THE COURT OF APPEAL

CIVIL

Court of Appeal Record No 2021/328

Neutral Citation [2022] IECA 211

Donnelly J

Ní Raifeartaigh J

Collins J

BETWEEN

AB

Plaintiff/Appellant

AND

CHILDREN'S HEALTH IRELAND (CHI) AT CRUMLIN

Defendant/Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 23 September 2022

PLEASE NOTE THAT ON 25 MARCH 2022 THE COURT MADE AN ORDER PURSUANT TO SECTION 27 OF THE CIVIL LAW (MISCELLANEOUS PROVISIONS) ACT 2008 PROHIBITING THE PUBLICATION OR BROADCAST OF ANY MATTER RELATING TO THE PROCEEDINGS WHICH WOULD, OR WOULD BE LIKELY, TO IDENTIFY THE PLAINTIFF AS HAVING AN IDENTIFIED GENETIC DISORDER.

1. This appeal raises important issues about the discovery of family communications.

BACKGROUND

2. The background facts can be stated relatively briefly. The Plaintiff's family has a history of a specific genetic disorder. In October 2017, the Plaintiff underwent genetic testing in the Defendant hospital (*"the Hospital*") to ascertain whether she suffered from that disorder. She was 18 at the time and thus an adult.

3. The Plaintiff says that, when attending the Hospital for those tests, she made it clear that she did not wish her test results to be communicated to her father, from whom she is said to be estranged. She says that she was assured that the results would remain confidential as between herself and the Hospital.

4. The results of the tests appear to have become available late November/early December 2017. Unfortunately, the results disclosed that the Plaintiff was positive for the relevant disorder. As a result of the admitted negligence of the Hospital, the test results were sent to both her parents, as well as to a consultant paediatrician who was not treating the Plaintiff (but who was treating her brother). Letters enclosing the test results appear to have been sent out on 13 December 2017. No notification of her test results was actually given to the Plaintiff herself and she learned of the results from her mother. In January 2018, she learned from her mother that her father had also been sent her test results.

PROCEEDINGS

5. In December 2019 the Plaintiff brought personal injuries proceedings against the Hospital. In the Indorsement of Claim, she says that her younger sister had previously been confirmed for the genetic disorder and her father (from whom, it is said, the disorder had been inherited and from whom the Plaintiff is said to be estranged) had reacted very badly to her sister's results. That had caused distress to the Plaintiff and she was acutely conscious that her own test results should not be revealed to him and so (she says) she specifically informed her doctor that she did not want her father to be advised of her results. She says that the doctor assured her that the results would remain confidential. She was extremely shocked and upset when her mother told her that she had received her test results and that upset and distress was compounded when she learned from her mother that her father had also received the results. She was *"devastated to learn that her father was aware of her test results .. and she feared an adverse reaction, similar to that which had occurred in relation to her sister."* In September 2018 when she was at a family wedding, a relative on her father's side questioned her about the diagnosis, which was embarrassing, humiliating and upsetting given that the Plaintiff had at all times intended to keep her diagnosis confidential. She was concerned about who else her father had told and *"the unauthorised disclosure of her results to her father continues to prey on her mind."* The Personal Injuries Summons claims damages (including aggravated and/or exemplary damages) for negligence and breach of duty as well as for breach of constitutional rights and rights under the ECHR. Although the Indorsement of Claim asserts that the Hospital breached its obligations under the Data Protection Acts 1988 and 2003, no claim for damages

under those Acts appears to be made in the Personal Injuries Summons, at least in express terms but it appears from the Reply subsequently delivered by the Plaintiff that she is asserting an entitlement to such damages. Whether or not that assertion is well-founded is not, of course, an issue in this appeal.

6. The Plaintiff delivered Updated Particulars of Injury in May 2021. In those Particulars it is said that the Plaintiff had tried to speak to her father after she became aware that he had received her test results but that he dismissed her, as did her paternal grandmother. These "*negative interactions*" had added to her distress. The Particulars go on to state that the Plaintiff's relationship with her father "*which had not been good, was further damaged as a result of his attitude to her abnormal test results and his inability to show any empathy towards her, as was the relationship with her paternal grandmother. The Plaintiff was upset that her father knew her information, in circumstances where he was not willing to speak about it, did not want to know anything about it and did not provide her with support".*

7. The Updated Particulars go on to assert that the Plaintiff had failed "*one or two exams in January 2018 due to her distress that her father had been informed*." She tended to ruminate on her decision to undertake genetic testing, questioning whether it had been worth giving her father knowledge of the results "*as he now had something over her."*

8. The Updated Particulars also make reference to the fact that the Plaintiff had attended for assessment with Dr Elizabeth Cryan, Consultant Psychiatrist, in March 2020. Dr Cryan had "*diagnosed the Plaintiff with an Adjustment Disorder with a mixed picture,*

including symptoms of anxiety, depression and anger, as a consequence of the wrongful disclosure and her father and grandmother's reactions." In addition to the Adjustment Disorder, it is said that Dr Cryan had also *"noted that the wrongful disclosure had resulted in a further strain on the Plaintiff's relationship with her father, due to his inability to respond to her diagnosis or empathise with her."*

9. The Hospital delivered its Defence in October 2020 (prior to the delivery of the Updated Particulars of Personal Injuries just referred to). After a number of preliminary objections (including a plea that the Plaintiff's claim is statute-barred), the Defence identifies a number of matters which the Hospital does not require to be proved, including the fact that, in or around December 2017, the Hospital had negligently disclosed the Plaintiff's test results to her parents and to a third party doctor. The Defence then gives particulars of the matters of which proof is required by the Hospital. It states that *"[s]ave for the admissions set out above the Defendant requires proof of all other allegations specified and matters pleaded in the Personal Injuries Summons unless otherwise specifically pleaded"* (my emphasis). It then sets out a number of specific matters ("*[w]ithout prejudice to the generality of the foregoing*") of which proof was required, including the following:

> *"i That the Plaintiff had made it clear to the Defendant's servants or agents that she did not wish for the test results to be communicated to her father;*
>
> *ii The particulars and circumstances relating to the commission of the wrong pleaded in the Indorsement of Claim.*

iii That the Plaintiff suffered a personal injury as a consequence of the admitted breach for which she is entitled to be compensated in law

iv That the Plaintiff suffered any material damage as a consequence of the admitted disclosure."

The only other part of the Defence that may be relevant for the purpose of this appeal is a plea in Part 3 (grounds upon which the Defendant is not liable for the alleged injuries suffered by the Plaintiff) to the effect that, prior to the disclosure of the test results to them, her parents had already been aware that the Plaintiff was undergoing testing (Para 3iii(ii)).

10. The Plaintiff delivered a Reply in August 2021 joining issue with the Defence.

THE APPLICATION FOR DISCOVERY
AND THE ORDER MADE BY THE HIGH COURT

11. By letter of 12 January 2021 the State Claims Agency, solicitors for the Hospital, wrote to the Plaintiff's solicitors seeking the voluntary discovery of the following categories of documents

> *"1. All medical records of the Plaintiff, to include counselling records, for a period of 3 years prior to the 30 November 2017 and up to the 12 January 2021.*
>
> *2. Records of all communications including instant messages, text messages, (to include WhatsApp, Instagram and all apps used by the Plaintiff) emails, phone calls, letters between the Plaintiff and her father between 1 June 2017 and 1 June 2018."*

12. The only category at issue in this appeal is category 2 above. The Plaintiff agreed to make discovery of her medical records for the 3 year period prior to 30 November 2017 but declined to make discovery of any later records. That was contested in the High Court, the Judge directed discovery of the category in the terms requested and that decision has not been appealed. It is therefore unnecessary to say anything more about category 1.

13. The letter seeking voluntary discovery set out the following reasons for seeking discovery of category 2:

> *"The Plaintiff claims that the disclosure to her father of her genetic test result was contrary to a specific instruction given to the Plaintiff's doctor by reason of the Plaintiff being estranged from her father. She says that she was devastated to learn that her father was aware of her test result and that she feared an adverse reaction. The discovery sought herein goes to whether there was estrangement, whether the Plaintiff's father did communicate an adverse reaction to the Plaintiff and the damage or harm which was sustained to the Plaintiff by reason of the Defendant's disclosure to the Plaintiff's father of the test result."*[1]

14. The Plaintiff declined to make discovery of category 2, saying that discovery was not appropriate "*as it involves private persons who are not parties to the proceedings herein and trespasses egregiously upon the fundamental principles of the GDPR and the constitutional rights to privacy and family life*." It was also said that the category was neither relevant nor necessary given the admissions in the Defence and it was said that in any event details of communications of a verbal nature were "*matters of evidence"*.[2]

15. In the face of this refusal (as well as the refusal to agree to the full scope of category 1), the Hospital issued a motion for discovery on 31 May 2021. The motion was grounded on an affidavit sworn by Pamela Potterton, a solicitor in the State Claims Agency on 21 May 2021. She repeated the rationale set out in the letter seeking voluntary discovery as to why category 2 was relevant (para 5) and averred that the

[1] SCA letter of 12 January 2021.
[2] CM Haughey letter of 18 February 2021.

categories of discovery sought were necessary to ensure that the Hospital was not ambushed at the hearing and was not prejudiced by now having access to relevant documents (para 6).

16. A replying affidavit was sworn by Ms Haughey on the Plaintiff's behalf on 14 October 2021. Addressing category 2, Ms Haughey stated as follows:

> *"The Plaintiff further objects to discovery of Category [2] on the basis that it constitutes an unwarranted intrusion into the Plaintiff's privacy and right to respect for her private and family life and further on the basis that it is unclear how the communications sought could have any meaningful bearing on the proceedings, the degree of estrangement between the Plaintiff and her father prior to the disclosure of her genetic test results being irrelevant, the damage it was pleaded was caused to their relationship, constituting a peripheral issue to the Plaintiff's diagnosis of an Adjustment Disorder."*

Ms Haughey referred to and exhibited further correspondence exchanged between her office and the State Claims Agency subsequent to the issue of the discovery in which it was made clear that the Plaintiff was "*not willing to make **any** proposals*" in relation to category 2 (original emphasis) and the State Claims Agency had maintained its position that discovery of that category was relevant and necessary. [3]

17. Ms Haughey's affidavit was silent as to whether there were communications between

[3] Correspondence in exhibit "**CM 2".**

the Plaintiff and her father in the period between 1 June 2017 and 1 June 2018, the form that any such communications took and/or the nature, tenor and frequency of them. The Plaintiff did not swear any affidavit. Thus, as far as the evidential material put before the High Court by the Plaintiff went, it was (and is) entirely unclear whether discovery of category 2 might, for example, involve the disclosure of only a limited number of text messages or whether it might instead involve the disclosure of many hundreds of communications across multiple platforms and channels.

18. The discovery application came on for hearing in the common law motion list, before Heslin J. on 18 October 2021. It does not appear that either party raised any issue about the application being dealt with in the common law list or that either party sought to have the application allocated a hearing date on the basis that it could not properly be dealt within the time constraints applicable in that list.

19. For the Hospital, Ms Fahey BL explained that her client was seeking to test the Plaintiff's claim that, because her father had learned the results of the genetic testing, she had been exposed to a particular situation in light of her relationship with her father. For that purpose, counsel said, the Hospital was seeking for the "*digital correspondence*" between the two for a limited but (so it was said)) highly relevant period of time.[4] Opposing the application, Ms Gallagher BL for the Plaintiff characterised her essential objection as being that the disclosure sought would be an unwarranted intrusion into her client's privacy and her right to respect for her private and family life. She noted that the Plaintiff's father was not a party. As to the issue of

[4] Approved DAR transcript of 18 October 2021 hearing, at page 4.

whether there was an estrangement prior to the wrong, Ms Gallagher submitted that the degree of estrangement was not relevant, given that she was entitled to privacy in respect of her medical information and the Hospital had conceded the wrongful disclosure of that information to her father and a consultant. In her submission, the only issues were, firstly, whether the Plaintiff was entitled to damages arising out of that accepted wrongful disclosure and, secondly, the extent of any psychiatric injury that she sustained as a result. Category 2 was not necessary in respect of either issue. She observed that the Plaintiff had not in fact pleaded any *"adverse reaction*" but had simply referred to her fear of such a reaction. Any damage to the Plaintiff's relationship with her father resulting from the disclosure was "*a peripheral issue*" that did not warrant the granting of such an "*intrusive and disproportionate category."* [5]

20. Having heard Ms Fahey briefly in reply, during which she took issue with the suggestion that the "*issue in relation to the father*" was peripheral having regard to how the case was being made, the Judge then gave his ruling. He referred to the background to the proceedings and noted that it was pleaded that the Plaintiff was estranged from her father and feared an adverse reaction from him. He referenced Ms Gallagher's characterisation of category 2 as an unwarranted intrusion into family life and her submission that the plaintiff was entitled to privacy in respect of her medical information and that in the present case the issue was whether the plaintiff sustained injury and the extent of that injury. He also noted her submission to the effect that the only reference to an adverse reaction was that the Plaintiff had feared one. He then expressed his conclusions as follows:

[5] Ibid, pages 6-7.

"I've taken very careful account of the submissions made. The Court is bound to direct discovery to ensure the fair disposal of matters in issue. The plaintiff, like any plaintiff in personal injuries proceedings, has undoubtedly put her health in issue and it's fair to say that 'question marks' arise as to the nature of the injury, the psychological injury and the effect that is said have had on the plaintiff. To my mind the discovery sought can fairly be said to be relevant and necessary. [The Judge then addressed category 1 and continued] And in relation to category [2] I take the view that as it is pleaded that the plaintiff feared an adverse reaction, then, relevant to that plea is this category. And I think that the time limits given what's pleaded are appropriate. So, I'm going to order those categories." [6]

21. The Judge allowed 12 weeks for the discovery to be made and awarded the costs of the application to the Hospital, subject to a stay pending the determination of the proceedings.

[6] Ibid, at page 9.

ARGUMENTS ON APPEAL

22. The Plaintiff asks this Court to refuse discovery of category 2 in its entirety or, in the alternative, to limit and/or narrow the order made. However, neither in her written nor oral submissions on appeal has the Plaintiff actually identified any specific limitations or restrictions to category 2 that, on her case (albeit in the alternative), should be imposed by the Court.

23. In her written submissions, the Plaintiff elaborates on and develops the objections to the discovery of category 2 advanced unsuccessfully in the High Court. The Plaintiff's fear of an adverse reaction from her father is said to be a "*tangential matter"* which, it is said, neither goes to her entitlement to recover damages nor to the extent of her injuries. In any event, the Plaintiff observes that category 2 encompasses a period in excess of 6 months prior to the wrongful disclosure of her test results to her father and, it is said, the issue of fear of an adverse reaction could not justify such discovery. The issue as whether there was an estrangement between the Plaintiff and her father is likewise said to be relevant only to context. As regards the issue of causation, it is acknowledged that that is indeed an issue in the proceedings but it is said that it is very difficult to see how communications between the Plaintiff and her father about potentially any manner of subjects bearing no relation to the subject-matter of the proceedings could reasonably contain evidence relevant to the causation issue. As regards the necessity of the discovery sought, reference is made to the judgment of Clarke CJ in *Tobin v Minister for Defence* [2019] IESC 57, [2020] 1 IR 211 and to earlier decisions of the former Chief Justice in the High Court, including *Independent*

Newspapers Limited v Murphy [2006] IEHC 276 and *Telefonica O2 Ireland Ltd v Commission for Communications Regulation* [2011] IEHC 265. Those decisions indicate that where discovery would involve disclosure of confidential material, the court had to carry out a balancing exercise and *"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."*

24. Here, the Plaintiff says, the discovery ordered involves *"highly sensitive and private communications between the Plaintiff and her father*" which were *prima facie* confidential. Reference was made in that context to the unenumerated right of privacy protected by the Constitution and to Article 8 ECHR which, it was said, extended to telephone conversations and to modern forms of electronic communications. The Judge had failed to engage in any proper analysis with regard to the necessity of the discovery and the privacy/confidentiality of the communications and, those issues of privacy/confidentiality having been raised, the Judge ought to have, but did not, carry out a balancing exercise of the kind discussed in *Tobin*. That, it is said, was particularly important given the engagement of Article 8 ECHR and the fact that the communications also involved a third party, the Plaintiff's father. The temporal and subject-matter scope of category 2 was such that its discovery would be "*entirely disproportionate to any possible tangential relevance that may attach to same*". It was also said that access to the Plaintiff's medical records, and the Hospital's facility to have the Plaintiff medically assessed, obviated any need for discovery of category 2 insofar as any issue of causation was concerned.

25. In his oral submissions on behalf of the Plaintiff, Mr Kean SC described his client's claim as "*sensitive and serious*" but nonetheless it was, he said, ultimately a "*simple case*" where negligence had been admitted and accordingly it was proceeding as an assessment. He stressed the breadth of category 2. As well as encompassing communications to and from the Plaintiff's father – who, he stressed, was not a party to the proceedings - such communications could include the private information of other family members. It was, he said, "*highly sensitive family information*." At best, such information was of very limited relevance to any issue in the case. Insofar as the Plaintiff's relationship with her father was of any relevance, it could be pursued in cross-examination of the Plaintiff at trial. The request for discovery was, he said, a form of fishing, there being no direct denial in the Hospital's Defence of the matters pleaded by the Plaintiff.

26. In response, the Hospital says that, far from being tangential, the Plaintiff's relationship with her father is central to the claim being made by her. It draws the Court's attention to the express terms of the Indorsement of Claim and, in particular, the Updated Particulars. It says that the gist of the Plaintiff's claim is that her private information was wrongly disclosed to *her father*, observing that the same information was also disclosed to *her mother* but that no complaint is made of that in the proceedings. While accepting that information within category 2 is private, the Hospital says that no claim has been made that any communications were confidential, in the sense of there having been any agreement between the Plaintiff and her father that such communication would not be disclosed to third parties. In any event, cases such as *Independent Newspapers Limited v Murphy* were clearly distinguishable in that communications

within category 2 were *"truly necessary to the just resolution of the proceedings*" given the nature of the Plaintiff's claim and the non-material damage on which she relied. Having regard to the basis on which the Plaintiff had elected to advance her claim, the Hospital argues that any right of privacy which the Plaintiff might otherwise have had been waived, citing *McGrory v ESB* [2003] 3 IR 407. Furthermore, any material discovered by reference to category 2 would be subject to the normal implied undertaking, reference being made in this context to *Ambiorix Ltd v Minister for the Environment (No 1)* [1992] 1 IR 277.

27. In her oral submissions, Ms Fahey took issue with the suggestion that category 2 constituted any form of fishing. Asked whether any issue arose on the pleadings as to the nature of the Plaintiff's relationship with her father, Ms Fahey explained that, given the requirement to verify its Defence pursuant to section 14 of the Civil Liability and Courts Act 2004 ("*the 2004 Act*"), the Hospital had not been in a position to directly deny what the Plaintiff had pleaded. However, she drew the Court's attention to those aspects of the Defence which I have set out above. She noted that the Defence expressly pleads that both of the Plaintiff's parents – including her father – had been aware of the fact that the Plaintiff was undergoing tests in advance and she also referred to the fact that it was evident from the Affidavit of Discovery sworn by the Plaintiff in respect of category 1 – which, as it happened, had been provided to the Hospital on the day of the appeal hearing – that the Plaintiff's father had attended some medical appointments with her. In the circumstances, she said, the Hospital had a legitimate basis for seeking to test the Plaintiff's pleas.

THE STANDARD OF REVIEW

28. Before considering these arguments further, I should address the standard of review in an appeal of this kind.

29. I addressed this question in my judgment (Edwards and Noonan JJ concurring) in *Ryan v Dengrove DAC* [2022] IECA 155 at paras 34-39. While that decision post-dates the hearing of the appeal here, it relies on authority referred to at the hearing, in particular the decisions of the Supreme Court in *Tobin* and in *Waterford Credit Union v J & E Davy* [2020] IESC 9, [2020] 2 ILRM 344.

30. As appears from *Ryan v Dengrove DAC*, decisions on discovery made by the High Court ought not to be disturbed on appeal unless they fall outside the range of decisions reasonably open to the High Court. Decisions on questions of relevance, necessity and proportionality involve judgment calls that are entitled to a margin of appreciation on appeal. However, that does not mean that this Court may intervene only where some error of principle is demonstrated. The jurisdiction of this Court is not so limited, as has been stated in many decisions of this Court in this area. Errors of assessment will justify appellate intervention, even in the absence of any error of principle, if the resulting decision falls outside the range of decisions reasonably open to the High Court.

31. That is the approach to be applied here. It follows that the burden is on the Plaintiff to demonstrate that the decision of the Judge to direct the discovery of category 2 was

outside the range of judgment calls reasonably open to him.

ASSESSMENT

Is Category 2 relevant?

32. The first issue is whether the documents coming within category 2 are *relevant* to the issues in the proceedings. More correctly, perhaps, the issue as it presents to this Court on appeal is whether the Judge was reasonably entitled to take the view that such documents were *relevant*.

33. In my view, the category 2 documents are manifestly relevant to the issue of the Plaintiff's relationship with her father and the related issue of the impact on that relationship, and on the health and well-being of the Plaintiff herself, of the wrongful disclosure of her test results to her father. As Ms Fahey observed, it is a notable feature of that claim that no real complaint is made about the wrongful disclosure of the Plaintiff's test results to her *mother* (though reference is made to such disclosure in the Summons). It is the wrongful disclosure to her *father* that is at the heart of her claim. On the Plaintiff's case, she was so concerned at the prospect of her test results being disclosed to him that she sought and was given a specific assurance that that would not occur. She and her father are said to have been "*estranged*". She was *"devastated to learn that her father was aware of her test results"* and "*feared an adverse reaction"* from him. The centrality of the father's role is emphasised further by the detailed contents of the Updated Particulars which I have already set out above.

34. These issues are not, as suggested by the Plaintiff, tangential or peripheral to her claim nor are they merely contextual. They are, in my view, central to the claim being advanced by the Plaintiff and a critical part of her claim for damages against the Hospital. On her case, the fact that her test results were wrongly disclosed to her father, and his reaction to those results, significantly aggravated the wrong done to her and caused - or at least was a significant contributory factor to – the Adjustment Disorder and other consequences detailed in the Updated Particulars of Loss.

35. *Prima facie,* therefore, communications between the Plaintiff and her father both in the period prior to the testing and the period subsequent to it would appear relevant, indeed highly relevant. Such communications (and/or the absence of such communications) are likely to be a reliable indicator of the nature of their relationship prior to the testing (and whether, as the Plaintiff says, her father was estranged from her at that time), their interaction (if any) about the results of the testing and/or the circumstances in which the Plaintiff's father was informed of those results and, in particular, the reaction of the Plaintiff's father to the results and the effect of that reaction on the Plaintiff and on her relationship with her father.

36. However, it is necessary in this context to address an issue that emerged – apparently for the first time – in the course of the hearing before this Court, namely whether the Plaintiff's relationship with her father is actually in issue in the proceedings at all, having regard to the pleadings and, in particular, the absence of any direct denial in the Hospital's Defence of the pleas in the Personal Injuries Summons directed to that issue.

37. The rules of pleadings in personal injuries actions were altered significantly by Part 2 of the 2004 Act. Sections 12(1) of the 2004 Act specifies the matters to be set out in a personal injuries defence and section 13(1)(b) imposes further obligations as regards the pleading of such a defence. Section 14(2) of the 2004 Act provides that where a defendant serves *"any pleading containing assertions or allegations, the defendant … shall swear an affidavit verifying those assertions or allegations."* Plaintiffs are subject to similar obligations: section 14(1). I have previously described the requirement that personal injuries pleadings be verified on affidavit as a *"very significant innovation*": *Crean v Harty* [2020] IECA 364, para 23.

38. It is not necessary here to consider whether a bald denial in a personal injuries defence of a matter pleaded in a personal injuries summons might be said to involve the making of an *assertion* or *allegation* triggering the section 14(2) requirement to verify. Nor is it necessary to consider whether the pleading of a bald denial in a personal injuries defence is permissible having regard to the provisions of sections 12(1) and 13(1)(b) of the 2004 Act. No arguments were addressed to those issues in this appeal. What is clear from section 12(1) is that such a defence must specify (a) those allegations specified, or matters pleaded, in the summons of which proof is *not* required and (b) those allegations and matters of which proof *is* required. The Hospital's Defence is pleaded in accordance with section 12(1) and it specifies a number of matters of which the Hospital does not require proof. Those matters do not include the claims made in the Personal Injuries Summons as to the Plaintiff's relationship with her father and as to the adverse impact on that relationship and on the health and well-being of the Plaintiff of the wrongful disclosure of her test results to him, resulting (so the Plaintiff claims)

in serious personal injury to her. On the contrary, it is clear from the Defence that the Hospital requires proof of all such matters, including that the Plaintiff suffered any compensable injury. In my view, any fair reading of the Hospital's Defence clearly indicates that all of these aspects of the Plaintiff's claim are contested.

39. It follows that category 2 is relevant to issues in dispute in the proceedings. In expressing that view, I have not overlooked the complaints made on the Plaintiff's behalf as to its breadth. However, as I have already observed, the Plaintiff did not propose any specific limitation or restriction nor did the Plaintiff put before the Court any evidence as to nature and breadth of her communications (if any) with her father during the period identified in category 2. The High Court - and this Court on appeal - has been left to operate in an information vacuum in that regard. That effectively makes it impossible to narrow the scope of category 2 by identifying specific communication channels and excluding others. One possible limitation would be to limit the category to communications arising from and/or relating the Plaintiff's test results. When that was canvassed in the course of the appeal hearing, Ms Fahey argued that such a limitation would inappropriately exclude communications relevant to the general relationship between the Plaintiff and her father, and in particular the Plaintiff's claim that her father was estranged from her in the period prior to her undergoing genetic testing. That argument is, in my view, a persuasive one. As a result of the manner in which the Plaintiff has chosen to make her claim, the entirety of her relationship with her father, both prior to and subsequent to the testing and the disclosure of the test results, is relevant. Accordingly, whether there were communications between them, the frequency of any such communications and the terms of them – whether or referring

directly to the test results - all appear to me to be a legitimate area of inquiry for the Hospital.

40. As regards the temporal scope of category 2, the Plaintiff underwent her tests in October 2017. The results of those tests were sent out in mid-December 2017 and in January 2018 the Plaintiff learned from her mother that the results had been sent to her father. The period specified in category 2 – 1 June 2017 to 1 June 2018 – thus begins some 6 months before the wrongful disclosure of the Plaintiff's test results and end 6 months afterwards. That time period does not appear to me to be unreasonable and I certainly do not think that, in directing discovery on that basis, it can be said that the Judge made a judgment call outside the range of judgment calls reasonably open to him.

Is discovery of category 2 necessary?

41. In addition to establishing that the documents sought are relevant in the *Peruvian Guano* sense), Order 31, Rule 12 RSC requires the party seeking discovery to show that the discovery sought is *necessary* for disposing fairly of the cause or matter or for saving costs. However, discovery/production of documents that are relevant will generally be considered to be necessary: the "*default position should be that a document whose relevance has been established should be considered to be one whose production is necessary*" (per Clarke CJ in *Tobin*, at para 48) or, as he also put it, *"the establishment of relevance will prima facie also establish necessity"* (at para 53). However, that default position is capable of being displaced "*for a range of other reasons*" (para 48), with the burden being on the requested party to identify grounds as to why the test of

necessity has not been met (also at para 53).

42. As I explained in *Ryan v Dengrove DAC*, the authorities suggest that there are particular circumstances in which a court may be persuaded that, although documents may be *relevant* in the *Peruvian Guano* sense, their discovery may nonetheless not be *necessary* for the fair disposal of the proceedings or for saving costs. One such circumstance is where the documents to be discovered are likely to contain confidential material. Applications for discovery of confidential material (and for production/inspection of such material) warrant special scrutiny. I addressed this issue in some detail in *Ryan v Dengrove DAC* but the position is usefully summarised in *Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform* [2020] IESC 56, where Clarke CJ observed that the "*traditional law of discovery"* in Ireland had developed so as to allow:

> *"for a nuanced and incremental approach to the disclosure of confidential information by the discovery process. The starting point must, of course, be that the information concerned is potentially relevant to the proceedings for if it is not relevant then there could be no legitimate basis for its disclosure in the first place. However, if relevance is established, then the Court will have to consider the appropriate weight to attach to the protection of confidential information in the particular circumstances of the case in question. This will ordinarily involve assessing the importance of the information to the just resolution of the case, the level of confidentiality attaching to the materials and, in particular, whether the materials involve third party confidential information and also paying*

appropriate regard to the extent to which it is possible, at a pre-trial stage, to form an accurate view as to the appropriate weight to be attached to those matters. The Court can also pay proper regard to the extent to which a credible basis for the claim, in respect of which relevance is asserted, has been made out. In addition, appropriate mechanisms have been identified for ensuring that materials, which can be demonstrated at trial to be required for the just resolution of the case, can be presented and produced. This modern approach to the discovery of confidential information is now well-established as part of our law."

43. Here, the Hospital disputes the assertion that communications coming within category 2 are confidential. There is, it says, no basis for supposing that the disclosure by one party of a communication from the other party would constitute a breach of any duty of confidentiality owed to the latter party. That may be so. But that is too narrow an approach in my view. Family members do not have to enter into a confidentiality agreement in order to have a reasonable expectation that private communications between them will not be disclosed. In any event, quite apart from confidentiality *stricto sensu*, discovery may also engage other interests such as the constitutional right to privacy (an unenumerated right protected by Article 40.3 of the Constitution: see *Kennedy v Ireland* [1987] IR 587), the rights of the family under Article 41 of the Constitution, the right to respect for private and family life (and for one's correspondence) protected by Article 8 ECHR and, within its field of application, the right to respect for one's private and family life and to protection of one's personal data provided for by Articles 7 and 8 respectively of the Charter of Fundamental Rights of

the European Union. Personal information (personal data) is also the subject of extensive protection in the form of the General Data Protection Regulation (GDPR)[7] and the Data Protection Act 2018.

44. None of these protections is absolute or unqualified. But, as I stated in *Ryan v Dengrove DAC* (at para 73), it does not follow from the fact that the protections are qualified that, in making decisions about discovery, courts should not give weight to the fact - if fact it be - that the effect of the discovery sought would be to require the disclosure of private and personal information of one of the parties and/or of third parties.

45. As already noted, the Court has no evidence as to the nature and scope of any communications that may have taken place here between the Plaintiff and her father. However, of their nature, communications between a parent and a child are likely to include information of a private and personal character and, in the circumstances here, it seems reasonable to suppose that, to the extent that there were communications between the Plaintiff and her father, these included such information and that the disclosure of those communications may reveal sensitive personal information (including health information) relating to them and, possibly, to other family members also.

46. In fact, I did not understand the Hospital to dispute the Plaintiff's contention that the compulsory disclosure of communications within category 2 would engage the

[7] Regulation (EU) 2016/679

constitutional right of privacy and also Article 8 ECHR.

47. In *Ryan v Dengrove DAC*, at para 67, I sought to summarise the principles to be taken from the authorities as to the proper approach to the discovery of confidential material and the manner in which the competing interests weighing for and against disclosure should be weighed. In my view, the same approach applies to the disclosure of sensitive private and/or personal information. I suggested (*inter alia*) that:

> *" 5. As is correctly emphasised in the authorities, confidentiality must ultimately yield to the interests of justice. Access to the courts and the right to a fair determination of civil rights and obligation are fundamental values under the Constitution, the ECHR and the Charter of Fundamental Rights of the European Union. But the confidential character of a document is properly to be regarded as a legitimate countervailing factor – and, in some circumstances at least, potentially a significant one - weighing against the making of an order for discovery, whether at all or at that stage of the proceedings (Hartside and Telefonica being examples of the court postponing discovery of confidential material until it was clearly established that its disclosure was actually necessary) and/or pointing to a need to limit its scope and/or impose conditions (such as conditions relating to redaction and/or conditions restricting the circulation of the discovered material) for the purpose of mitigating its impact.*
>
> *6. 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.

7. It follows from the foregoing that a court may – and in an appropriate case ought – to refuse to direct the discovery of a relevant document (relevant in the Peruvian Guano sense) on the basis that the document is confidential and that in the particular circumstances the interests of protecting its confidentiality outweigh the interests favouring its disclosure. If that is not so, then it follows that relevance trumps confidentiality in every circumstances. That is not the law as I understand it.

8. Where, however, it appears that a document "is really of some significance to the fair determination of proceedings", and where accordingly refusal of discovery would produce "a risk of an unfair result", the interests of disclosure will in the ordinary course outweigh any legitimate confidentiality interests

(though in such circumstances, a court might still be required to consider whether to adopt measures to mitigate the effects of disclosure).

9. It must always be remembered that contested issues of discovery are almost always addressed in advance of trial. The court must assess issues of relevance and necessity on the basis of the pleadings. At that stage, it will be difficult to predict the course of the trial. As proceedings move closer to hearing, some issues will loom larger and other will recede in significance. At the hearing of a discovery application, it may be very difficult to confidently assess the extent to which a document or category of documents (which, generally, the court will not have reviewed) will bear upon the resolution of any of the issues in dispute. The court will be concerned to adopt the approach that involves the least risk of injustice. Accordingly, where there appears to be any material risk that refusing discovery could give rise to unfairness, the court should generally err in favour of directing discovery (if necessary, on terms)."

48. Here, the communications within category 2 relate to a central issue in the Plaintiff's action and, one way or the other, appear likely to have a significant bearing on the determination of that action. The discovery may corroborate the claims made by the Plaintiff relating to her relationship to her father. It may undermine those claims. Either way, it appears to me that the category 2 communications are likely to be highly material to the resolution of the proceedings. The position differs significantly from that presented in *Ryan v Dengrove.* It follows that refusal of that discovery would give rise to a real risk of unfairness to the Hospital, as without access to the category 2 material

its capacity to defend the Plaintiff's claim effectively is likely to be significantly impaired.

49. In these circumstances, "*the interests of justice in bringing about a fair result of the proceedings"* clearly weigh in favour of disclosure. That is so notwithstanding that discovery of category 2 may involve disclosure of confidential or otherwise sensitive private or personal information relating to the Plaintiff's father. It is, in this context, a relevant factor that the Plaintiff has chosen to advance her case in the manner that she has. It is the Plaintiff that has brought her relationship with her father into these proceedings and, adapting what was said by the Supreme Court (per Keane J, Murray and Hardiman JJ agreeing) in *McGrory v ESB* [2003] IESC 45, [2003] 3 IR 407, she "*by implication necessarily waives the right of privacy which [she] would otherwise enjoy in relation to [that relationship]"* (at page 414). I emphasise that that does not mean that a personal injuries plaintiff waives all rights of privacy. That is not so. Every case is different. It is the particular manner in which the claim is advanced here that justifies the discovery sought by the Hospital.

50. It is also relevant in this context that the Plaintiff has chosen not to put any evidence before the court as to the precise nature and subject of her communications with her father (assuming that there were such communications). While it may be reasonable to suppose that communications between them are likely to include information of a private and personal character and that the disclosure of those communications may reveal sensitive personal information (including health information) relating to them and, possibly, to other family members also, the fact is that the Plaintiff could have, but

has not, produced direct evidence to that effect and could have, but has not, identified specific and particularly sensitive information liable to disclosure in the event that the Plaintiff was directed to make discovery of category 2.

51. The restrictions on disclosure which I propose below are also relevant in terms of striking an appropriate balance between the competing interests weighing for and against disclosure here.

52. It is not an answer to the discovery sought that the Hospital will be able to cross-examine the Plaintiff about her relationship with her father at trial. With no disrespect whatever to the Plaintiff, that disregards the important function of discovery "*in keeping parties honest*" (*Tobin*, at para 35). Furthermore, it is in the interest of parties, and in the public interest, that relevant material is disclosed in advance of any hearing so as to allow parties to consider, if appropriate, whether to pursue pre-trial settlement (or not). That point was made in *McGrory* (at page 415). Although *McGrory* was not concerned with discovery as such, it seems to me that the same rationale applies in the context of discovery also.

53. Nor, in my view, is this a case in which it might be appropriate to defer the issue of discovery/production to the judge hearing the action, as was done in *Independent Newspapers (Ireland) Limited v Murphy* [2006] IEHC 276, [2006] and *Hartside Limited v Heineken Ireland Limited* [2010] IEHC 3. In those cases, the relevance of the documents in dispute was marginal and/or contingent, but depending on developments at trial, their discovery might be necessary. That is not the case here. Here, the necessity

for the discovery of category 2 is not contingent on developments at trial; it is clear from the manner in which the Plaintiff has advanced her claim. The considerations mentioned in the previous paragraph by reference to *McGrory* also weigh against deferring discovery/production here.

54. Accordingly, the Judge was entitled to conclude that discovery of category 2 was necessary for the fair disposal of the proceedings and/or for the purpose of saving costs. While he gave his ruling in brief terms, it is clear from that ruling that the Judge understood the objection being made by the Plaintiff but considered that the manner in which she had advanced her claim made the discovery sought by the Hospital necessary to defend that claim. That view was reasonably open to him; indeed, it is very difficult to see how he could reasonably have reached a different view.

55. In my view, however, it is necessary to consider whether it is appropriate to impose restrictions on the circulation and/or use of any material that may be produced by the Plaintiff in response to category 2. The Hospital would, of course, be subject to the normal implied undertaking not to use any material discovered to it other than for the purposes of the proceedings. That a court may require such an undertaking to be given expressly and/or impose additional restrictions in the context of the discovery/production of commercially confidential material is clear: see, by way of example, *Courtney v OCM Emru DAC* [2019] IEHC 160, [2019] 2 ILRM 166. In some circumstances, such restrictions may properly extend to excluding disclosure to the other party, at least in the first instance, through the creation of a *"confidentiality ring*": see, for example, the decision of this Court in *Goode Concrete v CRH Plc* [2020] IECA

56. There is no reason why a court should not have the same powers in the context of the discovery/production of sensitive personal and/or private information.

56. In my view, the following restrictions on the circulation/use of any category 2 material produced on discovery are appropriate here:

(a) in the first instance, a single set of the material, in some appropriate hard-copy form, should be provided by the Plaintiff to the State Claims Agency.

(b) such material must be retained in the possession of the State Claims Agency and no further copies of that material may be made save for the purpose of its production in court in accordance with the advice of counsel.

(c) the material should be available for inspection only by Ms Potterton (or, in the event that she ceases to be the solicitor having carriage of the proceeding, the solicitor who replaces her), by counsel and by the person or persons in the Hospital responsible for giving instructions as to the conduct of the proceedings.

(d) the Hospital may also allow any expert witness retained by it for the purposes of the proceedings to review the material (but not to take or keep copies of it).

(e) no use may be made of any of the material other than for the purposes of the defence of the Plaintiff's claim.

(f) all of the material shall be returned to the Plaintiff upon the determination of the proceedings.

57. The above restrictions may be varied with the consent of the Plaintiff and/or by direction of the High Court.

58. No argument was made either in the High Court or in this Court on appeal as to the possibility of redacting documents coming within category 2. It may be that such documents contain personal information which is not material to the issues in the proceedings, for instance information identifying third parties. As the courts have observed more than once, redaction excites suspicion and tends to lead to unproductive and costly interlocutory disputes which inevitably delay the resolution of the underlying proceedings. It is not to be done lightly and, if done, it must be convincingly justified by appropriate affidavit evidence. In the first instance, it will be a matter for the Plaintiff and her advisors to take a view as to whether there is a proper basis for redacting any of the documents coming within the scope of category 2. Any dispute arising in that context will be a matter for the High Court to determine.

CONCLUSIONS AND ORDER

59. For the reasons set out above, I would dismiss the Plaintiff's appeal from the decision of the Judge to direct discovery of category 2 and affirm the order made by him which fixes a period of 12 weeks for the making of that discovery. I would, however, vary the order of the High Court in the manner set out above so as to limit the disclosure/use of the discovered material. If any particular difficulty arises in relation to the form of order suggested, the parties will have liberty to apply.

60. There remains the issue of costs. The Judge made an order for costs in favour of the Hospital, subject to a stay pending the determination of the proceedings. No basis for interfering with that order has been identified by the Plaintiff. As regards the costs of the appeal to this Court, the Plaintiff's appeal has been unsuccessful. While I would vary the High Court order in the manner set out above, the Plaintiff did not propose any such variation and it cannot therefore be characterised as any form of partial success on the appeal. In the circumstances, it would seem to follow that the Plaintiff should be liable for the costs of the appeal, subject again to a stay pending the determination of the proceedings. However, that is a provisional view only. If the Plaintiff wishes to contend that a different order should be made, she will have 14 days in which to notify the Office (and the Hospital) and in that event the Court will arrange for a brief further hearing on costs. The Plaintiff will be at the risk of the costs of any such hearing in the ordinary way.

Donnelly and Ní Raifeartaigh JJ have read this judgment in draft and have indicated their agreement with it.