THE HIGH COURT

[2018 No. 6400 P.]

BETWEEN

M.P.

PLAINTIFF

AND

TEACHING COUNCIL OF IRELAND

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 26th day of February, 2019

Introduction

1. This is an action for a permanent injunction restraining the defendant from making a notification to the National Vetting Bureau under s. 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act, 2012 which the defendant has notified the plaintiff of its intention to make.

2. The plaintiff is a registered teacher. He was the subject of an investigation and a disciplinary inquiry under Part 5 of the Teaching Council Act, 2001.

3. The defendant was established by Part 2 of the Teaching Council Act, 2001 and is a scheduled organisation under the National Vetting Bureau (Children and Vulnerable Persons) Act, 2012. The defendant has a statutory obligation, if it should have a *bona fide* concern that the person who is the subject of an investigation, inquiry or regulatory process, may harm any child or vulnerable person, to notify that concern, and the reasons for it, to the National Vetting Bureau.

4. Following the conclusion of the Part 5 inquiry the defendant notified the plaintiff of its intention to make a notification to the Bureau. The plaintiff's case, or at least the case the plaintiff would argue, is that the requirements of s. 19 have not been met; that the defendant has no *bona fide* concern; and that the decision to make the proposed notification was motivated by malice towards him and amounted to misfeasance in public office.

5. To understand the issues, it is necessary to look at the broad scheme of the National Vetting Bureau (Children and Vulnerable Persons) Act, 2012 and of the Teaching Council Act, 2001, which was extensively amended by the Teaching Council (Amendment) Act, 2015 to take account of the scheme established by the Act of 2012. It is also useful to recall briefly the law in relation to misfeasance in public office.

National Vetting Bureau (Children and Vulnerable Persons) Act, 2012.

6. The National Vetting Bureau (Children and Vulnerable Persons) Act, 2012 came into operation on 29 April, 2016.

7. By s. 12 of the Act a "*relevant organisation*" may not employ or engage or permit any person to undertake "*relevant work or activities*" unless the organisation has a vetting disclosure from the National Vetting Bureau.

8. By s. 13(4)(e) an application for vetting disclosure must be accompanied by a declaration of consent by the subject of the application.

9. On receipt of an application, the Bureau must make such enquiries of An Garda Síochána as it deems necessary and undertake an examination of its database to establish whether there is any criminal record or "*specified information*" relating to the person concerned. "*Criminal record*" includes any record of pending prosecutions as well as convictions, whether within or outside the State. "*Specified information*" is defined as meaning information concerning a finding or allegation of harm to another person which has been received by the Bureau from An Garda Síochána or from a scheduled organisation, which is of such a nature as to reasonably give rise to a *bona fide* concern that the subject may

(i) harm any child or vulnerable person,

(ii) cause any child or vulnerable person to be harmed,

(iii) put any child or vulnerable person at risk of harm,

(iv) attempt to harm any child or vulnerable person, or

(v) incite another person to harm any child or vulnerable person.

10. Significantly, the person who has been harmed, or has been found or alleged to have been harmed, need not be a child or vulnerable person.

11. If, on completion of the prescribed enquiries and examination, a member of the staff of the Bureau considers that there is specified information relating to the subject of the application, he or she must refer the matter to the Chief Bureau Officer.

12. Where a matter is referred to the Chief Bureau Officer for assessment and determination, he or she must notify the subject and invite a written submission. Having assessed the application and the specified information, the Chief Bureau Officer must make a determination whether the information should be disclosed. He or she must not make a determination that the information should be disclosed unless he or she reasonably believes that the information is of such a nature as to give rise to a *bona fide* concern that the subject may harm etc. any child or vulnerable person, and is satisfied that the disclosure is necessary and proportionate in the circumstances for the protection of children or vulnerable persons, or both.

13. Where the Chief Bureau Officer makes a determination that specified information should be disclosed, he or she must notify the subject of the determination and the reasons for it, and that the subject has a right of appeal. The right of appeal against a

determination of the Chief Bureau Officer is to an appeals officer, who must be a barrister or solicitor of at least seven years standing, who is to be independent in the performance of his or her functions, and who will hold office for a term of three years, and be subject to removal only for incapacity or stated misbehaviour.

14. The notification obligations imposed on scheduled organisations are set out in section 19. This provides, so far as is material:-

> *"19.- (1) Where, following an investigation, inquiry or regulatory process (howsoever described) in respect of a person, (including an investigation, inquiry or regulatory process initiated but not yet concluded before the commencement of this section) a scheduled organisation, has as a result of the investigation, inquiry or regulatory process, a* bona fide *concern that the person who is the subject of that investigation, inquiry or regulatory process, may-*
>
> > *(a) harm any child or vulnerable person,*
> >
> > *(b) cause any child or vulnerable person to be harmed,*
> >
> > *(c) put any child or vulnerable person at risk of harm,*
> >
> > *(d) attempt to harm any child or vulnerable person, or*
> >
> > *(e) incite another person to harm any child or vulnerable person,*
>
> *the scheduled organisation shall, as soon as may be, for the purposes of providing specified information to the Bureau, notify the Bureau in writing of that concern and shall state the reasons for it. …*
>
> *(3) The scheduled organisation shall, in relation to the person in respect of whom it has a concern under subsection (1) or (2), as the case may be, notify the person of the fact of that concern and of its intention to notify the Bureau of it.*
>
> *(4) If any specified information furnished by a scheduled organisation to the Bureau under subsection (1) or (2) is incorrect or is otherwise inaccurate, the scheduled organisation shall, as soon as may be, after becoming aware of its being incorrect or inaccurate, as the case may be, inform the Bureau thereof.*
>
> *(5) A scheduled organisation shall nominate a person (in this Act referred to as an 'appropriate person') as the appropriate person, for the scheduled organisation, for the purposes of notifying the Bureau under this section.*
>
> *(6) A scheduled organisation may nominate more than one person as an appropriate person for the scheduled organisation.*
>
> *(7) Section 9 [which requires the vetting of liaison persons] shall, with any necessary modifications, apply to the nomination of an appropriate person for a scheduled organisation as it applies to the nomination of a liaison person for a relevant organisation under that section.*
>
> *(8) A person who contravenes subsection (1) or (2) shall be guilty of an offence.*
>
> *(9) For the avoidance of doubt it is hereby declared that the obligation imposed on a person by subsection (1) or (2) to disclose specified information to the Bureau is in addition to, and not in substitution for, any other obligation that the person has to disclose that information to the Garda Síochána."*

Teaching Council Acts, 2001 to 2015

15. The Teaching Council was established by s. 5 of the Teaching Council Act, 2001 to perform the functions conferred on it by or under that Act. The Council consists of 37 members, chosen in accordance with section 8.

16. By s. 24 of the Act the Council was given a general power to appoint committees, consisting in whole or in part of persons who are members of the Council, to assist and advise the Council or to perform such functions of the Council as may be delegated to the committee.

17. By s. 24(2) the Council is required to establish an Executive Committee, to perform the functions conferred by s. 26, and an Investigating Committee and a Disciplinary Committee to perform the functions conferred on those committees by Part 5 of the Act. Part 5 of the Act deals with fitness to teach.

18. Section 42 allows any person, specifically including the Council, to make a complaint to the Investigating Committee in relation to a registered teacher. Subject to a power conferred on the Director to refuse to refer a complaint which does not satisfy the requirements of the Act or is frivolous or vexatious, and save as specified in s. 42(5)(b), the Investigating Committee is required to hold an inquiry into the fitness to teach of a registered teacher in respect of each complaint.

19. By s. 42, sub-s. 7A of the Act of 2001, where the Investigating Committee decides to hold an inquiry in respect of a registered teacher and that committee considers that the complaint is of such nature as to give rise to a *bona fide* concern that the teacher may harm etc. any child or vulnerable person, it may request the Council to apply to the National Vetting Bureau for a vetting disclosure in respect of that teacher.

20. Where, following its inquiry, the Investigating Committee is of the opinion that there is a *prima facie* case to warrant further action being taken, it must refer the complaint, in whole or in part, to the Disciplinary Committee.

21. By s. 43 of the Act, the Disciplinary Committee is required to hold an inquiry into the fitness to teach of any registered teacher in respect of a complaint referred to it by the Investigating Committee. The Disciplinary Committee sits in divisions or panels of between three and five persons, appointed by the chairperson of the Disciplinary Committee.

22. By s. 43A, a disciplinary panel may consider information contained in a vetting disclosure obtained by the Investigating Committee. Where the Investigating Committee did not seek a vetting disclosure but the Disciplinary Committee considers that the complaint is of

such a nature as to reasonably give rise to a *bona fide* concern that the teacher may harm etc. any child or vulnerable person, that committee may decide to request the Council to apply to the National Vetting Bureau for a vetting disclosure.

23. Following the completion of an inquiry by a panel, the panel, if it makes no finding against the teacher, will dismiss the complaint. If the panel does make a finding or findings, it must make a report and a decision.

24. Having made its decision, the disciplinary panel must provide a copy of the decision and the reasons for it to *inter alia* the registered teacher, who has a right to apply to the High Court within 21 days for annulment of the decision. If the registered teacher does not so apply, the Council must apply to the High Court *ex parte* for confirmation of the decision.

25. The Investigating Committee and the Disciplinary Committee have power to request the Council to apply for a vetting disclosure, and with certain restrictions and subject to certain conditions, to consider information contained in a vetting disclosure, but neither committee has any responsibility under the Teaching Council Acts to make any report to the National Vetting Bureau.

Misfeasance in public office

26. In *Kennedy v. Law Society of Ireland* (Unreported, Supreme Court, 21st April, 2005) [2005] IESC 23 Geoghegan J., at p. 11 of the transcript, observed:-

> *"The tort of misfeasance in public office has been variously though not inconsistently defined. Kearns J. [the trial judge] in commencing his treatment of the subject said the following:-*
>
> > *'Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his office whereby loss is caused to a claimant. Lack of vires is insufficient of itself to ground a cause of action sounding in damages. In the ordinary course, the quashing of the decision by judicial review completes the remedy.'*
>
> *That is, I think, a reasonable summing up of the result of the authorities. The learned judge goes on to quote Keane J. (as he then was) in McDonnell v. Ireland [1998] 1 I.R. 134 at 156:-*
>
> > *'the … tort is only committed where the act in question is performed either maliciously or with actual knowledge that it is committed without jurisdiction and with the known consequence that it would injure the plaintiff…'*
>
> *The passage begs the question to some extent as to what is meant by 'maliciously'. Counsel for the appellant made it clear in both the court below and in this court that although malice was alleged it was not malice in the sense of an intention at the relevant time to injure the appellant. Rather it was in the sense of mala* fides.
>
> *The most exhaustive treatment of the subject is to be found in the speech of Lord Steyn in the relatively recent decision of the House of Lords in Three Rivers District Council v. Bank of England [2000] 3 All E.R. 1. As pointed out by Kearns J. Lord Steyn identified two different forms of liability in misfeasance of public office. There is what he called 'targeted malice' by a public officer which is conduct intended to injure. This necessarily involves bad faith in the exercise of the public power for an improper or ulterior motive. The second form of liability identified by Lord Steyn is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. As Lord Steyn puts it, it involves bad faith in as much as the public officer does not have an honest belief that the act is lawful."*

27. In *Kennedy* it was the second type of liability that was claimed by the appellant and Geoghegan J. went on to consider whether, and then to find that, subjective recklessness was sufficient to ground the tort in its second form. In this case, the plaintiff alleges targeted malice.

The conduct of the action

28. This action was commenced by plenary summons issued on 16th July, 2018. The plaintiff immediately applied for an interlocutory injunction restraining the defendant from making the proposed notification. This was granted on the plaintiff's undertaking that he would not, pending the trial of the action, carry on any activities for which a vetting disclosure would be required. At that time the court gave directions for the progress of the action. Particulars were sought and provided; there was an exchange of pleadings; and both parties made extensive discovery. Shortly before the trial was due to commence, agreement was reached between the parties that the documents which had been discovered could be put into evidence without formal proof.

29. Rather surprisingly, the case was run without any oral evidence. Instead, Ms. Bolger S.C., for the plaintiff, brought the court through the pleadings; the affidavits which had been exchanged on the interlocutory application; and a core bundle of documents abstracted from the defendant's discovery. The case made on behalf of the plaintiff was that it would be apparent from the defendant's own records that the requirements of s. 19 had not been met and that the defendant's decision to make a notification to the National Vetting Bureau was motivated by malice towards him, and out of spite that the most serious allegations which had been made against the plaintiff had not been proved.

30. In the summons and statement of claim the plaintiff claimed a variety of other reliefs, including damages for damage to the plaintiff's reputation, damages for the intentional infliction of emotional suffering, damages for breach of the plaintiff's rights under the Data Protection Acts, and so forth, but the only claim really advanced was the claim for a permanent injunction, with an ancillary claim for damages for misfeasance in public office.

31. Mr. Farrell S.C., for the defendant, met the case on the basis upon which it was made: namely, by reference to the documents and without calling any oral evidence.

32. Ms. Bolger concedes, quite rightly, that in the case of an action alleging misfeasance in public office the bar is a high one. Mr. Farrell argues that not only was the case not made out but that there was no basis to bring the case on the basis upon which it was brought.

The evidence

33. On 29th November, 2016 at 00:30 a report was made to the Gardaí of a man walking on the M50 motorway in Dublin. The patrol

who responded picked up a young man in a distressed state. There was alcohol on his breath but he was not drunk. The young man gave his name and said that he was student in a nearby boarding school. He explained that he was trying to get to the airport, to get home to Germany. The young man would not tell the Gardaí how or why he had come to be walking on the M50 but kept repeating that he did not want to get anyone in trouble but needed to get to the airport to get home. The Gardaí decided to bring the young man ("*Student A*") back to his school, so that he could collect his belongings and inform the headmaster that he was leaving.

34. As the Gardaí were walking with Student A towards the headmaster's house in the school grounds, an older man approached the group and spoke to Student A saying:- *"You don't have to do this. Come here now and talk to me*". The Gardaí observed Student A to become more distressed and instructed the older man to stand aside and move away, which he did.

35. Student A then told the Gardaí that the man who had spoken to him was his housemaster, M.P. Student A said that he and M.P. had spent the evening drinking together, and that M.P. had tried to remove his tracksuit bottoms and had become angry when Student A had refused to let him. Student A said that following the argument he had left the room on the pretext of looking for a cigarette but instead had run through the school grounds and out onto the M50, to try to get to the airport.

36. Shortly after, Student A, who was very distressed and apologetic, gave substantially the same account of events to the headmaster, adding that he had previously smoked something other than cigarettes with M.P.

37. After the interview with the headmaster, the uniformed Gardaí brought Student A to the garda station where he was interviewed by a detective. Student A repeated his account of what had happened earlier that evening but said that he did not wish to make any complaint. The detective's assessment was that there did not appear to have been any offence disclosed.

38. At 07:30 on the morning of 29th November, 2016 the headmaster sent for M.P., who was suspended on full pay pending the outcome of an investigation and required to leave the school premises immediately.

39. In the meantime, starting at 01:22, when Student A was in the headmaster's house with the Gardaí, M.P. had sent Student A a series of WhatsApp messages, entreating Student A to talk to him. Student A having twice responded that he would, or might, speak to M.P. when he got to Germany, the exchange continued:-

> *"06:29 M.P. Sorry to annoy you but can you tell me what you told [the headmaster] because he'll ask me tomorrow about it.*
>
> *06:29 Student A That we had a big argument and that I didn't feel comfortable.*
>
> *06:30 Student A But he didn't really talk to me.*
>
> *06:30 Student A As well he didn't really care about me.*
>
> *06:30 M.P. What did the police have to do.*
>
> *06:31 Student A Some officers wanted to hear the story.*
>
> *06:31 Student A But I didn't accuse of anything.*
>
> *06:31 M.P. Ok.*
>
> *06:34 M.P. Well safe flight. We can get through this. I think it will actually be better now. Talk to me when you are ready. It was really nice tonight until I fucked up.*
>
> *06:36 M.P. Sorry again. But you didn't take my lighter to the airport did you??*
>
> *06:40 Student A Seriously.*
>
> *06:40 Student A I left it at the garda station.*
>
> *06:40 M.P. I know I am sorry.*
>
> *06:40 M.P. Too soon to be funny.*
>
> *06:40 M.P. Sorry."*

40. After M.P. had been suspended, the exchange between him and Student A continued:

> *"09:11 M.P. So I have been kicked out of school. If there is any way you can fix this, please do. I am sorry for being angry with you. But please don't ruin everything. Just explain we had a fight. Thanks.*
>
> *09:53 M.P. Please reply when you land. This is really serious.*
>
> *10:05 M.P. Please.*
>
> *10:07 M.P. [Student A] this is really bad. Please just let me know if this is really what you want.*
>
> *10:07 Student A No it's not of course.*
>
> *10:08 Student A But I've to get myself sorted first.*

10:08 Student A Do u want me to txt the school and tell them I lied about everything.

10:08 M.P. Please just take back what you said.

10:09 Student A Ok I will tell my parents now if I see them to text the school.

10:09 M.P. Please just say we got drunk and had a fight.

10:09 Student A Ok I will write an email later.

10:09 M.P I'm really done.

10:10 M.P. Please do it soon. I have nothing now.

10:10 Student A I will but I am still in the plane.

10:10 Student A Which email should I send it to.

10:11 M.P. [The headmaster] I think.

10:11 M.P. Can you phone him.

10:11 M.P. I know you hate me now but please do something.

10:11 M.P. I don't know what to do.

10:12 Student A I will tell my father to do so.

10:13 M.P. [the headmaster's email address].

10:26 Student A Can u give me [the headmaster's] number.

10:33 M.P. [the headmaster's mobile telephone number].

10:33 M.P. What are you going to say.

10:36 M.P. Can we talk on phone.

10:37 Student A My father will call him now and tell him what u told me.

10:41 M.P. Thanks. The drinking is fine. We were solving problems. But I just got angry and upset you.

10:54 Student A My parents don't know if they will do it.

10:57 M.P. [Student A] please. Nothing happened.

10:58 M.P. We have to fix this.

10:59 M.P. Think of everything please.

11:10 Student A Mr. P. this is [Student A's] father, no more WhatsApp!"

41. The internal investigation within the school lead to a disciplinary hearing before a panel of three board members. The panel found that some of the allegations formulated by the headmaster had been made out and others not. The panel concluded that the allegations which had been made out amounted to gross misconduct and recommended that M.P. be dismissed with pay in lieu of notice, which he was by letter dated 23rd December, 2016.

42. Under the school's disciplinary procedures, M.P. had a right of appeal. M.P. exercised his right of appeal but later decided not to pursue it.

43. On 16th March, 2017 the headmaster filed a complaint with the Teaching Council of Ireland under Part 5 of the Teaching Council Act, 2001. The headmaster suggested that the findings of gross misconduct made by the school amounted to professional misconduct under s. 42(1) of the Act of 2001.

44. The focus of the disciplinary process within the school had been on Student A and the events of 28th and 29th November, 2016 but in the course of that investigation, a statement had been taken from another student, Student B. Student B reported that *"[M.P.] always said that he loves [Student A] in a weird way"*; that there had been regular occasions in M.P.'s house on campus at which he, Student A and M.P. had drunk more than ten beers and had smoked "weed"; that M.P. had taken Student A and Student B to his cottage in the country on weekends, when they should have been in school; and that M.P. had encouraged Student B to convince Student A to keep going to M.P.'s house, although Student A was uncomfortable and did not want to go there. Student B said that at 05:00 on the morning on 29th November, 2016 M.P. came to Student B's room to see if Student A had come back and at 08:00 to tell

Student B that he, M.P., had been suspended and had to leave "*immediately because of sexual assault and asked [Student B] to tell [Student A] to take it back.*" In a statement signed on 5th December, 2016 Student B said that he was still getting WhatsApp messages from M.P.

45. The headmaster sent to the defendant, with the formal complaint, his own notes of his meeting with M.P. and the Gardaí on 29th November, 2016; a copy of the exchange of WhatsApp messages between M.P. and Student A (which had been sent to the headmaster by Student A's father); the statements of Student A and Student B, made in the course of the internal inquiry; two emails sent to the headmaster by Student A's father; a statement made by M.P. in the course of the internal inquiry; a copy of the report of the disciplinary panel; and copies of written submissions that had been made on M.P.'s internal appeal, before it was withdrawn. The papers sent to the defendant included, besides, an email sent on 29th November, 2016 by M.P. to a colleague who was advising and representing him in the internal process. This email had come to light after M.P.'s dismissal as a result of a data request made by M.P. to the school. This email gave an account of events on the evening in question which was not altogether consistent with the formal statement submitted to the school's investigation.

46. In accordance with Part 5 of the Act of 2001 the headmaster's complaint was dealt with by the Investigating Committee.

The section 47 application

47. Under s. 47 of the Act of 2001, the Teaching Council has the power, if satisfied that it is the public interest to do so, to apply to the High Court for an order for the suspension of the registration of a registered teacher.

48. On 24th April, 2017 a meeting of the Executive Committee of the defendant was convened to consider whether an application should be made to the High Court for a suspension order in respect of M.P. M.P. was unable to attend that meeting but was represented by his solicitors.

49. The Executive Committee, having considered the material which had been submitted to the defendant and the written and oral submissions of the parties before it, decided that it was necessary in the public interest to make an application to the High Court for an order pursuant to s. 47, and did so by special summons issued on 28th April, 2017.

50. I pause here to observe that the plaintiff made no complaint or criticism of the defendant's decision to make the s. 47 application. It was said on behalf of the plaintiff that the application was a very radical application to the court. Ms. Bolger highlighted that this was a matter of grave concern to the defendant at the time. It has never been suggested that the concern which motivated the s. 47 application was not a proper concern or that that application was not properly brought in the public interest.

51. When the respondent's application came before the court on 15th and 16th May, 2017, M.P. offered a voluntary undertaking, until further order of the court, not to teach in any school, recognised or otherwise, whether in the jurisdiction or in any Member State of the European Union, and to consent to the Council making a notification of the terms of the order to the competent authorities identified in EU Directive 2005/36/EC, as amended by Directive 2013/55/EU.

52. On the hearing of the s. 47 application, the High Court heard legal argument as to the obligations that might arise under s. 19 of the National Vetting (Children and Vulnerable Persons) Act, 2012. One of the reliefs sought in the special summons was an order giving liberty to the applicant to communicate the terms of any order that the court might make to the National Vetting Bureau. That issue was resolved by the Council then undertaking to the court that:

> *"(a) Advance reasonable notification will be given to [M.P.'s] solicitors should the [Council] decide in the course of its investigation that the statutory obligations of s. 19 of the National Vetting (Children and Vulnerable Persons) Act, 2012 are applicable and it decides to inform the National Vetting Bureau of this matter.*
>
> *(b) Should the aforesaid investigation be determined in favour of [M.P.] the [Council] will give notification of same to all relevant parties even if there is no express statutory obligation to do so."*

53. It will be noted that the Council's undertaking to notify the teacher of its intention to notify the Bureau of any concern is more or less in the terms of the statutory obligation imposed by section 19(3).

54. The order of 16th May, 2017 also permitted the respondent to respond frankly and honestly to any inquiry received from any individual or body, regarding the registration status of M.P. and to communicate to the persons enquiring the terms of the undertaking provided by him. The court gave liberty to M.P. to apply if it were to be alleged that there were delays on the part of the Council in progressing with the investigation against him.

The investigation

55. On 15th May, 2017 which was the same day as the defendant's s. 47 application was opened to the High Court, the Investigating Committee of the defendant met for the first time. At that meeting the Investigating Committee decided to exercise its power under s. 42(7A)(a) of the Act of 2001 to request the Council to apply to the National Vetting Bureau for a vetting disclosure for M.P. Mr. P. was duly notified of that decision by letter dated 18th May, 2017. There was no suggestion then, or at any time since, that the nature of the complaint was not such as to reasonably give rise to a *bona fide* concern on the part of the Investigating Committee as warranted the request to the Council.

56. On 14th July, 2017 the Investigating Committee decided that there was a *prima facie* case to warrant further action being taken in relation to the complaint and referred it to the Disciplinary Committee.

The disciplinary inquiry

57. The Disciplinary Committee retained solicitors to advise and assist it with its inquiry. Formal statements were taken from the headmaster and two teachers in the school, fleshing out the statements taken in the course of the investigation by the school and dealing with the school rules and practices in relation to alcohol consumption, students visiting teachers' houses on campus, dealing with situations in which students were found to be absent from school and so forth. The statements explained how the houses making up the school were made up and the role and responsibility of the house masters. The Disciplinary Committee, by the solicitors, engaged extensively with Student A, Student B, and their parents.

58. Following the incident in November, 2016 Student A returned to the school and completed his Leaving Certificate. In the summer

of 2017 Student A and Student B returned to Germany.

59. The Disciplinary Committee, by its solicitors, went to considerable lengths to secure the cooperation of Student A and Student B in its inquiry.

60. Student A did not want to become involved. In an email of 31st August, 2017 Student A's father referred to a previous telephone conversation and his previous correspondence. He wrote *"The matter is clear. I don't think there is [any] further need to discuss the matter on the phone. I kindly ask you not contacting us again, [Student A's] decision is final and as a matter of fact he [is] starting university next week and want to be never bothered from Mr. P. again."*

61. By early September, is was clear that Student A and Student B were not enthusiastic to participate in the inquiry. Mr. Declan O'Leary, the head of the Disciplinary Committee unit corresponded with the solicitors. In an email of 5th September, 2017 he noted that Student A's father had indicated that he was not happy that his son, who he said had suffered severe psychological damage, would be involved, and that Student B had indicated that he did not want to participate. He noted that Student A's father was aware that Student A could not be compelled to attend. Later in the day he suggested that the solicitors might have a view and asked *"… With both witnesses probably not cooperating, can any element of the case be salvaged?"* On 7th September, 2017 Mr. O'Leary wrote:- *"(It may be a small thing but if P. was to seek costs at a later stage I wonder would we be in a better position if we had been seen to have exhausted all avenues to secure this key witness)."*

62. In October, 2017 there was further contact with Student A's father, specifically to canvass the possibility that he might participate in the inquiry by video link. On 16th October, 2017 Student A's father said that having discussed the possibility intensively with his son, he would not do it. Student A's father repeated that he did not want to be contacted again.

63. In October or November, 2017 M.P. was seeking employment in Asia with an international school. On 6th November, 2017 a representative of the international school telephoned the defendant and in an email of that day recorded that she had been told that a complaint had been received about M.P. which was currently under investigation and that the investigation related to a safeguarding matter. On 9th November, 2017 the defendant confirmed that there was a complaint currently under investigation and that no findings had been made at that stage.

64. The engagement with Student B and his mother continued up to 9th November, 2017. On 7th November, 2017 the solicitors sent Student B an email with a draft statements attached for review and, if he was satisfied that it was accurate, signature. Student B was advised that the statement, if signed, would be sent to M.P. On 9th November, 2017 Student B's mother wrote that Student B had been speaking with Student A and other school friends and that all of them had told him not to sign his statement. Student B was said to feel really threatened and was not willing to participate any more. She wrote *"[Student B] was willing …. but he won't stand this alone! So I ask you to really understand his decision, unless you have other young people willing to engage with him in this."*

65. On 9th November, 2017, in anticipation of the listing of the s. 47 application before the High Court on the following Monday, the solicitors for the Director of the defendant wrote to M.P.'s solicitors. They confirmed that they had not secured the attendance of Student A and expected that the formal Notice of Inquiry would not contain any allegations about the alleged sexual advance on Student A. They said that they did intend to call student B.

66. Formal notice of inquiry was given to Mr. P. under cover of a letter of 17th November, 2017. That letter explained that it had been intended to call Student B, from whom a draft statement had been taken, but that Student B's mother had confirmed that he was no longer willing to engage with the inquiry. The list of allegations was confined to the matters which could be established from the evidence of the available witnesses and Mr. P.'s statements.

67. The disciplinary panel met on 12th and 17th January, 2018. The Director and M.P. were both represented by counsel. The panel decided to deal with that matter by asking for undertakings that M.P. would not in future provide one or more glasses of wine to a student in his on campus residence while the student was alone with him, or leave a student alone in his on campus residence when he knew that alcohol was available, in circumstances where he knew that the student had already consumed alcohol and/or was angry and/or upset.

68. In the meantime, the s. 47 application had come back before the High Court on 22nd November, 2017 for argument as to costs. As was noted by the President in his judgment given on 15th December, 2017 [2017] IEHC 755, it was by then clear that a major part of the case against M.P. could not be pursued. In light of the developments M.P. was no longer prepared to continue his undertaking and the Council indicated that it would not seek a suspension order against him. What is significant for present purposes is that M.P. was released from his undertaking.

The alleged delay

69. The plaintiff complains of delay on the part of the defendant in deciding to make the s. 19 notification. The argument made on behalf of the plaintiff is that the relevant time began to run shortly after the complaint was received, and certainly from the time the decision was made to bring the s. 47 application. Particular attention was focussed on the period between the end of the disciplinary panel hearing on 17th January, 2018, and 6th July, 2018 when the plaintiff was notified of the intention to make a notification.

70. What happened in that period is evident from the affidavit of Brendan O'Dea, the Deputy Director of the defendant, which was sworn on 23rd July, 2018 in answer to the interlocutory motion.

71. Although the Teaching Council Act was enacted in 2001 it was not commenced until 29th April, 2016 and the defendant's complaint and inquiry function was not commenced until 25th July, 2016. As of July 2018 there had been only two concluded inquiries before the Disciplinary Committee, one of which was that in relation to the plaintiff. Mr. O'Dea deposed that while it was clear that the defendant was subject to s. 19 of the Act of 2012, the precise circumstances in which its obligation to notify were not readily apparent to the defendant.

72. On 11th December, 2017 the defendant had preliminary advice from its solicitors who advised that the opinion of senior counsel be taken. In early January a decision was made to take the opinion of senior counsel and over the course of the month a case to advise was prepared which identified a number of issues, including when a notification was required and who was empowered to decide whether to make a notification in a given case. A lengthy opinion was received on 22nd February, 2018 which was the subject of a consultation with counsel and several further queries over the course of May and June, 2018.

73. At a meeting of the Council on 28th May, 2018 a decision was made to delegate the decision making function to the defendant's

Evidence of Character Panel. That panel met on 18th June, 2018 and decided that it did have a *bona fide* concern which it was required to notify to the National Vetting Bureau, and that decision was communicated to the plaintiff by letter dated 6th July, 2018.

The data breach

74. The decision of the disciplinary panel was finalised on 9th February, 2018 and was sent out by registered post under cover of a letter addressed to M.P.'s solicitors. Unfortunately, the letter and enclosure were misdirected. Apparently the labelling machine in the defendant's office reproduced a label which had been generated earlier for someone else. The error came to light when the track and trace system was checked. The erroneous recipient of the letter was identified and contacted, and an officer of the defendant drove to the recipient to recover the letter and to apologise.

75. In an email of 23rd February, 2018 the recipient of the letter and report expressed horror at what was said to be a breach of confidentiality and mistreatment of highly sensitive personal data. The recipient confirmed that she had the letter in her possession, had not shared or copied it in any way, and "*needless to say*" would not be divulging her knowledge of the case to anybody. The recipient identified herself as a member of the Teaching Council, but she appears to have been a registered teacher, rather than a member of the Council.

76. On 26th February, 2018 the defendant reported the data breach to the Data Protection Commissioner, explained what had happened, and said that a system had been put in place to ensure that if the anomaly happened again, the letter would not go out.

77. By letter of 27th February, 2018 (following a previous telephone call) the defendant summarised to Mr. P.'s solicitors what had happened, and again apologised.

78. By letter of 16th March, 2018 Mr. P.'s solicitors expressed their client's distress at what was said to have been such an egregious breach of his privacy, and the damage done to his health and reputation. The solicitors said that they were not satisfied by the explanation for the data breach and required an affidavit from the recipient to confirm that they had not copied or forwarded the correspondence to any other person, and that they would be making a formal complaint to the Data Protection Commissioner. By letter dated 28th March, 2018 the defendant's solicitors suggested that the explanation which had been given was adequate; that there was no basis for the request for an affidavit; and indicated that the defendant would not be providing an affidavit.

79. A formal complaint was made to the Data Protection Commissioner who noted that the defendant had explained what had happened and apologised and took the view that there was no purpose to be served by further pursuing the matter.

80. While the statement of claim pleaded that this data breach was "*flagrant*" the case was not made at trial that the data breach was intentional or malicious. Much, however, was made of the refusal of the defendant to ask the recipient of the letter for an affidavit to confirm what she had already said. I see no merit in this criticism of the defendant. The recipient was already put out by having been landed with material which she ought not to have been and had expressed outrage at the breach of confidentiality. It seems to me that any request to the recipient to confirm by affidavit what she had freely said and promised would very likely have conveyed that someone doubted her word. In my view such a request would have achieved nothing and would likely have offended the teacher.

The grounds of challenge to the decision

81. In written submissions made available to the defendant shortly before the commencement of the action, the plaintiff's lawyers provided a summary of the arguments they intended to make. The plaintiff would now argue that s. 19 of the Act of 2012 contains seven requirements, which, it is said, are mandatory and cumulative. Unless all seven requirements are met, it is said, the defendant is not entitled to make a notification. The peroration of that skeleton is that the defendant is trying to exercise its powers unfairly and unreasonably and in breach of the requirements of s. 19 of the Act of 2012, and that this should be classified as misfeasance in all the circumstances.

82. Mr. Farrell, for the defendant, objects that the many of the arguments which the plaintiff wishes to advance are no part of the pleaded case and that the plaintiff is now attempting to mount a judicial review style challenge to the defendant's decision on a variety of grounds, without having complied with the requirements of O. 86. It is submitted that as far as compliance with s. 19 is concerned, the only issue that the court should consider is the significance of the phrase "*as soon as may be*."

83. The statement of claim in this case was delivered on 22nd August, 2018. The primary challenge to the proposed notification was that it was not *bona fide* and was in breach of the plaintiff's legal and constitutional rights and his rights under the European Convention on Human Rights and the Charter of Fundamental Human Rights of the European Union. Para. 16 of the Statement of Claim set out six particulars:-

> (1) The defendant failed to act as soon as may be;
>
> (2) The defendant is acting *mala fide*;
>
> (3) The defendant seeks to rely on untested and unchallenged allegations made by Student A who was 19 at the relevant time;
>
> (4) The defendant seeks to rely on untested and unchallenged allegations made by Student A that he has refused to stand over;
>
> (5) The defendant seeks to rely on untested and unchallenged allegations by Student A where he refused to give a statement or to give evidence at the disciplinary inquiry;
>
> (6) The defendant seeks to rely on hearsay evidence of Student B and a draft document prepared by the defendant's solicitors that Student B has refused to confirm or sign and could not form part of the disciplinary inquiry.

84. At the hearing before me it was freely acknowledged by Ms. Bolger, perfectly correctly, that "*specified information*" for the purposed of the Act of 2012 includes information concerning allegations as well as findings, and the last four particulars were not pursued.

85. In the affidavit of Mr. O'Dea filed in answer to the interlocutory application, and in the defence, objection was taken that the

plaintiff was effectively seeking to quash the decision of the defendant to make the notification, otherwise than by way of judicial review. At the trial, Mr. Farrell declared himself content to meet the case pleaded on the procedure adopted by the plaintiff but contended that the plaintiff ought not be allowed to launch a late and oblique attack on the decision. Although a plaintiff may pursue public law remedies by way of plenary summons, he will be only permitted to do so where he has complied with the time limits prescribed by law. Reference was made to the summary in *Delaney & McGrath* (4th edition) at para. 31-12 and the decision of the Court of Appeal in *Express Bus Ltd. v. National Transport Authority* [2018] IECA 236.

86. In my view there is great force in the defendant's submission. Apart altogether from the lapse of time since the making of the impugned decision, there has been no application to amend. That said, three of the alleged requirements are plainly covered by the pleadings and the defendant's alleged failure to comply with some of the others are said to go to the issues of delay, *mala fides* and misfeasance and I think that I need to look at them.

The construction of section 19 of the Act of 2012

87. In the course of the hearing, two issues were argued as to the correct construction of section 19. The first was whether the section imposes mandatory requirements, with the consequence that a failure to observe the requirements of the section deprived the defendant of its power to make a notification. The second issue was as to the nature of the concern that triggered the reporting obligation.

88. In support of the argument that the requirements of s. 19 are mandatory and cumulative, counsel for the plaintiff referred to *Monaghan UDC v. Alf-a-Bet Promotions Ltd*. [1980] I.L.R.M. 64 and *Irish Skydiving Club Ltd. V. An Bord Pleanála* [2016] IEHC 448.

89. *Alf-a-Bet Promotions Ltd*. was a case in which turned on the validity of a planning notice. The appellant had applied to Monaghan UDC for permission for change of use but the published notice suggested that the application had been made to Monaghan County Council for permission for "*alterations and improvements*". The Supreme Court found that the planning application was invalid because it failed to comply with the mandatory requirements of the planning regulations. In the course of his judgment, Griffin J. said, starting at p. 72:-

> *"It is a well established rule of construction that the ordinary sense of words used in a statute or in regulations made thereunder is primarily to be adhered to; that requirements in public statutes which are for the public benefit are to be taken as mandatory or imperative; and that provisions that on the face of them appear to be mandatory or imperative cannot without strong reason be held to be directory. In the ordinary sense shall is to be considered as mandatory or imperative. This is the word which is used in Articles 14 and 15 and therefore the requirements should ordinarily be held to be mandatory unless the failure to comply with them was not substantial."*

90. Immediately before that statement, however, Griffin J. expressed agreement with the decision of the High Court in *Dunne Ltd. v. Dublin County Council* [1974] I.R. 45, which had held that an error in the name of the applicant in a planning application, a failure to state the nature of the interest of the applicant in the land, and a failure to include, as a heading, the area and the city, town or county in which the land was situate did not invalidate the application. And immediately after the passage cited, Griffin J. considered at some length the purpose of the legislation and the regulations. The *ratio* of the decision was that a notice of application for extensions and improvements could not convey that it was an application to change the use of a drapery shop to a betting office and amusement arcade.

91. *Irish Skydiving Club Ltd*. was an application for an extension of a statutory eight-week time limit for the bringing of a judicial review against a planning application. Baker J. held that the requirements in s. 50(8) of the Planning and Development Act, 2000 that the applicant must show (a) that there was good and sufficient reason for extending the time, and (b) that the failure to apply within time was outside the control of the applicant, were cumulative and mandatory. I do not find that decision to be helpful in analysing s. 19 of the Act of 2012.

92. Counsel for the defendant, focussing on the requirement to make a notification "*as soon as may be*", argue that the approach contended for on behalf of the plaintiff is difficult and strained. The court, it is said, should focus on the purpose of the Act of 2012, which, it is said, is to require the scheduled organisations to funnel information into the National Vetting Bureau. The critical issue in this case, it is submitted, is not when the obligation to notify arises but the consequence of a failure to make a notification "*as soon as may be".*

93. Counsel for the defendant referred to the decision of the Supreme Court in *Gillen v. Commissioner of An Garda Síochána* [2012] 1 I.R. 574. The issue in that case was whether a requirement that a disciplinary complaint against a garda "*shall be investigated as soon as practicable"* precluded an investigation after a lapse of three and a half years. Finnegan J. recalled the dictum of the Supreme Court in *The State (Elm Developments) Ltd. v An Bord Pleanála* [1981] I.L.R.M. 108 where it was said that whether a provision should be treated as mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. He went on to cite with approval a passage from the judgment of Lord Steyn in R. v. Soneji [2006] 1 A.C. 340, at page 353:-

> *"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead as held in Attorney General's Reference (No. 3 of 1999), the emphasis ought to be on the consequences on non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."*

94. In a concurring judgment in *Gillen* O'Donnell J. said that:-

> *"One way of approaching the question is to consider whether a phrase such as 'and if such appointment [of an investigating officer] is not made as soon as practicable, the process shall be invalidated' could be inserted in the regulation. This involves an analysis of the language and syntax in the regulation, the legal context and perhaps most importantly the purpose sought to be achieved by the regulation."*

95. In this case I am inclined to doubt whether the mandatory and directory analysis is useful at all. The requirement that the scheduled organisation notify any *bona fide* concern, and, I think, the requirement that it do so as soon as may be, is unquestionably mandatory. A scheduled organisation which fails to do so is guilty of an offence. It seems to me that the analysis in this case must be on the basis of the purpose of the requirement and whether non-compliance as soon as may be precludes later compliance.

"As soon as may be"

96. It was submitted on behalf of the plaintiff that the defendant's decision to make a notification to the National Vetting Bureau was not made "*as soon as may be*". The first requirement of s. 19 is said to be that the concern should arise "*following an investigation, inquiry or regulatory process*." In this case, it is said, the regulatory process was the application to the High Court under s. 47 of the Act of 2001, which ended in May, 2017; the investigation which ended in July, 2017; and the inquiry which ended in January, 2018. Particular emphasis is placed on the fact that on the s. 47 application the High Court heard argument in relation to the defendant's obligations under s. 19 of the Act of 2012. It is said that the obligation to make a notification arose in May, 2017 or, if not then, when the Investigating Committee decided to ask the Council to apply for a vetting disclosure, or, if not then, when the inquiry was concluded.

97. It seems to me that this argument fails to recognise that the Executive Committee (which decided to make the s. 47 application), the Investigating Committee, and the Disciplinary Committee are all statutory committees of the defendant. The functions and powers of the Executive Committee are set out in s. 24 of the Act of 2001, and the functions and powers of the Investigating Committee and the Disciplinary Committee are set out in Part 5. There is no suggestion that the defendant delegated its reporting obligation to the Executive Committee or that such obligation was any part of the business of either the Investigating Committee or the Disciplinary Committee.

98. This argument fails also to recognise that the legal test on an application under s.47 of the Teaching Council Act is different to that under s. 19 of the National Vetting Bureau (Children and Vulnerable Persons Act, 2012; that the role of the Investigating Committee is limited to a *prima facie* assessment of the complaint; and that (as in this case) the inquiry of the disciplinary panel will be limited to such allegations as can be supported by the available evidence.

99. Where the Investigating Committee or the Disciplinary Committee, as the case may be, considers that the complaint is of such a nature as to reasonably give rise to a *bona fide* concern, it may request the Council to apply for a vetting disclosure. In either case, where the vetting disclosure is received, the registered teacher must be provided with a copy and invited to make submissions. The power to seek a vetting disclosure and the procedures as to what is to be done in that event are contained in the Teaching Council Act. Those statutory committees have no role or function in the discharge of the defendant's obligations under the Act of 2012. Moreover, it seems to me that the plaintiff's argument fails to take account of the fact that he gave an undertaking to the High Court that he would not teach in any school in the European Union, which, for as long as it was continued, would have allayed any concern.

100. It might, I suppose, be said that the defendant ought to have anticipated its reporting obligations under s. 19 and identified the need for legal advice earlier than it did, but that is the height of what might be said.

101. The obligation which is imposed on scheduled organisations arises "*Where, following an investigation, inquiry or regulatory process…."*. There is provision in the legislation for the correction of information on the database but I do not understand s. 19 to impose successive obligations at the end of each of any investigation, inquiry, or regulatory process. It seems to me that what is contemplated is that, in the ordinary way, the scheduled organisation should consider at the end of its process or processes whether a notification should be made. A most serious complaint, on investigation, may transpire to have no substance. An investigation may lead to a disciplinary inquiry which may result in a finding or findings against the teacher or the exoneration of the teacher of the allegations. Or, as in this case, the inquiry may collapse for one reason or another. It seems to me that whether, or the extent to which, the complaints may be made out or, if the inquiry should collapse, the reason for the collapse, are all matters which will be of great weight in deciding whether there is a *bona fide* concern, and, if there is, the reasons for it. I do not altogether rule out the possibility of a notification before the process has concluded but in general, I think, the scheduled organisation's procedures will have run their course before a decision is made whether a notification is required.

102. There was in this case a significant lapse of time between the complaint and the decision to make the notification but as I have previously said, the views formed by the statutory committees of the defendant for the limited purposes for which those committees have been established do not amount to an assessment by the defendant for the purpose of section 19.

103. It is said that the defendant's explanation for the delay until June, 2018 that it needed to take legal advice is "*unconvincing*" but the fact of the matter is that the evidence of the need for that advice, and the time taken to get and consider it, is unchallenged. Effectively the court is asked either to disregard the unchallenged evidence of the need for, and taking of, advice or and to infer that in the teeth of the advice taken, a decision was made to abuse a statutory power to injure the plaintiff. I can see no conceivable justification for such an approach. Apart from anything else, the evidence clearly establishes that the members of the Evidence of Character Panel had nothing whatsoever to do with the disciplinary process.

104. Much is made of the fact that, as part of the s. 47 application, the Teaching Council asked for leave to notify the National Vetting Bureau of the terms of any order that might be made. This, and the legal argument on the hearing of the application, and the undertaking given to the High Court to notify M.P. should the Council decide to inform the National Vetting Bureau of the matter, is said to show that the defendant had applied its mind and taken advice in relation to its obligations under s. 19 by no later than 17th May, 2017. I accept that the papers show that at the time of the s. 47 application, some consideration was given to the defendant's obligations under s. 19, but I do not accept that this renders the evidence that the defendant later took detailed advice "*unconvincing*". If anything, the fact that the Council sought leave to communicate the terms of any s. 47 order to the National Vetting Bureau goes to show that the defendant's obligations under s. 19 had not at that stage been teased out.

105. While the focus of the argument was on the consequence of any failure to notify as soon as may be, I do not believe that there was any delay in this case.

106. In my view, the obligation imposed on a scheduled organisation by s. 19 does not arise upon or by reason only of the conclusion of the investigation, inquiry or regulatory process, but rather it arises when the scheduled organisation forms a *bona fide* concern. If, as in this case, at the end of the regulatory process, it is thought that there may be grounds for a concern, it is quite appropriate that consideration be given to whether the circumstances are such as to require a notification. On the evidence, the defendant delegated the task of assessing whether the circumstances gave rise to a concern to the Evidence of Character Panel which met on 18th July, 2018 and decided that they did. The defendant having decided that it had a *bona fide* concern, the plaintiff was notified of that decision by letter dated 6th July, 2018. There was no delay.

107. Even if there had been delay on the part of the defendant in deciding whether it had a concern or in notifying any such concern, that would not have absolved the defendant of its obligation, or deprived the defendant of its power, to make a notification.

108. The National Vetting Bureau (Children and Vulnerable Persons) Act, 2012 is entitled an Act to make provision for the protection of children and vulnerable persons and, for that purpose, to provide for the establishment and maintenance of a National Vetting

Bureau (Children and Vulnerable Persons) Database system; to provide for the establishment of procedures that are to apply in respect of persons who wish to undertake certain work or activities relating to children or vulnerable persons or to provide certain services to children or vulnerable persons; to amend the Garda Síochána Act, 2005; to provide for the change of name of the Garda Central Vetting Unit to the National Vetting Bureau; and to provide for related matters.

109. It is clear that the purpose of s. 19 is to require the several scheduled organisations to notify the National Vetting Bureau of any concerns. By contrast with the disciplinary regulation in *Gillen*, I do not see in s. 19 any dual purpose. There is, in sub-s. 3, a requirement to notify the person in respect of whom the scheduled organisation has the concern of its intention to notify the Bureau of it. That notification will, to some extent, enable the person in respect of whom a concern has been notified to decide whether to consent to an application for a vetting disclosure but there is no procedure under the Act to allow the subject to attempt to forestall the notification.

110. The scheme of vetting has the potential to impact on the rights of the subject of an application for disclosure but those rights are affected not by the collection of information but by its disclosure. Section 19 requires the notification of any concern, and the reasons for it, but whether information so collected amounts to "*specified information*" is a matter for the Chief Bureau Officer. The procedures for the sifting and assessing of the information on the database and the requirement that any disclosure be necessary and proportionate, are designed, and in my view, effective to protect the rights of the subject.

111. I accept the argument made on behalf of the plaintiff that an application for vetting disclosure in the case of a person in respect of whom the Bureau may have had notification of a concern may take longer than would be necessary in respect of a person in respect of whom no such notification had been made, but it seems to me that the time limits are tight and the procedures are proportionate to the requirement to balance the rights of the subject and the declared purpose of the Act. Any person in respect of whom a concern has been notified will know from the scheduled organisation of the fact of the concern and that it has been notified. Any application thereafter for a vetting disclosure can only be made with the subject's consent. It follows that the subject may anticipate an invitation from the Chief Bureau Officer for a written submission and, in general terms at least, prepare for it. In my view, any time that might be required to deal with any appeal against a decision of the Chief Bureau Officer would be not be attributable to the fact that the concern was notified but rather to the decision that the information is of such a nature as to give rise to a *bona fide* concern, and that the disclosure is necessary and proportionate.

112. It seems to me that if, as is argued on behalf of the plaintiff, the defendant is precluded from notifying a *bona fide* concern other than "*as soon as may be*" the result would be that the database would be permanently, rather than, in case of any delay, temporarily deficient. Such a construction, in my view, might very well lessen the protection that otherwise would be available to children and vulnerable persons and would be contrary to the declared purpose of the legislation. I cannot think that the Oireachtas would have intended such a consequence.

The nature of the concern

113. The second issue, as I have said, was as to the nature of the concern that triggered the reporting obligation. It was submitted on behalf of the plaintiff that the test prescribed by s. 19 of the Act of 2012 was the same as the test prescribed by ss. 42(7A) and 43A(2) of the Act of 2001, namely, that the information or complaint is of such a nature as to reasonably give rise to a *bona fide* concern that the subject may harm etc. a child or vulnerable person. In support of this argument Ms. Bolger references s. 2 of the Act of 2012 which defines specified information as information "*which is of such a nature as to reasonably give rise to a bona fide concern*" that the person may harm etc. a child, emphasising the word "*reasonable*". Counsel for the defendant, however, submits that all that s. 19 requires is a *bona fide* concern and points to the absence from s. 19 of the word "*reasonably*".

114. Not the least peculiarity in this case is that the plaintiff, while challenging the *bona fides* of the defendant's stated concern, does not contend that there was not a reasonable basis for a *bona fide* concern. Indeed, the argument that the decision to make a report to the National Vetting Bureau was not made "*as soon as may be*" is in part founded on the suggestion that the defendant had the requisite concern from the time at which the complaint was made to it, or soon thereafter. That being so, I am not sure that the issue arises at all in this case but having heard argument I will offer my view on it.

115. In my view, counsel for the defendant is correct. There is a statutory presumption that different words bear different meanings. "*Specified information*" is defined in s. 2 of the Act of 2012 as information which is of such a nature as to reasonably give rise to a *bona fide* concern and s. 2 of the Act of 2001 gives it the same meaning in that Act. In assessing whether information held by the Bureau should be disclosed, the Chief Bureau Officer must first decide whether he or she reasonably believes that the information is of such a nature as to give rise to a *bona fide* concern. As Mr. Farrell points out, the word "*reasonably*" is not used in section 19. I accept the defendant's argument that the purpose of s. 19 is to collect information and that the function of assessing and analysing it is conferred on the Chief Bureau Officer, subject to appeal to an appeals officer, and from there, on a point of law, to the High Court. I agree that the Act of 2012 provides for a coherent and proportionate assessment of the quality and reliability of the information collected, and the necessity, proportionality and reasonableness of any disclosure, which takes into account the rights of the subject and the requirements of fairness and justice. In my view it is clear from the legislation that a lower threshold is intended to apply to the collection of information than to its release, including any application for a vetting certificate otherwise than with the required declaration of consent of the subject.

Mala fides

116. The plaintiff alleges that the proposed notification is a personalised campaign against him, which amounts to misfeasance in public office. The statement of claim gives eight particulars.

> (1) The defendant has set about a stratagem to destroy the plaintiff's reputation without regard for the truth or any respect for their duty to act *bona fide* and in accordance with the plaintiff's legal and constitutional rights;
>
> (2) The defendant notified the plaintiff's employer in China that the investigation was of a "*safeguarding nature*", in breach of an undertaking to the High Court leading to the termination of his employment;
>
> (3) The defendant informed the school in China, with whom he was no longer employed, of information relating to the outcome of the disciplinary inquiry;
>
> (4) The defendant disregarded the anonymization of the disciplinary inquiry by the flagrant breach of data protection in sending the outcome letter and report to a different registered teacher;

(5) The defendant did not comply with its obligations under the approved code of conduct, the "*Personal Data Security Breach Code of Practice*";

(6) The defendant refused to give the plaintiff any comfort regarding the breach by providing an affidavit from the recipient confirming that no copies had been made and nobody else had been informed;

(7) The defendant did not notify the Data Protection Commissioner of the sensitive nature of the documentation which had been the subject of anonymization;

(8) The defendant is not acting *bona fide* in seeking to make a notification under s. 9 of the National Vetting Bureau Act.

117. The first particular is an unalloyed allegation of targeted malice, which is at the heart of the case.

118. Remarkably, the attack is directed solely to the *bona fides* or the decision to notify and not any alleged absence of objective justification for a notification. To my mind the argument that the defendant delayed in notifying a concern sits very uneasily with the alternative that there was no such concern. Effectively, the suggestion appears to be that although there may have been abundant justification for a *bona fide* concern, the defendant was so blinded by malice towards the plaintiff that the decision to notify was based on spite or vengeance rather than on the objective evidence.

119. There was no undertaking given to the High Court by the defendant in relation to communication with the school in China. The order of the President expressly permitted the defendant to respond frankly and honestly to any inquiry received from any individual or body regarding the registration status of the plaintiff and to communicate to any person inquiring the terms of the undertaking given by him to the court. The communication complained of was made by telephone on the morning of 6th November, 2017. That was before, if only very shortly before, the Disciplinary Committee decided that it could not proceed with the allegations which had been made by Student A and before Student B, by his mother, had declared himself unwilling to stand alone. What the person making the inquiry was told was true. It was not a data breach.

120. The allegation that the defendant informed the school in China of the outcome of the inquiry was not pursued: for the good and sufficient reason that there was no evidence that it happened.

121. In the course of the trial, counsel for the plaintiff confirmed that the case was not being made that the data breach was deliberate. If the misdirection of the letter was an accident, it follows that it could not by itself have amounted to, or been an element of a campaign of, targeted malice.

122. The allegation that the defendant did not comply with its obligations under the "*Personal Data Security Breach Code of Practice"* was not pursued. The court was not told what that code is, what it says, or how it was supposed to have been breached.

123. The plaintiff did press the complaint that the unintended recipient of the letter and report was not asked for an affidavit. For the reasons already given, I do not believe that the defendant was obliged to accede to the request that the recipient should be asked for an affidavit, or that such a request would have achieved anything apart, perhaps, from fuelling the fire. In any event, I cannot see how this could possibly have amounted to targeted malice.

124. "*Sensitive personal information*" is a term of art. It is defined by the Data Protection Act, 1988 as amended as meaning personal data as to racial or ethnic origin, political opinions, religious of philosophical beliefs, trade union membership, physical and mental health, and criminal record. The letter and report was simply "*personal information*" and the report made to the Data Protection Commissioner was perfectly appropriate. In any event, if the breach was not targeted malice, I cannot see how the report of the breach could possibly be targeted malice.

125. If the allegation of a lack of *bona fides* is to be taken as an allegation of *mala fides*, it must be part of the allegation that the defendant set about a stratagem to deliberately destroy the plaintiff's reputation, without regard for the truth, in wanton disregard of its duty, and in deliberate and conscious breach of the plaintiff's legal and constitutional rights.

126. I will not at this stage labour the fundamental difference between notification of a concern to the National Vetting Bureau, and the possible eventual disclosure by the Chief Bureau Officer or appeals officer of specified information, but will focus on what is said to be the evidence of malice.

127. The Disciplinary Committee is said to have been overzealous in attempting to persuade Student A and Student B to engage in the inquiry. I reject that argument. It is quite clear that from the outset Student A in particular was extremely reluctant to engage. By s. 43(14) of the Act of 2001 a panel of the Disciplinary Committee has the same powers as are vested in the High Court or a judge thereof of in respect of the enforcement of the attendance of witnesses. Student A and Student B having returned to Germany, the option of compelling their attendance was not available to the panel. If the two students had been resident in Ireland, they would have been compellable. If otherwise they could have been forced to attend and give evidence at the disciplinary hearing, I cannot see how the Disciplinary Committee can properly be criticised for exploring all options that might have secured their voluntary cooperation.

128. It cannot be gainsaid that the allegation of sexual assault was very serious. In those circumstances it was quite proper that all options were explored and canvassed with Student A, or, as happened, his father.

129. If the students had been persuaded to give evidence, they would have been subject to cross examination by counsel on behalf of Mr. P. If, on one view, the fact that the students would not participate in the inquiry meant that Mr. P. did not have to answer the allegations other than those that could be supported by his account of events, on another view a successful challenge to their evidence could have resulted in those allegations being dismissed by the panel. If that had happened, the Evidence of Character Panel might very well have taken quite a different view as to whether the defendant's reporting obligations under s. 19 were engaged.

130. Much was sought to be made of Mr. O'Leary's emails of 5th and 7th September, 2017 when, noting that the students would probably not be cooperating, he asked for the solicitors' view as to whether any element of the case might be salvaged and whether if M.P. were to seek costs at a later stage, the defendant would be in a better position if it could be seen to have exhausted all avenues. I do not believe that this consideration was improper, still less that it is evidence of targeted malice against the plaintiff. I note that these emails were part of the defendant's discovery and so cannot have formed any part of the alleged misfeasance when the case was brought.

131. As it became apparent that despite his best endeavours the students would not give evidence, the Director notified M.P.'s solicitors and modified the allegations that would go to the disciplinary panel. Quite properly, the Director only put before the panel those allegations as might be stood up with the available evidence. There may have been a sense of disappointment that the cooperation of the students could not be achieved. Following the decision of the disciplinary panel there may have been a sense that the panel, running in blinkers, may not have appreciated the potential significance of the WhatsApp messages. But it is an impossible and impermissible leap to suggest that the defendant thereafter set out to destroy the plaintiff's reputation without regard for the truth and in disregard of its duty.

The plaintiff's submissions as to the requirements of section 19

132. I will deal with the plaintiff's list of seven alleged requirements seriatim.

133. The first requirement is said to be that the concern should arise "*following an investigation, inquiry or regulatory process.*" I have dealt with that as part of the issue as to whether the defendant acted as soon as may be.

134. The second requirement identified by the plaintiff is said to be that the concern must arise "*as a result of the investigation, inquiry or regulatory process*". Two arguments are offered. Firstly, it is said, the notice of the intention to make a notification says that the concern has arisen "*following*" rather than "*as a result of"* the processes and does not identify which of the processes, or which part of the processes, gave rise to the concern. I unhesitatingly reject that argument. It is entirely artificial. The concern will always be based on information and not process. The process may be material, for example in a case where a complaint is withdrawn, but the relevance of the process is to the quality of the information. It is by no means beyond the bounds of possibility that an investigation may yield no more information than was contained in the initial complaint. It makes no sense to me to contemplate that a concern arising out of the complaint might not be notifiable, or that there would be any consideration to whether, or the extent to which, the concern is referable to the complaint or the investigation. Secondly, it is said, all of the information relied upon by the Evidence of Character Panel when it met on 18th June, 2018 was contained, for the most part, in the original complaint by the headmaster in March, 2017. I disagree. It seems to me that a scheduled organisation which has regulatory and disciplinary functions is entitled, if not obliged, to take into account the stage to which the investigation or inquiry has progressed as well as the background to the progress, or any lack of progress. So, it seems to me, it must be material to a consideration of information whether, or the extent to which, allegations have been made out, or rejected, or withdrawn or not pursued. If, as in this case, serious allegations have not been pursued, it must be material to consider why they were not pursued.

135. The third requirement is said to be a *bona fide* concern. It is argued on behalf of the plaintiff that the defendant must have had concerns long before the Evidence of Character Panel met in June, 2018. The defendant, it is said, must have had concerns as to the applicability of s. 19 of the Act of 2012 when it made the application under s. 47 in May, 2017. I follow. But the plaintiff jumps from the suggestion that the defendant must have had a concern shortly after the complaint was made in March, 2017 to the proposition that the stated concern in June, 2018 was not *bona fide*. I do not follow. It is not suggested that the complaint against M.P. was not such as might have given rise to a *bona fide* concern. It seems to me that if there was a *bona fide* concern at the time of the complaint, the suggested absence of a *bona fide* concern at any later time could only be by reference to a change in the information. The plaintiff's argument, however, is that there was not much difference in the available information. For the reasons given, I believe that the state of the available information was different in June, 2018 to what it had been in March, 2017 but that is not the basis of the argument. I accept the submission of Mr. Farrell that the argument that there was no proper basis for the decision to make the s. 19 report in June, 2018 is impossible to reconcile with the argument that there was a perfectly good basis for making such a report in May, 2017 when the s. 47 application was made.

136. I have dealt with the argument that the decision to invoke s. 19 was motivated by the failure of the defendant to secure findings against the plaintiff in relation to the most serious allegations made in relation to Student A, and which the defendant had decided necessitated a s. 47 application. I see no basis for that suggestion.

137. It is now said that the data protection breaches may have added to the motivation to make the notification to the National Vetting Bureau. I cannot see the point. The sending of the letter intended for Mr. P.'s solicitors to someone else was a data breach. It was not the plaintiff's fault. The data breach gave rise to a couple of very strongly worded letters from the plaintiff's solicitors and a complaint to the Data Protection Commissioner which went nowhere. I simply fail to understand how a mistake on the part of the defendant might be thought to have given rise to a vendetta against the plaintiff.

138. In the pleadings, the affidavits and in the written submissions filed on behalf of the plaintiff, repeated reference is made to the fact that Student A was over 18 years of age at the time of the incident. The suggestion seemed to be that if he was not a child at the time of the matters complained of, nothing that had or might have been done to him could form the basis of a *bona fide* concern that he might harm etc. a child or vulnerable person. At the hearing, however, it was conceded that this was not so. It seems to me that this was no great concession. Mr. P. was the housemaster of a house in a boarding school made up of boys of a range of ages. He was unquestionably employed and engaged in carrying out "*relevant work or activities*" within the meaning of the Act of 2012 and practically any complaint as to his conduct vis-à-vis any of his charges might give rise to concern as to how he might behave vis-à-vis the others.

139. The fourth requirement identified in the argument made on behalf of the plaintiff is that the concern relate to a child. I have dealt with this. It is correct that the concern must relate to a child but the fact that the complainant or the person harmed or alleged to have been harmed was not a child does not necessarily mean that the information cannot give rise to a concern that a child might be harmed. As part of the argument made under this heading, reference is made to the fact that the school made repeated efforts to get Tusla involved and that Tusla declined to become involved as the issues were between adults and there was no child at risk. It seems to me that the view of one statutory authority (*a fortiori* an agency which when it declined to become involved must have been less well informed) is not binding on any other. Ms. Bolger on the one hand concedes that the fact that Tusla declined to intervene did not displace the defendant's statutory obligations, but on the other argues that it goes to the *bona fides* of the defendant. I do not believe that that is a valid argument. In principle, I do not believe that it is proper to infer simply from the fact that two statutory authorities take differing views of the same facts and circumstances that one or other view must be mala fide. In fact, it is quite clear that the defendant knew a great deal more of the facts and circumstances of this case than were ever communicated by the school to Tusla.

140. Much is sought to be made of the fact that the defendant did not make a report to Tusla. Even if the defendant's decisions not to make a report to Tusla but to make a s. 19 notification had been made by the same person or committee (which they were not) and at the same time (which they were not) and on the basis of the same material (which they were not) I could not accept the argument that the decision not to make a report to Tusla could somehow amount to evidence that the decision to make a report to the National Vetting Bureau was malicious. In fact, the decisions were made by different people, at different times, and on the basis

of different material and for those reasons are not comparable.

141. The fifth requirement identified by the plaintiff is the requirement that the Bureau be notified of any concern "*as soon as may be*". The argument was put bluntly by counsel as a requirement that the defendant should "*use it or lose it*." I have dealt with this.

142. The sixth requirement identified by the plaintiff is that what is to be notified to the National Vetting Bureau by the scheduled organisation must be "*specified information*". I have dealt with this.

143. The seventh reason identified by the plaintiff is the requirement that the specified organisation provide reasons for its concern. The written submissions filed on behalf of the plaintiff first of all assert that no reasons were given, and immediately go on to criticise the reasons given. The point was not developed in oral argument. I accept the submission on behalf of the defendant that any attack on the reasons is quintessentially a judicial review point. This is not a judicial review and such argument as was directed to the reasons does not go to the issue of *mala fides*. In any event, I do not believe that the reasons given by a specified organisation necessarily have to be good reasons or that they are amenable to judicial review. It seems to me that under the scheme of the legislation, the quality and weight of the reasons are matters to be considered by the Chief Bureau Officer in deciding whether the information is such as to give rise to a reasonable belief etc.

Conclusions

144. The plaintiff invokes his constitutionally protected right to his professional reputation. I cannot forbear to observe that he appears to be rather less solicitous of the same right of the officers and staff of the defendant.

145. There is not now, and there never was, the merest scintilla of justification for the allegation of misfeasance in public office.

146. There is abundant justification for the concern which the defendant has decided it should notify to the National Vetting Bureau. There is not now, and there never was, any justification for the allegation that the defendant's concern is not a *bona fide* concern.

147. The defendant's obligation to notify its concern arose when it decided it had a concern. There was no delay. Even if the concern had not been notified "*as soon as may be*", that would not have absolved the defendant from making the notification, or prevented it from doing so later.

148. The scheme established by the National Vetting Bureau (Children and Vulnerable Persons) Act, 2012 potentially impacts on legal and constitutional rights. That potential impact, however, arises from the prospect of disclosure of information and not from the gathering of the information. The Oireachtas has put in place elaborate rules and procedures to ensure that information gathered by the National Vetting Bureau will not be disclosed except on a reasonable and reasoned belief that it is of such a nature as to give rise to a *bona fide* concern that the subject may harm a child or vulnerable person, and that the disclosure is necessary and proportionate for the protection of a child or vulnerable person.

149. When the defendant makes the disclosure which it has decided to make, the plaintiff will have all of the safeguards prescribed by the Act of 2012. There is no challenge to the efficacy or sufficiency of the statutory safeguards; or the validity of the Act having regard to the provisions of the Constitution; or the compatibility of the Act with the European Convention on Human Rights.

150. In the event of an application in the future for a vetting disclosure, such time as it may take to comply with the statutory procedures will not be an infringement of, or an impingement upon, the plaintiff's rights but will be necessary to vindicate his rights.

151. The action will be dismissed.