APPROVED **[2023] IEHC 47**

THE HIGH COURT

2019 No. 6358 P

BETWEEN

KARL BROPHY
GAVIN O'REILLY

PLAINTIFFS

AND

MEDIAHUIS IRELAND GROUP LIMITED
LESLIE BUCKLEY

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 February 2023

INTRODUCTION

1. This supplemental judgment addresses the allocation of legal costs consequent upon an earlier judgment directing the defendants to make discovery of documents: *Brophy v. Mediahuis Ireland Group Ltd* [2022] IEHC 660 ("*the principal judgment*").

PROCEDURAL HISTORY

2. The plaintiffs have brought these proceedings seeking damages in respect of what is described in the principal judgment as a "*data interrogation*" exercise

alleged to have been carried out by the first named defendant at the direction of the second named defendant. The "*data interrogation*" exercise is said to have involved the examination of computer data (including emails) held by the first named defendant. The plaintiffs plead that the carrying out of this exercise entailed a breach of their right to privacy and of their rights under the data protection legislation; a breach of their constitutional rights; and a conspiracy to damage their interests.

3. The "*data interrogation*" issue is one of a number of issues currently being investigated by two inspectors appointed by the High Court pursuant to Part 13 of the Companies Act 2014.

4. The plaintiffs had sought the discovery of documents in support of their claim. Following an exchange of correspondence, the parties had, to their credit, been able to agree almost all of the terms of the proposed discovery. The parties were unable, however, to reach agreement upon the following two points and it became necessary to bring an application before the court for adjudication.

5. The first point of disagreement related to public interest privilege. The defendants both raised a concern that documents held by them in respect of the ongoing statutory investigation into the affairs of Mediahuis Ireland Group Ltd might attract public interest privilege. The area of disagreement included a dispute as to the *procedure* to be followed: the plaintiffs contended that any consideration of privilege was premature until such time as an affidavit of discovery had been filed identifying the documents in respect of which privilege was being asserted.

6. This first point of disagreement was resolved in favour of the plaintiffs. The court, in the principal judgment, held that it would not be possible to adjudicate

on a claim of privilege in the abstract, without having the benefit of a description of the documents involved and that it would be premature for the court to rule upon the claim of public interest privilege. The defendants were each directed to file an affidavit of discovery describing the documents in respect of which privilege is being claimed and explaining the basis of the claim. This was subject to the following caveat. In the event that particular documents cannot be described in the affidavit of discovery without undermining a claim of privilege, then the relevant party is directed to preserve the disputed documents, and to provide a list setting out a description of those documents directly to the court.

7. The second point of disagreement related to whether a temporal limit should be imposed on the discovery which the second named defendant should be required to make. The position maintained on behalf of the second named defendant in correspondence had been that a cut-off date of 30 April 2016 should apply to the categories of discovery. At the hearing, counsel submitted that this cut-off date might be extended to August 2017. For the reasons set out in the principal judgment, it was held that a cut-off date of 25 March 2020 should be imposed in respect of all categories of discovery, save in respect of documents related to the ongoing inspectorate process.

SUBMISSIONS ON LEGAL COSTS

8. The parties made submissions on the allocation of legal costs at a short hearing on 30 January 2023. The plaintiffs submitted that they are entitled to the costs of the application for discovery in circumstances where, first, they succeeded in their argument that the assertion of privilege was premature, and, secondly, the

temporal limit on the discovery to be made by the second named defendant was some four years longer than that sought on his behalf.

9. In response, the first named defendant submitted that the costs should be made costs in the cause. Counsel submitted that, having regard to the duty of confidentiality imposed by the inspectors, this is not a case where the first named defendant could have safely agreed to make discovery voluntarily. An application to court would have been necessary in any event. While conceding that the plaintiffs had succeeded on the major legal argument, counsel emphasised that the principal judgment had addressed the concern that the mere act of describing a document in the affidavit of discovery might undermine any subsequent claim for privilege. It was submitted that the protocol prescribed by the court in the principal judgment would not have automatically arisen and thus the hearing was of some benefit.

10. Counsel on behalf of the second named defendant submitted that the costs should be reserved. Counsel emphasised that his side's oral submissions at the hearing of the motion for discovery were confined to the issue of the temporal limit. The second named defendant had, in the correspondence prior to the motion, indicated consent to the proposed discovery during all of the periods during which the cause of action occurred. Whereas the period over which discovery has been ordered spans an additional four years, it remains to be seen whether this brings anything new in terms of discoverable documents.

DISCUSSION AND DECISION

11. The principles governing the allocation of legal costs in the context of an interlocutory application, such as an application for the discovery of documents,

are prescribed by Sections 168 and 169 of the Legal Services Regulation Act 2015 and the recast Order 99 of the Rules of the Superior Courts. The combined effect of these provisions has been summarised as follows by the High Court (Murray J.) in *Daly v. Ardstone Capital Ltd* [2020] IEHC 345 (at paragraph 15):

> "(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99 R.2(1)).
>
> (b) The Court should, unless it cannot justly do so, make an order for costs upon the disposition of an interlocutory application (O.99 Rule 2(3)).
>
> (c) In so doing, it should '*have regard to*' the provisions of s.169(1) (O.99 Rule 3(1)).
>
> (d) Therefore – at least in a case where the party seeking costs has been '*entirely successful*' – it should lean towards ordering costs to follow the event (s.169(1)).
>
> (e) In determining whether to order that costs follow the event the Court should have regard to the non-exhaustive list of matters specified in s.169(1)(a)-(g) (O. 99 R.3(1)).
>
> (f) Those matters include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b))."

12. The central issue for determination on the application for discovery had been whether documents relating to the inspectorate process attract public interest privilege. There were two aspects to the dispute between the parties. The first involved a point of procedure, namely whether it was premature for the defendants to assert privilege in advance of their filing an affidavit of discovery which identified the documents in respect of which privilege was said to arise. The second involved a point of principle, namely whether documents relating to a statutory investigation under Part 13 of the Companies Act 2014 were capable of attracting public interest privilege. The first point was resolved in favour of

the plaintiffs. This had the logical consequence that any decision on the second point had to be deferred pending the filing of an affidavit of discovery.

13. Strictly speaking, therefore, the court has yet to make a final ruling on the asserted public interest privilege. It is possible that this point of principle might ultimately be resolved against the plaintiffs, and the defendants might be entitled to withhold the production of certain documents identified in the affidavits of discovery to be filed. Put otherwise, the plaintiffs have won the battle but not necessarily the war.

14. For the purpose of allocating costs, however, the crucial factor is that the plaintiffs were entirely successful in the procedural point raised. The plaintiffs had insisted from the very outset that the assertion of privilege was premature. The plaintiffs' objection was grounded in a long line of case law (discussed at paragraphs 33 to 42 of the principal judgment). Having regard to this case law, the conduct of the defendants in seeking an adjudication on the claim of public interest privilege, in advance of their filing affidavits of discovery, was not "*reasonable*" (in the broad sense that that term bears in the context of the allocation of costs). The consequence of the defendants having raised this issue is that the hearing of the motion for discovery was prolonged: the hearing took two days. Had the defendants adopted a more reasonable approach, then the motion could have been dealt with shortly. The defendants could, for example, have agreed to make discovery but sought directions from the court as to how to schedule documents in such a way as to avoid undermining the subsequent assertion of privilege.

15. The plaintiffs are, therefore, entitled to recover the costs of the motions for discovery as against the defendants. In this connection, no meaningful

distinction can be drawn between the respective positions of the two defendants. Whereas it is correct to say that counsel on behalf of the second named defendant did not press the privilege issue in oral submission, the stance adopted in the written legal submissions was different. It had been asserted therein that there is a "*public interest element in denying the disclosure of documents*" which pertain to the inspectorate process, and that it would be "*manifestly unfair for the confidentiality*" of the inspectorate process, and the assurances given by the inspectors in this regard, to be undermined. The issue having been raised in the written legal submissions, it became necessary for the plaintiffs to address same and this resulted in a prolonged hearing.

16. As to the separate issue of the temporal limit on the discovery to be made by the second named defendant, the plaintiffs can be said to have been substantially successful on this issue too. The plaintiffs succeeded in obtaining discovery over an extended period (capturing an additional four years). Moreover, in allocating costs, it is appropriate to have regard to the following aspect of the conduct of the plaintiffs. In open correspondence, the plaintiffs had offered to dispense with the requirement for the scheduling of privileged documents beyond 25 March 2020. Had this offer been accepted by the second named defendant, it would have resulted in an outcome not dissimilar to that ultimately ordered by the court.

COSTS INCURRED BY THE INSPECTORS

17. The inspectors were represented, by solicitor and counsel, at the hearing of the application for discovery. The inspectors adopted a neutral stance to the application but made submissions on the potential implications of an order for discovery for the confidentiality of the inspectorate process. The court was

greatly assisted by the submissions, written and oral, made on behalf of the inspectors.

18. My *provisional* view is that the costs incurred by the inspectors should be treated as expenses of, and incidental to, their statutory investigation. As such, the costs would fall to be defrayed in the first instance by the Corporate Enforcement Authority, as the authority who had petitioned for the appointment of the inspectors: see Section 762 of the Companies Act 2014. It occurs to me that it would probably not be appropriate to require any of the parties to these proceedings to bear those costs under Order 99 in circumstances where the inspectors' role in the application was akin to an *amicus curiae*. Of course, the inspectors and the Corporate Enforcement Authority will be afforded an opportunity to be heard on the question of costs before I reach any concluded view on this issue.

CONCLUSION AND FORM OF ORDER

19. The plaintiffs are entitled to recover the costs of each of the two motions for discovery as against the respective defendant. The costs are to include, *inter alia*, the costs of the written legal submissions; the costs of two counsel; the stenography costs; and the costs of the post-judgment hearing on 30 January 2023. All such costs to be adjudicated, under Part 10 of the Legal Services Regulation Act 2015, in default of agreement between the parties. A stay is imposed on the execution—but not the adjudication—of the costs order pending the final determination of these proceedings.

20. These proceedings will be listed, remotely, on Monday 20 February 2023 at 10.30 am to address any outstanding issues in respect of discovery.

Approved Garrett Simons