



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 146

Record Number: 2017/422

**Peart J.
Hogan J.
Hedigan J.**

BETWEEN:

MB

PLAINTIFF / APPELLANT

- AND -

**MARY COLLINS, MARY CHRISTIAN, CHRISTINA GORMAN, NOREEN O'SHEA, THE ARCHDIOCESE OF DUBLIN, THE MINISTER FOR
EDUCATION AND SKILLS, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS/RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 17th DAY OF MAY 2018

1. The Appeal in the above matter was heard in conjunction with the appeals in respect of four other appeals in which the same issues arise for determination in advance of certain motions by the defendants to dismiss all these proceedings *in limine* for the reasons explained hereunder. Those other appeals arise in similar proceedings commenced against various defendants, by plaintiffs AJ, ND, CW and KW, and bear appeal record numbers: 419/2017, 420/2017, 421/2017, 423/2017.

2. The issue on these appeals is whether the High Court (White J.) was correct to order discovery of the plaintiffs' documents and/or evidence relating to their application to the Residential Institutions Redress Board for a financial award under the scheme established under the Residential Institutions Redress Act, 2002 ("the Act"). The discovery ordered in respect of each plaintiff included the award made, and the waiver signed by each as required by s. 13 of the Act. The trial judge further ordered that the defendants may adduce before the Court such documents and/or evidence pursuant to s. 28(5A) of the Act, as inserted by s. 34 of the Commission to Inquire Into Child Abuse (Amendment) Act, 2005 ("the 2005 Act"), and further, that all information obtained by way of such discovery was to be treated as confidential information and was to be used solely for the purposes of the proceedings.

3. That order was made in each case on the 28th July 2017 in the context of the defendants' applications to dismiss the various plaintiffs' High Court proceedings which they have subsequently commenced by way of plenary summons seeking damages under a number of headings arising from their experiences in the various institutions in which they were placed during their childhood. Each plaintiff's case is necessarily different on its facts, but the matters to be determined on this appeal are the same.

4. The defendants are seeking to have those proceedings dismissed because each plaintiff previously made an application for an award of compensation under the redress scheme and accepted an award made by the Board. That fact is not in dispute. Each plaintiff will have signed a waiver when accepting such award as required by s. 13 (6) of the Act which provides:

"(6) Where an applicant accepts an award (including an award reviewed under section 15 the applicant shall agree in writing to waive any right of action which he or she may otherwise have had against a public body or a person who has made a contribution under section 23(5) and to discontinue any other proceedings instituted by the applicant, against such public body or such person, that arise out of the circumstances of the application before the Board."

5. Section 13(12) of the Act is also relevant. It provides:

"(12) An applicant who receives an award under this Act shall not institute civil proceedings arising out of the same, or substantially the same, acts complained of in an application in respect of which a public body or a person who has made a contribution under section 23(5) is a party if such proceedings concern the institution referred to in section 28(4)(b) and the period of residence at that institution referred to in section 28(4)(c)."

6. Quite apart from the inability at common law to achieve double recovery for the same injury, there is in the present cases a specific statutory prohibition in that regard.

7. The defendants consider, and wish to argue on their applications to dismiss, that in their proceedings the plaintiffs are seeking to recover damages in respect of the same injury or substantially the same injury as that for which they accepted an award under the Act, and accordingly that these proceedings must be dismissed *in limine*. For that reason they seek discovery of the information and/or evidence that was before the Redress Board when it made the award. They consider that such material is both necessary and relevant to the issues arising on their motions to dismiss, as it will establish whether or not the injuries for which they received their award are the same or substantially the same as those for which damages are claimed in these proceedings.

Section 28 of the Act

8. The solicitor who has represented all these plaintiffs, Ms. McMahon, has resisted the application for disclosure of this material on a number of grounds, including that, on what she contends to be the proper interpretation of s. 28 of the Act, the plaintiffs may not disclose the information to the defendants without being in breach of the confidentiality attaching to that material and information under the Act, and would commit an offence. Article 28 (as amended by s. 34 of the 2005 Act by the insertion of subsections 5A and 5B) provides:

"28(1) A person (including the Board and the Review Committee) shall not, subject to this section, disclose information other than the information specified in subsection (4) or (5) that is provided to the Board or the Review Committee and obtained by that person in the course of the performance of the functions of the person under this Act.

(2) A person referred to in subsection (1) shall disclose information so referred to for the purpose of the performance of the functions of the person under this Act.

(3) Documents that are (a) provided to or prepared by the Board and where appropriate the Review Committee, or (b) prepared by a person for the Board or the Review Committee in the course of the performance of the functions of such person as a member of the Board, Review Committee, a member of the Board or the review Committee or an adviser, shall not constitute Departmental records within the meaning of section 2 (2) of the National Archives Act, 1986.

(4) The Board shall keep a record of the following information –

- (a) the name, address and date of birth of an applicant,
- (b) the name of the institution concerned,
- (c) the period in which the applicant was resident at the institution, and
- (d) the amount awarded to the applicant under this Act,

and such records shall be available to the Minister for the purposes of section 13 (13) and to any party against whom proceedings are initiated contrary to section 13 (12).

(5) Notwithstanding subsection (1) or any other provision of, or an instrument made under, a statute or any other rule of law, a person shall disclose information other than the information specified in subsection (4) that is provided to the Board or the Review Committee and obtained by that person in the course of the performance of the functions of the person under this Act to:–

- (a) a member of the Garda Síochána if the person is acting in good faith and reasonably believes that such disclosure is necessary in order to prevent and act or omission constituting a serious offence, and
- (b) to an appropriate person (within the meaning of the Protections for Persons Reporting Child Abuse Act, 1998) if the person is acting in good faith and reasonably believes that such disclosure is necessary to prevent, reduce or remove a substantial risk to the life or to prevent the continuing of abuse of a child.

(5A) Nothing in subsection (1) operates to prohibit the production of a document prepared for the purposes or in contemplation of an application to the Board or a submission for a review by the Review Committee, or given in evidence in such application or review, to

- (a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, enquiry or investigation in relation to, or adjudicating on, any matter, or
- (b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, enquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.

(5B) Nothing in subsection (1) operates to prohibit the giving of information or evidence provided or given to the Board or the Review Committee to:–

- (a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, enquiry or investigation in relation to, or adjudicating on, any matter, or
- (b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, enquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.

(6) A person shall not publish any information concerning an application or an award made under this Act that refers to any other person (including an applicant), relevant person or institution by name or which could reasonably lead to the identification of any other person (including an applicant), a relevant person or an institution referred to in an application made under this Act.

(7) The Board shall, prior to the making of an order under section 3(3), determine the disposal of the documents concerning applications made to it.

(8) The Review Committee shall, prior to the making of an order under section 14 (3), determine the disposal of the documents concerning applications made to it.

(9) A person who contravenes subsection (1) or subsection (6) shall be guilty of an offence.

9. The argument in the High Court and in this Court on appeal is that each of the plaintiffs are "a person" for the purposes of s. 28 (1) of the Act, and are therefore prohibited from *disclosing* any information relating to their applications for an award under the Act

except for the limited information specified in s. 28 (4) of the Act. The trial judge rejected the plaintiffs' interpretation of the provision. He was in my view correct to so reject it. The argument is misconceived. The words of the subsection are very clear. The "person" referred to at the commencement of the subsection is, as appears towards the end of the subsection a person who has obtained information "in the course of the performance of the functions of the person under this Act". None of the plaintiffs is a person who performs a function under the Act. This was the conclusion of Noonan J. in the case of *GM v. DPP* [2015] IEHC 220 when he had to consider the meaning of s. 28(1) of the Act albeit in another context.

10. On the other hand, as pointed out by Noonan J. in his judgment in *GM*, the reference to "a person" in s. 28(6) of the Act does cover the plaintiffs. In other words each plaintiff is "a person" for the purposes of subsection (6) since it does not make any reference to the person being one performing functions under the Act. However, subs. (6) unlike subs. (1) is a prohibition against publication of information – not simply disclosure. The prohibition against publication is not a bar to disclosure as part of a discovery process, and is in any event concerned in these proceedings only with the plaintiffs' own information.

11. The defendants have relied also on the provisions of s. 28(5A) and (5B) of the Act as inserted by s. 34 of the 2005 Act which are set forth above. Given my conclusion that none of the plaintiffs is "a person" for the purposes of subs. (1), it is unnecessary to reach a conclusion on the significance of subss. (5A) and (5B) which would only have been relevant if I was not so satisfied in relation to subs. (1). The defendants' argument was that if the plaintiffs were within subs. (1) these inserted subsections made clear that notwithstanding subs. (1), the information being sought could be lawfully provided to a court by way of discovery or otherwise since, as provided for in subss. (5B)(a) it would be provided to a court which, it is argued, is "a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, enquiry or investigation in relation to, or adjudicating on, any matter". In this regard, the defendants have referred to the Supreme Court's judgment in *FMCK v. OL* [2011] 1 I.R. 263 - a consultative case stated in which one of the questions for determination was whether in the Circuit Family Court, on appeal from the District Court, an applicant for maintenance could require the respondent to that application to disclose details of an award made under the Act, given the provisions of s. 28 of the Act. That question was answered in the affirmative by Finnegan J. (O'Donnell, McKechnie JJ concurring). With regard specifically to subss. (5A) and (5B) of the Act, Finnegan J. stated the following at p. 270:

"Subsections (5A) and (5B) introduced into the Act of 2002 by s. 34 (h) of the [2005 Act] provide that s. 28 (1) shall not operate to prohibit the production of a document prepared for the purposes or in contemplation of an application to the Board or a submission for a review by the Review Committee, or given evidence and such application or review or the giving of information or evidence provided or given to the Board or Review Committee to a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, enquiry or investigation in relation to, or adjudicating on, any matter. The Circuit Family Court is, I am satisfied, when hearing an application for a maintenance order a body or person performing functions under an enactment consisting of the conducting of a hearing, and so subss. (5A) and (5B) apply and in consequence s. 28 (1) of the Act has no application; ...".

12. That is an authoritative and binding interpretation upon this Court, but in any event is one with which I am most respectfully in agreement.

13. In my view the trial judge was correct to reject the plaintiffs' arguments based on s. 28 of the Act, as amended.

Data Protection Act, 1988

14. The plaintiffs have also urged upon this Court, as they did in the High Court, that the information sought by the defendants to be disclosed constitutes 'sensitive personal data' as defined in s. 1 of the 1988 Act, as amended, and therefore that it may not be 'processed' by way of disclosure by the data controller without the express consent of the plaintiffs. They are not willing to give that consent because in their view as expressed to the Court by Ms. McMahon on their behalf, they do not consider the information to be of relevance to the defendants' applications to the High Court to dismiss these proceedings as being in breach of s. 13 (6) of the Act.

15. The trial judge concluded that in view of the provisions of s. 8(e) and (f) of the 1988 Act the restrictions on the disclosure of personal information do not apply in the present context, where as provided at (e) it is "required by or under any enactment or by a rule of law or order of a court", and where as provided at (f) it is "required for the purposes of obtaining legal advice or for the purposes of, or in the course of, legal proceedings in which the person making the disclosure is a party or a witness".

16. The trial judge also referenced s. 2B (1) of the Act of 1988 (as inserted by s. 4 of the Data Protection (Amendment) Act 2003) which provides that "sensitive personal data shall not be processed by a data controller unless: ... (vi) the processing is necessary – (I) for the administration of justice ..." and at (vii) "the processing – (I) is required for the purposes of obtaining legal advice or for the purposes of, or in connection with, legal proceedings or prospective legal proceedings, or (II) is otherwise necessary for the purposes of establishing, exercising or defending legal rights".

17. In my view the trial judge was entirely correct in his conclusions in relation to the plaintiffs' submissions under the 1988 Act. The Act is perfectly clear in this regard. The disclosure sought by the defendants for the purposes of the motions to dismiss before the High Court is not prohibited by any provision of the 1988 Act, as amended. Section 8(vi) to which I have referred expressly contemplates and permits disclosure for the purpose of the administration of justice. That alone is sufficient to entitle the disclosure of the information sought so that the High Court may determine whether or not the present proceedings have been commenced in breach of s. 13(6) of the Act. A determination of that question is an exercise in the administration of justice. But disclosure in the present context would also appear to come within (vii) also since it is required in connection with legal proceedings.

Disclosure would constitute a breach of contract of confidentiality

18. Another submission made by the plaintiffs is that to require the disclosure of this confidential information amounts to a breach of the contract which each applicant entered into with the Redress Board which included that all the information and evidence provided would be kept confidential, and that they would never be required to disclose it.

19. One can fully understand and appreciate the distress that the further disclosure of this sensitive information would cause all of the plaintiffs. That information is of course confidential and may not be disclosed other than for purposes recognised by law as requiring disclosure, even where the party entitled to that confidentiality will not consent. But in the present cases, it is the plaintiffs themselves who have commenced proceedings which, at least on the case being put forward by the defendants, may be in breach of s. 13(6) of the Act, and the waiver that each plaintiff will have executed when accepting their award. Given the express provision of s. 13(6) that is an argument that the defendants are entitled to put forward. Where the plaintiffs are opposing the defendants' motions on the ground that the claims being made in these proceedings relate to injuries for which they did not receive and accept an award, and the defendants have reasonable grounds based on the contents of the plaintiffs' statement of claim, and particulars

provided in answer to notices for particulars, the High Court must resolve that controversy. It can only do so if it is provided with the necessary information and evidence that was provided to the Board in connection with the application for an award made to the Board. That information and material is clearly relevant to that issue which the Court is asked to determine. It is necessary so that the Court may know precisely what injury each plaintiff sought redress in respect of and against which institution(s). It is not sufficient that the plaintiff would simply state what the position is in this regard. The defendants are entitled to such information by way of discovery/disclosure as a matter of fair procedures. The plaintiffs cannot therefore rely on any understanding or even contractual obligation on the part of the Board that such information would never and under no circumstances be disclosed, where it is they alone who have commenced their proceedings, which arguably at least are in breach of s. 13(6) of the Act, and where the legislative provisions identified actually permit disclosure where it is necessary for the administration of justice. I would reject this ground of appeal.

20. As this appeal proceeded, it became apparent through discussion between members of the Court and Ms. McMahon that behind all the objections to disclosure of their sensitive personal information in relation to their applications to the Board is the plaintiffs' apprehension that once disclosure of this information is made, it could be deployed outside the parameters of these proceedings, and in that way, abused. But the preservation of confidentiality beyond the needs of these proceedings was something that was specifically addressed by the trial judge, as is apparent from the transcript, and from the terms in which his order is drawn up.

21. In that regard, the order provides at paragraph 1 (v):

"(v) All information, documentation and/or evidence discovered between the parties and/or adduced to the Court pursuant to this order, is to be treated as confidential information and is to be used solely for the purposes of these proceedings. Dissemination of the information is to be limited to the lawyers with the respective parties and, to the extent necessary for preparing and contesting the said motions, in consultation with the parties themselves".

22. It seems to me that the above paragraph very adequately addresses the understandable concerns which the plaintiffs have in relation to the sensitive personal information which will be disclosed as a result of the order made by the High Court. All the lawyers acting for the respective defendants in these proceedings will already be acutely conscious of their obligations to respect the confidentiality of information, documents and material which will be disclosed pursuant to the said order. I have no doubt that even without the order at (v) that confidentiality would be fully safeguarded and respected by those concerned. But the order made put that beyond any possible doubt, and in my view nothing further is required to address those concerns.

23. For all these reasons I would dismiss these appeals.