[2010] IEHC 55.

THE HIGH COURT

COMMERCIAL

[2009 No. 7048P]

BETWEEN

Millstream Recycling Limited

Plaintiff

And

Gerard Tierney and Newtown Lodge Limited

Defendants

And

O'Neill's Fuels Limited

Third Party

Judgment of Mr. Justice Charleton delivered on the 9th day of March, 2010.

1. On the 7th December, 2008, it became public knowledge that food used for fattening pigs at several locations in Ireland had become contaminated with dioxins. This entered their meat. It could not be safely eaten. The consequence was that thousands of animals were slaughtered and the reputation of Irish pork products was severely undermined. The plaintiff is a company that manufactured that food. In several newspaper articles that company, together with its principal shareholder, Richard Hogg, was blamed as the originator of these troubles.

2. The plaintiff owns an animal feed manufacturing plant. Pigs are more omnivorous than other animals. Consequently, recycled food left over from human consumption, has since they were first domesticated, tended to be used in fattening swine. Insofar as I understand it, the plant of the plaintiff collects bread and other food products from companies and restaurants and puts it through a process of refinement and drying. Part of this involves the food being sucked into a kind of

moving heat process, or its by-products where there is alleged to be some contact between the fuel under combustion that drives the process and the ultimate product that the recycled food is being made into. It would seem that it was at this point that contaminants from oil used by the plaintiff and allegedly supplied by the defendants entered the food product, ultimately to be eaten by pigs which, in turn, are widely consumed by people here in Ireland and in places where our pork products and other agricultural foods are highly prized.

3. What I have said is preliminary. I have no entitlement to judge the facts because a trial has not yet taken place. The public dimension of what is at issue between the parties is, however, important in deciding the issues before me by way of five notices of motion. I will return to that in respect of two of the motions. The motions before me are:

(1) a motion by the plaintiff for third party discovery against the Garda Commissioner of papers related to the criminal investigation into this scandal, which I will deal with at the end of this decision;

(2) a motion by the second defendant to join O'Neill's Fuels Limited as a third party. I have already dealt with this motion by granting a third party order;

(3) a motion by the first defendant that the case against him should be dismissed pursuant to the inherent jurisdiction of the Court to strike out the claims which have in reality no prospect of success;

(4) a motion by the first defendant for security for costs pursuant to s. 390 of the Companies Act 1963; and

(5) a motion by the second defendant to the same effect.

The Parties Now

4. The plaintiff has multiple creditors in consequence of this food contamination scandal. They are claiming, as against the company, a figure which was put in the affidavits at around €36 million, but which counsel tells me has now grown. A scheme of arrangement pursuant to s. 201 of the Companies Act 1963 has been proposed. It is already the subject of a judgment of Laffoy J. entitled *In the matter of Millstream Recycling Ltd. and In the matter of the Companies Acts 1963 to 2009,and In the matter of an application by Millstream Recyling Limited pursuant to s.201 of the Companies Act 1963* [2009] IEHC (Unreported, High Court, Laffoy J., 23rd December, 2009). Laffoy J. has ordered a meeting of the creditors who are pursuing claims on the basis of contaminated foodstuffs. A meeting of those connected to the company through common shareholders has also been arranged. There is €6.5 million to divide up, which is the limit of the plaintiff company's insurance cover for this disaster. These meetings will take place on the 1st July, 2010, supposing that the litigation, of which this is part, is then concluded. If a two-thirds majority approve a scheme of arrangement then a petition seeking the sanction of the Court will be made returnable for the 19th July, 2010. In the meanwhile, all further sets of proceedings against the company are stayed.

5. The first defendant is a 75 year old man. He was a principal shareholder in the second defendant. It is claimed that the second defendant was used by him as a mere corporate veil and that it was not really a trading company. The second defendant has assets of €1.3million and current liabilities of €1.5 million, as of its last accounts. It carries no insurance in respect of the supply of products. It is therefore insolvent. The plaintiff claims against the first and second defendants that they are the source of

the fuel used to manufacture the pig feed which was contaminated. They claim a particular reliance on the expertise of the first defendant. He is a solvent individual; though whatever wealth he has is unlikely to extend to the full amount of the claims made against the plaintiff, and for which they claim that he and the second defendant are responsible. They are said to be the source of the fuel that came into contact, in some way, with the recycled foodstuffs later ingested by thousands of pigs. In turn, the second defendant has joined O'Neill's Fuels Ltd., as a third party. As part of their defence to these proceedings they say that they sourced this fuel from a reputable supplier, namely the third party, in circumstances where they neither knew, nor ought to have known that contamination would take place on contact with foodstuffs being recycled for pigs. As against this, the plaintiff claims a special relationship with the first defendant, one whereby they were relying on his expertise in sourcing appropriate fuel for their process in circumstances where the imposition of liability for negligent misstatement causing the damage complained of to the plaintiff can be established.

6. Prior to December 2008 the plaintiff company was trading successfully with about 16 employees and a good balance sheet. The principal of the company, Richard Hogg, had a number of companies prior to the incorporation of the plaintiff. They included Hogg's Hoggs Ltd. and Millstream Power Ltd. The current plaintiff was incorporated on the 19th June, 2007. The first contact with the defendants came in October 2006, in consequence of a recommendation from a Mr. O'Connell. There is an affidavit from Mr. O'Connell in a form which calls out for requires its contents to be tested in oral evidence. An agreement for the ongoing supply of the relevant fuel was then made. For reasons of cost, convenience, or efficacy, I cannot judge which, a change was made in April 2008 from the kind of fuel apparently supplied over the

previous eighteen months by the defendants, or one or other of them, to a new kind of fuel. Again, the plaintiff claims to rely on the expertise of the first defendant in circumstances giving rise to liability, it asserts, for negligent misstatement. Then, over the next six months, this new kind of fuel was used in their pig feed manufacturing plant. When, around the autumn to early winter of 2008 a problem arose with the use of the fuel in their manufacturing process, the plaintiff again claimed to have relied upon the expertise of the first defendant. The plaintiff asserts that it took his advice and acted accordingly to the detriment complained of. It is, of course obvious that all of this is of high public importance. What happened, however it happened, is a national scandal.

7. I emphasise again that it is impossible for me to form any conclusive view as to the issues involved in this case. Because, however, it is important that I express a preliminary view as to aspects of the defence and aspects of the claim, I now set out what I perceive to be the issues in this case.

Issues

8. What does not seem to be disputed by the parties is that the plaintiff company is the source of the pig feed that was contaminated. The manner in which the contamination occurred did not result from the waste human food used, as far as is known, for recycling, but the finished product after it had been dried, baked, grinded and compressed, or whatever, in their plant. That contaminant seems to have come from the oil used in driving the manufacturing process. Those pigs which ingested this foodstuff, in turn, became contaminated. What the contested matters are include the following:-

(1) Were there contaminants in the oil? If so, where did they originally come from?

(2) Did the oil come from other suppliers than the defendants? Some suggestion is made in the affidavits that the plaintiff. was using so much oil that they must have had a separate source beyond the defendants. At the moment, there is no evidence of this.

(3) Was the supply relationship between, in reality, the plaintiff and the third party, whereby the defendants had faded completely into the background as mere agents, or even historical facilitators? The claim here is that the third party may not have been the contracting party for the oil to the plaintiff at the start of the supplies, but was the contracting party at the time any contamination occurred.

(4) In relation to the supply of oil, did the plaintiff contract with the first or second defendant, or with both? Here the issue is whether the plaintiff is protected by the corporate nature of the second defendant. The first defendant claims to have acted through the second defendant. It is common in much litigation that a defendant will claim to be the servant of a corporate entity for which he works, in which he has shares, or of which he is the controller. Since contract law is primarily based upon what the parties themselves decided, the law interfering as little as possible so as to give effect to bargaining at arms length, an answer to this issue might usually be found in the terms of written agreements, or at least in correspondence. Where, however, a point is left unstated in the negotiations of the parties to a contract then an agreement may be effected through construing it in accordance with ordinary business sense. Since

parties to a business relationship may be presumed to act reasonably, sometimes, terms may be unstated, though acted upon by the parties. The nature of their dealing can therefore supply the missing elements of the contractual framework. The Court is not entitled to include terms which were not agreed by the parties but, sometimes terms can be implied into a contract if, from the point of view from those in the same circumstance as the parties, it was obviously necessary in order to complete the agreement so as to give it effect. Here, it seems to me, there are two sub-issues: The first is as to whether the averments of those acting on behalf of the plaintiff are truthful in ascertaining that they contracted with the first defendant and not the second defendant, or with both the first and second defendants? Secondly, whether a reasonable business person in the position of the plaintiff, in the circumstances identified by the Court as probable, would conclude that they were contracting with a limited liability company, namely the second defendant, or with the first defendant who was merely using a limited liability company, the second defendant, for certain limited purposes in fulfilling the contract?

(5) In making representations, if he did, was the first defendant acting on his behalf on behalf of the company? The resolution of this issue, it seems to me, is very like the last one; as to what a reasonable business person would have thought in the factual circumstances as found by the court.

(6) What were the terms of the relevant contract of sale? Did these include a representation that the oil was fit for the particular purpose for which it was required, or was the plaintiff simply buying any old oil in the expectation that it would be fit for purpose? On the other hand, the

plaintiff claims that the term implied by statute of merchantable quality in the supply of the oil product included the purpose for which it was sought and the use for which it would be particularly made and the use to which it would be particularly put in the manufacture of pig feedstuffs.

(7) Was the plaintiff guilty of contributory negligence? Here, an allegation has been made by the defendants that the manufacturing process of drying and compressing, or whatever, was done to make the pig meal was such as to give rise to a high risk of contamination. In other words, they assert that it was not to be expected that material used for combustion or a by-product would ever be combined into a food product. Therefore, the actual process of the plaintiff in the manufacture of swine food is closely under scrutiny.

(8) Was there a relationship of proximity giving rise to liability for negligent advice between the plaintiff and the first defendant? That could, depending on the facts found, also mean the second defendant as his corporate master. Here the issue is whether the first defendant held himself out as an expert not simply in sourcing oils, but in sourcing appropriate oil for the manufacturing process of the plaintiff. In that regard, the plaintiff relies on the events to which I have previously referred to as establishing firstly; a reliance by them on his expertise, secondly, a positive holding out by him of his ability to advise in a specialist way, thirdly, the consequent relationship of proximity leaving them to take his advice and, fourthly, that the damage to the pig food resulted from this.

(9) Should the corporate veil be pierced? The assertion by the plaintiff is that the second defendant was used by the first defendant essentially as an instrument of convenience in circumstances where it would be right to lift

the corporate veil and establish liability against the first defendant personally even if all contracts were with that company and in making representations the company was the actor.

9. I turn therefore to the motions before me.

Inherent Jurisdiction to Dismiss

10. It has been established since *Barry v. Buckley* [1981] I.R. 306 that the High Court is entitled to stay any proceedings against a party, or to remove from pleadings any cause of action against a party, if it is clear that the plaintiff's claim must fail. That jurisdiction is to be exercised only upon the closest scrutiny and in clear cases. It exists in order to avoid injustice. In most of the cases where it has been exercised a clear injustice exists whereby the parties are dragged into contest liability on foot of a written contract, or on the basis of documents that cannot be gainsaid, when the Court could have much earlier decided that there was nothing in the plaintiff's claim.

11. All of this emerges clearly from the judgment of the Supreme Court in *Jodifern Ltd. v. Fitzgerald* [2000] 3 I.R. 321. I wish to briefly refer to a number of the passages in the three judgments. At p.326 of the report, Keane J. made the following general observation:-

> "The principles of law applicable are not in dispute. It could not be seriously contended that the statement of claim itself disclosed no reasonable cause of action or one that was frivolous or vexatious. The case made on behalf of the defendants and accepted by the learned High Court Judge was that the proceedings should be struck out in the exercise of the inherent jurisdiction of the High Court to take that course where it is clear that the plaintiff's claim

must fail. As was pointed out by McCarthy J. in this court in *Sun Fat Chan v Osseous Limited* [1992] 1 I.R. 425, such a jurisdiction undoubtedly exists and is peculiarly appropriate to actions for the enforcement of contracts, since in such cases it may well be that the action may inhibit or preclude the party sued from entering into a new contract in respect of the same subject matter. He also observed, however, that, generally, the High Court should be slow to entertain an application of this nature, since though the facts at first sight may appear clear, a different picture may emerge at the trial. In this case, the defendants say that the correspondence exhibited with the affidavits grounding the application make it clear that the plaintiff's case must fail and that, accordingly, the High Court was correct in striking out the proceedings".

12. The judgment of Baron J. emphasises that it is easier to base the jurisdiction to strike out a claim on written documents than it is on the assertion of conflicting testimony. At p. 332 of the report he said:-

> "Every case depends upon its own facts. For this reason, the nature of the evidence which should be considered upon the hearing of an application to strike out a claim is not really capable of definition.
>
> One thing is clear, disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application. Again, while documentary evidence may well be sufficient for a defendant's purpose, it may well not be if the proper construction of the documentary evidence is disputed. If the plaintiff's claim is based upon allegations of fact which will have to be established at an oral hearing, it is hard to see how such a claim can be treated as being an abuse of

the process of the court. It can only be contested by oral evidence to show that the facts cannot possibly be true. This however would involve trial of that particular factual issue.

Where the plaintiff's claim is based upon a document as in the present case then clearly the document should be before the court upon an application of this nature. If that document clearly does not establish the case being made by the plaintiff then a defendant may well succeed. On the other hand, if it does, it is hard to see how a defendant can dispute this *prima facie* construction of the document without calling evidence and having a trial of that question".

13. Murray J. was perhaps strongest in emphasising caution since, in his view, the dismissal of proceedings on a summary basis deprives a plaintiff of a constitutional right to access the court. At pp. 334 to 335, he stated:-

"The object of such an order is not to protect a defendant from hardship in proceedings to which he or she may have a good defence but to prevent the injustice to a defendant which would result from an abuse of the process of the court by a plaintiff. Clearly, therefore, the hearing of an application by a defendant to the High Court to exercise its inherent jurisdiction to stay or dismiss an action cannot be of a form of summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings.

For this reason, a primary precondition to the exercise of this jurisdiction is that all the essential facts upon which the plaintiff's

claim is based must be unequivocally identified. It is only on the basis of such undisputed facts that the court may proceed.

Moreover, and this is the aspect I wish to emphasise, where all the essential facts have been so identified, it must also be manifest that on the basis of those facts the plaintiff's case has no foundation in law. It seems to me that if on the basis of the undisputed facts there remains a substantial issue or issues of law as to whether the plaintiff is entitled to some or any of the reliefs sought, the proceedings can hardly be said to constitute an abuse of the process of the court. It may indeed be that since the factual basis of the plaintiff's claim has been identified that the legal issues arising are susceptible to judicial determination. For this reason it may be tempting, in the interests of economy of litigation, to do just that. However, to proceed (at least in the absence of agreement between the parties) to make a final determination of such issues in an application to stay or dismiss proceedings for abuse of the process of the court would deprive the plaintiff of the due process of plenary proceedings before the court. It must be borne in mind that such an application is usually if not invariably to be made by the defendant before he or she has filed a defence and always before the action is heard. McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 also pointed out at p. 428 that "Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the

trial itself will disclose a different picture". I fully agree with that observation. Any such change in perception of the circumstances of the case or disclosure of a different picture could well have implications as to the application of the relevant principles of law and how the legal issues are determined.

Certainly, a plaintiff faced with an application to have the proceedings stayed or dismissed in these circumstances is likely to raise, in one form or another, legal issues in response. In a case where there is in effect an abuse of the process of the court, it is quite possible that some at least will be clearly spurious or have no relevance to the facts of the case. Any other legal issues must be clearly discernible as being without merit and readily capable of being resolved in favour of the defendant. It is for the judge hearing the application, within the scope of his discretion, to determine whether any points of law raised can be so clearly and readily resolved in favour of the defendant that to allow the action to proceed would constitute an abuse of the process of the court. Legal issues that are sufficiently substantial as to fall outside that bracket should be left to the trial of that action in those proceedings".

14. While, as I have said, the jurisdiction to dismiss tends to have been centred around cases based upon the interpretation of contracts or documents, it can be the case that an examination of facts contained in affidavits will reveal a plaintiff who, as a matter of fact, lacks any rational prospect of succeeding in an action although what he has pleaded is sustainable in law.

15. A weak or innovative case based upon contested assertions of fact does not fit within the category of a case that should be dismissed unless it can be demonstrated that what the plaintiff asserts is utterly undermined by the known and readily ascertainable circumstances of the claim, usually in written documentary form; *Price and Lynch v. Keenaghan Developments Ltd* [2007] I.E.H.C. 190, (Unreported, High Court, Clark J., 1st May, 2007)).

Motion to Dismiss; Analysis

16. The first defendant claims that his personality is subsumed into that of the corporate entity through which he traded. He claims that even in giving advice that he was the obvious servant of the second named corporate entity. In consequence, he says there is no prospect of the plaintiff succeeding against him and that he should be released from the burden of litigation in defending himself against allegations of tort and negligence.

17. Firstly, I am satisfied that a relationship of proximity giving rise to liability in negligence can occur even within the context of the obvious existence of a corporate entity. In *Shinkwin v. Quin-Con Ltd.* [2001] 1 I.R. 514 the plaintiff was injured in a factory. His employer, the party from whom he received cheques, was the first named defendant, a limited liability company. This defendant was uninsured. The second defendant was the sole shareholder. In addition, however, he controlled the factories. What was to be done, and how it was to be done, were matters he decided. The Supreme Court decided that it was essential to examine the relationship of the parties giving rise to the reasonably foreseeable risk of harm. This determines whether a duty of care existed and the nature and extent of that duty. After all, an employee who negligently injures another employee is personally liable and the employer vicariously for acts performed by the employee as part of their set duties. As to

whether a duty of care arose depends upon an assessment of all the circumstances of the case. At page 518-519 of the report, Fennelly J. stated:-

> "McCarthy J. in *Ward v. McMaster* [1988] I.R. 337 at p. 347 declared his unwillingness to 'dilute the words of Lord Wilberforce ...' . We are here concerned only with the first stage of the two stage test adopted by Lord Wilberforce in the passage from *Anns v. Merton London Borough* [1978] A.C. 728 at p. 751:-
>
> > 'First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the later ...'
>
> The criterion of 'control' which is proposed in this case is not an addition to the test for the existence of proximity. The open textured language of Lord Wilberforce leaves wide scope for argument as to the character of 'proximity or neighbourhood'. Clearly it involves more than a mere test of foreseeability of damage. The assessment of the relevance of control as well as its nature and degree will depend on the circumstances. Ó Dálaigh C.J. in *Purtill v. Athlone U.D.C.* [1968] I.R. 205 at p. 212 noted that 'the defendants' employees were in charge and control of the detonators ...' which caused injury to the plaintiff in that case. In my opinion some assessment of the element of control, in the sense of 'control of the circumstances," mentioned by Gannon J. in *Tulsk Co-operative Livestock Mart Ltd. v. Ulster Bank* (Unreported, High Court, Gannon J., 13th May, 1983), is a useful guide to the decision as to the existence of a duty of care.

A person cannot be held liable for matters which are outside his control. He will not be, as the defendant in *Ward v. McMaster* [1988] I.R. 337 was not, in control of the plaintiff's independent actions and should be responsible in law only for matters which are within his own control.

In my view, the second defendant, on the particular facts of this case, placed himself in a relationship of proximity to the plaintiff. He had personally taken on a young and untrained person to work in a factory managed by him and personally put him to work upon a potentially dangerous machine over which he exercised control to the extent of giving some though completely inadequate instructions to the workers. He was bound to take appropriate steps to warn the plaintiff of such obvious dangers as failing to stop the circular saw from revolving while adjusting the jig or to ensure that it was guarded. In his supervision and instruction of the plaintiff, he failed to do these things and was consequently negligent."

18. Liability for negligent advice can also arise personally, as well as in respect of advice from a corporate entity. In *Forshall v. Walsh* [1997] I.E.H.C. 100, (Unreported, Shanley J., 18th June, 1997) Shanley J. usefully summarised how liability for negligent misstatement arises in law. At para. 129, he first referred to liability for fraud, which is not pleaded here, and then considered the tort of negligence by misrepresentation. The plaintiff had bought several expensive motorcars, which never materialised, relying on representations from people that the company selling this product to her had both the necessary franchise relationship with the manufacturer and also had the financial ability to procure delivery. Some guidance

may also be had from this decision as to the status of an individual who worked for a company but was not subsumed in corporate liability. I quote:

"129. Where fraudulent misrepresentation is alleged it must be established that the representation (as defined above) was intended to and did induce the agreement in respect of which the claim for damages arises.

(a) A plaintiff seeking to establish the commission of the tort of fraud or deceit must prove –

(i) the making of a representation as to a past or existing fact by the defendant;

(ii) that the representation was made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false;

(iii) that it was intended by the defendant that the representation should be acted upon by the plaintiff;

(iv) that the plaintiff did act on foot of the representation; and

(v) suffered damages as a result.

(b) A party seeking damages for negligent misrepresentation must establish that the representor failed to exercise due care in making the representation as a result of which representation the person to whom it was made was induced to enter into the particular agreement and suffered damage in consequence of the inaccurate representation. Closely aligned to the claim of negligent misrepresentation is the wider tort of negligent misstatement. In relation to negligent misstatement, the first matter a plaintiff must

establish is that the defendant owed him a duty of care. In *Ward v. McMaster* [1989] I.L.R.M. 400, McCarthy J. considered that the duty of care arose from the proximity of the parties, the foreseeability of the damage and the absence of any compelling exemption based upon public policy. And in *Caparo Industries plc. v. Dickman* [1990] B.C.L.C. 273, Lord Bridge, in his speech in the House of Lords, said at page 280:

> 'What emerges is that in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care, are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.'

130. He observed in relation to decided cases in which a duty of care in respect of negligent misstatement had been held to exist, that the limit on the liability of a wrongdoer towards those who had suffered economic damage:

> ' ... rested on the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the proximity between the plaintiff and the defendant that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically

in connection with a particular transaction or transactions of a particular kind (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter on that transaction or on a transaction of that kind.'

(b) Finally, it should be noted that while an employer can be made vicariously liable for the torts of his employee, such liability can only be imposed for the negligence of an employee where the negligence is committed in the course of his employment and the employer is not liable for negligence committed outside the scope of his employment.

131. There was clearly a most exceptional relationship between Michael McSweeney and Amanda Forshall. It started with the fact that she was doing business with a customer of the bank. It was compounded by the fact that the managing director of the customer of the bank was a brother of Michael McSweeney. That the relationship was exceptional is illustrated, first by the number of unsolicited phone calls made by Michael McSweeney to Amanda Forshall and, that, when in trouble, Mrs. Forshall phoned Michael McSweeney, not just at his office, but at his home, using a number which he himself had given to her.

132. Whether one adopts the test propounded by McCarthy J. in *Ward v. McMaster*, supra, or the test of Lord Bridge in *Caparo*, supra, all the necessary ingredients which might give rise to a duty of care exist in relation the bank and Mrs. Forshall: there was a relationship which can undoubtedly be characterised as one of 'proximity' or

> 'neighbourhood', a relationship of such a nature that the bank, in the person of Michael McSweeney, was aware that statements he might make would most likely be relied upon by Mrs. Forshall and that carelessness in making such statements might cause her damage. There can be no doubt in my mind that in such circumstances it is fair just and reasonable that the law should impose a duty of care on the bank in relation to the representations it made to Mrs. Forshall."

19. Secondly, I am not convinced that the argument is clearly correct that the first defendant is no longer contractual liable to the plaintiff and so has disappeared from a contractual liability as regards his relationship to the plaintiff. At each stage in these proceedings allegations occur that seem to be personally directed against the first defendant. Whether these are credible can only be judged at trial. The plaintiff claims a continuing relationship of contract between a related company and the defendants from October 2006. The defendants claim that each supply of oil was an independent contract. In giving advice whereby O'Neill's Fuels Ltd. may have been introduced into the relationship, allegations are directed against the first defendant. In giving advice as to the appropriate fuel to be used as and from April 2008, when the allegedly defective oil came to be first used by the plaintiff, again allegations are made against the first defendant. In later apparently attempting to assist the plaintiff in issues that arose whereby that fuel was alleged not to be burning properly, again it is claimed the first named defendant attended at the plaintiff's premises and allegations are directed against him personally. I do not know how the evidence as to all of this will come out at trial, much less be decided upon by the trial judge.

20. The first named defendant has made a number of statements to the Gardaí. These include the following:-

"In about March 2008 waste cooking oil got very expensive because biofuel on the continent got very dear, it has since come down. Robert Hogg asked me if I knew any other source of cheap material for running boilers. I was talking to a long time friend of mine, Joe Finnucane, and work colleagues and he told me about O'Neill's Coals based in Armagh and in the U.K. Joe Finnucane made me aware that O'Neill's Coals were involved in the business of making biofuel on a much smaller scale and that a by-product of this process was ester oil. Ester oil is vegetable based. When you manufacture biofuels you use soya oil, rape oil, used cooking oil, tallow (that's animal grease), basically any oils other than fossil oils. ... Between myself and Joe Finnucane we put Fergus O'Neill of O'Neill's Coals in contact with Robert Hogg. Fergus O'Neill and Robert Hogg entered into a business arrangement, more correctly the arrangement was between the two companies O'Neill's Coals and Millstream Power. ..."

21. In another statement Mr. Tierney referred to previous statements that he had made to the gardaí and then went on:-

"I want to say that during the statement when I referred to myself personally, I was really acting as a director of the company Newtown Lodge and the references to myself in the statement should be read accordingly .... Newtown Lodge Limited ... was established about four or five years ago to hold a number of small family investments and it was used as a trading link for the used cooking oil pending the establishment of the bio-diesel plant. It does nothing now .... The reason we used Newtown Lodge as a vehicle was because it was an existing trading company with VAT registration and also

O'Neill's payments arrangements would not have fitted in with my experience of Hogg. My experiences were that he was a slow payer. In effect Newtown Lodge was acting as a banker to the arrangement. Initially the contacts between O'Neill's and Hogg were through me for a few weeks. Then Joe Finnucane came into the picture and all the logistical arrangements were made through him and in effect O'Neill's and Millstream were dealing with each other directly. As far as I know Robert Hogg and Fergus O'Neill were in direct communication and communication through Joe Finnucane all the time and O'Neill made a number of visits to the plant. At this stage I was virtually withdrawn from the picture because I was involved in the bio-diesel plant in Wexford but Newtown Lodge still maintained the banking and invoicing procedures. Really the company was only a letterbox to facilitate the arrangement between Hogg and O'Neill."

22. In addition to that, a question has arisen as to the VAT registration of the second defendant Newtown Lodge Ltd. I note that the invoices in respect of the supply of fuel to the plaintiff were headed in such a way as to identify the corporate personality and limited liability status of the second named defendant. The rate of VAT charged on supplies was, however, 0%. It is claimed in affidavits that this was, or was believed to be, a VAT exempt supply. I have no view on this beyond that the matter of inference from whatever is to be decided is not now clear. This is an issue peculiarly to be decided at the trial.

23. Then, it is argued forcibly by the first named defendant that the plaintiff, through Richard Hogg, was very well aware of the benefits of incorporation. He might be regarded, it is asserted, as something of an expert, if not in company law,

then at least in the principles of limited liability and separate legal personality acquired through the assumption of corporate personality. It is true that there were many companies associated with Richard Hogg. He might well be the very kind of person who, in the circumstances, would conclude that he was contracting with a limited liability company as opposed to with Mr. Tierney. A written contract would perhaps, as in some of the decided cases, put this beyond peradventure. Here, however, that is merely one of the facts to be looked at in the context of the entire factual matrix relevant to this issue. The applicant has also laid great stress upon the reports from Manus Coffey Ltd., apparently prepared by the plaintiff's insurance company FBD, in an attempt to adjust the huge losses involved in this case. What is said by Dr. Hayes in that report are a series of hearsay assertions the likely source of which is Richard Hogg. I cannot, however, act on them as of this time. In looking carefully through them I notice, again, a recitation of the alleged involvement of Mr. Tierney in some of the crucial events related to the choice of oil and, more latterly, the decision to proceed notwithstanding apparent issues in the process. Perhaps these allegations are unfair, but I can have no view beyond noting that they are made.

24. Apart from that, I must look to the issue of what Newtown Lodge Ltd. in fact is. I reassert that I am not judging the facts in this case. I notice on reading the second named defendant company's bank statements that these are addressed to one of two individuals with the surname Tierney at a particular address in Dublin. I notice, in addition, that the bank balance from January 2005 was apparently healthy, at one stage rising to €283,000. I notice as well that €100,000 was withdrawn from that bank account after 7th December, 2008. There may very well be a legitimate reason for this, but the fact is that the balance was then reduced to around €3,000.

25. Lastly, the issue of dissolving the corporate veil cannot be said in this case to be so far fetched that it should now be dismissed. In Keane *Company Law in the Republic of Ireland* 3rd Ed., (Dublin, 2000) the confusing decisions on the removal of separate legal personality from the company in favour of establishing liability against its controllers are reduced to five separate propositions. The high degree of scholarship shown by Keane in the various editions of this work require, at the very least, the deference of acknowledgment of the point based on the law as set out by him being arguable at this stage in the proceedings. He extracted these principles at pp. 139-140 at para. 11.64 from a myriad of case law on piercing the corporate veil as follows:-

> "(1) The rule in *Salomon's* case is still the law. The company and its shareholders are separate legal entities and the courts normally cannot infer from the degree of control exercised by the shareholder a relationship of principal and agent or beneficiary and trustee between the shareholders and the company.
>
> (2) The courts, however, will not permit the statutory privilege of incorporation to be used for a fraudulent, illegal or improper purpose. Where it is so misused, the court may treat the company thus incorporated as identical with its promoters.
>
> (3) In certain cases, where no actual misuse of the privilege of incorporation is involved, the courts may nonetheless infer the existence of an agency or a trust if to do otherwise would lead to injustice or facilitate the avoidance of tax liability.
>
> (4) In the case of a group of companies, the court may sometimes treat the group as one entity, particularly where to do otherwise would

have unjust consequences for outsiders dealing with companies in the group.

(5) The rule in *Salomon's* case does not prevent the court from looking at the individual members of the company in order to determine its *character* and *status* and where it legally resides."

26. Here, the plaintiff points to a number of factors. They claim that there was an illegal importation of oil at the direction of the defendant. I do not know whether this is true or not. I do not know whether that oil contained toxins which were banned. The assertion is made, however, not baldly but in the light of the experience that led to the national scandal in December 2008. The plaintiff says that the VAT status of the company is questionable. In contrast to the defendants, the plaintiff claims that vatable transactions were being effected. As to whether both parties joined to evade VAT, or whether VAT was not properly chargeable, or whether the second defendant company was exempt from VAT because of low turnover, I do not know. This, however, is part of the factual issues in the case. As well as that, the plaintiff claims that the second defendant was not in reality a trading company. They rely on the statements made by Mr. Tierney to the gardaí. If it was not a trading company, they ask, what was it doing? They say that there must be an onus on the second defendant, and on the first defendant, if he is to escape liability, to establish that the company was indeed a properly incorporated entity, with genuine accounts, complying with the law and engaged in the business of supplying oil. Finally, they point to the company's accounts and aspects of concern they raise with regard thereto. In particular, and on a more understandable level, from the point of view of the court without affidavit evidence, they refer to the diminishing balance and the situation in the account as of the end of December, 2008.

27. Whether there is enough there to pierce the veil of corporate identity, I do not know. It is, however, arguable in a real way.

On the entirety of the issues traversed, I cannot, on the basis of the material before me, come to a conclusion on the relevant issues in this case which would enable me to even decide where the balance of the strengths of the case lay at this point, much less dismiss it.

Security For Costs

28. Each defendant seeks security for the costs of defending the case brought against it by the corporate plaintiff. Section 390 of the Companies Act 1963 provides:-

> "Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

29. Since *Peppard v. Bogoff* [1962] I.R. 180 it has been clear that it is not mandatory for a court to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant. A discretion is vested in the court which may be exercised against the plaintiff in special circumstances. In that case the allegation made by the plaintiff was that the defendants had, in effect, ruined its business. This was identified as a special circumstance enabling the court to exercise a discretion along with the fact that a joint

plaintiff, not a corporate entity, remained within the jurisdiction and available, in the ordinary way, to satisfy an order for costs should the defendant be successful. At page 187 of the report Kingsmill Moore J. put the matter in this way:-

> "Substantially the allegation is one of a conspiracy between the defendants to transfer the business of the plaintiff company to the two defendants, Reynolds and Peppard. If this be the case – an on an application for security for costs a Court cannot try the merits – to order security would be to allow the defendants to defeat an action by reason of an impecuniosity which they have themselves wrongfully and deliberately procured, a result which a court would strive to avoid."

30. One matter in respect of which any discretion does not exist, however, is in relation to the costs, should the court order security. I have been told that this is potentially a six week case in respect of which costs will tax to include one junior and two senior counsels. I do not see why that should be so. The case seems to me to be straightforward. The fact that scientific evidence is involved is neither here nor there. In virtually every criminal case counsel, if diligent, will research forensic investigative techniques and in every murder case forensic pathology is commonplace as is the psychology of interrogation in confession cases. Further, each of the defendants have claimed, by bald assertion, an amount of €750,000, or €1.5 million in total, a security for costs in order to engage with this litigation as between two very challenged companies and one private individual. The plaintiff, on the other hand, has set aside a sum short of €200,000 for the prosecution of the claims. This seems to me to be a much more realistic, though very substantial, sum. It more accords with the exercise of access to the courts as a right under the Constitution. Further, in

litigation parties may have to cut their cloth to suit their measure. Nonetheless, were the larger amount proven, and it is not, that is the security I would have to order. In *Thalle v. Soares* and Others [1957] I.R. 182, Kingsmill Moore J., at page 192, indicated that the wording of the statute had laid down reasonably precise instructions as to the measure of security to be provided. In *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd. (No. 3)* [2001] 3 I.R. 536 the Supreme Court confirmed that whereas the court could make a finding as to the appropriate amount, security for costs meant the sum that was needed by the defendants, I would add reasonably, as a measure of legal costs to defend the claim. At p. 546 Murphy J. said:-

> "The word 'sufficient' in its plain meaning, signifies adequate or enough and it is directly related in the section to the defendant's costs. The section does not provide for – as it might have – a sufficient sum 'to meet the justice of the case' or some such phrase as would give a general discretion to the court. Harsh though it may be, I am convinced that 'sufficient security' involves making a reasonable estimate or assessment of the actual costs which it is anticipated that the defendant will have to meet."

31. The legal principles which I am required to apply with regard to the issue as to whether security for costs ought to be ordered in favour of either defendant are set out fully by Clarke J. in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.*[2009] IEHC 7, (Unreported, High Court, Clark J., 16th January, 2009); . Since I cannot either improve or usefully comment on the summary of the law therein contained, I now quote it in full:-

> "2.1 In *Usk and District Residents Association Limited v. The Environmental Protection Agency* (Unreported, Supreme Court, Clarke

J., 13th January, 2006,) the Supreme Court approved what was described as a helpful summary of the law by Morris P. in *Interfinance Group Limited v. K.P.M.G. Pete Marwick* (Unreported, High Court, Morris P., 29th June, 1998,). As adapted by the Supreme Court in *Usk* the test set out by Morris P. in *Interfinance* is in the following terms:-

'(1) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:

(a) that he has a *prima facie* defence to the plaintiff's claim, and

(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.

(2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case with ought to cause the court to exercise its discretion not the make the order sought.

In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.

The list of special circumstances referred to is not of course, exhaustive.'

2.2 Neither counsel disagreed that the principles are correctly summarised in the passage which I have just cited. It should also be noted that counsel for Connaughton Road helpfully and properly accepted that the evidence before the court established both of the matters set out at paras. (1)(a) and (1)(b) above. Thus, the two matters which Laing O'Rourke were required to establish are accepted as having been so established.

2.3 It follows that security ought to be required unless Connaughton Road can show that there are special circumstances which ought to cause the court to exercise its discretion not to make the orders sought. The special circumstances asserted in this case are, perhaps, the most common category of such circumstances where it is asserted that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the moving party. It is common case, and clear from the authorities, that the onus of establishing that fact rests on Connaughton Road. It is also common case, and clear from the authorities (see for example the comments of Finlay C.J. in *Jack O'Toole Ltd v. McEoin Kelly Associates* [1986] I.R. 277 at pp 284 and 285) that the obligation of Connaughton Road, in those circumstances, is to establish a *prima facie* case to the effect that its inability to pay the costs of the defendant, in the event that the defendant were successful, stems from the wrongdoing alleged in these proceedings. I will shortly turn to an assessment of that issue on the evidence. However, two questions concerning the precise way in which that test ought be applied did arise

for debate in the course of the hearing before me. The issues raised do not go to the underlying principles which must now be taken to be well settled. Those issues do, however, concern the precise way in which a court should approach an application where there is a significant contest between the parties as to whether the type of special circumstances asserted in this case have been shown to exist to the necessary *prima facie* level. Before going on to the application of the relevant principles to the evidence in this case I should, therefore, briefly touch on certain aspects of what might be called the "inability due to wrongdoing" special circumstance to which I now turn.

3.1 As I have already noted, there is ample authority for the proposition that the court retains a discretion not to order security for costs where the plaintiff concerned can establish, on a *prima facie* basis, that his inability to pay the costs of the defendant concerned (in the event that the defendant might succeed) is due to the wrongdoing which he asserts in the proceedings. It has, of course, been pointed out that there is a certain superficial illogicality about the court considering such an eventuality. The defendant would only become entitled to its costs if it wins. By definition if it wins then the plaintiff's inability to pay costs cannot have been due to any wrongdoing on the part of the defendant, because the court will have found either that there was no such wrongdoing or no losses (or indeed both).

3.2 On the other hand the court is faced with being unable, at the stage at which the application must necessarily be brought for it to have any practical effect, to reach a view as to which party is going to

win. It must, therefore, take the rather superficially illogical step of assuming, for the purposes of the defendant recovering costs, that the defendant will win, but also assuming, for the purposes of determining whether any inability to pay those costs is attributable to the wrongdoing asserted, that the plaintiff will win.

3.3 I am mindful of the fact that all of the authorities make clear that the court's assessment must be conducted on a *prima facie* basis. As was pointed out in *Irish Conservation and Cleaning Ltd v. International Cleaners Ltd* (Unreported, Supreme Court, Keane C.J., 19th July, 2001) to do otherwise would be to invite the court, on a preliminary motion, to decide the case. Everything which I say hereafter should, therefore, be subject to the qualification that I am referring, even if not expressly stated, to the various necessary matters being established on a *prima facie* basis.

3.4 In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-

(1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);

(2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;

(3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which

loss is recoverable as a matter of law (for example by not being too remote); and

(4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."

Decision on security for costs

32. Applying these principles I am satisfied that it is impossible at this stage to adjudge between the strength of the contentions of the plaintiff and the defendant. However, the defendant has raised a defence to the plaintiff's claim and it can be characterised as being potentially sufficient. The position of the plaintiff is that it continues to trade and to hope that the scheme of arrangement under s. 201 of the Companies Act will be both voted in favour of by the creditors and approved by Laffoy J. in July of this year. The sum of money which the plaintiff company insured itself for would, under normal circumstances, have been ample at €6.5 million. In the light of this catastrophe, however, it is very far from adequate. Any of the pig meal consumers who purchased from the plaintiff could mount an action in negligence outside any scheme of arrangement. The defence to that might well be that the oil supply was bought from a reputable supplier, namely the defendants. An action could also be brought in contract that the goods sold were not of merchantable quality. It is hard to see what the defence to that might be, apart from the defendant proving an understanding as to a different purpose to the assertion of the plaintiff. Under section 62 of the Civil Liability Act 1961 the insurance monies have been ring-fenced as

applicable only to discharging the claims payable against the insured in respect of which the insurance was effected. No part of the monies is, in reality, an asset of the plaintiff. The plaintiff company continues to trade. As I have mentioned, its number of employees has decreased from sixteen to six and its reputation has been seriously undermined.

33. Delay is not an issue in this case as a special circumstance enabling me to refuse to award security for costs in favour of other defendants. Nor does a point of law arise which, as put by Morris P. in *Lanceforth v. An Bord Pleanála* [1998] 2 I.R. 511 at p.516 is of "such gravity and importance that it transcends the interest and consideration of the parties actually before the court". Nor is there an additional plaintiff who can be made liable for security for costs in the ordinary way. Since the discretion of the court on a motion for security for costs is delineated by existing caselaw, it is important to note that the categories are not closed in respect of which a special reason for not ordering security as against a company likely to be unable to pay costs where the defendant has shown a real prospect of a defence.

34. There are two other factors relevant as special circumstances. The statements made by the plaintiff as to the cause of the situation it now faces goes far beyond "a mere bald statement of fact that the insolvency of the company has been caused by the wrong the subject-matter of the claim"; see *Jack O'Toole Ltd. v. MacEoin Kelly Associates* [1986] I.R. 277 at p.284 per Finlay C.J. This company traded successfully up to the point where a change of oil, for whatever reason, was, it was claimed, advised by the defendants, or one or other of them. Prior to these events, no issue would have arisen but that the pig meal produced by the plaintiff was of good quality. It had been traded successfully over many years. In contrast, any allegation made by the defendant of contributory negligence is, at this point, unsubstantiated. Similarly, it

is difficult to act on the assertion that the plaintiff was in reality trading with O'Neill's Fuels or that their oil supplies came from unidentified suppliers. On the issue of contributory negligence, or total negligence, the defendants may say that we need time and scientific expertise to establish that the plaintiffs were substantially to blame in respect of the wrong complained of. In other words, their claim that the plaintiff company contaminated its own pig meal amounts to an assertion, and assertions are very often made in the preliminary stages of a case. There is nothing to suggest an alternative defence whereby oil was sourced by the plaintiffs from a supplier other than the defendants and that oil was the cause of the contamination. This amounts, again, to a mere bald assertion. It is unlikely on the current state of the papers that the assertion that the true contracting party with the plaintiff was O'Neill's Fuel will be made out.

35. Without judging, in any way, the fact of this case, there is a strong argument being made out by the plaintiff that there was an actionable wrong on the part of the defendants both in contract and in tort and that there is a causal connection between that actionable wrongdoing and the practical consequence whereby the plaintiff is now meeting these claims giving rise to a huge level of loss and which has now put the plaintiff into the position where its inability to meet the costs of the defendant is due to that cause alone.

36. There is a further reason. A point of law of exceptional public importance such as that identified by Morris P. in *Lanceforth v. An Bord Pleanála* [1998] 2 I.R. 511 may be sufficient to transcend the interests of the parties before the court. Here the court is concerned with issues of fact of exceptional public importance. Those issues of fact are set out in the early paragraphs of this judgment. They concern the public blaming of the plaintiff for a contamination of food scandal that rocked an important

sector of the Irish economy, the agri-food industry. The plaintiff has a case to make that they were not responsible for this, but that they acted as they had always done and had it not been for the oil supplied by the defendants that their pig food products would have continued to enjoy the high reputation for quality that they assert was their entitlement. I would find it impossible, where they have made out a case that the ruination of their business and reputation was caused by the defendant to make an order that undermines or removes their right to litigate. The courts are a public forum and it is there that issues of public interest should be resolved. These issues go far beyond the claims and counterclaims of the parties. The principle enunciated by Morris P. as to exceptionally important points of law being of vital public interest is clearly applicable to the resoloution of whatever happened to bring about this scandal. It is clear to me that the determination of the facts behind the scandal transcends the individual claims and counterclaims of the parties. It means that this litigation must proceed.

37. Either of the reasons that I have stated would be sufficient and are each on their own, in my mind, sufficient to refuse to order security for costs.

Third Party Discovery

38. The plaintiff claims a discovery against the Garda Commissioner. It is claimed that there are bound to be documents which are of high assistance in the pursuit of their civil claim which have resulted from the Garda Commissioner's investigation. Two categories, in particular, are sought. Firstly, the forensic and testing results of the composition of oil by each relevant location. The relevant locations are clearly testings from the oil used by the plaintiff, the oils supplied, it is alleged, by the first and second named defendants, or from Northern Ireland through

O'Neill's Fuels, and, it is alleged, oil imported into Wexford which was supposed to be incinerated in Northern Ireland. Then, secondly, the plaintiff seeks a statement as to the source of the oil. As will be apparent from what has gone before, the oil is supposed to have come to the plaintiff from the defendant. They are supposed to have got it from O'Neill's Fuels Limited. There is also an allegation that O'Neill's Fuels Limited and the defendants entered into an arrangement, the legality of which is attacked, whereby useful oil that was destined for incineration, was imported from the neighbouring United Kingdom through Wexford and brought up to Northern Ireland. It is speculated that some of this oil may have been the oil ultimately supplied from O'Neill's through the first and second named defendants, pursuant to contract or on their advice, ultimately used in the pig meal manufacturing process of the plaintiffs, and then consumed by swine all over the country.

39. It is established by *Breathnach v. Ireland and The Attorney General,* [1993] 2 I.R. 458 that discovery can be made in civil proceedings as to a prior criminal investigation. That was a case, however, where the plaintiff had been prosecuted many years before for robbing a mail train and had been convicted. He claimed his custody was tainted illegality and an alleged confession statement was fabricated. All of this history was of high interest to the parties, when the claim for civil discovery was pursued. It is also beyond that documents consisting of notes, or statements, from informers can never be discovered. To list them, under the heading of a schedule of informer privilege, even without any name would be to invite severe menace by reason of the possibility of investigation. If a serious issue were to arise then the appropriate procedure would be to ask the judge to privately inspect the documents in the presence of a high ranking Garda officer under the strictest security. These principles are well established in consequence of the judgment of Carney J. in

the High Court and of the Supreme Court in *Ward v. Special Criminal Court* [1999] 1 I.R. 60. In any event I have no potential reason to either believe that are informer statements in this case relevant to the issues, or to doubt that they are in truth informer statements; the only issue upon which a judge can ever been called to adjudicate.

40. In addition to that the Gardaí will be in possession of certain information from Northern Ireland. Under s. 62 of the Criminal Justice (Mutual Assistance Act) 2008 a judge may seek the assistance of another nation in obtaining evidence. Among the procedures are the taking of evidence in a foreign state on oath, and its transcription or video recording, or perhaps a video conferencing. However, that procedure is solely available for the purpose of criminal proceedings. Section 62(6) provides:-

> "Evidence obtained by virtue of this section shall not, without the consent of the appropriate authority, be used for any purpose other than that permitted by the relevant international instrument or specified in the letter of request".

41. It is clear, therefore, that any such material is not discoverable without such permission in a civil case. There can be circumstances where, to protect the legitimate interests of parties, redactions can be made; *Cooper Flynn v. R.T.E.,* [2000] 3 I.R. 344. That, however, does not arise here because I am not persuaded that the criminal investigation file in an active investigation is now discoverable. In *McDonald v. R.T.E.* [2001] IESC 6 (Unreported, Supreme Court, 25th January, 2001) the plaintiff was alleged to have been a member of a terrorist gang. Words spoken over the television about a murder in 1991 referred to an arrest of the plaintiff on suspicion of membership of such an organisation two years previously. The plaintiff sued for libel. An issue arose as to whether the plaintiff had been identified and whether defamation had occurred. A notice of motion similar to this one for non

party discovery, was brought against the Garda Commissioner in order to obtain to access to the relevant investigation files.

42. McGuinness J. first of all set out the arguments of the Garda Commissioner against discovery. These included the following at pp. 16-17 of the judgment:-

> "In this case, in *Brannock v. Ireland,* No. 3 1993 2 I.R. 458. The document sought to be discovered related exclusively to criminal proceedings. In *Brannock* the criminal proceedings were at an end before the civil proceedings came into being. In the present case while the plaintiff's proceedings are civil in nature the Oliver file deals with an active and criminal investigation which is aimed at bringing the murderer of Thomas Oliver to justice. To make such documents discoverable, particularly in the situation where certain persons had given information to the Gardaí on an assurance of confidentiality, would create an almost impossible situation in the investigation of crime."

43. McGuinness J. then went to hold that such documents had been inspected by the court were irrelevant. She then held at p. 27:-

> "In addition the file has been assembled in connection with the investigation of criminal offence of abduction and murder which on the evidence before the court is a live investigation. I would accept the submission of counsel for the notice parties that in such a situation it might be of interest to various persons to discover not only what was on the file but was not on the file. It seems to me that in principle it would be injurious to the public interest to bring some of the relevant documents in to the public arena through the means of discovery. There are, however, a number of documents on the file which clearly ought to be produced to the plaintiff. I note that the numbering in the file is handed into this court seems to differ in some way from the numbering

which was given to the learned High Court judge... The remainder of the documents on this file should not be produced".

44. It seems to me to be clear that the Garda Commissioner should not be asked to hand over any statements taken from persons either in Northern Ireland or in this jurisdiction as to the source of the oil or any other matter. Doubtless, interrogations will be planned and the dissemination of the information could undermine the relevant inquiries. However, the forensic results as to the nature of what was found at each relevant site, be it Wexford, the plaintiff's premises, the defendants' premises, and the analysis of relevant pig meal and pig meat samples, are neutral facts. The inspection of these is not such as to in any way hinder the Garda investigation. These should be disclosed with, the exception of those obtained under the Criminal Justice (Mutual Assistance) Act 2008. In addition it is beyond argument that nothing in relation to informers can be disclosed, nor even the existence of such information. If a real issue arises on that in the future, the trial judge can be asked to adjudicate in the manner indicated.

Approved 9 March 2010

Tim Charleton