

THE HIGH COURT

[2023] IEHC 371

[2015/2414P]

BETWEEN

KEITH HARRISON

PLAINTIFF

AND

**THE COMMISSIONER FOR AN GARDA SIOCHÁNA, THE
MINISTER FOR JUSTICE & EQUALITY, IRELAND AND THE
ATTORNEY GENERAL**

DEFENDANTS

JUDGMENT of Mr. Justice Jordan delivered on the 19th day of May 2023

1. The Plaintiff issued a Personal Injuries Summons on the 26 March 2015 in which he sought damages including aggravated and exemplary damages for alleged negligence, breach of duty, breach of statutory duty, bullying, harassment, breach of contract of employment and/or the intentional or reckless infliction of emotional suffering. The claim related to the Plaintiff's employment as a member of An Garda Síochána.

2. A full Defence was delivered on behalf of the Defendants on the 28 April 2016. The Plaintiff later sought Discovery.

3. By Order of Mr. Justice Cross dated the 22nd day of May 2017, the Defendants were directed to provide Discovery of the following categories of documentation:

- a. All documents evidencing and recording in relation to the Plaintiff's employment contract.
- b. All documents evidencing, recording, or relating to safety statements, safety procedures, guidelines for risk assessments and incident reports conducted by the First Named Defendant its servants or agents which relate to the Plaintiff during his employment from November 2008 until May 2014.
- c. All documents relating to the Code of Practice conducted by the First Named Defendant for its employees including but not limited to the procedures addressing disciplinary procedures bullying and/or harassment protective and preventative guidelines in the workplace from November 2008 to May 2014.
- d. All documents, records, notes, correspondence, memorandum, and any other document provided or part thereof however arising whether stored in electronic format or otherwise touching or concerning or relating to the Plaintiff's personnel file disciplinary records and performance appraisals from November 2008 to May 2014.
- e. Copies of all PULSE entries on the PULSE system records of and concerning the Plaintiff to include the Plaintiff's family and their respective motor vehicles ...
- f. All documents evidencing, recording, and/or relating to the monitoring and/or investigations of incidents of bullying and/or harassment and/or any issue raised by the Plaintiff in the workplace to include all complaints made by the Plaintiff between the period

from November 2008 to May 2014 to include the “profile” referred to in an email of September 2014.

- g. All documents evidencing, recording, and/or relating to complaints threats investigations made against or made by the Plaintiff during the course of his employment concerning bullying and harassment from November 2008 to May 2014.
- h. All documents evidencing, recording, and/or relating to managerial reviews and/or disciplinary reviews conducted by the First Named Defendant concerning the decision to commence to prosecute the Plaintiff during the course of his employment from November 2008 to May 2014.
- i. All documents evidencing, recording, and/or relating to the Plaintiff’s transfers from one station to another from November 2008 to May 2014.
- j. All documents evidencing, recording, and/or relating to the procedures used when a member of An Garda Síochána makes a protected disclosure including but not limited to when the Plaintiff made a protected disclosure.

4. An affidavit of Discovery was sworn by Chief Superintendent Terry McGinn on the 4th of January 2018 listing a total of 1184 documents in the first part of the first schedule. In the second part of the first schedule a claim of privilege was made in respect of a total of 87 documents each of which were listed and described in the schedule. A claim of Legal Professional Privilege was made in respect of 14 of the documents, Litigation Privilege was claimed in respect of 58 of the documents while Public Interest Privilege was claimed in respect of the remaining 15 documents.

5. The Plaintiff issued a motion for inspection of documents on the 26 April 2018. In the grounding affidavit the Plaintiff's solicitor exhibited a letter of the 09 January 2018 in which the Plaintiff's solicitor took issue with the claim of public interest privilege and sought precise averments as to the public interest engaged. The balance of the affidavit relates to the provision of inspection facilities in respect of the balance of the 1184 documents which had been discovered in the affidavit. These facilities were provided to the Plaintiff following the issuing of the motion so the issue that remains is the claim of privilege.

6. A supplemental affidavit was sworn by Chief Superintendent Terry McGinn on the 03 December 2019.

7. In a further supplemental affidavit sworn by the Plaintiff's Solicitor on the 22 April 2022 it is asserted that the Defendants are in default of the Court Order in failing to provide a sufficiently detailed description over each document over which each claim of privilege has been made. Essentially Mr. Collins as the Plaintiff's Solicitor challenges the claim of public interest privilege and each claim of privilege.

8. At paragraph 16 of the Legal Submissions on behalf of the Plaintiff it is stated that the Plaintiff is challenging the claim of privilege and, in particular, is challenging the claim of public interest privilege.

PRINCIPAL ISSUES.

9. It is submitted that the principal issues to be decided upon in respect of the motion before the Court are as follows:

- (i) Whether the Affidavit of Discovery contains a sufficiently detailed description of the documents over which a claim of privilege has been made?

- (ii) Whether the Defendants can claim Legal Advice Privilege over the documents listed at 1-14 of the second part of the first schedule of the affidavit of discovery?
- (iii) Whether the Defendants can claim Litigation Privilege over the documents listed at 15-72 of the second part of the first schedule of the affidavit of discovery?
- (iv) Whether the Defendants can claim Public Interest Privilege over the documents listed at 73-87 of the second part of the first schedule of the affidavit of discovery?

SUBMISSIONS ON THE PRINCIPAL ISSUES.

The manner in which privilege has been claimed.

10. The Plaintiff at paragraph 2.4 of his written submissions submits that both the affidavit of discovery and the supplemental affidavit are deficient in detail and fail to establish any reasonable basis upon which privilege could be claimed.

11. It is submitted on behalf of the Defendants that guidance as to the manner in which privilege should be asserted was given by the Supreme Court in *Bula Ltd v Crowley* [1991] 1 I.R. 220 where it was held that (p222):

“what was required ... was an individual listing of the documents with the general classification of privilege claimed in respect of each document indicated in such fashion by enumeration as would convey to a reader of the affidavit the general nature of the document concerned in each individual case together with the broad heading of privilege being claimed for it. Such a requirement irrespective of what may have been a habitual form of affidavit of discovery in the past, seems necessary to comply with the principles laid down by this Court.”

12. It is submitted on behalf of the Defendants that the requirement is to provide sufficient detail to allow the Plaintiff to consider whether or not a claim of privilege should be challenged. It is pointed out that this issue was further considered by Kelly J in *Irish Haemophilia Society Ltd v Lindsay & Blood Transfusion Service Board* [2001] IEHC 240 in which he held “*There is in my view no necessity to describe the documents in greater detail than has been done here. To do so would run the risk of diluting or perhaps even destroying the privilege which is being asserted.*”

13. It is further submitted on behalf of the Defendants that in the case of each document over which a claim of privilege has been made the affidavit of discovery provides sufficient detail as to the general nature of the document as well as setting out the particular form of privilege being claimed in each case. It is submitted that to provide any further information would have the effect of diluting or undermining the privilege being claimed.

14. The Court is satisfied that sufficient detail has been provided in respect of the documents and the form of the privilege/basis for the privilege claimed in each case. The Court had no difficulty in this respect and is satisfied that the Defendant’s description and detail concerning the documents and the privilege claimed is adequate even if it did require a supplemental affidavit to meet the threshold in that regard.

15. The far-reaching consequences of an assertion of privilege over documentation is considered by Finlay C.J. in *Smurfit Paribas Bank Ltd v A.A.B Export Finance Ltd* [1990] 1 I.R. 469 at 477;

“The existence of a privilege or exemption from disclosure... clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining

the truth and rendering justice. Such privilege should, therefore, in my view only be granted by the Courts in instances which have been identified as securing an objective which is in the public interest... can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.”

16. It is the party seeking to assert privilege over documentation which bears the burden of proving that this claim for privilege is valid. As Kelly J points out in *Irish Haemophilia Society Ltd v Lindsay & Blood Transfusion Service Board*;

“... The obligation and onus is on a party asserting legal professional privilege to prove that such a claim is justified...”

17. The procedure which has developed with regard to challenges to privilege was recently summarized by Barrett J in *A. v B.* [2021] IEHC 96 at paragraph 36;

“(i) in general, where competing interests conflict the court will examine the text of the disputed document and determine where the superior interest rests: it will carry out this enquiry on a case-by-case basis;

(ii) this exercise may not always be necessary. On rare occasions, it may be possible for the court to come to a decision solely by reference to the description of the document as set out in the affidavit, that is, without recourse to an examination of the particular text of the document itself (Breathnach pp. 469/763);

(iii) In all cases however (and this is the crucial point) it will be for the examining court to both make the decision and to decide on what material is necessary for that purpose; and finally

(iv) in performing this exercise, no presumption of priority exists as between conflicting interests.”

Barrett J continues;

“Whatever the particular interest relied upon, it should be noted that its terms must be formulated by reference to the issues in question and must be particularized in such a way that the courts can properly adjudicate thereon.”

Legal Advice Privilege.

18. The leading authorities on the application of Legal Advice Privilege are *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 I.R. 469 as well as the House of Lords decision in *Three Rivers D.C. v Bank of England* (No.6) [2005] 1 A.C. 610. The applicable test is considered in Abrahamson, Dwyer & Fitzpatrick’s *Discovery and Disclosure* (3rd edition, 2019) at paragraph 40-16 as follows:

“The authorities reveal that, in order to attract legal advice privilege, the material in question must satisfy a number of criteria.

(a) First, the material must constitute or refer to a communication between lawyer and client.

(b) Secondly, that communication must arise in the course of the professional lawyer–client relationship.

(c) Thirdly, the communication must be confidential in nature.

(d) Fourthly, it must be for the purpose of giving or receiving legal advice.”

19. It is submitted on behalf of the Defendants that it is clear from the descriptions of each of the 14 documents over which a claim of legal advice privilege has been made as well as from the averments in the supplemental affidavit which was sworn by Chief Superintendent Terry McGinn on the 03 December 2019 that each of the four criteria outlined above apply to the documents in question.

Litigation Privilege.

20. The test for Litigation Privilege was considered by the High Court in *Silver Hill Duckling Ltd v Minister for Agriculture* [1987] IR 289 in the following terms:

“once litigation is apprehended or threatened, a party to such litigation is entitled to prepare his case, whether by means of communications passing between him and his legal advisers, or by means of communications passing between him and third parties, and to do so under the cloak of privilege.”

21. The relevant principles to be derived from leading authorities in Ireland and the U.K. were summarized by Finlay Geoghegan J. in *UCC v ESB* [2014] IEHC 135:

(i) Litigation privilege constitutes a potential restriction and diminution of a full disclosure, both prior to and during the course of legal proceedings which is desirable for the purpose of ascertaining the truth and rendering justice. As such, it must be constrained. Smurfit Paribas v. AAB Export Finance [1990] 1 I.R. 469 per Finlay C.J. at p. 477.

(ii) The purpose of litigation privilege is to aid the administration of justice, not to impede it. In general, justice will be best served where there is candour and where all relevant documentary evidence is available. Gallagher v. Stanley [1998] 2 I.R. 267 per O’Flaherty J. at p. 271.

(iii) The document must have been created when litigation is apprehended or threatened.

(iv) The document must have been created for the dominant purpose of the apprehended or threatened litigation; it is not sufficient that the document has two equal purposes, one of which is apprehended or threatened litigation. Gallagher v. Stanley [1998] 2 I.R. 267 at p. 274

approving the test propounded by the House of Lords in Waugh v. British Railways Board [1980] A.C. 521.

(v) The dominant purpose of the document is a matter for objective determination by the Court in all the circumstances and does not only depend upon the motivation of the person who caused the document to be created. Gallagher v. Stanley and Woori Bank & Hanvit LSP Finance Ltd. v. KDB Bank Ireland Ltd. [2005] IEHC 451.

(vi) The onus is on the party asserting privilege to prove, on the balance of probabilities, that the dominant purpose for which the document was brought into existence was to obtain legal advice or enable his solicitor prosecute or defend an action. Woori Bank and Downey v. Murray [1988] N.I. 600.

Public Interest Privilege.

22. It is submitted on behalf of the Defendants that the legal principles applicable to the determination of whether a public interest privilege is properly asserted are well settled. In *Ambiorix Ltd v. Minister for the Environment (No.1)* [1992] 1 I.R. 277, Finlay C.J. summarized the relevant principles initially elaborated in *Murphy v. Dublin Corporation* [1972] I.R. 215 as follows: -

- 1. Under the Constitution the administration of justice is committed solely to the judiciary in the exercise of their powers in the courts set up under the Constitution.*
- 2. Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the State.*

3. *Where a conflict arises during the exercise of judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.*
4. *The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.*
5. *It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision.*

23. The Plaintiff at paragraph 4.1 - 4.7 of his written submissions has referred to the judgment of Keane J. in *Breathnach v Ireland & Ors* [1993] 2 IR 458 where the Court held that the appropriate approach was to apply the balancing test set down in *Murphy v Dublin Corporation* [1972] IR 215 and *Ambiorix Ltd v Minister for Environment (No. 1)* [1992] 1 I.R. 277 between the public interest in the administration of justice and the public interest in the prevention and prosecution of crime. In this regard the Defendants submissions focus on the following extract from the judgment of Keane J (at p 469):

“information supplied in confidence to the gardaí should not in general be disclosed, or at least not in cases like the present where the innocence of an accused person is not in issue.... there may be material the disclosure of which would be of assistance to criminals by revealing methods of detection or combatting crime, a consideration of particular

importance today when criminal activity tends to be highly organized and professional. There may be cases involving the security of the State, where even disclosure of the existence of the document should not be allowed. None of these factors - and there may, of course, well be others which have not occurred to me - which would remove the necessity of even inspecting the documents is present in this case”.

24. The issue is dealt with in the Supreme Court’s Judgment in *McLaughlin v Aviva Insurance (Europe) Public Limited Company* [2011] IESC 42 - involving a challenge to a claim by An Garda Siochana over non-party Discovery. Denham CJ refers to the Judgment of Lord Morris in *Conway v Rimmer* [1968] A.C. 910;

“It is, I think, a principle which commands general acceptance that there are circumstances in which the public interest must be dominant over the interests of a private individual. To the safety or well-being of the community the claims of a private person may have to be subservient. This principle applies in litigation. The public interest may require that relevant documents ought not to be produced. If, for example, national security would be or might be imperiled by the production and consequent disclosure of certain documents, then the interest of a litigant must give way... But where disclosure is desired and is resisted there is something more than a conflict between the public interest and some private interest. There are two aspects of the public interest which pull in contrary directions. It is in the public interest that full effect should be given to the normal rights of a litigant. It is in the public interest that in the determination of disputes the Courts should have all relevant material before them. It is, on the other hand, in the public

interest that material should be withheld if, by its production and disclosure, the safety or well-being of the community would be adversely affected.”

More particularly, Denham CJ goes on to state at paragraph 13;

“It is an important part of an analysis of this type of privilege that it exists only for a limited time. Thus, it would apply only until the criminal trial is concluded or until the Director of Public Prosecutions has decided not to prosecute.”

In the instant case, the Plaintiff submits that it does not appear that the documents in question are related to and/or associated with any criminal trial and that it is also important to emphasize that in circumstances where An Garda Síochána seeks to assert a claim of public interest privilege over documentation associated with the detection and investigation of criminal activity, that privilege does not apply indefinitely.

25. Barr J, in *Kelly v Commissioner of An Garda Síochána & Ors* [2021] IEHC 808 considers a claim of privilege made by An Garda Síochána against the backdrop of parallel criminal proceedings, and refers to the above jurisprudence; -

“39. I am satisfied that having regard to the principles laid down in the McLoughlin and Breathnach cases, it is appropriate for this Court to read the documents contained in the investigation file and having done so, to balance the public interest in the due administration of justice, being the conduct of the civil litigation being maintained by the plaintiff against the defendants; as against the public interest in preserving the confidentiality of a garda file in relation to a criminal investigation conducted by it.

40. The court is satisfied having read the documents, that no issues arise therein in relation to either informant privilege, or state security. The court is further satisfied that there is no material within the garda investigation file that would be of any benefit to any criminal, or subversive organisations in general.

41. The court also approaches its consideration of the matter in light of the fact that a decision has been made by the DPP that there should be no prosecution arising out of the receipt by the plaintiff and his wife of the document in question....”

The above is indicative, the Plaintiff submits, that even in circumstances where there are in fact criminal proceedings in being or contemplated, the Court can nonetheless determine the privilege does not apply.

26. It is submitted on behalf of the Plaintiff that in the instant case, the applicable standard is in fact lower for the Court in satisfying itself that privilege should not apply, on the basis that no such criminal proceedings are in being or appear to be contemplated, and any concern regarding criminal activity is not directly related to the circumstances of the proceedings.

27. In the Kelly case Barr J at paragraph 42 of his Judgment touched on the issue of probative value of the document to the party seeking it and stated :-

“Notwithstanding that the content of the file will only be of very marginal relevance to the issues that the plaintiff will face in his civil action, the court is of the view that the following documents from the garda investigation file should be furnished to the plaintiff, as the court is of the view that there is no public interest in the withholding of these documents in the circumstances of this particular case.”

28. In *Law Society v Minister for Justice* [1987] I.L.R.M. 42, Murphy J followed a similar line of reasoning;

“I believe that in many applications of this nature it would be difficult to evaluate the benefits which could flow to a Plaintiff from the disclosure of a particular document or series of documents. Indeed, it might be difficult to foresee how documents disclosed could be put in evidence or used in cross-examination until the case was at hearing. However, in the present case it does seem to me that to deny the Plaintiffs access to the documentation for which this privilege is claimed would be to impose some measure of injustice on them and in my view that injustice is almost necessarily greater than the potential damage to the Public Service which I regard as minimal in the present case .”

A Review of the Documents.

29. Legal professional privilege/legal advice privilege is claimed in respect of items 1 to 14 inclusive. This documentation involves correspondence passing between An Garda Síochána and State Solicitors and involving also correspondence with the Office of the DPP. In addition there is some correspondence passing between An Garda Síochána and its own internal Human Resources and People Development section – for the attention of Legal Affairs. It is clear from a review of all of the documentation that all of it does satisfy the criteria necessary to attract legal advice privilege. While the situation is different from the normal situation given the entities involved the situation is nonetheless that there is a client (An Garda Síochána) involved in confidential communications with solicitors acting for the State. The communications involve essentially requests for advice or directions from the DPP – which are channelled through the State Solicitor – and related matters concerning investigations and possible

prosecutions. The additional items of correspondence between An Garda Síochána and the Legal Affairs section of its Human Resources and People Development section do meet the same criteria. An Garda Síochána is the client and the communications are confidential communications which arise in the course of the necessary interaction between An Garda Síochána and its Legal Affairs section – for the purpose of receiving legal advice. The Court has not been advised as to the makeup of the Legal Affairs section in the Human Resources and People Development section of An Garda Síochána. However, as a matter of probability the Court is satisfied that the Legal Affairs section of An Garda Síochána includes lawyers/staff with legal qualifications and expertise and there is no good reason in the instant case to hold that legal advice obtained in-house does not merit the same legal professional privilege/legal advice privilege as would otherwise apply. Furthermore, a review of the actual documentation in this regard satisfies the Court that the claim of privilege made is *bona fide* and justified. The Plaintiff is not entitled to see these documents.

30. Turning then to the litigation privilege claimed. This privilege is claimed in respect of documents 15 to 72 inclusive. The Court has reviewed each of these separately.

31. As already indicated the proceedings in this case were commenced on 26 March 2015. The claim was first notified to the Injuries Board on 05 August 2014. A review of the documents under this heading shows that all of the documents either postdate the notification of the claim or the institution of the proceedings. They were therefore generated at a time when litigation had in fact commenced or was reasonably apprehended.

32. From a review of each of the items of documentation it is evident that the documentation is part and parcel of the preparation for litigation and the defence of litigation. It is legitimately entitled to the cloak of privilege claimed.

33. It is the position that there are and have been several strands of litigation between the parties with many overlapping issues, facts, and contexts. At the core of the various strands of litigation is the Plaintiff's position of employment as a member of An Garda Síochána - and the issues that have arisen with his employer and the other Defendants in that regard. The other litigation – or strands of litigation (some of which is referenced in the documentation in this category) - does not impair or dilute the cloak of privilege which applies and the Court is satisfied that the privilege claimed in respect of this category of documentation is valid. The Plaintiff is not entitled to sight of this documentation.

34. Turning then to the main battleground - insofar as the claim of privilege by the Defendants is concerned - the claim of public interest privilege over the items at paras. 73 to 87 inclusive.

35. The Court must consider this claim of privilege alongside any countervailing considerations. It has read and considered all of the documentation separately with a view to determining whether the privilege claimed is valid or not. The Plaintiff forcefully submits that the public interest in litigants, and in particular the Plaintiff, prosecuting their claims against the State in a fair and just manner is a strong countervailing consideration and particularly so in circumstances where the burden of proof in maintaining the claim of privilege is on the Defendants. A claim of public interest privilege will frequently involve ; -

- (a) The public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State.
- (b) The consideration that information supplied in confidence to the gardaí should not in general be disclosed.
- (c) The consideration that a situation ought to be avoided whereby the disclosure of material might in itself be of assistance to criminals by revealing methods of detection or combatting crime – in a world where criminal activity is highly organised and professional.
- (d) Cases involving the security of the State where even disclosure of the existence of the document should not be allowed.

36. Insofar as the claim of public interest privilege is concerned it is necessary to consider the averments on affidavit in support of it. In the affidavit of Chief Superintendent Terry McGinn sworn on 04 January 2017 he states at para. 4: -

“I object to produce the said documents set forth in the second part of the said first schedule hereto. Such documents are privileged and consist solely of statements, memoranda and correspondence prepared for the purpose of obtaining legal advice and/or for the purpose of litigation, prepared for the purposes of and in contemplate of these proceedings and/or are the professional communications of a confidential nature passing between this Defendant and its solicitors and counsel advising on behalf of this Defendant. Further documentation which relates to confidential intelligence received by An Garda Síochána for purposes of investigating criminal activity are also privileged”.

37. This is a somewhat proforma paragraph – the last sentence of which is the only averment germane to the claim of public interest privilege.

38. In a supplemental affidavit sworn on 03 December 2019 the same deponent expanded on the above averment “for the purpose of clarifying certain queries raised by the Plaintiff in relation to (the) claim of privilege...”.

39. It is perhaps worthwhile setting out the additional averments in full; -

“Legal advice

3. The documents at numbers 1 to 14 of the first schedule second part of my affidavit of discovery are privileged and consist solely of statements, memoranda and correspondence prepared for the purpose of obtaining and/or receiving legal advice. The said documents are professional communications of a confidential nature passing between this Defendant and its solicitors and counsel advising on behalf of this Defendant.

Litigation privilege

4. The documents at numbers 15-72 of the first schedule second part of my affidavit of discovery are privileged and consist solely of statements, memoranda and correspondence prepared for the purposes of and in contemplation of these proceedings. Further these documents are professional communications of a confidential nature passing between this Defendant, its solicitors and counsel advising on behalf of this Defendant for the purpose of litigation.

5. There are a number of documents in the schedules to my affidavits sworn on 04 January 2018 which include the words “copy email dated....from donotreply@garda.ie to ...”. These are all documents which have been retrieved from the garda email archive and the date stated on the “donotreply” section is the date of retrieval rather than the date of the documents.

6. The description of four documents which were retrieved from the archiving system require a more detailed description to clarify their content. The more detailed description of document numbers 15, 16, 22 and 41 are set out in the schedule below.

Public interest privilege

7. The documents at numbers 73-87 of the first schedule second part of my affidavit of discovery relate to confidential intelligence received by An Garda Síochána for purposes of investigating criminal activity and are privileged.

8. The information concerns information provided to An Garda Síochána in confidence and there is a public interest in maintaining that confidentiality and the information and that it is not relevant to the Plaintiff's action. Further, the disclosure of such material would potentially be of assistance to criminals by revealing methods of detection, investigation and combatting crime, is an accurate reflection of the position."

- 40.** Thus, the claim of public interest privilege asserted is on the basis that; -
- (a) The information concerns confidential intelligence or information provided to An Garda Síochána in confidence and there is a public interest in maintaining that confidentiality.
 - (b) The information is not relevant to the Plaintiff's action.
 - (c) The disclosure of such material would potentially be of assistance to criminals by revealing methods of detection, investigation and combatting crime.
- 41.** The Court will deal firstly with the Pulse screen printouts which are items 76 to 87 inclusive – and including some Incident Summary Reports [as at item 82 and 83].

42. It is worth bearing in mind when considering the claim of public interest privilege over these documents that the Plaintiff was a serving member of An Garda Síochána up until March 2021 when he was suspended from duty. He remains a member of the Force as such. He undoubtedly has some familiarity with methods of detection, investigation and combatting crime – albeit that he may not be familiar with all such methods currently in vogue. Secondly, a review of the Pulse documentation does not establish that any of the entries contained in the Pulse printouts could be described as confidential intelligence - or as confidential or sensitive – or were received in confidence. Furthermore, it is not possible to see how the disclosure of any of the material in the Pulse printouts would potentially be of assistance to criminals by revealing methods of detection, investigation and combatting crime. Finally, insofar as it is asserted that the information is not relevant to the Plaintiff’s action, the Court accepts the Plaintiff’s contention that relevance is not an appropriate consideration in terms of the task in hand for the Court. However, if it was, the Court would not be prepared to find that the information in question is irrelevant to the Plaintiff’s claim in these proceedings.

43. In addition to the above points, it is worthy of note that the Plaintiff did have access to the Pulse records in question whilst at work – and indeed he features frequently as a person who logged on to the Pulse records in question. His name is listed in the column “inquiry by” on a frequent basis in many of the printouts. Elsewhere, he is the actual subject of the Pulse printouts.

44. Insofar as the Pulse record printouts are concerned, this Court is satisfied that no valid basis has been shown to exist by the Defendants in support of the public interest privilege claimed. Insofar as the Pulse record printouts are concerned, this Court holds

that the claim of public interest privilege over these documents is not valid and the Plaintiff is entitled to sight of these documents.

45. Turning then to the items listed at paras. 73,74 and 75 in the public interest privilege bundle.

46. Items 73 and 74 can be taken together as there is some duplication involved.

47. There is nothing in the documentation at numbers 73 and 74 which can justify a claim of public interest privilege. This correspondence in itself appears to be quite innocuous. It may well be that the documentation will become or will be made relevant at the hearing of the Plaintiff's action. Its relevance is not a foremost consideration for the court in evaluating and balancing the claim of public interest privilege.

48. The Court is satisfied from reading the documentation that there is nothing established in evidence or indeed by way of submissions in relation to this particular material which would justify the claim of public interest privilege – which claim is detailed at para. 8 of the supplemental affidavit sworn on 03rd of December 2019.

49. The Court holds that the Plaintiff is entitled to sight of this documentation as the claim of public interest privilege fails in respect of it.

50. It should also be said that there is a handwritten note in the copy of the letter dated 18 February 2015 which is barely legible. However, the defendants Solicitor will provide the best effort at making it out to the Plaintiff's Solicitor – same having been provided to the court recently when requested.

51. The documentation at number 75 duplicates the letter of 12 January 2015 which is also contained at number 73 – and marked secret. There is a letter of 05 January 2015 from Fintan Fanning Assistant Commissioner to the Executive Director Human Resources and People Development – marked secret. There is a letter of the same date – 05 January 2015 – from Fintan Fanning Assistant Commissioner to Chief

Superintendent Scanlon Portlaoise – again marked secret. It is copied to the Chief Superintendent Mullingar, Assistant Commissioner Crime and Security, Executive Director, Human Resources and People Development.

52. There is then a letter marked secret dated 31 December 2014 from John Mahoney Assistant Commissioner to the Eastern Region and which refers to attached correspondence – comprising of a letter of 24 December 2014 from Peter Kirwin Detective Chief Superintendent to the Assistant Commissioner Crime and Security along with a comprehensive letter dated 18 December 2014 from a Detective Superintendent to the Detective Chief Superintendent, Security and Intelligence. The letter of 24 December 2014 and the letter of 18 December 2014 are – as with the other correspondence in this section – marked secret although the stamp is faded.

53. This documentation and in particular the letter of 24 December 2014 and the enclosed letter of 18 December 2014 are more substantial and more weighty in terms of the public interest privilege claimed than the other documentation in this bundle.

54. In particular, the letter dated 18 December 2014 refers to intelligence reporting suggesting criminal activity by members of An Garda Síochána – and an amount of detail is provided.

55. The letter of 18 December 2014 refers to a series of reports from a single strand of intelligence but does not indicate the source.

56. The intelligence and the events referred to in it are by now somewhat dated.

57. Insofar as item 1 at para. 1 in the letter dated 18 December 2014 is concerned, the letter indicates the Pulse incident number and indicates that it occurred in December of 2012. It goes on to say that it (presumably the Pulse record) was updated on 02 December 2014 stating that the DPP had directed no charges be brought.

58. The events referred to at item 2 in the letter of 18 December 2014 include a reference that the detail provided would appear to be based on the source's historic knowledge rather than anything current.

59. Likewise, the events referred to at item 3 indicate that the detail provided would appear to be based on the source's historic knowledge rather than anything current.

60. The author of the letter makes a point that much of the information has already been disseminated locally to Detective Superintendent Lordan but that the detail regarding a named Garda (not the Plaintiff) is being disseminated for the first time. The author also makes the point that the foregoing intelligence material has been generated following the processing of information but that the intelligence is not corroborated and should not form the sole basis for taking executive action (arrest/searches). It is recommended that independent investigations and/or enquiries, as deemed appropriate, should be undertaken in conjunction with the intelligence supplied.

61. Certainly, the content of the letter of 18 December 2014 may perhaps be a source of some embarrassment for An Garda Síochána. If so, that does not justify a claim of public interest privilege.

62. The Court is concerned with the claim of public interest privilege as detailed at para. 8 of the affidavit sworn on 03 December 2019.

63. The source of the intelligence is not identified or alluded to in the letter of 18 December 2014 - or elsewhere in the documentation. Indeed, it is not apparent if the single strand of intelligence referred to emanates from within the force or from outside (through an informant). In these circumstances it is difficult to attach any weight to the claim of protecting confidentiality. The Court does not accept that such a consideration of protecting confidentiality has been established. Insofar as the suggestion that the disclosure of the material would potentially be of assistance to criminals by revealing

methods of detection, investigation and combatting crime, there is nothing in the documentation, in the evidence before the Court or indeed in the submissions to warrant such a conclusion being reached.

64. It is asserted that the information is not relevant to the Plaintiff's action. Again, the Court is not really concerned with its relevance. It is difficult for the Court to speculate on how information or documentation might become relevant at the hearing of the action. Moreover, if relevance was a consideration this Court would not be prepared to conclude that the information contained in the documentation at tab 75 is not relevant to the Plaintiff's claim.

65. The Court must weigh the competing considerations in the balance and decide where the justice lies in terms of upholding or rejecting the claim of public interest privilege. On evaluating the evidence, and having regard to the submissions, and having considered the documents at tab 75, the Court is satisfied that the claim of public interest privilege is not made out. The Plaintiff is entitled to sight of this documentation also in circumstances where the claim of public interest privilege over it has failed.

66. An issue did arise concerning two letters at tab 64 - the letter of 09 January 2015 and the letter of the 23 December 2014 as they did not seem to the Court to fit in there – and they required explanation in order to be dealt with. A supplemental affidavit was sworn on 16th day of May 2023 by Inspector Paul McGee and he confirmed that the letters should have appeared in the first schedule second part of the affidavit of discovery as documents 88-89. He avers that the documents relate to confidential intelligence received by An Garda Síochána for the purposes of investigating criminal activity and are privileged. Having considered these letters and this claim of privilege the Court is satisfied that the claim of public interest privilege is not made out for the

reasons mentioned above in respect of the other documents where public interest privilege is claimed. It follows that the Plaintiff is entitled to see these documents.

67. Conclusion

The claim of Public Interest Privilege in respect of Items 73 to 89 inclusive is not established and the Plaintiff is entitled to sight of these documents. The Claim of Legal Advice Privilege and Litigation Privilege in respect of the other documents at 1 to 72 inclusive is established and the Plaintiff is not entitled to sight of these documents.