

BETWEEN

BARBARA FLYNN

APPLICANT

AND

CHARITIES REGULATORY AUTHORITY

RESPONDENT

JUDGMENT of Ms. Justice Reynolds delivered on the 18th day of June, 2018

1. This is an application for discovery brought by the applicant in the within proceedings seeking discovery of some five categories of documents. The respondent's position is that the discovery sought is neither necessary nor appropriate in the context of the within proceedings.

Background

2. In the within proceedings, the applicant has sought, *inter alia*, the quashing of a report (the "Report") prepared by inspectors (the "Inspectors") appointed by the respondent pursuant to s. 64 of the Charities Act 2009 to investigate the affairs of the Charity now operated by Ataxia Ireland CLG (the "Charity").

3. At all material times relevant to the Report, the applicant was the CEO of the Charity. Further, the applicant's parents (Tim and Claire Creedon) were founding trustees of the Charity.

4. The Report was published in July 2017 and made various findings including the following:-

(a) certain payments made to the two founding members of the Charity were in breach of a well-established principle of charities law in Ireland;

(b) the said payments were contrary to Revenue's stated position in respect of trustee remuneration;

(c) the Inspectors were not convinced that the nature of the charitable activities performed by the founding trustees supported the contention of the provision of "employee services" by them to the Charity;

(d) these payments were not disclosed to the wider management committee of the Charity that served between January 2014 and mid-2015 by the founding trustees or the CEO;

(e) there were fundamental weaknesses in financial governance, including financial management and control;

(f) there were significant weaknesses in internal controls over travel expenses, credit card expenditure and petty cash, creating significant financial and reputational risk to the Charity;

(g) the Charity did not operate in accordance with governance best practice.

5. By order dated 6th November, 2017 the applicant was granted leave to apply by way of application for judicial review seeking, *inter alia*, the quashing of the Report.

The Discovery Application

6. By letter dated 27th March, 2018, the applicant's solicitors sought voluntary discovery of some five categories of documents and set out therein the reasons for such discovery.

7. The respondent's solicitors replied by way of letter dated 6th April, 2018 advising that the discovery was neither necessary nor appropriate in the context of the judicial review application.

The Law

8. The law in respect of discovery in judicial review proceedings is well settled. It is accepted by both parties that in general terms discovery is neither necessary or appropriate in such applications.

9. The general principles to be applied were set out by Geoghegan J. in the Supreme Court in *Carlow Kilkenny Radio Ltd. v. Broadcasting Commission* [2003] 3 I.R. 529. In the course of his judgment Geoghegan J. noted the distinction in the approach to be adopted between judicial review and ordinary plenary proceedings as follows:-

"It is trite law that judicial review is not concerned with the correctness of a decision but rather with the way that the decision is reached. It follows that the categories of documents which a court would consider were necessary to be discovered will be much more confined than if the litigation related to the merits of the case."

10. In applying the principles as laid down by Geoghegan J., it is clear that a distinction must be drawn between documents relevant to the underlining decision being reviewed and those potentially relevant to the proceedings. This was emphasised by Clarke J. in his judgment in *MacAodháin v. Ireland* [2012] 1 I.R. 430 as follows:-

"It seems clear that in judicial review proceedings it is important, when considering relevance, to identify how the document concerned can be relevant to the specific types of issues which will arise in the relevant judicial review application rather than being relevant to the substantive questions which were before the decision maker."

11. It is clear that in applying the dicta as enunciated by Geoghegan J. and Clarke J. in the decisions as aforesaid and as endorsed in a number of more recent judgments that the relevant principles applicable in such applications can be summarised as follows:-

- (a) discovery is generally neither necessary nor appropriate in judicial review proceedings;
- (b) judicial review proceedings are to be distinguished from ordinary plenary proceedings in respect of discovery arising from the fact that in judicial review the court is not concerned with the correctness of the decision under review but rather the manner in which that decision was reached;
- (c) the fact that a document may be relevant to the substantive issue in respect of which the decision under review is made is not a valid basis upon which discovery should be granted;
- (d) in circumstances where what is being considered by the court is the procedure by which the decision under review was made or a contention on behalf of the applicant that the decision made was an unreasonable one, discovery will be neither necessary nor appropriate;
- (e) generally, the only instance in which discovery may be necessary or appropriate is where the court is required to resolve a conflict on the evidence as set out on affidavit;
- (f) in considering whether such an unavoidable conflict of evidence must be resolved by way of discovery, such a factual dispute must be based on substance and on evidence provided by the applicant;
- (g) discovery is not appropriate to facilitate a party verifying or challenging the accuracy of an opponent's affidavit.

Determination

12. In applying the foregoing principles to determine whether the categories of documents sought are relevant or necessary, this Court finds as follows:

Category 1 – All documents relating to the relevant interviews and questionnaires

13. It is clear that the respondent has already exhibited notes of interviews carried out by the respondent with the applicant and her parents in circumstances where the applicant has sought to take specific issue in these proceedings with the manner in which she and her parents were treated during the course of the respondent's investigation.

14. In seeking discovery of the outstanding interviews and questionnaires, the applicant has failed to identify any factual dispute between the parties' respective evidence on affidavit to justify this category of discovery.

15. Whilst the applicant purports to rely on a duty of candour to provide such discovery, it is clear that there is no legal basis for this proposition.

16. Further the applicant posits that "said documentation is necessary in assisting the applicant to understand why the respondent confined its investigation to the seventeen people and was not willing to interview other relevant witnesses". It is clear that an explanation has already been provided in this regard in circumstances where the persons interviewed were those who served as trustees during the relevant time period under investigation.

17. In circumstances where the facts as found by the respondent are clearly set out in the Report and where the applicant has failed to identify any factual dispute which could be resolved by the discovery of the documents in this category, this Court is satisfied that the discovery is neither relevant nor necessary and will refuse same.

Category 2 – Original written complaints and expressions of concern

18. The applicant contends that the motivation of the complainants who made the original complaints to the respondent are in issue in these proceedings and that the complaints were maliciously made. These are wholly unsubstantiated assertions and clearly neither the motivation of the complainants nor the respondents "level of knowledge of these individuals involvement in the setting up of a rival charity" is of any relevance to the matters at issue in these proceedings.

19. Furthermore, no evidence has been identified by the applicant that the findings in the Report were somehow the result of *mala fides* on the part of any of the complainants.

20. In addition, the respondent in conducting an investigation into the affairs of a charity, is reliant on the cooperation of individuals involved in the Charity and has treated the complaints confidentially. This is clearly understandable in circumstances where the essence of the investigation would be jeopardised in the event that notes of such complaints or expressions of concern were likely to be disclosed.

21. In all the circumstances, again the Court must refuse discovery of this category of documentation.

Category 3 – Notes or records of discussions or meetings at which the applicant and her parents were identified as persons of specific interest in the investigation

22. The applicant has asserted that she had been "targeted" by the respondent and that the outcome of the investigation had been "unlawfully predetermined". The applicant has failed to rely on any factual evidence to support such assertions.

23. Accordingly, this Court can only conclude that the documents sought are for the sole purpose of assisting the applicant to support her unsubstantiated allegations. In all the circumstances again the Court must refuse this request for discovery.

Category 4 – Documents relating to correspondence and records of discussions between the respondent and the Revenue Commissioners

24. It is clear from the Report that very specific findings were made in respect of trustee remuneration. Indeed, para. 45 of the applicant's affidavit of the 25th October, 2017 acknowledges these findings wherein the applicant states:-

"I have no difficulty in acknowledging that it is the Revenue Commissioners' stated position the trustees of charity should

not receive remuneration”.

25. Further, it is clear from the Report that the respondent does not rely on any engagement between it and the Revenue Commissioners.

26. In circumstances therefore where no factual dispute arises between the parties, again the court must refuse the request for discovery.

Category 5 – All documentation in relation to planning a media strategy to deal with the published report prior to its publication

27. Mr. Malone in his affidavit dated the 21st December, 2017 avers to the manner in which the Report and an associated press release were published by the respondent and has confirmed that this was done by the respondent’s Head of Communications and stakeholder engagement. Clearly, the outcome of a statutory investigation of a charity is a matter of public interest and there was an obligation on the respondent to publish its findings. Indeed, it is to be noted that the Charity has not objected to the findings and indeed has sought to implement same.

28. It is difficult to see how discovery of the nature sought under this category of documentation would assist the applicant in any meaningful way in progressing her judicial review application. The Court therefore concludes that it is neither relevant nor necessary and also refuses this category of documentation.

Conclusion

29. I therefore refuse the application for discovery in its entirety.