

**THE HIGH COURT
DUBLIN**

Record No. 1999/12903 P

E. F. AND T. F.

PLAINTIFFS

AND

**THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND AND
THE ATTORNEY-GENERAL**

DEFENDANTS

Judgment by Mr. T.C. Justice Smyth on Friday, 12th January 2007

1. Mr. Justice Smyth: This is an appeal from the Master of the High Court dated 31st January, 2006 whereby he refused to order the Defendants to make discovery to the Plaintiffs of the following:-

"(f) All documentation in respect of the funding provided by the First or Second Named Defendant to the Health Board in relation to the provision of occupational therapy, physiotherapy, speech and language therapy or behavioural therapy or music therapy to the Plaintiff in order to meet the Plaintiff's needs in its functional area since the coming into force of Sections 6 and 7 of the Education Act, 1998 together with such documentation as may be in the possession of this Defendant in relation to the request for such funding, the information furnished to the First and Second Named Defendants by the Health Board when seeking such funding, how such funding was computed and the amount of such funding actually allocated by the First and Second Named Defendants to the Health Board.

2. The reasons why such discovery is required are as follows:-

(1) Counsel has advised that same will advance the Plaintiff's claim, reduce the length and complexity of the trial and will produce a savings in costs.

(2) In particular, we will refer you to the particulars of negligence set out in the Statement of Claim.

(3) The Plaintiff is a person of unsound mind and clearly is not in a position to fully instruct the next friend in relation to this matter. The Plaintiff has for the majority of her life been under the care of the Defendants. The Plaintiff's parent has access to very little documentation on his daughter and accordingly, the only place in which they can gain access to that documentation is by means of discovery against the Defendants.

(4) The Plaintiff has to have evidence of the resources that were made available in relation to the education for the Plaintiff, the consideration that was given to those resources and the consideration that was contained in her education and in particular, in this regard, the Plaintiff will rely upon the provisions of the Education Act, 1998 in which the Minister is entitled to have regard to resources available and in order to challenge any such decision that was made in relation to the Plaintiff's education, then clearly the Plaintiff will have to have evidence that the Minister did in fact have regard to the resources available.

(g) All documentation (post-dating the coming into force of Sections 6 and 7 of the Education Act, 1998) in respect of the funding provided by the First and Second Named Defendants to any of the facilities at which the Plaintiff attended during any period in which the Plaintiff attended any such facility together with any documentation in relation to the application for and request for such funding, with any supporting documentation attached to such requests and applications together with all documentation setting out precisely how such funding was computed together with details of how such funding was allocated.

3. The reasons why such discovery is required are as follows:-

4. Paragraphs 1 to 4 follow in exactly the same order and form the same basis of the request as set out at and under (f) above.

5. The Plaintiffs are twins and were born in 1995 and they were diagnosed in May, 1999 as autistic. These proceedings were initiated by Plenary Summons dated 21st December, 1999. Notwithstanding that the primary educators of the minors is the family under the Constitution, they have through their next friend effectively sued the State alleging that it has failed to provide for their proper education in breach of constitutional and statutory provisions. The State has raised in its Defence (Amended) the following plea [which is without prejudice to the Pleadings by and on behalf of the Plaintiff that by virtue of the allegations of non-compliance with constitutional and statutory provisions that the Plaintiffs have suffered and continued to suffer loss, damage, inconvenience, upset and expense and will continue to suffer the loss, damage, inconvenience, upset and expense unless and until the Defendants are compelled by order of the court to provide such free primary education for the Plaintiff as the Plaintiffs seek in these proceedings].

"9(a) In February 2000, following extensive investigations and enquiries, a recommendation was made by two Departmental Inspectors to the First Named Defendant to establish a special class for children with autism in Ballyduff National School, Kilmeaden, County Waterford to be staffed by a suitably qualified teacher and two special needs assistants whose positions would be funded by the First Named Defendant. The First Named Defendant accepted that recommendation.

(b) The First Named Defendant has been in discussion with the South Eastern Health Board for the provision of necessary support services for children with autism attending the proposed special class such as speech and language therapy and occupational therapy together with other necessary support services to be provided by a multidisciplinary team of professionals.

(c) The Plaintiff has been offered a place in the special class commencing in December 2000."

6. The response of the Plaintiff in the Amended Reply filed on 1st April, 2004 was that they awaited proof of the matters set out in paragraph 9 of the Defence. There is no specific denial of the plea and, in particular, no specific denial of the plea that the Plaintiffs had been offered a place in the special class commencing in December 2000.

7. Mr. McDonagh in the course of his submissions on behalf of the State on this discovery motion appeal, observed that while the Department were considering the recommendation of the Inspectors, a motion seeking interlocutory relief was sought on 12th January of that year, though listed for a later date in that month, and this was simultaneous with the Department in early February sanctioning the special class in the special school. However, it appears that an affidavit was filed for and on behalf of the Plaintiffs amounting to an alteration of their position whereby notwithstanding the class becoming available in the autumn, they wanted an entirely different educational provision involving applied behaviour analysis.

8. Notwithstanding such alteration of position by the Plaintiffs, the Department/State proceeded with the establishment of the class which actually was established but the Plaintiffs' parents took the children to California and put them into a school there for a year or so and then brought them back to Ireland. The clear inference is that the litigation was continued with a view to either coercing or otherwise seeking the State to alter its position and include the type of additional provision involving applied behavioural analysis to be provided in the special school. A special class had been in existence since the autumn of the year 2000.

9. Mr. McDonagh's submissions were not contradicted in any reply made by the Plaintiffs or on their behalf. The Plaintiffs filed an Amended Statement of Claim on 26th June, 2003 which very specifically dealt with aspects of statutory duty and, in particular, pleaded as follows:-

"9. The Plaintiff makes this claim pursuant to the provisions of the Constitution hereinbefore referred to and furthermore pursuant to the provisions of Sections 3, 6 and 7 of the Education Act, 1998 and Sections 3, 4 and 7 of the Equal Status Act, 2000."

10. Arising from that amendment, the Plaintiff's claim was extended to include the following:-

"(a) A declaration that the Defendants are in breach of the provisions of Sections 3, 6 and 7 of the Education Act, 1998 and Sections 3, 4 and 7 of the Equal Status Act, 2000.

(b) Damages for breach of statutory duty.

(c) A mandatory injunction pursuant to the provisions of the Education Act, 1998 directing the Defendants to forthwith provide for free primary education for the Plaintiff appropriate to her needs.

(d) Alternatively, a Mandatory Injunction (pursuant to the provisions of the Education Act, 1998 or otherwise) directing the Defendants to forthwith provide for free primary education for the Plaintiff appropriate to her needs."

11. The foregoing led to very extensive amendments in the Defence by the State which, notwithstanding their length, I consider appropriate to record in this judgment, and they are as follows:-

"11A. It is denied that the provisions of the Constitution and/or the provisions of Sections 3, 6 and 7 of the Education Act, 1998 (the "1998 Act") and/or Sections 3, 4 and 7 of the Equal Status Act, 2000 (the "2000 Act") confer on the Plaintiff the alleged rights or impose upon the Defendants the alleged obligations asserted by the Plaintiff in these proceedings.

11B. Section 3 of the 1998 Act provides that any expenses incurred by the First Named Defendant in the administration of the 1998 Act shall, to such extent as may be approved of by the Minister for Finance, be paid out of monies provided by the Oireachtas. Section 3 of the 1998 Act does not confer any right upon the Plaintiff or impose any obligation upon the Defendants which is enforceable by way of these proceedings against the Defendants.

11C. Section 6 of the 1998 Act specifies the objects of that Act and provides that every person concerned in the implementation of the 1998 Act shall have regard to those objects. However, Section 6 of the 1998 Act does not confer any right upon the Plaintiff or impose any obligation upon the Defendants which is enforceable by way of these proceedings against the Defendants.

11D. Section 7 of the 1998 Act specifies the functions of the First Named Defendant under that Act and provides that the First Named Defendant shall have all such powers as are necessary or expedient for the purpose of performing his or her functions thereunder. Section 7(4) provides that in carrying out his or her functions, the First Named Defendant:

(a) Shall have regard to:

(i) The resources available;

(ii) The provisions for education and training made by other agencies provided by the Oireachtas;

(iii) The need to reflect the diversity of educational services provided in the State, and;

(iv) The practices and traditions relating to the organisation of schools or groups of schools existing at the commencement of Part 1 of the Act and the right of schools to manage their own affairs in accordance with the 1998 Act and any charters, deeds, articles of management or other such instruments relating to their establishment or operation; and

(b) Shall make all reasonable efforts to consult with patrons, national associations of parents, parents' associations in schools, recognised school management organisations, recognised trade unions and staff associations representing teachers and such other persons who have a special interest or knowledge of matters relating to education, including persons or groups of persons who have a special interest in, or experience of, the education of students with special educational needs, as the First Named Defendant considers appropriate. Section 7 of the 1998 Act does not confer any right upon the Plaintiff or obligation upon the Defendants which is enforceable by way of these proceedings against the Defendants.

11E. Further or in the alternative and without prejudice to the foregoing, if the provisions of Sections 3, 6 and 7 of the 1998 Act do confer rights upon the Plaintiff or obligations upon the Defendants which are enforceable by way of these proceedings against the Defendants as alleged (which is denied), it is denied that the Defendants or any of them have

acted in breach of those provisions or any of them.

11F. Section 3 of the 2000 Act contains provisions governing general discrimination. Section 3 of the 2000 Act does not confer any right upon the Plaintiff or obligation upon the Defendants which are enforceable by way of these proceedings against the Defendants. Nor does Section 4 of the 2000 Act which contains provisions governing discrimination on the grounds of disability. Further or in the alternative and without prejudice to the foregoing, if Section 3 and/or Section 4 of the 2000 Act does confer rights upon the Plaintiff or obligations upon the Defendants which are enforceable by way of these proceedings against the Defendants as alleged (which is denied), it is denied that the Defendants or any of them have acted in breach of those provisions.

11G. Section 7 of the 2000 Act contains provisions concerning educational establishments. However, it is denied that Section 7 of the 2000 Act confers rights upon the Plaintiff or obligations upon the Defendants which are enforceable by way of these proceedings against the Defendants. Further or in the alternative and without prejudice to the foregoing, if Section 7 of the 2000 Act does confer upon the Plaintiff the alleged rights or impose upon the Defendants the alleged obligations enforceable by way of these proceedings by the Plaintiff against the Defendants as alleged (which is denied), it is denied that the Defendants or any of them have acted in breach of the provisions of Section 7 of the 2000 Act.

11H. Without prejudice to the foregoing, it will be contended by the Defendants at the hearing of these proceedings that they have fully complied with their statutory and constitutional obligations to the Plaintiff.

11I. Having regard to the foregoing, and having regard to the statutory obligations of the First Named Defendant to have regard to the resources available to meet all educational needs within the State in exercising his functions under the 1998 Act, it will be contended by these Defendants at the hearing that they do not have any statutory or constitutional obligation to make any further or additional educational provision for the Plaintiff in these proceedings.

11J. It will be further contended by these Defendants at the hearing that in utilising and allocating the limited resources available to them, the Defendants are exercising an executive power as sanctioned by the legislature and that insofar as the effect of the relief being sought by the Plaintiff is to direct the Defendants as to the manner in which such resources should be allocated, the grant of any such relief would constitute a breach of the principle of a separation of powers under the Constitution of Ireland. Accordingly, this Honourable Court should not grant such relief.

11K. Further or in the alternative and without prejudice to the foregoing, it is denied that the Plaintiff has put forward any basis on which she is entitled to aggravated or exemplary or punitive damages.

14. The Defendants will further contend at the hearing of this action that their obligations under Bunracht na hÉireann and under Statute to the Plaintiff require that those obligations be vindicated as far as reasonably practicable. The Defendants will contend at the hearing of the action that in utilising and allocating limited resources they are exercising an executive power, as sanctioned by Oireachtas Éireann. Insofar as the Plaintiff seeks relief directing the Defendants as to the manner in which resources should be allocated, the Defendants will contend that any such order made by this Honourable Court will constitute a breach of the principle of separation of powers and, therefore, in the premises no such order should be made by this Honourable Court.

15. Furthermore, insofar as the relief sought within the Plaintiff's Statement of Claim involves a claim for damages against the Defendants, it is denied that the Plaintiff is entitled to same to the extent that any such award of damages as sought is predicated upon this Honourable Court forming the view that in the past the Oireachtas and/or the Executive has failed or has failed appropriately to distribute public resources and/or has failed to distribute those resources in the manner which this Honourable Court might regard, or might have regarded, as appropriate."

12. Subsequent to the issue of the discovery motion, a letter was written on 21st October, 2005 by the Plaintiffs' solicitors which states as follows:-

"Dear Sirs,

We refer to the discovery motion in the above matter which is listed for hearing next Thursday, October 27th.

Would the Minister confirm that she intends defending this case on the basis that what was provided was adequate, not on the basis that there were other matters which could have been provided if money was available, but weren't provided because money was not available.

If that is the case, discovery of money issues, does not arise and we will not therefore require to pursue discovery in the context of paragraphs (f) and (g).

We await hearing from you, in advance of this matter which is listed for hearing on Thursday, 27th October next.

Yours faithfully."

13. The response from the Chief State Solicitor is dated 18th November, 2005 and states as follows:-

"Dear Sirs,

We refer to your letter in the above matter of 21st October, 2005.

The Minister will be defending this case on the basis that what was provided was appropriate. This does not necessarily mean that there were not other matters which could have been provided if the money was available but weren't provided because the money was not available. Of course in any given case the money for any given thing sought could be provided. On the other hand, the services available to T. and E. F. are available in the context of the Minister's obligations to all persons in education, including those with special needs. In that sense all educational and health related provision is subject to the financial constraints brought about by the many competing demands for the available resources. Resources available to Ministers are in turn a reflection of the allocation to Ministers of resources by the Oireachtas.

It is for this reason as in all other cases that having regard to the separation of powers, it is contended by the Defendant that the Court will not enquire into the allocation of resources in deference to the doctrine of the separation of powers. It is essentially a matter of distributive and not commutative justice.

Consequently, it is for this reason that we say discovery does not arise. This was the reason put forward by us in the recent case of E. O'C. in which your motion for discovery was withdrawn. The contention made in that case as to the availability or otherwise of discovery still express the Defendant's position.

The Court in the case of E. O'C. was of the view that this issue should be decided before any decision on discovery should be made.

It would have been decided had you not withdrawn your motion. If it were to be raised again, it is our view that it should be litigated to a conclusion, following which it can be determined what, if any, orders for discovery are appropriate.

Yours faithfully."

14. Mr. Gardiner for the Plaintiffs referred to the matters in controversy on this appeal as "resources issues", and submitted that the points for decision, have in substance been determined in a similar case by Kelly J. in *Downey -v- Minister for Education* (the High Court, unreported 9th May, 2002). This is one of "these type of cases" (Mr. Gardiner's expression). Downey was a decision made prior to the Supreme Court decisions in *Ryanair plc -v- Aer Rianta CPT* [2004] 1 ILRM 241 and *Framus -v- CRH plc* [2004] 2 ILRM 439, both authoritative Supreme Court decisions on approaches to discovery. This is not a case in which the Defendants are seeking to have the matter dealt with by way of preliminary issue but are defending the discovery motion on the basis that discovery ought not to be made in the instant case, because it is not necessary for disposing fairly of the cause or matter before the Court and that in terms of relevance, necessity and proportionality, the discovery order ought not to be made pursuant to the provisions of Order 31 Rule 12. They claim it is disproportionate and burdensome and in the context of the provisions of 1998 Act, the public law nature and character of the functions of the Minister under the Act not to give rise to an entitlement in the proceedings (nor are they necessarily required for the fair disposal of the issues between the parties). The declaratory relief and injunctive relief sought under the Statute are effectively a form of judicial review with consequences flowing from it. This Court is bound by the decision of the Supreme Court in *Kildare Meats Limited -v- Kildare Chilling Company* [2004] 1 I.R. 192. Discovery ought not to be ordered at this stage in these proceedings in respect of a decision which could be ignored or by-passed and lead to a direct claim by the Plaintiffs against the Defendant.

15. A further case of *Dempsey -v- The Minister for Science* (unreported judgment of Laffoy J. of 18th May, 2006) was drawn to my attention which has many similarities to the instant case. In her determination Laffoy J. clearly saw two issues requiring consideration on the procedural question as to whether the court should direct the trial of the points of law raised by the defendants as a preliminary issue and she held against the defendants on the basis that the defendants had not established that in the circumstances of the case, that it would be appropriate to direct a trial as a preliminary issue on points of law itemised on the Notice of Motion in that case.

16. In the course of her judgment in *Dempsey's* case, Laffoy J. said:-

16 "If at the trial of the action the court were to decide that the provision which the defendants have made to meet the plaintiff's educational needs is adequate and proper as the plaintiff contends the law requires, or appropriate, as the defendants contend the law requires, that should dispose of the action and the issue raised by the assertion at (c) should not arise. But, if the court were not to so find, so that the issue would come into play, what the court would be concerned with in determining that issue would be the application of constitutional principles.

Counsel for the defendants characterised the issue raised by the assertion at (c) as a question of jurisdiction, suggesting as I understand the argument, that, if the defendants raise the issues of resource in this type of case, the matter is not justiciable at all. In my view, that proposition has such profound implications that it would be inappropriate to express any view on an application of this nature."

(Page 13 of typescript copy of judgment).

17. Issue (c) is what has been characterised (not very accurately) as "a resources defence".

18. In the instant case I cannot envisage any real difficulty in the case proceeding to a point where the Court can determine as a matter of fact if the Plaintiffs have been accorded the level of education (more truthfully schooling) mandated by the Constitution as interpreted in *Sinott's* case. If the answer is in the affirmative, other issues, and in particular "the resource issues" do not arise. I see no justification for ordering discovery of documents in respect of a non-issue (which apparently was the case in *O'Cuanocháin* after a hearing before Peart J. of 68 days). If at a stage in the trial, the trial judge was of the view that the constitutional rights of the Plaintiffs have not been vindicated - he/she is entitled to so conduct the trial as to make a determination in that regard; and before permitting the Defendants to seek to defend their position, subject to being satisfied that a "resources defence" is justiciable - and Mr. McDonagh does not contend that it is non-justiciable, but it is only in the context of Judicial Review (*O'Donnell -v- Dun Laoghaire Corporation* [1991] ILRM 301) and the application of *Wednesbury* principles, then the trial judge, if satisfied, that discovery is, to the extent and of the character sought on this appeal, necessary to fairly dispose of the cause or matter before the court, it can be so ordered and the trial resumed to a conclusion.

19. Regretfully, I am unable to agree with the view of Laffoy J. "that the availability of resources is such an *intrinsic* part of the *core issue* in these proceedings - whether the provision actually made for the plaintiff's educational needs meets the statutory requirements - that it is not possible to segment out of the allocation of resources issue from the overall determination of the State's liability to the Plaintiff in any meaningful manner."

20. In my judgment the core issue is as to whether the Plaintiffs have been accorded their legal entitlements, not whether the Defendants had or had not applied or did or did not apply resources. Then questions such as the following may arise:

1) Is there an obligation on the Minister to see to the proper allocation of public monies sanctioned to his Department for the discharge of his statutory functions;

2) Is a want of resources (if proven) ever a defence to a breach of the constitutional right (if proven) or a statutory duty (if proven);

3) Does the provision of resources (adequate or inadequate) to enable a Minister to discharge a public function give rise to a private right based on a duty?

21. All these are questions related to distributive justice upon which the courts should refrain from embarking, but if enquiry is undertaken as a necessary last resort, upon which the court should do so with a great deal of self-restraint.

22. Conscious as I am of expressing views at variance with my brethren, I would rather be reversed on appeal (if in error) than that this promoted line of litigation, if it is to continue, would do so with a definitive judgment of the Supreme Court, so that the scandal of extensive protracted and convoluted litigation and legal costs might cease or proceed on settled lines, and that the resources of the State would be exclusively applied to the persons who are intended to be protected by the Constitution, the legislation and the courts.