APPROVED **[2024] IEHC 65**

THE HIGH COURT

Record No.: 2023/1642P

Between:

ELECTRICITY SUPPLY BOARD

Plaintiff

-AND-

KIERAN SHARKEY

Defendant

JUDGMENT of Mr Justice Rory Mulcahy delivered on 9 February 2024

Introduction.

1. In **McGee v Governor of Portlaoise Prison [2023] IESC 14**, O'Donnell CJ reminds us of the manner in which constitutional law develops:

> *"The development of constitutional law in a common law system owes more to chance, therefore, than to systematic deduction from accepted principle. It is dependent on the happenstance of litigation raising an issue that is recognised as such by the lawyers and judges involved, and then the manner in which it is analysed. Development is at best incremental, random, and unpredictable."*

2. This application represents an example of the happenstance of litigation referenced by the Chief Justice. The particular factual circumstances arising, and the arguments of the parties as to the consequences flowing from those particular facts, require the court to address the vexed question of when an individual can rely on constitutional rights in the private sphere. In particular, the court is asked to consider whether the Defendant's privilege against self-incrimination, or his right to silence, can be relied on in the teeth of his employer's demand that he respond to its request for information.

3. In brief, the Plaintiff is the Defendant's employer and wrote to the Defendant asking him to provide answers to questions regarding certain matters, alleged to have occurred during the course of his employment, in respect of which the Defendant is the subject of a criminal investigation. The Defendant denied wrongdoing, but otherwise refused to answer any questions, invoking his right to silence.

4. In these proceedings, the Plaintiff seeks a declaration that the Defendant has, by refusing to answer the questions, repudiated his contract of employment or that it is entitled to treat his contract of employment as having been terminated. In the alternative, it seeks an Order compelling the Defendant to disclose certain information to it.

5. By Consent Order dated 15 May 2023, it was agreed by the parties that the following points of law be set down for trial:

1. Does the Defendant's right to silence and/or privilege against self-incrimination permit him to lawfully refuse to comply with the directions issued to him by the Plaintiff in its letter dated 17 February 2023?
2. If the answer to the first question is 'No', does the Defendant's refusal to comply with the directions issued to him by the Plaintiff in its letter dated 17 February 2023 amount to a repudiatory breach of his contract of employment with the Plaintiff such that the Plaintiff is entitled to treat his contract of employment as terminated?
3. If the answer to the second question is 'Yes', on what date was the said contract of employment terminated?

6. For the reasons set out below, the answer to the first of those questions is a qualified 'Yes'. In those circumstances, the second and third questions do not arise for consideration.

Factual Background

7. Most of the factual background relevant to the application is set out in an affidavit of Brian Tapley, Custom and Project Delivery Manager with the Plaintiff ("**ESB**"), although Mr Sharkey has also sworn an affidavit which details certain factual matters which have not been contested. I note that certain of the factual background has also been set out in detail in a recent related judgment of the High Court (Dignam J), **ESB and Anor v Richmond Homes Ltd and Anor [2023] IEHC 571**, concerning an application for a Norwich Pharmacal Order, to which I will refer briefly below.

8. Mr Tapley explains that the Defendant is a network technician who commenced employment with ESB on 2 February 2017. In May 2022, ESB became aware of allegations from two developers, Richmond Homes Ltd ("**Richmond**") and Arkmount Construction Limited ("**Arkmount**"), that certain ESB employees were demanding cash payments for expediting the completion of works to be carried out by ESB. Mr Tapley met with representatives of both firms. The representative of Richmond, Mr M (as he is referred to in the judgment of Dignam J), advised Mr Tapley that, in February 2022, he requested that electricity meters be installed in a new development in Malahide. He said that he was advised to contact the relevant network technician and, therefore, contacted the Defendant. Mr M alleged that the Defendant advised him that he should pay €50 per meter to the network technicians who would install the meters. Mr M advised that meters were installed on two occasions and that on each occasion, the network technician installing the meters was paid €50 per meter. It was not alleged that the Defendant had received any payments.

9. Mr M also told Mr Tapley that the Defendant asked Richmond's site foreman to arrange for the tiler on site to carry out tiling work at the Defendant's home. He alleged that the sum charged for that work was "*probably well below cost for the job completed".*

10. ESB reported these allegations to An Garda Siochána on 1 June 2022. An Garda Siochána asked ESB not to do anything that would put the relevant employees, including the Defendant, on notice of their investigation, although, as explained in Mr Sharkey's affidavit, the Gardaí carried out searches at the Defendant's home on 27 July 2022 and searched his vehicle. Two mobile phones were seized and the Defendant was advised by a member of the Gardaí that he was being investigated for bribery and corruption in his work for ESB.

11. On 27 July 2022, ESB commenced proceedings in the High Court against Richmond and Arkmount (bearing Record Number 2022/3755P) seeking certain reliefs requiring Richmond to disclose to ESB information and documents relating to payments made to employees of ESB, a Norwich Pharmacal order. By consent order, dated 6 October 2022, Richmond and Arkmount were required to provide to ESB documents concerning, evidencing or recording the making of alleged payments to any employee of ESB in connection with the carrying out of any works at, *inter alia*, the Malahide site. Relevant documents were provided by Richmond and Arkmount on 25 October 2022, which were exhibited in Mr Tapley's affidavit. ESB sought further orders against Richmond and Arkmount, which application was the subject of a contested hearing in February 2023 and is the subject of Dignam J's judgment referenced above.

12. Mr Tapley wrote to the Defendant on 8 August 2022 on behalf of ESB, following a meeting between the Defendant and Mr Tapley which the Defendant had requested following the Garda search of his home. The letter confirmed that ESB had notified An Garda Siochána of certain issues which a customer had brought to its attention and informed Mr Sharkey about the Norwich Pharmacal proceedings. The letter included the following statement:

> *"At this time, ESB does not propose engaging with you further in relation to this matter but we do expect to engage with you further as matters develop. In the meantime, in terms of supports, the ESB Employee Assistance Programme is available to you at this time and of course the line support of your supervisor and manager….*

Finally, if you have engaged in conduct in connection with your employment with ESB that requires to be disclosed to ESB then you should immediately provide all relevant information to ESB."

13. Following the hearing of the application against Arkmount and Richmond in February 2023, Mr Tapley wrote to the Defendant (and others) on 17 February 2022 on behalf of ESB. As this is the letter which contains the request for information the subject of these proceedings, it is worth setting out in full:

"Dear Kieran,

I am writing to you further to my letters of 8 August 2022 and 2 December 2022.

As you're aware, ESB has initiated High Court proceedings against Arkmount Construction Limited and Richmond Homes Limited seeking documentation and information relevant to certain allegations that have been made to ESB.

You are one of the ESB employees referenced in those allegations as having received payments of cash or other consideration from one of these companies.

ESB recently made an application in the High Court for Orders compelling those companies to provide further information / documentation relating to the allegations and this application was heard by the High Court on 7, 8 and 10 February 2023. The High Court reserved its judgment.

As members of the public can attend Court proceedings of this type, significant information about the allegations – including the fact that you are one of the persons against whom the allegations have been made – is now in the public domain.

The nature of the allegations made is very serious, i.e., that unlawful payments were made in a clandestine way to ESB employees, including you. In circumstances where the details of those allegations are now in the public domain, ESB believes

that it is necessary and appropriate to seek certain confirmations from you in connection with alleged behaviour the subject matter of the allegations:

1. *Please confirm whether you have ever asked for or received any payment (whether in cash or otherwise) or any other emolument (including gifts) from a third party (not limited to Arkmount Construction Limited or Richmond Homes Limited) in connection with the performance of your duties with ESB, or the performance by any other person of his/her duties on behalf of ESB.*
2. *If you have ever asked for or received any payment(s) or other emolument(s), please confirm full details of same, including details of what you received, the date on which payments or other emoluments were received and the identity of the person or company that provided those payments or emoluments to you.*

You are directed to provide the foregoing confirmations by 5pm on Tuesday 21st February. This is a formal instruction in connection with your employment with ESB.

ESB reserves its rights in this matter, including with respect to the steps it will take in the event that you confirm in response to these queries that you have not asked for or received any payments as described and it subsequently transpires that you have asked for or received such payments."

14. The allegations made against the Defendant had appeared on the front page of the Sunday Independent newspaper 12 February 2023 in an article by Mark Tighe, though this is not referenced in the letter quoted above. In any event, Mr Tapley avers that ESB had not taken any action against the Defendant prior to that point because it was anxious not to prejudice any investigations being conducted by An Garda Siochána.

15. The Defendant's solicitor replied to ESB's letter by letter dated 21 February 2023. The letter sought details of the allegations being made by ESB and confirmation that the allegations concerning the Defendant were those set out in the Sunday Independent article and nothing else. The letter concluded:

"In circumstances where there is an ongoing criminal investigation into the conduct of my client, my advice to him is that he must not reply to the paragraphs enumerated 1 and 2 in your letter of the 17th February 2023, as he has right to silence [sic], which he invokes.

However, please note that my client denies any wrongdoing, let alone criminality, on his part."

16. ESB replied by letter dated 1 March 2023. The letter did not provide the confirmation sought that the allegations against the Defendant were confined to those set out in the Sunday Independent article. Rather, it asserted that the Defendant knew whether he had received payments as referred to in ESB's earlier letter and asserted that *"ESB is entitled to this information as of right by virtue of the relationship of employer and employee between ESB and your client*." The letter drew attention to the express provisions of the Defendant's contract of employment, which obliged him to cooperate with ESB and, in particular, "*to obey all reasonable and lawful directions given to you by your line manager*". The letter also referred to the Defendant's implied obligation of cooperation under Irish law. The letter disputed the Defendant's entitlement to rely on the right to silence in the context of the direction issued by the ESB. The letter stated that the ongoing refusal to provide the confirmation sought was being treated by the ESB as a repudiatory breach of contract and that if the information was not provided by 12pm on 3 March 2022, ESB reserved all of its rights, including its rights to suspend the Defendant (with or without pay), commence a disciplinary process against him, elect to accept the breach and treat the contract as being at an end, and/or to issue proceedings seeking a declaration that the Defendant had, by his actions, repudiated his contract of employment.

17. The Defendant's solicitor replied by letter dated 2 March 2023 in the following terms:

"We acknowledge receipt of your letter of 1st March 2023.

Are your clients seriously suggesting that any contractual obligation my client may have on foot of his contract of employment, overrides his constitutionally enshrined right to silence in the context of a criminal investigation?

We take the view that this cannot be the case, most particularly where any statements made by my client can be relied on in a prosecution against him, in circumstances where there is an ongoing criminal investigation as confirmed by your clients in writing on the 17th February 2023 in an email circulated to ESB staff and signed by Paddy Hayes, Chief Executive, although I reiterate my client is not guilty of any wrongdoing or any criminality.

We invite you to issue legal proceedings seeking a declaration that my client, by invoking his right to silence, has repudiated his contract of employment and if you pursue this course of action and fail, this letter will be relied upon for costs.

In the event that your clients suspend my client without or without pay [sic], commence a disciplinary process against my client, or deem my client's contract at an end, my client will seek injunctive relief and this letter will be relied upon for costs and all inter-partes correspondence will be exhibited in any grounding affidavit."

18. ESB issued the within proceedings by plenary summons on 13 April 2023. Following the making of the Consent Order setting down the points of law for trial, the Defendant delivered a replying affidavit. The Defendant did not dispute any of the factual matters relied on by the Plaintiff, that is, he did not dispute that allegations had been made to ESB, but he did set out details of the Garda searches of his property, and he took the opportunity to deny any wrongdoing, criminal or otherwise. The Defendant's affidavit also made clear that in refusing to answer questions beyond a denial of wrongdoing and asserting an entitlement to rely on his right to silence, he was acting on legal advice.

19. Following the conclusion of the hearing in the above, judgment was delivered in **ESB and Anor v Richmond Homes Ltd and Anor [2023] IEHC 571**. The court directed the provision of further information by Richmond and Arkmount. I invited the

parties to make further submissions on the relevance, if any, of the decision. The parties agreed that further submissions could also be made on a Supreme Court decision **DPP v BK [2023] IESC 23**, which post-dated the hearing. They also agreed that I could have regard to a letter received from Richmond and Arkmount on 11 November 2023, detailing the steps taken by them to comply with the Order of Dignam J following his judgment. In substance, the letter suggests that compliance with that Order had yielded no further relevant information. The Defendant delivered further submissions on 30 November 2023 in which it argued that the Richmond Homes decision had no bearing on the issues in this case and made submissions on **BK**. On 11 December 2023, the Plaintiff indicated that it did not propose replying to these submissions.

20. There are some striking features in the factual matrix against which the court is asked to determine the answers to the preliminary issues. Of particular note is that the Plaintiff has not commenced disciplinary proceedings against the Defendant in relation to the allegations made by Arkmount and Richmond. Indeed, Mr Sharkey has continued in his employment and has not been suspended. ESB did not raise any queries with him until some nine months after it first became aware of the allegations and some seven months after it first communicated with him regarding the Norwich Pharmacal proceedings. It would appear, therefore, that ESB did not consider, on the basis of the information it had, that it was in a position to commence disciplinary proceedings. The questions posed must, therefore, be seen as preliminary to possible disciplinary proceedings. Nor did ESB commence disciplinary proceedings in relation to the Defendant's refusal to answer the questions posed of him. Rather, it seeks to summarily dismiss him from his position.

21. It is also clear that the Defendant was acting on legal advice in refusing to answer the questions and, in particular, on the basis of legal advice that he was entitled to refuse without being considered to have repudiated his contract. The Defendant argues, therefore, that even if the court were to conclude that he had been required to answer the questions posed by ESB, it would be premature for ESB to treat his past refusal to answer – based on legal advice which had proved to be incorrect – as repudiation, and he should be given a further opportunity to decide whether to answer the questions in light of the court's conclusion as to his constitutional entitlements. ESB sought to address this objection by writing to the Defendant on the evening of the first day of

hearing of this application. That letter made clear that in the event that this Court decided that Mr Sharkey was not entitled to refuse to answer the questions, he would be provided with a further opportunity, a period of five days, to take advice and decide whether he would provide the information requested. It seems to me that the Defendant was correct to argue that he would have been entitled to reconsider his position if the point of law was determined against him before his contract could be treated as having been repudiated. In light of my conclusions reached on the first point of law, however, it is not necessary to address this further.

Positions

22. Before considering the legal authorities relied on by the parties in advancing their arguments, it might be helpful to set out in thumbnail what is and what is not in dispute between the parties. The parties agree that the Defendant is required, as a condition of his employment, to obey the lawful and reasonable directions of his employer, ESB. It is also agreed that ESB's request for information, *all things being equal*, was a lawful and reasonable request with which the Defendant was bound to comply and that failure to comply would, in the ordinary course, amount to a repudiation of his contract of employment (see **Berber v Dunnes Stores Ltd [2009] IESC 10**).

23. ESB accepts that the Defendant is the subject of a criminal investigation. Moreover, it accepts that it may be obliged to provide An Garda Siochána with any information provided to it by the Defendant by reason of section 19 of the Criminal Justice Act 2011, which provides:

> *(1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—*
>
> > *(a) preventing the commission by any other person of a relevant offence, or*
> >
> > *(b) securing the apprehension, prosecution or conviction of any other person for a relevant offence,*
>
> *and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.*

24. ESB's position is that Mr Sharkey must comply with all the obligations of his employment contract and cannot insist on part performance of his contract. If he is not prepared to comply with his contractual obligation to obey all reasonable and lawful directions of his line manager, then ESB is entitled to treat him as having repudiated his contract of employment and to summarily dismiss him. Given that this is a private contractual arrangement, ESB contends that any concern that Mr Sharkey may have about providing answers to ESB which may tend to incriminate him in the Garda investigation is no concern of ESB and does not entitle Mr Sharkey to fail to perform his contract of employment. It does not dispute that the privilege against self-incrimination is a constitutionally protected right; it simply argues that it is not engaged in this instance.

25. The Defendant accepts that there is no general 'right to silence' in an employment context and that employees are not entitled, in disciplinary proceedings, to simply say to their employers "prove your case". However, he contends that in the particular circumstances, where it is accepted that he is the subject of a Garda investigation in relation to the very matters which are the subject of ESB's request, his constitutional right to silence and/or his privilege against self-incrimination *in that criminal investigation* means that his refusal to answer his employer's questions does not amount to a repudiation of his employment contract.

26. Both parties agree that the precise circumstances at issue here have not been the subject of any prior decision of an Irish court, but each relies on a number of earlier Irish decisions. Reference is also made to European and UK case law. In addition, the Defendant, in particular, points to the way similar issues have been addressed by US, Canadian and New Zealand courts.

27. Before addressing in more detail the arguments made and the jurisprudence relied on, it is helpful to consider the nature of the privilege against self-incrimination as protected in Irish law.

The Right to Silence / The Privilege Against Self-incrimination in Irish law

28. The cases in which the Irish courts have expressly engaged with the right to silence, or the privilege against self-incrimination, often involve challenges to statutory powers which are said to infringe the common law or constitutional right. As appears from that case law, the right to silence has long been recognised in the common law but has now been elevated to constitutional status.

29. The Plaintiff refers to **National Irish Bank (No. 1) [1999] 3 IR 145**, in which both the High Court and the Supreme Court conducted a detailed analysis of the right to silence as a matter of Irish law. In that case, inspectors had been appointed pursuant to Part II of the Companies Act 1990 to investigate alleged misconduct in National Irish Bank regarding the improper charging of interest and fees and misuse of funds. Section 18 of the 1990 Act provided that answers given to an inspector, appointed under the Act, in response to questions put by the inspector in the exercise of his powers under the Act could be used in evidence against that person. The inspectors sought a direction as to whether persons from whom information was sought could refuse to answer questions or provide documents on the grounds that the answers or documents might incriminate them.

30. In the course of his judgment in the High Court, Shanley J referred to the decision in **Heaney v Ireland [1994] 3 IR 593**. In **Heaney**, the High Court (Costello J) had identified that the right to silence was a protection afforded by the constitutional guarantee of a fair trial contained in Article 38.1 of the Constitution, but concluded that section 52 of the Offences Against the State Act 1939, which made it an offence to fail, when asked, to provide a member of An Garda Siochána with a full account of one's movements during a specified period and all information on the commission or intended commission of an offence by another person, was a proportionate interference with that right. The Supreme Court (in **Heaney**) refrained from expressing a view on whether Article 38 was applicable but concluded that the right to freedom of expression, protected by Article 40.6 of the Constitution, necessarily implies the right to silence. Shanley J summarised the position thus:

"Accordingly, while the Supreme Court recognised a right to silence as a correlative right to the right of freedom of expression contained in the Constitution, it did not exclude the possibility that compelled evidence of an accused at his trial might have the protection of Article 38.1 of the Constitution. Both Costello J. and the Supreme Court accepted that whatever the nature of the right (i.e. whether founded on Article 38 or Article 40) it was not an absolute right and could, in certain circumstances, be abridged by the legislature where it passed a test of "proportionality". Costello J. expressed the position thus at p. 607:-

> "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
>
> > (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> >
> > (b) impair the right as little as possible;
> >
> > (c) be such that their effects on rights are proportional to the objective …"

In the Supreme Court, O'Flaherty J. at p. 590, adopting the same approach expressed the view that:-

> "The Court concludes that there is a proper proportionality in the provision between any infringement of the citizen's rights with the entitlement of the State to protect itself."

A similar approach was adopted by the Supreme Court in Rock v. Ireland *[1997] 3 I.R. 484, when considering the constitutionality of ss. 18 and 19 of the Criminal Justice Act, 1984. Hamilton C.J., speaking for the Court, said at p. 500:-*

> "The question to be considered by this Court is whether the restrictions which the impugned sections place on the right to silence is any greater than is necessary to enable the State to fulfil its constitutional obligations."

31. Barrington J delivered the judgment for the Supreme Court in **NIB**. He noted that the "*so called right to silence was developed by the common law courts in reaction to the abuses of the Courts of Star Chamber*" (p. 173), but stated that although the right had its origins in the common law, it "*was elevated into a constitutional principle by the 5th Amendment to the American Constitution.*" He stated that:

> *"It grew out of the revulsion of the judges for forced confessions as being both unjust in their origin and unreliable in practice. Some judges also seemed to have felt that it was unfair to place a man in a position where he was condemned no matter what he did. As Mustill L. put the matter in* Reg. v. Director of Serious Fraud Office, Ex p. Smith *[1993] A.C. 1 at p. 32-*
>
> > "Next there is the instinct that it is contrary to fair play to put the accused in a position where he is exposed to punishment whatever he does. If he answers, he may condemn himself out of his own mouth; if he refuses he may be punished for his refusal …"

32. To the extent that Article 40.6, the right to expression, was engaged, Barrington J concluded that the powers given to the inspectors were no greater than the public interest required and that the powers passed the proportionality test. Article 38.1, he noted, dealt with a different matter:

> *"That Article, as reinforced by Article 40.3, deals with the conduct of a criminal trial and provides that no person is to be tried on any criminal charge "save in due course of law." The phrases "due course of law" and "due process of law" like the phrase "equality before the law" embody dynamic constitutional concepts into which lawyers have obtained deeper insights as society has evolved. But it is doubtful if the principle of proportionality - so important in other branches of constitutional law - can have any useful application here. A criminal trial is conducted "in due course of law" or "with due process of law" or it is not. The question then arises would a trial, at which a confession obtained from the accused under penal sanction imposed by statute, was admitted in evidence against the accused, be a trial in due course of law?"*

33. Barrington J noted that the question of whether a trial was being conducted in due course of law was a matter, in the first instance, for the trial judge, but that in the particular circumstances of this case, it was appropriate for the court to give guidance. Barrington J noted the "*fundamental rule of Irish law … that a confession is not admissible at a criminal trial unless it is voluntary*" and analysed the relevant Irish case law. He concluded:

> *"It appears to me that the better opinion is that a trial in due course of law requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a voluntary confession were admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Article 38 of the Constitution and that it is immaterial whether the compulsion or inducement used to extract the confession came from the executive or from the legislature."*

34. In affirming the decision of the High Court that section 18 of the 1990 Act was constitutional, he added the further statement that confessions obtained pursuant to the exercise of an inspector's powers under the Act would not, in general, be admissible at trial unless the trial judge was satisfied that the confession was voluntary.

35. It is important to note that Barrington J appears to have taken a different view of the role of Article 40.3 of the Constitution from that of Costello J in **Heaney**. Barrington J considered that Article 40.3 "reinforced" Article 38.1. This represents a departure from **Heaney**, where Costello J had stated as follows:

> *"Secondly it is claimed that the right to silence and cognate rights is an unspecified "personal" right within the meaning of Article 40, s. 3, sub-s. 1 and that the impugned section infringes the protection thereby accorded to such rights. Again, I must disagree. It seems to me that the Constitution should not be construed as protecting the right to silence in both Article 38, s. 1 and Article 40, s. 3, sub-s. 1 and that it is not one of those "personal" rights which adhere to citizens as human persons to which Article 40, s. 3, sub-s. 1 refers but rather is one of those fundamental civil rights arising from a free democratic society established by the Constitution which obtains protection elsewhere. But even if this were not so, the*

protection guaranteed is subject to any restrictions on the exercise of the right which are constitutionally permissible and, for the reasons already given, s. 52 would not constitute an impermissible restriction and so no breach of Article 40, s. 3, sub-s. 1 would have been established."

36. The approach taken in the **NIB** case, therefore, was to distinguish between, on the one hand, the power to obtain the information, which was subject to a requirement that it be a proportionate interference with rights protected by Article 40.6, and, on the other, the entitlement to rely on information obtained by the exercise of that power in a subsequent criminal trial, which would, in general, be impermissible as infringing the entitlement to a trial in due course of law guaranteed by Article 38.1. This approach was endorsed in the more recent decision in **DPP v KM [2018] IESC 21**.

37. The High Court (Kearns J, as he then was) applied the decision in the **NIB** case in **Dunnes Stores Ireland Company v Ryan [2002] 2 IR 60** in which he found different provisions of the 1990 Act unconstitutional for failing to immunise answers given under compulsion from later use in criminal proceedings. As he noted, it was implicit in Barrington's observations in **NIB**, that there was scope for voluntariness in the answers given under section 18. There was no such scope in section 19, the provision he was considering.

38. Kearns J identified that the right to silence, or the privilege against self-incrimination, referred to a bundle of rights, with different levels of protection appropriate depending on the circumstances. He referred to the *dicta* of Lord Mustill in **Smith**, which had been cited in **Heaney** and in **NIB**:

"*The right to silence does not denote any single right, but rather, in the words of Lord Mustill in* R. v. Director of the Serious Fraud Office, ex p. Smith *[1993] A.C. 1 it "refers to a disparate group of immunities which differ in nature, origin, incidence and importance".*
Lord Mustill in that case took time to consider various types of immunity embraced by the term and said, at p. 30:-

"Amongst these may be identified:

(1) A general immunity, possessed by all person and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure

(a) to answer questions before trial, or

(b) to give evidence at the trial."

He then pointed out that each of these immunities was of great importance, but that they were not all different ways of expressing the same principle. It was necessary, he said, to at p. 31 "to keep distinct the motives which have caused them to become embodied in English law; otherwise objections to the curtailment of one immunity may draw a spurious reinforcement from association with other, and different, immunities commonly grouped under the title of a 'right to silence'."

Having referred to the various forms of immunity identified by Lord Mustill, Costello J. in Heaney v. Ireland *[1994] 3 I.R. 593 stated as follows at p. 602:-*

> "Looking at the various motives for the different immunities he had identified he pointed out that the first was a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business, which was an assertion of personal liberty and privacy but that 'few would dispute that some curtailment of the liberty is indispensable to the stability of society'."

He then pointed out that there was a long history of reaction against abuses of judicial interrogation and so the immunity against judicial interrogation arose. He further pointed out that there was an instinct that it is contrary to fair play to put an accused in a position where if he answers questions he may condemn himself and if he refuses he may be punished for his refusal. And finally, he pointed to the desire to minimise the risk that an accused will be convicted on the strength of an untrue extra-judicial confession to which the law gives effect by refusing to admit confessions in evidence, except upon proof that they are "voluntary". He quoted Lord Mustill's conclusion as follows, at p. 602:-

> "In these circumstances I think it is clear, given the diversity of immunities and of the policies underlying them, that it is not enough to ask simply whether Parliament can intend to abolish a long-standing right to silence. Rather, an essential starting point must be to identify what variety of this right is being invoked, and what are the reasons for believing that the right in question ought at all costs to be maintained."

In every case, therefore, the issue with which the court is concerned is not to debate an invasion of rights in the abstract, but rather infringements of rights at a particular time and in a concrete factual setting."

39. Kearns J, therefore, recognised the same distinction between the requirement to provide answers and the entitlement to rely on those answers in criminal prosecutions as applied in **NIB**, but in contrast with **NIB**, he concluded that the provisions in question could only be interpreted as entitling reliance on compelled statements in criminal

proceedings. The provision which allowed for such reliance was therefore unconstitutional.

40. Both parties rely on the decision of Clarke J (as he then was) in **Wicklow County Council v O'Reilly [2006] 3 IR 623** for assistance. The judgment considered the entitlement of the defendants to invoke the privilege against self-incrimination in civil proceedings. In brief, the tenth defendant was the subject of criminal proceedings in relation to matters which overlapped with the civil proceedings, which were proceedings under section 58 of the Waste Management Act 1996, as amended. Three of the defendants, the tenth defendant, a company of which he was a director, and the other director of that company, sought an order staying the civil proceedings on the basis that the civil proceedings would necessarily amount to a breach of his right to silence. Clarke J refused to stay the proceedings.

41. At pages 632 to 635 of the judgment, Clarke J referred to UK and Irish authorities on how a court should approach contemporaneous civil and criminal cases. He concluded as follows:

> *"35 It would, therefore, appear that there is no hard and fast rule as to how contemporaneous civil and criminal proceedings arising out of the same matter should be progressed. It is clear that the onus rests upon the party seeking a stay of the civil proceedings to establish the grounds necessary to enable the court so to do. In coming to any such assessment the court must, on the one hand, give due recognition to the importance of allowing the plaintiff or other moving party in the civil proceedings to achieve a timely resolution of those proceedings and obtain the benefit of any orders which might be appropriate. On the other hand the court has to balance, as against that, the extent to which there may be a real risk that prejudice might be caused to the criminal proceedings. I am satisfied that in giving consideration to this latter matter the court must attempt to analyse the likelihood of there being any such prejudice and have regard to the extent to which it may be possible by measures to be adopted in the criminal process to minimise or ameliorate any such prejudice as might arise.*

36 For the reasons which I have analysed in some detail above I am satisfied that a high weight needs to be attached to the importance of permitting a plaintiff charged with the enforcement of a civil regime for remedying environmental pollution to be able to obtain, in a timely fashion, whatever orders might be justified on the facts of an individual case. What needs to be weighed against those considerations are the contentions on the part of the eighth, tenth and eleventh defendants as to the prejudice which might arise in respect of the criminal proceedings in the event that these civil proceedings are allowed to progress. I now turn to that alleged prejudice."

42. In considering the question of prejudice, the court emphasised the difference between the situation at issue in this case and that in **NIB**, in particular, the level of compulsion which was in issue:

"41 The circumstances that arise in a case such as this are, of course, different. There is no absolute requirement under pain of criminal penalty upon any of the defendants in proceedings such as these to answer any questions. It is undoubtedly the case that the defendants may be at a significant disadvantage if they do not put forward, in the course of the process, such evidence as they may think appropriate, for the purposes of defending the proceedings. However, it needs to be emphasised that the "compulsion" under which the defendants may be said to lie in circumstances such as arise in this case (i.e. being placed at a disadvantage in the defence of civil proceedings) must be regarded as less onerous than that which would pertain in circumstances such as arose in Re National Irish Bank (No. 1) *[1999] 3 I.R. 145, where the persons concerned would have been liable to a criminal conviction and penalty for failing to give an account to the inspectors on matters which might expose them to a separate criminal liability in relation to the underlying events."*

43. Ultimately, he concluded:

"In all those circumstances it seems to me that the limited form of interference with the right to silence by indirect means which applies in circumstances where a party

may, as a matter of practice, though not as a matter of legal obligation, be required to file an affidavit in defence to an application for an order under s. 58 amounts, in general terms, to a proportionate interference with the right to silence for the purposes of securing the objectives of the Act of 1996, even where a criminal prosecution is in being."

44. Clarke J concluded that there was a balance to be struck between the defendants' rights and the public interest in securing the objectives of the 1996 Act, the protection of the environment from waste. In carrying out that balancing exercise, the Court had regard to the degree of compulsion at issue and the importance of enabling the local authority to proceed with its civil claim.

Constitutional Rights in the Employment Context

45. It is undoubtedly the case that constitutional rights can be engaged in the employment relationship. Express provision is made in Article 40.6 for the right to form associations and unions. The Irish courts have identified that this constitutional right, and the co-relative right *not* to associate, must be protected even in a purely private employment arrangement. The issue was expressed as follows by the Supreme Court in **Meskell v CIE [1973] IR 121** (at p. 135):

"One of the questions which was argued in detail in the present appeal was the effect of the constitutional right to form an association, or the constitutional right not to belong to an association, on the ordinary common-law rights of an employer to engage or dismiss his workers when, in doing so, he was not in breach of contract. If an employer threatens an employee with dismissal if he should join a trade union, the employer is putting pressure on the employee to abandon the exercise of a constitutional right and is interfering with his constitutional rights. If the employer dismisses the worker because of the latter's insistence upon exercising his constitutional right, the fact that the form or notice of dismissal is good at common law does not in any way lessen the infringement of the right involved or mitigate the damage which the worker may suffer by reason of his insistence upon exercising his constitutional right. If the Oireachtas cannot validly seek to compel a person to forgo a constitutional right, can such a power be effectively exercised

by some lesser body or by an individual employer? To exercise what may be loosely called a common-law right of dismissal as a method of compelling a person to abandon a constitutional right, or as a penalty for his not doing so, must necessarily be regarded as an abuse of the common-law right because it is an infringement, and an abuse, of the Constitution which is superior to the common law and which must prevail if there is a conflict between the two."

46. In **Glover v BLN [1973] IR 388**, the Supreme Court found that the constitutional guarantee of fair procedures found in Article 40.3 of the Constitution applied, at least in that case, in the employment context. Walsh J stated (at p. 425)

"This Court in In re Haughey *held that that provision of the Constitution was a guarantee of fair procedures. It is not, in my opinion, necessary to discuss the full effect of this Article in the realm of private law or indeed of public law. It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures."*

47. The obligation for fair procedures in disciplinary proceedings is now firmly established, though it is also clear that what constitutes a fair procedure will depend on the particular circumstance of an individual case.

48. In a number of cases, the courts have treated the right to silence as an aspect of the fair procedures which must be afforded in the employment context, albeit the courts' observations in these cases are clearly *obiter*. In **Flynn v An Post [1987] IR 68**, the Supreme Court found that an employee's suspension had become invalid by reason of the passage of time. He had been suspended and sought a full hearing of the charge of misconduct alleged against him, notwithstanding that he faced criminal proceedings arising out of the same circumstances that had given rise to his suspension. Henchy J (in a dissenting judgment) stated that there was no hard and fast rule as to whether criminal or civil proceedings arising from the same alleged misconduct should go first and said (at p. 77) that "*if the employee waives his rights as defendant-to-be in the*

criminal proceedings (including his right to silence) and opts to have the domestic proceedings heard first, his claim in that respect will be greatly enhanced by that waiver." It appears, therefore, that Henchy J proceeded on the assumption that there was a right to silence, in some form, capable of being exercised, or indeed, waived in the employment proceedings. McCarthy J, for the majority, was more circumspect (at p. 82):

> *"In the High Court it was held that the plaintiff's right to silence might be lost or he might be otherwise prejudiced in the criminal trial if the investigation had proceeded. Without expressing any view as to the nature of an alleged right to silence, in my judgment, if an accused in a criminal proceeding wishes to embark upon a course which may damage him in the manner suggested, it is no function of his employer, who is not the prosecutor (although the confusion of the two is understandable because of the D.P.P.'s choice of solicitor) to protect him from the consequences of such a course."*

49. He did, however, suggest that where there was acquiescence in delaying disciplinary proceedings, a court should, in such circumstances, lean towards "*avoiding prejudice*".

50. In **Mooney v An Post [1998] 4 IR 288**, the entitlement of an employee to refuse to answer questions was directly engaged. The plaintiff had been the subject of disciplinary proceedings and criminal proceedings arising out of the same circumstances. In that case, no issue had been raised about the disciplinary proceedings being delayed pending the determination of the criminal proceedings. He was acquitted on the criminal charge and claimed a breach of fair procedures in the disciplinary proceedings which followed. The Supreme Court (Barrington J) commented that the employer was entitled to a candid response from the plaintiff when misgivings were put to him and rejected his claim that there had been a breach of fair procedures. Of relevance for present purposes, however, was Barrington J's observation (at p. 300) that it *"was of course the Plaintiff's right to remain silent while the criminal proceedings were hanging over him."*

51. As with **Flynn** and **Mooney**, in **H v Governor of a Prison and the Irish Prison Service [2023] IEHC 262**, the High Court (Barr J) also seems to have proceeded on the

assumption that an employee might be entitled to rely on the privilege against self-incrimination in disciplinary proceedings (see para. 60).

52. In **Carroll v Law Society (No. 2) [2003] 1 IR 284**, the High Court (McGuinness J) was asked to restrain a disciplinary hearing by the Law Society in circumstances where, it was argued, that the procedure proposed was unfair. One of the matters relied on by the applicant was that, although it was accepted that he could invoke the privilege against self-incrimination before the disciplinary committee, doing so might undermine his ability to defend himself in the disciplinary proceedings. McGuinness J identified this as a legitimate concern. Having referred to **Rock** and **Heaney**, she observed:

> *"These dicta emphasise the importance of the privilege and this, indeed, is acknowledged by the respondent in its submission that the applicant has the right to remain silent. However, the difficulty that arises in such a situation is not so much the question of the applicant's right to silence as the question of the practical results of his either remaining silent or answering the questions put to him. If he is to deal properly with the allegations made against him at the inquiry it is probably in his interest to answer as fully as possible any question put to him. Silence may damage his case at the inquiry. On the other hand he understandably is concerned that information or evidence given by him in the context of the inquiry might later be used by the respondent in mounting a prosecution against him."*

53. Having referred to the authorities regarding applications for disclosure under the Proceeds of Crime Act 1996 referred to below at paragraph 59, she concluded that while the difficulty identified in the paragraph quoted above was "a real one", it was not such as to preclude the hearing going ahead, as it was not the role of the court to direct the committee's procedures in advance. In that case, the court identified a clear nexus between the disciplinary function of the respondent and its prosecuting function.

European Law

54. The right to silence and the right not to incriminate oneself have also been recognised by the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU). In **Saunders v United Kingdom, Case 19187/91**, the

ECHR considered whether the use in a criminal trial of statements given by the applicant to the Department of Trade under compulsory powers breached his Article 6 rights to a fair hearing:

> *"68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6) (see the above-mentioned John Murray judgment, p. 49, para. 45, and the above-mentioned Funke judgment, p. 22, para. 44). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2).*
>
> *69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing*."

55. The Court noted (at para. 73) that whether *"a particular applicant has been subject to compulsion to incriminate himself and whether the use made of the incriminating material has rendered criminal proceedings unfair will depend on an assessment of the circumstances of each case as a whole"* and concluded that in the circumstances of that case, the use of the statements breached Article 6.

56. **Saunders** was referenced by the Supreme Court in **NIB** and it is apparent that the distinction between requiring a person to provide answers to questions and requiring that person to provide evidence that has an "existence independent of the will of the suspect" can be observed in the Irish authorities. See, for instance, the decision of the High Court (Kearns J, as he then was) in **EPA v Swalcliffe Limited [2004] 2 IR 549**, in which the court found that the admission in evidence of records maintained by the defendant pursuant to a statutory obligation did not infringe the privilege against self-incrimination.

57. **Saunders** was also referenced by the CJEU in its decision in **Case C-481/19, *DB v Commissione Nazionale per la Società e la Borsa***. In that case, the CJEU was asked to consider whether the provisions of certain Directives concerning market abuse were required to be interpreted as imposing an obligation to penalise parties who remained silent when questioned by the competent authorities. The Court concluded that the Directives, read in light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, did not oblige Member States to penalise persons exercising their right to silence:

> *"39. Since protection of the right to silence is intended to ensure that, in criminal proceedings, the prosecution establishes its case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, to that effect, ECtHR, 17 December 1996, Saunders v. the United Kingdom, CE:ECHR:1996:1217JUD001918791, § 68), this right is infringed, inter alia, where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify (see, to that effect, ECtHR, 13 September 2016,* Ibrahim and Others v. the United Kingdom, *CE:ECHR:2016:0913JUD005054108, § 267).*
>
> *40. The right to silence cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person (see, to that effect, ECtHR, 17 December 1996,* Saunders v. United Kingdom, *CE:ECHR:1996:*

1217JUD001918791, § 71, and 19 March 2015, Corbet and Others v. France, CE:ECHR:2015:0319JUD000749411, § 34).”

Other Jurisdictions

58. In their written and oral submissions, the parties refer to a number of authorities from other jurisdictions. The Plaintiff refers to the decision of the House of Lords in **AT & T Istel Ltd v Tully [1993] AC 45**, arguing that there is no public policy reason why the right to silence or the privilege against self-incrimination should be engaged in this context. It quotes the judgment of Lord Templeman:

“This is a powerful reason for the existence of the privilege against self-incrimination in certain circumstances. Indeed, in my opinion, the privilege can only be justified on two grounds, first that it discourages the ill-treatment of a suspect and secondly that it discourages the production of dubious confessions. Neither of these considerations applies to the present appeal. It is difficult to see any reason why in civil proceedings the privilege against self-incrimination should be exercisable so as to enable a litigant to refuse relevant and even vital documents which are in his possession or power and which speak for themselves. and it is fanciful to suggest that an order on Mr. Tully to say whether he has received Abbey’s money and if so what has happened to that money could result in his ill-treatment or in a dubious confession. I regard the privilege against self-incrimination exercisable in civil proceedings as an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff’s property or money.”

59. However, that case is far from being authority for a proposition that the privilege against self-incrimination can never be relied on in civil proceedings, still less that it is incapable of being engaged at all. As a full reading of the various judgments of that court make clear, the Crown Prosecution Service (CPS) had provided confirmation that it would not rely, in any prosecution, on any documentation discovered in the civil case which it had not obtained independently of the civil proceedings. As summarised in the headnote to the judgment, the court’s conclusion was that “*although the privilege*

against self-incrimination subsisted and could only be removed or altered by Parliament, there was no reason to allow a defendant in civil proceedings to rely on it, thus depriving a plaintiff of his rights, where the defendant's own protection was adequately secured by other means." The "other means", in that case, being the confirmation from the CPS. As noted by McGuinness J in **Carroll**, the Irish courts have referenced **AT & T Istel** when requiring that undertakings be given by prosecuting authorities that disclosure made in proceedings under the Proceeds of Crime Act 1996 not be used in any subsequent prosecution (see **M v D [1998] 3 IR 175** and **Gilligan v Criminal Assets Bureau [1998] IR 185**).

60. The Defendant relies on jurisprudence from the US, Canada and New Zealand. The US decision, **Uniformed Sanitation Men Association v Commissioner of Sanitation of the City of New York (1968) 392 US 80**, has some similarities with the instant case, with one distinction, which the Plaintiff argues is critical. A number of employees were fired by the Commissioner of Sanitation for refusing to answer questions into investigations of misconduct. They relied on their Fifth Amendment rights. The Supreme Court (Fortas J) held:

> *"Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege.*
>
> *But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination.* Gardner v. Broderick, *supra;* Garrity v. New Jersey, *supra. Cf.* Murphy v. Waterfront Commission, *378 U. S. 52, at 79 (1964). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."*

61. As discussed below, the Plaintiff contends that the right identified in that case are rights enjoyed only by public employees, and argues that this reflects the fact that the privilege against self-incrimination is concerned with protecting individuals against compulsion by the State, echoing its genesis in the common law's response to the abuses of the Star Chamber.

62. The Canadian and New Zealand authorities relied on by the Defendant do not involve state actors. In **Merritt v Tigercat Industries Inc (2016) ONSC 1214**, an employee who was subject to criminal charges of sexual assault had been summarily dismissed for refusing to answer his employer's questions about the criminal charges. The Supreme Court of Justice of Ontario found that his dismissal was wrongful:

> *"Mr. Merritt was under no obligation to disclose the criminal allegations. At the time, the investigation was ongoing and he had been charged. Mr. Merritt is entitled to the presumption of innocence and the right to silence. An employee cannot be compelled to discuss the criminal allegations as any disclosure to an employer could easily be forwarded to the police. "*

63. To similar effect is the decision of the Employment Court of Auckland, New Zealand in **Russell v Wanganui City College [1998] 3 ERNZ 1076**. In that case, the applicant had sought a stay on disciplinary proceedings pending the conclusion of a police investigation which might have led to his prosecution. Goddard CJ noted that his right to have the disciplinary proceedings stayed derived from his right to a fair trial and his right to see that *"the criminal process is not interfered with to his detriment without just cause*". He concluded that being forced to answer questions about the subject matter of the criminal investigation would defeat the applicant's right to silence and provide the prosecution with ammunition not otherwise available to it.

Submissions

64. The Plaintiff argues that the Defendant's reliance on the privilege against self-incrimination is misconceived; the case law establishes that there is no entitlement to

silence in the employment context (see **Mooney** and **Kelly v Minister for Agriculture [2021] 2 IR 624, 696)**. It points out that the consequences for the Defendant if he refuses to answer the questions put to him are grounded in private law, *i.e.* his contract of employment will be repudiated. Insofar as Mr Sharkey invokes his right to silence, ESB argues that it is premature for him to do so. It contends that the appropriate course is for him to invoke that right in any criminal trial in which it is sought to rely on his answers to ESB's questions.

65. ESB focuses, therefore, on the questions of admissibility and voluntariness. By reference to **NIB** and **Dunnes Stores v Ryan**, it says that a requirement to answer questions is only objectionable where the statements given may be admissible in evidence. The admissibility of statements, it argues, depends on whether they were given voluntarily or not. In **NIB**, where there was scope for the statements to be given voluntarily, the statutory provision was capable of being operated in a constitutionally permissible manner, *i.e.* there were some circumstances in which the statements given could be used in evidence. In **Dunnes Stores**, where no issue of voluntariness arose, there was no room for a constitutionally permissible application of the statutory provision and it was therefore deemed unconstitutional.

66. Despite its reliance on these core concepts, ESB argues that "*it is not required to, and does not take, any view on the future admissibility of any answers that Mr Sharkey may give.*" It does, however, suggest that the Defendant is not under a "statutory compulsion" to answer questions and any requirement to answer the questions arises from a voluntary contractual arrangement.

67. ESB further argues, by reference to the matters identified by Lord Mustill in **Smith**, that none of the public policy arguments in favour of the right to silence or the privilege against self-incrimination arise, stressing that there is no risk of abuse of power by the State or of unreliable confession evidence being obtained.

68. ESB draws a comparison with those cases in which a stay is sought on the progress of disciplinary proceedings where there is a parallel criminal investigation, in particular, the decision of Clarke J (as he then was) in **Wicklow County Council v O'Reilly**, which

is described as exemplifying what ESB says is "*the correct analysis of the issue before the Court*".

69. ESB rejects the Defendant's reliance on the US Supreme Court decision referred to above. It argues that the protection afforded to employees identified in that case and in other cases where so-called **Garrity** rights are engaged is afforded to public employees only, because, it argues, the privilege against self-incrimination is concerned with protecting against the abuse of State power. It argues that a corollary of confining the privilege to cases where the State is the party seeking to compel answers is that the State is able to remedy any imposition on constitutional rights by affording immunity from prosecution based on compelled answers. It contends that it would be unfair to put ESB, as a private employer, in a worse position than the State, in circumstances where it is not in a position to provide such immunity.

70. The Defendant emphasises that he is arguing for a very limited form of protection. In particular, he does not contend that there is any privilege against self-incrimination in the context of disciplinary proceedings; an employee cannot refuse to answer an employer's question on the basis that the answer may tend to expose that employee to sanction. Rather he argues that his privilege against self-incrimination in the context of the criminal investigation entitles him, for the time being, to refuse to answer his employer's questions. Any such entitlement will come to an end as soon as the criminal process is at an end. He rejects the Plaintiff's reliance on case law regarding the right to silence in the employment context as irrelevant since the cases relied on do not concern situations where there was a concurrent criminal investigation.

71. The Defendant argues, as he did in his first solicitor's letters, that his constitutional rights have primacy over ESB's private contractual rights. He relies in that regard on the Supreme Court's decision in **Meskell**, discussed above.

72. In considering the right to silence, he argues that the cases which consider statutory powers to compel answers and the ability of a court to draw inferences from silence, such as **NIB** and **Dunnes Stores** are of limited assistance, save that they establish the privilege against self-incrimination is a constitutionally protected right. Since those cases concern the scope of the legislature's power to limit the scope of the right to silence, different issues entirely are engaged. The Defendant, rather, relies on those Irish

decisions referred to above, **Flynn**, **Mooney** and **Carroll,** in which the Courts have proceeded on the assumption that the privilege against self-incrimination can be invoked in the private sphere. He stresses, also, that the right to silence concerns not simply an entitlement not to answer questions which actually incriminate, but also questions which *tend* to incriminate. He relies, in this regard, on the CJEU decision in **Case C-481/19, *DB v Commissione Nazionale per la Società e la Borsa*** referred to above.

73. He argues further that the US, Canadian and New Zealand cases referred to above represent the correct approach to the right to silence in disciplinary proceedings. He describes as "extraordinary" ESB's failure to take a view on what ESB argues is the "determinative" issue of whether answers to questions would be admissible in criminal proceedings. Firstly, he points out how unsatisfactory it would be to expect the Defendant to, in effect, run the gauntlet of the criminal investigation and potential proceedings in order to determine whether answers he gives to ESB's questions are admissible in those proceedings. He also notes that his concern is not confined to the use by the prosecuting authorities of the answers he gives to ESB in subsequent criminal proceedings but to the use which they may be put in a criminal investigation, *i.e.* that his answers may lead to lines of enquiry which might ultimately expose him to criminal proceedings. Furthermore, he argues that by reference to the recent Supreme Court decision in **DPP v BK**, there is a substantial risk that any statements he gives to ESB will be admissible in the event of a criminal trial. In that case, statements given to a psychologist for the purpose of preparing a Court ordered report in wardship proceedings were deemed to be admissible in subsequent criminal proceedings. The implication, he seems to suggest, is that he must seek to invoke his right to silence now, and refuse to answer the questions, because it may be too late to invoke his rights at any subsequent trial.

Discussion

74. In **McGee v Governor of Portlaoise Prison**, O'Donnell CJ hypothesised that the drafters of a comprehensive constitutional code would have to give special care when considering the circumstances in which constitutional rights would give rise to a civil claim in damages.

"In the first place, the drafters would have had to consider if the Constitution created a right between citizens (or other rights holders) and the State alone, or if it could affect the relations between private parties; in modern parlance, whether the Constitution created rights having vertical effect only, or whether they also had horizontal effect, and, if so, in all cases, or only in certain circumstances. Assuming the Constitution could come into play in any way in the relations between private parties, it would also be necessary to distinguish between a number of different circumstances."

75. It seems to me that this *a priori* question – whether the rights invoked by the Defendant in this case are capable of having horizontal effect at all? – is the principal issue in dispute between the parties. The Plaintiff takes an absolutist position. It contends that the privilege against self-incrimination or the right to silence are never engaged between private parties and are solely concerned with preventing state oppression. The Defendant contends for a more nuanced but still stark alternative. He argues, in effect, that for so long as criminal proceedings against him are in being, or in contemplation, then his constitutional right to silence in those proceedings overrides his employer's contractual entitlement to require him to answer questions about his conduct in the course of his employment. Although he denies that his position is an extreme one, it is, in substance, no less absolute than the Plaintiff's. As discussed below, I am unable to agree with either party's contention that the position faced by the parties here can be addressed by the simple application of a fixed rule, one way or the other.

76. The Plaintiff's assertion that there are no circumstances in which the privilege can be relied on by the Defendant in its dealings is based on a narrow understanding of how the right to silence or the privilege against self-incrimination has developed in Irish law, which is, in my view, unsupported by the case law.

77. The Plaintiff faces the immediate difficulty that the Irish courts have consistently recognised that constitutional rights can have effects between private parties, horizontal effects, as they are described in **McGee**. Since **Meskell**, the case law has consistently identified that there are circumstances in which the courts will intervene to protect constitutional rights in the private sphere. The Plaintiff's assumption that its private

contractual arrangement with the Defendant displaces any possibility that constitutional rights are engaged is simply incorrect.

78. The Plaintiff rejects the Defendant's reliance on **Uniformed Sanitation Men Association**, stressing that the **Garrity** rights recognised in that case are confined to cases involving State actors. It argues that the reason that the protection is limited to circumstances in which it is a state entity which is exerting the compulsion reflects the fact that the protection against self-incrimination is solely targeted at preventing state abuse, e.g. in procuring false confessions. But that is simply not the case. First, there is nothing in the **Uniformed Sanitation Men Association** case which suggests that the compulsion exerted by the public employer ran the risk of procuring unreliable confessions. The Court's objection was to the employees being compelled to forgo their constitutional rights. Second, and more fundamentally, the argument ignores the fact that the limitation on protection to state actors reflects the nature of the US Constitution. This is described in the following way by Martin Margulies in *Standard of Review and State Action under the Irish Constitution*, Irish Jurist, 2002, 37(1):

> *"It is axiomatic that the individual rights guarantees of the United States Constitution – except for the seldom-used Thirteenth (anti-slavery) Amendment – only limit the state and national governments. They do not control the behaviour of private individuals or entities. That is so, not only because some of the guarantees, most importantly the Fourteenth Amendment, expressly require state action, but also because the state action doctrine serves important structural purposes."*

79. As Margulies acknowledges in the same article, and as confirmed in **DPP v McGee**, the Irish courts have recognised that there are circumstances in which constitutional rights can operate horizontally. It is worth recalling the clear language of the Supreme Court in **Meskell** referred to above:

> *"If an employer threatens an employee with dismissal if he should join a trade union, the employer is putting pressure on the employee to abandon the exercise of a constitutional right and is interfering with his constitutional rights."*

80. Thus, the basis for the Plaintiff's rejection of the *possibility* that the privilege against self-incrimination could have consequential impacts in the context of a purely private employment relationship seems to fall away. It does not, of course, necessarily follow that it is a right capable of having horizontal effects, but the possibility must be examined.

81. The Plaintiff also relies on the decisions in **NIB** and **Dunnes Stores** as supporting its position. Reliance too is placed on the decision of the House of Lords in **AT & T Istel** and, in particular, the *dicta* of Lord Templeman. Given that the Irish cases concerned the extent to which the Oireachtas can circumscribe the common law or constitutional privilege against self-incrimination, the relevance of those decisions, and of **AT & T Istel** is twofold. First, they discuss the purpose that the privilege is intended to serve and from where the constitutional protection derives, and second, they identify key considerations, such as compulsion, voluntariness, and admissibility. The Plaintiff seeks to identify the privilege as being confined to the prevention of State abuse, in the form of ill-treatment, or the procuring of unreliable confessions and characterises the right as extending no further than is necessary to prevent such abuses. In my view, none of the authorities relied on support such a narrow characterisation of the rights encompassed by the right to silence or the privilege against self-incrimination. Although the authorities are uniform in confirming that the right or privilege is not absolute, none suggest that a person is only entitled to assert the privilege where the absence of such a right or privilege runs the risk of State abuse.

82. In **Heaney**, the High Court identified the right to silence as being constitutionally protected pursuant to Article 38.1, but the Supreme Court took the view that it was encompassed within the rights of expression guaranteed by Article 40.6. In **NIB**, the Supreme Court considered that both constitutional provisions were engaged, Article 40.6 when considering the constitutionality of a provision conferring a power to compel answers to questions, and Article 38.1, when considering the constitutionality of provisions permitting those answers to be used in evidence. Although Costello J in **Heaney** had taken the view that the right to silence was not a personal right protected by the Constitution, in **NIB** Barrington J took the view that the right to a fair trial guaranteed by Article 38.1, which included the right to silence, was "reinforced" by Article 40.3.

83. **NIB** and **Dunnes Stores** were, necessarily, concerned with the extent to which the State could compel answers to questions, because they were concerned with the lawfulness of statutory provisions, but they are not authority for the proposition that the *only* constitutional protection is from compulsion by State authorities. The Irish courts have long recognised that the constitutional right to fair procedures, identified in **Re Haughey**, are also guaranteed in any proceeding, such as a disciplinary proceeding, where a person's good name may be in issue, the scope of such procedures falling to be determined in each individual case. There is a series of cases concerning fair procedures in disciplinary proceedings, **Flynn**, **Mooney**, **Carroll** and **H v Governor of a Prison**, in which the courts have proceeded on the assumption that a fair procedure may entitle employees to delay engagement with a disciplinary procedure rather than risk incriminating themselves in pending criminal proceedings. The Plaintiff, correctly, characterises these as *obiter dicta*, but the comments made by the courts in each of those cases are, in my view, more than mere straws in the jurisprudential wind. Rather they are the reflection of the courts' recognition that the right to silence is a constitutional right engaged where there is a risk that a person may be compelled to provide testimony which may tend to incriminate them. What requires to be considered is, first, whether the person is acting under a compulsion, and second, whether there is a risk that the testimony provided may be relied on in a criminal trial. The sole support for the Plaintiff's contention that the right is only engaged where the State is the party compelling the testimony is the US case law on **Garrity** rights, which is based on a different constitutional structure than has been adopted in this jurisdiction. The Plaintiff's principled basis for arguing that the scope of the protection is limited in that way is to characterise the rights as being solely concerned with the prevention of the risk of state abuse. That is not how the right is characterised in the Irish or European law, nor even in the UK authorities on which the Plaintiff places reliance. Lord Mustill in **Smith** refers to it being "contrary to fair play" to put a person in a position of being punished no matter what course was taken. In **AT & T Istel**, the requirement to make discovery in a civil case was only unobjectionable because there was an undertaking from the prosecutor not to rely on the evidence obtained. In **Saunders**, the right not to incriminate oneself was "*primarily concerned with respecting the will of an accused person to remain silent*".

84. When the right is considered as an integral feature of a fair trial, and of fair procedures, confining impermissible compulsion to compulsion by the State is difficult to justify at the level of principle. **Meskell** makes clear that requiring an employee to forgo constitutional rights or face dismissal is an infringement of those rights. **Uniformed Sanitation Men Association** suggests that demanding answers to questions on the basis of a threat of dismissal if the answers are not provided can be regarded as impermissible compulsion. In my view, that is undoubtedly the case; the fear of being dismissed may, in many cases, be just as much a cause for concern as the threat of a penal sanction. If that is so, it is difficult to justify affording protection to persons who happen to be employed by the State but depriving all others of even the possibility of such protection.

85. One further argument advanced by the Plaintiff is, in effect, that it is fair to require the State to respect the right to silence in civil proceedings because it is in a position to provide (or procure) immunity in criminal proceedings, as happened in **AT & T Istel**, and **M v D** and **Gilligan**. ESB argues that it cannot be put in a worse position than the State and be required to afford the Defendant the benefit of the privilege against self-incrimination when it doesn't have the power to immunise the Defendant against the adverse consequences of being compelled to answer. In this regard, ESB does not contend that the answers given to its questions will not be admissible in criminal proceedings, it contends that it is not required to express a view. In fact, it suggests that the Defendant's argument is defeated by a sort of Catch-22: if the answers are regarded as voluntary, then no right to silence is engaged, if characterised as having been compelled, then they will be inadmissible. Such an analysis would, of course, deny a defendant of ever remaining silent.

86. The Defendant argues, by reference to **DPP v BK**, that there is a significant risk that any responses given to ESB will be admissible. Both parties agree that that will ultimately be a matter for any putative criminal trial. In any event, the Plaintiff's argument that its inability to provide immunity means the privilege is not engaged is an argument which proves too much. What the Plaintiff contends for is to be put in a *better* position than the State and to be entitled to compel its employees to answer questions without providing them with any guarantee of protection in relation to their compelled

replies. This is an argument against giving the Plaintiff freedom to act, not in favour of it.

87. The Plaintiff suggests that **Wicklow CC v Reilly** represents the correct approach for the Court to take. I agree that the analogy between this application and applications to restrain disciplinary proceedings is a close one. But that undermines the Plaintiff's absolutist position. That case involved a balancing exercise which has not been conducted here. The Court acknowledged that the right to silence was capable of being engaged and that allowing the civil proceedings to advance might involve a degree of compulsion in that the defendants would be required to make statements in order to best protect themselves in the civil proceedings. However, those factors had to be balanced against the importance of allowing the civil proceedings to proceed. Despite its own suggestion that **Wicklow CC** represents the correct approach, the Plaintiff has rejected the idea that the Defendant's privilege against self-incrimination is a factor to be considered *at all* and has therefore failed to carry out any balancing exercise. In those circumstances, it would be wholly premature for the Plaintiff to treat the Defendant's contract as having been repudiated when he refused to answer its questions.

88. In the absence of such a balancing exercise, it would not, however, be appropriate for this Court to simply state that the Plaintiff could never discipline the Defendant for failure to answer the questions posed in its letter of 17 February 2023. The Defendant accepts that once he is no longer subject to the criminal investigation into the matters about which ESB wish has asked questions, he must answer the questions or face the consequences of his refusal to do so. But he also accepts, as is made clear in the case law, that the right to silence is not absolute. In order to determine whether he can be required to answer the questions while the criminal investigation is in being, the Plaintiff must, in my view, commence a process in which it carries out an assessment of the competing interests involved, which assessment can, if necessary, be reviewed by the Court.

89. The Defendant contended in his submissions that the Plaintiff's application was premature. The Plaintiff objected on the basis that it had taken precisely the course of action the Defendant had suggested in his correspondence of 2 March 2023. In fact, the option of the Plaintiff seeking the type of declaratory relief claimed in these proceedings

was only one possibility canvassed by the Defendant. In any event, even if it were the only option suggested, it would not alter the position that by denying the possibility that the Defendant's privilege against self-incrimination in the criminal proceedings could be engaged by its enquiries, the Plaintiff has failed to take account of that privilege in demanding answers to its questions and would therefore be premature in penalising the Defendant for failing to answer them.

90. Nor would it be appropriate for the Court to carry out the necessary balancing exercise at this stage. The Court was asked to determine points of law based on an agreed factual matrix. Any balancing of rights is not solely a question of law and, in any event, could not be carried out on the basis of the limited agreed facts. For instance, in carrying out any balancing exercise, the ESB will have to consider the importance of being able to pursue the matter in advance of the Garda investigation being concluded. In this regard, the fact that Mr Sharkey has continued in his employment without being suspended is capable of being regarded as a factor which increases the urgency of ESB proceeding with its enquiries – if his continuation in his employment without investigation could be particularly disruptive or demoralising – or as a factor which suggested that delay was acceptable. Any assessment would have to have regard to the extent of any such potential delay in obtaining compliance with the Defendant's contractual obligations. The parties were in agreement that it would be possible to obtain confirmation from An Garda Siochána that the criminal investigation into the Defendant had closed, but it is at least questionable whether the Defendant's reliance on his constitutional rights could continue to be available to him indefinitely if the criminal investigation were not closed.

91. For the above reason, my answer to the first question posed is that the Defendant is entitled to refuse to comply with the directions issued to him by the Plaintiff in its letter dated 17 February 2023 for the time being. However, that entitlement will cease as soon as the criminal investigation into the Defendant is at an end, or the Plaintiff can establish that its interest in insisting on the performance by the Defendant of his contractual obligations outweighs the risk of infringement of the Defendant's constitutionally protected right to silence.

92. In circumstances where I have answered the first question with a qualified 'yes', the second and third questions, which presupposed that the first question was answered 'no' do not arise for consideration. As indicated above, however, in circumstances where the parties agreed that the precise question at issue here hadn't been determined before, and the Defendant was acting on legal advice, it seems to me that the Plaintiff would have been required to afford the Defendant a reasonable opportunity to re-consider his decision not to answer its questions had the answer to the first question been 'no'.

93. I will list the matter for the purpose of making final orders on 1 March 2024 at 10.30 am.