

## THE HIGH COURT

[2003 No. 15671 P.]

BETWEEN

PHILIP SMYTH

PLAINTIFF

AND

COLM CHURCH, RAY MURRAY, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE, EQUALITY AND  
LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

**JUDGMENT of Mr. Justice McDermott delivered on the 22nd day of June, 2018**

1. The court is asked to determine whether the defendants are entitled to claim privilege over a number of documents which have already been the subject of an order for discovery on 15th January 2015 and an order for further and better discovery on 30th November 2017 which are set out in schedules to five affidavits of discovery made thereafter. The five affidavits dated 21st October, 2016, 31st October, 2017 and 5th February, 10th April and 11th May, 2018 were sworn by Chief Superintendent Anthony Howard of the Drugs and Organised Crime Bureau of An Garda Síochána. The documents which are the subject of this application are set out in paragraphs (1)(a) to (d) inclusive of the Notice of motion and an updated "Privilege Table" provided to the court dated the 23rd May 2018. The discovery process in this case is also relevant to proceedings commenced by the plaintiff's brother entitled "*The High Court Record No 2002 15244 P, between/ Paul Smyth, Plaintiff and Commissioner of An Garda Síochána, The Minister for Justice Equality and Law Reform, Ireland and the Attorney General, Defendants*" in which an order was made on the 14th January 2015 that discovery in these proceedings may be used in Paul Smyth's proceedings which seek similar relief in respect of events concerning phone calls allegedly made to police in the United Kingdom between 1992 and 1996 .

**Background**

2. The documents in issue are said to be relevant to two sets of events.

3. On 12th September, 1988 Detective Garda Church swore two informations before a peace commissioner pursuant to which he obtained two warrants to search parts of Sachs Hotel, Morehampton Road, Donnybrook, Dublin and an address at 3 Sycamore Drive, Cabinteely, County Dublin under the Misuse of Drugs Acts 1977 to 1988. The latter address was the home of Ms. Brenda Flood who was employed by the plaintiff as a manager and personal assistant to the plaintiff in the operation of Sachs Hotel in which Genport Ltd., a company of which the plaintiff was managing director, held a leasehold interest.

4. It is alleged that later on the same day the warrant in respect of the hotel was executed by gardaí. It is alleged that when doing so gardaí accused Ms. Flood of selling or suppling cocaine, a controlled drug under the Misuse of Drugs Act. Ms. Flood maintained her innocence of this allegation. She was escorted to her home at 3 Sycamore Drive which was also searched. Nothing was found in the course of either search. Subsequently, Ms. Flood initiated proceedings against the defendants in 1991 claiming damages for false imprisonment and violation of a number of her constitutional rights. These proceedings were settled on or about the 11th June, 1997 on terms in which it is said the "State publicly and unreservedly acknowledged the good name and integrity of Ms. Flood and the falsity of the information upon which the said search warrants were obtained".

5. The plaintiff in these proceedings which issued on 19th December, 2003 sought an order directing the first and second defendants to disclose to him the true names of persons who furnished false information to them which caused them to conduct the searches of Sach's Hotel or alternatively, to confirm that they acted on information supplied by an anonymous source. The second named defendant is now deceased. An order is also sought directing the remaining defendants to take all such steps as are necessary to ascertain the true identity of the person who furnished the false information. A declaration is also sought that the Commissioner of An Garda Síochána failed to cause or carry out a full and thorough investigation into the circumstances in which the searches were carried out in 1988.

6. Detective Garda Church and Murray refused to disclose the identity of their informer to Detective Inspector Hickey or the then Commissioner of An Garda Síochána in the course of an investigation into the affair. Their dismissal from An Garda Síochána was therefore sought under garda regulations as a result of which they initiated High Court proceedings against the Commissioner to prevent their dismissal. These proceedings were determined by the High Court (Costello J.) in a judgment delivered on 18th March, 1997 in which the Commissioner's order directing the Detective Gardaí to identify the informant was held to be legally valid and that they were required to obey it. They were not dismissed because they then gave an undertaking to disclose the identity of the informant.

7. Thereafter the two Detective Gardaí identified one H. K., by then deceased, as a man who allegedly gave them the information on 7th September, 1988 at Harcourt Square Garda Station. The plaintiff claims that Mr. K. could not have been the informant as he was not in Ireland at the time and had been residing in Spain for some years prior to September 1988. He died on 4th November, 1995 some two years prior to his nomination as the informant by the two Detective Gardaí. The plaintiff complains that the Commissioner of An Garda Síochána thereafter failed to take any effective steps to ascertain the true identity of the informant or whether the source of the information was in fact anonymous. It is claimed that the Commissioner failed in his duties to the plaintiff to the extent set out at para. 20 of the statement of claim. The particulars furnished therein allege that the investigation carried out by or on behalf of the Commissioner and which concluded with the submission of a report by Detective Superintendent Noel Conroy (as he then was) dated 11th April, 1989 to the Chief State Solicitor for a decision as to whether any criminal charges should be instituted in the matter, failed to acknowledge or refer to a number of matters which were pertinent to and known to Detective Superintendent Conroy or could or should have been readily identified by him.

8. In 1993 the then Commissioner Culligan appointed Chief Superintendent Reid to carry out a further investigation. In the course of that investigation it is claimed that information furnished by the plaintiff to the Chief Superintendent showed that the nominated informant Mr. K had been in Spain at the time he allegedly gave the information to the Detective Gardaí. However, it is claimed Chief Superintendent Reid failed to take any effective step against the two Detective Gardaí on the basis of that information.

9. The defendants deny the allegations set out in the statement of claim concerning the searches of Sachs Hotel and Ms. Flood's residence. In particular, the defendants deny the alleged breach of duties set out paras. 20 and 21 of the statement of claim. The

nomination of H.K. publicly as the alleged informant is denied as also is the suggestion that Mr. K. could not have been the person who supplied the information in question. It is stated that it is the policy of An Garda Síochána not to identify informants but it is also denied that Mr. K. could not have been the informant.

### **Anonymous Calls to the Metropolitan Police**

10. The second element of the plaintiff's claim is that between 1992 and 1996 extremely damaging statements were made concerning the plaintiff and his brother Chief Superintendent Paul Smyth who has also issued proceedings in respect of these matters (*The High Court Record No. 2002 No. 15244 Between/ Paul Smyth plaintiff and Commissioner of An Garda Síochána, The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General defendants*). It is claimed that between June 1992 and May 1995 a series of anonymous telephone calls were made by a female to the South Eastern Regional Crime Squad of the Metropolitan Police Force where they were received by Detective Inspector Keith Condon and Detective Constable Paul Edwards.

11. It is alleged that in the course of these telephone calls the caller claimed that a man called S, a criminal associate of a convicted drug trafficker with excellent sources within An Garda Síochána was part of a money laundering operation on behalf of the IRA and that monies were cleansed through a company called Princeton Ltd. which was a company controlled by the plaintiff and the parent company of Genport Ltd., the leaseholder of Sachs Hotel. It is claimed the caller also alleged that Princeton Ltd. owned hotels and clubs in Dublin including Sachs Hotel and that the directors of Princeton Ltd. were the plaintiff and his brother Chief Superintendent Paul Smyth. She alleged that Princeton Ltd.'s solicitor had well-known IRA connections in Ireland and that the plaintiff was a friend of one A. J. J. from Northern Ireland who had been arrested and convicted for possession of 15 kilogrammes of heroin. The plaintiff claimed that she also alleged that the plaintiff was known to a Mr. S. who was part of a money laundering operation on behalf of the IRA and that Chief Superintendent Smyth had actively inhibited any enquiries about Mr. S. and his associates and others by misusing his own authority whilst head of personnel in An Garda Síochána by transferring "troublesome" officers.

12. It is claimed that these allegations were notified to An Garda Síochána by the Metropolitan police which led to an investigation by An Garda Síochána which ultimately caused damage to the plaintiff and his brother Chief Superintendent Paul Smyth.

13. It is claimed in the light of the history of the search of Sachs Hotel and the alleged involvement of the plaintiff's brother Chief Superintendent Paul Smyth in alleged wrongdoing, that the defendants owed a duty to the plaintiff to investigate comprehensively the circumstances surrounding the making of these telephone calls and to identify insofar as possible their source and the persons who communicated the information and made the telephone calls or were responsible for same or assisted or acquiesced in such activities. Furthermore, it was alleged that the defendants were under a duty to ascertain the truth or falsehood of these allegations having regard to the seriousness of the crimes alleged to have been committed and to recommend to the Director of Public Prosecutions that the person or persons suspected of being responsible for the commission of such crimes be prosecuted.

14. The plaintiff outlines in his statement of claim other matters concerning a business rival Mr. Hugh Tunney and Crofter Properties Ltd., a company controlled by Mr. Tunney and which owned the freehold of Sachs Hotel. The plaintiff described the difficult relationship between Crofter Properties Ltd. and Genport Ltd. who owned the leasehold interest in the hotel. There had been serious disputes between the two companies and Mr. Tunney and the plaintiff which lead to contentious litigation. It is said that had the Commissioner of An Garda Síochána carried out a proper investigation into the two events outlined above, it would have discovered that the telephone calls made to the London Metropolitan police were made by a Ms. Caroline Devine from telephone lines from a telephone(s) at Classiebawn Castle, Mullaghmore, Co. Sligo which was Mr. Tunney's residence and in particular from telephone numbers 071-66455, 071-66491 and 071-66326 which were lines listed in the name of Mr. Tunney and/or Tunney Meats Ltd. (a company controlled by Mr. Tunney). It is claimed that telephone calls of a similar nature were made from telephone lines and a telephone in a penthouse in the Gresham Hotel Dublin which were listed in the name of Mr. Tunney care of the Gresham Hotel. In total it is alleged that 150 telephone calls were made between 1992 and 1994 from these telephone numbers by Ms. Devine to the South East Regional Crime Squad in London. In addition, it is said that telephone calls were made from these numbers to The Phoenix Magazine shortly before or after the telephone calls made to the English police. In that regard, Phoenix Magazine is alleged to have published an article entitled "Philip Smyth and his brother Paul" on 11th September, 1992 alleging illegal activities in nightclubs controlled by the plaintiff through Princeton Ltd. and alleging or implying improper behaviour on the part of the plaintiff's brother. The plaintiff complains that the Commissioner of An Garda Síochána failed to take any effective action to investigate the source of these alleged facts.

15. In separate High Court proceedings *"The High Court Record No. 1996 No. 25 P. Between/ Crofter Properties Ltd. plaintiff and Genport Ltd. Defendant"* the plaintiff sought to establish that Ms. Caroline Devine made the telephone calls referred to above. The High Court in its judgment was satisfied despite her denial that she had done so. In a judgment delivered by the Supreme Court on 9th July, 2002 it was held that Crofter Properties Ltd. was liable for Ms. Devine's actions. In delivering judgment on 10th September, 2002 McCracken J. stated that Crofter Properties Ltd. "did concoct or attempt to concoct a malicious prosecution against the defendant [i.e. Genport Ltd.] and did attempt to pervert the course of justice". The plaintiff complains that despite supplying this information to An Garda Síochána at no stage were Mr. Tunney or Ms. Devine interviewed in relation to these matters.

16. It is claimed that the Commissioner of An Garda Síochána is under a duty to investigate and gather all relevant evidence and information concerning these matters including material not available to the plaintiff such as the telephone records of relevant persons on the days other than those days upon which telephone calls were made to South Eastern Regional Crime Squad and to recommend to the Director of Public Prosecutions that appropriate charges be brought against those involved. It is claimed that the plaintiff had not been able to establish the source of the information which led to the unjustified search of Sachs Hotel in 1988 and has only been able to establish the untruth and malicious nature of the telephone calls concerning him made between 1992 and 1995 using his own resources.

17. The plaintiff also claims damages for negligence and breach of duty against the defendants and for their failure to vindicate and protect his constitutional rights under Article 40.3.1, 40.3.2, and 40.4.1 of the Constitution.

18. The defendants deny the allegations made by the plaintiff in their defence and in particular deny that they were notified by the Metropolitan Police of the anonymous telephone calls or that such notification led to an investigation by An Garda Síochána to the prejudice, damage and detriment of the plaintiff. In particular, it is denied that the Commissioner failed to inquire into the matter concerning the alleged telephone calls. It is claimed that in 1993 Detective Superintendent Ted Murphy, Crime Branch, carried out an investigation into the alleged telephone calls in the course of which he travelled to England and met with officers of the South East Regional Crime Squad. The defendants deny that they failed to discharge their duties in respect of these matters.

### **Discovery**

19. The plaintiff sought and obtained an order for discovery in these proceedings on 14th January, 2015 (Peart J.) and an order for further and better discovery (Kelly P.) on 30th November, 2017. The affidavits of Chief Superintendent Howard were delivered in

compliance with those orders. The first two affidavits were made in compliance with the order for discovery and the latter three related to the order for further and better discovery. The plaintiff was furnished with a number of documents which are in redacted form or were not made available for inspection on the basis of an assertion of a public interest privilege or legal professional privilege by the defendants. The assertion of this privilege was challenged in a motion returnable to 24th April, 2018. On the eve of that hearing, the plaintiff's solicitor was informed that further documents had been found relevant to the categories of documents subject to discovery. The case was adjourned by the President to the Non-Jury List for mention on 14th May when the fifth affidavit of discovery dated 11th May, was furnished. The matter was then adjourned for hearing to 30th May, 2018.

20. A number of procedural objections were made to the manner in which the claims to privilege have been asserted in the affidavits of Chief Superintendent Howard. The defendants assert privilege on behalf of and on the instructions of the Director of Public Prosecutions who is not a party to these proceedings. The privilege claimed is in relation to directions given by the Director of Public Prosecutions concerning alleged criminal offences in respect of named individuals and communications by the Director of Public Prosecutions and her officers in respect of matters under the rubric of legal professional privilege. It was submitted at the hearing that if this was so, Chief Superintendent Howard should, in compliance with case-law, have set out on affidavit that the claims were made on behalf of the Director of Public Prosecutions and their precise basis. It was said that this was not done. The court indicated that if this point were to be pursued, having regard to the seriousness of the issues raised and the considerable potential prejudice that might accrue to the Director of Public Prosecutions from any order that might be made by the court, the court would adjourn the motion and direct that the Director of Public Prosecutions be given notice of the application, thereby giving her an opportunity to appear and make such submissions and submit such evidence as might be thought appropriate on the issues raised in respect of any matter over which the Director might otherwise be entitled to claim privilege had she been a party to the proceedings. I was satisfied that this would be in the interests of justice and fairness to the Director of Public Prosecutions and in the interests of the administration of criminal justice in the State having regard to the significant issues raised in respect of the prosecution of offences and access to documentation generated in the course of the exercise by the Director of her powers under the Prosecution of Offences Act 1974. The plaintiff then withdrew the point. The court in the unusual circumstances of this case received the documents in issue on the basis of the submissions made that a claim has been asserted by the Director of Public Prosecutions for the reasons set out in the affidavits furnished. The Director was content that the claim would be made on her behalf by the defendants.

### **Legal Principles**

21. The principles applicable to this application are well established though their application to the particular relevant facts or documents is subject to different emphasis by the parties.

22. In *Murphy v. Dublin Corporation* [1972] I.R. 215, Walsh J. (delivering the judgment of the court) considered a claim of privilege asserted by the Minister for Local Government and stated at pp. 233 to 234:-

"Under the Constitution the administration of justice is committed solely to the judiciary in the exercise of their powers in the courts set up under the Constitution. Power to compel the attendance of witnesses and the production of evidence is an inherent part of the judicial power of government of the State and is the ultimate safeguard of justice in the State. The proper exercise of the functions of the three powers of government set up under the Constitution... is in the public interest. There may be occasions when the different aspects of the public interest 'pull in contrary directions'—to use the words of Lord Morris of Borth-y-Gest in *Conway v. Rimmer*. If the conflict arises during the exercise of the judicial power then, in my view, it is the judicial power which will decide which public interest shall prevail. This does not mean that the court will always decide that the interest of the litigant shall prevail. It is for the court to decide which is the superior interest in the circumstances of the particular case and to determine the matter accordingly. As the legislative, executive, and judicial powers of government are all exercised under and on behalf of the State, the interest of the State, as such, is always involved. The division of powers does not give paramountcy in all circumstances to any one of the organs exercising the powers of government over the other. It is clear that, when the vital interests of the State (such as the security of the State) may be adversely affected by disclosure or production of a document, greater harm may be caused by ordering rather than by refusing disclosure or production of the document. In such a case the courts would refuse the order but would do so on their own decision. The evidence that the courts might choose to act upon to arrive at that decision would be determined by the courts, having regard to the circumstances of the case. Again, taking the example of the safety of the State, it might well be that the court would be satisfied to accept the opinion of the appropriate member of the executive or of the head of the Government as sufficient evidence of the fact upon a claim being made for non-disclosure or non-production, as the case may be, on that ground. I have referred to non-disclosure and non-production as distinct matters because in certain circumstances the very disclosure of the existence of a document, apart altogether from the question of its production, could in itself be a danger to the security of the State. As this is not such a case it is unnecessary to deal further with this aspect of public interest."

23. Later in the judgment, Walsh J. stated:-

"A case such as the present one is far removed from the considerations which would apply in matters concerning the safety or security of the State. That is not to say that in the ordinary day-to-day administration of the executive branch of government matters may not arise whose disclosure would be contrary to the public interest. Where documents come into existence in the course of the carrying out of the executive powers of the State, their production may be adverse to the public interest in one sphere of government in particular circumstances. On the other hand, their non-production may be adverse to the public interest in the administration of justice. As such documents may be anywhere in the range from the trivial to the vitally important, somebody or some authority must decide which course is calculated to do the least injury to the public interest, namely, the production of the document or the possibility of the denial of right in the administration of justice. It is self-evident that this is a matter which falls into the sphere of the judicial power for determination. In a particular case the court may be able to determine this matter having regard to the evidence available on the subject and without examining the document in question, but in other cases it may be necessary, as the court may think, to produce the document to the court itself for the purpose of inspecting it and making the decision having regard to the conflicting claims made with reference to the document. ..."

24. Once the court is satisfied that a document is relevant, the burden of satisfying the court that a particular document ought not to be produced lies upon the party asserting the privilege. This requires that a claim must be made in respect of the particular document and a statement of the grounds upon which the claim is made.

25. These principles were again considered and applied in *Ambiorix Limited v. Minister for Environment (No. 1)* [1992] 1 I.R. 277 in which Finlay C.J. summarising the applicable principles stated *inter alia*:-

"....

3. Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.

4. The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.

5. It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision."

26. In *Breathnach v. Ireland and others* [1993] 2 I.R. 458 Keane J. considered the application of legal professional privilege to communications between the Director of Public Prosecutions, a professional officer in his department, solicitors and counsel in respect of prosecutions which are in being or contemplated which arose in a civil action for damages for malicious prosecution :-

"It was obvious ... that the great bulk of (the documents) consist of the garda files assembled for the purpose of the investigation of the crime which gave rise to the original criminal proceedings and the report accompanying it by the investigating gardaí which was forwarded to the Director of Public Prosecutions so that a decision could be taken by him as to whether a prosecution should be initiated against the plaintiff and other persons. ...

It seems to me ... the documents in question in this case could not be equated to the documents which come within the second heading of legal professional privilege, i.e. communications between a client or his lawyer and third parties the dominant purpose of which is preparation for contemplated or pending litigation.

It is obvious that in every case where the commission of a crime, whether trivial or serious, is suspected, documentary material will be assembled by the gardaí irrespective of whether a prosecution is ever initiated. The fact that the documents in question may, as in the present case, be submitted by the investigating gardaí to the Director of Public Prosecutions in order to obtain his decision as to whether a prosecution should be instituted could not possibly give that material the same status as, to take an obvious example, a medical report obtained by a plaintiff in a personal injuries action solely for the purpose of his claim. If privilege exists in relation to such documents, it can only be because of the other factors referred to by Mr. Liddy, of which undoubtedly the most important is the desirability of freedom of communication between the gardaí and the Director of Public Prosecutions. The extent to which that freedom might be inhibited by the knowledge that the documents furnished to the Director of Public Prosecutions may subsequently be disclosed in court proceedings is clearly a matter which has to be taken into consideration in determining whether the public interest in the particular case requires its production.

In civil proceedings, the desirability of preserving confidentiality in the case of communications between members of the executive has been significantly eroded as a factor proper to be taken into account by the courts ... However, different considerations would appear to apply to communications between the gardaí and the Director of Public Prosecutions, where the public interest in the prevention and prosecution of crime must be given due weight. It would be clearly unacceptable if in every case where a person was acquitted of a criminal charge, he could, by instituting proceedings for wrongful arrest or malicious prosecution, embark on a fishing expedition through all the files of the gardaí relating to the case. The circumstances of the particular case must determine, in the light of the constitutional principles to which I have referred, whether an inspection should be undertaken by the court and whether, as a result of that inspection, production of any of the documents should be ordered."

27. The direction of the Director of Public Prosecutions in that case in relation to the charges against the accused was held to be clearly privileged and the court was satisfied that it ought not to be produced. A similar claim is asserted by the defendants in this case.

28. It is claimed by the plaintiff that the passage of time between the events and investigations the subject matter of these proceedings reduces the possibility of any prejudice to those who might have been under investigation in respect of matters in respect of which privilege is now claimed. The efflux of time is also said to erode any potential damage to confidential sources, the investigation of other criminal matters or potential difficulties or prejudice to witnesses interviewed in respect of matters which are now some thirty years old. In *Nic Gibb v Minister for Justice* [2013] IEHC 238 O'Malley J. considered the circumstances in which the balance of the public interest privilege asserted as against the public interest in the administration of justice may be affected by the passage of time. In striking this balance the court should be mindful whether at this remove there is a continuing risk that disclosure will at this time assist criminals, disclose investigative methodologies, damage police investigations or continue to give rise to potential prejudice or indeed danger for others whether potential witnesses, sources or investigators (see paras. 29-36).

## The Documents

### Paragraph 1(a)

29. Chief Superintendent Howard in the first affidavit of discovery of 21st October, 2016 listed a number of documents in category four which are the subject of paragraph 1(a) of the Notice of Motion and described as:-

"The garda investigation file into the anonymous telephone calls made to the Southeast Regional Crime Squad of the Metropolitan Police Force, London between 1992 and 1996 concerning the plaintiff (and his brother, then a serving Senior Officer of An Garda Síochána)".

The documents are then more particularly described in the following way:-

Category	Date	Nature of document	Description of document	Author of document
4(i)	18/03/93	copy	Report from Detective Superintendent Thomas Murphy to Chief Superintendent Crime Branch and copy of notes referred to therein	Detective Superintendent Thomas Murphy

4(ii)	unknown	copy	Report from an unknown author to Detective Superintendent Investigation Section	unknown author (incomplete report)
4(iii)	24/03/93	copy	Report from Chief Superintendent Thomas P. Burns to Assistant Commissioner Crime and Security and attachments	Chief Superintendent Thomas P. Burns.
4(iv)	08/04/93	copy	Report from Deputy Commissioner to Assistant Commissioner Crime and Security	Deputy Commissioner
4(v)	25/03/93	copy	Report from Assistant Commissioner O'Dea to Deputy Commissioner Operations	Assistant Commissioner O'Dea
4(vi)	26/08/94	copy	Statement of Mr. Thomas Anthony Matthews	Witnessed by Detective Superintendent Ted Murphy
4(vii)	Multiple dates	copy	Telephone records	Computer generated

30. Chief Superintendent Howard deposed that the category 4 documents related to the garda investigation file into certain anonymous telephone calls made to the Southeast Regional Crime Squad or the Metropolitan Police Force in London between 1992 and 1996 concerning the plaintiff and his brother who was then serving as a senior officer in An Garda Síochána. The gardaí located documents in respect of these matters but redacted them in the course of discovery and disclosed only those entries that concerned the plaintiff and his brother. The defendants claim that the redacted parts of the documents contain information about an investigation by the Metropolitan police into alleged international drug smuggling and which has no relevance to the issues raised in these proceedings, the plaintiff or his brother. A public interest privilege is claimed in respect of redacted parts of the documents in question on the basis that they contained operational information gathered by the Metropolitan Police in respect of identified third parties who are believed to be drug smugglers or agents acting on behalf of the authorities. It is claimed that this information relates to the detection and investigation of crime and is privileged. In his second affidavit Chief Superintendent Howard following queries raised by the defendants caused the category 4 documents to be re-examined and the redactions made reconsidered. As a result of that exercise some of the redactions were removed primarily relating to references to the plaintiff's brother, Paul Smyth in category 4(iii) and 4(v).

31. The document at category 4(ii) concerning a report from an unknown author to Detective Superintendent Investigation Section was incomplete and one page only was available. Efforts were made to identify the author of the document which proved unsuccessful and the other pages of the report are missing.

32. Documents in category 4(i) to 4(vii) are the subject of a claim of public interest: redacted versions have been supplied but inspection is sought of these documents in their unredacted form in para. 1(a). The court has considered each of the documents set out in category 4 in respect of which the redactions have been made.

33. I am satisfied that the redactions made in respect of document 4(i) are appropriate on the basis of the claim of privilege based on public interest as set out in the affidavits of discovery. However, I am satisfied that the words in the second and last line on p. 2 on the document should not be redacted in respect of the identification of the location from which a number of telephone calls may have been made relevant to the case. In a related document 4(ii) there are a number of redactions which are also based on the same claim of privilege. This is a single page document setting out details of contacts made from identified telephone numbers which have been redacted to a United Kingdom number on various dates and times. These details were procured during an inquiry which is relevant to these proceedings having regard to the allegations set out in the statement of claim in particular at paras. 26 to 31 inclusive. While undoubtedly this was a confidential inquiry carried out by An Garda Síochána in respect of the location of the telephone numbers from which relevant calls were made in 1993, I am satisfied having regard to the passage of time and the public availability of knowledge of the surrounding circumstances in which these calls were made arising out of civil proceedings conducted in open court in this jurisdiction that the public privilege claim in respect of this document should not prevail in respect of the redacted material relevant to the identification of phone numbers in this jurisdiction: the number to which the calls were made may be redacted for the same reasons set out below at paragraph 37. In reaching that conclusion I have regard to the conclusion contained in redacted form of document 4(i) by Detective Superintendent T. Murphy that the references to the plaintiff which appear to have resulted from calls from these numbers when considered and examined was perceived to be of a rather vindictive and suspicious nature.

34. The document 4(iii) is also heavily redacted. I am satisfied that the public interest claim of privilege which resulted in the redaction of portions of this document because the document is said to contain information about an investigation by the Metropolitan police into alleged international drug smuggling and which has nothing to do with the plaintiff or his brother is properly asserted. In addition, the document contains information relevant to the investigation carried out by the Metropolitan Police in London in respect of third parties alleged to be engaged in serious crime. However, I am not satisfied that the redactions contained in the last three paragraphs on p. 2 of that report should be sustained on the basis of public interest privilege. I will direct that that redaction be removed save for the reference to the name of the English police officer with whom the gardaí were communicating. The briefing note attached to document 4(iii) is heavily redacted in respect of "Operation Zulu Cricket". However, there is a passage on p. 5 of the briefing document which remains unredacted. I am satisfied that in addition to the element which has been disclosed the balance of the paragraph should also be disclosed but the name of the alleged culprit should be redacted.

35. I am satisfied that the privilege in respect of document 4(iv) should be upheld and that the redactions presently applied should continue. The redactions are in relation to the identification of English police officers.

36. I see no reason why the redaction in respect of document 4(v) should be maintained in particular having regard to the existence of proceedings in respect of Paul Smyth concerning these matters to which this discovery is relevant.

37. I am satisfied that the redaction set out in document 4(vi) should not be maintained. The information contained in the redacted material relates to events in 1993/4 and phone calls relevant to these proceedings. The information provided arose from inquiries in relation to the identification of the location of a telephone numbers from which the calls were made. As with document 4(ii) I do not consider that the public interest privilege should prevail over the plaintiff's interests in pursuing his cause of action. Similar considerations apply to the material set out in the call analysis documentation contained in document 4(vii). This consists of ten sheets in which a number of telephone numbers in this jurisdiction are identified in a left-hand column as A numbers. The B number to which the calls were made is also redacted. The remaining information gives the date, time and duration of the relevant calls. It does not appear to me that at this remove this information (apart from the B number) should be withheld on the basis of a claim of public interest privilege. I do not consider that there is on the papers available to the court any basis upon which it could be claimed that the inspection of this data concerning the location from which the calls originated would be prejudicial to the public interest or compromise any legitimate issues of confidentiality in the investigation of crime at this time. I consider that the number to which the calls were made should continue to be redacted. It was a number used in the course of English police operations and I am satisfied that it should be protected from public disclosure.

#### Paragraph 1(b)

38. The plaintiff also seeks inspection of documents set out at para. 1(b) of the notice of motion which are referred to in a supplemental affidavit of discovery sworn on 31st October, 2001 and listed under the first schedule second part as documents numbered 18, 19, 20, 21, 22, 23 and 24. These documents were additional to those discovered in the first affidavit of discovery. Chief Superintendent Howard claimed legal professional privilege in respect of these documents because the plaintiff's solicitor wrote a letter on 21st September, 1989 setting out various complaints and indicating that if the matters raised were not dealt with "then my client will commence the necessary civil proceedings". On the basis of this letter An Garda Síochána sought legal advice from the Director of Public Prosecutions and the Chief State Solicitors Office. It is claimed that these documents are the subject therefore of legal professional privilege as they constitute responses to the request for legal advice in contemplation, anticipation or threat of legal proceedings as set out in the solicitor's letter. In respect of document number 23 a claim of legal and public interest privilege was made on the ground that it consisted of legal advice given to the Chief State Solicitor by a senior legal assistant in the Office of the Attorney General in response to the correspondence from the plaintiff's solicitor. The document expressly referred to the possibility of the initiation of legal proceedings by the plaintiff and discussed issues that might arise in such litigation. In addition it was claimed there was a public interest in the maintenance of confidentiality in the provision of advice by the Office of the Attorney General to State bodies. The relevant documents are set out below.

Document Number	Date	Author	Description	Nature of privilege claimed
18	31/05/1989	F. Alymer, DPP	Copy directions	Legal advice/public interest
19	05/10/1989	Personal Assistant Commissioner	Copy letter seeking legal advice and correspondence	Legal advice/public interest
20	23/10/1989	Personal Assistant Commissioner	Copy letter seeking legal advice and correspondence	Legal advice/public interest
21	22/01/1990	James Lynch Assistant Chief State Solicitor	Copy letter in reply to above	Legal advice/public interest
22	25/01/1990	Personal Assistant Commissioner	Copy letter seeking further advice	Legal advice/public interest
23	09/02/1990	Matthew Russell Attorney General's office	Copy letter in response to above providing further advice	Legal advice/public interest
24	08/03/1990	Personal Assistant Commissioner	Copy letter requesting further advice	Legal advice/public interest

The court notes that the nature of the privilege now claimed is somewhat different to that originally claimed in the affidavit of Chief Superintendent Howard (apart from document 23) in that a public interest privilege is now asserted in respect of each document, the original claim being confined to legal professional privilege.

39. The court has considered each of the documents. Document 18 contains the directions of the Director of Public Prosecutions in relation to the files submitted in respect of the investigation into the search carried out at Sachs Hotel and Ms. Flood's residence. The investigation file submitted to the Director of Public Prosecutions has been discovered and the Director's decision is not the subject of any proceedings. I am satisfied that privilege should attach on the ground of public interest to this document as it sets out the reasons for the direction. It is also clear from the pleadings and from discovery documentation to date that the plaintiff now has a considerable number of documents which have yielded a great deal of information and evidence in respect of the searches carried out and the subsequent garda investigation into those searches which is the focus of these proceedings. The Plaintiff claims that he has been unable to establish and prevented from establishing the source of the information which led to the search of Sachs Hotel in 1988. He seeks orders directing the taking of steps to ascertain the true identity of the source, disclosure of the identity of the person or persons who provided the information or confirmation that the source was anonymous. He also seeks damages for negligence and breach of duty. I am not satisfied that the furnishing of this document would or could advance the plaintiff's case further. I am satisfied that the balance therefore lies against inspection in respect of this document.

40. I have also considered the chain of correspondence evidenced by documents 20 to 24 inclusive. I am satisfied that they are documents created entirely for the purpose of seeking advice in contemplation or anticipation of threatened legal proceedings by the plaintiff's solicitors in respect of the investigation of the searches. I am satisfied therefore that the defendants are entitled to claim legal professional privilege in respect of these documents. I am also satisfied that a claim of public interest privilege is made out in respect of these documents. I am satisfied that the various bodies involved in this investigation and more generally the investigation

and prosecution of crime including An Garda Síochána, the Office of the Director of Public Prosecutions and the Office of the Prosecuting Solicitor could not function without confidentiality attaching to their communications and that such confidential communication is essential to the discharge by the Director of her duties. It is also necessary to ensure that the rights and on occasion the well-being of others are assured, whether they be persons in respect of whom no prosecution is directed or witnesses who are vulnerable or under threat of harm from others. It is necessary that documents which communicate her decisions or furnish reasons for the exercise of her powers remain confidential and are preserved from public disclosure save for limited circumstances as defined in the case-law or necessitated by a particular legal challenge to her decision of which this is not one. I am also satisfied that the upholding of the privileges asserted will not adversely affect the right of the plaintiff to present and advance his case in these proceedings

#### Paragraph 1(c)

41. The documents described at para. 1(c) of the notice of motion are set out in the first schedule second part of the affidavit of discovery of 5th February, 2018 and numbered 45, 46 and 47.

Number	Date	Author	Description of document	Nature of privilege claimed
45	01/09/2005	Henry Matthews, DPP	Copy directions	Legal advice/public interest
46	23/06/2004	Chief Superintendent Corcoran	Copy letter to DPP	Legal advice/public interest
47	22/06/2004	Henry Matthews, DPP	Copy letter referring to letter from Registrar of High Court	Legal advice/public interest

42. Chief Superintendent Howard objected to producing these documents on the basis of a simple statement that they were protected by legal and/or public interest privilege. They resulted from the submission of a file to the Director of Public Prosecutions at the conclusion of the civil proceedings between *Crofter Properties Ltd.* and *Genport Ltd.* The papers in that case were referred by Mr. Justice McCracken for possible investigation of Ms. Devine for committing perjury in the course of the trial related to the making of the phone calls to the Metropolitan Police. This resulted in correspondence between Mr. Matthews a professional officer with the Director of Public Prosecutions and Chief Superintendent Corcoran the personal assistant to the Garda Commissioner. I am satisfied that the Director of Public Prosecutions is entitled to claim privilege in respect of this correspondence and in respect of the Director's consideration of whether there should be a prosecution in the matter on the ground of public interest. I do not consider that this material will or could assist the plaintiff in the pursuit of these proceedings particularly having regard to the relief sought, the extensive knowledge, information and documentation already in the possession of the plaintiff as evident from the pleadings and the documentation already furnished by way of discovery. The Director's entitlement to assert this privilege derives directly from her unique role in the prosecution of crime under statutory powers which are derived from the constitution.

#### Paragraph 1(d)

43. The fourth set of documents of which inspection is sought are those described at para. 1(d) of the notice of motion. These are unredacted copies of documents referred to in the first schedule, second part and para. 6 of the affidavit of discovery of 5th February, 2018 and numbered 21, 22, 23, 25, 32, 33, 35 and 38 therein. They also concern the investigation carried out by An Garda Síochána arising from the referral by McCracken J. of the matter to the Commissioner of An Garda Síochána in respect of potential perjury on the part of Ms. Devine. A number of other documents were discovered which are also relevant to that investigation on 10th, 11th, 12th, 13th, 14th, 15th, 16th and 17th April, 2018 and 11th May, 2018 as set out in the updated "privileged table" supplied to the court dated 23rd May, 2018. The following table contains a list of these documents.

Plaintiff's motion	Date of affidavit	Document number	Date	Author	Description	Nature of privilege claimed
1(d)	05/02/2018	21	03/10/2005	Superintendent Donohoe	Copy letter updating department on investigation	Legal advice/public interest redactions
1(d)	05/02/2018	22	29/09/2005	Superintendent Mangan	Copy minute updating Commissioner on investigation	Legal advice/public interest redactions
1(d)	05/02/2018	23	26/09/2005	Assistant Commissioner Callaghan	Document copy minute updating operations on investigation	Legal advice/public interest redactions
1(d)	05/02/2018	25	16/09/2005	D/C Superintendent White	Copy report on DPP directions	Legal advice/public interest redactions
1(d)	05/02/2018	32	19/11/2004	C/Supt. Corcoran	Copy letter regarding investigation	Legal advice/public interest redactions
1(d)	05/02/2018	33	12/11/2004	Dermot Fitzpatrick	Copy letter seeking update concerning previous correspondence	Legal advice/public interest redactions

1(d)	05/02/2018	35	16/11/2004	Superintendent Mangan	Copy minute updating Commissioner on investigation	Legal advice/public interest redactions
1(d)	05/02/2018	38	02/11/2004	D/Superintendent O'Mahoney	Copy interim report on investigation	Legal advice/public interest redactions
A	10/04/2018	1	19/11/2004	Personal Assistant to Commissioner	Copy letter regarding correspondence from Department of Justice, Equality and Law Reform	Legal advice/public interest redactions
B	11/04/2018	21	03/10/2005	Superintendent Donohoe	Copy minute providing update on investigation	Legal advice/public interest redactions
C	12/04/2018	23	26/09/2005	A/C Callinan	Copy minute providing update on investigation	Legal advice/public interest – redactions
D	13/04/2018	25	16/09/2005	D/Superintendent	Copy minute providing update on investigation	Legal advice/public interest – redactions
E	14/04/2018	28	19/11/2004	Personal Assistant to Commissioner	Copy minute forwarding correspondence	Public interest – redactions
F	15/04/2018	29	19/11/2004	Personal Assistant to Commissioner	Copy minute forwarding correspondence	Legal advice/public interest – redactions
G	16/04/2018	32	02/11/2004	D/Superintendent O'Mahoney	Copy minute providing update on investigation	Legal advice/public interest – redactions
H	17/04/2018	41	08/08/2005	D/Garda Padraig Cleary	Report on investigation into allegation of perjury	Public interest – redactions
I	10/04/2018	1	01/09/2005	Henry Matthews DPP	DPP v. Caroline Devine; directions	Legal advice/public interest
J	10/04/2018	2	22/06/2004	Henry Matthews DPP	DPP v. Caroline Devine; letter from Registrar of High Court	Legal advice/public interest
K	10/04/2018	3	22/08/2005	D/Superintendent O'Mahony	DPP v. Caroline Devine; seeking directions	Legal advice/public interest
L	11/05/2018	1	10/03/2005	Henry Matthews DPP	DPP v. Caroline Devine; seeking advice	Legal professional/public interest
M	11/05/2018	2	13/04/2005	Henry Matthews DPP	DPP v. Caroline Devine; seeking advice	Legal professional/public interest
N	11/05/2018	3	04/08/2005	Henry Matthews DPP	DPP v. Caroline Devine	Legal professional/public interest

44. I have already addressed the documents dated 01/09/2005 (I) and 22/06/2004 (J) from Mr. Henry Matthews which were also items 45 and 47 respectively the documents contained at para. 1(c) and para. 41 above. I am satisfied that both documents are entitled to public interest privilege for the reasons already stated.

45. There are a number of redacted documents in relation to the investigation of the alleged perjury committed by Ms. Devine including correspondence between the gardaí and the Department of Justice and Equality and the gardaí and Mr. Matthews. This correspondence is of course, confidential. It concerns an investigation commenced upon receipt of a letter from the Office of the



Registrar of the High Court to the Office of the Director of Public Prosecutions pursuant to the order of McCracken J. Correspondence then took place between the Office of the Director of Public Prosecutions and the Commissioner of An Garda Síochána and an investigation was carried out. A report was then furnished to the Director of Public Prosecutions by Detective Garda Cleary via Detective Superintendent O'Mahony dated 8th August, 2005 (document no. 41- H). This correspondence and documentation spans the period 22nd June, 2004, the date of the Registrar's letter to Mr. Matthews, and 1st September, 2005, the date upon which Mr. Matthews issued a letter giving directions in relation to the matter. There is related subsequent correspondence in September and October 2005. I have considered each document separately. These documents are relevant to the investigation carried out by An Garda Síochána in relation to this matter and paras. 33 to 38 of the statement of claim. The redactions made are limited. It is part of the plaintiff's claim that no proper investigation leading to a recommendation to prosecute Ms. Devine or others in respect of these calls was carried out. I am satisfied that the redactions made in documents 21, 22, 23, 25, 33, 35 and 38 (para.1(d)) should be upheld on the basis of public interest privilege. I am not satisfied that the redactions made in the listed documents 29 and 32 (F and G) should be allowed to stand at this remove from the alleged commission of the offence and because the investigation has long since been concluded and been considered fully by the Director of Public Prosecutions. The garda investigation report (41) submitted to the Director of Public Prosecutions has been disclosed. I see no basis upon which the redacted names should remain redacted having regard to the extent of the information that is already in the public domain. The persons named in the report were nominated as potential witnesses in the case. They are the High Court Registrar who sat with Mr. Justice McCracken, and the stenographers who provided the transcript relied upon in the appeal at the Supreme Court. Another potential witness was the billing consultant from Eircom who has already given evidence in open court in relation to the billing of the calls the subject matter of the proceedings. It does not appear to me that any claim of public interest privilege in respect of these redactions should therefore prevail against the plaintiff's interest in pursuing his case.

46. There are two references to a named individual who wrote to the Minister for Justice and Equality in documents 1 and 28 (documents A and E) which are directly relevant to the claim made by Mr. Paul Smyth in the related proceedings to which the discovery in this case is also relevant. It seems to me that a general claim of confidentiality is made in respect of the name of this person who wrote to the Minister as referred to in the garda correspondence. I am not satisfied that any public interest or legal professional privilege attaches to the naming of this individual in respect of whom no specific claim is made of any likely prejudice as a result of such disclosure. Indeed the non-disclosure of his identity may inhibit the plaintiff and in particular Mr. Paul Smyth in the presentation of his case. A number of other redactions related to the actual directions given by the Director of Public Prosecutions and the communication of that decision to a number of parties including the Secretary General of the Department of Justice (21), the Deputy Commissioner of Operations (23), the D/C Superintendent NCBI (25), documents B, C, and D. While I am satisfied that the Director is entitled to assert a public interest privilege over her decision in relation to any particular case for a variety of reasons including the prejudice that may accrue to persons under investigation, the question arises as to whether that public interest should prevail in this case under the principles set out in the case-law cited above and in particular the *Breathnach* decision

47. I am satisfied that the directions sought or issued from the Director of Public Prosecutions in respect of the file submitted concerning the alleged perjury are privileged (documents K, L, M and N) and consequently, the redactions referring to same are privileged and should prevail in the circumstances. I am not satisfied that either the direction or the reasons given for it by Mr. Matthews should be disclosed. In addition, I do not consider that the disclosure of this material would or could advance the case to be made on behalf of the plaintiff or may lead to a further line of inquiry that might provide other evidence to him that is not already available from the materials which are clearly in his possession having regard to the pleadings in the case and the documentation already discovered by the defendants.