Neutral Citation Number: [2008] IEHC 122

**THE HIGH COURT**

**2007 No. 403 SP**

**BETWEEN**

**MARK CHRISTOPHER BRESLIN, CATHERINA ANNE GALLAGHER, MICHAEL JAMES GALLAGHER, AUDREY MARTHA MOONEY, CAROLINE FAITH MARTIN, EDMUND WILLIAM GIBSON, ELIZABETH CATERINE GIBSON, ROBERT JAMES GIBSON, WILLIAM JAMES GIBSON, WILMA SELINA KYLE, STANLEY JAMES McCOMBE, GERALD GEORGE McFARLAND, MARIAN ELAINE RADFORD, PAUL WILLIAM RADFORD, COLIN DAVID JAMES WILSON, DENISE FRANCHESCA WILSON, GARRY GODFREY CHARLES WILSON, GERALDINE ANN REBECCA WILSON AND GODFREY DAVID JAMES WILSON**

**PLAINTIFFS**

**AND**

**SEAMUS McKENNA, JOHN MICHAEL HENRY McKEVITT, LIAM CAMPBELL, MICHAEL COLM MURPHY AND SEAMUS DALY**

**DEFENDANTS**

**Judgment of Mr. Justice Gilligan delivered on the 20th day of March, 2008**

1. The plaintiffs in these proceedings are citizens of Northern Ireland and reside therein, they are victims of the bomb blast which occurred in the town of Omagh, County Tyrone, on 15th August, 1998, (hereinafter referred to as the "Omagh bombing"), and have suffered bereavement and personal injury as a result thereof.

2. The first named defendant was, on 8th December, 2004, found guilty at a sitting of the Special Criminal Court of the unlawful and malicious possession of explosive substances, with intent to endanger life or cause serious injury to property contrary to s. 3 of the Explosive Substances Act 1883 as substituted by s. 4 of the Criminal Law (Jurisdiction) Act 1976. He was sentenced to six years imprisonment as and from 15th June, 2003. The first named defendant did not appeal his conviction in this regard and has now been released from prison.

3. The second named defendant was convicted on 7th August, 2003, of membership within the State of an unlawful organisation styling itself "The Irish Republican Army", contrary to s. 21 of the Offences against the State Act 1939, as amended, and was sentenced to a term of imprisonment for a period of six years. He was further convicted by the Special Criminal Court on 7th August, 2003, of directing the activities of an illegal organisation styling itself "The Irish Republican Army", in respect of which a suppression order has been made pursuant to s. 19 of the Offences Against The State (Amendment) Act 1939, and was sentenced to a term of imprisonment for a period of twenty years, as and from 29th March, 2001. The second named defendant appealed his conviction to the Court of Criminal Appeal which, on 9th December, 2005, dismissed the appeal. Subsequently, on 17th July, 2006, the second named defendant was granted a certificate to appeal to the Supreme Court on a point of law pursuant to s. 29 of the Courts of Justice Act 1924, and this appeal was heard in early February, 2008, by the Supreme Court. Judgment is awaited in this appeal.

4. The third named defendant was, on 24th May, 2004, convicted by the Special Criminal Court on two counts of membership within the State of an unlawful organisation and was sentenced to four years imprisonment on both counts, the sentences to run concurrently from 1st May, 2001. The third named defendant has now been released from prison.

5. The fourth named defendant was convicted on 22nd January, 2002, at the Special Criminal Court of unlawfully and maliciously conspiring with another person, not before the court, between 13th and 16th August, 1998, at Dundalk, County Louth, to cause an explosion of a nature likely to endanger life or cause serious injury to property within the State or elsewhere contrary to s. 3 of the Explosives Substances Act, 1883, as substituted by s. 4 of the Criminal Law (Jurisdiction) Act, 1976. He was sentenced to fourteen years imprisonment. His conviction was overturned by the Court of Criminal Appeal on 21st January, 2005, and a retrial, which is awaited, was directed.

6. The fifth named defendant pleaded guilty to a charge of membership within the State of an unlawful organisation styling itself "The Irish Republican Army" on 2nd March, 2004, and was sentenced to three years and six months imprisonment and has since been released from prison.

7. The circumstances of the Omagh bombing are such that shortly after 3 p.m. on Saturday, 15th August, 1998, a massive car bomb exploded at Market Street, Omagh, County Tyrone, Northern Ireland, which resulted in the deaths of 29 people and personal injuries of varying degrees of severity to over 300 others. In addition, extensive damage occurred to property in the town centre. The outrage was one of the worst atrocities in Northern Ireland occurring at a time when the town was crowded with shoppers and visitors.

8. The plaintiffs' herein commenced proceedings against the defendants' in the High Court of Justice in Northern Ireland, (Queens Bench Division) on 10th August, 2001, claiming damages, *inter alia*, for the intentional infliction of harm, trespass to the person, conspiracy to commit trespass to the person and/or conspiracy to injure arising from the Omagh bombing. A trial date has now been fixed for the 7th day of April, 2008.

9. For the purposes of prosecuting the Omagh proceedings, the plaintiffs' applied to the Special Criminal Court for the production of the transcripts of evidence and Books of evidence from the criminal proceedings as taken against the various defendants. In the course of a ruling on the 7th day of February, 2005, the Special Criminal Court noted that the Director of Public Prosecutions and the Attorney General in this jurisdiction had both indicated that as far as they were concerned the release by any one defendant, or defendants, of documents in their possession, power or procurement to the plaintiffs' does not cause them any concern. Further, the court indicated that it had no difficulty with the concept except to say that if such release was in any way to jeopardise the outcome of any appeal or future trial of any of the parties the subject matter of the proceedings, then it would be prudent to seek advice before doing so.

10. Having considered the arguments advanced, the authorities cited, and the law as the court saw it applying to the particular request and being conscious of the anxiety of the applicants' relatives to the issue, the court came to the conclusion that it was unable to make the direction requested by reason of lack of jurisdiction and thereby refused to grant the applicants' request. The court indicated in the course of its ruling that insofar as jurisdiction to make the order sought does exist, it was the view of the court that jurisdiction rested with the High Court, as clearly stated in both *Kelly v. Ireland* [1986] I.L.R.M 318 and *Chambers v. Times Newspapers Ltd* [1999] 2 I.R. 424, and that the High Court had power to order and refuse the production of documents by a third party based upon the principals cited in each of those cases.

11. The plaintiffs then sought discovery of the transcripts of evidence and the books of evidence in the Northern Ireland proceedings. By various orders made by the courts in Northern Ireland, (Morgan J. in the High Court, and Kerr L.C.J., Campbell L.J. and Higgins L.J.

in the Court of Appeal in Northern Ireland) the first, second and third named defendants were ordered to produce for inspection the transcript of evidence and books of evidence in relation to the criminal proceedings as taken against them at the Special Criminal Court.

12. The fourth named defendant was ordered to produce for inspection those parts of the transcript of evidence and books of evidence that related to the telephone evidence given at his trial before the Special Criminal Court.

13. The fifth named defendant was ordered to produce for inspection the transcript of evidence and books of evidence in relation to the criminal proceedings as taken against him in the Special Criminal Court.

14. In making the various production orders, the courts in Northern Ireland concluded that if there was some impediment to the production of the documents held within the jurisdiction of this Honourable Court, then the defendants would be bound by that decision.

15. The various defendants have been called upon to comply with the said orders for production but have failed and refused to do so, principally on the basis, inter alia, that the documents involved are in the de jure control of the Special Criminal Court, that the documents in their possession were furnished pursuant to an implied undertaking not to use them for any collateral purpose and that they cannot by law produce the documents to a third party without committing a contempt of court.

16. In these proceedings the plaintiffs claim:

> 1. A declaration that there is no impediment under Irish law preventing the defendants from producing for inspection the transcripts and books of evidence relating to the criminal proceedings concerning them before the Special Criminal Court.
>
> 2. A declaration that the documents supplied to the defendants for the purposes of their criminal trials before Special Criminal Courts and in particular the transcripts and books of evidence are not subject to an implied undertaking that they would not be used for any other purpose other than the defence of the criminal proceedings.
>
> 3. If necessary, an order granting the defendants leave to produce to the plaintiffs the transcripts and books of evidence furnished to them for the purposes of the criminal proceedings before the Special Criminal Court.
>
> 4. If necessary, an order varying the terms of any implied undertaking pursuant to which the defendants were furnished with transcripts and books of evidence from the Special Criminal Court.
>
> 5. Furthermore, and or in the alternative and if necessary, a declaration that, insofar as a rule of law precludes, prohibits or prevents the production of the transcripts and books of evidence from the Special Criminal Court pursuant to the order of the High Court of Justice in Northern Ireland the said rule of law is incompatible with the obligations of the Republic of Ireland under the European Convention on Human Rights and Fundamental Freedoms.

17. The issue in the case is whether there is an impediment in law in this jurisdiction which prevents the defendants from producing for inspection the transcript and books of evidence relating to the various criminal proceedings, involving each defendant before the Special Criminal Court.

18. Kerr L.C.J., at para. 29 of his judgment in the Court of Appeal in Northern Ireland in *Breslin and Others v. McKenna and Others* [2007] N.I.C.A. 14 stated as follows:-

> "It is clear that the burden of establishing that an impediment to the production of the documents exists rests on the party who asserts it, in this case the appellants [being the defendants herein]. That burden has not been discharged and there was no reason that the judge should have considered that there was an inhibition to his making the order. Quite apart from that, however, there is no lack of comity involved in the judge's decision. He made it clear that his order was not intended to trespass on the jurisdiction of the courts of the Republic of Ireland and that any order that those courts made would be binding on the parties. The notion that the judge's order would be used in the courts in the Republic of Ireland in order "to persuade them to change their minds" appears to us to be preposterous. There is absolutely no reason to believe that the courts in that jurisdiction would be swayed by Morgan J's order to a course other than that dictated by the law of the Republic."

19. Further, at para. 44, Kerr L.C.J., went on to state:-

> "None of the many grounds advanced by the appellants has succeeded and the appeal must be dismissed. This appeal has been characterised by the inclusion of every conceivable technical objection to the judge's order. The case generally has spawned much interlocutory litigation where, again, every possible ground on which the action might be frustrated has been canvassed. There has been satellite litigation challenging the grant of funds to the respondents' for the legal costs of the action. The time has now arrived for this case to proceed with all dispatch. It is clear that the learned trial judge has bent every effort to achieve this. We now expect the legal representatives of all the parties to give their full co-operation to him to realise what has obviously been his aspiration of bringing this action to trial without further delay."

20. Further, to the orders of the courts as made in the Northern Ireland proceedings, the defendants have continued to assert that they are effectively precluded from producing the transcript of evidence and books of evidence which they have been directed to produce.

21. It is clearly apparent from the reliefs being sought that this Court is not being asked to make an order for discovery and/or production, in respect of the transcripts of evidence and books of evidence in issue. Furthermore, the relevance of the documents to the issues in the Northern Ireland proceedings are not an issue for this Court to determine or indeed one which it is in a position to assess. It is not an issue for this Court as to whether or not the documents sought are admissible as documents at the trial of the proceedings. Their admissibility and any consequences flowing from them are a matter for determination by the trial judge in Northern Ireland.

22. Two preliminary issues arise. The first is that it has been submitted on the defendant's behalf that these proceedings, which have been brought by way of special summons pursuant to O. 3 r. 22 of the Rules of the Superior Courts, 1986 ought to have been brought by way of a plenary summons. I am satisfied that this Court has a discretion pursuant to O. 3 r. 22 of the RSC to dispose of matters by way of special summons. I am satisfied in the present case, in the exercise of my discretion, that the issues herein being primarily

issues of law are not issues which require oral evidence and as such are matters fit for disposal by way of a special summons.

23. The second preliminary issue that is raised on the defendants behalf is that the Special Criminal Court, having indicated that it had no jurisdiction to deal with the application as made and as previously referred to herein, effectively brings an end to the matter and that this Court does not have jurisdiction now to embark on effectively the same application. I reject this contention and take the view that pursuant to the inherent jurisdiction of this Court, it is appropriate to hear the arguments as advanced herein and decide the issue. I further note that an argument raised on the defendants behalf before the Special Criminal Court was that the application should have been made in the first instance to this Court and not the Special Criminal Court.

24. Mr. Collins on the plaintiffs' behalf submits that an implied undertaking does not arise. He accepts, of course, that it is well established that documents provided to a party on foot of an order for discovery, or an agreement for voluntary discovery in lieu of such an order, are subject in civil proceedings to such an implied undertaking. The documents at issue in this instance were not, of course, Mr. Collins submits, provided to the defendants on foot of an order for discovery or an agreement to make discovery.

25. The documents herein comprise of the book of evidence and the transcript of essence in the respective prosecutions of the various defendants' pursuant to the provisions of the Criminal Procedure Act 1967. It is submitted that there is nothing in the Act of 1967, or in the Offences against the State Act 1939, nor is there any Irish authority which suggests that material disclosed pursuant to those provisions is subject to an implied undertaking, analogous or equivalent to the implied undertaking in civil discovery.

26. Mr. Collins refers to the fact that the issue as to whether or not an implied undertaking applies in the context of criminal proceedings appears never to have been considered by an Irish court. The contention that such an undertaking is operative is not supported in principal and appears to be impossible to reconcile with existing Irish authority, in which issues relating to the discovery or disclosure of such material have arisen.

27. Mr. Collins refers to the judgment of Keane J., in *Greencore Group plc v. Murphy* [1995] 3 I.R. 520, at p. 528, wherein it was stated:-

> "The order requiring the production of the documents is an invasion of the right of the person against whom the order is made to keep his documents to himself and it is for that reason that the court will ensure that documents are not used for any purposes other than the purpose of the particular legal proceedings in which they are produced by making the order for production subject to that implied undertaking."

28. Mr. Collins contrasts the situation relating to a defendant's private documents as created and documents which have been provided and which are required by Statute to be provided by the State in the context of criminal proceedings, and that this is especially the case when one considers that the evidence contained in the documents was provided in open court.

29. Mr. Collins refers to the decision of O'Hanlon J. in *Kelly v. Ireland* [1986] I.L.R.M. 318. The plaintiff, *Kelly*, had been convicted by the Special Criminal Court. in High Court proceedings for assault arising out of the same issues which had been before the Special Criminal Court. The plaintiff was seeking the production of a transcript of his proceedings before the Special Criminal court or a relevant portion thereof.

30. O'Hanlon J., stated at p. 323:-

> "[Counsel for] the plaintiff submitted that there was no procedure available for the formal proof in later civil proceedings of decisions taken in the course of a criminal trial before the Special Criminal Court. An official transcript was kept for the purpose of appeals or applications for leave to appeal to the Court of Criminal Appeal, but this was not available for any other purpose. (O. 86 r. 14, Rules of the Superior Courts).
>
> An application by counsel for the plaintiff to see the transcript after the court had ruled on the admissibility of the statements had been refused during the course of the trial.
>
> I do not think this objection is well founded. Rule 25 of the Special Criminal Court Rules 1975 (S.I. No. 234 of 1975), makes provision for the official record of the proceedings before the Special Criminal Court and while the practice has been (in accordance with the provisions of s. 41 of the Offences Against the State Act 1939) for the court to control its own procedures in all respects, I have no doubt that where it is necessary for the purpose of doing justice in a case involving litigation between contesting parties, an extract from the transcript of the proceedings before the court would be made available or its production could be compelled should it become necessary to do so."

**Relevant rules**

31. Order 86 r. 14, Rules of the Superior Courts states:-

> "14. (1) The official stenographer shall, at the conclusion of the trial, sign the shorthand note taken by him and certify the same to be complete and correct.
>
> (2) On request by the Registrar, the official stenographer shall furnish to him a report comprising the original shorthand note and a transcript of the whole of such note or of such part thereof as may be required.
>
> (3) Before furnishing his report to the Registrar, the official stenographer shall submit the transcript to the judge of the court of trial to be certified by him.
>
> (4) A party interested in an appeal, or application for leave to appeal, may obtain from the Registrar a copy of the transcript of the whole or of any part of such shorthand note as relates to the appeal or application upon payment of the proper charges.
>
> (5) The transcript may be made by the official stenographer who took the shorthand note or other competent person.
>
> (6) The transcript shall be typewritten and certified by the person making the same to be a correct and complete transcript of the whole, or of such part as may be required of the shorthand note taken by the official stenographer.

(7) The report of the official stenographer shall contain the evidence, any objection taken in the course thereof, any statement made by the prisoner, the summing up and the sentence of the judge of the court of trial, but unless otherwise ordered by such Judge shall not include any part of the speeches of counsel or solicitor.

32. Order 86 r. 17, Rules of the Superior Court state:-

"(1) At any time after notice of appeal or notice of application for leave has been served, an appellant or the Director of Public Prosecutions or the solicitor or other person representing either of them, may obtain from the Registrar copies of any documents or exhibits in his possession for the purposes of such appeal or application. Such copies shall be supplied by the Registrar at the proper charges.

(2) A transcript of the shorthand notes taken of the proceedings at the trial of an appellant shall be supplied by the Registrar free of charge;

(a) to an appellant who has been granted a legal aid (appeal) certificate, and

(b) to any other appellant by order of the Court.

(3) Where an appellant who is not legally represented, or who has been granted a legal aid (appeal) certificate, requires from the Registrar a copy of any document or exhibit in his custody for the purposes of his appeal, he may obtain it if the Registrar considers it is proper to supply the same and in such case shall obtain it free of charge."

33. Rule 25 of the Special Criminal Court Rules, 1975 (S.I. No. 234 of 1975), states as follows:-

"25. (1) An official stenographer appointed for the purpose of the Acts by the Minister for Justice shall sign the shorthand note taken by him of any trial or proceeding in the court or any part of such trial or proceeding and shall certify the same to be a complete and correct shorthand note thereof, and shall lodge the same with the Registrar.

(2) For the purpose of section 44 of the Principal Act, the shorthand note of the official stenographer shall consist of the evidence and any objection taken in the course thereof, any statement made by the accused person and the verdict and sentence of the Court, but unless otherwise ordered, the Court shall not include any part of the speeches of counsel or solicitor."

34. Section 41 of the Offences against the State Act, 1939 states:-

"(1) Every Special Criminal Court shall have power, in its absolute discretion, to appoint the times and places of its sittings, and shall have control of its own procedure in all respects and, shall for that purpose make, with the concurrence of the Minister for Justice, rules regulating its practice and procedure and may, in particular, provide by such rules for the issuing of summonses, the procedure for bringing (in custody or on bail) persons before it for trial, the admission or exclusion of the public to or from its sittings, the enforcing of the attendance of witnesses, and the production of documents.

(2) A Special Criminal Court sitting for the purpose of the trial of a person, the making of any order, or the exercise of any other jurisdiction or function, shall consist of an uneven number (not less than three) of members of such Court present at and taking part in such sitting.

(3) Subject and without prejudice to the provisions of the next preceding sub-section of this section, a Special Criminal Court may exercise any power, jurisdiction, or function notwithstanding one or more vacancies in the membership of such court.

(4) Subject to the provisions of this Act, the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, so far as practicable, apply to the trial of a person by a Special Criminal Court, and the rules of evidence applicable upon such trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court."

35. Mr. Collins submits it is clear that O'Hanlon J., in *Kelly* was of the view that no impediment arose in relation to the making of an order for the discovery or production of a transcript of a trial in the Special Criminal Court.

36. Further reliance is placed on the judgment of Morris P. in *Chambers v. Times Newspapers Limited* [1999] 2 I.R. 424, where the defendants were seeking copies of the books of evidence and the transcripts of the plaintiffs' trial relating to criminal proceedings. It was essential, the defendants contended, that they procure copies of the witness statements used in the criminal trial and subsequent appeal as well as the transcripts of the trial and appeal and the final order made. Voluntary discovery had been sought from the Registrars of the Court of Criminal Appeal and the Special Criminal Court and had been refused on the directions of the President of the High Court, in accordance with the practice of those courts that such documents should only be handed over for the purpose of an appeal. Morris P. adjourned the application with liberty to re-enter on the basis that the documents sought were relevant to an issue arising in the litigation between the plaintiff and the defendants. He stated that an order for discovery should, in general, only be made against the third party where there was no realistic alternative available such as where the documents in question were not readily available to be discovered by a party to the action, or where, in the particular circumstances of the case, the court, in the interests of justice, requires that it should be done.

37. Morris P. took the view that there was no satisfactory evidence that the documents in question were not available to be discovered by the plaintiff and proper discovery would not be made, and the order sought was not appropriate unless the documents were not produced on discovery by the plaintiff. Further, that the practice of the Registrars of the Special Criminal Court and the Court of Criminal Appeal to refuse to hand over the documents sought, although well founded, must yield to an order made pursuant to O. 31 r. 29, RSC.

38. Morris P., in the course of his judgment, stated, at pp. 428 and 429 thereof:-

"When this matter was referred by the defendants' solicitors to the Registrar of the Special Criminal Court, my directions

were sought in relation to the handing over of these documents. In accordance with the practice of that court, I made a ruling that the documents sought should not be made available to the defendants and were only to be handed over for the purposes of appeals taken against the decision of that court. This practice, in my view, is based upon sound reason, inasmuch as transcripts, while taken at the hearing by stenographers, are only made up when an appeal is lodged against the decision of the court. Otherwise the transcript is not available in typed form.

This practice must, of course, yield to an order made in pursuance of O. 31, r. 29 and there is nothing in the rule which deprives it of its applicability to a book of evidence or a transcript of a hearing of a criminal matter.

O'Hanlon J in *Kelly v. Ireland* [1986] I.L.R.M. 318 at p. 323, considered a similar application. In the course of submissions, counsel for the plaintiff argued that no procedure was available for the production, in civil proceedings, of evidence taken in the course of criminal trials before the Special Criminal Court. In the course of his judgment O'Hanlon J said:-

> 'I do not think this objection is well founded. Rule 25 of the Special Criminal Court Rules 1975 (SI No. 234 of 1975), makes provision for the official record of the proceedings before the Special Criminal Court and while the practice has been (in accordance with the provisions of s. 41 of the Offences Against the State Act 1939) for the court to control its own procedures in all respects, I have no doubt that where it is necessary, for the purpose of doing justice in a case involving litigation between contesting parties, an extract from the transcript of the proceedings before the court would be made available or its production could be compelled should it become necessary to do so.'

The issue that emerged during the course of the hearing of this application can be summarised in this manner. It is submitted that given that the documents in question are prima facie available and in the possession of the plaintiff in the action and would be discovered by him should the court so direct, is it desirable to involve a third party in the proceedings by making an order for discovery of these same documents against it?

It is submitted on behalf of the third party that as a general principle, an order for discovery against a third party should only be made where the documents sought to be discovered are not available as a consequence of an order for discovery made against a party to the action.

In the course of his judgment in *Allied Irish Banks plc. v Ernst & Whinney* [1993] 1 I.R. 375 McCarthy J., while considering the circumstances in which third party discovery might be made, said at p. 394:- 'These documents are, of course, available to the defendants but that does not preclude them from pursuing the same documents in the possession of the Minister and any train of enquiry to which that very possession may lead.' This was not part of the ratio of the case but I do accept it as a clear indication that in an appropriate case the court should make the order sought even though the documents might be discovered by a party to the action.

In my view, however, it is undesirable and the court should be slow to put someone, not a party to the action, to the trouble of making discovery if it can be avoided and I am satisfied that an order should only be made against a third party in circumstances where the documents in question are not readily available to be discovered by a party to the action or where, in the particular circumstances of the case, the court, in the interests of justice, requires that it should be done."

39. Mr. Collins further relies on the judgment of Finnegan J., in *Minister for Justice v. Information Commissioner* [2001] 3 I.R. 43, which was an appeal to the High Court pursuant to the Freedom of Information Act 1997. Finnegan J., in considering whether or not records including shorthand notes and transcripts, books of evidence and statements compiled in a book of evidence in a Circuit Court prosecution ought properly to be disclosed pursuant to that Act, suggested that an order could be made by way of discovery for such documentation. Finnegan J. stated, at p. 49:-

> "O. 86, R.14 and R. 17(2) of the Rules of the Superior Courts, 1986, regulates who is entitled to obtain a transcript from the Registrar and the conditions as to payment which should apply. I read the Rules as prohibiting the issue of a transcript to any other person save and except, however, that an order may be made in favour of any other person pursuant to O. 31, R. 29 of the Rules of the Superior Courts, 1986."

40. Mr. Collins relies on these various cases for the proposition that the discovery of transcripts of evidence at a criminal trial, and the books of evidence as served on an accused at a criminal trial, are not subject to any implied undertaking which prevents their disclosure, even where that disclosure is acquired by an order for discovery duly made by a competent court.

41. The plaintiffs acknowledge that the House of Lords has held in *Taylor v. Director Serious Fraud Office* [1999] 2 A.C. 177, that an implied undertaking applies, they say, to "unused material" disclosed to a defendant in criminal proceedings being material which the prosecution does not intend to rely upon, but which, nonetheless, is disclosed in the interests of justice.

42. It is contended on the plaintiffs' behalf that the approach in *Taylor* attaches insufficient weight to the very material difference that exists between discovery in civil proceedings and disclosure in criminal proceedings. Emphasis is placed on the fact that no restriction on the use of the material disclosed in a criminal prosecution is to be found in any legislation in this jurisdiction, whereas there is such statutory provision in both England and Wales.

43. The plaintiffs' rely on the analysis of Otton L.J., in *Mahon v. Rahn* [1998] 1 Q.B. 424, wherein at p. 450 he comes to the conclusion:-

> "Accordingly, I have come to the conclusion that it is not appropriate to imply an undertaking in criminal proceedings by analogy with the implied undertaking which exists in civil proceedings."

44. He also took the view at p. 449:-

> "I do not regard the position of the Crown in a criminal case as analogous to that of a party in civil proceedings. The former is bound by a strict common law, and now statutory duty, to disclose documents of which the body is rarely the author or owner. Such documents are often obtained by compulsion. The disclosure must be in the interests of justice so that the accused knows the nature of the case against him, and so that he has access to documents which might assist his case. I am unable to accept that public policy requires a duty on an accused not to use disclosed documents for any purpose other than the criminal proceedings on the ground that the Crown would be deterred from complying with their

obligations of full disclosure in the interests of justice. The common law duty ensured that this did not happen; it is now a statutory duty."

45. It is submitted on the plaintiffs' behalf that the question as to whether an implied undertaking applies at all has to be answered in the negative. Even if this Court is not satisfied that that is the case and considers that an implied undertaking is capable of applying for material disclosed in the course of criminal proceedings, it is submitted that it does not apply to books of evidence which are not "unused material" as considered by the House of Lords in Taylor. More clearly still, no implied undertaking could conceivably apply to transcripts of evidence which are, it is submitted on the plaintiffs' behalf, quite clearly in a different category, being neither statements or documents disclosed pursuant to statute to which any considerations of confidentiality could apply. It is contended that they are the record of criminal trials heard in public in accordance with the requirements of Article 34.1 of the Constitution.

46. In any event, counsel submits on the plaintiffs' behalf that even if there is an implied undertaking against collateral use of transcripts and books of evidence in criminal trials, in the circumstances of this case both the Director of Public Prosecutions and the Attorney General have made it clear that they have no objection to the defendants' producing the documents at issue by way of discovery.

47. During the course of the application to the Special Criminal Court on the 11th day of January, 2005, Mr. Birmingham, appearing on behalf of the Director of Public Prosecutions, indicated to the court that the Director of Public Prosecutions would not in any way consider it to be contempt of the orders of the Special Criminal Court if the defendants' were to comply with an order of the Northern Ireland Court in respect of discovery of the books of evidence and transcripts. Mr. Birmingham did however, caution that:-

> "Now, in different circumstances issues may arise about a defendant making a book of evidence available to a third party and questions about the identity of witnesses who were not subsequently called and so on may arise…In this particular case the persons in respect of whom there might be anxieties have had to have their books of evidence ready and they are simply being asked to make them available to persons who say they are victims of their actions. We can see no difficulty in that regard. So far as the transcripts are concerned, all that is involved there is what has already happened in public and in open court, so we do not claim any particular privilege, in the context of this case at least, or any particular specific entitlement to retain in our possession anything remotely of that nature. It seems to me entirely within the jurisdiction of the Northern Ireland courts to order this discovery and we would have nothing to say contrary."

48. Mr. O'Higgins, on behalf of the Attorney General, indicated that the view of the Attorney General was virtually identical to that of the Director of Public Prosecutions. Mr. O'Higgins drew a distinction between the transcript and the book of evidence and in his submission the issue in relation to the book of evidence was essentially a matter for the Director of Public Prosecutions in a particular case.

49. In a supplemental affidavit of Daniel Coady, as sworn on the 6th day of March, 2008, a letter from the Director of Public Prosecutions is exhibited as dated March 5, 2008, wherein it is indicated that "the Director of Public Prosecutions has no objection to the declarations as sought in paras. 1, 2, 3 of the plaintiffs' claim, subject to the court considering so appropriate. On that basis, matters of four and five do not arise and those at six and seven are a matter for the court itself."

50. The Chief State Solicitor, in a letter of the 12th of November, 2007, to the plaintiffs' solicitors, refers to the attitude of the Attorney General to this application in the following terms:-

> "As you are aware, the Attorney General has previously indicated in the Special Criminal Court, that he has no objection in principle to an order being made by the Courts Service directing discovery or disclosure of the transcripts. This position is unchanged. We refer you to the ruling of the Special Criminal Court delivered on the 7th February, 2005 in this regard and in particular page 6 of that ruling which records the Attorney General's position in the matter."

51. The ruling of the Special Criminal Court as delivered in early February, 2005, was to the effect that insofar as jurisdiction to make the order sought does exist, it was the view of the court that this rests with the High Court as clearly stated in both the *Kelly* and the *Chambers* cases and that the High Court had power to order and refuse the production of documents by a third party based upon the principles cited in each of those cases.

52. Specific reference is made at p. 6 of the ruling of the Special Criminal Court to the position of the Director of Public Prosecutions and the Attorney General in the following terms:-

> "The Director of Public Prosecutions and the Attorney General in this jurisdiction have both indicated that as far as they are concerned the release by any one defendant or defendants of documents in their possession, power or procurement to the plaintiffs does not cause them any problem. This, we assume, reassures the parties to those proceedings as to the Director of Public Prosecutions' and the Attorney General's attitude in that regard. This Court has no difficulty with the concept, except to say that if such release was in any way to jeopardise the outcome of any appeal or future trial of any of the parties the subject matter of the proceedings, that it would be prudent to seek advice before doing so."

53. It is contended on the plaintiffs' behalf that the Director of Public Prosecutions and the Attorney General have made it clear that they have no objection to the defendants producing the documents at issue by way of discovery.

54. It is further submitted that in any event, if the court was of the view that both the transcript of the evidence and the books of evidence carried an implied undertaking, this Court has jurisdiction to grant relief from such an implied undertaking and that significant assistance in this regard as to the proper approach of the court is to be derived from the recent decision of this Court, (Clarke J.) in *Cork Plastics v. Ineos UK Ltd.* [2008] 1 I.L.R.M. 174.

55. Mr. Collins, on the plaintiffs' behalf, submits that the position in *Cork Plastics* is strikingly similar in many respects to that of the High Court in Northern Ireland in the present case, in that one of the defendants who had previously been directed to make discovery in the proceedings (being civil proceedings for damages arising from the supply of allegedly defective goods), resisted the discovery of certain categories of documents which had been prepared for the purposes of earlier proceedings in England, and which were subject to restrictions on use similar to those applicable in civil proceedings in this jurisdiction. Unlike the present case, there was no dispute as to the existence and application of such restrictions. However, the plaintiffs argued that the discovery obligations of the defendants arising from the order of the High Court here required it to seek consent to the disclosure of the documents at issue, and in the absence of such consent to seek the leave of the relevant English court to such disclosure.

56. Clarke J. upheld the plaintiffs' arguments and further held that the defendant was obliged *bona fide* to seek an effective release

from the restrictions affecting his capacity to make discovery and provide inspection in accordance with his obligations in this jurisdiction.

57. Clarke J. at p. 181, cited with approval a number of Australian decisions which established as the general principle that "the implied obligation arising from discovery in one action must yield to the requirements of curial process in other litigation", a principle which in his view, at p. 182:

> "stems from the fact that, in the ordinary way, the requirements of justice in the second set of proceedings will, normally, mandate that documents which are relevant to those proceedings be disclosed so as to allow a proper and just determination of the second set of proceedings."

58. Addressing firstly the position where sets of proceedings were in the same jurisdiction, Clarke J., stated at pp. 182 and 183:-

> "In my view, the proper course of action to be adopted, where both relevant proceedings are in this jurisdiction, is the following.
>
> > Firstly, I adopt the proposition stated in Matthews and Mallek that the existence of an obligation not to make collateral use (or an implied undertaking to the same effect) does not prevent the disclosure, as opposed to the production, of the documents concerned. The documents are in the 'possession or power' of the party concerned. It is production which is not, without further action, possible. In those circumstances, any documents in respect of which an appropriate obligation exists, should be referred to in the affidavit of discovery concerned but, if desired, an appropriate objection to production can be made.
> >
> > Secondly, if the party, in whose favour the order of discovery was made, wishes to, nonetheless, seek the production of the documents concerned, then it is appropriate to join, as a notice party to any motion seeking production, any party in whose favour the obligation not to produce existed. That party should, of course, be given an opportunity to agree to production so as to obviate the necessity for an application to the court. The court should pay due regard to any legitimate basis put forward by such party as grounds for not directing disclosure.
> >
> > Thirdly, and finally, in assessing the weight to be attached to, on the one hand, the existing obligation on foot of the implied undertaking and, on the other hand, the obligation to disclose in the second set of proceedings, the court should place a heavy weight on the obligation to ensure that the second proceedings come to a just result and should not, in the absence of some significant countervailing factor, decline to direct production. By directing disclosure, the court would, in effect, overrule or discharge the existing implied undertaking subject to any conditions that might seem appropriate."

59. Mr. Collins further relies on the decision of this Court, Kelly J. in *Roussel v. Farchepro Ltd* [1999] 3 I.R. 567.

60. The plaintiff company was the proprietor of patents in Ireland and Italy pertaining to a generic drug. The plaintiffs sued the defendants in respect of an alleged infringement of its patent rights. It involved in similar litigation in the courts in Spain and Switzerland.

61. Arising out of discovery made by the seventh defendant in respect of the proceedings before the Irish courts, it was found that certain of the materials discovered therein were relevant to the proceedings before the Spanish and Swiss courts. The plaintiff applied to the High Court for leave to use these materials in the foreign litigation thereby modifying the implied undertaking normally made in respect of discovery applications that material produced by means of discovery in an action would not be used otherwise than for the purpose of the particular action in suit. The application was opposed by the seventh defendant who argued that the injunction contained in the undertaking was absolute and could not be lifted or modified.

62. The court acceded to the application in part holding that it had a discretion to lift or modify the implied undertaking given in respect of materials produced on discovery. An absolute prohibition on the lifting or variation of the implied undertaking would be likely to give rise to an injustice and frustrate the constitutional obligation on the court to administer justice. The court further held that in exercising this discretion it must be satisfied as to special circumstances which make it appropriate to lift or modify the applied undertaking, that no injustice would be suffered by the respondent to any such application and also any public interest which may be involved.

63. Kelly J. stated at p. 572:-

> "Indeed, it seems to me that if one were to adopt the submission made by counsel, one would be left with the position where the court's hands would be unduly and unnecessarily tied and this would, in my view, frustrate the constitutional obligation which is imposed upon the court to administer justice."

64. Kelly J., goes on to state at pp. 573 and 574:-

> "What then are the principles which ought to apply in considering an application of this sort? The first port of call in relation to that appears to me to be the decision of the House of Lords in *Crest Homes Plc v Marks* [1987] A.C. 829 at p. 860 of that report, in the course of the speech of Lord Oliver, the following is to be found:-
>
> > 'I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse L.J. observed in the course of his judgment in the instant case, each case must turn on its own individual facts. In the instant case, the determinative point to my mind is that it is purely adventitious that there happened to be two actions. That has been brought about partly by purely technical considerations and partly, as Crest allege, by the appellants' failure to make full and frank disclosure under the 1984 order, and the fact that the parties to the two actions are not identical is quite immaterial. The cause of action is the same in each and the first and second appellants are defendants in both.'
>
> So, it seems to me that in the exercise of this discretion, first there has to be a demonstration of special circumstances and secondly, it has to be shown that the making of an order of this type will not occasion injustice to the person giving discovery. But as the matter is one of discretion, it doesn't appear to me that the exercise of discretion simply stops

there.

I am of the view that in deciding whether or not to grant leave, the appropriate approach for the court is to look at all of the circumstances, including, if necessary, the circumstances of the original disclosure, the nature and the strength of the evidence, the type of wrongdoing which is alleged to be involved and the interests of both the applicant and the party providing discovery as well as any public interest which may be involved.

So, the first question I must pose for myself is; are there here special circumstances? I have dealt with a very large number of the interlocutory applications in this litigation and so I have acquired a great deal of knowledge concerning the dealings of the parties to the litigation. In my opinion, there are here special circumstances which would warrant the court making an order of the type sought."

65. Mr. Collins submits that even if there is in implied undertaking not to make use of the transcripts and/or the relevant books of evidence, the court has full jurisdiction in the exercise of its discretion to vary or set aside the implied undertaking as to collateral use.

66. Mr. Hogan, on behalf of the fourth and fifth named defendants, contends that there is in an implied undertaking attaching to the possession and use of the transcripts and books of evidence referred, notwithstanding that they emanate from criminal proceedings and indeed because their confidentiality is protected by important considerations of public interest and the undertaking operates to prevent their disclosure to the plaintiffs in these proceedings. Further, the particular consequences of breaching the implied undertaking is to commit a contempt of court. Furthermore, in the particular circumstances of this case, where the Special Criminal Court has refused to produce these documents to the plaintiffs on the grounds that it has no jurisdiction to do so, neither the Director of Public Prosecutions nor the Attorney General can unilaterally waive the implied undertaking.

67. More generally, Mr. Hogan submits that to grant the extraordinary reliefs being sought would offend against or bring about an unwarranted and unacceptable risk of offending against the presumption of innocence as well as the guarantees of a fair trial in both a civil and criminal context by stepping into the arena in a manner inconsistent with the role of the courts. Further, Mr. Hogan submits that the documents as furnished to the defendants by the prosecution in the respect of criminal proceedings against them, including the documents comprised in the book of evidence, are not in the de jure possession of the defendants.

68. Mr. Hogan contends that principles of constitutional fairness including the privilege against self incrimination have to be respected in this case.

69. Prior to embarking on the legal principles involved, Mr. Hogan refers to the judgments of Morgan J. in the High Court and Kerr L.J. in the Court of Appeal in Northern Ireland wherein it had concluded that there was no controversy surrounding the "factual telephone evidence" and that this had not been challenged in the earlier trial.

70. Mr. Hogan refers to the judgment of the Court of Criminal Appeal as delivered on the 21st day of January, 2005, by Kearns J., in *The People (D.P.P.) v. Murphy* [2005] 2 I.R. 125, wherein at p. 131 it was specifically stated as follows:-

> "As was pointed out by the trial court, the accused's admission that he borrowed Mr. Morgan's mobile phone is consistent with Mr. Morgan's original evidence, although in the teeth of the latter retraction. The court decided to accept as truthful Mr. Morgan's original evidence and rejected Mr. Morgan's purported retraction of evidence having observed his demeanour and having noted the general tenor of his evidence on both occasions.
>
> Insofar as the telephone evidence was concerned, the court decided it could accept the veracity and accuracy of the telephone evidence beyond reasonable doubt. The court further held that the accuracy of the records had not been challenged by the defence."

71. Further, at pp. 157 and 158 in the judgment dealing with the telephone records, Kearns L.J. referred specifically at (e) to the evidence of Mr. Morgan in the following terms:-

> "The evidence given by Mr. Morgan, including the sequence of that evidence and the circumstances in which Mr. Morgan retracted evidence previously given by him is fully set out earlier in the course of the judgment. Under this ground the accused argues that the court erred in accepting the earlier evidence of Mr. Morgan which confirmed that the accused had borrowed his mobile phone on Friday, the 14th August, 1998, notwithstanding the later evidence given by him, when recalled on the 11th January, 2002, to the effect that he had left his mobile phone in an open glove compartment in his van on the work site on the 14th August.
>
> It seems clear to this court that the question of the credibility of the evidence given by Mr. Morgan, whether in its entirety or in respect of either of the conflicting accounts given by him, was a matter entirely within the competence of the trial court which had the opportunity of hearing and observing Mr. Morgan while he was giving evidence. While the obvious contradiction between the two accounts given by Mr. Morgan is a matter which was, quite properly, canvassed by the defence at the trial, it does not seem to this court that it would be appropriate for it to seek to 'second-guess' the assessment of the credibility of Mr. Morgan. The grounds advanced by the accused to suggest that the court should decline to accept the trial court's assessment of Mr. Morgan's credibility would involve this court in an impermissible inquiry into the assessment made. It was open to the trial court to decide as it did that the evidence given by Mr. Morgan when he was first before the court was truthful. On that basis the court rejects this ground of appeal."

72. Mr. Hogan submits that with great respect it appeared that the judgment of the Court of Criminal Appeal in the fourth named defendant's appeal from his conviction in the Special Criminal Court may not have been before the Northern Ireland Courts. Mr. Hogan accepts that he cannot deny for a moment, but that ultimately in the trial of the fourth named defendant the telephone evidence was resolved as against him, but to say that it was not a matter of controversy, particularly when one of the key witnesses gave what would appear from the judgment to be diametrically conflicting accounts of that evidence, is, he says, somewhat striking.

73. Mr. Hogan also refers to the fact, as deposed to by Mr. Finnucane on behalf of the fourth named defendant, that these matters will be put in controversy at the re-trial of the fourth named defendant. In any event, Mr. Hogan submits that the telephone evidence was a matter which was in acute controversy in the course of the trial before the Special Criminal Court as borne out by the analysis conducted by the Special Criminal Court.

74. In relation to the question of the implied undertaking attaching to both the transcript and books of evidence arising from criminal

trials, this is the real issue to be decided leading to an impediment in law to the defendants making discovery.

75. Dealing with the issue of the transcript, Mr. Hogan refers to the judgment of Finnegan J. in *Minister for Justice v. Information Commissioner* [2001] 3 I.R. 43.

76. Mr. Hogan also refers to s. 46 of the Freedom of Information Act, and in particular exemptions thereto, one of which is a record held by the courts.

77. Mr. Hogan refers specifically to Finnegan J. at p. 48 of the judgment who refers to the statutory requirement for a record and transcript of criminal proceedings arising under s. 33 of the Courts of Justice Act 1924, as substituted by s. 7 of the Criminal Justice (Miscellaneous Provisions) Act 1997.

78. Finnegan J. went on, at pp. 48, 49, to cite O. 86 of the Rules of the Superior Courts, 1986, relating to the Court of Criminal Appeal, specifically rules 14 and 17, cited above. Rule 1 defines official stenographer as:-

> "the person appointed to attend the trial and, where necessary, to make a report."

Rule 14 provides as follows:-

> "(1) The official stenographer shall, at the conclusion of the trial, sign the shorthand note taken by him and certify the same to be complete and correct.
>
> (2) On request by the Registrar, the official stenographer shall furnish to him a report comprising the original shorthand note and a transcript of the whole of such note or of such part thereof as may be required.
>
> (3) Before furnishing his report to the Registrar, the official stenographer shall submit the transcript to the judge of the Court of trial to be certified by him.
>
> (4) A party interested in an appeal or application for leave to appeal may obtain from the Registrar a copy of the transcript of the whole or of any part of such shorthand note as relates to the appeal or application upon payment of the proper charges."

Rule 17(2) provides as follows: -

> "A transcript of the shorthand notes taken of the proceedings at the trial of an appellant shall be supplied by the Registrar free of charge;
>
> (a) to an appellant who has been granted a legal aid (appeal) certificate, and
>
> (b) to any other appellant by order of the Court."

He goes on to state:

> "Order123 deals with shorthand reporting in civil matters and the provisions thereof are not strictly relevant here other than that O. 123 refers to a shorthand writer appointed by the judge as opposed to O. 86 which refers to the official stenographer. Order 123 provides for the manner in which the expense of the shorthand writer shall be dealt with as between the parties but also provides that the judge shall have power to direct that copies of the transcript be furnished to him at the public expense or be furnished to any Rule (4) party applying therefore (sic) at the expense of that party. The relationship between the party applying for an order under O. 123 that the proceedings be reported by a shorthand writer and the shorthand writer so appointed would appear to be a matter of contract between that party and the shorthand writer subject only to the powers conferred upon the judge under O. 123 R. 4:- to direct that copies of the shorthand writer's transcript of the evidence or any part thereof be furnished to him at the public expense or to be furnished to any party applying therefor at the expense of that party."

79. Finnegan J. goes on to state at pp. 49 and 50:-

> "On the other hand, the official stenographer is appointed by the court through the agency of the [Courts Service]. The sole relationship that the stenographer has is with the court. A party interested in an appeal or application for leave to appeal is entitled to a copy of the transcript upon payment of the proper charges, so however that where an appellant has been granted a legal aid appeal certificate or where the court so orders, the transcript shall be supplied free of charge. It seems clear to me that at all times the official stenographer has a relationship exclusively with the court and transcripts are only provided by the Registrar to a party interested in an appeal or application for leave to appeal. In this sense, [Mr. Rogers] is not a party, and indeed there is no appeal in being, and on both these counts he is not, under the Superior Court Rules, entitled to a transcript. Having regard to the relationship which exists between the official stenographer and the court as it appears from the Rules of the Superior Courts, 1986, I am satisfied that the shorthand note and the transcript which may be produced from the same is created by the court. It therefore falls outside the exception at s. 46(1)(a)(I). It cannot be material whether the stenographer is employed by or is an independent contractor to the Courts Service.
>
> I am further satisfied that the shorthand note and transcript fall outside the exception to s. 46(1)(a)(I) in that it is a record whose disclosure to the general public is prohibited by the court. O. 86 r. 14 and r. 17(2) of the Rules of the Superior Courts, 1986, regulate who is entitled to obtain a transcript from the Registrar and the conditions as to payment which should apply. I read the Rules as prohibiting the issue of a transcript to any other person, save and except however, that an order may be made in favour of any other person pursuant to O. 31 r. 29 of the Rules of the Superior Courts, 1986: see *Chambers v. Times Newspapers Ltd* [1999] 2 I.R. 424 and *Kelly v. Ireland* [1986] I.L.R.M. 318, as to the court's power to regulate its own procedures.
>
> Thus, the [Information Commissioner] was incorrect insofar as he held that s. 46(1) (a) (I) is concerned with a specific prohibition imposed by the court which has dealt with, or is dealing with, the matter to which the record relates. I am satisfied that the provision equally applies to the situation here where there is a general prohibition express or implied in the Rules of the Superior Courts, 1986, with specified exceptions and a discretion in the court where appropriate to

relieve from that prohibition. I therefore hold that [Mr. Rogers] is not entitled to access to the transcripts as their disclosure to the general public is prohibited by the court. While not relevant here, I would hold that as the courts are entitled to regulate the conduct of court business a practice not having its origin in the Rules of the Superior Courts would likewise amount to a prohibition e.g. the practice of confining access to central office files to parties and their representatives."

80. Mr. Hogan contends that the judgment of Finnegan J. in Minister for Justice v. Information Commissioner establishes three matters. First, that a transcript of a criminal trial is a record of the court pursuant to O. 86 and that it is very different from civil proceedings. Secondly, that the purpose of the transcript and the purpose of the transcript being given to the accused is to enable the accused to prosecute an appeal, and he says it follows that it cannot be used more generally than that, or in effect cannot be used for any other collateral purpose other than for an appeal. It is, Mr. Hogan submits, the property of the court and has been given only for the purpose of appeal. Thirdly, that a transcript is a record whose disclosure to the general public is prohibited by the court.

81. Referring to civil proceedings where the applied undertaking exists, Mr. Hogan contends that the answer that emerges in a whole series of cases is that discovery is necessarily an invasion of the personal privacy of the party who has to make discovery, but it is as it were, an abridgement of that right of privacy for a particular purpose, namely the proper administration of justice. It is in constitutional terms the balancing of the need for due process in the fair administration of justice on the one hand with privacy on the other. The quid pro quo is because privacy in the context of civil litigation has to yield to fair procedure. The *quid pro quo* is that you disclose only for the purpose of civil litigation and not for any other purpose and that is why the implied undertaking arises.

82. Mr. Hogan referred extensively to the decisions in *Mahon v. Rahn* [1998] Q.B. 424, and *Taylor v. Serious Fraud Office* [1999] 2 A.C. 177.

83. In *Taylor*, the plaintiff began an action for defamation against the defendants based on the contents of a letter which had been provided to him by way of unused material which had come into existence during the course of the investigation leading to the criminal prosecution of the plaintiff. The Court of Appeal held that there was no implied undertaking in respect of the documents, but dismissed the plaintiffs' case on the basis that the relevant document was immune from suit because it was brought into existence for the purpose of a criminal investigation.

84. On appeal to the House of Lords, it was held in dismissing the appeal that: in order to ensure that the privacy and confidentiality of those who made, and those who were mentioned in, statements contained in unused material which had come into existence as a result of a criminal investigation were not invaded more than was absolutely necessary for the purposes of justice, compliance by the prosecution with it is obligations to disclose all such material to the defence generated an implied undertaking not to use the material for any purpose other than the conduct of the defence and that, accordingly, the documents disclosed to the plaintiffs' solicitors could not be used for the purposes of the action for defamation.

85. Mr. Hogan refers the court specifically to that part of the judgment of Lord Hoffmann as set out at p. 207 wherein he states as follows:-

> "The two principles in debate are each well established and the question before your Lordships is the extent of their reach. The concept of an implied undertaking originated in the law of discovery in civil proceedings. A solicitor or litigant who receives documents by way of discovery is treated as if he had given an undertaking not to use them for any purpose other than the conduct of the litigation."

86. There is then a reference to *Home Office v. Harman* [1983] 1 A.C. 280 at p. 308, wherein it was stated (by Lord Keith of Kinkel):-

> "Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place upon the litigant any harsher or more oppressive burden than is strictly required for the purpose of securing that justice is done."

87. Lord Hoffmann stated at p. 208:-

> "It will be noticed that although both principles are concerned with public policy in securing the proper administration of justice, the interests which they are intended to protect are somewhat different and this is reflected in differences in their scope. The implied undertaking in civil proceedings is designed to limit the invasion of privacy and confidentiality caused by compulsory disclosure of documents in litigation. It is generated by the circumstances in which the documents have been disclosed, irrespective of their contents. It excludes all collateral use, whether in other litigation or by way of publication to others. On the other hand, the undertaking may be varied or released by the courts if the interests of justice so require and, unless the court otherwise orders, ceases to apply when the documents have been read to or by the court, or referred to, in proceedings in open court ..."

88. In dealing with the implied undertaking, Lord Hoffmann went on to state at pp. 208 to 212 as follows:-

> "We are concerned in this appeal with whether an implied undertaking is created by the disclosure of documents pursuant to the prosecution's duty at common law, in accordance with the principles most recently discussed by Lord Hope of Craighead in *Reg. v. Brown (Winston)* [1998] A.C. 367, 374-377. Since the trial of Fuller and Deacon took place, the law of disclosure has been put on a statutory basis by the Criminal Procedure and Investigations Act 1996. Section 17 imposes obligations of confidentiality in relation to disclosed material, but I do not think that the statute is of any assistance in deciding whether such obligations existed at common law.
>
> Until recently there was no authority on the subject. The reason, I suspect, is that the perception by prosecuting authorities of their disclosure obligations was substantially widened by the decisions of the Court of Appeal in *Reg. v. Ward (Judith)* [1993] 1 W.L.R. 619 and *Reg. v. Keane* [1994] 1 W.L.R. 746. Under the earlier Attorney General's *guidelines ( Practice Note (Criminal Evidence: Unused Material)* [1982] 1 All E.R. 734), the documents disclosed would almost invariably have fallen within the immunity principle as extended in *Watson v. M'Ewan* [1905] A.C. 480. We were told that the disclosure of internal memoranda made by investigators or letters passing between investigators is a relatively new practice.

The matter was, however, discussed by the Court of Appeal in *Ex parte Coventry Newspapers Ltd.* [1993] Q.B. 278. The case was unusual in a number of respects and did not involve normal disclosure by the prosecution in advance of the trial. The documents in question were, in fact, disclosed by the Police Complaints Authority pursuant to an order of the Court of Appeal for the purposes of an appeal against conviction. They related to an investigation of the conduct of police officers who had given evidence against the appellant. As a result of the information contained in the documents, his appeal was allowed. A newspaper which was being sued for libel by the same police officers applied to the court for the accused to be given leave to allow it to use the documents in its defence. Both sides proceeded on the assumption that there had been an implied undertaking which it was necessary to vary. Lord Taylor of Gosforth C.J. endorsed this assumption. He said, at p. 285:-

> 'But for such proposed order, the appellant would clearly be unable to hand over the documents: he would be subject to an implied undertaking, analogous to that arising on discovery in civil proceedings, not to use the disclosed documents otherwise than for the purposes for which discovery was given, here the pursuance of the criminal appeal, which is now, of course, successfully concluded.'

The court went on to hold that the interests of justice required the undertaking to be varied so as to allow the appellant in the criminal proceedings to hand over the documents to the newspaper upon its undertaking to use them only for the purposes of its defence.

At first instance, in *Mahon v. Rahn* (unreported), 19 June 1996, Brooke J. held that counsel in *Ex parte Coventry Newspapers Ltd*. [1993] Q.B. 278 had been right to concede the existence of an implied undertaking. The case concerned a libel action brought by two directors of a London firm of stockbrokers against two Swiss bankers. The alleged libel was contained in a document provided by the bankers to the Securities Association and the Serious Fraud Office in connection with an investigation which led to a prosecution of the plaintiffs on charges of conspiracy to defraud. The document was disclosed to the plaintiffs as an exhibit to a witness statement before the trial and subsequently read in open court. At the end of the prosecution case, the plaintiffs successfully submitted that there was no case to answer and were acquitted.

Brooke J. said that in his view, the general principle was that the use of documents disclosed for the purpose of legal proceedings should remain under the control of the court. The undertaking could always be varied in an appropriate case but the court should retain control. It was a necessary tool for preventing its process from being abused. He also held that the undertaking applied to material disclosed by the prosecution as intended to be used at the trial as well as to unused material and that it survived the use of the document in open court.

In the Court of Appeal [1998] Q.B. 424, his decision was reversed. Otton L.J. said, at p. 448, that he could find 'no basis for an implied undertaking in criminal proceedings on the grounds of privacy and confidentiality.' The reason, as I understand it, was that it was foreseeable that the information, if acted upon, would be made public. It is true that in *Mahon v. Rahn* the letter had actually been made public by use in open court. But that raised the separate and subsequent question of whether the undertaking, if it exists, should survive publication in open court. In the case of information which has not been made public, like the letter and file note in this case, the fact that publication may have been foreseeable as a possibility at the time when the documents were written, does not mean that privacy and confidentiality should not be preserved so far as it is possible to do so. It is equally foreseeable that documents disclosed in civil discovery will be published in open court but that does not mean that there is no point in the court retaining control over the use of documents which have not been published or even, for some purposes, over those which have.

Otton L.J. went on to say that he saw no analogy between the position of the Crown in a criminal case and that of a party in civil proceedings. It could not be said that the Crown would be deterred from complying with its obligations of disclosure, whether at common law or now under statute, by concern that the accused might use the documents for some ulterior purpose.

I am not sure that it is right to treat the implied undertaking in civil proceedings merely as an inducement to a litigant to disclose documents which he might otherwise have been inclined to conceal. I think that it is more a matter of justice and fairness, to ensure that his privacy and confidentiality are not invaded more than is absolutely necessary for the purposes of justice. But I readily accept that these considerations do not apply to the Crown as prosecutor with the same force as they apply to an individual litigant. In the case of material disclosed by the prosecution, the main interest in privacy and confidentiality lies at one or sometimes two removes: in the persons who provided the information and in the persons to whom the information refers.

Otton L.J. said that the most impressive argument in favour of an implied undertaking was the need to protect informers close to criminals.

But in his view, sufficient protection was already provided by public interest immunity, which entitled the prosecution to apply for leave to withhold documents which would disclose the identity of a police informer, and by the immunity from suit accorded to statements made for the purpose of litigation, which I shall consider in more detail later.

In my view, this takes too narrow a view of the interests which require protection and too broad a view of the other rules which may be available for that purpose. Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may, in the end, require the publication of the information or at any rate its disclosure to the accused for the purposes of enabling him to conduct his defence. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected.

One must also consider the interests of persons who are mentioned in the statements. Information given to the police or investigatory authorities will frequently contain defamatory or at least hurtful allegations about other people. That is to be expected in a criminal investigation. Such people may never be charged or know that they were under suspicion or that anything untoward was said about them. If such allegations are given publicity during the course of the proceedings, they will have to suffer the consequences because of the public interest in open justice. Even then, the judge will often be able to prevent the introduction of allegations about third parties which are not relevant to the issues in the case. But

there seems to me no reason why the accused should be free, outside court, to publish such statements to the world at large. The possibility of a defamation action is for most people too expensive and impractical to amount to an adequate remedy.

Otton L.J. thought that the rules of public interest immunity, immunity from suit and qualified privilege should be sufficient protection for people who might be adversely affected by collateral use of disclosed documents. But the first two of these rules are not designed to protect the same interests as those protected by the implied undertaking and can therefore offer only accidental protection. Public interest immunity, in a criminal trial, involves weighing the public interest in confidentiality against the interests of justice - usually, the interests of the accused in being able to establish his defence. But the interests at stake when a question of collateral use arises are quite different. One is, by definition, no longer concerned with the use of the information for the purposes of establishing a defence at the trial. The interests to be weighed are, on the one hand, the public interest in allowing the collateral use (as in *Ex parte Coventry Newspapers Ltd*. [1993] Q.B. 278) and, on the other hand, the public interest in avoiding unnecessary invasion of the privacy and confidentiality of the maker of the statement and anyone to whom it refers. There may be occasions on which the answers produced by these two exercises will coincide but that will be accidental.

Likewise, as I mentioned earlier, the interests protected by the immunity rule are different. The immunity rule, for example, offers no protection of the privacy or reputations of people mentioned in the statement. On the contrary, it makes their position worse, since they cannot even clear their names by bringing a libel action against the maker. In the present case, the plaintiff might have taken some comfort from the fact that the documents which showed that he had been under suspicion could go no further than the files of the S.F.O. and Mr. Fuller's solicitors. They could not have damaged his reputation in the outside world. Instead, he chose to bring libel proceedings and (apparently due to the thoughtlessness of his solicitors) put the statements into the public domain by quoting them *in extenso* on a specially endorsed writ.

In addition, the immunity rule, at its widest, protects only statements made for the purposes of the investigation. It offers no protection for documents in existence at the time when the investigation commences and which are given to the police or investigators for the purposes of the prosecution. But these documents too would have been disclosed only because the interests of justice so required and there seems no reason why that should justify their collateral use.

Finally, qualified privilege also seems to me an inadequate answer, both for the reasons given by Fry L.J. in *Munster v. Lamb* , 11 Q.B.D. 588, 607 and because it does nothing to protect the privacy of persons mentioned in the statements.

In my opinion, therefore, the disclosure of documents by the prosecution as unused material under its common law obligations, did generate an implied undertaking not to use them for any collateral purpose. I agree with the reasoning of Brooke J. on this point in *Mahon v. Rahn* and I think that Sir Michael Davies was right to strike out the action for the reasons which he gave.

I do not propose to express a view on the further points which arose *in Mahon v. Rahn* [1998] Q.B. 424, namely, whether the undertaking applies also to used materials and whether it survives the publication of the statement in open court. I do not do so because these questions may well have been overtaken by the express provisions of the Criminal Procedures and Investigations Act 1996. But I would draw attention to the comments of Brooke J. in *Mahon v. Rahn* on the question of whether the provisions of Ord. 24, r. 14A (which was introduced in response to a decision of the European Court of Human Rights, holding that the previous law unduly limited freedom of expression) and, by parity of reasoning, section 17(3)(b ) of the Act of 1996, are not too widely drawn. There seems to me much force in his view that the court should, nevertheless, retain control over certain collateral uses of the documents, including the bringing of libel proceedings."

89. Mr. Hogan relies extensively on the views of Lord Hoffmann and the consequences to his statement, if the law were otherwise. If there was to be no implied undertaking, you would have some remarkable consequences. It could scarcely be the law, Mr. Hogan submits, that an accused, once he receives the book of evidence, is free to do as he sees fit with it, unless there was an implied undertaking.

90. Mr. Hogan submits that persons make statements for the purpose of criminal proceedings to the Garda Síochána in the knowledge that their statements might well be used in the course of a pending criminal prosecution and if it is used they will be obliged to give evidence, and be discommoded to that extent and may have to suffer publicity, but that is part of the adherent administration of justice. But it could never have been supposed that those persons would make such statements in the knowledge that they might be used for collateral purposes in the context of a civil action taken by a person in fact in another jurisdiction, and if they had known that, they would never have made such statements in the first place.

91. If however, the court takes the view that it has a jurisdiction to set aside or vary in some way the implied undertaking, Mr. Hogan submits that the court should then be very slow to release the parties from their undertaking which are there for very good purposes. Mr. Hogan submits that parties should be relieved from their undertakings only in very limited circumstances.

92. Insofar as Taylor refers to unused material, Mr. Hogan submits that there is no distinction and that, for example, in Mr. Daly's case, he pleaded guilty to a charge of membership of an unlawful organisation and none of the material in the book of evidence was ventilated in open court, Mr. Hogan submits that this is unused material in the Taylor sense of that term, even though all the material would have been contained in a book of evidence.

93. With regard to the decision of Clarke J., in *Cork Plastics*, Mr. Hogan submits that the duty which is cast upon litigants to apply for releases has, in one shape or another, been prefigured in this case with the application to the Special Criminal Court for the variation from the terms of the undertaking and the Special Criminal Court has given its ruling in this regard.

94. As regards the decision in Chambers and Kelly, in neither case was the issue of an implied undertaking discussed and the judgments in both these cases must suffer this criticism.

95. Mr. Hogan concludes by submitting that the court is the ultimate guardian of public policy. In the absence of an implied undertaking, the consequences are quite simply breathtaking in terms of what an accused person could or could not do with the contents of a book of evidence. It is submitted that the court has a duty to protect the integrity of the criminal process in all its facets. Humanity, understanding and sympathy with the plaintiffs cannot, in Mr. Hogan's submission, be allowed to cloud the legal principle or to obscure the very important considerations that are at stake. The plaintiffs say there is no implied undertaking and Mr. Hogan contends that this is demonstrably incorrect, and the undertaking is essential to protect the integrity of the criminal justice

system.

96. Mr. Molloy, on behalf of the first, second and third named defendants, endorses the submissions of Mr. Hogan and submits that it is absolutely fundamental to criminal procedure that the statements in the book of evidence are only provisional statements until the witness has been called, takes the oath, gives his evidence and is subject to cross-examination.

97. There is a line of authority, Mr. Molloy submits, in the criminal jurisprudence generally, that it is improper for the trial judge during a jury trial, or for the sentencing judge, to explore the book of evidence and have regard to provisional statements untested by oath and by cross examination, unless the witness has been called by the prosecution or the defence.

98. This is of particular relevance, Mr. Molloy submits, in the case of Seamus McKenna who pleaded guilty.

99. With regard to the second named defendant, Mr. Molloy submits that the Court of Criminal Appeal was minded to grant a special certificate pursuant to s. 29 of the Courts of Justice Act 1924, allowing for an appeal on a question of law of exceptional public importance to the Supreme Court. The hearing of that reference was heard in early February and judgment is awaited. It could lead either to an affirmation of the conviction, a re-trial or the allowing of the appeal.

100. In reply on the plaintiffs' behalf, the principles, as enunciated by Clarke J., in *Cork Plastics*, are emphasised.

101. The alleged particular prejudice that would result to the fourth named defendant being required to comply with the order of Morgan J. is not, it is submitted, a proper matter to be agitated in these proceedings. Both the High Court and the Court of Appeal in Northern Ireland were aware that the fourth named defendant was facing the prospect of a re-trial and it is for that reason that the order was far more limited than the orders made in relation to the other defendants.

102. The issue of privilege against self-incrimination is properly an issue for the Northern Ireland courts and was, in fact, considered by the Court of Appeal in the context of the fourth and fifth named defendants' appeal from the order of Morgan J. In any event, the material that is being sought to be obtained is material provided to the respective defendants by the Director of Public Prosecutions and is therefore already available to him. There can be no suggestion that the production of such material by the defendants, including the fourth named defendant, would involve a violation of any privilege.

103. It is submitted that the decision in *Taylor* is of very limited assistance because it referred exclusively to unused material. It was emphasised that *Mahon* and *Rahn* is the more appropriate authority to be followed in this jurisdiction.

104. It was emphasised that in Chambers, *Kelly* and *Minister for Justice v. Information Commissioner*, there was no reference to an implied undertaking existing.

**Conclusion**

105. The Northern Ireland High Court has made orders for the discovery and production of the relevant transcripts of evidence and books of evidence pertaining to each of the defendants' trials on various charges before the Special Criminal Court. The plaintiffs are maintaining a civil action for damages in Northern Ireland in respect of loss and damage arising from death and personal injury of some of those persons killed and injured in the Omagh bomb explosion. A successful result in those proceedings in Northern Ireland would result in a finding that on the balance of probabilities, the defendants, or some of them, were civilly liable to the plaintiffs and that an award of damages would follow.

106. The position in this jurisdiction with discovery is that pursuant to Order 31, rule 19 of the Rules of the Superior Courts, 1986:-

> "If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection."

107. Accordingly, if the plaintiffs' proceeding had been instituted in this jurisdiction, Order 31 rule 19 would have come into play and the various issues as raised by way of objection would have been considered by the court, on the facts as presented and the submissions made.

108. It is clear from a detailed examination of the very comprehensive judgment of Morgan J. in the proceedings in the Northern Irish High Court, that the issue as to discovery and production was fully contested and the defendants were given every opportunity to raise objection which they appear to have done. All the objections were very carefully considered by Morgan J. prior to arriving at his decision and making the orders with which this Court is now concerned.

109. There was then a very full consideration given by the Court of Appeal in Northern Ireland to an appeal from the decision of Morgan J. in a judgment delivered on the 15th March, 2007, by Kerr L.C.J. which concluded with the final observation that:

> "None of the many grounds advanced by the appellants have succeeded and the appeal must be dismissed. This appeal has been characterised by the inclusion of every conceivable technical objection to the judge's order. The case generally has spawned much interlocutory litigation where again every possible ground on which the action might be frustrated has been canvassed . . .".

110. I take the view that there is a clear distinction to be drawn between the order in respect of the transcripts of evidence and the books of evidence.

111. The transcript of evidence comes into existence when a convicted person intimates an appeal from his conviction and or sentence, (or the Director of Public Prosecutions with respect to leniency of sentence) following a trial on indictment to the Court of Criminal Appeal pursuant to Order 86, rule 14 of the Rules of the Superior Courts.

112. The official stenographer supplies the transcript pursuant to Order 86, rule 17 of the Rules of the Superior Courts, 1986, which states:-

> "(1) At any time after notice of appeal or notice of application for leave has been served, an appellant or the Director of Public Prosecutions or the solicitor or other person representing either of them, may obtain from the Registrar copies of

any documents or exhibits in his possession for the purpose of such appeal or application. Such copies shall be supplied by the Registrar at the proper charges.

(2) A transcript of the shorthand notes taken of the proceedings of the trial of an appellant shall be supplied by the Registrar free of charge;

(a) to an appellant who has been granted a legal aid (appeal) certificate, and,

(b) to any other appellant by order of the Court."

"Court" means "Court of Criminal Appeal" and shall, in relation to any interlocutory application, include the Chief Justice or any Judge of the Supreme Court nominated by the Chief Justice to hear and determine such application;

"the Registrar" means the Registrar of the Court of Criminal Appeal.

113. I take the view that on an interpretation of the Rules of the Superior Courts, it is clear that a transcript of the evidence as taken by the official court stenographer in the Circuit Criminal Court, in the Central Criminal Court, and in the Special Criminal Court, can only be furnished after Notice of Appeal or Notice of Application for Leave to Appeal has been served and the appropriate person from whom to receive the transcript is the Registrar of the Court of Criminal Appeal and the appropriate persons who are entitled to a copy of the transcript are an appellant who has been granted a legal aid (appeal) certificate and any other appellant by order of the court, being the Court of Criminal Appeal.

114. This Court, (Finnegan J.) in Minister for Justice v. Information Commissioner, considered this very aspect in relation to an application by a notice party to the Information Commissioner pursuant to the provisions of the Freedom of Information Act 1997, for access to certain records including the shorthand note and transcript, the book of evidence, the original statements and other documents compiled into the book of evidence in a Circuit Criminal Court prosecution.

115. Finnegan J., having reviewed Order 86 of the Rules of the Superior Courts, 1986, took the view at p. 49 that:

> "…the official stenographer is appointed by the court through the agency of the applicant in the second proceedings. The sole relationship that the stenographer has is with the court. A party interested in an appeal or application for leave to appeal is entitled to a copy of the transcript upon payment of the proper charges, so however that where an appellant has been granted a legal aid appeal certificate of where the court so orders, the transcript shall be supplied free of charge. It seems clear to me that at all times the official stenographer has a relationship exclusively with the court and transcripts are only provided by the Registrar to a party interested in an appeal or application for leave to appeal. In this sense, the first notice party to the second proceedings is not a party and indeed there is no appeal in being and on both these counts he is not, under the Superior Court Rules, entitled to a transcript. Having regard to the relationship which exists between the official stenographer and the court as it appears from the Rules of the Superior Courts, 1986, I am satisfied that the shorthand note and the transcript which may be produced from same, is created by the court . . . I am further satisfied . . . that it is a record whose disclosure to the general public is prohibited by the court. O. 86, r. 14 and r. 17 (2) of the Rules of the Superior Courts, 1986 regulate who is entitled to obtain a transcript from the Registrar and the conditions as to payment which should apply. I read the Rules as prohibiting the issue of a transcript to any other person save and except, however, that an order may be made in favour of any other person pursuant to O. 31 r. 29 of the Rules of the Superior Courts, 1986: see *Chambers v. Times Newspapers Ltd.* [1999] 2 I.R. 424 and *Kelly v. Ireland* [1986] I.L.R.M. 318 as to the court's power to regulate its own procedures."

116. It is clear that the judgment of Finnegan J. can be interpreted to the effect that a transcript of criminal proceedings is a record created by the court, is a record whose disclosure to any third party is prohibited by the court and further, that the courts are entitled to regulate the conduct of court business.

117. In this regard, there is in existence a practice direction as issued by the then President of the High Court, Hamilton J. on 25th September, 1986, which still pertains and states as follows:

> "Transcripts of evidence prepared for the Court of Criminal Appeal cannot be used or made available for any purpose as to do so could cause injustice to an accused person who has been dealt with by the court, if the facts in his case were to be reviewed or dealt with in any way by any other body. His Constitutional right is to have his case heard and determined by the courts in accordance with law".

This practice direction, while not binding in law, adds weight to the view adopted by Finnegan J. to the effect that transcripts of criminal trials as prepared by the court stenographer, are for use by an appellant with regard to an appeal to the Court of Criminal Appeal and for no other purpose.

118. Insofar as the plaintiffs' seek, through the medium of discovery, production for use in their civil proceedings for damages against the defendants of the official stenographer's transcript of the evidence adduced at the defendants respective trials, I take the view that as a matter of law, the official stenographer's transcript of the proceedings at a criminal trial is only provided to an appellant for the sole use of assisting in his appeal. There is, in my view, an absolute prohibition on the disclosure of the content of the official stenographer's transcript to any third party, for whatever purpose.

119. I do not consider that the plaintiffs' position as regards access by way of discovery to the official stenographer's transcript is assisted by the facts or determination as found by this Court (Morris P.) in *Chambers v. Times Newspapers Ltd.* [1999] 2 I.R. 424.

120. It is clear that in principle, the application before the court involved exclusively Order 31, rule 29 of the Rules of the Superior Courts, 1986, which states:-

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

The defendants were the publisher and editor respectively of the "Sunday Times" newspaper. The plaintiff claimed he was defamed by the defendants in an article published in that newspaper in which it was alleged, *inter alia*, that he had been involved in certain bombings in England. The defendants, in admitting the writing and publication of the words 'complained of', alleged that the words were true in substance and fact and relied on the defence of justification and alleged that the plaintiff was convicted of several offences and was sentenced to imprisonment.

121. It was submitted on behalf of the defendants, that in order to fully defend the proceedings, it was essential that they procure copies of the witness statements used in the criminal trial and subsequent appeal, as well as the transcripts of the trial and appeal and the final order made. Voluntary discovery had been sought from the Registrars of the Court of Criminal Appeal and the Special Criminal Court and had been refused on the direction of the President of the High Court, in accordance with the practice of those courts that such documents should only be handed over for the purpose of an appeal.

122. Morris P. took the view that the documents sought were in the possession, custody or power of the Registrars of the Special Criminal Court and Court of Criminal Appeal and that they were relevant to the issues arising in the litigation between the parties.

123. He accepted that when the matter was referred by the defendants' solicitors to the Registrars, his directions were sought in his capacity as President of the High Court and he made a ruling that the documents sought should not be made available to the defendants and were only to be handed over for the purposes of appeals taken against the decision of that court. This practice, in his view, was based upon sound reason, inasmuch as transcripts, while taken at the hearing by stenographers, are only made up when an appeal is lodged against the decision of the court. Otherwise, the transcript is not available in a typed form.

124. Morris P. took the view that this practice must, of course, yield to an order made in pursuance of Order 31, rule 29 and there was nothing in the rule which deprives it of its applicability to a book of evidence or a transcript of a hearing of a criminal matter.

125. Morris P. then referred to a decision of this Court (O'Hanlon J.) in *Kelly v. Ireland* [1986] I.L.R.M. 318 at p.323 and proceeded to take the view that the court should be slow to put someone, not a party to the action, (namely the relevant Registrars), to the trouble of making discovery if it can be avoided and directed that the plaintiff should be the subject matter of an order for discovery initially.

126. Morris P. stated at p.430:-

> "I believe that as a general principle, third party discovery, with all the inconvenience which it involves, should only be ordered when there is no realistic alternative available."

127. Morris P. proceeded to adjourn the application generally with liberty to re-enter and if requested by the defendants he indicated that he would make an order for discovery against the plaintiff and would give the defendants liberty to re-enter for further consideration of the application if it should transpire that the documents were not forthcoming. It was at that stage he indicated he would propose to favourably consider the application.

128. I take the view that the entire thrust of the case for consideration before Morris P. in *Chambers* was that of third party discovery where an application had not already been made against the plaintiff to the proceedings. It does not appear from the judgment that any consideration was given to the effect of Order 86 of the Rules of the Superior Courts and its relevant effect on the official stenographer's transcript.

129. Further, I do not consider that the judgment of O'Hanlon J. in Kelly v. Ireland provides any comfort to the plaintiffs in their application herein. The specific issue relating to formal proof of a decision of the Special Criminal Court arose in circumstances where counsel for the plaintiff, submitted that there was no procedure available for the formal proof in later civil proceedings of decisions taken in the course of a criminal trial before the Special Criminal Court. An official transcript was kept for the purpose of appeals or applications for leave to appeal to the Court of Criminal Appeal but this was not available for any other purpose (Order 86, rule 14, Rules of the Superior Courts). An application by counsel for the plaintiff to see the transcript after the court had ruled on the admissibility of the statements had been refused during the course of the trial.

130. O'Hanlon J. while expressing a view, did not feel it was necessary to resolve the particular legal issue in view of the fact that the pleadings were to be read as an admission by the plaintiff that the issues which he was now seeking to litigate were the same as those which already arose for consideration during the course of his trial before the Special Criminal Court and which that court decided against him.

131. In the circumstances, I come to the conclusion that in respect of the official stenographer's transcript of evidence arising from trials of the individual defendants before the Special Criminal Court, the transcripts of evidence, where provided to them, were solely for the purpose of use in respect of an appeal and in circumstances where disclosure of its content to any third party is prohibited by the Court of Criminal Appeal pursuant to Order 86, rule 14 and rule 17 of the Rules of the Superior Courts, 1986. I take the view that this prohibition cannot be circumvented by means of an order for discovery or production in favour of a third party who is not an appellant from a conviction and/or sentence to the Court of Criminal Appeal.

132. Accordingly, I come to the conclusion that there is an impediment in law in this jurisdiction to the production by the defendants of the respective transcripts of evidence as furnished to them arising from their respective trials in the Special Criminal Court to the plaintiffs for use by them in civil proceedings by way of a claim for damages, as against the defendants.

133. The issue that arises with regard to the books of evidence is whether or not there is an implied undertaking against any collateral use when the book of evidence is provided to an accused in accordance with fair procedures in respect of his forthcoming trial of alleged criminal offences. This issue has never previously been determined in this jurisdiction. In the cases of *Kelly, Chambers* and *Minister for Justice v. The Information Commissioner*, the issue as to an implied undertaking with regard to the book of evidence was not considered. The situation in the United Kingdom has given rise to conflicting judgments and is dealt with at least in part by statute pursuant to the Criminal Procedure and Investigations Act 1996. Conflicting decisions have also been arrived at in Canada where the aspect is, in part at least, subject to statutory provisions and the rules of civil procedure. There has been considerable debate as to whether an implied undertaking, if it exists, should relate only to unused material as opposed to used material. Suffice to state that the legal issue that arises is significant and merits in-depth consideration with respect to this jurisdiction. In the circumstances that pertain, it clearly would be preferable to await and decide the issue in a suitable case dependant on facts and circumstances occurring within this jurisdiction, to be determined and concluded by the courts in this jurisdiction. If this court were to embark on deciding the issue, it would be doing so to some extent in a vacuum because the courts in Northern Ireland have already determined, on the facts and circumstances as presented to them, that the relevant orders for discovery and production are

warranted. It is the view of this court that the Director of Public Prosecutions would be an essential notice party to any such application, the result of which will undoubtedly have a bearing on a significant element of our criminal justice system. It also has to be borne in mind that the consent of the Director of Public Prosecutions in the particular circumstances of this case is given subject to the approval of the court and against the background where the High Court in Northern Ireland has already made orders, not only for the discovery of the books of evidence, but also for their production. There is, in my view, no question of the Director of Public Prosecutions giving any type of a far reaching consent applicable to all cases.

134. Mr. Collins, on the plaintiffs' behalf, at the conclusion of submissions, made a suggestion to the court that it may consider that on the basis of an assumption that there is an implied undertaking. He followed this by stating that the matter could be determined and that this may or may not be a course that would commend itself to the court, but is a course that would obviate the necessity to decide the legal issue as to whether or not there is an implied undertaking. Neither Mr. Molloy, on behalf of the first, second and third defendants, nor Mr. Hogan, on behalf of the fourth and fifth named defendants, demurred from this suggestion.

135. Mr. Collins's suggestion does commend itself to the court because in the particular circumstances that arise, the court is of the view that the circumstances are significantly less than ideal to decide the legal issue that arises. Mr. Justice Morgan in the High Court in Northern Ireland, has had the benefit of dealing with the application and of considering all the facts as presented, the legal submissions, and with the various technical objections that were raised. As such, having regard to his carefully reasoned judgments and in-depth rulings, this Court deems it appropriate to have respect for his findings and those of the Court of Appeal in Northern Ireland.

136. It can only be to the benefit of the defendants if this Court assumes, solely for the purpose of this application, that, as contended for on the defendants behalf, there is an implied undertaking against any collateral use attaching to the book of evidence as served upon each of them with regard to their respective trials before the Special Criminal Court. For the sake of completeness, no claim is being made in this instance and no order has been made in respect of any unused documentation. This application and the order of the High Court in Northern Ireland relates solely to the actual book of evidence or part thereof, in each of the defendants' cases.

137. Accordingly, solely for the purpose of this application, I am prepared to assume that an implied undertaking against any collateral use does apply to the book of evidence as served on each of the defendants with respect to their respective trials before the Special Criminal Court.

138. I take the view that significant assistance to the issue that arises is to be derived from the recent decision of this Court, (Clarke J.) in *Cork Plastics Manufacturing v. Ineos Compounds UK Ltd*.

139. The position in that case is strikingly similar in many respects to that of the present case save for the criminal prosecution aspect. One of the defendants had previously been directed to make discovery in civil proceedings for damages and had resisted the application for discovery of certain categories of documents which had been prepared for the purposes of earlier proceedings in England and were subject to restrictions on use similar to those applicable in civil proceedings in this jurisdiction. Unlike the present case, there was no dispute as to the existence and application of such restrictions. However, the plaintiffs argued that the discovery obligations of the defendants arising from the order of the High Court in this jurisdiction required it to seek consent to this disclosure of the documents at issue and in the absence of such consent, to seek the leave of the relevant English court to such disclosure.

140. Clarke J. upheld the plaintiffs' arguments and held that the defendant was obliged bona fide to seek an effective release from the restrictions affecting its capacity to make discovery and provide inspection in accordance with its obligations in this jurisdiction.

141. Clarke J. cited with approval a number of Australian decisions (*Esso Australia Resources Limited v. Plowman* (1995) 18 C.L.R. 10, *Patrick v. Capital Finance PTY Limited (No. 4)* [2003] F.C.A. 436), which established as a general principle that, at p. 181, "the implied obligation arising from discovery in one action must yield to the requirements of curial process in other litigation", a principle which, in his view at p. 182, "stems from the fact that, in the ordinary way, the requirements of justice in the second set of proceedings will normally mandate that documents which are relevant to those proceedings be disclosed so as to allow a proper and just determination of the second set of proceedings."

142. Clarke J. went on to set out his view of the proper course of action to be adopted where both relevant proceedings are in this jurisdiction and in particular he referred to the necessity to join any party in whose favour the obligation not to produce existed.

143. Further, Clarke J. went on to state that (at pp. 182 and 183):-

> "…in assessing the weight to be attached to, on the one hand, the existing obligation on foot of the implied undertaking and, on the other hand, the obligation to disclose in the second set of proceedings, the court should place a heavy weight on the obligation to ensure that the second proceedings come to a just result and should not, in the absence of some significant countervailing factor, decline to direct production. By directing disclosure, the court would, in effect, overrule or discharge the existing implied undertaking subject to any conditions that might seem appropriate."

144. Clarke J. went on to consider the situation as exists herein, where there was the added dimension of one set of proceedings being in another jurisdiction. In his view, the availability of documents ought not to be dependant (at p.183) "…on the happenstance of whether that previous litigation was in the same or another jurisdiction". Although he acknowledged that there was (p. 183) "one significant complication" in that the order, made by the court here in the second proceedings, cannot have the automatic effect of releasing the party concerned from its pre-existing obligations. Clarke J. added significantly at p. 183:-

> "However, it seems to me that the comity of courts would require, that the courts of the second jurisdiction would give significant weight, in considering whether to direct a release of a party from its obligations, to the need to ensure that the courts in the jurisdiction having seizin (sic) of the second proceedings could arrange for the conduct of those proceedings in the way most calculated to achieve a just result."

145. A significant influencing fact in the particular circumstances of this application, is that the Director of Public Prosecutions, being the person in whose favour the implied undertaking exists, has stated in open court through counsel, on the application to the Special Criminal Court and by way of letter as dated 5th March, 2008, that he has no objection in this case to the declarations as sought in paras. 1, 2 and 3 of the plaintiffs' claim, subject to this Court considering so appropriate.

146. I am satisfied in the circumstances of this case where an order for discovery and production has been made by a competent court outside this jurisdiction, this Court has to give significant weight in considering whether to direct a release of a party from its

obligation to the need to ensure that the High Court in Northern Ireland can arrange for the conduct of the proceedings before it, in the way most calculated to achieve a just result. It is clear from the judgment of Morgan J. and from the judgment of the Northern Ireland Court of Appeal, that it is considered necessary for the defendants to make discovery and produce the books of evidence as served upon them in their respective trials, so as to enable a just result to be achieved in the proceedings to be determined.

147. Morgan J. in the High Court in Northern Ireland has determined all the objections as raised on the defendants behalf, in coming to a conclusion affirmed on appeal that the defendants make discovery and produce for inspection the books of evidence as served upon them.

148. I am satisfied that there is a discretion vested in this Court to release from or modify the assumed implied undertaking in relation to the books of evidence. Each case involving such an implied undertaking has to be looked at on its own merits. In following this Court (Kelly J.) in *Roussel v. Farchepro Ltd.* [1999] 3 I.R. 567, I am satisfied that in the exercise of this discretion, firstly there has to be a demonstration of special circumstances, and secondly, it has to be shown that the person making an order of this type will not occasion injustice to the person giving discovery. I take the view that special circumstances do exist in the particular circumstances that pertain, in that, clearly Morgan J. in the High Court in Northern Ireland was satisfied that the discovery and production of the books of evidence were essential to enable a just result of the action between the parties to be achieved. The Court of Appeal in Northern Ireland put the matter at a higher level stating:-

> "It is beyond dispute that the documents contain material that will – at least potentially – be pivotal to the outcome of the case. In our judgment, the interests of justice unmistakably call for their production."

149. The issue as to whether an injustice will be occasioned to the defendants has been exhaustively canvassed before the Northern Ireland courts. Further, it has to be borne in mind that the production of the books of evidence, as sought, is solely for use in civil proceedings and will be subject to the necessary implied undertakings as to collateral use arising on discovery. Furthermore, insofar as there is to be a re-trial of the fourth named defendant and a possible re-trial of the second named defendant, both re-trials would take place before the Special Criminal Court and will not involve a jury and will be decided according to the criminal standard of proof, on the evidence adduced before the court. There can be no justifiable suggestion that any proposed re-trial would be affected in some way by reason of evidence given, or by a result achieved in civil proceedings. Furthermore, from the defendants' perspective, they are being asked to produce the book of evidence as supplied to them by the Director of Public Prosecutions, so that all the information in the book of evidence is already available to the prosecuting authority. This is not a situation whereby the production required is going to throw up some new document, or piece of evidence which could, in some way, potentially affect a defendant at a subsequent re-trial. The first, third and fifth named defendants do not make out any case that they face any further criminal proceedings arising out of any matter contained in the books of evidence and having served the sentences of imprisonment as imposed upon them have now been released.

150. Mr. Hogan on behalf of the fourth named defendant, argued extensively that he faced a re-trial and that the order of the Northern Ireland court was effectively of obliging him to produce for inspection those parts of the book of evidence as related to telephone evidence given at his trial before the Special Criminal Court. Mr. Hogan referred to the judgment of Morgan J. in the High Court in Northern Ireland and also that of Kerr L.C.J. in the Court of Appeal of Northern Ireland wherein it had been concluded that there was no controversy surrounding the "factual telephone evidence" and that this had not been challenged in the earlier trial. Mr. Hogan has urged upon this Court that in fact, the Court of Criminal Appeal at p. 131 of the judgment, as handed down by Kearns J., specifically refers to the evidence of a witness, Mr. Morgan, whose initial evidence was later retracted. Mr. Hogan submitted to this Court that with great respect to the High Court in Northern Ireland and the Court of Appeal, it appeared to him that the judgment of the Court of Criminal Appeal could not have been before the court and that as deposed to by Mr. Finnucane on behalf of the fourth named defendant, these matters would be put in controversy at any re-trial of the fourth named defendant.

It is quite clear that both the High Court in Northern Ireland and the Court of Appeal were aware that the fourth named defendant was facing a re-trial. It is clear from the judgment of Kearns J., in the Court of Criminal Appeal that the Special Criminal Court had come to the conclusion that the accuracy of the actual telephone records had not been challenged by the defence. Clearly, Mr. Morgan retracted his earlier evidence and, as set out by Kearns J. in the judgment of the Court of Criminal Appeal, it was open to the trial court to decide, as it did, that the evidence given by Mr. Morgan, when he was first before the court was truthful. I do not agree with the submission of Mr. Hogan that the production of the book of evidence insofar as it relates to the telephone evidence in respect of the fourth named defendant would in some way prejudice his anticipated re-trial. This aspect has already been referred to in general terms. Quite clearly, the fourth named defendant will be in a position, if there is any doubt in the matter, to produce to the trial judge in Northern Ireland the judgment of the Court of Criminal Appeal and to make any relevant submissions thereon.

151. The main reasons for the defendants' refusal to comply with the order for production is to the effect that the books of evidence are not within their control. Rather, they are in the de jure control of the Special Criminal Court. The defendants also contest that the documents in their possession were furnished pursuant to an implied undertaking not to use them for any other purpose and that they cannot, by law, produce the said documents without committing a contempt of court.

152. I am satisfied that the books of evidence are in the control of the respective defendants and not the de jure control of the Special Criminal Court. For the purpose of these proceedings, and for that sole purpose, I am satisfied to assume that the books of evidence were furnished to the defendants pursuant to an implied undertaking that they were not to be used for any collateral purpose. In the particular special circumstances of this case, I am satisfied in the exercise of my discretion, to waive the assumed implied undertaking that the books of evidence would not be used for any collateral purpose so as to enable them to be produced in accordance with the order of Morgan J. of the High Court in Northern Ireland. I am satisfied in the circumstances to come to the conclusion that in discovering and producing the books of evidence and in particular, having regard to the observations of counsel on behalf of the D.P.P. when the application was made initially to the Special Criminal Court and the subsequent letter of consent from the Director of Public Prosecutions, that each of the defendants will not be committing any contempt of court in discovering and producing the relevant books of evidence.

153. Accordingly, I come to the conclusion that there is no impediment in law in this jurisdiction to the defendants discovering and producing the books of evidence, or part of them as the case may be, the subject matter of the various orders of Morgan J., in the High Court in Northern Ireland.