THE HIGH COURT

Between:

V

PLAINTIFF

– AND –

W, X AND Y

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 17th May, 2019.

Part I: Discovery Sought

1. These proceedings concern alleged instances of historical sexual abuse of V, when he was a schoolchild, by X, a priest/schoolteacher. As part of the pre-trial process, documentation has been discovered to the plaintiff that relates to the wider history of actual/alleged historical sexual abuse perpetrated by X, though with certain details redacted. In this application, the plaintiff seeks various of the redacted details.

2. The redactions fall into four broad categories: (I) redactions of the names of persons who (a) have in the past made a complaint to the Gardaí about X (in consequence of having, according to them, witnessed and/or experienced child sexual abuse by X) and (b) have seen criminal proceedings commenced against X as a consequence and/or (c) have commenced civil proceedings against X; (II) redactions of the names of persons in respect of whom X has admitted to his clerical superiors were victims of his predations; and (III) redactions of the names of persons who have complained of X's actions to X's religious order (which complaints came via students or other persons whose names are redacted, or via the police, or via solicitors). Additionally, (IV), the discovered documentation also reveals that there are other individuals against whom allegations of abuse have been made. It is not clear whether the persons whose names are redacted in each category overlap wholly, partly or at all with those in one or more of the other categories.

3. The information referred to at (I), (II) and (III) appears to the court to be relevant in the context of the within proceedings. (Indeed the relevance of at least some of the information is conceded). The court recalls in this regard the observation of Murray J. in *Framus Ltd v. CRH plc & ors* [2004] 2 IR 20 that once relevance is established, it will follow in most instances, as it does here, that discovery is necessary for the fair disposal of the issues. Here discovery is clearly necessary, not least so those other alleged/proven victims might perhaps be called to give evidence at trial.

4. What then of proportionality? Not proportionality in the sense of the scale of detail/documents to be provided – in fact the information at play is relatively limited – but proportionality in the sense of interfering with, to borrow from Clarke J. in *Independent Newspapers (Ireland) Ltd v. Murphy* [2006] 3 IR 566, 572 as "*the right of confidence to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing".* In this regard, it seems to the court that: (A) "*the right of confidence*" – the right to privacy – of all the people in categories (I)-(III) (inclusive) requires that their names not be provided to the plaintiff without additional initial safeguards being engineered by the court into the process, and (B) it is possible and yields proportionality in the form of order to be made by the court to distinguish between: (a) people who (i) have made complaint to the Gardaí and/or to X's religious order and/or (ii) have commenced civil proceedings against X, and (b) alleged victims whose names have 'surfaced', *e.g.*, in the context of X's admissions or in the context of third party allegations against X, but who for reasons best known to those alleged victims (and they are entitled to those reasons and to proceed however they want with their lives) have never taken any of the steps referred to at (a).

5. How is the court to juggle the dual objective identified by Clarke J. in *Independent Newspapers* with the factors identified at (A) and (B)? **First**, by requiring the solicitors for the defendants (whom the court is advised are possessed of the requisite details) to contact any solicitors on record for the people at (B)(a) and ask if they would be satisfied for their details to be disclosed to the solicitors for the plaintiff, with a view to their possibly assisting the plaintiff in making his case. If any person so contacted is willing to assist, his details can then be disclosed to the solicitors for the plaintiff. Because of the professionally cooperative approach which each side to these proceedings has taken to discovery to date, it seems to the court that this is an approach that is practicable. In the event of any unforeseen issues arising, the parties will have liberty to make further application to the court. Although the court is mindful that pursuant, *e.g.*, to *Cooper Flynn v. RTÉ* [2000] 3 IR 344, it could order the disclosure of the details directly to the solicitors for the plaintiff, it considers that when it comes to persons who are possible/actual victims of past sexual abuse (an intensely personal and delicate matter) a more nuanced approach is required. **Second**, by declining to order the disclosure of the identities of the persons referred to at (B)(b). Given the type of order which the court has indicated that it is minded to make, it seems to the court that these persons, who have never come forward, can be left to themselves without a risk of impairment of fair hearing presenting. However, this aspect of matters may yet require to be re-visited in the event that the order contemplated does not yield much by way of cooperation from the persons contacted.

6. As to the information referred to at (IV), which seems to the court to be, at best, of tangential relevance, here one is in the realm identified by Clarke J. in *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 265, para.[3.4], *viz.* "*where there is a disproportion between the level of confidence which would be breached and a very limited potential relevance of the material concerned*". In truth, this was all but acknowledged by both sides at hearing and the court considers that the said information can be provided by linking the relevant individuals and details in anonymised form so that there is no impairment of the fairness of the hearing to come, but the minimum interference with the right of privacy.

Part II: Data Protection

7. Does any of the foregoing present an issue under the Data Protection Act of 2018/the GDPR Regulation? The court was referred in this regard to s.60 of the Act of 2018 which provides, *inter alia*, as follows:

> *"(1) The rights and obligations provided for in Articles 12 to 22 and Article 34 and Article 5 in so far as any of its provisions correspond to the rights and obligations in Articles 12 to 22 –*
>
> *(a) are restricted to the extent specified in subsection (3)….*

(3) Subject to subsection (4), the rights and obligations referred to in subsection (1) are restricted to the extent that –

(a) the restrictions are necessary and proportionate –

…(iv) in contemplation of or for the establishment, exercise or defence of, a legal claim, prospective legal claim, legal proceedings or prospective legal proceedings…before a court….

(4) The Minister may prescribe requirements to be complied with when the rights and obligations referred to in subsection (1) are restricted in accordance with subsection (3)".

8. It was intimated to the court by counsel for the defendants that relevant secondary legislation under s.60 is currently anticipated. In the meantime the court must determine whether the restrictions that its order will yield *vis-à-vis* the rights of the data subjects who are identified in the presently redacted discovered documentation are "*necessary and proportionate"* in the manner contemplated by s.60(3) or whether, conversely, a difficulty presents under the Act of 2018. Counsel for both sides urged on the court that having done its analysis of necessity and proportionality in the context of the general rules as to discovery, the court has effectively decided on restrictions that are necessary and proportionate in the context contemplated by and need do no more. A few observations might be made in this regard:

(1) ***Relevance***. Section 60(3) makes no mention of relevance but clearly relevance is the touchstone of the discovery process, with the decision of Brett LJ in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55 remaining the *locus classicus* of the test as to relevance. Absent relevance, there can be no discovery and so one will never even get to s.60(3).

(2) ***Necessity***. Order 31, rule 12(5) of the Rules of the Superior Courts, provides that an order for discovery shall not be made if the court is of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs. Offhand, the court does not see how an instance could present in practice in which (i) this requirement as to necessity was satisfied and (ii) any restrictions on the rights and obligations referred to in s.60(1) would not also be (to borrow from s.60(3)(a)) *"restrictions…necessary…(iv) in contemplation of or for the establishment, exercise or defence of, a legal claim, prospective legal claim, legal proceedings or prospective legal proceedings…before a court".*

(3) ***Proportionality***. As the learned authors of *Delany and McGrath on Civil Procedure*, 4th ed. (2018), observe, at 439, "*While there is no explicit reference in Order 31, rule 12 to the concept of proportionality, it is consistently referred to as a relevant factor in assessing whether discovery should be ordered*". The authors then proceed to consider two principal classes of proportionality identifiable in case-law, *viz*. (1) *Astrazeneca-style* proportionality, where the court is concerned with "*the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of an applicant or damage the case of his opponent*" (*Astrazeneca AB v. Pinewood Laboratories Ltd* [2011] IEHC 159), and *Independent Newspapers*-style confidentiality where a court is concerned with balancing (a) interference with the right of confidence to the minimum extent necessary, and (b) securing no risk of impairment of a fair hearing (*supra* at 572). Neither of these forms of proportionality is the proportionality to which s.60(3) refers, that being whether such restrictions as will be occasioned by court order on the rights and obligations referred to in s.60 are proportionate "*in contemplation of or for the establishment, exercise or defence of, a legal claim, prospective legal claim, legal proceedings or prospective legal proceedings…before a court*". The court does not see how express consideration of this particular form of proportionality can be avoided in discovery applications where s.60 is engaged.

(4) ***European Charter***. If one looks to the decision of the UK Supreme Court in *The Rugby Football Union v. Consolidated Information Services Ltd* [2012] UKSC 55 – so a case that pre-dates the GDPR and the Act of 2018 but which is nonetheless of interest – Lord Kerr points in his judgment for the court (at paras. 26-31) to the applicability of the Charter of Fundamental Rights of the European Union, there in the context of a *Norwich Pharmacal* order (in an environment where the Data Protection Directive (Directive 95/46/EC), as transposed, pertained); however, it seems to the court that the same would hold true, for the reasons identified by Lord Kerr, when it comes to granting a discovery order which results in a restriction of rights and obligations as referred to in s.60 (in an environment where the GDPR pertains). Under Art.52(1) of the Charter, limitations on the rights and freedoms recognised by the Charter (including under Article 8) may be made only "*if they are necessary and genuinely meet objectives of interest recognized by the Union or the need to protect the rights and freedoms of others*". Offhand the court cannot conceive of an instance in which a court would be satisfied that (a) the requirements as to relevance, necessity and proportionality (the 'triple standard' applicable in the general discovery context) and (b) where s.60 is engaged, the necessity and proportionality contemplated by s.60(3), would both be satisfied, yet a difficulty under Art.52 would nonetheless be considered to present. Even so, the court notes the test applicable under Art.52 is not identical to the 'triple standard'.

9. In this case the court is satisfied that no issue presents by reference to s.60(1) and (3) of the Act of 2018 when it comes to the form of order contemplated by the court in Part I.

Part III: Conclusion

10. The court will make the form of order contemplated in Part I.