[2020] IEHC 234

THE HIGH COURT

[Record No. 2016/1526P]

BETWEEN

PAT O'MAHONY,
LEONARD HYDE &
LABARDIE FISHER LTD

PLAINTIFFS

AND

GUARDIAN NEWS & MEDIA LTD

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 19th day of May 2020

Introduction

1. This is the judgement of the Court on two applications for non-party discovery in a defamation suit. The proceedings arise from the publication of an article on the Defendant's website in November 2015. The article, entitled *"Revealed: Trafficked Migrant Workers abused in Irish Fishing industry",* contained the story of Filipino fisherman Demie Omol's experiences on a trawler under the heading "*Where's my Boat: Demie's Story."*

2. The article resulted from a yearlong investigation by the Defendant into employment practices in the Irish fishing industry. It was claimed that African and Asian migrant workers were being *"illegally used as cheap labour on Irish fishing trawlers."* Demie Omol's story is recounted in the form of an interview contained in the second part of the article. In March 2014 he was recruited in Manila by the Diamond H Marine Services Agency ("Diamond H") to work as a fisherman on the Labardie Fisher, an Irish flagged trawler owned and operated by the Plaintiffs. When he arrived at Belfast airport he was met by a representative of Diamond H and the first Plaintiff, Pat O'Mahony. According to the interview, Mr. Omol expected to board the vessel at Belfast harbour and to set sail for Morocco. Instead, he was driven through the night to Crosshaven, Co. Cork, where the Labardie Fisher was docked. Upon arrival, he was taken on a four day fishing trip without receiving any safety training for trawler fishermen in accordance with the Fishing Vessel (Basic Safety Training) Regulations 2001. During the trip Mr. Omol became very ill and had to be removed from the vessel. He was taken to Cork University Hospital where he was diagnosed with a form of stomach cancer. The Plaintiffs strenuously deny the claims made in the article and allege same are defamatory of them.

3. The Defendant's motions for discovery against two non-parties, the Department of Tourism, Transport and Sport and the Commissioner of An Garda Síochána are contested on four grounds (i) Relevance and Necessity, (ii) Excess Scope and Oppression, (iii) Public Interest Privilege and (iv) Confidentiality. The applications were entertained by the Court together as the grounds of opposition by the non-parties were substantially the same.

Background to the Motions for Non-Party Discovery

4. The background to the subject applications begins with the order for discovery made against the Plaintiffs by Noonan J. on 7 December 2017. He granted discovery in respect of four of the five categories of documents sought by the Defendants as follows:

i. *All documents relating to Demie Omol, including, but not limited to documents relating to his engagement on the Labardie Fisher, his travel arrangements, his work and work conditions, records of hours worked and hours of rest, training that he received, payments made to him either directly or through an agency, his medical condition and medical treatment, his return to the Philippines and all communications concerning him or with him and with agents, friends or intermediaries on his behalf and statements made by or concerning him;*

ii. *All documents relating to the "second Filipino crew member" referenced at paragraph 10 of the statement of claim, including (but not limited to) all documents, correspondence, notes, records communications and notices (including those with or from any authorities) relating to his engagement or termination as a worker on the Labardie Fisher, his travel arrangements, his work and work conditions, records of hours worked and hours of rest, training that he received, payments made to him either directly or through an agency, his return to the Philippines and all other communications with or concerning him and statements made by or concerning him;*

iii. *Documents relating to the procurement, engagement, transport and working conditions, including (but not limited to) records of hours worked and hours of rest, training records, crew wages and share accounts or any other crew payments and terms and conditions of all workers/crew members on the Labardie Fisher vessel in the period 1 March 2015 to 30 November 2015 including (but not limited to) records of the Labardie Fisher vessel log book, log receipts, safety records and electronic logs maintained for any state authority; and*

iv. *Any documents relating to the Plaintiffs' compliance (or otherwise) with regulatory and legal requirements in respect of the Labardie Fisher vessel or its operations in the period 1 March 2015 to 30 November 2015, to include (but not limited to) documents relating to any criminal, civil or regulatory prosecutions, or any inspections or investigations (whether proposed or carried out) by any statutory, regulatory of government body.*

5. Following a number of inter-party exchanges an affidavit as to documents was sworn on behalf of the Plaintiffs on 16 March 2018. The Defendant raised a number of issues around the scheduling of the documents in response to which a supplemental affidavit was sworn on 4 October 2018. The Defendant remained unsatisfied with the content and brought a motion for further and better discovery which resulted in a a supplemental affidavit, sworn the 17 December 2018. When this matter was listed for hearing on 25 March 2019, the Court was advised that the non-parties objected to the orders sought. They contended, *inter alia*, that the documentation in question ought to be in the power, possession and / or procurement of the Plaintiffs, an assertion rejected by them, on the grounds full discovery had been made in accordance with the order of December 7th. Accordingly, a question arose as to whether or not that order had been fully complied

with and if so whether inter-parties discovery was complete. Consequently, the Court made a number of case management directions as follows:

i. Discovery as between the Plaintiffs and the Defendant on foot of the Order of December 7th 2017, had to be completed before the applications for non-party discovery would be entertained; and

ii. In advance of hearing these applications a tripartite exchange between the Plaintiffs, the Defendant and the non parties take place with a view to establishing each other's positions with regard to discovery and the documents each believed were in the possession or ought to be in the possession of the other.

6. Subsequently, on the 18th July, 2019 a further affidavit of discovery was sworn on behalf of the Plaintiffs which sought to address the contentions of the non-parties, set out in correspondence, regarding the documentation which they had asserted was in or ought to have been in the Plaintiffs power, possession or procurement. The Plaintiffs rejected the assertions and deposed that they had no such documents to discover; the Defendant accepted the deposition. Consequently, the Court is satisfied inter-party discovery has been completed, accordingly, the matters remaining for determination are the applications herein.

Categories of Documents Sought from the Non-Parties

7. In the course of the exchange directed by the Court, the Defendant set out the categories of documents to be discovered from the non-parties in letters of even date, the 17th April 2019. The documentation sought from the Department of Transport is as follows:

i. All documents held by Brian Hogan, Deirdre O'Keefe, Eoghan O'Toole, Neil Forde and any inspectors of the Marine Survey Office which relate to the Labardie Fisher vessel, Demie Omol or any other crew member which pre or post-date the said report [being the inspection report produced by the Marine Survey Office in respect of the Labardie Fisher vessel on 5 October 2015].

ii. Documents relating to other crew members including Alexandru Romanov, Krzysztof Kosilo, Czeslaw Pieroszkiewicz or any other crew members of the Labardie Fisher vessel named in the Plaintiffs' discovery in the period 1 March 2015 30 November 2015.

iii. Communications with other departments/state bodies relating to the Labardie Fisher and/or Demie Omol.

8. The Defence delivered to the Plaintiffs' claim contains a plea of truth in respect of the impugned statements, a plea which the Defendant seeks to substantiate through the specified categories of documents, particularly in relation to how the Plaintiffs engaged migrant workers and the manner in which they were treated during the relevant period. It is contended by the Defendant that the documentation sought is directly relevant to this plea, particularly with regard to the establishment of differences in treatment between migrant and non migrant workers or between EU and non EU nationals on the Labardie

Fisher during the period in question. Moreover, the Defendant maintains that the non-parties are the only original source of the documentation in question and as such orders for discovery of the categories of documents set out in the notices of motion are necessary if unfairness at trial is to be avoided. The same reasoning is advanced to ground the categories of documents sought from An Garda Síochána, which are as follows:

i. *Documents relating to Demie Omol including any interviews with Mr. Omol, statements given by him, files relating to him or any notes or e mails relating to Mr. Omol including communications with other state bodies/government departments.*

ii. *Documents relating to other crew members including Alexandru Romanov, Krzysztof Kosilo, Czeslaw Pieroszkiewicz,or any other crew member of the Labardie Fisher vessel named in the Plaintiffs' discovery.*

iii. *Statements, correspondence, e mails and all files relating to Mr. Omol and/or the Labardie Fisher vessel held by Detective Inspector Paul Molloy of the Human Trafficking Investigation and Coordination Unit.*

iv. *Statements, correspondence or e mails relating to Mr. Omol or the Labardie Fisher vessel held by Garda Kathleen O'Brien and Detective Inspector Joe Moore, Cork division.*

v. *A statement given by Mr. Omol to a member of the Gardaí in the anti trafficking unit for a Garda Human Trafficking assessment.*

vi. *Documents, notes, e mails, notes relating to the trafficking assessment of Mr. Omol put before the superintendent responsible for signing off the Omol file.*

vii. *the An Garda Síochána file sent to the DPP.*

viii. *Reports and documents relating to reports, anonymised or otherwise, filed with the US embassy in Dublin for the purposes of the US State Department Trafficking in Persons report relating to fishermen in the Irish fleet.*

The Defendant's Submissions

9. The submissions of the Defendant may be summarised as follows. Mr. Kirwan S.C. contended in the first instance that the applications had to be viewed in context, rooted as they were in the categories of documents comprised in the order of Noonan J.; the applications were not an attempt to engage in some form of freestanding fishing expedition looking for information. He addressed the four grounds on which the non-parties were opposing the applications, namely, (i) The documents are not relevant and are unnecessary, (ii) the categories of documents are too broad and are oppressive, (iii) the documents are subject to public interest privilege and (iv) are covered by confidentiality.

10. As to the first of these, the defendant argues that the sole reason and purpose for seeking discovery of the categories of documents in question is to aid and advance material already available to the Defendant in order to substantiate the plea of truth. In this regard the attention of the Court was drawn to the judgment of Macken J. in *McDonagh v Sunday Newspapers* [2005] 4 IR 528 (hereinafter "*McDonagh");* simply put, a defendant pleading truth/justification by way of defence in a defamation action must have some evidence to support a plea and if so established is entitled to discover all documents in aid thereof. In Mr Kirwan's submission it was particularly significant in the context of the subject applications that the statement of the principle enunciated by Macken J., was without qualification. The Court was also referred to *Keating v. Ireland* [2013] IESC 22, to the same effect, where truth of the impugned statement was central to the defence.

11. With regard to Mr. Omol's story, he was interviewed by the Gardaí to whom he made a statement or statements; he is going to be called to give evidence at the trial. One of the issues which will inevitably arise on the pleadings is whether or not he has given previously inconsistent statements with his evidence; the only way it could be known whether such may or may not be the case is by discovery of the documents sought. It is submitted that the clear advantage of having such documentation would be to know the evidence Mr. Omol is likely to give. Similarly, in respect of other crew members identified in the Plaintiffs' discovery.

11. In response to the second ground, that the documents sought are overbroad and oppressive, Mr. Kirwan makes two points:

    i. As part of the exchange process there has been a concerted effort to narrow down to a necessary minimum the categories of documents for discovery with the non-parties; and

    ii. It is not a requirement on any Order 31 rule 29 application that a party to the litigation is required to identify the specific documents as distinct from the categories of documents in respect of which discovery is sought. In this regard reliance is placed on the dictum of Finlay CJ in *AIB v Ernst & Whinney* [1993] 1 IR 375.

12. In relation to the third and fourth grounds of opposition, public interest privilege and confidentiality, the Court was urged to follow the well-established principles applicable to non-party discovery set out in *Keating* .While accepting that *Keating* acknowledged a claim for privilege could be raised on an application for discovery and might in very limited circumstances warrant the refusal of an order on the grounds that such an order would ultimately be in vain, Mr. Kirwan submitted that in the case circumstances this objection was without substance and was sequentially out of place.

13. As to the latter point, privilege is ordinarily claimed in an affidavit as to documents sworn after the order for discovery has been made rather than at the time when discovery is requested or sought. Where claimed on affidavit it is then a matter for the court, if

required, to determine whether or not the claim of privilege over any document or category of documents is warranted and should be sustained. Although the non-parties were entitled to raise public interest privilege as a ground of objection on these applications and thus before an order is made, it is submitted that the privilege in question is not absolute and there was no certainty when examined by the Court that success of the claim was unavoidable. Save in circumstances where the Court is satisfied success on a claim of privilege is inevitable it is not a ground for refusing to make the orders sought.

14. As to the determination of that question, the proposition advanced by the Garda Commissioner, that the prosecution of crime militates against making an order for discovery and that the documents utilised therein could be subject to a claim of public interest privilege, is forcibly rejected by Mr Kirwin. He places reliance on *Livingstone v Minister for Justice* [2004] IEHC 58 as authority for the proposition that the prosecution of crime is not in and of itself a reason for asserting pubic interest privilege. Moreover, as the criminal prosecution of the Plaintiffs in 2017 had been unsuccessful there remained no good reason to continue to assert privilege over the categories of documents. The attention of the Court was also drawn to *McLaughlin v Aviva Insurance* [2012] I.L.R.M 487, where the exercise of balancing the public interest in the administration of justice with the public interest in the prevention of crime is discussed in the context of discovery consequent upon a claim for public interest privilege.

15. With regard to confidentiality as a ground for refusal, the Defendant argues that a communication made under circumstances of confidentiality simpliciter does not thereby create a privilege against disclosure. As to that submission the Court was referred to *In Re Kevin O'Kelly* [1974] 108 ILT 97 (hereinafter "*O'Kelly*"). Acknowledging that there were clearly circumstances where a party might be required or would wish to protect sources or genuinely confidential information, it was sequentially premature to claim confidentiality in respect thereof before order. Rather, the appropriate course is to redact the name of the source or the particular piece of information when the affidavit as documents is being drawn; confidentiality *per se* is not a ground for refusal to make an order for discovery.

16. Similarly, with regard to the arguments advanced by the Department of Transport in respect of protecting sources and established relationships within the fishing industry in furtherance of its statutory functions. In this context the Court was referred to the judgment of Barr J., in *Ryanair v Besancon* [2019] IEHC 744. Accordingly, there was no good reason why the same principle with regard to redactions could not be applied in the instant case once an order for discovery has been made. Finally, the fact that a sub-department of the Department of Transport (the Marine Survey Office) has never been subject of a discovery order, and that the making of such would create a precedent which might likely have a detrimental effect on cooperation with the stakeholders in the marine industry were not valid grounds for refusing the application.

17. In this connection the Court was referred to the dictum of Walsh J. in *O'Kelly* at para 102 wherein he stated that the public has a right to every man's evidence except for those persons protected by a constitutional or other established and recognised privilege. It was also submitted that the non-parties' reliance on mutual trust was misplaced insofar as the non-parties claim that they have to protect information and established relationships as between the various regulatory bodies. Mr. Kirwan submitted that *Ryanair v. Besancon* also dealt with the confidentiality of communications between regulatory bodies and that any concerns regarding mutual trust could be mitigated by way of redactions at a later date.

Submissions of the Non-Parties

18. On behalf of the non-parties Mr. Lennon contended that the categories of documents in question were different and distinct from the categories of documents ordered to be discovered by the Plaintiffs; the categories sought from the non-parties fell to be considered on their own merits. Where the categories sought from the non-parties were the same or similar to those ordered against the Plaintiffs, it did not follow from the finding of relevance underpinning the order that requirements of necessity and relevance in respect non-party discovery were satisfied, different considerations applied.

19. In approaching an application for non-party discovery it is contended that in carrying out its analysis of necessity for such an order, the court may have regard to alternative means of proof available to an applicant if unfairness at trial is to be avoided, as to which the Court was referred to the judgment of Finnegan J. in *Hansfield Developments & Ors v Irish Asphalt Ltd. & Ors* [2009] IEHC 420, where he cited with approval the judgment of Fennelly in *Ryanair Plc v Aer Rianta Plc* [2003] 4 IR 264. Finnegan J. found that non-party discovery was not necessary because the information could be provided by way of expert evidence.

20. The onus on an applicant seeking non-party discovery is to demonstrate that the information sought could not be obtained elsewhere and it is in this sense that necessity is to be understood. See Abrahamson *Discovery and Disclosure* (3rd edn, 2019) at para. 10.16. Furthermore, documents sought to be discovered in the context of a plea of truth should only be considered to be relevant and necessary where they speak to the issues raised by the plea.

21. The non-parties contend, in line with the dicta of Finnegan J. in *Hansfield*, that the documentation sought is unnecessary in circumstances where Mr. Omol is available to the Defendant as a witness and where the investigative journalists involved are also presumably available to testify. If Mr. Omol were to seek copies of his statements from the Gardaí, as opposed to the statements being sought by way of a non-party discovery, he would be entitled to obtain same, accordingly, the discovery sought was unnecessary as the fairness of the trial could be assured by the attendance of Mr. Omol. Addressing the purpose to which the statements and other documentation sought could be put, the non-parties submit that any documentation that records an earlier consistent account given by Mr. Omol would have to be ruled out as inadmissible, the only exception being a previously inconsistent statement which would not advance the Defendant's case.

22. Quite apart from these considerations it is submitted that the scope of the categories is overly broad and oppressive. Without prejudice to their contentions with regard to relevance and necessity, the non-parties submit that if any order is to be made it should be confined to statements made by Mr. Omol and those workers on the vessel who may be called as witnesses. Insofar as any documents from the file sent to DPP or used in the prosecution of the Plaintiffs are sought from the Gardaí *simpliciter*, the non-parties contend that this is a category of documents covered by public interest privilege and on that basis, if not by reference to any of the other arguments advanced, the Court should decline to make discovery thereof. Finally, discovery of such documents in particular together with the documents sought from the Marine Survey Office would have grave implications for confidentiality connected with the collation and obtaining of information in the performance of statutory duties and would set a dangerous precedent, about which more later.

Decision:

The Law; Non Party Discovery;

23. The jurisdiction to make an order for non-party discovery is expressly vested in the High Court by Order 31 Rule 29 of the Rules of the Superior Courts 1986, as amended, which provides:

> *"29. Any person not a party to the cause or matter before the Court who appears to the Court to be likely to have or to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is likely to be in a position to give evidence relevant to any such issue may by leave of the Court upon the application of any party to the said cause or matter be directed by order of the Court … to make discovery of such documents or to permit inspection of such documents…"*

25. The law in relation to non-party discovery was elucidated by McKechnie J. in *Keating*. The case involved a broadcast by RTÉ in relation to the importation and supply of drugs. Orders for non-party discovery were made against the Commissioner of An Garda Síochána and the Revenue Commissioners. The latter appealed the order; the appeal was unsuccessful. There are certain similarities with these proceedings in that the plea of justification (truth) which was central to the defence was the context in which the appeal was considered by the court:

> *"Based on the affidavit evidence of Ms. Trish Whelan, solicitor for R.T.É., it is most probable that this justification plea will be R.T.É.'s central defence to the liability aspect of the claim. Accordingly, it is in this context that the instant appeal must be considered."* (McKechnie J. at para 6)

The four requirements to be met in any application for non- party discovery are that:

> *(i) the non-parties have or are likely to have in their possession or power documents falling within the parameters of the type of documents sought;*

(ii) such are relevant to an issue or issues in the action;

(iii) an order for discovery is necessary for disposing fairly of the cause or matter or for saving costs; and

(iv) any order made, by reference to its scope, is not oppressive.

Requirements: Relevance and Necessity; Plea of Truth

24. As observed earlier, counsel for the Defendant places great emphasis upon the decision in *McDonagh*, a case where the defendant newspaper had pleaded that the words it had published about the plaintiff were "true in substance and in fact." The defendant sought discovery of a range of documents. Macken J. held that while there was no requirement for a defendant to particularise a plea of justification in the defence itself, a court considering an application for discovery would need to have before it "*some sufficient particulars in support of the plea."* The law in respect of the test of relevance on an application for discovery was set out at para 24 of the judgment as follows:

> *"I think it fair to say that there is little or nothing between the parties on the principles applicable to the test of relevance. In so far as the distinction and the nuances, if any, between the question of relevance, litigious disadvantage and necessity are concerned, as these words are used in the jurisprudence, the real question remains at all times, as is clear from the judgment of Fennelly, J, in Ryanair v. Air Rianta, supra, one of relevance. I agree with counsel for the defendant's submission that an analysis of the jurisprudence makes clear that the long established principle that discovery is permitted, and will be granted, in respect of such documents as will or may advance the plea or the case of one party and/or which will or may undermine the plea or the case of the other party, or which may lead to further enquiry in relation to the same, is fully applicable in the present case. Nor do I think that counsel for the plaintiff has in any way disagreed with counsel for the defendant's approach to those principles applicable to the question of relevance. In these circumstances, I do not consider it necessary to cite or analyse the various cases opened to me on this general aspect of relevance in the context of discovery. Both parties also appear to me to be ad idem as to the principle that a defendant may not plead justification in his defence to a libel action, unless he has, at the time the defence is filed, sufficient evidence to support his plea. Nor are the parties in disagreement with the principle that, once the defendant does have evidence to support his plea of justification, he is then entitled to discovery of all documents which may aid those pleas, in the sense set forth above. I do not, therefore, propose to revisit the jurisprudence cited on these matters either, save where it is necessary to do so in support of any conclusions I reach."*

25. It is clear from this statement of the law that once there is evidence available to support a plea of justification/truth and the requirement of relevance is satisfied no restriction or qualification is placed on the documentation the defendant is entitled to discover, namely, *all documentation which may aid the plea*.[emphasis added]. So far as relevance is

concerned, the applicant must show a definitive connection between the discovery, or the extent of the discovery sought and a particular plea or pleas raised on the pleadings. I would add that the case advanced in support of the request or application for discovery must be sufficiently related to the issues raised by the pleadings as to make clear the reason for seeking discovery of the particular category or categories of documents.

26. While *McDonagh* is a case involving inter-partes discovery, Mr. Kirwan argues that the same principles apply to an application for non-party discovery. He notes that when dealing with the principles applicable to non-party discovery in *Keating* the Supreme Court did not distinguish or otherwise qualify the requirements of relevance and necessity. I agree with counsel for the Defendant and am satisfied this submission is correct.

27. In Keating McKechnie J. dealt with the approach to be taken by the court to an application for discovery in the context of a plea of truth/justification. Firstly, the pleadings must disclose with some particularity the information on which the plea is based, generalised non-specific details will not suffice. In essence, the court must be satisfied evidence exists or likely exists to support the plea. Secondly, once a Defendant surmounts that hurdle the court is not concerned with and should not carry out an evaluation of the strength of the plea at that juncture as to do so would be to conflate distinct steps in a two tier process, the trial, at which proof must be adduced, and the application for discovery, where the court's role and the enquiry to be undertaken is of a quite different nature. In this regard para. 63 of the judgment merits repetition in full:

> *"Provided the court is satisfied that some such evidence exists, that will be sufficient. The court does not and should not evaluate its strength as a defence plea. This is not its role on such an application. Nor is it necessary for a defendant to disclose the full extent of what information he may have. He does not have to compromise his defence in this regard. Once it is shown that the plea can be supported, the discovery application cannot be regarded as a fishing exercise or as one whose sole purpose is to establish circumstance, is one of aiding and supporting the material which already exists. This of course is the essence of what discovery is."*

29. The stages in the process of litigation and the distinction to be drawn between the requirements at trial and the considerations which apply to a pre-trial application, such as discovery, have significant implications for the resolution of the issues with which the Court is now concerned. This is particularly so with regard to the approach which should be taken where, as here, it is said privilege will be claimed, or is likely to be claimed, in the event orders are made in the terms sought.

Categories of Documents; Overly Broad and Oppressive

30. The non-parties make the submission that the scope of the discovery is overly broad and oppressive. Moreover, the Defendant's presentation of the exchange which took place as an exercise on its part in refining and narrowing the categories of documents was disingenuous; the fact remained that the scope was overly broad and an order in the

terms sought would be oppressive. This claim is rejected by the Defendant, maintaining that it has gone as far as it can in narrowing the scope and that the law does not require it to go further. In this respect the obligation was not one of identification of individual documents but rather to show the relevance of the categories of the documents to be discovered to the issues raised on the pleadings. As is apparent from the form of the affidavit as to documents set out in Appendix C to the Rules of the Superior Courts the obligation of identifying specific documents in any given category covered by an order for discovery is carried by the party swearing the affidavit and not by the party seeking discovery.

31. In support of this proposition, from which I did not understand the non-parties to demur and which I am satisfied is correct, the Defendant relies upon the well-settled principles enunciated in AIB v Ernst & Whinney, supra, a case where it had been claimed the making of an order against the Minister for Industry would be oppressive. Having analysed Order 31 r. 29 McCarthy J. found that while there was a general requirement in Rule 12 to identify classes and categories of documents, no further limitation is imposed by Rule 29, the purpose of which was:

> *"… to advance the course of justice, in this instance by seeking to ensure that the parties to an action may, before trial, be fully informed as to all relevant documents. Until the Rules of 1986 came into force, an order for discovery of documents could not be made against a person who was not a party to the cause or matter before the court. Rule 12, in matters between parties to the action, enables the court to refuse an order, if satisfied that such discovery was not necessary, and to make an order generally, or limited to certain classes of documents as might be thought fit. Rule 29 imported the provisions of O. 31, mutatis mutandis, as if the order had been directed to a party to the cause or matter. The enabling provision allows the court, where it appears to be likely that a person not a party has or had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter, to direct that person to make discovery of such documents. It is extending the scope of discovery in a very material and helpful way. The rule itself does not expressly provide for any limitation in the scope of the order to be made by the court. It may be that the possible limitation under r. 12 "either generally or limited to certain classes of documents" may be appropriate to rule 29. At first sight, however, r. 29 appears to contemplate a general order for discovery in relation to an issue arising or likely to arise."*

Public Interest Privilege

32. As outlined earlier, the non-parties argue that there are certain situations where an application for non party discovery may be refused by the court if satisfied a claim of privilege will inevitably succeed, as *per* the judgment of the court in *Keating*. One of the arguments advanced there was that the material directed to be discovered was privileged from production by reason of public interest privilege and that no useful purpose would be served by directing its discovery. The contention was rejected by the court for the reasons

set out at para 46 of the judgment of McKechnie J., reasons which are directly relevant to the issue in hand and thus merit repetition.

33. Privilege as a ground for refusing an order for discovery *simpliciter*, as opposed to inspection, is subject to a very restrictive limitation, namely, that success on a claim in that behalf is nothing less than inevitable and unavoidable; it is only where the court is so satisfied that an affidavit as to documents will not be required, otherwise, the application will not be refused on that ground. The learned judge explained:

> *"…there is also no doubt but that on a discovery motion the court has an inherent jurisdiction to refuse the application on the basis that its entire purpose, namely access to relevant evidence capable of aiding or defeating a particular claim, can never be achieved in the face of a privilege plea which inevitably must succeed. Before holding however that the normal process can be abridged in this way and that privilege can ground a refusal for a discovery order as distinct from an inspection order, the court will have to be satisfied that such plea permits of no other possible result. For if it should or might, the court will not refuse to grant a discovery order on such grounds. To view the situation otherwise would be to conflate distinct steps in a two-tier process which involve addressing different questions and determining different issues. Accordingly, when the matter is raised at this stage of the process, the first enquiry must be to determine whether success on the plea is unavoidable. It is only if it is, that an affidavit as to documents will not be required."*

34. The court was not satisfied any privilege that might be asserted would "*inevitably succeed"* and thus the objection failed. In reaching this conclusion a clear distinction was drawn between the different considerations which apply to the various stages in the litigation process where different questions and issues have to be addressed and determined. In the ordinary course the question of whether or not documents are subject to any form of privilege arises when such a claim is made in the affidavit as to documents consequent upon an order for discovery, or where the affidavit is sworn voluntarily following request, rather than at the time when discovery is requested or an application therefore is made to the court.

Confidentiality

35. As mentioned earlier, a distinct submission is made in respect of confidentiality as a ground for refusing the orders sought, particularly on behalf of the Commissioner of An Garda Síochána. It is contended that granting discovery of certain categories of documents would have implications for the confidentiality attaching to information received in the course of policing operations, including criminal investigations. In this regard it is argued that An Garda Siochána have a unique role in the prevention of crime and that many of those who provide information to the police in this connection do so on the understanding that the source of the information will remain confidential. Accordingly, the compromise of such should only arise in the most exceptional of circumstances none of which, it is submitted, are present in this case.

36. It seems to me that there are two elements to this particular objection: the public interest in the prevention of crime and the maintenance of confidentiality as part of that process. When consideration is given to these and to the categories of documents sought to be discovered it is clear that the Court is being called upon to balance two public interests, one against the other; the public interest in the administration of justice and the public interest in the prevention of crime. It is only where the former outweighs the latter that disclosure should be ordered or inspection should be undertaken. However, the prevention of crime is not in and of itself a reason for asserting privilege and refusing an order. The subject was addressed by Keane J. (as he then was) in *Breathnach v Ireland (No. 3)* [1993] 3 I.R. 458 at 469:

> *"…the court, as I understand the law, is required to balance the public interest in the proper administration of justice against the public interest reflected in the grounds put forward for non-disclosure in the present case. The public interest in the prevention and prosecution of crime must be put in the scales on the one side. It is only where the first public interest outweighs the second public interest that an inspection should be undertaken or disclosure should be ordered. In considering the first public interest, it is necessary to determine to what extent, if any, the relevant documents may advance the plaintiff's case or damage the defendants' case or fairly lead to an enquiry which may have either of those consequences. In the case of the second public interest, the various factors set out by Mr. Liddy must be given due weight. Again, as has been pointed out in the earlier decisions, there may be documents the very nature of which is such that inspection is not necessary to determine on which side the scales come down."*

37. The potential significance of certain factors to the outcome of this balancing exercise in the context of discovery, such as a pending prosecution or decision of the State as to whether or not to proceed with a prosecution, is very well illustrated by the decision in *McLaughlin*, supra, where the Supreme Court dealt with a claim of public interest privilege over CCTV material. In balancing the competing public interests, O'Donnell J. held that the CCTV footage was covered by public interest privilege and that same would be maintained until either the prosecution was complete or the State had decided that there would not be such a prosecution. Consequently, it is not without significance to the outcome of the same exercise in this case that the criminal proceedings against the Plaintiffs in 2017, which were unsuccessful, are now complete.

38. As to the non-parties contention that the public interest in the prevention of crime extends to cover communications made confidentially, I am satisfied such communications of themselves do not create a privilege against disclosure. The argument in this regard was addressed in the judgment of Walsh J. delivered *In Re Kevin O'Kelly* [1974] 108 I.L.T.R 97 at para.101:

> *"The fact that a communication was made under terms of expressed confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public has a right to every man's evidence*

except for those person's protected by a constitutional or other established or recognised privilege."

39. This is not say that confidentiality of information or sources is not relevant or cannot be raised in discovery, however, the distinct stages in that process are again relevant in this connection. Where confidentiality is claimed over sources or information contained in documents sought to be discovered the appropriate course to be taken in order to address this question is to redact the particular piece or pieces of information on the document or documents when the affidavit as to documents is being drawn rather than when the application for the order is sought. See *Ryanair v Channel Four Television Corp*. [2018] 1 I.R. 734, a case involving journalistic privilege, where Meenan J. dealt with the question, accepting that extensive redactions of the documents involved would likely be necessary in order to avoid the risk of identification.

Conclusion; Necessity and Relevance

40. In approaching the determination of the issues which have arisen on these applications the Court is mindful of the contribution which discovery makes to the administration of justice as enunciated recently by the Chief Justice in *Tobin v Minister for Defence* [2019] IESC 57 at para 7.5 namely, that *"…it is important not to lose sight of the valuable contribution that discovery can make. It improves the chances of the court being able to get at the truth where facts are contested. In that way, it makes a significant contribution to the administration of justice."* The authorities to which the Court has been referred very helpfully set out the principles to be applied and the approach to be taken to an application for discovery in the context of defamation proceedings. Significantly with regard to an application for non-party discovery, the requirements of necessity and relevance in that context were not qualified in any way when the opportunity to do so arose in *Keating*.

41. As mentioned at the outset, a key defence to the Plaintiffs' claim is the plea of truth. Having read the pleadings and having considered the affidavits sworn herein the Court is satisfied the Defendant has some evidence available to support this plea at trial; it follows that this criterion has been met. I cannot accept the submissions made on behalf of the non-parties in relation to necessity and relevance rather I accept the Defendant's submissions in this regard as being correct. In my judgment, the categories of documents sought are not only patently relevant to the issues raised by the plea of truth but critically in this case it is also clear the non-parties are also the only remaining sources for the documentation sought, the Plaintiffs having made discovery which the Defendant accepts is full and complete.

42. While the court may consider the availability of evidence from other sources to a party to the proceedings when carrying out its analysis of necessity for an order, the existence of such per se does not determine the outcome of the exercise unless the court is satisfied the evidence available negates the necessity for making the order sought; I am not so satisfied. Accordingly, the conclusion reached by the Court on these grounds is that orders in the terms sought are necessary if the unfairness at trial which may arise by a refusal to grant the orders sought is to be avoided.

Conclusion; Discovery Overbroad and Oppressive

43. The Court accepts the submission that while the Defendant's obligation is to categorise the documents which it seeks to discover by reference to the issues raised on the pleadings it does not extend to itemisation; that obligation is carried by the party swearing the affidavit. While it is contended that the impugned part of the article deals largely with Mr. Omol's account and that statements made by him to the Gardai could probably be obtained by him on request, that is the limit of his entitlement, moreover, it is evident from the article when read as a whole, as it is from the pleadings, that the Plaintiffs' complaints herein go well beyond the story of Mr. Omol and extend to allegations that the Plaintiffs migrant workers in particular were deprived of appropriate rest, food and sleep; the burden of proof as to the truth of these allegations and those of Mr Omol is carried by the Defendant.

44. It is evident from the papers made available to the Court, from a consideration of the issues raised on the pleadings and from a perusal of the categories of documents sought to be discovered that such have been narrowed by Defendant as much as is reasonably possible. Although some of the categories are more broadly framed this reflects some of the difficulties with non-party discovery in which the Defendant finds itself. By way of example, it would be impossible for the Defendant to establish, in advance of discovery being made, the extent to which intra-departmental correspondence should be discovered. Relevant correspondence may or may not exist, however, in the absence of discovery the Defendant cannot know whether or not this is the case.

45. The Court is satisfied that the categories of documentation sought are for the sole purpose of aiding material already available to the Defendant in support of the plea of truth raised in answer to the Plaintiffs' claim and that this does not constitute a form of fishing expedition or an attempt to establish circumstance alone. The Court is also satisfied that the categories of documents are sufficiently detailed so as to identify what documentation is required relevant to the issues in the case thereby sufficiently limiting the scope of the discovery required. I accept the Defendant's submissions that the scope of the discovery is not so broad as would render compliance with the terms of the orders sought onerous to the point of being oppressive. In this regard, the Court is also conscious that the non-parties have considerable resources available to enable them meet the task which the orders to be made will require. Finally, so far as the costs of the discovery are concerned, these will ultimately be borne by the unsuccessful party to the litigation, either way the cost of making discovery will not fall on the non-parties.

Conclusion; Public Interest Privilege and Confidentiality

46. The Court finds that neither objection warrants refusal of the orders sought. I accept the Defendant's submissions that the claim for public interest privilege is not absolute and am satisfied it is by no means certain the claim therefor would be sustained if raised on an affidavit as to documents, particularly in circumstances where the unsuccessful criminal proceedings are complete. In the circumstances it appears to me that in carrying out the balancing exercise between the public interest in the administration of justice and the public interest in the prevention of crime the scales would weigh in favour of the former. Accordingly, the Court is not satisfied that success of a claim for public interest privilege,

if raised, would be unavoidable and inevitable. Therefore, having regard to the circumstances of the case and the authorities opened to it, the Court finds that public interest privilege is not a ground for refusing the orders sought.

47. Finally, I do not accept the proposition that An Garda Síochána's role in the prevention of crime and its interest in the confidentiality of sources militates against making an order for discovery; I agree with the Defendant's submissions, and for the reasons given earlier, find that communications of a confidential nature do not of themselves create a privilege against disclosure. However, and as Mr. Lennon very fairly acknowledged, the question of protecting sources and information given in confidence together with information of a highly sensitive nature, including information relating to national security, is properly and appropriately addressed by redaction when the affidavit as to documents is being sworn. It is not, however, a ground for refusing discovery.

Ruling

48. Having regard to the findings made and conclusions reached herein the Court will accede to the applications and will make the orders for discovery sought against the non-parties. I will discuss with counsel the final form of the orders to be made by the Court.