

THE HIGH COURT

[2022] IEHC 82
[2020 No. 5169P]

BETWEEN

LORRAINE LENCH

PLAINTIFF

AND

**ST. PATRICK'S GUILD (INCORPORATED)(IN VOLUNTARY LIQUIDATION), KATHLEEN
NEWELL, KATHLEEN LANG, PATRICIA LENIHAN, IRELAND AND THE ATTORNEY
GENERAL**

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 8th day of February, 2022

1. By this action, commenced by plenary summons issued on 17th July, 2020, the plaintiff, Ms. Lorraine Lench, claims damages for a number of alleged wrongs and a declaration that the State failed to vindicate her constitutional rights.
2. Ms. Lench's birth certificate shows that she was born on 20th November, 1951 at St. Monica's Nursing Home, Mount Street, Dublin, to Richard P. Wallace and Christina M. Wallace with an address at Ballybough, Dublin. She grew up and married in England as Lorraine Frances Wallace.
3. In early 2019 Ms. Lench was informed by a member of staff of Tusla, the Child and Family Agency, that she had been illegally adopted at birth and was provided with documentation showing that she had been born on 18th November, 1951 at St. Monica's Nursing Home, Mount Street, Dublin, to a woman, then aged 28 years, whose name was recorded only as Margaret.
4. Ms. Lench's case is that she was falsely registered as having been born two days later to Mr. and Mrs. Wallace and that she was wrongfully removed from the community of her mother and abducted by Mr. and Mrs. Wallace who were passed off as her parents. Broadly speaking, the case against the first, second, third, fourth and fifth defendants is that they were responsible for the fact that she was removed from the custody of her mother and for the false registration of her birth; and the case against the sixth and seventh defendants is that they failed to ensure that the other defendants made proper and timely disclosure and failed to provide the plaintiff with appropriate and timely remedies for the wrong visited on her.
5. The first defendant, St. Patrick's Guild, was incorporated on 4th June, 1926 and went into liquidation on 17th December, 2018. The first defendant carried on the business or activity of an adoption agency. The plaintiff's case is that it acted as an agent for the Religious Sisters of Charity.
6. On 17th February, 2020 an order was made pursuant to s. 678 of the Companies Act, 2014 giving liberty to the plaintiff to issue the proceedings against the first defendant. The first defendant is insolvent and the liquidator acquiesced in the making of an order on 15th March, 2021 granting the plaintiff judgment in default of appearance.

7. The second, third and fourth defendants were joined as the only surviving members of the Religious Sisters of Charity at the time the summons issued who had been members of the order in 1951. The fourth defendant died soon after the commencement of the proceedings. By order of the court (Reynolds J.) made on 15th March, 2021, Sr. Anne Curry, a member of the order, was appointed as *guardian ad litem* to represent the interests of the second and third defendants, who were of very advanced years and lacked capacity to defend the action. The second defendant has since died. While the second, third, and fourth defendants were joined as representative of the members of the order at the time of the events complained of, it is not suggested that any of them had any knowledge of or involvement in the circumstances of the plaintiff's birth, the registration of her birth, or her placement with Mr. and Mrs. Wallace.
8. The fifth defendant is said to have been joined in her capacity as the superior general of the Religious Sisters of Charity and as representative of the members of the order in Ireland.
9. As against the first, second, third, fourth and fifth defendants the plaintiff claims damages for conspiracy, deceit, enticement, harbouring, malicious falsehood and intentional infringement of her constitutional rights. As against the State defendants, the plaintiff claims a declaration that they have failed to vindicate her constitutional rights as a child and an adult to the society of her true family members, and damages.
10. An appearance was entered on behalf of the fifth defendant on 25th August, 2020 by Arthur Cox, solicitors, and on behalf of the second and third defendants on 30th March, 2021, by the same firm.
11. An appearance was entered on behalf of the State and the Attorney General on 28th September, 2020. By order of the court (Heslin J.) made on 29th November, 2021, on a motion for judgment in default of defence, the time for delivery of the State defendants' defence was extended by six weeks.
12. A motion for judgment in default of defence against the third and fifth defendants was adjourned, by consent of the plaintiff, pending the outcome of this application.
13. By letter dated 23rd November, 2020 the fifth defendant, by her solicitors, wrote to the plaintiff's solicitor seeking voluntary discovery of three categories of documents said to be necessary to allow her to deliver her defence. The fifth defendant was not, she said, a nominated representative of the Religious Sisters of Charity and did not hold and never held any relevant files, records, or documentation in relation to the plaintiff. Voluntary discovery at that stage, it was said, would save costs which would inevitably arise by reason of substantial amendments to the fifth defendant's defence if discovery were to be made later. What was said was that the fifth defendant was in the unusual position of not being in a position to deliver a defence until such time as she should have received and considered documentation relevant to the claim from the plaintiff. While the fifth defendant expressly reserved her right to make further or additional requests for discovery, inferentially, at least, the premise of the request made to the plaintiff was that

the fifth defendant would be in a position to deliver her defence if the documentation sought from the plaintiff was disclosed by the plaintiff and the fifth defendant had an opportunity to consider it.

14. The categories of discovery sought from the plaintiff were:-
 - (1) Copies of all data, documentation or information (including electronically stored information) touching on or concerning the plaintiff's birth, including but not limited to the plaintiff's birth certificate.
 - (2) Copies of all data, documentation or information (including electronically stored information) touching on or concerning the alleged illegal adoption to Richard P. Wallace and Christina M. Wallace on 20th November, 1951.
 - (3) Copies of all communications and/or correspondence and/or records of meetings between the Child and Family Agency (Tusla) and the plaintiff in relation to the matters set out in the statement of claim.
15. The request for discovery by the plaintiff of all records of communications between Tusla and the plaintiff, it seems to me, can only have been premised on an acceptance that there was such communication. The premise of the suggestion that such discovery was necessary to allow the fifth defendant to deliver her defence, it seems to me, can only have been that the plaintiff may have misunderstood what she was told by Tusla and that she might not have been told, as she has pleaded, that she was not the natural child of Mr. and Mrs. Wallace.
16. The premise of the suggestion that discovery by the plaintiff – and examination by the fifth defendant – of all records in her possession or power in relation to her birth and alleged illegal adoption was necessary to allow the fifth defendant to deliver her defence, it seems to me, can only have been that Tusla might have made a dreadful mistake and that the plaintiff might, after all, have been the natural child of Mr. and Mrs. Wallace.
17. By letter dated 14th April, 2021 the solicitors for the second, third and fifth defendants wrote to the solicitors for the State defendants calling on the State to make voluntary discovery of five categories of documents. The request indicated that the fifth defendant had obtained limited voluntary discovery from the plaintiff but did not identify what documents and records had been discovered.
18. The categories of documents sought from the State were:-
 - (1) Copies of all data, documentation or information (including electronically stored information) touching on or concerning the plaintiff's birth.
 - (2) Copies of all data, documentation or information (including electronically stored information) touching on or concerning the alleged illegal adoption of the plaintiff to Richard Patrick Wallace and Christina Mary Wallace on 20th November, 1951.

- (3) Copies of all documentation, data and/or information passing between the sixth defendant and the Child and Family Agency (Tusla), its servants and/or agents in relation to the matters set out in the statement of claim dated 20th July, 2020.
 - (4) Copies of all data, documentation or information (including electronically stored information) touching on or concerning any illegal registrations and/or the adoption records of St. Patrick's Guild, which are in the possession, power or procurement of the sixth defendant, its servants and/or agents, including but not limited to such documents in the possession, power or procurement of the following government departments:-
 1. The Department of Justice;
 2. The Department of Health (or its predecessor, the Department for Local Government and Public Health);
 3. The Department of Foreign Affairs (or its predecessor, the Department of External Affairs);
 4. The Department of Children, Equality, Disability, Integration and Youth (and its predecessors); and
 5. Any other relevant government departments.
 - (5) All and/or any other documentation, data and/or information which falls outside the above categories but which may nevertheless, to the knowledge of the State, be relevant to the issues which are the subject of the within proceedings, including the alleged role and/or responsibility of the State.
19. In the case of category (4), it was spelled out, for the avoidance of doubt, that the relevant documentation should include, but was not limited to:-
- (a) All reports, papers and correspondence in relation to the consideration of "*informal adoptions*" including those of Miss Lister [*recte*. Litster] of the Department of Local Government and Health (as documented in the Mother and Baby Homes Commission of Investigation Report, published on 12th January, 2021);
 - (b) All records in relation to foreign adoptions organised by St. Patrick's Guild (or any other adoption society) including correspondence and memoranda to/from the Department of External Affairs in consideration of such foreign adoptions;
 - (c) All documents comprising or documenting the "*Clandillon papers*" held by the Department of Health, including all correspondence between Miss Clandillon and St. Patrick's Guild;
 - (d) All documents touching or concerning the prosecution of Mary Keating of St. Rita's Nursing Home, including the relevant Department of Health files;
 - (e) All documents touching on or concerning the action of the Department of Health in relation to St. Rita's Nursing Home following the prosecution of Mary Keating and

the decision not to deregister St. Rita's Nursing Home as a nursing home under the Registration of Maternity Homes Act, 1934;

- (f) Any documents concerning or dealing with the reporting to the Gardaí or other relevant authorities of alleged illegal registrations;
 - (g) All documents touching on or concerning the review into incorrect birth registrations commissioned by the Minister for Children and Youth Affairs in May, 2018; and
 - (h) All advices received in relation to adoption practices and/or alleged illegal registrations.
20. It will have been seen that categories (1), (2) and (3) mirrored, more or less, the categories of documents which the plaintiff had been asked to discover, and had discovered.
21. The reason given in support of the request to the State was that with the exception of limited voluntary discovery received from the plaintiff, the second, third and fifth defendants had no records or information in relation to the plaintiff and were unable to respond to any of the allegations in relation to the plaintiff's birth, and that disclosure was necessary for the fair disposal of the case and for saving costs. In relation to category (3), the second, third and fifth defendants added that they required discovery to consider the findings of Tusla in relation to the plaintiff. In other words, the sisters apprehended that Tusla might have made a dreadful mistake and that the plaintiff, after all, might be the natural child of Mr. and Mrs. Wallace.
22. In support of category (4), a long reason was offered. The plaintiff's case, it was said, was just one of a large number of essentially similar claims brought in relation to St. Patrick's Guild and the circumstances of alleged illegal adoptions. Many of the matters pleaded, it was said, related to the alleged failure of various State bodies to address and/or rectify the issues such that the plaintiff and others were unaware of their true identities until very recently. The letter continued:-

"It appears that the relevant State departments and/or its related agencies had a level of knowledge of the matters and/or issues which are the subject of these proceedings both at the time the alleged acts were carried out and/or at various times thereafter. The State's knowledge and/or actions appear to be especially relevant to ascertaining the relevant and full circumstances of the wrongs which are alleged to have been caused to the plaintiff. If the allegations in the statement of claim are made out, it appears that if the relevant State entities acted upon the information that they appear to have had, not only could the matters which are the subject of the within proceedings have been avoided in 1951, but these issues could have been brought to light sooner than 2017, appropriately resolved, and the level of any harm which is alleged to have been inflicted on the plaintiff could have been reduced. This category of discovery is necessary to establish same.

The fact, and the content, of the publication of the Mother and Baby Homes Commission of Investigation report on 12 January 2021, and its clear relevance to this claim regarding alleged illegal adoptions, is a material part of these proceedings. The Commission's report took evidence and considers the issue of adoption and alleged illegal registrations, including material concerning St. Patrick's Guild, as part of its terms of reference and made specific findings that the actions of the State authorities 'fell far short of what should be expected of those charged with implementing the maternity home regulations'. The report explicitly states that the alleged illegal registrations appear to have been known to the Department of Health for many years and 'did not seem to cause any significant concern', and this is of obvious and significant relevance to the within proceedings".

23. The request for voluntary discovery of the documents in category (5) was said to be justified on the ground that:-

"The within proceedings are just one of a large number of comparable proceedings in relation to St. Patrick's Guild, the State and/or its agencies and alleged illegal adoptions. In light of the public comments made by the State in relation to these matters, in particular in relation to the recent publication of the Mother and Baby Homes Commission of Investigation Report, full disclosure of all relevant material in the possession of the relevant State authorities is essential to this case. In particular, you will be aware that the State (through the Taoiseach) has recently acknowledged, in making a State apology, relevant to these proceedings, to the survivors of Mother and Baby Homes, that 'the Irish State, as the main funding authority for the majority of these institutions, had the ultimate ability to exert control over these institutions, in addition to its duty of care to protect citizens with a robust regulatory and inspection regime'. It therefore clearly is appropriate that the State provides to our client the relevant voluntary disclosure".

24. The request for discovery made the point, generally, that having regard to the efflux of time, the unavailability of persons who likely might have had relevant information and evidence, the absence of current documentation, data and information that might reasonably assist in relation to the hearing and determination of the proceedings, it was essential in the interests of constitutional fairness and the integrity of the determination by the court of the factual and legal matters at issue that the State should make voluntary discovery.
25. As they had vis-à-vis the plaintiff, the second, third and fifth defendants portended inevitable and expensive amendment of any defence that might be delivered before discovery was made by the State defendants, and reserved their right to make such further and additional requests for disclosure by the State as might be necessary for the proper hearing of the proceedings and in the interests of justice.
26. There was no substantive reply to the request for voluntary discovery and by notice of motion issued on 30th September, 2021 the second and third defendants – but not the fifth defendant – applied for an order directing the State to make discovery in the terms

requested by the letter of 14th April, 2021. The motion was grounded on an affidavit of Ms. Joanelle O’Cleirigh, solicitor, who deposed that she made it with their authority. Ms. O’Cleirigh deposed positively that the fifth defendant was not an appropriate defendant and she exhibited a letter to the plaintiff’s solicitors which was said to have informed them of that fact. I do not believe that it is unfair to say that Ms. O’Cleirigh rather glossed over the fact that the request for voluntary discovery had been made on behalf of all the of her clients.

27. The affidavit grounding the motion set out the request for voluntary discovery and the efforts made to get a substantive response, and averred that the documents were necessary to allow the second and third defendants to plead to the plaintiff’s claim and were relevant and necessary for the resolution of the issues in dispute and for saving costs. Slightly surprisingly, Ms. O’Cleirigh deposed that the second and third defendants had no information and documentation. While it is true that the request made to the plaintiff for voluntary discovery had been made on behalf of the fifth defendant, only, the letter to the State, written on behalf of all three, acknowledged – or took the position that – the voluntary discovery which had been made by the plaintiff was available to all three.
28. When the motion first came into the list on 29th November, 2021 there had still been no substantive response on behalf of the State and the motion was transferred to the list to fix dates on 16th December, 2021.
29. On 15th December, 2021 an affidavit of Ms. Cora Fitzsimons, solicitor, was filed on behalf of the State defendants. Ms. Fitzsimons positively averred that the first defendant, St. Patrick’s Guild, was an adoption society run by the Religious Sisters of Charity and that the Religious Sisters of Charity were responsible for the day to day management of St. Patrick’s Guild. This is contested by the sisters, who point to the separate corporate legal personality of the limited company.
30. Having summarised the request for discovery, Ms. Fitzsimons took the position that all five categories were excessively broad and encompassed vast swathes of documentation, of which, on any reading and consideration, only a fraction would be relevant to the action between the plaintiff and the moving defendants. She suggested that the categories sought amounted to a massive fishing expedition and that in particular, categories (3), (4) and (5) had not been pleaded with any specificity, nor had there been any effort to give specific reasons or rationale for those categories. Ms. Fitzsimons pointed to the fact that the pleadings had not closed and suggested that the moving defendants had not shown that there were such exceptional circumstances as would justify the making of the orders sought.
31. On 5th January, 2022 a supplemental affidavit of Ms. O’Cleirigh was filed on behalf of the third defendant, the second defendant having died since the motion was issued. The affidavit was largely argumentative and quoted extensively from the letter of 14th April, 2021 which was already before the court. Ms. O’Cleirigh did suggest that as well as being relevant to the determination of the plaintiff’s claim, *“the documentation held by the State may also be relevant to assessing the question of liability as between the*

defendants, including the possibility of a claim for indemnity and contribution by the third defendant against the State”.

32. In response to the State’s suggestion that the discovery sought amounted to a general and oppressive trawl, Ms. O’Cleirigh made the point that there was no evidence as to what might be involved in making it. She pointed also to two passages from the Mother and Baby Homes Commission Report which, she suggested, showed that the State had already gathered, collated and analysed some, at least, of the documentation sought by the motion.
33. On the affidavits there was a dispute as to whether the State defendants should be obliged to make any discovery at this stage of the proceedings but there was a significant development on the very eve of the hearing of the motion on 14th January, 2022.
34. On 13th January, 2022 at 23:55 a revised request for discovery was sent by the third defendant’s solicitors setting out five amended categories, which were said to be more limited than the original request. By letter dated 14th January, 2022 the State defendants, by their solicitors, indicated that the State was willing to make discovery of the first three revised categories, but not the fourth or fifth.
35. The formulation of the revised categories (1), (2) and (3) was slightly different but I cannot see the difference between the revised categories and the original categories.
36. It will be recalled that the original request was for:-
 - (1) Copies of all data, documentation or information (including electronically stored information) touching on or concerning the plaintiff’s birth.
 - (2) Copies of all data, documentation or information (including electronically stored information) touching on or concerning the alleged illegal adoption to Richard Patrick Wallace and Christina Mary Wallace on 20th November, 1951.
 - (3) Copies of all documentation, data and/or information passing between the sixth defendant and the Child and Family Agency (Tusla), its servants and/or agents in relation to the matters set out in the statement of claim dated 20th July, 2020.
37. The revised request was for:-
 - (1) Copies of all data, documentation or information (including all electronically stored information) touching on or concerning the plaintiff’s birth in the power, possession or procurement of the Department of Children, Equality, Disability, Integration and Youth (and its predecessors), the Department of Health (and its predecessor), the Department for Local Government and Public Health), the Department of Foreign Affairs (and its predecessor, the Department of External Affairs), the Department of Justice and/or Tusla, the Child and Family Agency (and its predecessor).

- (2) Copies of all data, documentation or information (including all electronically stored information) touching on or concerning the alleged illegal adoption of the plaintiff to Richard Patrick Wallace and Christina Mary Wallace on 20th November, 1951 in the power, possession or procurement of the Department of Children, Equality, Disability, Integration and Youth (and its predecessors), the Department of Health (and its predecessor, the Department for Local Government and Public Health), the Department of Foreign Affairs (and its predecessor, the Department of External Affairs), the Department of Justice and/or Tusla, the Child and Family Agency (and its predecessor).
- (3) Copies of all documentation, data and/or information passing between [the State] and the Child and Family Agency (Tusla), its servants and/or agents in relation to the matters set out in the statement of claim dated 20th July, 2020 in the power, possession or procurement of the Department of Children, Equality, Disability, Integration and Youth (and its predecessors), the Department of Health (and its predecessor, the Department for Local Government and Public Health), the Department of Foreign Affairs (and its predecessor, the Department of External Affairs), the Department of Justice and/or Tusla, the Child and Family Agency (and its predecessor).
38. The order of words has been changed and the several emanations of the State identified but it seems to me that the categories were the same: the plaintiff's birth, her allegedly illegal adoption, and all communications with Tusla, the Child and Family Agency, as referred to in the statement of claim
39. Category (4) was revised to limit the period of the discovery sought to the ten years from 1946 to 1956 and to modify the request for discovery of all of the documents and records in relation to the consideration of "*informal adoptions*" to such documents as were delivered by the State to the Mother and Baby Homes Commission. The revised request for discovery omitted the express reference to St. Rita's Nursing Home, the prosecution of Mary Keating and the reporting of alleged illegal registrations: but those documents had been asserted in the original request – for the avoidance of doubt – to have been included in the
40. In the moving defendants' solicitors' letter of 13th January, 2022, category (5) was revised to limit the period of the request to 1946 to 1956 and to list the various emanations of the State, and by adding the words "*relevant to the issues which are the subject of these proceedings.*" With the possible exception of the limitation of the time, I do not see how the revised request was any different to the original request.
41. As I have said, it was contested up to the morning on which the motion was heard whether the State should make any discovery. The State having agreed at the last minute to make discovery of the first three revised categories, the argument was limited to categories (4) and (5). The view was taken that it would have been inconsistent with the agreement to make any discovery to argue that the motion was premature and the

debate focussed on whether the moving defendants had established the relevance of the disputed categories to the case which they had to meet.

42. While it was acknowledged on both sides that this case is one of a number of very similar actions taken against the same defendants arising out of alleged illegal adoptions arranged by St. Patrick's Guild, the motion was argued on the basis that the discovery sought was required for this case alone. It was anticipated that the view the court would take on this motion would guide similar motions in the other cases but it was not suggested that the implied undertaking that any discovery made would be used solely for the purposes of the case in which it was ordered should be modified to allow any documents which the State might be ordered to discover to be used for any of the other cases. Nor was it suggested that such discovery as might be made to the third defendant might be used by the fifth defendant for the preparation of her defence.
43. The case made by counsel for the third defendant was that these are exceptional cases in which the third defendant, by reason of her age and infirmity, was not in a position to instruct her solicitors. The discovery which had been sought, it was said, was sought in order to allow the case to be dealt with sensitively and to avoid a situation in which it might later be necessary to amend the defence. Absent any evidence as to the burden that an order for discovery of the contested categories would impose on the State, it could not be said to be unduly burdensome. The State, it was said, clearly had the documents identified in category (4) and there was no justification for not producing them. The contested categories, it was said, are relevant to the issue of liability as between the defendants. Category (5) was acknowledged to be directed to anything not captured by category (4). The third defendant, it was said, was attempting to find a sensible way forward in dealing with the cases.
44. The moving defendants emphasised that the requested party was the State and that the case was one of a number of very exceptional cases. The State, it was said, obviously has the documents and has offered no justification for not producing them. It was suggested, rather tentatively, that the obligation on the State as the requested party was different to that of any other party requested to make discovery. Counsel referred to the judgment of the Supreme Court in *Tobin v. Minister for Defence* [2020] 1 I.R. 211 and sought to distinguish the observations at para. 108 by arguing that this was not an ordinary civil action.
45. Reference was also made to the judgment of the Supreme Court in *McGrory v. Electricity Supply Board* [2003] 3 I.R. 407, which established that a plaintiff in a personal injuries action was not entitled to unfairly or unreasonably impede the defendant in preparing his defence by refusing to consent to a medical examination or by refusing to make available the medical records necessary to allow such examination to take place on the basis that the pleadings had not closed. By reference to the judgment of the High Court in *Ballymore Residential Ltd. v. Roadstone Ltd.* [2017] IEHC 539, it was argued that the unavailability to the third defendant of the information available to the State amounted to an inequality of arms.

46. Counsel for the State defendants started by directing the court to the statement of claim. The case against the first, second, third, fourth and fifth defendants, is was said, is quite different to the case against the State. The case against the moving defendants, it is said, is focussed on the registration of the plaintiff's birth and her placement at that time. By contrast, the case against the State is that it oversaw or was responsible for a regime. The thrust of the justification for seeking discovery at this stage being the inability of the third defendant without discovery to meet the plaintiff's case, that need will be met by the discovery which the State is willing to make.
47. I am content to make an order, by consent, for discovery by the State of the documents in categories (1), (2) and (3) of the revised request dated 13th January, 2022. I will hear counsel as to what time should be allowed. At the forefront of my mind is that the plaintiff is entitled to have her case heard with all expedition, and that at least the third and fifth defendants' defences are long overdue.
48. I cannot forbear to say that I am not altogether easy that the fifth defendant is not party to this motion. I clearly understand her position to be that she ought not to have been named as a defendant as she was not a member of the order at the time of the events the subject of the proceedings but it is clear that she does not intend to defend the action on that ground alone. The fifth defendant has already sought and obtained discovery by the plaintiff of the documents in the plaintiff's possession in relation to her birth on the basis that this was necessary to allow the fifth defendant to plead. The premise of the initial request for voluntary discovery by the State was that the documents sought were necessary to allow the fifth defendant, as well as the second and third defendants, to deliver her defence and to avoid the necessity of substantial amendment of her defence, as well as that of the second and third defendants. Theoretically, I suppose, it might now be contemplated that there will be a Chinese wall in Arthur Cox between the lawyers dealing with the case on behalf of each of the third and fifth defendants but it surely cannot be contemplated that there will be a further discovery motion by the fifth defendant at this stage of the proceedings. If, as has been asserted, the discovery that the State has agreed to make is necessary to allow the third defendant to plead, I find it difficult to understand how the fifth defendant might be able plead without it.
49. It is evident from the letter requesting voluntary discovery of 14th April, 2021 that some voluntary discovery has been made by the plaintiff but not precisely, or even generally, what discovery has been made. What is evident is that the fifth defendant, as well as the second and third defendants, has whatever limited discovery it was made by the plaintiff. It seems to me that if the fifth defendant was determined to stand on the point that she has been improperly joined it would not have been necessary for her to seek discovery from the plaintiff. I find it difficult to contemplate that the fifth defendant's defence will be formulated and delivered by reference to the material discovered by the plaintiff, only, but that of the third defendant by reference, also, to the additional discovery sought from the State.

50. I think that I need to say, also, that I find it very uncomfortable to contemplate that the State might have in its possession or power documents or information in relation to the plaintiff's birth, her alleged illegal adoption, and the registration of her birth which has not already been disclosed to the plaintiff. It seems to me that if the request to, and the agreement by, the plaintiff to make voluntary discovery was in more or less the same terms as the request to the State, the third defendant should have all the information and records that there are.
51. As to categories (4) and (5), I am not satisfied that the third defendant has justified her request that discovery should be made at this stage of the proceedings.
52. It seems to me that the third defendant's argument that the State has not justified its refusal to produce the documents fails to take into account the onus on the requesting party to establish in the first instance the relevance of the discovery sought.
53. I accept the submission on behalf of the State that the case pleaded against the third defendant is focused on the circumstances of the registration of her birth and her placement with Mr. and Mrs. Wallace, whereas the case against the State is based on the State's alleged failure to establish what is said to have happened and deal with it sooner. While it was asserted, generally, in the letters of request that all of the discovery sought was necessary to allow the third defendant to plead her defence, it was not argued on the hearing of the motion that the documents in category (4) and (5) were necessary for that purpose. It was argued that these documents are relevant to the issue of indemnity or contribution between the defendants but at this stage of the action there is no such issue.
54. It was suggested in argument that the third defendant was trying to see a sensible way forward for the litigation but it seems to me that the first step is for the third defendant to declare, by delivering her defence, what her position is in relation to the allegations against St. Patrick's Guild and the sisters.
55. The premise of the request for discovery is that discovery of the contested categories is necessary to allow the third (and the fifth) defendant to establish the level of knowledge of the State in relation to the matters alleged against the other defendants. Drawing heavily on the Mother and Baby Homes Commission of Investigation Report, it is suggested that if the State authorities had acted on the information they appear to have had, the matters in issue could have been avoided in 1951 and, if not, could have been brought to light sooner than they were, and resolved. From this, it seems to me, it is clear that the third defendant does not need discovery to plead her case but rather wishes to examine all of the material collected by the State with a view to assessing the strength of any claim that she or the State might or might not make for contribution or indemnity. As Ms. O'Cleirigh put it in her supplemental affidavit, the third defendant's justification for the request is that the documents "*may*" be relevant to "*the possibility*" of a claim for contribution or indemnity by the third defendant against the State.
56. I think that the third defendant has the better end of the argument as to the burden in terms of time and cost that an order for discovery of the contested categories would

impose on the State, but any consideration of proportionality comes after the requesting party has established relevance and necessity which, in my view, the third defendant had failed to do.

57. I can see immediately that the case might be sensitive as far as the sisters are concerned but I do not see how the discovery sought might be necessary to allow them to deal with the plaintiff's case sensitively.
58. I can see immediately the litigation advantage that the third defendant hopes to achieve by having sight of all of the State records before she declares her position as to the case made by the plaintiff against the sisters and any case that might be made against the State but it does not follow that such an approach is "*sensible*" as far as the other parties are concerned. As far as the plaintiff is concerned, this application has delayed the progress of her case.
59. I do not accept that the State's refusal to make discovery of the documents in categories (4) and (5) can fairly be characterised as unfairly or unreasonably impeding the third defendant in preparing her defence to the plaintiff's claim or in articulating any claim for contribution or indemnity.
60. Any assessment of what discovery by the State may be necessary for the fair disposal of any claim for contribution or indemnity – whether by the sisters against the State, or by the State against the sisters – must depend first on whether there is any such claim by either against the other and then upon the basis of any such claim.
61. There will be an order, by consent, for discovery by the State of the documents set out in categories (1), (2) and (3) of the third defendant's solicitors letter of 13th January, 2022. The application for discovery of the documents set out in categories (4) and (5) will be refused.
62. I will list the matter for final orders and costs on 15th February, 2022.