

APPROVED

[2024] IEHC 62



THE HIGH COURT

2018 3821 P

BETWEEN

MICHAEL DILGER

PLAINTIFF

AND

KEITH BURKE
DANIEL BURKE
KATHLEEN BURKE
GERRY BURKE
HEALTH SERVICE EXECUTIVE
CHILD AND FAMILY AGENCY

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 February 2024

INTRODUCTION

1. This judgment is delivered in respect of an application for the discovery of documents. The matter comes before the High Court by way of an appeal from the order of the Deputy Master. The underlying proceedings arise out of events alleged to have occurred when the plaintiff was a child in foster care. It is alleged that certain members of the foster family perpetrated acts of assault and battery upon, and inflicted emotional suffering upon, the plaintiff.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. The plaintiff had been placed in foster care as a child. The first to fourth named defendants are members of the foster family. The fifth and sixth named defendants are the Health Service Executive and the Child and Family Agency, respectively (“*the statutory bodies*”). This judgment is concerned with an order for discovery made against the statutory bodies.
3. Insofar as relevant to the question of discovery, the case made against the statutory bodies is that they failed to ensure that the third and fourth named defendants were fit and suitable people to carry out the duties of foster parents. It is further pleaded that the two statutory bodies failed to provide for any or any adequate assessment or inspection, periodic or otherwise, of persons approved by them to carry out the duties of foster parents so as to ascertain any abusive potential of such persons or their families.
4. The plaintiff’s solicitors had sought the agreement of the two statutory bodies to make discovery on a voluntary basis in accordance with Order 31 of the Rules of the Superior Courts. Neither statutory body made a substantive response to this request. Thereafter, the plaintiff’s solicitors issued a notice of motion seeking discovery returnable before the Deputy Master. Again, no response was made by the statutory bodies to this motion. The Deputy Master made an order on 28 February 2023 directing discovery of, *inter alia*, the following three categories of documents:

“Category 1: All documents or notes in relation to any investigations inspections risk assessments safety plans checks and/or enquiries made or steps taken by the Fifth and Sixth Defendants their respective predecessors servants and/or agents in relation to the suitability of the Third and Fourth Defendants as foster parents both prior to the Plaintiff being placed in foster care and up to the date on which he finally left the foster home

Category 2: All documents or notes evidencing any response by the Fifth and/or Sixth Defendants their predecessors servants or agents insofar as it related to the fostering arrangements of the Third and Fourth Defendants to information about the behaviour and proclivities of the First Defendant up to the date on which the Plaintiff finally left the foster home

Category 3 All documents or notes evidencing any communications to or from the Fifth and Sixth Defendants with any party concerning any proposal to remove the Plaintiff from the care of the Third and Fourth Defendants up to the date of the Plaintiff's final removal from the foster home"

5. The application to discharge the Deputy Master's order initially came on for hearing before me on 4 December 2023. As of the date of the hearing, the statutory bodies had made no substantive response to the request for discovery, whether by way of correspondence or affidavit. Counsel on behalf of the statutory bodies indicated that his clients had a concern as to the adverse implications which the making of discovery in the terms granted by the Deputy Master would have for certain non-parties, namely, other individuals who had been in foster care with this foster family in or around the same time as the plaintiff. Given the importance of this issue, I took the unusual step of adjourning the hearing before me so as to allow the statutory bodies an opportunity to file affidavit evidence and written submissions in relation to their concerns. An affidavit has since been sworn by Mr. Donnellan, a social worker with the Child and Family Agency. The matter was relisted before me on 22 January 2024 and judgment reserved to today's date.

POSITION OF THE HSE AND CHILD AND FAMILY AGENCY

6. The revised position of the HSE and the Child and Family Agency, as set out on affidavit, is as follows. The statutory bodies are anxious that the discovery of confidential and sensitive information in relation to a number of other individuals who had been in the care of the foster family should be limited to the greatest extent possible consistent with ensuring that the plaintiff has all the evidence necessary to allow him to prosecute his claim. The first named defendant, Keith Burke, has been convicted of offences of child sexual abuse against these individuals while they were in care. Mr. Burke is the son of the foster parents.
7. To protect their privacy, and to reflect the fact that they are not parties to these proceedings, these individuals will be referred to in this judgment simply as "*the non-parties*".
8. The deponent goes on to express the concern that the terms of discovery ordered by the Deputy Master are disproportionately wide given the extremely sensitive nature of the documents which would be responsive to the order. The deponent then suggests that it would, at least in the first instance, be more appropriate to confine discovery to the file relating to the foster parents themselves and the social work file of the plaintiff. It is suggested that the latter might be available pursuant to the Freedom of Information Acts.
9. The deponent has explained that discovery in terms of categories one and two would necessitate the discovery of almost the entirety of the social work files in respect of the non-parties. It is further suggested that given that the plaintiff is aware of the personal significant details of those individuals it is difficult to

envisage how any system of redactions could protect the confidentiality of the information contained in their social work files.

10. The deponent goes on to explain that the social work files in respect of the non-parties each run to thousands of pages. The documents include details of sexual abuse suffered by those non-parties as young children. The documents relate to how the non-parties sought to deal with the abuse and the manner in which they were supported in response to the abuse. The deponent suggests that the information contained in those documents “*could hardly be more personally sensitive*”.
11. The deponent has explained that the inclusion of the wording “*checks and/or enquiries made, or steps taken*” in Category 1 of the Deputy Master’s order has greatly expanded the range of documents which will be responsive to the order:

“[...] By including the wording ‘checks and/or enquiries made, or steps taken’, the category is greatly expanded. While fostering arrangements are ongoing, there is a system of constant checks and enquiries into the appropriateness or suitability of the fostering arrangements. While some of these are formal investigations, inspections and risk assessments, the vast majority of the checks which take place are informal, though all are recorded. Every interaction with the foster child is recorded and retained in the foster care files of each child. Observations are made on the child’s demeanour, mood and levels of social interaction. This might be a simple conversation while a child is being brought to the doctor, for example. At the time of the Plaintiff’s foster care, most such notes were handwritten in ledgers. Each such note would be used by the social worker in assessing whether foster parents were suitable for the role and whether they were compatible with the foster child in question. The wording as ordered would also include any steps, no matter how small, to improve the relationship between the foster child in question and the foster parents. This is effectively the entire social work file of each child during the period of the foster care.”

12. The deponent indicates that limiting discovery of documents which evidence the “*unsuitability*” of the foster parents would vastly reduce the number of

documents to be discovered, and the amount of confidential information disclosed, while providing the plaintiff with all the information and evidence he requires for his case. If further documentation is required, then it is suggested that same could be addressed through a formal focused discovery request when the review of the first tranche of discovery documentation is complete.

DISCUSSION AND DECISION

13. The first issue to be addressed is whether, in broad terms, the type of documents being sought by the plaintiff fulfil the criteria of relevance. The question of whether a category of documents is relevant falls to be determined by reference to the pleadings. The scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to plead their case (*Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211 (at paragraph 57)).
14. Here, the gravamen of the case made against the statutory bodies is that they failed to assess whether the third and fourth named defendants were fit and suitable foster parents. The statutory bodies have denied any breach of duty in this regard, and have pleaded that all applicable standards were followed in relation to the original placement of the plaintiff in foster care and in relation to the supervision and monitoring thereof. The statutory bodies, in response to a notice to admit facts, have stated that they only became aware of allegations of abuse against the non-parties after the abuse had occurred, following which the first defendant was required to stay away from the foster family's home. It is

also denied that the statutory bodies had knowledge of any allegations of abuse against the plaintiff while the plaintiff was residing with the foster family.

15. Having regard to these pleas, documents which record the initial and ongoing assessment of the suitability of the foster parents by the statutory bodies are *prima facie* relevant to the issues in dispute between the parties as defined by the pleadings. Such documents might, for example, indicate whether the plaintiff or other children in the foster home had disclosed conduct by any members of the foster family which should have been a cause of concern.
16. The next question to be considered is whether discovery of the documents is necessary. It is in this context that the implications for the non-parties become relevant. It is apparent from the affidavit belatedly filed on behalf of the statutory bodies that the categories, as formulated in the Deputy Master's order, would require the discovery of highly sensitive personal information relating to the non-parties.
17. The fact that a document may be confidential is something which goes to the question of whether an order for discovery is necessary. Where an application for an order for discovery is made in respect of confidential documentation, the court should only order discovery in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made (*Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211 (at paragraph 42)). A court will adopt appropriate measures to respect the importance of confidentiality by ensuring that it is only displaced when the production of confidential documentation proves truly necessary to the just resolution of proceedings (*ibid*, at paragraph 44).

18. The approach to be taken to an application for the discovery of confidential documents has recently been considered by the Court of Appeal in *Ryan v. Dengrove DAC* [2022] IECA 155 and in *A.B. v. Children's Health Ireland (CHI) At Crumlin* [2022] IECA 211.
19. These judgments emphasise that the court must engage in a balancing exercise as follows (*Ryan v. Dengrove DAC* at paragraph 67(7)):

“In that context, a balance has to be struck between the likely materiality of any given document to the issues likely to arise in the proceedings and the degree of confidentiality attaching to it. A confidential document (and particularly one that is highly confidential) should not be directed to be discovered unless the court is satisfied that there is a real basis on which it is likely to be relevant at the hearing. The more material the document appears to be — the greater the likelihood that the document will have ‘*some meaningful bearing on the proceedings*’ — the more clearly the balance will be in favour of disclosure. Such an assessment necessarily requires the court to look beyond the threshold test of *Peruvian Guano* relevance. The ‘*nature and potential strength of the relevance*’, and the degree to which the document is likely to advance the case of the requester, or damage the case of the requested party, are appropriate considerations in this context.”

20. Applying these principles to the circumstances of the present case, I have concluded that an incremental approach to discovery is appropriate. The order for discovery will be confined, in the first instance, to the following two categories of documents. First, all documents contained in the social work file held by the HSE and the Child and Family Agency in relation to the plaintiff personally. Second, all documents contained in the social work file held by the HSE and the Child and Family Agency in relation to the foster parents, i.e. the third and fourth named defendants. In respect of each category, the content of the respective file may, in the first instance, be redacted to exclude any

extraneous reference to third parties. The affidavit of discovery should explain, in general terms, the nature of the information, if any, which has been redacted.

21. This incremental approach to discovery will ensure that the privacy of the non-parties is protected insofar as possible as is consistent with allowing the plaintiff to prosecute his claim effectively.

CONCLUSION AND PROPOSED FORM OF ORDER

22. For the reasons explained herein, the order of the Deputy Master will be discharged and in lieu thereof the fifth and sixth named defendants will be directed to make discovery of the following two categories of documents. First, all documents contained in the social work file held by the HSE and the Child and Family Agency in relation to the plaintiff personally. Second, all documents contained in the social work file held by the HSE and the Child and Family Agency in relation to the foster parents, i.e. the third and fourth named defendants. In respect of each category, the content of the respective file may, in the first instance, be redacted to exclude any extraneous reference to third parties. The affidavit of discovery should explain, in general terms, the nature of the information, if any, which has been redacted. The plaintiff will have liberty to apply for further and better discovery, if necessary, once the documents discovered in response to the two categories above have been reviewed.

23. The parties are directed to correspond with each other with a view to agreeing an appropriate form of wording which accurately describes these categories. It may be, for example, that there is a more technical term to describe a social work file. The parties are also asked to confirm whether or not discovery is to

be made in terms of Category 3. It is not entirely clear from the papers before me whether the statutory bodies' appeal is confined to Categories 1 and 2. A time period for the making of the affidavit of discovery should be agreed. If possible, an agreed form of wording should be submitted to the registrar within four weeks of today's date. In the event of disagreement, the parties should arrange to have the motion relisted before me.

24. As to costs, the plaintiff is entitled to recover the legal costs of and incidental to the application for discovery from the fifth and sixth defendants. This includes costs before both the Deputy Master and the High Court. In default of agreement, such costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015. A stay is placed on the execution of this costs order until the conclusion of these proceedings.
25. This form of costs order had been flagged at the time of the initial hearing of the motion on 4 December 2023. It is intended to reflect the fact that the failure of the HSE and Child and Family Agency to engage with the request for voluntary discovery and the subsequent motion caused the plaintiff's side to incur legal costs unnecessarily. It should be acknowledged that the statutory bodies, to their credit, ultimately adopted a very constructive approach to discovery.

Appearances

John Kerr for the plaintiff instructed by MHP Sellors LLP

Donnchadh Woulfe for the fifth and sixth named defendants instructed by
Corrigan & Corrigan

Approved
Gemma S. Mans