THE HIGH COURT

[2021] IEHC 229

[2016 No. 4450 P.]

BETWEEN

PAT CAREY

PLAINTIFF

AND

INDEPENDENT NEWS & MEDIA PLC, INDEPENDENT NEWSPAPERS (IRELAND) LIMITED, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 26th day of March, 2021

1. This judgment relates to an application for discovery made by the plaintiff in the context of proceedings seeking damages for breach of privacy and confidentiality. The proceedings are brought against a number of defendants, the first two of whom I shall refer to in this judgment as the media defendants. The second defendant is the publisher of the Irish Independent and Sunday Independent newspapers which, in November, 2016, published a series of articles concerning an investigation by An Garda Síochána into allegations of child sexual abuse. It is noted that the defence filed on behalf of the media defendants acknowledges publication by the second defendant but not the first defendant. As both media defendants have the same legal representation, have filed a single defence and the affidavit replying to this motion for discovery is sworn on behalf of both, it is not proposed to address the potential consequences of that plea in this motion.

2. The media defendants oppose the discovery sought by the plaintiff both in terms of its relevance and necessity to the issues in the case and, in the event discovery is found to relevant and necessary, on the grounds of journalistic privilege. There is a serious dispute between the parties as to whether the claim to journalistic privilege should be ruled on in the context of this application or, if discovery is ordered, at the time when the plaintiff seeks to inspect the documents so discovered. Although this is ostensibly a procedural issue, it has significant substantive implications in circumstances where the media defendants contend that any affidavit of discovery to be sworn by them could potentially identify their sources and, thus, breach the privilege which they seek to assert.

Background to the Plaintiff's Claim

3. The plaintiff is a retired politician, having served as a TD between 1997 and 2011 and as a Government Minister between 2010 and 2011 before losing his seat in the 2011 general election. Prior to becoming a full time politician, he was a teacher and community activist. Despite having retired from representative politics in 2011, the plaintiff retained a public profile and remained actively involved in the political party of which he was a member. At the time the articles the subject of the proceedings were published, he was the national director of elections for that party. He was also actively involved in a number of charitable and not-for-profit organisations.

4. The media defendants published a series of articles in the Irish Independent newspaper and its online editions on the 11th and 12th November, 2015. Those articles reported that a Garda investigation was taking place into allegations of child sexual abuse made by a

number of complainants against a former Government Minister. The plaintiff contends that it is evident from the detail relating to the investigation set out in the articles that the "*sources*" referred to in the articles could only be Garda sources. Further, although the former Government Minister the subject of the investigation was not named, the plaintiff contends that he was identifiable as the person concerned from the contents of the articles taken in their entirety and consequently that he became the subject of speculation, both in political circles and more generally, as to who the former Government Minister might be. The plaintiff contends that, as a result, he was placed *"in the invidious position of having to address public speculation surrounding his involvement by issuing a statement dealing with those allegations about which he had no knowledge*". Given the level of "*rumour and innuendo*", the plaintiff felt obligated to, and did, step down from the various positions he held while any investigation was underway. Naturally, the issuing of that statement by the plaintiff meant that his name was now indisputably in the public domain as the subject of the investigation referred to in the articles.

5. The media defendants deny that the plaintiff was either identified in or identifiable from the articles published prior to his making his statement on the evening of 12th November, 2015. Consequently, they contend that it was this statement which publicly identified the plaintiff, a plea with obvious significance in the context of a claim for breach of privacy. Subsequent to the plaintiff's statement, the media defendants published a further series of articles on the allegations in which the plaintiff was named. Those articles included reports of the plaintiff's denial of the allegations. An editorial published by the media defendants on 14th November, 2015 stated the publication was "*manifestly in the public interest*" and was critical of attempts within An Garda Síochána to investigate the leak which was allegedly the source of the information used in the articles.

6. Finally, although not strictly relevant to this discovery application and, perhaps not even relevant to the underlying proceedings, the court was informed that the Garda investigation has concluded and the Director of Public Prosecutions has informed the plaintiff that no charges are to be brought against him arising out of these allegations.

Proceedings

7. Against this factual background, the plaintiff issued proceedings on 19th May, 2016. In addition to the media defendants, the plaintiff has sued the Commissioner of An Garda Síochána, Ireland and the Attorney General ("the State defendants"). The plaintiff's statement of claim is lengthy and complex and includes extensive quotations from the articles complained of. Essentially, the plaintiff's claim is for a breach of his right to privacy and confidentiality as protected under the Irish Constitution and the European Convention on Human Rights. It is a central plank of this claim that the plaintiff was identifiable from the articles published prior to his statement on the evening of 12th November, 2015 and that he had, in fact, been identified by people reasonably familiar with Irish politics as the former Minister who was allegedly under investigation. Thus, it is contended that the plaintiff's identification was an entirely foreseeable consequence of publication of this confidential material and also foreseeable that irreparable harm would be caused to his reputation. It is also central to the plaintiff's case that, given the level of

detail regarding the investigation contained in the article, the "*sources*" referred to in the articles could only be a serving member or members of An Garda Síochána. Consequently, it is pleaded that the information contained in the article must have been provided by members of An Garda Síochána "*who had direct knowledge of the nature, content and scope of the investigation and were operationally involved in same".* The provision of such information by members of An Garda Síochána, it is pleaded, amounts to a criminal offence under s. 62 of the Garda Síochána Act, 2005 and/or s. 4 of the Official Secrets Act, 1963 or to the offence of misconduct in public office (only the first of these was the subject of significant debate in the argument before the court).

8. It is expressly pleaded that the media defendants published material regarding the plaintiff which they knew or ought to have known had been disclosed to them unlawfully by the servants or agents of the Garda Commissioner in breach of the plaintiff's privacy rights and which would cause grave harm to him. The plaintiff claims aggravated or exemplary damages against the media defendants by reason, *inter alia*, of the alleged wilfully malicious nature of the publication and the fact that confidential material published by them was unlawfully procured by them from, or disclosed to them by, servants or agents of the Commissioner of An Garda Síochána ("the Commissioner").

9. Although the case pleaded against the State defendants is not directly relevant to this discovery application, there is clearly a synergy between the pleas made against each set of defendants. Insofar as it is pleaded against the media defendants that they published confidential material unlawfully disclosed to them, it is pleaded in parallel that the servants or agents of the third defendant (i.e. the Commissioner) unlawfully disclosed confidential material to the media defendants in breach of the plaintiff's privacy rights. In particular, it is pleaded that complaints of sexual offences are made in a privileged setting in which complainants are entitled to statutory anonymity. The disclosure of information relating to the complaints made against the plaintiff was, it is alleged, calculated to associate him with a criminal offence without a criminal trial having taken place in circumstances where the disclosure was made knowing that the information would be published by the media defendants and would receive widespread attention. Aggravated and punitive damages are sought against the State defendants.

10. The defence filed on behalf of the media defendants is a very carefully constructed document. Publication of the articles by the second defendant is admitted but virtually everything else is denied or the plaintiff is put on formal of proof of the matters alleged. It is pleaded that the articles were true in the sense that complaints had been made about the plaintiff which were the subject of a Garda investigation although it is also alleged that the complaints "*appeared not to have been investigated at the time of initial publication".* The overarching plea made on behalf of the media defendants is that the articles were published in the public interest and concerned serious criminal allegations connected to a public figure. In this regard, reliance is placed on Articles 40.3 and 40.6.1(i) of the Constitution, Article 11 of the Charter of the European Union and Article 10 of the European Convention on Human Rights (via the European Convention of Human Rights Act, 2003).

11. The defence denies that the plaintiff was identifiable from the articles published prior to his making his public statement on 12th November. It is specifically denied that confidential material was unlawfully disclosed to the media defendants by members of An Garda Síochána involved in or familiar with the investigation or that any disclosures were made by members of An Garda Síochána contrary to s. 62 of the 2005 Act. It is denied that any information communicated to the media defendants was confidential in character or such as to entitle the plaintiff to the protection of the courts. Unsurprisingly, in light of the claim of privilege made in this application, there is no denial *simplicater* of the contention that the sources referred to in the articles must, by necessary inference, be Garda sources. Instead, the approach adopted is to plead that all information obtained was from "*confidential journalistic sources*" and to deny that those sources were under any duty of confidence to the plaintiff nor "*under any… threat of prosecution in their treatment and subsequent publication of the information conveyed by them"* to the media defendants.

12. It is denied that any of the plaintiff's rights have been breached and it is pleaded that the damage the plaintiff claims to have suffered resulted from his own conduct and his decision to release his statement on 12th November, 2015. Finally, in response to the plaintiff's pleas that the events complained of have caused him reputational harm, the media defendants plead that the plaintiff has not sued in defamation, a fact on which some emphasis was placed in legal argument.

Request for Discovery

13. By letter dated 21st November, 2019, the plaintiff's solicitors sought voluntary discovery from the media defendants of five categories of documents. No formal response was received within the time stipulated in that letter and this motion was issued on 5th December, 2019. The media defendants' response is now set out in a replying affidavit dated 13th February, 2020, of their solicitor, Mr. Kelly. Of the five categories of documents in respect of which discovery was originally sought, agreement has been reached on one (category 3 relating to circulation figures) and the plaintiff has decided not to pursue two more (categories 4 and 5). That leaves two categories to be dealt with by the court. For ease of reference, these categories will be set out in full together with the synopsis of the reasons given for the request and of the response thereto.

14. Category 1:-

> *"All documentation, notes, memoranda and/or records evidencing any communication between the first and/or second named defendants, or any of their servants or agents, and the third named defendant, or any of its officers, servants or agents:*
>
> *(i) concerning or otherwise relating to the plaintiff and/or matters forming the subject of the articles published by the first and/or second named defendants and scheduled to the statement of claim dated 19th May 2016;*
>
> *(ii) for the period 1 May 2015 to 15 November 2015"*

In seeking this category, the plaintiff's solicitor points to the pleas in the statement of claim to the effect that the articles complained of were based on information unlawfully disclosed to the media defendants by the servants or agents of the Commissioner with direct knowledge of the criminal investigation underway at the time. This contention is said to be supported by the content of the articles themselves, which, it is said, by implication nominate the Gardaí as the source of the information published. The plaintiff then refers to para. 7 of the defence, summarised above, in which the allegation that confidential material was unlawfully procured from or disclosed by the servants or agents of the Commissioner is denied. Consequently, it is contended that discovery is required to resolve this factual dispute and to establish that the information forming the subject of the article was unlawfully disclosed to the media defendants by a member or members of An Garda Síochána.

15. In reply, the media defendants' solicitor squarely asserts that this discovery is sought to elicit the sources of the information published by them. I do not think that this is in dispute – central to the plaintiff's claim against both the media defendants and the State defendants is the contention that published articles were based on information regarding an ongoing Garda investigation which was unlawfully leaked by members of or persons employed by An Garda Síochána. However, Mr. Kelly states, in categorical terms, that the plaintiff is "*not entitled to obtain information which might tend to reveal the source of the information giving rise to these publications, or indeed any information… or journalistic material given in confidence to or obtained in confidence by*" the media defendants. It is also asserted that even to list documents potentially relevant to this category would run the risk of revealing confidential sources. Again, this is not really disputed – to list the existence of documents in this category would confirm contact between the Gardaí and the media defendants as alleged by the plaintiff; equally if no documents are listed it confirms that the Gardaí were not the source of the information and may inevitably suggest one of a limited number of other possible sources. The rationale for the protection of journalistic sources is outlined as is the importance of such sources to the work of the press. Whilst Mr. Kelly describes the request as "*fishing for the source of the information giving rise to the publications"* (a point to which I shall return), he does not otherwise dispute the characterisation of the dispute raised on the pleadings as set out by the plaintiff's solicitor, nor set out any reason why the documents should not be considered relevant or necessary in line with the well-established jurisprudence relating to discovery. In contrast, the response of Mr. Kelly to categories 3 and 5 (neither of which remain in issue) expressly contests the necessity and/or the relevance of the documents within those categories.

16. The dispute between the parties in respect of the second category of discovery is somewhat different. The category essentially relates to the editorial consideration given by the media defendants to publication of the articles under three subheadings relating to different aspects of the plaintiff's claim. The three subheadings are rationalised separately by the plaintiff's solicitor by reference to different elements of the plaintiff's pleadings. The defendants' solicitor responds both globally and by reference to each of the subheadings. The category is as follows:-

"Category 2

All documentation, communications, notes, memoranda and/or records generated by the first and/or second named defendants, or any of their servants or agents, for the period 1 May 2015 to 15 November 2015 bearing on the consideration given by the first and/or second named defendants regarding the following:

(i) the actual or potential identifiability of the plaintiff that would or would likely arise from publication of the articles scheduled to the statement of claim dated 19 May 2016;

(ii) the private and/or confidential nature of the information intended to be published in the articles scheduled to the statement of claim dated 19 May 2016;

(iii) The damage that would or would likely be caused to the plaintiff by reason of the publication of the articles scheduled to the statement of claim dated 19 May 2016."

17. In respect of the first sub-paragraph, the reason advanced by the plaintiff's solicitor is based on the plea at para. 10 of the statement of claim contending that the plaintiff could be and, in fact, was identified from the first series of articles notwithstanding that the ex-Government Minister was not named. Thus, it is contended that not only was the identification of the plaintiff inevitable, but it was the plain intent and effect of the publication. The reason highlights that the plaintiff is seeking aggravated and exemplary damages as a result of what is alleged to be the wilful nature of the media defendants' conduct. As each of these pleas are denied, it is said that there is a factual dispute not just as to whether the plaintiff was identifiable from the articles initially published but also as to the wilful nature of the defendants' conduct. The defendants' solicitor asserts that documents sought under this subheading do not further the plaintiff's claim given the causes of action pleaded and the plaintiff's reliance on the admitted fact of publication. The advice given to the defendants' solicitor is that the plaintiff's cause of action does not depend on whether the media defendants considered that the plaintiff might be identifiable.

18. The second subparagraph of the request focuses on the private nature of the information published. The plaintiff's solicitor refers to the pleas at paras. 13 and 25 of the statement of claim which assert that the media defendants relied on confidential material unlawfully disclosed to them by the servants or agents of the Commissioner and the fact that they knew or ought to have known that the material concerning the plaintiff was sensitive and highly confidential. Reference is made to the plaintiff's privacy rights allegedly breached by such publication and to the legislative provisions allegedly breached. Again, the plaintiff's claim for aggravated or exemplary damages is highlighted as is the denial of all of these pleas. The disputed factual issues said to arise is the consideration given by the media defendants to the confidential and private nature of the material it was intended to publish. Again, the defendants' solicitor relies on legal advice to the effect that the cause

of action pleaded by the plaintiff does not depend on the views taken by the media defendants in respect of the nature of the material as the confidentiality and privacy at the core of the action must be judged objectively. Consequently, the defendants' solicitor asserts that this category of documents is irrelevant.

19. The third subparagraph focuses on the damage likely to be caused to the plaintiff by reason of publication and the plaintiff relies on the plea at para. 24 of the statement of claim to the effect that publication by the media defendants constituted an unlawful action "*carried out with calculated malice in the knowledge that they would cause irreparable harm to the plaintiff's heretofore impeccable reputation*". Complaint was also made of the "*scale and deliberate nature*" of defendants' actions. Again, the plaintiff's solicitor relies on the claim for aggravated and exemplary damages based on the wilful nature of the defendants' conduct. As all of these pleas are denied, it is said that discovery of these documents is necessary to establish the consideration given by the media defendants to the extent of the damage that would likely be caused to the plaintiff and the wilful nature of the defendants' conduct. The defendants' response is similar to that in respect of previous subparagraphs, namely that the plaintiff's cause of action does not depend on whether the media defendants took the view that damage would or would not be caused to the plaintiff's reputation.

20. In addition to the assertion that discovery of the individual subparagraphs of category 2 is not relevant or necessary to the cause of action pleaded by the plaintiff, the defendants' solicitor responds in more general terms to the category as a whole. Three points are made. Firstly, it is said that the type of discovery sought might be relevant to a defamation action in which malice was an issue but is not, as a matter of law, relevant to a claim of breach of privacy or confidentiality. Second, it is contended that the request for discovery of this category is a fishing expedition as "*there is nothing in the papers before the court to demonstrate that there are likely to be documents in this category*". In essence, it is contended that the plaintiff is hoping to establish that these categories of document exist without any evidence that they actually do. Thirdly, and finally, it is contended that the drafting of the categories is so uncertain and non-specific as to impose on the media defendants an unnecessarily burdensome and onerous task. Consequently, it is contended that the entire of category 2 is irrelevant, unnecessary and disproportionate.

21. Thus, the pleaded basis for refusing to make discovery of each of the two categories remaining in issue is very different. No issue is taken with the potential relevance of the discovery sought in category 1 but the documents are said to be covered by journalistic privilege and, consequently, not to be discoverable. Journalistic privilege is not invoked in respect of category 2 but the discovery sought is said to be irrelevant, unnecessary and disproportionate. This distinction is elided somewhat in the written and oral submissions made to the court in which arguments as to the relevance (or lack thereof) and as to journalistic privilege were made more generally in relation to the application for discovery as a whole, although discrete arguments were also made as regards each category.

Submissions of the Parties

22. The battle lines between the parties on the central issue, namely journalistic privilege, were very clearly drawn and, at least initially, focus on whether that issue should be determined by the court at all in response to this application for discovery or should be deferred to a later stage. The plaintiff's counsel recognised the high value placed on the confidentiality of journalistic sources but noted that this was not an absolute or unqualified privilege. Consequently, unless it is manifest at the time a request for discovery is made that a claim of privilege in respect of the documents will "*inevitably succeed",* discovery ought to be ordered in the usual way subject to the criteria of relevance and necessity, leaving the claim of privilege to be made and determined in the context of an application for inspection of the discovered documents (*per Desmond v. Irish Times* [2020] IEHC 95 and *Keating v. RTE* [2013] 2 ILRM 145). The plaintiff argues that the claim of privilege in this case is not one which will inevitably succeed and, indeed, that if the court were to proceed to determine it, that it should not be upheld. In this regard the plaintiff identifies two aspects of the public interest which are said to outweigh the interests protected by the privilege. . The first is the fundamental right to privacy and confidentiality of a person the subject of a Garda investigation and the second is the broader public interest in the integrity of a criminal investigation and the prosecution of criminal offences. This, it is argued, is as much for the benefit of the victims of crime as it is the person being investigated. Reliance is placed on the rationale behind s. 62 of the Garda Síochána Act, 2005 and the case law concerning the motivation of those who provide confidential information in circumstances where it is intended to be or likely to be published (*Walsh v. News Group* [2012] 3 IR 136 and *Corcoran v. Commissioner of An Garda Síochána* [2020] IEHC 382).

23. In response, the media defendants focus on the distinction between a claim in defamation and these proceedings claiming breach of privacy and confidentiality for two main reasons. One is to argue that the concept of malice as it would apply in defamation is not relevant to this claim (although malice has been pleaded). The other is to contend that the legal tests applicable to a breach of privacy claim – initially is the material *prima facie* private and does the plaintiff have a reasonable expectation of privacy and, subsequently, whether publication was justified by another interest – are all objective. Consequently, it is argued that the subjective views of the parties on these issues are irrelevant to the case as pleaded as is, by extension, any documentation in which those views may be evident.

24. A detailed argument was made on behalf of the media defendants based on *Framus Ltd v. CRH plc* [2004] 2 IR 20 that the categories of discovery requested are not sufficiently specific. This is said to come about because, in turn, the plaintiff's pleadings are not sufficiently specific. It is said that the request must establish the likely existence of documents likely to contain information of a particular kind. In essence, the request must identify the types or categories of document or the type of material allegedly given by the Gardaí to the media defendants. It is said that the plaintiff could or should have asked the Gardaí what relevant material is held by them and then framed a request for discovery

based on that response which would ground an asserted belief on the part of the plaintiff that the media defendants are in possession of particular relevant material.

25. In relation to journalistic privilege, the media defendants contend that this should be addressed in the context of this discovery application as the identification of the source of the information is the express purpose of the plaintiff seeking the documents in category 1. The media defendants articulate a concern that the act of swearing an affidavit of discovery in response to this request would serve to potentially identify the source of the information contained in the articles. This is because even if the affidavit were to state that there were no documents in the possession of the media defendants evidencing communications with the servants or agents of the Commissioner, that would, of itself, potentially point to another source. In response to the plaintiff's argument that discovery should be ordered unless it is shown that the claim of privilege will inevitably succeed, the media defendants note that that high threshold does not apply to the determination of the claim of privilege itself. In inviting the court to determine the claim now, the media defendants contend that it should be determined by reference to the ordinary civil standard of proof, namely on the balance of probabilities and not by reference to any higher standard.

26. The court's attention was drawn to a series of recent cases in which claims of journalistic privilege were upheld and to the reasoning of the courts in those decisions *(Cornec v. Morrice* [2012] 1 IR 804; *Mahon v. Keena* [2010] 1 IR 336; and *Ryanair v. Channel 4* [2018] 1 IR 734). Counsel focused on the extent to which any evidence likely to be contained in the documents sought on discovery would be essential to the plaintiff's case, arguing that unless such evidence were essential, the balancing of the respective interests should weigh in favour of upholding the privilege. Finally, the media defendants disputed the claim that any disclosure in this case was a breach of s. 62 of the 2005 Act but, even if it were, argued that the mere fact disclosure was illegal, although a relevant consideration, would not of itself defeat a claim of journalistic privilege. Issue was raised as to how disclosure of material such as this could discourage other complainants from coming forward since the purpose of making a complaint to An Garda Síochána is generally to see someone prosecuted for the offence complained of which necessarily means the complaint will become public knowledge. A distinction was drawn between circumstances such as those in this case in which the illegality or criminal act complained of is the disclosure itself rather than some anterior act.

Consideration of Issues

27. In light of the way the parties have approached this case, there are three broad issues to consider. Firstly, the court must address the discoverability of each of the categories of documents sought by reference to the ordinary principles of discovery subject to the proviso that the court should, in applying these principles, be cognisant of the claim of confidentiality and should not accede too readily to a request for discovery which would undermine that confidentiality. If the documents are not, in principle, discoverable, then it will be unnecessary to consider whether the claim of privilege should be upheld so as to prevent their disclosure. Secondly, if the documents are relevant and necessary so that in

normal course an order of discovery should follow, the court must decide whether the claim of journalistic privilege made by the media defendants should be decided at this stage or, alternatively, whether the media defendants should be required to make discovery and to claim privilege in the context of the affidavits sworn in response to the order for discovery. The claim of privilege will then be adjudicated upon in the context of a subsequent application by the plaintiff to inspect the discovered documents. Thirdly, if the court were to decide that the claim of privilege should be ruled on now, it must then proceed to conduct the required balancing exercise which, in the context of the circumstances of this particular case, will be between the important interests underlying the protection of journalistic sources and the interests of the plaintiff in seeking to protect his fundamental rights along with the broader public interest underlying the statutory restrictions evident in s. 62 of the 2005 Act. In this regard, I acknowledge that there is both a private and a public element in the interests advanced by each side. The media defendants undoubtedly have a commercial interest in the continued flow to them of information which can be used to create stories for which there is a public demand. Equally, the plaintiff has a personal interest in pursuing this litigation in which he seeks damages for an injury allegedly done to him. Notwithstanding, the existence of a private aspect to each of the interests advanced, I regard both sides as asserting a public interest of some significance and interests which undoubtedly merit legal protection. The evident difficulty lies in ascertaining the boundary of each of those interests when placed in opposition to the other.

Relevance, Necessity and Proportionality

28. The basic principles by reference to which an application for discovery under O. 31, r. 12 of the Rules of the Superior Courts falls to be decided are well established. The documents sought must be relevant to the issues in dispute arising from the pleadings in the case. Discovery of these documents must be necessary for the requesting party to advance his own case or to damage that of the other side (*Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano* [1882] 11 QBD 55). More generally, in the language of O. 31, r.12(5) and r.12(2)(a), the discovery sought must be necessary for disposing fairly of the cause or for saving costs. Necessary does not mean absolutely necessary but, rather, "*having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought*" (per Fennelly J. in *Ryanair Plc v. Aer Rianta* [2003] 4 IR 264). There is some tension between the general acceptance that discovery does not have to be absolutely necessary and observations made in the specific context of journalistic privilege that it should be shown that the material sought is "essential" (*per* Hogan J in *Cornec v Morrice* (above) and Meenan J in *Ryanair v Channel 4* (above)). However, it seems that these observations have generally been made at the point in time where the court is considering the application of a claim of privilege and do not to alter the antecedent thresholds of relevance or necessity, although they may have a bearing on the issue of proportionality as discussed below.

29. Increasingly, courts are looking at the potential burden discovery might impose on a requested party when assessing the need to accede to a request as part of the overall fairness of the litigation. The mere fact that discovery may assist a requesting party to

advance his case or to damage that of the other side may not, of itself, suffice to justify making an order for discovery when compliance with that order would be disproportionate to the potential benefit provided by the discovery itself. Whilst typically this burden is one measured in terms of the scale and volume of the discovery sought and the time and cost entailed in providing it, more recent case law acknowledges that the involuntary disclosure of information the requested party regards as confidential may also constitute a "*burden*" consequent on the obligation to make discovery. Clearly, it does not follow that a requested party can simply claim confidentiality so as to defeat a request for discovery. However, a claim of confidentiality in an area where the law has traditionally recognised the need for such confidentiality will be treated with some care by a court and not only in the context of a recognised claim of privilege. Instead, the effect on a requested party of having to make discovery of confidential material will be factored into the potential burden when considering the necessity of making the discovery sought.

30. That this is so emerges from the recent review of the issue of proportionality in discovery by the Supreme Court, Clarke C.J., in *Tobin v. Minister for Defence* [2019] IESC 57. Of note for present purposes, is the staged approach undertaken by the Supreme Court to the analysis of the relevant issues and the related question of which party bears the onus of proof at each stage. The threshold criterion is relevance, there being no basis to require discovery at all if the documents are not relevant and the onus lies on the requesting party to establish such relevance. In principle, the requesting party also bears the onus of establishing necessity. Although the Supreme Court acknowledged the distinction between relevance and necessity, it considered the default position to be that "*a document whose relevance has been established should be considered to be one whose production is necessary"*. That default position can be displaced and the onus lies on the requested party who contends that the discovery of a relevant document is not necessary to set out reasons why that criterion has not been met.

31. Much of the discussion in *Tobin* concerns the potential availability of the same information through alternative procedural mechanisms which may not entail the same cost or burden for the requested party. A legal entitlement to access documents through a procedure external to the litigation (e.g. freedom of information, a data access request or inspection of planning files which the holder is legally obliged to keep available for public inspection) will generally mean that discovery of those documents is unnecessary although they may still be relevant. For the most part, these examples are more likely arise where the litigation involves a public sector defendant. In addition, many of the statutory provisions under which individuals can access publicly held information contain exclusions and provisos where that information is deemed by its holder to be confidential in nature. Equally, the ability to procure the same information through another procedural mechanism available in the litigation such as interrogatories may make discovery unnecessary. However, it is probable that the media defendants would refuse to answer any interrogatory directed at identifying the source of their information. Given the nature of the issues raised in response to this request for discovery, there is no reason to believe that the plaintiff could obtain the requested information from the media defendants more readily through any other means. I will consider in due course the suggestion that the

plaintiff should have sought information from the Commissioner before making this request for discovery.

32. In looking at the onus of proof, Clarke C.J. said, at para. 7.21:-

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

33. The comments made by Clarke C.J. in *Tobin* regarding confidentiality are potentiality significant although they might be regarded as *obiter* as confidentiality does not appear to have been an issue raised in response to the particular request for discovery. In looking broadly at the issue of confidentiality, Clarke C.J. stated, at paras. 7.10 and 7.12 of his judgment, as follows:-

> *"While this case is concerned with problems arising from what is said to be over-burdensome discovery, similar issues can also arise where there are other considerations, such as confidentiality, which might be said to play a role. 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.*
>
> *Those measures exist, of course, against the backdrop of the fact that confidentiality (as opposed to privilege) does not provide a legitimate basis for refusing to require disclosure of documents should they prove necessary to the proper administration of justice. But they do provide a warrant for the Court adopting 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."

Clarke C.J. cited his own judgment in *Independent Newspapers (Ireland) Ltd v. Murphy* [2006] 3 IR 566 as an example of a case where he took the view that it would be disproportionate to order immediate discovery of documents which were claimed to be confidential and, instead, made an order requiring the relevant documents to be recorded and preserved to ensure that they would be available for production at trial if it were established that they were necessary to the proper resolution of the case. He mentions a number of other cases in which a similar approach was followed, most usually because of a claim of commercial confidentiality in relation to the documents of which discovery is sought.

34. A point repeatedly made in the case law opened to the court is that a claim based in the confidentiality of journalistic sources is not a claim of privilege properly so-called (see, for example, Hogan J. in *Cornec v. Morrice* [2012] 1 IR 804). In recent times, almost all courts have used the phrase "journalistic privilege" to refer to the claim of confidentiality made in these circumstances. The use of the word "privilege" imports recognition of the high value placed on the underlying rationale for protecting the confidentiality of that particular type of information, namely, freedom of expression and the role of the media in a democratic society (as acknowledged by the Supreme Court in *Mahon v Keena* [2010] 1 IR 336). I think the real distinction lies between a claim of absolute privilege and a claim of qualified privilege. In the former, the privilege must prevail regardless of the contents of the documents and the case made by the requesting party as to their relevance and necessity for the purposes of the litigation. In contrast, in the case of a qualified privilege the court will examine the documents in order to assess whether the documents should be discovered in all of the circumstances of the case and in light of the interests sought to be protected by the privilege advanced. I note that in the more recent cases, the phrase "journalistic privilege" is invariably used in circumstances where it is clear that the courts are not treating the privilege as an absolute one. Indeed, many of the cases arise at the point where the documents in respect of which the privilege is claimed have been discovered and objection is taken to their production or inspection (see *Ryanair Ltd v. Channel 4 Television* [2018] 1 IR 734 and *Kean v. Independent Star Ltd* [2018] IEHC 206). The reference by Clarke C.J. to "*confidentiality (as opposed to privilege)"* may be intended to distinguish between claims of confidentiality which, although legally recognised, do not entail a public interest as such (e.g. commercial confidentiality) and claims of confidentiality which are grounded in a recognised public interest which does not provide an absolute protection against disclosure but which are nonetheless commonly referred to as a privilege.

35. In contending that the plaintiff had not met the onus of establishing that the documents are both relevant and necessary, the defendant relied on the following passage from the judgment of Murray J. in *Framus Ltd v. CRH plc* [2004] 2 IR 20, citing his own earlier judgment in *Aquatechnologie Ltd v. National Standards Authority* (Unreported, Supreme Court, 10th July, 2000):-

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

Reliance was also placed on Murray J.'s acceptance of the principle set out by McCracken J. in *Hannon v. Commissioners for Public Works* [2001] IEHC 59 to the effect that a court must decide, as a matter of probability and not merely possibility, that a particular document is relevant; that relevance must be determined in relation to the pleadings and not submissions as to alleged facts put forward on affidavit; that a party is not entitled to discovery in order to find out whether a particular document is relevant; and that discovery should not be oppressive nor used as a tactic in the war between the parties.

36. Finally, as regards who bears the onus of proof in respect of each of the issues connected to journalistic privilege, Meenan J. summarised the relevant principles in *Ryanair Ltd v. Channel 4 Television Corporation* [2018] 1 IR 734 at p. 752 as follows:-

"(i) The protection afforded by journalistic privilege protects not only the identity of source(s) but, where necessary, the information provided by such source(s);

(ii) Unlike legal advice/litigation privilege journalistic privilege is not absolute and may be displaced following a balancing exercise carried out by the court between, on the one hand, the right to freedom of expression and, on the other hand, a legal right such as a person's right to a good name;

(iii) A heavy burden rests on the person who seeks disclosure of journalistic source(s). The court must be satisfied that such disclosure is justified by an overriding requirement in the public interest or is essential for the exercise of a legal right."

Meenan J. was considering a claim of privilege where discovery had been made and the plaintiff sought inspection of the discovered documents to which the defendant objected on the grounds of journalistic privilege. Thus, it is only if the second issue identified above is decided against the plaintiff and the court proceeds to decide on the claim of privilege made by the media defendants that the shifting back to the plaintiff of an onus to defeat the claim of privilege will arise. Nonetheless, it is interesting to observe the continuous shifting of the onus of proof in a case such as this. The plaintiff bears the initial onus of proving relevance and necessity in order to be entitled to an order for discovery; necessity generally follows if a document is deemed to be relevant and the onus then shifts to the defendant to establish why discovery of a relevant document is not necessary; presumably, where a claim of privilege is made there is a *prima facie* onus on the defendant raising that claim to establish an entitlement to do so (which would be readily met here given the nature of the media defendants and the circumstances of the

case). Finally, the onus shifts back to the plaintiff to defeat the claim of privilege properly made. Of course, one of the central issues in this case is when the latter parts of the exercise should be carried out.

Application of Principles to this Case

37. In applying these principles to this case, it is important to distinguish between the two categories of discovery in issue. As noted, the media defendants did not initially dispute the relevance or necessity of the first category although they maintained it was not discoverable because of journalistic privilege. The relevance of each of the subparagraphs in category 2 is disputed by reference to the nature of the cause of action pleaded by the plaintiff.

38. The objection now raised to the relevance of category 1 is characterised by Counsel as being a lack of specificity based on the judgment of Murray J. in *Framus* (above). The media defendants acknowledge that the case in the statement of claim is pleaded on the basis of their reliance on confidential information disclosed to them by members of An Garda Síochána. However, it is contended that the plaintiff is required to be more specific as regards the categories of documents alleged to have been provided and the categories of person to whom the documents are alleged to relate. It is said that in the absence of a request for confirmation having been made by the plaintiff to the Commissioner (and presumably, such confirmation having been provided), the plaintiff cannot have "*a belief*" that the media defendants are in possession of material relevant to category 1. In essence, it is contended that the court cannot conclude from the pleadings that there are likely to be documents likely to contain relevant information of this type in the possession of the media defendants.

39. Having considered the pleadings and the way in which category 1 of the request for discovery is framed, I do not accept the argument made by the media defendants. In order to be able to meet the level of specificity which the media defendants say is required – i.e. knowledge of the particular type of document likely to be in their possession - the plaintiff would effectively have to be in possession of the documents of which he seeks discovery in order to make an application for discovery. As the plaintiff observes, this is a circular argument. In my view, the imposition of such a requirement would be illogical and would impose an unfair burden on a party seeking discovery who, by definition, will not have knowledge of the particular documents. I also do not think that it would be an accurate application of the judgment of Murray J. in *Framus*. The Supreme Court in Framus identified how an assessment of relevance is to be carried out. That assessment does require a degree of specificity both as regards the pleadings and as regards the likely contents of the material of which discovery is sought. The burden on the plaintiff is to show that "*it is reasonable for the court to suppose*" that the defendants are in possession or likely to be in possession of documents which, again, it is reasonable to suppose, are relevant to the proceedings. There is no additional requirement to identify more specifically the types or categories of documents in issue. In his statement of claim the plaintiff has set out in some detail the basis upon which he infers that the sources referred to in the published articles are Garda sources. In my view, these pleas are not

speculative but point to specific information in the articles concerning not just the underlying allegations but the investigation itself which, it is contended, could only be known by someone with knowledge of or connected to the investigation. The plaintiff cannot be expected to know whether communications made to the media defendants by their sources were by phone, by email, in discussions at meetings with journalists or through the furnishing of copies of documents or any combination of these. By extension, the plaintiff cannot be expected to specifically identify phone records, emails, records of meetings or copy documents as being the particular categories or types of documents of which discovery is sought.

40. Nor do I believe the plaintiff was under an obligation to have sought either discovery from or confirmation from the Commissioner before being in a position to make a sufficiently concrete and non-speculative application for discovery against the media defendants. In another case, it might well be appropriate for a media party to point to an alternate source of information which, if explored by a litigant, could obviate the need for discovery impinging upon the confidentiality of journalistic sources. However, in this case, that argument has two significant weaknesses. Firstly, it cannot be assumed that the provision of information by a Garda source to the media defendants would be known to the Commissioner. Even taking the plaintiff's case at its height, there is no reason to believe that the Commissioner would be in a position to provide the confirmation which the media defendants suggest the plaintiff should seek. The plaintiff has not contended that information was passed by Garda sources to the media defendants with the knowledge and consent of the Commissioner. Rather, it is pleaded that there is endemic pattern of leaking of confidential information by members of An Garda Síochána and a persistent failure on the part of Garda authorities to take adequate steps to prevent such leaks amounting to an implicit consent or approval of the practice. Secondly, the Commissioner is also entitled to raise a public interest privilege regarding any criminal investigations being carried out by An Garda Síochána, a privilege which persists until an investigation is formally concluded either by the taking of a criminal prosecution or by a formal decision not to prosecute. While a decision not to prosecute the plaintiff in respect of the allegations the subject of the original investigation has been made and communicated to him, the court has no information as to whether the investigation is on-going as regards any other person nor as to the status of the second investigation into the alleged leaks. Thus, there is no real basis to expect that the plaintiff could have procured the information underlying category 1 or sufficient information to identify more specifically the categories of documents involved through any procedural mechanism directed at the third defendant.

41. In light of these conclusions, I am satisfied that category 1 is both relevant and necessary to the plaintiff's case. I will consider further below whether the claim of journalistic privilege raised by the media defendants should be addressed at this point or whether the media defendants should be directed to make discovery on the understanding that they will raise that claim to meet any application by the plaintiff to inspect the documents so discovered.

42. The principal argument made against the discoverability of the documents in category 2 is that they are not relevant to the cause of action pleaded by the plaintiff. That cause of action, a breach of the plaintiff's right to privacy, is described as one to be judged entirely by objective standards. Consequently, it is contended that the editorial consideration given by the media defendants to the publication of the articles is completely irrelevant to the legal issues arising in the case. In other words, it is argued that it does not matter to the plaintiff's case whether or not the media defendants intended to identify the plaintiff or accepted that identification was likely or possible or appreciated that material published by them was private and confidential in nature or that the plaintiff was likely to suffer damage as a result of publication (these being the issues covered by the various subheadings of category 2).

43. The media defendants rely on the judgment of Warby J. of the UK High Court in *HRH Duchess of Sussex v. Associated Newspapers Ltd* [2020] EWHC 1058 (Ch) to contend that the motives of a publisher are entirely irrelevant to a breach of privacy claim even where malice has been pleaded. In particular, they rely on his comments at paras. 37 and 39 of that judgment as follows:-

> *"The meaning of this passage is clear: a media publisher will be held responsible for publication of information which it is wrongful to publish, even if the publisher acts in good faith; and the publisher will be liable for a publication which is not justifiable in the public interest, even if it believed that it was so justifiable. Both issues are to be determined objectively…*
>
> *The defendant's state of mind is not mentioned here. True, this is a non-exhaustive list of considerations, but state of mind is a subjective, not an objective question. Mr Sherborne has submitted that "purpose" and "motive" are linguistically difficult to separate, and overlap conceptually. He has further sought to persuade me that Strasbourg and domestic authorities show, or at least that they arguably support the view, that dishonesty, bad faith, or improper motives on the part of the defendant are among the circumstances of the case which can and should be taken into consideration at the first or at the second stage. They are aspects of the "form, content and manner of publication" (claimant's emphasis). I am not persuaded of either proposition."*
>
> *However, at a later point in the judgment (para. 54), Warby J. recognises the entitlement of a plaintiff to seek aggravated damages for distress resulting from the commission of the tort with a malicious motive and notes that there was no attack on the claimant's reliance on malice in aggravation of damages in that case.*

44. The judgment in *HRH Duchess of Sussex* was one on an interlocutory application to strike out elements of the plaintiff's pleadings which it was contended (and accepted) were irrelevant to her plea of misuse of private information. It appears from the judgment that the cause of action in issue, misuse of private information, is a tort based on the protection of private and family life under Article 8 of the ECHR which entails a proportionality analysis in light of the right to freedom of expression protected under

Article 10. It is difficult to draw exact parallels between the law of privacy in this jurisdiction and the law in the neighbouring jurisdiction especially in light of the constitutional aspects of the plaintiff's claim in these proceedings which were naturally absent from the UK case. It is by no means certain that the plaintiff in this case is confined to the cause of action described as misuse of private information and, indeed, I note that the plaintiff has not pleaded his case so as to invoke that specific tort and certainly not to do so on an exclusive basis. Unlike the Duchess of Sussex, the plaintiff is not asserting any proprietary interest or copyright in the material published. Further, much of the discussion in the judgment concerns the extent to which pleas of dishonesty (not made in this case) were relevant to the tort and, to the extent to which they were relevant, were adequately pleaded.

45. Even if the court takes the media defendants' arguments on this point at their height which is that the cause of action pleaded is essentially objective, I do not think that that fully addresses the claim expressly made for aggravated and exemplary damages and the legal basis upon which such damages may be awarded under Irish law. The media defendants say that the only plea relevant to their consideration of whether to publish is that of wilfully malicious publication at para. 31(i) of the statement of claim and that this does not alter the objective nature of the claim. On a straightforward reading of the pleadings, I do not think that this is correct. The plea claiming aggravated and exemplary damages is at para. 31 of the statement of claim. The central argument made at subpara. (i) concerns the wilfully malicious nature of the publication and references, *inter alia*, the gravity of the imputations against the plaintiff. The notion of malice imports a deliberateness to the actions complained of; wilful suggests not just deliberate but that the actions were directed towards a purpose. Thus, the plea that the publication was wilfully malicious necessarily engages with the media defendants' mindset as regards the publication. Further, para. 31(ii) refers to the fact that the confidential material published by the media defendants was disclosed to them unlawfully in breach of s. 62 of the Garda Síochána Act, 2005 and that this is something which they knew or of which they ought to have been aware. Thus, the extent to which the media defendants knowingly used material the disclosure of which is a criminal offence is also put in issue. Other elements of para.31 are not relevant to the request for discovery.

46. Aggravated damages are normally awarded in addition to compensatory damages by reason of the manner in which a wrong was committed by the person against whom the order for damages is being made. Similarly, exemplary damages can be awarded where a defendant acts in wilful and conscious disregard of another's rights. It seems to me that the claim for aggravated and exemplary damages and the matters pleaded in support of that claim at para. 31(i) and (ii) of the statement of claim do go to the editorial consideration given by the media defendants to the publication of articles of this nature. The entire thrust of the plaintiff's claim is that the media defendants deliberately published articles based on confidential material unlawfully communicated to them in circumstances where the articles were framed in a manner from which the plaintiff was easily identifiable and that, once identified, it was inevitable that significant damage would be caused to him. Thus, the plaintiff makes an allegation of the deliberate and

conscious violation of his rights against the media defendants. I struggle to understand the argument that these pleas and the editorial consideration given to the factors reflected in category 2 are simply not relevant to the plaintiff's cause of action. Of course, the plaintiff may not succeed in this cause of action but he has pleaded a case which, in my view, puts the deliberateness of the defendants' actions in issue and which has been denied in almost all material respects by the defendants. Consequently, in principle, I find that each of the subcategories of discovery sought in category 2 are relevant and necessary for the reasons identified by the plaintiff's solicitor in the request for voluntary discovery and in the affidavit grounding this motion.

47. Finally, I propose to address the three general arguments made by the media defendants against the discovery sought at category 2. The media defendants have placed emphasis throughout on the fact that the plaintiff has not sued in defamation, conceding that the discovery sought in category 2 might be relevant to a plea of malice in a defamation action but is not relevant in a privacy action even where malice is pleaded. I must confess to some difficulty in understanding the media defendants' focus on the fact that the plaintiff has not sued in defamation. The court must deal with the proceedings before it and cannot draw inferences in relation to these proceedings, and certainly not at this early stage, because the plaintiff has chosen not to pursue other causes of action which may or may not have been available to him. The court is not prepared to draw any inference adverse to the plaintiff from the fact that he has not brought defamation proceedings, if that is what the media defendants are implicitly suggesting. It is possible for a claim for breach of privacy to be made even where the truth of the matters published about an individual are not in dispute. Indeed, the conundrum which a person who is the subject of adverse media reporting may face in bringing defamation proceedings is evident on the facts of this case where it may be true to state that the plaintiff was the subject of an investigation without the truth of the allegations being investigated ever being established. In any event, the court has had regard to the case as pleaded and not to potential cases which are not pleaded nor to the reasons why they may not have been pleaded.

48. Nor do I accept the media defendant's claim that this element of the request comprises a fishing expedition. In *Carlow/Kilkenny Radio Ltd v. The Broadcasting Commission of Ireland* [2003] 3 IR 528 Geoghegan J. accepted the description given by Bingham MR of "*fishing*" in the context of discovery as representing Irish law. In *R v. Secretary of State, ex parte, Hackney London Borough*, Bingham MR had stated:-

> *"It is not open to a plaintiff in a civil action, or to an application for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions that the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the proscribed activity usually described as 'fishing': the lowering of a line into the other sides waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."*

The starting point for considering whether a request for discovery is a fishing expedition is the extent to which the pleaded case establishes a basis for supposing the existence of documents within the requested categories. If the pleas comprise unsubstantiated assertions or reflect only the plaintiff's opinion or belief, then discovery should not be granted merely to afford the plaintiff the opportunity of seeing whether his case can be substantiated. However, if the pleaded case identifies a clear basis for the claim and moreover the request for discovery identifies the basis for supposing the existence of relevant documents, then the request is not fishing. Without discovery, the plaintiff cannot be expected to know precisely what that material may be but that does not mean the request for discovery is a fishing expedition.

49. This argument is advanced particularly on the basis that there is nothing before the court to demonstrate that there are likely to be documents within category 2. I find this suggestion surprising given that the category is focused on the editorial consideration given by the media defendants to the publication of articles based on information which was allegedly passed to them unlawfully. The articles published by the media defendants refer, on their face, to the fact that information was obtained from "*sources*". The plaintiff has set out in his pleadings the basis for believing that those sources are Garda sources and, in my view, these pleas comfortably pass the threshold of being more than a bare assertion. Further, the defendants plead at para. 25 of their defence that all of the articles "*were published for the public good and in the public interest, and were of a nature requiring that details of those matters be placed in the media and brought to the attention of the public*". It is inherent in a plea of this nature that an editorial decision was taken that publication of these articles would be in the public interest for the reasons pleaded. In other words, this plea suggests that a deliberate editorial decision was made to publish these articles in circumstances where it was anticipated that the decision to do so might require justification. It may be that the media defendants will establish that such editorial decisions were made without any consideration being given to the identifiability of the plaintiff, the confidential nature of the material, how it had been acquired by them or the damage that might be caused to the plaintiff, although that seems unlikely. However, the onus on the plaintiff, *per Framus*, is to establish that it is reasonable to suppose the existence of documents containing information of the type requested. I am satisfied that the plaintiff has established reasonable grounds for supposing the existence of relevant material as regards both categories of discovery.

50. Finally, it is contended that the drafting of the subcategories in category 2 is so uncertain and non-specific as to impose an unnecessarily burdensome and onerous task on the media defendants. I do not agree with this characterisation of the request. There are two aspects to this complaint which are not necessarily linked – the assertion that the request is too vague and the assertion that compliance with it would be too onerous. I accept that in some instances the extent to which a request for discovery is couched in vague and non-specific terms will increase the difficulties faced by the party which must comply with it. However, this is not always so as a request for discovery can be vague without requiring any particularly burdensome response and conversely a request for discovery

may be very clear and specific but entail a disproportionate burden in responding to it. In this instance I do not think the criticism is warranted in either respect.

51. The first of these two issues was dealt with by the Supreme Court in *Ryanair Plc v. Aer Rianta* [2003] 4 IR 264. In considering an objection to discovery taken on the grounds, *inter alia*, that the categories of discovery sought were not sufficiently precise. McCracken J. observed (at p. 279 and 280):-

> *"In many cases and this is particularly so in relation to competition cases, a plaintiff cannot know whether documents exist, and if so what those documents are. For example, meetings may have been held between a defendant and third parties, or indeed between members of the staff of a defendant, relating to a number of the matters in issue. A plaintiff has no means of knowing whether those meetings were ever held, or whether any record or minutes of such meetings exist. All he can do is seek documents in relation to any such discussions which may have taken place, and cannot be any more specific than that…*
>
> *In the present case, I consider that the plaintiff has clearly identified categories of documents in relation to quite precise and specific allegations of abuse against the defendant. The situation in a competition case is very different from that in a personal injuries action and any reference to precision in categories of documents must be considered in the light of the particular cause of action and the likely knowledge of the party claiming discovery as to what documents exist."*

For the reasons discussed above in relation to the relevance of category 1, I do not regard the request for discovery in respect of either outstanding category to be insufficiently specific.

52. As regards the burden likely to arise from an order of discovery, the categories of documents of which discovery is sought are relatively limited. Each of the subcategories is confined to the editorial consideration given to the publication of the articles scheduled to the statement of claim - that is a finite series of articles published by the media defendants on a discrete topic. Further, documents are only sought in respect of the period 1st May, 2015 to 15th November, 2015, thereby imposing a temporal restriction on the scope of the request. I do not accept that this category is burdensome or onerous in the sense in which those terms are normally used in the context of discovery applications which may span many years and many thousands of documents passing through the hands of many individuals. The likelihood is that the documents relevant to each subcategory will be confined to those bearing on the consideration given and decisions made by a small group of persons with editorial responsibility and, perhaps, the journalists involved in the preparation of the articles.

53. Thus, the real "burden" in issue is the potential for discovery to impinge upon the confidentiality which the media defendants not only wish to, but regard themselves as ethically bound to, afford to their sources. In considering the issues of relevance, necessity and proportionality I have taken into account the fact that a claim of

confidentiality of a type to which the law attaches great significance has been made. However, the claim made by the plaintiff alleging a breach of his fundamental rights is also one to which the law attaches great significance. The media defendants have not identified any other mechanism through which the plaintiff could reasonably expect to obtain the information sought by him other than by way of discovery and they have not made any material concession as regards the plaintiff's claim which might make some or all of the discovery sought unnecessary. Consequently, in principle, the interests of justice in bringing about a fair result to the proceedings require that an order for discovery be made (to paraphrase Clarke CJ at paragraph 7.10 of *Tobin* (above)). This is of course subject to the claim of privilege that the media defendants make in respect of the discovery sought.

Timing of Adjudication on Claim of Privilege

54. Given that I have held both categories of discovery to be relevant and necessary, the next task is to consider whether the court should make an order for discovery now or, alternatively, consider and adjudicate upon the media defendants' claim for journalistic privilege before making an order for discovery. This is an issue which has been considered by Irish Courts in a number of recent cases, most recently by Collins J. (sitting as a judge of the High Court) in *Desmond v. Irish Times* [2020] IEHC 95. Before looking in some detail at that judgment, it might be noted that historically the authorities are inconsistent as to the approach to be taken. Where a claim of privilege has been adjudicated on at the hearing of the application for discovery, the judgments do not always identify the features of the case which made that appropriate in all of the circumstances. Further, not all of the decided cases have arisen in the context of discovery applications which usually go through a number of prescribed steps before disclosure is actually made. For example, in *Cornec v. Morrice* [2012] 1 IR 804 Hogan J. was considering an appeal from an order of the District Court giving effect to letters rogatory issued by a US Court in commercial litigation in that jurisdiction. In *Boyle v. Governor of St. Patrick's Institution* [2015] IEHC 410, Barr J. was considering an application to set aside a subpoena *duces tecum* issued to a journalist and, although the subpoena was not set aside, Barr J. ruled that the applicant did not have to reveal his confidential sources for the article. In *Corcoran v. Commissioner of An Garda Síochána* [2020] IEHC 382, Simons J. was deciding judicial review proceedings in which the applicant, a journalist, challenged the issuing and execution of a search warrant at his private residence and the seizure of his mobile phone from which the identity of his journalistic sources could be extracted. All of these cases contain important analyses and observations on the public interest underlying journalistic privilege and how those interests might be balanced against competing interests, whether that be an individual's right to litigate or the public interest in An Garda Síochána investigating and prosecuting crime. These cases do not, however, address the specific question in issue here, namely the point in the discovery process at which the issue of privilege should be addressed.

55. In other cases orders for discovery had been made and the judgment is that of the court considering the claim of privilege made in an affidavit sworn pursuant to the discovery order (e.g. *Kean v. Independent Star Ltd* [2018] IEHC 206 and *Ryanair Ltd v. Channel 4*

Television [2018] 1 IR 734). It is not clear from these cases the extent to which the discovery was objected to in principle on grounds apart from the claim of journalistic privilege nor whether the consideration of the claim of privilege in the judgment is the first time the claim was raised or addressed in the context of those proceedings.

56. *Walsh v. News Group Newspapers Ltd* [2012] 3 IR 136 is one of the few cases in which both the claim of privilege was adjudicated upon at the hearing of the discovery motion and the judge's reasons for taking this approach are recorded. O'Neill J. states at the outset of his judgment:-

> *"Because the defendants' opposition was in respect of all of the discovery sought on this particular ground, the hearing of this motion was treated as also the hearing of the defendants' claim to privilege in respect of all of the documents sought to be discovered."*

The judgment does not record if this approach was taken with the agreement of all parties or whether, as here, it was strongly resisted by the requesting party. Given the absence of any discussion on the point, one would have to suspect the former.

57. It appears from para. 11 of the judgment in *Walsh* that the defendants had accepted that all of the categories of discovery sought, bar one, were relevant to the issues in the proceedings. Thus, the only issue of substance dealt with in the judgment was the claim of journalistic privilege. There are some parallels between this case and *Walsh*, although the latter was a claim in defamation, in that the articles the subject of the proceedings related to allegations of sexual misconduct against a well-known public figure. There are also significant differences in that the complainant, who was identified in the articles, subsequently admitted that the allegation was false and the plaintiff alleged that the defendants had procured the making of the allegation to An Garda Síochána in order to publish the story. In a plea similar to that made in this case, the plaintiff contended that any disclosures by members of An Garda Síochána to the defendant would be a criminal offence contrary to s. 62(2)(g) of the Garda Síochána Act, 2005 and, therefore, that documents relating to communications of that sort could not enjoy journalistic privilege. This argument was accepted and in ruling on the claim of privilege O'Neill J. upheld the claim insofar as it related to any documents which might lead to the identification of a source other than the complainant (whose identity was already in the public domain) or members of An Garda Síochána.

58. Three cases were referred in argument as being directly relevant to the timing of the determination of a claim of privilege, namely *Keating v. RTÉ* [2013] IESC 22; *Desmond v. Irish Times* [2020] IEHC 95; and *Crawley v. Sunday World* [2020] IEHC 305. The latter two cases concern claims of journalistic privilege. The former, although arising out of defamation proceedings, concerns claims of public interest privilege attaching to material comprising confidential information provided to the Customs Service of the Revenue Commissioners and used for the purposes of their enforcement functions regarding the illegal importation of drugs into the State. RTÉ had broadcast a documentary programme on this issue. The plaintiff claimed he was identifiable in the broadcast and that it was

defamatory of him in circumstances where he was working as a Garda informant and, consequently, had participated in the criminal activity at the direction of An Garda Síochána. RTÉ sought third party discovery from An Garda Síochána and the Revenue Commissioners which was granted by the High Court without deciding on the claim of privilege which had been raised. The Revenue Commissioners appealed this decision. The Gardaí did not appeal but made an affidavit of discovery in which a claim of privilege was made on the grounds that disclosure would be damaging to the detection and prevention of crime and, as the documents included confidential Garda intelligence, the lives of persons referred in those documents could be put at risk. It does not appear that this claim of privilege had been adjudicated on by the time the Supreme Court heard the Revenue's appeal.

59. McKechnie J. regarded the primary argument made by the Revenue Commissioners to the effect that the trial judge should have accepted that the public interest asserted by it outweighed the private interests of the parties to the litigation as being the same argument as that rejected in *Murphy v. Dublin Corporation* [1972] IR 215 and *Ambiorix v. Minister for the Environment (No. 1)* [1992] 1 IR 277. Those cases established that as the administration of justice was committed by the Constitution solely to the courts, any conflict between the public interest in the production of evidence and the public interest in the confidentiality of documents fell to be decided by the courts. The Revenue's subsidiary argument was that discovery should be refused "*on the basis that its intended claim for privilege is bound to succeed and accordingly, to force the creation of a discovery affidavit would be an exercise in futility*". Acceptance of this argument would have halted the discovery process at its first stage and neither disclosure nor production would be made. McKechnie J. agreed that, in principle, the court had a discretion not to order discovery in a case where a claim of privilege was bound to succeed but did not accept that this was such a case. He stated, at para. 46 of the judgment:-

> *"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."*

In considering whether the claim of privilege was one which would inevitably succeed, McKechnie J. took care to "*refrain from expressing any view more than what is necessary*

to deal with the particular point, for to do otherwise may risk pre-empting the ultimate outcome of the privilege issue". Having listed potentially relevant factors, he then concluded at para. 50:-

> *"In light of the above therefore and in the absence of knowing how the Revenue will formulate a privilege claim in respect of what documents they might have, I am far from satisfied at this stage of the procedure that any privilege so asserted will inevitably succeed. Or to put it differently, I cannot say that R.T.É. will ultimately exit this process empty-handed. Accordingly, this ground of appeal must also fail."*

60. *Keating v. RTÉ* was followed and applied separately in two High Court judgments delivered last year. In *Desmond v. Irish Times* [2020] IEHC 95, a claim of defamation, breach of privacy regarding the plaintiff's business and financial affairs and breach of a duty of confidence was brought by the plaintiff in respect of the publication by the defendant of material leaked from an international legal firm. The claim was denied and a plea of fair and reasonable publication in good faith on a matter of public interest was made pursuant to s. 26 of the Defamation Act, 2009. Discovery was sought by the plaintiff of certain categories of material which the defendant regarded as being intended as a means to investigate the original source of the documents emanating from the legal firm. Journalistic privilege was claimed and, as here, the defendant contended that the mere listing of the documents in an affidavit of discovery would run the risk of infringing the privilege.

61. Collins J., relying on *Keating v. RTÉ*, took the view that journalistic privilege did not provide a shield against the making of an order for discovery in the circumstances of the case. He acknowledged the protection the law affords to journalists in respect of confidential sources but also that such protection, conveniently referred to as a privilege, was not absolute. In the particular case, the claim of privilege made did not reach the threshold required under the Keating test. Collins J. put it thus at para. 35 of the judgment:-

> *"Posing the test articulated by McKechnie J in Keating, it appears to me that the material before the Court on this application does not demonstrate that, in the event that an order for discovery is made in relation to one or [sic] more of the categories of documents at issue, an objection to production on the basis of journalistic privilege would "inevitably succeed." Of course, any such claim may well succeed if and when made in due course. I express no view on that. The point I am making is that the exceptional circumstances that might arguably justify the Court in refusing discovery on the basis that any order would be futile because Mr Desmond would end up empty-handed in any event do not in my opinion apply here."*

Collins J. went on to conclude that *"issues of journalistic privilege should be addressed in the ordinary way i.e. by way of an appropriate affidavit of discovery following which any extant dispute can be addressed in the context of inspection/production*". It seems Collins J. felt he could not fairly reach a view on whether the claimed privilege applied to the

particular documents on the basis of the affidavit before him. He was also mindful of the fact that the application raised an issue as to the interaction of journalistic privilege and the statutory defence under s. 26 of fair and reasonable publication which had not previously been considered by the Irish Courts. Obviously, this statutory defence has not been raised in this case which is not a claim in defamation. Nonetheless, many aspects of the plaintiff's claim are novel, not least the fact that the alleged breach of his right to privacy was facilitated by what is said to be the unlawful disclosure to the media defendants by members of An Garda Síochána of information originating in a criminal investigation. The nature of the underlying claim and the relationship between the two sets of defendants may well have a bearing on the claim for privilege and is certainly something warranting more detailed consideration by reference to a claim of privilege specifically made in respect of particular documents.

62. Finally, Hyland J. delivered judgment in *Crawley v. Sunday World* [2020] IEHC 305 shortly after Collins J.'s judgment in *Desmond* and it is interesting to observe that both judges separately came to similar conclusions in following *Keating v. RTÉ*. The plaintiff in *Crawley* sought damages for defamation and breach of privacy arising out of the publication by the defendants of articles in which the plaintiff was described as a criminal and a range of unsavoury criminal activity allegedly attributed to him. The defendants raised a plea of truth. Discovery was sought of documents relating to the defendants' investigation into the plaintiff prior to publication of the articles and relating to the preparation of the articles. In an affidavit sworn in response to that motion, the defendants' solicitor (coincidentally the same solicitor who acts for the defendants in this case) claimed journalistic privilege in respect of the confidential sources relied on for the articles. The importance of such confidentiality was emphasised in the context of journalism dealing with serious criminal conduct. In looking at how a similar claim of privilege had been treated in *Keating*, Hyland J. observed, at para. 11 of her judgment:-

> *"The Supreme Court did accept that the court has an inherent jurisdiction to refuse the application on the basis that the privilege plea must inevitably succeed. However, it noted that this was an abridgement of the normal two step process, which distinguishes between discovery and inspection obligations. If there is any possibility that the privilege plea might not succeed, then to refuse discovery would be to conflate distinct steps in a two-tier process. Therefore, where a party is refusing to swear an affidavit on the grounds of privilege, including journalistic privilege, the first inquiry must be to determine whether success on the plea is unavoidable. It is only if so that an affidavit as to documents will not be required."*

On the facts of the case before her, Hyland J. went on to decide that the *Keating* threshold had not been reached, stating, at paras. 13 and 14 of her judgment:-

> *"However, in this case, I am only concerned with the first step i.e. whether it is so inevitable that the defendant will be successful in its plea of journalistic privilege that I should not order discovery at all. The judgment in Keating makes it quite clear that in the majority of cases, an assertion of privilege should be determined*

following an identification of the document and the nature of privilege in the Schedule to the Affidavit of discovery in the normal way.

In this case, there are undoubtedly strong arguments that may be made in respect of the privilege; but there will also be respectable countervailing arguments made in respect of the personal rights of the plaintiff, including his good name. It is true that there is a very heavy burden on those who seeks disclosure of a journalistic source. Nonetheless, I cannot conclude at this stage that it is inevitable that the defendant will succeed in respect of a claim to privilege over each and every document that might be caught by the categories sought or a variation of same. Accordingly, the normal obligations of a party asserting privilege apply to the defendant in this case."

63. I think the logic of these judgments is that where a claim of privilege is made in response to an application for discovery, the approach of the court should be to carry out what is effectively a screening exercise. The claim should only be ruled on definitively if it is self-evidently so strong that it will inevitably succeed. Presumably this must be so regardless of the particular nature and content of the documents in respect of which the privilege is asserted (since those documents will not be individually identified, examined or considered) and regardless of the countervailing arguments likely to be raised by the requesting party. Unless all parties agree to the court determining the claim of privilege at this stage in the process, it will never be appropriate to reject the claim of privilege outright without at least affording the requested party the opportunity to formally make the claim at the next stage. A finding that a claim of privilege is not so strong that it will inevitably succeed or that there are countervailing arguments which are at least "respectable", does not preclude the possibility that when fully argued and perhaps after the court has considered the documents the claim will be upheld.

64. Whilst the appellant in *Keating* sought to characterise the balance to be struck as one between the public interest in protecting confidentiality for what were undoubtedly strong public policy reasons and the private interests of the litigants, the case law makes it clear that the balance is not just between the public interest underlying the claim of privilege and that attaching to the availability of evidence for the purposes of the administration of justice but may also encompass the public importance attached to the rights a litigant is asserting through the litigation. Further, at this screening stage the court is not really looking to strike a balance between competing interests. For the claim of privilege to be allowed succeed without requiring the requested party to swear an affidavit of discovery and to formally make the claim in respect of identified documents, the scales must be overwhelmingly weighted in favour of the privilege. If a complex balancing exercise is required, it necessarily follows that the success of claim of privilege cannot be regarded as "inevitable" or "unavoidable".

65. 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.

66. I am not satisfied that the requisite threshold has been reached in this case. Conscious of the observations of McKechnie J. in *Keating v. RTÉ*, I do not wish to delve too deeply into the claim of privilege or the potential countervailing arguments lest I pre-empt the outcome of the privilege issue. Nonetheless, I note that in *Mahon v. Keena* [2010] 1 IR 336, the case which is generally regarded as marking the full acceptance in Irish law of the ECHR jurisprudence on journalists' right to protect their sources subject only to the overriding requirements of the public interest, Fennelly J. expressly identified the individual's right to private and family life protected under Article 8 of the ECHR as one of the rights which might have to be balanced against the protection of journalistic sources under Article 10 of the same Convention (see p. 357 of the report). Thus, at a minimum privacy rights under Article 8 appear capable of constituting the type of overriding requirement of the public interest which might restrict freedom of expression. Of course, it remains to be determined whether the plaintiff can "convincingly establish" this on the facts of this case. I note also that in *Walsh*, O'Neill J took the view that where material had been disclosed to journalists by members of An Garda Síochána contrary to s.62 of the 2005 Act, journalistic privilege which might otherwise have applied no longer applied because of the criminal nature of the conduct involved. The media defendants dispute the correctness of this decision and also dispute the assertion that there has been a breach of s.62. Nonetheless it is clear that there is a significant factual and legal issue between the parties as to whether the privilege applies such that it cannot be said that the claim will inevitably succeed.

67. In circumstances where the claim of journalistic privilege is not one which must inevitably succeed (although it may well ultimately do so), I think the media defendants should be required to make an affidavit of discovery in the usual manner. They will then have the opportunity to formulate their claim of privilege specifically in respect of whatever documents they may have and the plaintiff will have the opportunity of meeting that claim. The court will then have the difficult task of deciding between two competing public interests each recognised as comprising an important aspect of the fundamental rights which it is necessary to protect in a democratic society. To paraphrase McKechnie J., it is appropriate that that decision be made in circumstances where the nature of the asserted privilege and of the documents the subject thereof have been sufficiently particularised so as to permit the court to evaluate the claim.

68. I am conscious that the media defendants state that even listing the documents in an affidavit of discovery will tend to undermine the privilege which they seek to assert. As I have observed in my analysis of the case law, this is an assertion often made in claims of this nature and does not invariably result in the court accepting that no obligation to make discovery should be imposed. In my view, it is important that the mere making of

such an assertion should not of itself be regarded as sufficient to justify upholding a claim of privilege unless it is also clear that the *Keating* threshold has, in any event, be met. In the analogous context of claims of executive privilege, the courts have staunchly refuted the notion that it is open to the requested party to decide that any category of documents is too sensitive to be identified in an affidavit of discovery. To accept an assertion that the listing of documents will necessarily disclose a journalist's confidential sources without the court being able to interrogate the reasons this is contended to be so nor to examine the documents themselves, would impermissibly encroach upon the court's exercise of the judicial power.

69. At the same time, I fully accept the comments of Meenan J. in *Ryanair Ltd v. Channel 4* (above) to the effect that there is "*a fine line to be drawn between giving a detailed description of the document and undermining the privilege you are seeking to assert*". I also accept Meenan J.'s view that a more general description of documents may be acceptable in an affidavit where it is intended to raise a claim of journalistic privilege in respect of those documents as discussed at para. 39 of his judgment:-

> *"Where a party is asserting journalistic privilege to protect a source, it seems to me that, there is a particular difficulty when it comes to describing the document. Whereas in legal advice/litigation privilege the sender and recipient of a document may be easily disclosable without undermining the privilege; the same is probably not the case where you are seeking to protect a source. Even the most basic description of the document could well have the effect of identifying the source. In general, what is being protected in legal advice/litigation privilege is the advice itself whereas what is being protected in journalistic privilege is the identity of the source. Therefore, in my view, a more general description of documentation over which journalistic privilege is being claimed is more acceptable than where legal advice/litigation privilege is being claimed."*

Similarly, Collins J. in *Desmond v. Irish Times* (above) acknowledged the difficulties arising in respect of identifying documents the subject of a claim for journalistic privilege (at para. 37 of his judgment):-

> *"I do however accept that, in swearing affidavits of discovery in defamation actions such as this, issues may arise as to how documents are described and, in particular, there may be a difficulty as to the level of detail required to be given in identifying documents in respect of which journalistic privilege is asserted. Here, as already noted, Ms Veldon has stated that even the listing of documents in an affidavit of discovery would run the risk of infringing journalistic privilege by which, I understand, she means a risk that the identity of the source might thereby be disclosed… The law does not require a party to undermine a privilege in order to claim it. At the same time, however, I would observe that where a claim of privilege – of whatever kind – is made over documents in the context of discovery, the onus ultimately lies on the party claiming it to establish by evidence that it is applicable to those documents. The reconciliation of those competing considerations may*

present difficulties in practice but, fortunately, such difficulties do not present themselves at this stage."

70. It seems from these judgments that the courts will afford considerable leeway as regards the description of documents in an affidavit of discovery where it is intended to make a claim of journalistic privilege in respect of those documents and a more detailed description might undermine the privilege claimed. At the same time, such leeway does not extend to allowing a party who has been directed to make discovery to decline to identify even in the most general sense documents of which it may be in possession within the relevant categories. In other words, there is a minimum threshold which must be met in order to allow the requested party to make, and the requesting party meet, the claim of privilege and to enable the court to adjudicate upon it. If the media defendants find they cannot work within the parameters indicated by Meenan J. and Collins J. in the judgments discussed above, it may be necessary to consider alternative mechanisms to enable the claim of privilege to be made, met and adjudicated upon fairly. For example, in cases of commercially sensitive information, the parties frequently establish a "confidentiality ring" to ensure that potentially privileged material will not be disclosed outside a very small group of persons professionally involved in the litigation. Whilst it might not be possible or appropriate in a case such as this to keep discovered material permanently within a confidentiality ring, the establishment of a confidentiality ring on a temporary basis for the purposes of determining the privilege issue may provide a mechanism through which the claim can be asserted without being undermined. This is not something which needs to be decided at this stage.

71. Finally, I note that the argument made by the media defendants in this case was more nuanced than simply asserting that their claim of privilege was one which must inevitably succeed. The media defendants also invited the court to determine the claim of privilege at this stage, not on the basis that it was bound to succeed, but because it would be unfair not to do so. Whilst I appreciate the attractiveness of such an approach from the perspective of the media defendants, it is not consistent with the logic underpinning the decision of McKechnie J. in *Keating v. RTÉ*. If a claim of privilege is to be made, responded to and determined as a specific claim in respect of particular documents, this cannot be done by the making of a general claim and without identifying the documents to which that claim relates. To accede to the media defendants' request in this regard would effectively elide the two stage discovery process and bypass the *Keating* threshold of establishing that the claim of privilege is one which must inevitably succeed.

72. In circumstances where I have found that the plaintiff is entitled to discovery of both of the categories of documents remaining in dispute between the parties and that the claim of privilege raised by the media defendants is not one which must inevitably succeed, it follows that the third issue identified at this beginning of this judgment (the determination of the claim of privilege itself) is not one on which the court should offer any view at this stage.