THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 672

[2021 No. 1079 JR]

BETWEEN

OSAMA ELSHARKAWY

APPLICANT

AND

THE MINISTER FOR TRANSPORT

RESPONDENT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 1st day of December 2023.

INTRODUCTION

1. This judgment is in respect of a motion which was brought by the applicant by way of notice of motion dated 15 March 2023. The applicant seeks an order for inspection of a series of documents that contain legal advice received by the respondent, and which has been referred to in, *inter alia*, a replying affidavit sworn by or on behalf of the respondent in these proceedings. The documents prima facie are accepted to attract a valid claim of privilege, and the central question for the court is whether that privilege has been waived on the basis that the respondent has deployed the legal advice for the purpose of defending these proceedings.

2. The proceedings were commenced when this court granted leave to apply for judicial review on 21 December 2021. The substantive relief and the reasons why that relief is sought

are set out in an amended statement of grounds which is dated 31 May 2022. For the purposes of this application the court does not need to resolve the underlying dispute. It is however necessary to describe the underlying proceedings briefly in order to contextualise this application.

3. The proceedings canvass a broad array of issues and reliefs, and the amended statement of grounds is very extensive having regard to the relatively straightforward circumstances that gave rise to the claim.

4. By way of a very brief summary, in 2014 the Oireachtas amended the law in relation to the threshold number of penalty points that could be accumulated before a mandatory disqualification applied. The main provisions are found in section 3 of the Road Traffic Act 2002 ("the RTA 2002"), and the amendments were introduced by section 8 of the Road Traffic Act 2014 ("the RTA 2014"). Prior to the commencement in August 2014 of the relevant amendments, the threshold was 12 penalty points and that threshold applied to all categories of drivers. The 2014 amendments brought about a change to the threshold in respect of drivers who held a learner's permit/provisional licence and the new category of novice drivers. In the case of learners and novices, a new threshold was introduced of 7 penalty points before a mandatory six month disqualification applied. This case arises from the treatment of learner drivers who already had accumulated points prior to the introduction of the amended threshold and how the State understood and implemented the legislation.

THE PLEADINGS

5. The applicant and his solicitor have sworn affidavits both for the purposes of the underlying proceedings and this application. Affidavits were sworn on behalf of the respondent by a senior official, Mr. Hattaway.

6. The applicant claims that in or about the second week of October 2021 he received a fixed penalty notice relating to the offence of driving a mechanically propelled vehicle unaccompanied by a qualified driver on 28 September 2021. At that point in time, the applicant held a provisional driving licence. The applicant decided to accept responsibility in respect of the offence and proceeded to pay the notice in accordance with the terms required. On 19 October 2021, after receiving the notice but before paying the fine, the applicant was issued a full driving licence. The applicant claims that when he decided to pay the fixed charge notice he believed that the threshold for disqualification for him was 12 points, and therefore his driver's licence would remain valid. He did not believe that he would be disqualified from driving as a result of paying the fixed charge notice. However, on 1 November 2021 the applicant was written to by the Road Safety Authority ("the RSA") and informed that a six-month disqualification would be imposed, commencing on 29 November, 2021. This was said to be pursuant to section 3 of the Road Traffic Act, 2002, as amended by section 8(c) of the Road Traffic Act, 2014.

7. According to the applicant, and this does not appear to be disputed, the change in legislation brought about by section 8 of the Road Traffic Act, 2014 (which commenced on 1 August 2014) was interpreted and applied by the respondent as meaning that the new threshold of 7 points would only apply to people who entered the driving licence system on or after 1 August 2014 and who did not have a learner permit or driving licence before 1 August 2014. On 14 May 2021 the respondent published a press release setting out that the respondent was revising its approach to the interpretation of section 8 of the 2014 Act. From that point on, the 7-point threshold would be applied to persons who had learner permits prior to 1 August 2014 and to persons deemed to be novice drivers prior to 1 August 2014. The applicant describes the consequent situation from his point of view in paras. xvii and xviii of grounds (e) of the statement of grounds as follows:

"xvii. The above has resulted in the respondent in May 2021, nearly 7 years after the commencement of the Road Traffic Act 2014, seeking to change how the law applies to persons who held a learner permit prior to the introduction of the 2014 Act, whereby this class of person, the Applicant being one, are now subject to disqualification when 7 penalty points are endorsed on their licence as opposed to 12 penalty points, which latter threshold the respondent represented the state of the law to be since the commencement of the Road Traffic Act 2014 in August of 2014.

xviii. The applicant now finds himself in a position where, unless this Honourable Court intervenes, he will be disqualified from driving on 29th November 2021 for a period of 6 months on foot of the respondent reinterpreting the Road Traffic Act 2014, which has resulted in the Road Safety Authority applying the statutory regime in accordance with this new interpretation by the respondent, notwithstanding the fact that neither the Road Safety Authority or the respondent has provided any legal basis for doing so."

8. If this case merely was concerned with the proper interpretation and application of the amendments made through section 8 of the RTA 2014, the issues would be relatively simple, and it would not be necessary to consider an application of the type before the court. Ultimately, the court would determine the proper interpretation of the legislation, and, at the level of principle, the interpretation adopted by any other party will be immaterial. However, the applicant goes further than contesting the interpretation adopted by the respondent. Having set out the factual basis for the application for judicial review, from paras. xxiii through to xlv of the amended statement of grounds, the applicant sets out a number of legal grounds on which he contends the decision ought to be impugned and set aside by the court. At the risk of doing an injustice to the extent of the arguments deployed by the applicant, the essence of his case seems to be that if the respondent decides to change the manner in which they interpret and apply a piece of legislation – regardless of its ultimate proper interpretation by the courts –

there is a need to provide reasons for the change in position and a need to take into account certain relevant considerations, including the likely impact on the rights and interests of persons who were likely to be affected. In the premises, the applicant seeks to argue, *inter alia*, that the approach adopted by the respondent was "*manifestly unfair, discriminatory, retrospective, disproportionate and unlawful in all of the circumstances.*" (amended statement of grounds, section (e) (xxvi)). As noted above, the court at this point is not concerned with whether these arguments are likely to succeed. The applicant has obtained leave to apply for the relief sought, having reached the relevant threshold for such leave; and the respondent has not sought to have the grant of leave, or any element of the claim, set aside.

9. In the affidavits grounding the proceedings the applicant exhibited two documents. First, there is a press release, entitled "Statement on the Penalty Point Threshold for Learner and Novice Driver Licences", that was published by the respondent on 14 May 2021. The press release states that the Department of Transport "*has today written to a number of Learner and Novice Drivers to inform them of a legal clarification on the penalty point disqualification threshold for these licence types.*" The notice refers to the introduction of the new legislation on 1 August 2014 and then goes on to note that "*the interpretation by the Department, based on legal advice received at the time, was that this new threshold should be applied only to people who entered the driver licencing system on or after that date. Those learner drivers already in the system before the new legislation was introduced on 1st August 2014 should continue to be subject to the standard 12 points disqualification threshold*". The notice states that, "*As a result of further, revised, legal advice, the Department is now applying the 7-point threshold to people who were in the system before that date…*" The notice then sets out the basis upon which the 7 point threshold will be applied.

10. In addition, in an affidavit sworn by the solicitor on behalf of the applicant on 13 December 2021, he exhibits an email dated 23 November 2021 from the Road Safety

Authority, which responded to correspondence on behalf of the applicant. The material portion of that email for the purposes of this application is as follows:-

> *"In August 2014, new legislation was introduced that set the disqualification threshold for novices and learners to seven points as opposed to 12 points for driving licence holders. When the rules were introduced, the Department of Transport understood, based on legal advice, that this new threshold would not apply to individuals who had any licence before that date. As a result of a revised legal advice, the Department now understands the seven-point threshold rule does apply to these individuals, but it only applies in relation to penalty points received after that date."*

11. A statement of opposition was delivered on behalf of the respondent on 7 September 2022. The statement of opposition puts almost all the claims made by the applicant in issue. In particular, the following pleas are made:-

> *"18. Regarding §13, it is admitted that prior to 2021 it had been decided that the limit of seven penalty points would apply only to persons who obtained their first learner permit on or after 1 August 2014 and that a person who was already a learner at that point will remain on the 12 point limit while they were a learner and when they became a novice. However, any suggestion or implication that this approach was somehow not subject to reconsideration or to change, in particular with the passing of time, is denied.*
>
> *[…]*
>
> *26. Regarding §24, it is denied that the Department of the Respondent "change[d] how legislation should be applied" and it is denied that it is a requirement on the Department of the Respondent to provide "adequate reasons", notwithstanding the vagueness of the plea including what the Applicant considers to be "adequate". While the Respondent's primary position is to deny that the duty to give reasons as a matter of administrative law is in any way engaged in the circumstances of the present judicial*

review, without prejudice to that, if such a duty applied, the Applicant is put on proof of any proposition that adequate reasons were not advanced. In that regard, it is noted that §16 of the Statement of Grounds itself has referred to the press release of 14 May 2021, as well as its reference to legal advice.

[…]

29. §27 is denied, without prejudice to its bare and speculative nature. To the extent that administrative law obligations to have regard to relevant considerations are in fact properly engaged in this case (a matter in respect of which the Applicant's arguments are awaited in due course), it is specifically denied that the Respondent failed to take account of those considerations which were actually properly relevant, as alleged or at all."

12. The opposition of the respondent was grounded on an affidavit of Mr. Ross Hattaway dated the 31 August 2022. Mr. Hattaway is a Principal Officer in the Department of Transport. Among the preliminary points made by him, the following is stated at para. 6 of the affidavit:-

"6. By way of further preliminary point, legal advice received by the Department of Transport, as with any Government Department is confidential and privilege [sic]. *No references to any legal advice in this Affidavit or the Statement of Opposition have the effect of derogating in any way that position."*

13. Thereafter, Mr. Hattaway sets out the background to the penalty points system and notes the amendments brought about, with effect from 1 August 2014 by section 8(c) of the Road Traffic Act 2014. The following is stated from para. 22:-

"22. On the basis of legal advice received by the Department of Transport at that time [2014] *only persons who received a learner's permit for the first time on or after 1 August 2014 were subject to the new seven penalty point threshold. They were subject to this threshold for the duration of their first learner's permit and the first two years*

after receiving their full driver's licence when they were classed as a novice driver. Persons who held a learner's permit or were a novice driver prior to 1 August 2014 remained on the twelve point disqualification threshold.

23. A press statement was issued by the then Minister in this regard on or about 25 July 2014, ... [and a copy of the statement is exhibited].

24. The Road Safety Authority, as per their online information note published in July 2014, applied the above legal advice in their administrative rules. Therefore only persons who received a learner's permit for the first time on or after 1 August 2014 were subject to the new seven penalty point threshold."

14. The affidavit goes on, from para. 26, to explain the change of position on the part of the respondent:-

"26. The Department of Transport subsequently received legal advice which had the effect of altering its opinion on the administrative rules. That advice disagreed with the original interpretation and determined that there was no reason why a person who held a learner permit or was a novice driver prior to 1 August 2014 should not be disqualified on the accumulation of seven new points after 1 August 2014. Furthermore, the advice stated that if the total amount of points accumulated before and after the 1 August 2014 reached the 12 point threshold the drivers could also be disqualified. This advice was reaffirmed in further advice."

THIS APPLICATION

15. As noted above, this motion issued on 15 March 2023, and the applicant seeks:-

"1. The legal advice received by the Respondent referred to at paragraph 26 of Ross Hattaway's verifying affidavit sworn on the 7th September 2022, comprising of:

(a) The original legal advice received by the Respondent in or around 2014.

(b) The updated legal advice received by the Respondent in or around early 2021.

(c) The reaffirmed legal advice received by the respondent."

16. This motion is grounded on an affidavit of Mr. Ian McSweeney sworn on 15 March 2023. Mr. McSweeney is a solicitor acting for the applicant. In his affidavit he sets out the reference made by Mr. Hattaway to legal advice received by the respondent and he goes on to contend that while it is not impermissible for the respondent to refer to the fact that advice was obtained, he says that the respondent went further than that and has deployed some of the content of that advice for his benefit and for the purpose of bolstering its case in the within proceedings. As such, he contends that the respondent should be taken to have waived any legal privilege attaching to that advice. One of the exhibits to Mr. McSweeney's affidavit is a letter dated 18 January 2023 from the Chief State Solicitor's Office on behalf of the respondent, but the contents of the assertions on that letter are effectively repeated in the replying affidavit of Mr. Hattaway. Prior to issuing this motion, the applicant, served a notice to produce documents pursuant to Order 31, rule 15 of the Rules of the Superior Court ("the RSC") seeking the documents which are the subject of the application herein.

17. The respondent replied to the application herein by way of a further affidavit sworn by Mr. Hattaway on 3 May 2023, where he makes a number of points in reply. First, he notes that it was the applicant himself in his statement of grounds who first referred to any legal advice received by the respondent. In those premises Mr. Hattaway avers that the verifying affidavit had little choice but to make reference to the legal advice. Second, insofar as his verifying affidavit noted that the change to the approach in relation to the interpretation of the Act occurred as a result of legal advice which altered the Department's opinion on its administrative rules, it did so for the purpose of providing context. Third, Mr. Hattaway disputes that the reference to legal advice has the effect that it has been "deployed", as that concept is considered

in the relevant case law. Fourth, Mr Hattaway asserts that the respondent does not seek to defend the substantive proceedings by contending that weight must be given to the legal advice *per se* in this litigation. Rather, it is asserted that the case of the respondent is made by reference to the underlying factual and legal merits, and the respondent is not placing any reliance on the legal advice. Finally, without prejudice to their overall position, the respondent separately contests that the advices from in or around 2014 have been deployed at all, noting that the verifying affidavit makes clear that the approach in earlier advices had simply been departed from.

SUBMISSIONS

18. The court had the benefit of both written and oral submissions from the parties, for which it is grateful. On behalf of the applicant, emphasis is placed on the fact that the respondent's press release on 14 May 2021 constituted a reversal of policy which caused "*a fundamental change in the regulatory regime for drivers who first got their licences before 2014. This change has come about without a change in the law, without the Respondent enacting new legislation, without the Respondent making a new S.I. and without any change in the caselaw.*"

19. The applicant accepts that legal advice received by the respondent is privileged but states that the core issue is whether that privilege has been waived in this case. In that regard, the applicant submits that what the respondent has done is more than adverting to the fact that advice was obtained but has referenced some of the content of the advice. On those premises, it is asserted that the respondent is "*clearly seeking to derive some benefit in the within proceedings from the various references to the advice received.*"

20. Insofar as the respondent states in the verifying affidavit that the legal advice received by the respondent is confidential and privileged, it is asserted that the respondent cannot assert

confidentiality over such advice whilst simultaneously deploying the contents of same in furtherance of its objectives in the proceedings.

21. In terms of legal authorities, the applicant relies on extracts from Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (3rd edn, Round Hall 2019) and *Hannigan v. DPP* [2001] 1 IR 378, *Byrne & Leahy v. Shannon Foynes Port Co*. [2008] 1 IR 814, *Redfern Ltd v. O'Mahony & Ors* [2009] 3 IR 583, *Fyffes Plc v. DCC Plc* [2005] 1 IR 59, and *Director of Corporate Enforcement v. Cumann Peile Na hÉireann* [2022] IEHC 593.

22. The respondent opposes the application. A preliminary objection is raised on the basis that the motion is not properly constituted as a motion seeking inspection because no "document" as that concept applies for the purpose of O.31, r.15 of the RSC was referred to by the respondent in its papers. In that regard, the respondent argues that for O.31, r.15 of the RSC to be applicable, it is necessary for a specific or identifiable document to be referred to, and no such document is identified in the motion papers or grounding affidavit. Second, the respondent contends that the applicant is relying on O.31, r.15 of the RSC improperly as a substitute for discovery in circumstances where an application for discovery is subject to various conditions and safeguards including tests of relevance, necessity and proportionality.

23. In terms of its substantive defence of motion, the respondent relies on four propositions. First, the argument is made that inspection should not be granted in circumstances where the legal advice was first referred to in the applicant's amended statement of grounds and was only referred to in the responding affidavit for the purpose of reply. In that regard, the respondent noted that at grounds (e)(xv) and (xvi) in the statement of grounds the applicant referred to the fact that the respondent published a press release referring to the fact that the various approaches adopted were on foot of legal advice obtained by the respondent. The respondent contends that it had "*little choice but to make reference to the legal advice*" in the circumstances where it had been referred to by the applicant, and that it would have been artificial,

inappropriate and probably impossible for the State to attempt to avoid reference to the legal advice, particularly having regard to the duty of candour in judicial review proceedings imposed on a respondent. Finally, in this regard, the respondent refers to English authority to the effect that where a party who responds in a minimal way to a reference by an applicant to a privileged document it cannot be said that privilege in respect of the contents of that document have been waived. Under this heading, the respondent notes that only the facts and broad effects of the legal advice were referred to as opposed to the contents thereof.

24. The second point made on behalf of the respondent is that the legal advice was not "deployed" in the sense used in the case law. Under this heading, the respondent submits that no privilege has been waived where the respondent has only referred to the fact of the legal advice being received or the effects thereof rather than the contents of the advice. In that regard the respondent relies on extracts from Abrahamson, Dwyer and Fitzpatrick (already cited) and dicta from Clarke J. in *Byrne & Leahy v. Shannon Foynes Port Co*.

25. The third point raised by the respondent is that this is not a case in which the respondent could gain any litigious or other advantage from referring to the advice in the verifying affidavit. The respondent makes the point that it does not seek to defend the litigation by contending that some form of weight should be given to the advice in the litigation. Instead, as noted by Mr. Hattaway in his affidavit, the case would be defended by reference to the underlying legal and factual merits. It can be noted that the respondent does not refer to the question of whether, on the other hand, the applicant may gain some litigious advantage from access to the legal advice.

26. Finally, the respondent notes that at all times it expressly reserved privilege in respect of the legal advice that the Department had been given. In essence, the respondent argues that whatever else might be said, there is no express waiver of privilege in this case.

AUTHORITIES

27. The applicant placed significant reliance on the judgment of the Supreme Court in *Hannigan v. DPP* [2001] 1 IR 378. This was a short judgment of Hardiman J. in which the court noted that, from the point of view of privilege, as a matter of general principle there is a change in the status of a document once it has been referred to in pleadings or on affidavit. In that regard the court quoted from Matthews and Malek's, *Discovery* (Sweet & Maxwell 1992) at para. 915 where it was stated that:-

> "*The general rule is that where privilege material is deployed in Court in an interlocutory application, privilege in that and any associated material is waived....".*

28. Because there was considerable debate in this application about the question of what constitutes sufficient deployment or use of litigation advantage by a party it is helpful to consider the factual matrix in which *Hannigan* was decided. In that case, by the time the matter reached the Supreme Court the applicant was seeking a single document and the respondent was contesting the need to produce that document on the grounds that it was privileged. The applicant had been charged with a sexual assault offence. There was a debate in the District Court on the question of whether the charge was to be dealt with on indictment or summarily. The applicant was granted leave to apply for an order of prohibition by the High Court. The complaint was summarised as, first, one accusing the Director of Public Prosecutions ("the DPP") of oppression in withholding his consent to the summary disposal of the charge unless he were to plead guilty to the offence in the District Court, and second that there had been a pattern of abuse of process and fundamental unfairness amounting to oppression and denial of constitutional justice. The applicant had argued that it was wrong of the DPP to make his consent to summary disposal conditional on a plea of guilty. The Supreme Court highlighted the following passage in an affidavit sworn on behalf of the respondents: -

"*On the 29th May, 1996, a letter was received from the first respondent [the DPP] containing directions as to prosecution and venue for trial. It was the intention of the first respondent that the matter would proceed on indictment although if there was a plea of guilty proffered, it might be that the case be dealt with in the District Court. The letter also raised certain queries in relation to certain matters contained in the statements of proposed evidence. Copies of the correspondence were sent to me at Mayfield on the 4th June,1996, by the State Solicitor. On the following day I passed the correspondence to Sergeant Brosnan with a request that the queries raised by the first respondent be dealt with."*

29. In the application before the Supreme Court, the letter referred to in that paragraph was the sole document whose disclosure was sought.

30. The applicant sought disclosure of the document in relation to his claim the DPP was guilty of oppression, abuse of process and fundamental unfairness. In that regard, the applicant sought to establish a pattern of conduct. It should also be noted that that was a case involving a claim of public policy privilege or immunity. In that case or type of case the court is required to balance the public interest in the proper administration of justice against the public interest referred to in the grounds put forward for non-disclosure. This is different from the test in relation to legal advice privilege.

31. Turning to the deployment issue, Hardiman J. noted that the Superintendent's affidavit went further than referring to or summarising contents of the document at issue:-

"Superintendent Brennan did not merely mention the existence of the document but relied on a summary of its contents. This reference to the letter, in some degree of detail, seems to me to support (if support is necessary) the view that the letter has or may have a degree of relevance beyond the merely tangential. It also appears to support the

proposition that disclosure of the terms of the letter may occur without deleterious effect from the first respondent's point of view."

32. However, from the point of view of the matters at issue in this application, the court was concerned with a second basis for disclosure, that of deployment. In that regard the court referred to the following quote from *Nenea Karteria Maritime Co. Ltd v. Atlantic and Great Lakes Steamships Corporation (No. 2)* [1981] Com. L.R. 139:-

> "*"..... the opposite party..... must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question".*

33. Hardiman J. took the view that because the party entitled to claim privilege in its contents referred to the document and summarised its content, for litigious purposes, that it was just and equitable that the appellant should be entitled to have access to see it. The court found that the document seemed clearly capable of advancing one party's case or damaging that of the other, adopting the classic statement in the *Peruvian Guano Company* case (*Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano* (1882) 11 QBD 55).

34. The issue arose more directly in the context of an assertion of legal professional privilege in *Fyffes Plc v. DCC [2005] 1 IR 59*. The application before the Supreme Court in that case concerned whether a disclosure of otherwise privileged documents to the stock exchange implied a more general waiver of privilege. The gravamen of the decision of the Supreme Court was that legal professional privilege could only be removed where it was waived, either expressly or impliedly by the client, via the crime of fraud exception, or where it was overwritten by express statutory authority. Otherwise, legal professional privilege was absolute, and the court was not required to engage in the question of whether or not an assertion of privilege was "fair" or otherwise.

35. In his judgment, Fennelly J. considered the authorities on legal professional privilege and made clear that whether or not documents are privileged will be determined by the application of the existing principles to the facts of the case. As noted by Fennelly J. "*once it is found to exist, there is no judicial discretion to displace it.*"

36. In relation to the case of implied waiver, Fennelly J. noted that Lord Bingham C.J. in *Paragon Finance v. Freshfields* [1999] 1 WLR 1183 had approved the following dictum of Ebsworth L.J.in *Kershaw v. Whelan* [1996] 1 WLR 358, at p. 370:-

> "*Waiver is not lightly to be inferred; although privilege is an aspect of the law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy."*

37. The court noted that up to that point in time it was clear that *"the circumstances in which privilege is lost or limited to the effects of some voluntary act of the person claiming it."*

38. The court also noted the judgment of Hardiman J. in the *Hannigan* case and expressed the following conclusion at para. 40, p. 72:-

> *" I would conclude, however, that the well-established rule regarding privilege, whether including a notion of fairness or not, goes no further than the proposition that a party who seeks to deploy his privileged documents by partially disclosing them or summarising their effect so as to gain an advantage over his opponent in the action in which they are privileged, runs a serious risk of losing the privilege. I do not deny that the partial disclosure which has that effect might, in some circumstances, be made to a third party, but it would have to be for the purpose of gaining an advantage in that action. I would add that express stipulations of confidentiality, such as in the present case, will necessarily be a material factor. They will obviously negative any claim of express waiver and most cases of implied waiver.."*

39. *Redfern Ltd v. O'Mahony & Ors.* [2009] 3 IR 583 was similar in many respects to *Fyffes* insofar as it involved a claim that the furnishing of otherwise privileged documents to third parties amounted to a waiver of privilege more generally. In that case, the court reiterated the approach adopted in *Fyffes* and found that privilege may be waived by disclosure. Similarly, if the document comes into the public domain, privilege will be lost. However, privilege will not be lost where there is limited disclosure for a particular purpose or to parties with a common interest. This is so on the basis that such disclosure does not evince an intention to waive the privilege. A second issue in *Redfern* concerned the effect of a plea in their defence by the third and fourth defendants that was alleged to amount to an applied waiver of privilege over legal advice obtained by them. The third and fourth defendants in the Supreme Court conceded that at the hearing of the action it was their intention to rely upon *the fact* that legal advice was obtained in relation to a particular agreement, and asked the court to infer the absence of an intention to procure a breach of contract to interfere with the plaintiff's contractual relations from the terms of a particular further agreement and from the fact that legal advice was obtained. The third and fourth defendants asserted that the legal advice sought or given would not be introduced into evidence.

40. In analysing the effects of that situation, the court started from the premise that the importance of legal professional privilege in our system of litigation cannot be overemphasised (para. 19).

41. At para. 20, the court noted that, *"While the courts afford a very high degree of protection to legal professional privilege the party entitled to the same may expressly or by implication waive it."* In that regard the court noted the following proposition in Matthews and Malek, *Disclosure* (3rd edn, Sweet & Maxwell 2007) at para. 1164 where the authors state:

"*Where in litigation allegations are made by a party concerning his state of mind (e.g. in entering an agreement) to which legal advice contributed, that party cannot withhold the advice on grounds of privilege, but this is because of implied waiver...*"

42. In *Redfern*, the court conducted a close analysis of the law in this jurisdiction, in England and Wales and in Australia. In relation to deployment, the court noted at para. 28:-

> *"[28] There is one other area in which legal professional privilege can be lost on the basis of unfairness and that is in relation to partial disclosure of legal advice: see R v. Secretary of State for Transport, Factortame (The Times, 16th May, 1997) and cases therein referred to. Where a party deploys in court material which would otherwise be privileged the other party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."*

43. In that regard, the court concluded, at para. 33, that *"a party by its pleadings or by deployment in court may waive legal professional privilege: this will arise where the contents and effect of the legal advice are disclosed. That is not the position here as the contents and effect of the legal advice are not pleaded and, as the third and fourth defendants have informed the court, will not be relied upon. Only the fact that legal advice was obtained will be relied upon."*

44. The question of deployment was considered at some length by Clarke J. in the High Court in *Byrne & Leahy v. Shannon Foynes Port Co*. [2008] 1 IR 814. In that case, the first defendant made a discovery of a number of categories of documents, and inadvertently disclosed a number of documents in respect of which privilege could be claimed. As part of the defence to the first defendant's application that he should be permitted to claim privilege

by swearing a revised affidavit of discovery, the plaintiffs argued that the relevant documents had been deployed in the proceedings and that they were now entitled to discovery of other connected privilege documents.

45. In relation to the question of implied waivers or deployment the court noted, at para. 34, the following:-

> *"It should be noted that there are types of litigation where it is far from unusual to find privilege being waived. In particular, cases where the bona fides of a party or the reasonableness of its actions are concerned frequently involve the reliance by such a party on the fact that it acted on legal advice as part of its case. In such litigation it is not unusual to find a clear waiver of privilege in respect of documents relevant to legal advice so that the party can maintain in the proceedings that it acted bona fide and/or reasonably because it took and followed appropriate advice."*

46. In relation to deployment, the court noted the approach adopted by Hardiman J. in the *Hannigan* case but highlighted "*that the test is to the effect that the document concerned was 'deployed'".* In that regard the court at para. 49 stated:-

> *"It is clear from Marubeni Corporation v. Alafouzos [1988] C.L.Y. 2841 that a mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege and that this is so even if the document referred to is being relied on for some purpose, for reliance in itself is not the test. Properly speaking, the test is whether the contents of the document are being relied on rather than its effect.*
>
> *[50] As thus put, the test is as to whether the party concerned has placed reliance on the content of the document concerned. It does not seem to me that the mere disclosure of the existence of the document without claiming privilege in respect of it in an affidavit of discovery can be said to amount to the placing of reliance on the document in the proceedings so as to, properly speaking, suggest that the document has been deployed.*

Obviously, if the document is relied on as to its contents in an interlocutory application, or a fortiori, at trial, then it follows that it has been deployed.

[51] I am, therefore, satisfied that, where reliance is placed upon the contents of the document in either an interlocutory application or at trial, the party concerned will be taken not only to have waived any privilege that might attach to that document but also to any other documents which are connected to the document in question in such a manner as would make it unjust to allow the document concerned to be deployed in that fashion without also disclosing the content of the other documentation concerned."

47. In that case, in which concerned an erroneous reference to otherwise privileged documents in an affidavit of discovery, the court was content that none of the documents had been deployed in the sense he meant.

48. The following propositions, relevant to this application, emerge from the authorities above:

(a) The starting position is that legal professional privilege is absolute in the sense that once established there is no judicial discretion to displace it on grounds of fairness.

(b) However, privilege may be waived, expressly or by implication, by the parties entitled to assert the privilege.

(c) Waiver is not to be lightly inferred.

(d) Waiver is not inferred simply because the party refers to a privileged document.

(e) Waiver may be inferred when a party deploys their own privileged documents by partially disclosing them or summarising their effect.

(f) The test is whether the contents and effect of the document are being relied upon so as to gain an advantage over their opponent.

ORDER 31 ISSUES

49. As noted above, the respondent's preliminary objection to the applicant's motion is that the incorrect procedure has been adopted. In that regard, the respondent argues (a) that O.31, r.15 to 18 have not been invoked properly because the opposition papers do not refer to a document, per se, but merely refer to the fact that the respondent obtained and took steps on foot of legal advice; and (b) that the proper course of action would have been for the applicant to seek discovery, in which case the respondent would have been entitled to raise issues of relevance, necessity or proportionality before any issue could arise on the question of whether the advice ought to be produced or inspected. The court is inclined to take a pragmatic view on this point. Although the preliminary objection was not in any sense abandoned, it was clear that the respondent was fully able to articulate the privilege arguments that it wished to rely on, and those arguments took up the bulk of the written and oral submissions.

50. There is no doubt that O.31, r.15 can obviate the necessity for a discovery application on the basis that where a document is referred to in pleadings by a party this may very well show that it is considered relevant by the party so referring. However, that will not necessarily be the case. As noted by Noonan J. in *Dunne v. Grunenthal Gmbh & Ors* [2018] IEHC 798, the court has to consider the reasons why a document is referred to. In that case, the court refused to grant inspection of two medical reports on the basis, *inter alia*, that the opinions were referred to in the pleadings solely for the purpose of pleading the plaintiff's state of knowledge within the meaning of the Statute of Limitations (Amendment) Act 1991.

51. In addition, for the purposes of deciding whether or not to order inspection under O.31, r.18 the court ought not make an order unless it is satisfied that the order is necessary for disposing fairly of the action or for saving costs. In that regard, Noonan J. considered the judgment of Kelly J. (as he then was) in *Cooper-Flynn v Radio Telefís Eireann* [2000] 3 IR 344 and the authorities discussed therein, in particular the judgment of Simon Brown L.J.

in *Wallace Smith Trust Company Ltd v. DeLoitte Haskins and Sells* [1997] 1 WLR 257 which contained the following passage:

> *'2. The burden lies on the party seeking inspection to show that that is necessary for the fair disposal of the action….5. Disclosure will be necessary if: (a) it will give "litigious advantage" to the party seeking inspection (Taylor v Anderton [1995] 1 WLR 447 at p.462 and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g. interrogatories) or from some other source (see e.g. Dolling-Baker v Merrett [1990] 1 WLR 1205 at p. 1214) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (see e.g. Science Research Council v Nasse [1980] AC 1028 at p. 1076 per Lord Edmund-Davies).'"*

52. On the issue of what constituted "*necessity*", Kelly J. also referred with approval to the dicta of Bingham M.R. in *Taylor v. Anderton* [1995] 1 WLR 447 at 462 where the Master of the Rolls said:-

> *"The crucial consideration is, in my judgement, the meaning of the expression 'disposing fairly of the cause or matter'. Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it, if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test."*

DISCUSSION

53. In disposing of the preliminary objections in this case I have taken into account that the respondent has not asserted that the legal advice sought was oral advice. Instead, the assertion is that the applicant has not identified a specific document. In the premises, the court considers it sensible to infer that the legal advice obtained by the respondent was reduced to writing and that there are documents available setting out the advice. Further, it seems to the court that the information comprised in the advice is not otherwise available to the applicant or that the advice is so voluminous to make production or inspection oppressive.

54. The question for the purposes of O.31, r.18 of the RSC, is whether inspection will give a litigious advantage to the applicant or place him in a position of unfair disadvantage, bearing in mind that curiosity about the document is not sufficient. To some extent the analysis of litigious advantage overlaps with a part of the test of whether privilege has been waived, in the sense that in *Fyffes*, Fennelly J. stated that it was deployment "*so as to gain an advantage over his opponent in the action*" that runs the risk of privilege being lost.

55. In this case, taking the applicant's case on its own terms, the court is satisfied that if there was no question of privilege this would be an appropriate case in which to direct inspection pursuant to O.31, r.18 of the RSC. The court is satisfied that the reference to legal advice, particularly at paras. 22 to 27 of Mr. Hattaway's affidavit of 31 August 2022, can be treated as a reference to a document, particularly where the respondent has not argued that the advice was given orally. On the applicant's theory of his case, access to the documents containing the advice from 2014 and 2021 confers on him a litigious advantage, either by assisting in proving his case or damaging that of his opponent. The question then is whether inspection should be refused on grounds of privilege.

56. There is no dispute that but for the reference to the advice in the pleadings and affidavits the legal advice obtained by the respondent would be the subject of an unimpeachable claim of

privilege. In this case, the court is satisfied however that the respondent has engaged in conduct that amounts to a waiver of that privilege.

57. It is true that there is no express waiver of privilege and that the respondent has continued to assert that no waiver should be inferred, but that does not determine whether a waiver arises by implication.

58. I do not agree with the respondent's contention that it was placed in a position where it had no alternative but to refer to the advice because the applicant raised the matter in his pleadings. There are two reasons for this. First, before the proceedings commenced the respondent at various stages itself sought to explain its position by reference to the legal advice, both generally and in response to threatened litigation by the applicant. Hence, there were press releases in 2014 and 2021, and an email from the Road Safety Authority to the applicant's solicitor on the 23 November 2021, all of which referred to the fact that the position of the respondent was in response to legal advice. Second, and this goes to other aspects of the overall analysis, when the respondent did refer to legal advice it went further than just repeating the information already available. In that regard it is necessary to set out the following statements from Mr. Hattaway's affidavit:

> "*22. On the basis of legal advice received by the Department of Transport at that time [2014], only persons who received a learner's permit for the first time on or after 1 August 2014 were subject to the new seven penalty point threshold. They were subject to this threshold for the duration of their first learner's permit and the first two years after receiving their full driver's licence when they were classed as a novice driver. Persons who held a learner's permit or were a novice driver prior to 1 August 2014 remained on the twelve point disqualification threshold.*
>
> *[…]*

24. The Road Safety Authority, as per their online information note published in July 2014, applied the above legal advice in their administrative rules. Therefore only persons who received a learner's permit for the first time on or after 1 August 2014 were subject to the new seven penalty point threshold.

[…]

26. The Department of Transport subsequently received legal advice which had the effect of altering its opinion on the administrative rules. That advice disagreed with the original interpretation and determined that there was no reason why a person who held a learner permit or was a novice driver prior to 1 August 2014 should not be disqualified on the accumulation of seven new points after 1 August 2014. Furthermore, the advice stated that if the total amount of points accumulated before and after the 1 August 2014 reached the 12 point threshold the drivers could also be disqualified. This advice was reaffirmed in further advice."

59. To my mind, and accepting that the issues are somewhat finely balanced, this goes further than simply confirming that legal advice was obtained or relied upon. I am satisfied that if Mr. Hattaway went no further than repeating the previously articulated references to legal advice that were set out in the press releases and emails from the Road Safety Authority, this would have maintained the privilege and amounted to no more than a reference to the fact that legal advice was obtained rather than a deployment of that advice. However, the court considers it significant that the contents of para. 26 of Mr. Hattaway's affidavit seem to expand on the information that was disclosed in the May 2021 press release or in the email from the Road Safety Authority. The respondent may have been able simply to state that at any given time its approach to the application of the statutory provisions was informed by the available legal advice. Instead, their evidence highlights a legal disagreement with their original advice, refers to a determination that "*there was no reason why*" certain categories of driver should not be

disqualified, and refers to advice relating to the effect of the accumulation of 12 penalty points over the period before and after 1 August 2014, with the latter point seemingly being of no relevance to the situation of the applicant.

60. In those premises, it seems to the court that the averments go further than simply referring to the legal advice. In *Hannigan*, the Supreme Court considered that the document at issue was referred to in a way that suggested it had a degree of relevance beyond the mere tangential. In *Fyffes*, the Supreme Court emphasised that documents could lose privilege if they were deployed by summarizing their effect. Likewise in *Redfern*, Finnegan J. highlighted the effect of a party disclosing the contents and effect of legal advice. In that regard the Supreme Court was clear that a party cannot partially disclose its legal advice, as this would risk injustice through its real weight or meaning being misunderstood.

61. In all the circumstances the court is not satisfied that this is a situation in which the respondent merely referred to the fact of it having obtained and acted upon legal advice. This is a situation where the respondent has chosen to disclose in part the contents and effects of that legal advice. Rightly or wrongly, the parties are engaged in a dispute about the reasonableness of the course of action engaged in by the respondent. Many of the substantive pleas by the respondent are expressly framed as being without prejudice to the claim that the premises of certain pleas in the statement of grounds are firmly contested. Nevertheless, the respondent is contending that it did provide adequate reasons (which include the reference to legal advice) for the change in position (see para. 26 of the statement of opposition), and that it did not act unreasonably, unfairly disproportionately or retrospectively (para. 31 of the statement of opposition). It follows, that there has been a deployment for the litigious advantage of the respondent. Even if the deployment was not specifically or expressly to the advantage of the respondent, the court is satisfied that it would be unfair to the applicant to allow the

respondent to deploy the advice in this manner without affording the applicant an opportunity to satisfy himself as to the proper weight or meaning to be afforded to that advice.

62. Hence, for the purposes of determining whether the respondent waived privilege over the legal advice regarding the implementation of the amendments brought about by section 8 of the Road Traffic Act 2014, the court is satisfied that the respondent has deployed the legal advice for its litigious advantage in these proceedings, and that there has been a waiver of privilege.

63. In the premises, the court proposes to make an order pursuant to O.31, r.18 of the RSC directing the respondent to allow the applicant to inspect all documents comprising (a) the original legal advice received by the respondent in 2014 and which is referred to at para. 22 of the affidavit of Mr. Ross Hattaway dated 31 August 2022, and (b) the legal advice received by the respondent in 2021, together with the reaffirmed advice referred to at para. 26 of the said affidavit.

64. As this judgment is being delivered electronically, I will list the matter before the court on Monday 18 December 2023 to deal with any arguments about the final form of any order and to adjudicate if necessary on any application for costs.