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.

JUDGMENT ON FIRST APPLICATION TO USE DOCUMENTATION

14. Two interested parties, Messrs. Karl Brophy and Gavin O'Reilly, 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 purposes of other proceedings.

15. 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.

16. 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. Both individuals had been amongst the nineteen individuals subject to the "data interrogation" exercise.

17. Kelly P. delivered a written judgment on this application on 27 June 2019, *In the matter of News and Independent Media plc* [2019] IEHC 467 ("***the Brophy/O'Reilly 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. It seems that 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.

18. Kelly P. considered that the application to use the documentation for the purposes 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 purposes of those particular proceedings. A court has discretion to release a party from this implied undertaking in special circumstances.

19. The President explained the appropriateness of the analogy with the discovery process as follows.

> "I should point out that, of course, *Roussel's* case dealt with documents disclosed on discovery. Documents in the present case have been disclosed to the Applicants by the agreement of the Director and the Respondent. They were, however, disclosed in the context of the current litigation and thus were acquired in a process analogous to discovery. For that reason, I felt it appropriate that they should be subject to the same limitation as is applicable to documents disclosed on foot of the discovery process proper."

20. The reference in the passage above to "*Roussel's* case" is to an earlier judgment of Kelly J. (as he then was) in *Roussel v. Farchepro Ltd* [1999] IEHC 78; [1999] 3 I.R. 567. The nature of the court's discretion to release a party from its implied undertaking not to use documents obtained in discovery in one set of proceedings for the purposes of *other* proceedings had been described as follows.

> "So it seems to me that in the exercise of this discretion, first there has to be a demonstration of special circumstances and secondly, it has to be shown that the making of an order of this type will not occasion injustice to the person giving discovery. But as the matter is one of discretion, it doesn't appear to me that the exercise of discretion simply stops there.
>
> I am of the view that in deciding whether or not to grant leave, the appropriate approach for the court is to look at all of the circumstances, including, if necessary, the circumstances of the original disclosure, the nature and the strength of the evidence, the type of wrongdoing which is alleged to be involved and the interests of both the applicant and the party providing discovery as well as any public interest which may be involved."

21. Applying these principles by analogy to the application before him, 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.

22. In exercising his discretion to allow the use of the documentation in the intended proceedings, Kelly P. placed reliance on the following factors.

23. 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.

24. 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.

25. 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 *Brophy/O'Reilly* 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."

26. The evidential status of documents obtained by way of discovery has been explained in detail by the Supreme Court in its recent judgment in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 1 I.R. 63; [2019] 2 I.L.R.M. 273. The judgment emphasises that discovered documents are not evidence of anything unless

properly placed before the court and proved in the ordinary way. Similarly, the mere fact that a document is exhibited in an affidavit does not, in and of itself, turn that document into admissible evidence.

THE MOTIONS HEARD ON 28 JULY 2020

27. Three motions were heard by this court on 28 July 2020 as follows.

(1). Application by Simon McAleese & Ors.

28. The first application heard on 28 July 2020 had been brought on behalf of the following individuals: Jennifer Kilroy, Harriet Mansergh, Jonathan Neilan, Mark Kenny, Sam Smyth, Andrew Donagher, and Simon McAleese. Save with the exception of the first two individuals named, all of these moving parties have already been furnished with copies of the documentation referred to in the order of 24 April 2018.

29. The moving parties, bar Mr McAleese, are all individuals whose names appear in the so-called "INM 19" spreadsheet. Mr McAleese is a solicitor and the managing partner of Simon McAleese Solicitors LLP. It will be recalled from the principal judgment that the explanation which had been offered by Mr Buckley for the "data interrogation" exercise is that it formed part of a cost-reduction exercise in respect of a contract which the company had with Simon McAleese Solicitors.

30. Mr McAleese has sworn two affidavits in support of the application, on his own behalf and that of his clients. Mr McAleese explains his own relationship with the Company as follows (at paragraph 15 of his affidavit of 7 July 2020).

> "15. My close association with INM and it's former management was reasonably well-known. Aside from legal work carried out by me for INM over the years, I had represented Sir Anthony O'Reilly during a well-publicised appearance by him at the Moriarty Tribunal in March 2004 when he gave evidence to the Tribunal pertinent to its investigation of the award of the State's second mobile telephone licence to Denis O'Brien's ESAT Digifone consortium. My contract with INM's publishing subsidiary, Independent Newspapers

> (Ireland) Limited, was widely known about. That contract and other work carried out by me for INM placed me in a position of the utmost trust and sensitivity *vis-à-vis* my dealings with INM and its management. Also, but known to very few, I had represented Gavin O'Reilly in a personal matter. […]"

31. Mr McAleese summarises the relationship of the other moving parties with the Company as follows.

32. Mr Smyth is a journalist, and had previously been employed by a publishing subsidiary of the Company, namely Independent Newspapers (Ireland) Ltd. Mr Smyth left this employment in mid-2013.

33. Mr Donagher is a former company secretary of the Company, having retired from this position in December 2013. Mr McAleese avers that Mr Donagher had been closely associated with what he describes as the "former management" of the Company, i.e. the management which had prevailed prior to Mr O'Brien gaining "effective control" of the Company.

34. Mr Smyth and Mr Donagher each had INM email accounts while employees, and they believe that the "data interrogation" exercise resulted in the content of their email accounts, including personal communications, being interrogated.

35. The position of other of the moving parties is addressed as follows (at paragraph 18 of Mr McAleese's affidavit of 7 July 2020).

> "18. Ms Kilroy, Ms Mansergh, Mr Kenny and Mr Neilan were not employees of INM. However, they provided investor relations and corporate governance advice to INM through the business in which they were all then involved, namely FTI Consulting ('FTI'). Mr Neilan is the current Managing Director of FTI. Ms Kilroy, Ms Mansergh and Mr Kenny ceased their employment with FTI in October 2012, July 2012 and July 2018, respectively. I am instructed that FTI was perceived as having been associated with the former (O'Reilly) management of INM. I am instructed that Ms Kilroy, Ms Mansergh, Mr Kenny and Mr Neilan, in their FTI roles, were in positions of the utmost trust and sensitivity *vis-à-vis* their communications with the Respondent company's senior executives which explains why they believe they were targeted for the purpose of having their data 'interrogated' and why their names appear on the

> list of 19 names, the so-called INM 19. I am advised that many of their communications with the Respondent company's former senior executives would have been of a highly confidential nature and written in the expectation that such communications were of the utmost confidentiality and that same would not be unlawfully infringed by third parties."

(2). Application by Donal Buggy, Annemarie Healy and Mandy Scott

36. The second application has been brought by Donal Buggy, Annemarie Healy, and Mandy Scott. Mr Buggy and Ms Healy have not previously been furnished with the disputed material. The first leg of their application, accordingly, seeks an order granting them access to the material referred to in the order of 24 April 2018. All three moving parties then seek permission to use the documentation for the purpose of bringing proceedings against the Company and others, including Mr Buckley, for, *inter alia*, breach of privacy and breach of data protection rights.

37. Mr Buggy has been the financial director of the Company, and had been a member of the Company's board and executive committee from 2002 to 2012. Ms Healy had been employed by the Company between 1995 and June 2012. For a period of that time, she had been the senior group finance and treasury manager. Ms Scott was the Executive PA to Mr Anthony O'Reilly and Mr Gavin O'Reilly, both former chief executive officers of the Company. Ms Scott had been employed in that role from 1988 to 2012.

38. Mr Buggy, Ms Healy, and Ms Scott have all been identified as part of the so-called "INM 19".

39. These moving parties' application is grounded on an affidavit of their solicitor, Mr McAleese, sworn herein on 2 July 2020. Mr McAleese avers that these parties would have been closely associated with what he describes as "the (former) O'Reilly management" of the Company, and that all three were in positions of the utmost trust and

sensitivity, which, in their view, explains why they believe they were targeted for the purpose of having their data "hacked" as part of the "data interrogation" exercise.

40. Mr McAleese further avers that each of the three moving parties has instructed him that, for at least part of the time, their INM email address had been used for all their personal emails, i.e. as well as for work-related emails.

(3). Application by Vincent Crowley

41. Mr Vincent Crowley is a former chief executive officer of the Company. Mr Crowley is also one of the names featuring on the spreadsheet of the so-called "INM 19".

42. It has been explained in the affidavit of his solicitor, Ann Henry, grounding his application, that Mr Crowley had applied to the High Court (Kelly P.) on 5 July 2018 for an order directing that he be served with a copy of all pleadings, motion papers and affidavits (including exhibits). In the event, an agreement was reached between the parties to the effect that the said papers would be supplied to Mr Crowley by the Office of the Director of Corporate Enforcement subject to certain redactions and subject to a preclusion on Mr Crowley using the documentation provided to his solicitors for any purpose other than in these proceedings. The curial part of the order reads as follows.

> "The applicants hold the material confidentially and are not to use the material for any purpose outside of the proceedings."

43. The parties were, however, given liberty to apply. Mr Crowley now applies for leave to use the documents furnished to him for the purpose of proceedings which he has issued against the Company and Mr Buckley. Those proceedings are entitled *Crowley v. Independent News and Media Ltd and Buckley*, and bear the High Court record number "2020 No. 5177 P.".

POSITION OF COMPANY AND DIRECTOR OF CORPORATE ENFORCEMENT

44. The position adopted by the Company and the Director of Corporate Enforcement on 28 July 2020 had been not to oppose the various applications. (It will be recalled that the Company had unsuccessfully opposed the *Brophy/O'Reilly* application).

MR BUCKLEY'S OPPOSITION TO THE APPLICATIONS

45. The applications were opposed by Mr Buckley. As explained in the principal judgment, Mr Buckley had been the chairman of the board of the Company until he resigned on 1 March 2018. Mr Buckley is alleged to have directed the "data interrogation" exercise.

Objection to Mr Buckley's standing

46. The moving parties make the objection that Mr Buckley does not have standing (*locus standi*) to oppose the various applications. The approach adopted in this judgment will be to consider Mr Buckley's grounds of opposition *de bene esse* and to rule upon them on their merits. I will then return to consider the procedural objection at paragraph 87 *et seq*. below.

Mr Buckley's grounds of opposition

47. Leading counsel on behalf of Mr Buckley emphasised that the reliance placed upon the case law in respect of the use of discovery documentation is by way of analogy only. The investigations carried out by the Director of Corporate Enforcement, and the inspection now being carried out by the court-appointed inspectors, are governed by statute, and are different in nature to *inter partes* proceedings. The primary difference identified by counsel is that the Director of Corporate Enforcement is entitled to exercise statutory powers which require documents to be produced, and which require questions to be answered by parties. It is further submitted that Mr Buckley has had to comply with statutory directions to answer questions and to furnish material, including private email

communications and text messages. The moving parties are said to be attempting to use answers given by Mr Buckley under statutory compulsion to the Director of Corporate Enforcement and to the court-appointed inspectors, and to take action on foot of those at a time when the investigation that the court has mandated is far from complete. It is said that the acknowledged purpose of the application is, in part, to obtain access to material which the moving parties would not be capable of obtaining access to through the discovery process in *inter partes* proceedings.

48. (It should be noted that the specific materials which are said to have been produced under compulsion have not been expressly identified to the court as part of the application).

49. Counsel observes that it is something of a "curiosity" that the Director of Corporate Enforcement is not taking a view on the appropriateness of material obtained under statutory compulsion being made available to other parties. It is also said that it is ironic that the moving parties, in support of their own claims for breach of privacy, seek to have access to Mr Buckley's private communications. More specifically, it is submitted that the moving parties, in seeking permission to use the documentation in aid of their claims for breach of privacy, are inviting the court, in effect, to spare them the trouble of undergoing the ordinary rigours of the discovery process, and to allow them to have access to Mr Buckley's private communications without having established that it is necessary for them to do so for the purposes of the proceedings, or that those materials are relevant to the claim they intend to make.

50. Counsel submits that the public interest in the use of documentation and answers obtained by way of statutory compulsion, and the impact on the privacy of affected parties, such as Mr Buckley, were not fully considered in the *Brophy/O'Reilly* judgment. Mr Buckley had not participated in that application, and whereas the application had been opposed

by the Company itself, it would not have the same personal privacy rights that a natural person, such as Mr Buckley, would have.

DISCUSSION

51. The principal issue for determination in this judgment is whether the moving parties should be allowed to use the documentation, which has already been furnished to them in the context of the application to appoint the inspectors, for the purposes of *other* proceedings which they have instituted against the Company and/or Mr Buckley. (The position of the four individuals who have not yet been furnished with the disputed material is addressed separately at paragraph 84 below).

52. In addressing this issue, it is appropriate to recall the precise nature of the documentation involved. The relevant material consists of affidavits and exhibits which had been exchanged between the Company and the Director of Corporate Enforcement in advance of the hearing in July 2018 of the application to appoint the inspectors.

53. The affidavits and exhibits had been furnished, in advance of the hearing in July 2018, to a number of interested persons, including most of the moving parties in the applications the subject of this judgment. It is evident from the terms of the orders of 24 April 2018 and 5 July 2018 that, in approving and authorising access to the disputed material, the President of the High Court was anxious to impose some limitation on the use which could be made of the documentation by those parties without leave of the court. The nature of the limitation has subsequently been elaborated upon by Kelly P. in his judgment on the *Brophy/O'Reilly* application. Specifically, the limitation is envisaged as being akin to that which governs the use of documents which one side has obtained by way of discovery in legal proceedings.

54. I pause here to note that the nature of the implied undertaking not to use discovered documents for collateral purposes has very recently been described as follows by the Supreme Court in *Waterford Credit Union v. J & E Davy* [2020] IESC 9 (at paragraphs 1.2 and 1.3).

> "However, in the context of civil litigation it has always been recognised that the fair resolution of civil cases may well require a party to disclose to its opponent relevant documents within its possession. While the criminal law recognises a right to avoid self-incrimination, there is no equivalent entitlement of a party to civil litigation to refrain from making relevant if unfavourable evidence available. This Court has, in *Tobin v. Minister for Defence* [2019] IESC 57, recently emphasised the importance of the discovery process in ensuring a fair result in civil proceedings, while also acknowledging that there can be circumstances where the process becomes so burdensome that it operates to defeat, rather than to enhance, justice.
>
> However, it has also always been recognised that the reason why a party may be entitled to have access to its opponent's documents, often including confidential documents, is for the very specific purpose of enhancing the prospects of justice being done in the case in question. Given that very limited focus of the discovery process, it has also always been recognised that a party who gains access to documentation through the discovery process is obliged to use that documentation only for the purposes of the litigation. It is said that a party obtaining such documentation is subject to an implied undertaking only to make use of the documentation in question in that limited fashion. […]."

55. Returning to the judgment on the *Brophy/O'Reilly* application, there, Kelly P., in determining the application before him applied, by analogy, the case law governing the collateral use of discovered documents. Pointedly, the judgment emphasises the extent of the court's *discretion*, and, in particular, the need to have regard to the justice of the case, and to avoid conferring an improper litigation advantage on the party seeking to use the discovered documents.

56. As correctly observed by counsel during the course of the submissions before me on 28 July 2020, the analogy with the collateral use of documents obtained by way of discovery is not an exact one. In particular, the public interest which the limitation on

the use of the disputed material in these proceedings is intended to serve is different. The case law in respect of the collateral use of documents obtained by way of discovery identifies two public interest objectives. First, to enhance the integrity of the discovery process by ensuring that parties are not discouraged from making full discovery by a concern that the documentation disclosed will be used for improper purposes by the other side. Secondly, to ensure that the obligation imposed on a party to disclose documents (including private or confidential documents) is proportionate, by confining the use of those documents to the proceedings in which discovery has been made. To elaborate: the process of making discovery will, in many instances, require a party to disclose confidential or private documents. This interference with a party's rights is justified by the countervailing public interest in the proper administration of justice. The implied undertaking, i.e. not to use discovered documents other than for the purposes of the specific proceedings in which discovery has been obtained, ensures that the interference does not go further than is necessary to advance this countervailing public interest.

57. This rationale does not apply with the same force to the disputed material in the present case. This is because the disputed material, i.e. the affidavits and exhibits, differs from discovered documents in two crucial respects. First, the disputed material had been put before the High Court voluntarily by the two protagonists to the application to appoint the inspectors, namely the Company and the Director of Corporate Enforcement. Each side chose to put the material forward in support of their position on the application. The element of compulsion, which underlies the implied undertaking in the case of discovered documents, is not present.

58. Secondly, the application to appoint the inspectors took the form of a *public hearing* before the High Court. The hearing took place over a three-day period commencing on 10 July 2018. Kelly P. had considered the affidavits and exhibits in advance of the

hearing, and counsel made reference, in open court, to specific parts of the affidavits and exhibits during the course of the hearing.

59. Any member of the press or broadcast media who had been in attendance at the hearing in July 2018 would have been entitled to publish details of the content of the affidavits and exhibits as part of their reportage of the hearing. This was subject only to an implied obligation not to refer to certain specified parts of the affidavits which had been subject to redaction in accordance with the procedure prescribed under the order of the High Court of 23 April 2018.

60. Indeed, had the proceedings commenced on or after 1 August 2018, then any *bona fide* member of the press or broadcast media would have been entitled to request access to the documentation for the purposes of facilitating the fair and accurate reporting of the hearing. See Data Protection Act 2018 (Section 159(7): Superior Courts) Rules 2018 (S.I. No. 660 of 2018).

61. Moreover, the court would also appear to have an inherent jurisdiction to allow a non-party to access documents or other information which has been placed before the court in the context of a public hearing. The existence of such an inherent jurisdiction, to be exercised on a discretionary basis, is consistent with the constitutional imperative that, save in such special and limited cases as may be prescribed by law, justice shall be administered in public (Article 34.1 of the Constitution of Ireland). Subject to any exception prescribed by law, a court has an inherent jurisdiction to allow access to affidavits and exhibits which have been relied upon in the context of a public hearing. This is so even in those cases where the material has been read in advance by the judge, and has not been read out in full in open court. It is to be reiterated, however, that the decision as to whom, and on what terms, access to documentation might be allowed is always a matter for the *discretion* of the court.

62. The nature of the equivalent jurisdiction under English law has recently been described as follows by the United Kingdom Supreme Court in *Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v. Cape Intermediate Holdings Ltd* [2019] UKSC 38; [2020] A.C. 629 (at paragraph 41).

> "The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case."

63. Part of the rationale, as explained by the United Kingdom Supreme Court, for the need for such a discretionary jurisdiction is as follows(at paragraph 43).

> "[…] It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material."

64. It is a moot question as to what the legal consequences are where discovered documents have been referred to at a public hearing. This is because the disputed material in this case has a higher status, i.e. affidavits and exhibits. For the sake of completeness, however, it should be noted that the position in England and Wales is that the preclusion on the collateral use of discovered documents no longer applies once the documents have been read to, or by, the court at a public hearing. More specifically, the current position under Rule 31.22 of the Civil Procedure Rules is as follows.

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.
>
> (3) An application for such an order may be made –
>
> (a) by a party; or
>
> (b) by any person to whom the document belongs.
>
> […]

65. (The effect of Rule 31.22 of the Civil Procedure Rules—and its precursor Order 24, rule 14A—is to reverse the ruling of the House of Lords in *Harman v. Secretary of State for the Home Office* [1983] 1 A.C. 280. This was seen as necessary to give effect to the European Convention on Human Rights. A *different* aspect of the ruling in *Harman* had been cited with approval in *Roussel v. Farchepro Ltd* [1999] IEHC 78; [1999] 3 I.R. 567).

66. There is no equivalent provision addressing the implied undertaking to be found under the Rules of the Superior Courts. For completeness, it should be noted that the High Court (Clarke J.) made brief reference to Rule 31.22 of the Civil Procedure Rules in *Cork Plastics (Manufacturing) Ltd v. Ineos Compounds UK Ltd* [2007] IEHC 247; [2011] 1 I.R. 492 (at paragraph 11).

> "While the prohibition on use of disclosed documents in the United Kingdom is now described as a restriction on collateral use, the basic obligation does not appear to be, in substance, different from that

> which arose under the former implied undertaking which applied in that jurisdiction and which continues to apply in this jurisdiction. In the circumstances it seems to me that the principles applicable in this jurisdiction are likely to be the same or very similar to those applied, in a like case, in the United Kingdom. […]"

67. It should be emphasised, however, that the judgment in *Cork Plastics (Manufacturing) Ltd* had been concerned solely with whether the permission of the (original) court is required before discovered documents may be relied upon in other proceedings, and did not address the separate contingency under the Civil Procedure Rules of a document having been read to or by the court, or referred to, at a hearing which has been held in public.

DECISION ON APPLICATION TO USE DISPUTED MATERIAL

68. For the reasons which follow, I have decided that, adopting the test applied by Kelly P. in the *Brophy/O'Reilly* judgment, special circumstances exist which justify allowing the moving parties to rely on the disputed material for the purposes of proceedings against the Company and/or Mr Buckley. I am also satisfied that this order is in the interests of justice and does not confer any improper litigation advantage on the moving parties.

(i). Content of the disputed material is in the public domain

69. The content of the disputed material is already in the public domain, and, further, the affidavits and exhibits form part of the record of the court in respect of the public hearing in July 2018. Any member of the press or broadcast media who had been in attendance at the hearing in July 2018 would have been entitled to publish details of the content of the affidavits and exhibits as part of their reportage of the hearing. This was subject only to an implied obligation not to refer to certain specified parts of the affidavits which had been subject to redaction in accordance with the procedure prescribed under the order of the High Court of 23 April 2018.

70. The content of those affidavits and exhibits are referred to, in general terms, in the principal judgment delivered on the application on 4 September 2018. Relevantly, the nature of the alleged "data interrogation" issue has been set out in some detail in the principal judgment.

71. The public interest values which underlie the implied undertaking not to use discovered documents for collateral purposes do not apply to affidavits and exhibits which were filed in proceedings which have since been heard and determined at a public hearing and are the subject of a published unredacted judgment. The affidavits and exhibits were not provided under compulsion, and the confidentiality which the implied undertaking is intended to protect has been lost.

72. Moreover, two interested parties, namely, Messrs Brophy and O'Reilly, have already been permitted by the court to use this documentation for their claims for alleged breach of privacy. It would be artificial and arbitrary to rule that other similarly situated parties should not equally be entitled to rely on the documentation for the same purpose.

73. There is no obvious public interest which would be advanced by refusing to allow the moving parties the same entitlement to rely on the documentation. Rather, for reasons similar to those expressed by Kelly P. in the *Brophy/O'Reilly* judgment, to require the moving parties to have to apply for discovery of the self-same documents which they already hold would, from a public interest point of view, be wasteful of the scarce time and resources of the court, as well as increasing the costs and delaying the litigation in question.

(ii). The parties providing the disputed material do not object

74. The two protagonists to the application to appoint the inspectors, namely the Company and the Director of Corporate Enforcement, are not objecting to the granting of permission to the moving parties to use the disputed material. This is a crucial difference

between the circumstances of the *Brophy/O'Reilly* application and the present application. It will be recalled that the Company had objected to the *Brophy/O'Reilly* application on a number of grounds.

75. Again, the objective of the implied undertaking not to use discovered documents for collateral purposes is to protect the confidence and privacy of those who have had to make discovery of documents under compulsion. Whereas the undertaking is, ultimately, one given to the court, the fact that the parties who benefit from the undertaking do not object is a factor which weighs heavily in favour of permitting the use of the documents. By analogy, the fact that neither of the parties who filed the affidavits and exhibits are objecting is equally significant.

(iii). Leave to use documents is in the interests of justice

76. The judgment in *Roussel v. Farchepro Ltd* indicates that the court should look at the type of wrongdoing which is alleged to be involved, and the nature and strength of the evidence. This is consistent with the approach taken by the High Court in *Cork Plastics (Manufacturing) Ltd v. Ineos Compounds UK Ltd* [2007] IEHC 247; [2011] 1 I.R. 492. Clarke J. (as he then was) observed that, in the ordinary way, the requirements of justice in the second set of proceedings will, normally, mandate that documents which are relevant to those proceedings be disclosed so as to allow a proper and just determination of the second set of proceedings.

77. The defining feature of the wrongdoing alleged against the Company and Mr Buckley is its covert and furtive nature. This feature makes it less likely that the moving parties would have been aware of the alleged wrongdoing had it not been for the disclosure of same as part of the process leading up to the appointment of the inspectors by the court on 6 September 2018. Not only would it be artificial to restrain the moving parties from now relying on this material, it also has the potential to cause them an injustice. Without

in any way prejudging the outcome of their proceedings, it is a matter of record, as set out in the principal judgment, that the materials put before the President in July 2018 were sufficient to persuade him that there were circumstances suggestive of the affairs of the Company being conducted for an unlawful purpose. This was said to be particularly so in respect of the "data interrogation" issue, where Kelly P. stated that its actual purpose remained unclear but was certainly suggestive of the company's affairs being conducted for a purpose that is unlawful. See paragraph 79 of the principal judgment.

(iv). No improper litigation advantage

78. It is next necessary to consider whether allowing the moving parties to rely on the disputed material would confer an improper litigation advantage upon them. The emphasis here is on whether any litigation advantage is *improper*: if the order sought did not confer any benefit at all on the moving party, then there would be little point in the application. The benefit is that the moving parties can plead out their case by reliance on the disputed material. In the absence of permission, the moving parties would be vulnerable to a complaint that they were in breach of the limitation imposed by the orders of 24 April 2018 and 5 July 2018. This would be so notwithstanding that the detail of the alleged "data interrogation" exercise is set out in the principal judgment, which is publicly available and has been subject to extensive reportage. The moving parties will also be relieved of the paradoxical exercise of having to seek an order for discovery in respect of documents which they already have.

79. It is argued on behalf of Mr Buckley that these benefits represent an improper litigation advantage. In particular, it is submitted that some of the disputed material includes responses which had been provided to the Director of Corporate Enforcement on foot of statutory compulsion. It is also said to include private communications, text messages and emails provided by Mr Buckley under compulsion. It is said that these responses

and private communications are not material which is or should be available to anyone who wants it, and certainly not without showing a sufficient basis for the making of such disclosure.

80. Notwithstanding the eloquence with which they were presented by counsel, Mr Seán Guerin, SC, these arguments are not well founded. First, the arguments tend to overlook the precise route by which the disputed material came to be furnished to the moving parties. The material takes the form of affidavits and exhibits which, subject to certain specified redactions, formed the basis of a public hearing before the High Court in July 2018. The fact, if fact it be, that certain of the documentation had initially been obtained by the Director of Corporate Enforcement through the use of his statutory powers does not alter this analysis. Once the documentation was used for the purposes of the application to appoint the inspectors, same came into the public domain. The application to appoint the inspectors was heard in public in accordance with the constitutional imperatives under Article 34.1.

81. Secondly, if and insofar as Mr Buckley may wish to argue that it is unfair that answers, which he contends were only provided on foot of statutory obligation, are now to be used against him, then this is a matter which can be raised in the context of the proceedings taken against him. The trial judge in those proceedings can rule on any objection to the admissibility of such evidence.

82. The effect of this court's order allowing the documents to be used is not conclusive of the evidential status of the disputed material. See paragraph 58 of the *Brophy/O'Reilly* 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."

83. See also the discussion of the evidential status of discovered documents in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 1 I.R. 63; [2019] 2 I.L.R.M. 273.

POSITION OF PERSONS NOT YET SUPPLIED WITH THE DISPUTED MATERIAL

84. Four of the moving parties, namely Ms Kilroy, Ms Mansergh, Mr Buggy and Ms Healy, have not previously been supplied with the disputed material. For the reasons which follow, I am satisfied that they are entitled to be supplied with a copy of same. They are also to be permitted to use that material for the purposes of their proceedings against the Company and Mr Buckley. The rationale set out under the previous heading above applies *mutatis mutandis* to these four moving parties.

85. Each of these four moving parties has established that they have a legitimate interest in the proceedings leading up to the appointment of the inspectors in September 2018. Each of these individual's names appear on the spreadsheet setting out the so-called "INM 19". This suggests that they had been specifically targeted for analysis as part of the "data interrogation" exercise. It will ultimately be a matter for the trial judge hearing the proceedings for breach of privacy to determine what precisely occurred, and whether it represents an actionable wrong. For the purposes of the present application, however, it is sufficient that these moving parties have established that the disputed material contains matters which are directly referable to their position as subjects of the "data interrogation".

86. Insofar as Ms Kilroy and Ms Mansergh's entitlement to have access to the disputed material is concerned, it is to be noted that their position approximates to that of Messrs Kenny and Neilan. All four had provided investor relations and corporate governance advice to the Company through FTI Consulting. It has been averred by Mr

McAleese in his affidavit that many of their communications with the Company's former senior executives would have been of a "highly confidential nature" and would have been written in the expectation that such communications were of the utmost confidentiality. These averments have not been contradicted by Mr Buckley. It will be recalled that Messrs Kenny and Neilan have already been furnished with copies of the disputed material pursuant to the order of 24 April 2018. It would be arbitrary to deny Ms Kilroy and Ms Mansergh access to same.

MR BUCKLEY'S STANDING TO OPPOSE THE APPLICATION

87. The approach adopted up to this point of the judgment has been to proceed on the working assumption that Mr Buckley has standing (*locus standi*) to oppose the application. To this end, Mr Buckley's submissions have been considered on their merits *de bene esse*. For the reasons set out above, I have concluded that his opposition to the application for leave to use the disputed material for other proceedings is not well founded.

88. For the sake of completeness, however, it is also necessary to address the objection raised by the moving parties to the effect that Mr Buckley does not have standing. There are two strands to this objection. The first, more formalistic, argument turns on the precise wording of the order of 24 April 2018. The wording suggests that any application by any party to use the disputed materials other than for the purposes of the within proceedings was to be made "on notice to all parties to the proceedings". It is submitted that as Mr Buckley is not a party to the proceedings, he has no entitlement to be heard. Mr Buckley had, under the terms of the order of 24 April 2018, been given liberty to apply to be joined to the proceedings as a notice party, but had failed to do so. Further, the *Brophy/O'Reilly* application had been heard and determined without any requirement that Mr Buckley should have been on notice of same.

89. The second, more substantive, argument pursues the logic of the analogy with the implied undertaking in respect of discovered documents. An application to use discovered documents in other proceedings must be made on notice to the party who had made discovery in the first set of proceedings (*Cork Plastics (Manufacturing) Ltd v. Ineos Compounds UK Ltd*). This corresponds, by analogy, to the position of the two protagonists in the application to appoint the inspectors, i.e. the Company and the Director of Corporate Enforcement. They are the parties who furnished the exhibits and affidavits.

90. By contrast, it is said, Mr Buckley's position approximates to that of a person ("X") who had previously supplied documents in confidence to another person ("A"), only to find that those documents are subsequently made available on discovery as documents in the possession of that other person ("A") in proceedings involving "A" and "B". Assuming that the person ("X") who had supplied the documents is not also a party to those proceedings, then they would have no right to oppose an application by "B" to be released from their implied undertaking not to use the discovered documents for other proceedings. The *legitimus contradictor* to such an application would be the party who had made the discovery ("A").

91. On this analogy, it is said, Mr Buckley similarly has no right to be heard in opposition to the moving parties' application to use the disputed material in other proceedings.

92. These arguments are refuted by counsel on behalf of Mr Buckley. It is submitted that, from a substantive point of view, Mr Buckley is both a person who provided some of the material to the Director of Corporate Enforcement which it is sought to use, and that he is also the person against whom it is intended to use the material, i.e. in the proceedings for alleged breach of privacy. It is said that Mr Buckley has a substantive interest both

in terms of the origin and in terms of the intended use of at least some of the documents. Therefore, as a matter of justice, he should be heard in relation to the application.

93. At one point in his submissions, counsel *appeared* to suggest that the question of Mr Buckley's standing may have already been ruled upon by this court insofar as I had, at an earlier hearing, adjourned the motions and directed that Mr Buckley be put on notice of the various applications. With respect, this is to read too much into my earlier direction. The applications to use the disputed material had, initially, been made on notice only to the Company and the Director of Corporate Enforcement. (This is the same approach as had been adopted in the *Brophy/O'Reilly* application). On the original return dates, counsel for Mr Buckley objected that his client had not been on notice of the relevant application. I adjourned the hearing and directed that Mr Buckley be put on notice. This was done *de bene esse*. The direction had been made without hearing argument from the moving parties as to whether Mr Buckley was entitled to be put on notice. Rather, that question remained open for full argument. The objective of the direction was simply to ensure that Mr Buckley had an opportunity to make submissions on the motions, including submissions on his asserted entitlement to be heard in opposition to same.

DECISION ON OBJECTION TO STANDING

94. It is difficult to disentangle (i) the procedural objection that Mr Buckley does not have standing to oppose the application for permission to use the disputed material, from (ii) the substance of that opposition. The resolution of both turns largely on the legal status to be attached to material which is said to have been supplied under statutory compulsion to the Director of Corporate Enforcement, and on the status of affidavits and exhibits the content of which are in the public domain. Having ruled against Mr Buckley

on the merits of his opposition, it might be tempting to conclude that he may not even have had standing to advance those (unsuccessful) grounds of opposition. Certainly, on a strict analogy with the case law on the implied undertaking in respect of discovered documents, Mr Buckley would not have standing for the reasons summarised at paragraph 90 above.

95. The legal position is, however, more nuanced. The proceedings leading up to the appointment of the inspectors in September 2018 had a public interest element. The category of persons who had a legitimate interest in the outcome of the application extended beyond the two protagonists. It was precisely for this reason that the President approved of the arrangements whereby redacted copies of the affidavits and exhibits were supplied to a number of individuals (including most of the moving parties). It seems that a similar logic applies to Mr Buckley's position. Whereas Mr Buckley did not avail of the opportunity afforded to him to apply to be joined to the proceedings, he nevertheless has a legitimate interest in the outcome of those proceedings. Mr Buckley is also named as a defendant in most of the proceedings in aid of which the moving parties seek leave to use the disputed material. In the peculiar circumstances of this case, therefore, I find that Mr Buckley has a right to be heard on the questions raised by the applications to use the disputed material.

96. It should be emphasised that this finding is rooted in the peculiar circumstances of this case, and confined to the central role of Mr Buckley in the alleged wrongdoing. This judgment is not authority for any general proposition that a person, whose confidential material has become enmeshed in proceedings to which they are not a party, has an automatic entitlement to be heard on any application to use that material for other proceedings. This is especially so where the material takes the form of affidavit evidence and exhibits which have been the subject of a public hearing.

CONCLUSION AND FORM OF ORDER

97. The moving parties are granted permission to rely on the affidavits and exhibits for the purposes of the proceedings which they have instituted and intend to pursue against the Company and/or Mr Buckley. This permission does not extend to certain specified parts of the affidavits which had been subject to redaction in accordance with the procedure prescribed under the order of the High Court of 23 April 2018.

98. The four moving parties who have not previously been supplied with the disputed material, namely Ms Kilroy, Ms Mansergh, Mr Buggy and Ms Healy, are entitled to be supplied with a copy of same. They are also to be permitted to use that material for the purposes of their proceedings against the Company and/or Mr Buckley, on the same terms as above.

99. The attention of the parties is drawn to the statement issued 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."

100. The parties are requested to correspond with each other on the precise form of the order. In particular, they are requested to agree the extent of the redactions, if any, which are to apply to the documentation. It also seems sensible that the order should identify the documentation in direct terms, rather than by a cryptic cross-reference to a letter in an earlier order (as is currently the position). In the event of disagreement, the matter may

be mentioned to me on Tuesday 6 October 2020. This application and a number of related matters are listed for directions on that date in any event.

101. Insofar as costs are concerned, the general rule is that costs follow the event; and that a 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. Were this approach to apply, then the moving parties would be entitled to the costs of their motions (to include the costs of preparing written submissions where relevant) as against Mr Buckley. If any party submits that a *different* approach to costs should apply, then the parties are to file written submissions in the following sequence. Mr Buckley's side is to file submissions by 9 October 2020, and any moving party who wishes to file submissions is to do so by 30 October 2020. I will then prepare a written ruling on costs.

Appearances

Seán Guerin SC, Lorcan Staines SC and Brian Gageby for Mr Buckley instructed by A & L Goodbody Solicitors
Oisín Quinn SC and Hugh McDowell for the first and second set of moving parties instructed by Simon McAleese Solicitors LLP
Joe Jeffers for Mr Crowley instructed by Pinsent Mason (Ireland)

Approved