Neutral Citation Number [2005] IEHC 288

THE HIGH COURT

[2002 No. 14536 P]

BETWEEN

ALAN CLIFFORD A PERSON OF UNSOUND MIND NOT SO FOUND SUING BY HIS MOTHER AND NEXT FRIEND MARY CLIFFORD
PLAINTIFF

AND

THE MINISTER FOR EDUCATION AND SCIENCE, THE MINISTER FOR HEALTH AND CHILDREN, THE SOUTHERN HEALTH BOARD, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Declan Budd delivered on the 10th day of June, 2005

1. This case came before this court by way of three motions. The first motion dated 15th February, 2005 was for an order on behalf of the plaintiff seeking liberty to issue and serve an amended plenary summons and statement of claim to include a claim pursuant to the European Convention on Human Rights Act, 2003, together with such further and other consequential orders and directions as to the court might seem fit and proper, including an order as to costs as appropriate vis-à-vis each of the defendants. This application is grounded on the affidavit of Orla Phelan the solicitor acting on behalf of the plaintiff. There are two further motions concerning appeals by the plaintiff and by the third named defendant, the Southern Health Board, which are each in respect of appeals from the order made by the Master of the High Court on 3rd February, 2005 in respect of discovery of documents in the proceedings between the plaintiff and the defendants. For clarity I propose to refer to the Southern Health Board as the third named defendant. At times the Southern Health Board has been referred to previously in the pleadings as the fourth named defendant but now appears as the third named defendant as a notice of discontinuance has been served by the plaintiff in respect of proceedings against the National Educational Welfare Board.

Background

2. The history behind these proceedings is that the plaintiff, who is now aged twenty seven having been born on 12th October, 1977, is a profoundly autistic young man whose parents, when he was aged six years old, were advised and realised that the plaintiff was a child with special educational needs and he was referred by the defendants to a special school at Lixnaw and then subsequently to a specialist provision at Scoil Triest at Lota House. The particulars in the statement of claim allege that early medical and social reports undertaken in February, 1981 suggested that the plaintiff was slightly autistic with some mental retardation. In September, 1981 he was assessed at the facility at Fitton St. and the plaintiff was seen as autistic but it was suggested that there was a "resolution" of this phase and at the time it was conjectured that he might have mild moderate mental handicap. It was confirmed in the psychological assessment in September, 1981 that he was functioning as a child with moderate learning difficulties. When the plaintiff started at Lixnaw (otherwise known as the Nano Nagle School) it is alleged that he was toilet trained and could string three word sentences together and was able to interact in a playful manner with children of his own age by, for example, kicking a ball on the lawn. The plaintiff's parents were advised that there were no staff trained to deal with autistic children at Lixnaw and since it was clear that Alan needed early intervention with specialist staff trained to deal with the autistic he was subsequently brought to Scoil Trieste in Lota. It is alleged that no IEPA (Independent Educational Psychological Assessment) was prepared at Scoil Trieste and that in the absence of the necessary treatment and help the plaintiff regressed and that he became resistant to learning and that his behaviour deteriorated. It is alleged that the placement has been deficient in relation to the provision of appropriate speech and language therapy and in a detailed communication programme and educational provision. From the plaintiff's reply dated 6th November, 2003 to a notice for particulars it is indicated that the plaintiff was started on a PECS programme in January, 2003, a behavioural therapy programme in January, 2003 and a structured programme for him throughout his day again in January, 2003. These are the only therapies that the plaintiff's next friend is aware that he is getting. The Southern Health Board, the third named defendant, is alleged to have failed to defend or vindicate the personal rights of the plaintiff, including the right to bodily integrity and the right not to have his health endangered by the State, his right to communicate, his right to privacy, the right to make the best possible use of his inherent capabilities, physical, mental and moral and the right to have his welfare vindicated by the State in the manner set out in the statement of claim under the headings of "Particulars of Negligence, Breach of Duty including Breach of Statutory Duty against the third named defendant (the Health Board)".

3. No less than forty-nine particulars of negligence are clearly and specifically alleged against the first, second, fourth and fifth named defendants and no less than forty-five particulars of negligence are listed against the third named defendant and it is helpful to have the flavour of such particulars for the purposes of the discovery motions. It is alleged, inter alia, that the third named defendant failed to carry out adequate and proper assessment of the plaintiff to ascertain his needs and failed to carry out an individual care programme (I.C.P.) for the plaintiff and failed to intervene at an early stage to assess the plaintiff's special needs and provide for those needs and failed to provide any adequate and proper speech therapy, occupational therapy, behavioural therapy, physiotherapy, music therapy, and further also failed to retain any adequate and proper number of properly trained personnel to cater for the plaintiff's special needs or to adopt any adequate and proper programme of therapies for the plaintiff. The third named defendant's defence dated 7th September, 2004 is in effect a traverse. While the defence of the first, second, fourth and fifth named defendants does admit parts of the statement of claim nevertheless many of the allegations are denied and thus there are wide issues in dispute with regard to the plaintiff's claims in respect of his treatment and the therapies and the lack of them provided for him.

The Motion to Amend

4. By motion dated 15th February, 2005 the plaintiff seeks liberty to issue and serve an amended plenary summons and statement of claim to include a claim pursuant to the European Convention on Human Rights Act, 2003 together with such further and other consequential orders and directions as to the court seems proper including an order as to costs in respect of each of the defendants. This is the motion which is grounded on an affidavit sworn by the plaintiff's solicitor on 10th February, 2005. She says that since the institution of the proceedings, the European Convention on Human Rights Act, 2003 has been enacted and that Counsel has advised that this adds certain rights to the plaintiff which are actionable within this jurisdiction and ought to form part of the plaintiff's claim. Accordingly, she wrote to the defendants notifying them of the intention specifically to include a claim pursuant to the European Convention on Human Rights Act, 2003 in correspondence starting with a letter dated 15th March, 2004. While mention had been made at para. 25 of the statement of claim that the first named defendant was obliged, inter alia, by Article 2 of the European Convention on Human Rights Act, 2003 to provide for and care for the plaintiff and to provide such education and care and seeking a declaration in this respect, previously this was not specifically pleaded against the third named defendant Health Board. By letter dated 26th March, 2004 from the Chief State Solicitor it was made clear that an amendment would be needed for clarity and that the plaintiff's claim under the European Convention on Human Rights Act, 2003 must be set out. This correspondence is set out in exhibit A of the affidavit of the plaintiff's solicitor including the letters from the third named defendant's solicitor dated 4th March, 2004 and 6th April, 2004 which suggests that "you are obliged to plead your case specifically against the Southern Health Board", and consequently the query is repeated seeking particulars including exactly how it is alleged that the third named defendant has failed to meet the plaintiff's special needs.

5. By reference to para. 11, the third named defendant's solicitor makes reference to the report of Albert Reid, Educational Psychologist, which had been furnished as an attachment to the pleadings. The defendant's solicitor specifically suggested that the plaintiff was obliged to plead the plaintiff's case against the third named defendant. The European Convention on Human Rights Act, 2003 was enacted on 30th June, 2003 and came into force after 31st December, 2003. By letter dated 10th August, 2004 the plaintiff's solicitor responded and sent the proposed draft amended plenary summons and draft amended statement of claim with the proposed amendments underlined in red and called upon the third named defendant's solicitor to indicate consent in relation to having the pleadings formally amended. The third named defendant's solicitor responded that having taken counsel's advice they would not consent to the amendment in all of the circumstances and that application to the court would have to be made formally to amend the pleadings. The draft amendments to the pleadings are contained in exhibit C to the effect that the plaintiff claims in the amended general endorsement of claim at (e): A declaration that the defendants and each of them are in breach of the provisions of Articles 2, 3, 5, 8, 13, 17 and 18 of the Convention on Human Rights and Fundamental Freedoms together with Article 2 of the First Protocol to the said Convention, as incorporated into Irish Law by virtue of the European Convention on Human Rights Act, 2003. A draft amended statement of claim clarifies the pleadings by referring in para. 3 to a Notice of Discontinuance dated 9th July, 2003 served on the National Educational Welfare Board (then the second named defendant) and also by further pleading, fresh paragraphs 28, 29 and 30, the obligations of the defendants under the provisions of the European Convention on Human Rights and of the European Convention on Human Rights Act, 2003. The amended draft sets out extensive particulars of the alleged breaches of the plaintiff's Convention rights by the defendants, setting these out at paras. 28, 29 and 30 including fresh particulars against all the defendants at (a) to (z) and (aa) and (bb) and also including particulars of negligence, breach of duty including breach of statutory duty against the third named defendant (the Health Board) containing forty five particulars with the forty second particular also setting out further specific particulars that this defendant failed to provide a framework that would enable the plaintiff to be provided with therapies and care appropriate to his needs. The reference to "framework" includes such basic matters as are set out clearly and concisely in paragraphs lettered (a) to (l) in respect of training for care workers and therapists and psychologists for the provision and care for persons with special needs; also the obtaining from the Department of Finance of sufficient funds to enable education to be provided for the plaintiff and to provide, inter alia, adequate therapies and care for the plaintiff and to assess the adequacy thereof, and to provide proper home help facilities and respite facilities for the plaintiff. Further particulars of the plaintiff's immediate needs and particulars of the plaintiff's history were then furnished and a claim was made for a declaration at (e) being "a declaration that the defendant and each of them are in breach of the provisions of Articles 2, 3, 5, 8, 13, 17 and 18 of the Convention on Human Rights and Fundamental Freedoms together with Article 2 of the First Protocol of the said Convention, as incorporated into Irish law by virtue of the European Convention on Human Rights Act, 2003."

6. It is significant that it is clear from the correspondence that the Chief State Solicitor has consented to the amendments being made subject to his client's right to plead to these by way of an amended defence. In paragraph 7 of her affidavit the plaintiff's solicitor refers to the fact that the solicitors for the third named defendant Health Board have refused to consent to the amendment without citing any grounds or reasons for this. She further avers that:-

> "The Health Board has not demonstrated any prejudice or other reason why it is objecting to the proposed amendments, and considering that the amendments relate solely to a matter of law, that the attitude taken by the Southern Health Board to this application is unreasonable."

7. Senior counsel for the plaintiff submits that, while mention of the European Convention on Human Rights Act, 2003 was made in the original statement of claim, no specific claim was made in this respect against the third named defendant at that time because the European Convention on Human Rights Act, 2003 was not in force. However, the provisions of the Act have since come into effect and he submits that the court has power under O. 28, r. 1 of the Rules of the Superior Courts, 1986 to amend as this provides that the court may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. He submits that the court will usually grant leave to amend unless there is evidence that the party applying has been acting *mala fide* or has prejudiced the opponent in some manner which cannot properly be compensated for by costs. It is clear that in this case it is preferable that for convenience and economy the entire of the real issues between the parties are dealt with in one set of proceedings. It is understandable why the plea under the European Convention on Human Rights Act, 2003 was not included although mention of the Convention was made in relation to the case being made against the State defendants. It is probable that the obligations and rights now referred to in the amended pleadings and of which very full particulars are included in the draft only became enforceable under the Act in 2004. Presumably there is no reason why the plaintiff could not issue fresh proceedings in this respect but this would be at considerable further expense and it would seem that the real issues between the parties can be conveniently and clearly set out for the purpose of adjudication in an amended set of pleadings with consequential liberty to file amended defences and replies. Since it would appear that the plaintiff is claiming not only past but ongoing obligations under the European Convention on Human Rights Act, 2003 there would appear to be much to be said for these further pleadings putting focus on the future needs and therapies required for the plaintiff's care and treatment and that evidence in respect of the plaintiff's history and care and future needs and therapies and care should be given in the one set of proceedings in which the real issues between the parties can best be addressed.

8. Counsel have referred me to a number of cases reflecting the approach of the courts to the wide powers granted under O. 28, r. 1. In Bell v. Pederson [1996] 1 ILRM 290, in a defamation action, on the morning of the trial counsel for the defendants even at that late stage applied for and was allowed to amend the defence even where the proposed amended defence would radically alter the issues. Any potential prejudice to the party resisting the amendment could be remedied by an adjournment and by requiring the defendant to indemnify the Plaintiff in relation to any extra expense he might be put to in dealing with the amendment.

9. In *Rubotham v. M & B Bakeries and National Insurance Company Limited* [1993] ILRM 219 Morris J. allowed the plaintiff to introduce a claim for relief which had not originally been pleaded. The plaintiff was burned in a fire in the van of the first named defendant. Negotiations had taken place in which the second named defendant was represented and a settlement for £150,000 and costs was reached, subject to court approval which was given. A provisional liquidator was appointed to the first named defendant and the settlement sum was never paid. The plaintiff instituted these proceedings by plenary summons of 18th July, 1989 against both defendants, being the original defendant and the indemnifier on the first named defendant's insurance policy, and sought to make the indemnifier accountable for the judgment. The second named defendant repudiated the policy and the first named defendant did not contest this in arbitration. The plaintiff sought liberty to amend comprehensively and to introduce a new claim for relief. The radical nature of the amendment was to allow a claim to rescind the settlement and to set aside the order ruling the settlement and to replace this by a court order that damages be reassessed. The second named defendant opposed the plaintiff's application because of the radical nature of the plaintiff's amendment and the delay in making the amendment. In granting leave to the plaintiff to amend the statement of claim Morris J. stated at p. 221:-

> "In my view the infancy of the plaintiff is an answer to the defendant's submissions relating to delay and since O. 28, r. 1 of the Superior Court Rules envisages the making of an amendment which may be necessary 'for the purpose of

> determining the real questions in controversy between the parties' it seems to me that the fact that this may be a new and hitherto un-pleaded case is not a bar to granting the amendment."

10. In *Krops v. The Irish Forestry Board Limited and Kieran Ryan* [1995] 2 I.R. 113, the plaintiff's wife was killed in an accident in 1990 when the car in which she was travelling was struck by a falling tree. The defendants had been felling trees in the area at the time. The plaintiff's statement of claim alleged that the tree had fallen as a result of the negligence, breach of duty and breach of statutory duty of the defendants in their felling of trees in that area. In 1994 an application was brought to amend the statement of claim to add an allegation of nuisance. The first named defendant claimed that if the amendment were allowed, it would be deprived of a defence open to it under s. 48 subs. 6 of the Civil Liability Act, 1961, the proceedings not having been instituted within three years of the death of the plaintiff's wife. It was argued on behalf of the plaintiff that as no new facts were being alleged the first named defendant could not be prejudiced. It was held by Keane J., in allowing the plaintiff to amend his statement of claim, that under O. 28, r. 1 of the Rules of the Superior Courts 1986 the Court has a wide jurisdiction to amend pleadings in such manner and on such terms as it considers just in the circumstances, and that in the absence of any rule in Ireland corresponding to the relevant English rule specifically permitting leave to amend after the expiration of the relevant period of limitation, the matters at issue in the case fell to be determined by reference to principle rather than authority. Significantly Keane J. went on to hold that under O. 28, r. 1 and as a matter of principle, pleadings carry with them from the time they are issued or delivered the potentiality of being amended by the court and that since the proceedings were always capable of amendment by the Court in such manner as might be just and in order to allow the real question in controversy between the parties to be determined, the first named defendant could not be said to have been in any position to rely on a defence based on a limitation period. Keane J. reviewed the somewhat harsh operation of the similar order in England which led to the new rule in O. 20, r. 2, 3, 4 and 5, which overruled a series of cases which worked injustice, and allowed an amendment whenever it was just to do so, even though it may deprive a defendant of a defence under the statute of limitations. The conclusion was that the amendment would not in any way prejudice or embarrass the defendant by new allegations of fact, so no injustice would be done to the defendant by permitting the amendment. Since the proceedings were always capable of amendment in such manner as might be just and in order to allow the real question in controversy between the parties to be determined, it could not be said that the defendant was at any stage in a position to rely on the Statute of Limitations, 1957. The conclusion is significant:-

> "The evolution of the law in the neighbouring jurisdiction demonstrates, I think, that the difficulties that have arisen can be traced, not so much to the decision in *Weldon v. Neal* [1887] 19 QBD 394, as to an over rigid application of the principle laid down in that case. Where, as here, the plaintiff seeks to add a new cause of action arising out of – to borrow the words of English rule – 'the same facts or substantially the same facts', there seems no reason why this court, even in the absence of a corresponding rule in this jurisdiction, should be precluded from permitting such an amendment."

11. In the present case the essential facts of the history have remained the same. The defendant has been aware from the pleadings of the suggestion of the relevance of the European Convention on Human Rights Act, 2003. The amended pleadings make it clear that the Oireachtas has now made the provisions of the Convention a part of Irish domestic law by way of the European Convention on Human Rights Act, 2003 and this is now being pleaded as a fall back position against the defendants, including the third named defendant, on behalf of the plaintiff. Clearly it is helpful to ensure that the real issues, including claims under the Convention and the Irish Act based upon it likely to be in contention are properly pleaded and placed before the court with clarity. The proposed amendments are intended to achieve this when combined with liberty to the defendants to deliver amended defences.

12. If I had any misgivings about the justice in favour of making an order allowing the amendments, which I do not, these would be dispelled by a reading of the recent decision of the Supreme Court in *Walter Croke v. Waterford Crystal Limited and Irish Pensions Trust Limited* [2005] 1 ILRM 321. The plaintiff/appellant had sought leave to deliver an amended statement of claim and liberty to deliver replies to the defences of each of the respondents. The plaintiff in that case had taken voluntary redundancy from the first named respondent in the early 1990s. The second named respondent was the sole trustee of the pension scheme created by the first named respondent for its employees. The appellant alleged that the first named respondent had made misrepresentations to him concerning his pension entitlements which he subsequently discovered were untrue. Allegations of breach of duty, deceit, fraud and fraudulent concealment were pleaded against the first named respondent. In allowing the appeal against the first named respondent the Supreme Court made clear that while there was undoubtedly a discretion in the court as to whether to make an order under O. 28, r. 1 the primary consideration of the court was whether the amendments were necessary for the purpose of determining the real questions of controversy in the litigation. At first instance the judge did not adequately address that question but was much more concerned with the procedural conduct of the appellant. There was an over emphasis in some of the cases on an obligation to give good reasons for having to amend the pleadings. There was a danger that in overly concentrating on the discrepancies and the procedural behaviour of the appellant that the real purpose of O. 28, r. 1 might be forgotten. O. 28, r. 1 was intended to be a liberal rule. While other factors had to be taken into account in the exercise of the discretion, the primary purpose of the rule was to give the court wide powers of amendment so that the real issues between the parties could be determined. This was always subject to questions of real prejudice to the respondent but some aspects of prejudice could be dealt with by appropriate costs orders or conditions. Inserting the date of knowledge into the statement of claim was a helpful piece of clarification but was not necessary for the purposes of meeting a plea of the Statute of Limitations. The allegations of deliberate misconduct on the part of the first named respondent were implicit in the existing statement of claim and it was appropriate that they be properly pleaded and made explicit. It was not clear that the amendments as against the first named respondent would give rise to any relevant legal prejudice. If by reason of the appellant's date of knowledge the action, which might otherwise have been statute barred, was not in fact statute barred it could not be said that prejudice had arisen. Since the appellant had not put forward any factual basis to support a fraud or any kind of deliberate misconduct claim against the second named respondent, the Supreme Court dismissed the appeal against the second named respondent on the motion seeking liberty to amend the statement of claim but allowed the appeal on the motion seeking liberty to deliver a reply to the defence. I think that in the present case there are also good reasons to allow the plaintiff's proposed amendment. Firstly, I think that the amendment will facilitate the real issues being determined between the parties. Secondly, the amendment will help to clarify the nature and particulars of the claim being made under the heading of the European Convention on Human Rights Act, 2003 and the Irish legislation in respect thereof. Thirdly, the claim being made on behalf of the plaintiff is being made for a person who has been disadvantaged for most of his life and it would seem practical, economic, sensible and just that issues between the parties should preferably be adjudicated upon in the one set of proceedings. Furthermore no evidence on behalf of the third named defendant has been adduced of any particular prejudice to this defendant in whose care, for practical purposes, the plaintiff has been for most of his life, if the amendment sought is allowed.

13. Counsel for the third named defendant submits that the cause of action under the European Convention on Human Rights Act, 2003 only came into existence sometime after the issue of the original plenary summons and that this new cause of action would not have arisen until after 31st December, 2003 with the coming into force of the Act of 2003. She submits that the European Convention on Human Rights Act, 2003 has no retrospective effect and that if the amendment is granted then this would take effect not from the date when the amendment was made but from the date of the original plenary summons and she relies on passages from the English White Book 1999 at p. 370. No such objection is taken by counsel on behalf of the other defendants. In the circumstances of the

present situation, it seems sensible, now that the European Convention on Human Rights Act, 2003 has come into force, that what I might term as being the plaintiff's fall back position under s. 2 and s. 3 of that Act should, for the sake of the convenience of having a single trial of the real issues, be allowed to be pleaded by way of amendment to the plaintiff's pleadings. Furthermore, if counsel for the defendant Health Board is correct in saying that the provisions of the European Convention on Human Rights Act, 2003 do not have retrospective effect then this point can be pleaded in the amended defence, in the event that this is considered to be proper and appropriate. In the present case it would seem that the plaintiff's case is that the claim is a continuing claim not related to a single point in time, as it might be in a road traffic accident injury case. On the contrary the plaintiff's claim under the 2003 Act would here appear to be of a continuing nature. I note that in the 1999 White Book at p. 377 it is noted that an amendment duly made, with or without leave, takes effect not from the date when the amendment is made, but from the date of the original document which it amends; and this rule applies to every successive amendment of whatever nature and at whatever stage the amendment is made. First, when an amendment is made to the writ, the amendment dates back to the date of the original issue of the writ and the action continues as if the amendment had been inserted from the beginning, "the writ as amended becomes the origin of the action, and the claim thereon endorsed is substituted for the claim originally endorsed". There is a subsequent comment that "the rule as to the effect of an amendment is the reason why a plaintiff may not amend his writ by adding a cause of action which has accrued to him since the issue of the writ". I suspect that the reason for this comment is that difficulties can arise when an amendment is sought which will prejudice the defendant or deprive a party of a defence which has already accrued. However, in the present case this would not appear to be germane to the situation in view of the continuing nature of the plaintiff's proposed amended claim, the "incapacity" and "infancy" of the plaintiff and the fact that the third named defendant will be able to plead the lack of retrospectivity of the relevant provisions of the European Convention on Human Rights Act, 2003 and of the Convention in the event that they are called in aid by the plaintiff.

14. In the light of the authority of the Irish cases, in many of which radical amendments even at a much later stage have been allowed and in particular, the observations of Geoghegan J. in the considered judgment of the Supreme Court in *Croke v. Waterford Crystal Ltd*. [2005] 1 I.L.RM. 321 as to O. 28 r. 1 being intended to be a liberal rule with a view to enabling the real issues between the parties to be determined, I propose to give liberty to amend the plenary summons and statement of claim as sought and I will hear counsel as to the sequential orders to be made, including the delivery of amended defences and amended replies. As to the costs involved in this motion, I should bear in mind that the Chief State Solicitor acting for the other defendants briefed counsel to consent to the delivery of such amended pleadings and also presumably to the appropriate sequential orders in relation to amended defences. I will hear counsel's submissions in respect of the appropriate order to be made in respect of the costs of this first motion.

The plaintiff's motion appealing the Master's order dated 3rd February, 2005 and the third named defendant's motion also appealing the Master's order for discovery dated 3rd February, 2005.

15. I have already set out a short synopsis of the history and the issues which seem to arise on the pleadings to date in this case. The plaintiff's motion for discovery dated 22nd October, 2004 was grounded on the affidavit of Orla Phelan sworn on 19th October, 2004. She referred to a bound book of pleadings to date and indicated that the plaintiff's claim was for damages for breach of the plaintiff's constitutional and statutory rights in or about the failure on the part of the defendants to provide the plaintiff with an appropriate and adequate education (including support services e.g. *inter alia*, occupational therapy and speech and language therapy). She referred to a full defence which had been filed with the proceedings. In fact the defence of the third named defendant is dated 7th September, 2004 and denies the plaintiff's claim by way of traverse and in particular, at paragraph 11, pleaded that at all times it had complied with any obligations imposed upon it and has provided for the plaintiff appropriately. The plaintiff's solicitor refers to counsel's advices that discovery is necessary to protect the plaintiff's interest and to overcome the defence of the defendant and that discovery would reduce the length and complexity of the trial and would produce a saving in costs. She refers to her letter dated 6th April, 2004 which requested voluntary discovery of all documents in the power, possession or procurement of the third named defendant relevant to issues which were set out in categories listed alphabetically from (a) seriatim to (l). She then gave the reasons why such discovery of these categories of documents was required and numbered these paragraphs numerically 1 to 10. The defendant's solicitor responded to the request dated 6th April, 2004 seeking voluntary discovery by reply dated 14th April, 2004 which sought clarifications and agreed to make discovery of documents sought at paras. (i) to (j), respectively being documents at (i) in respect of therapies since the plaintiff's birth and (j) in respect of all care programmes prepared for the plaintiff. Further correspondence ensued in which the defendant's solicitor maintained that the request for discovery was, generally speaking, too wide. Ultimately the matter came before the Master of the High Court on 3rd February, 2005 when an order was made directing the third named defendant to make discovery in the terms of the Master's order and against this order both the plaintiff and the third named defendant have appealed to this court.

16. Before approaching the specific issues posed by these two appeals, it may be helpful to set out some of the relevant considerations governing the situation and the relevant rules as an aide memoire. A litigant in civil proceedings may be able to obtain by way of discovery before a trial disclosure of documents in the possession or control of another party or sometimes in the possession or control of a person who is not an actual party, provided that the documents are relevant to the issues in the litigation. Often much information can be obtained voluntarily but at times the most vital documents are in the hands of a person who will not be prepared to disclose such documents if this informative material would damage the case this person intends to make. Accordingly, the discovery process was developed and has become an extremely valuable legal procedure. At the same time some litigants have deployed tactics of delay and the strategy of swamping with documents in order to frustrate the efficacy of the process. Judges have become increasingly conscious and wary of the fact that discovery of documents can impose a considerable burden on a litigant and that there is a peril that this useful legal procedure may be invoked unnecessarily or may become an oppressive tactic in its application. In *Hannon v. Commissioners of Public Works* (Unreported, High Court, McCracken J., 4th April, 2001) McCracken J. at p. 4 commented:-

> "The court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties."

17. A basic rationale is that orders for discovery should only be made where they are necessary and that the court should be aware of the effectiveness of discovery as an instrument for extracting documentary evidence of the true situation and also as a means to reduce the time spent in trial eliciting what actually occurred. At the same time the court must bear in mind the onerous burden put on a party who has to make discovery on oath of documentary or other materials relevant to the issues in contention. In *McCarthy v. O'Flynn* [1979] IR 127 at p. 129 Henchy J. gave a concise summary of the aims of the discovery process as follows:-

> "The aim of the relevant rules is to enable a party to learn, in advance of the trial, of the existence of the documents on which a deponent might rely at the trial; to give the party who has obtained an order for discovery an opportunity of seeking production for inspection of any of those documents; and to debar the party who has made discovery from introducing in evidence at the trial, documents which he ought to have, but which he has not discovered."

18. In *Allied Irish Banks plc. v. Ernst & Whinney* [1993] 1 I.R. 375 at 390 Finlay C.J. made the helpful comment that:-

> "The basic purpose and reason for the procedure of discovery… is to ensure as far as possible that the full facts concerning any matter in dispute before the court are capable of being presented to the court by the parties concerned, so that justice on full information, rather than on a limited or partial revelation of the facts arising in a particular action, may be done."

19. Issues may arise with regard to confidentiality and also the time of discovery and it is clearly important the court ensures that this useful and often necessary legal procedure is used in order to further the aim of achieving justice between the parties to an action and so as not to allow a party to delay or increase the costs of proceedings unnecessarily. O. 31, r. 12.1 as initially set out in the Rules of the Superior Courts 1986 provided that a party might apply to the court for an order directing discovery without filing an affidavit and that the court might refuse or adjourn such an application, if satisfied that it was not necessary, or not necessary at that stage of the proceedings. Order 31, r. 12.3 went on to provide that an order should not be made "if and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs." In 1993, O. 31, r. 12.4 was added and provided that an order directing discovery should generally not be made unless the applicant had previously applied for voluntary discovery and the person to whom such a request was made had failed to make such discovery within a reasonable time. Increasing concern as to the way in which O. 31, r. 12 was being used and misused brought about the substitution of another rule with effect from 3rd August, 1999 and this altered the discovery process significantly. By S.I. No. 233 of 1999 the following was inserted as O. 31, r. 12:-

> 1. "Any party may apply to the court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his or her possession or power, relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall: (a) verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs; (b) furnish the reasons why each category of documents is required to be discovered.
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> 2. On the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance with the provisions of sub-rule 4.1, or make such order on terms as to securities for the costs of discovery or otherwise and either generally or limited to certain classes or documents as may be thought fit. An order shall not be made under this rule if and so far as the court shall be of the opinion that it is not necessary.
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> 3. An order shall not be made under this rule if and so far as the court shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.
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> 4. 1 An order under sub-rule 1 directing any party or under r. 29 directing any other person to make discovery shall not be made unless:
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> (a) The applicant for same shall have previously applied by letter in writing requesting that discovery be made voluntarily, specifying the precise categories of documents in respect of which discovery is sought and furnishing the reasons why each category of documents is required to be discovered; and
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> (b) A reasonable period of time for such discovery has been allowed; and
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> (c) The party or person requested has failed, refused or neglected to make such discovery or has ignored such request.
>
> Provided that in any case where by reason of the urgency of the matter or consent of the parties, the nature of the case or any other circumstances which to the court seem appropriate, the court may make such order as appears proper, without the necessity for such prior application in writing.
>
> 2. Any such discovery sought and agreed between the parties or between the parties and any other person shall, subject to sub-rule 4 below, be made in like manner and form and have such effect as if directed by order of the Court.
>
> 3. …"

20. These seem to me to be the salient features of rule 12 in respect of the issues in contention in this case.

21. I propose to consider the categories of documents sought by the plaintiff's solicitor and the Order of the Master in respect of each category together with the opposing arguments and the matters set out in each affidavit and the relevant material contained in the pleadings. Unfortunately there is an unnecessary complication in that the plaintiff's motion dated 22nd October, 2004, listed the categories of documents sought alphabetically whereas in the Master's order the categories are listed numerically and items (i) and (j) in the plaintiff's motion are listed as 1 and 2 in the first numerical series in the Master's order and then in the second numerical series I shall try to make it clear where the numbers in the Master's order correspond with the letters of the alphabet in the plaintiff's motion. Perhaps there is some good reason or practice of which I am not aware which has caused this added complication. I suspect that it may stem from an understandable wish to conform to the manner in which previous orders in similar proceedings have been set out.

22. Before tackling individual paragraphs which are in contention, I intend to deal with a few general considerations governing the situation. First, in the letter dated 6th April, 2004, from the plaintiff's solicitor to the third named defendant's solicitor, in her exhibit A under reference para. 6 she states:-

> "The Education Act, 1998, does not apply to the Southern Health Board. However, the Southern Health Board purports to provide therapies to persons in need of same."

23. The claim of the plaintiff is that the Constitution protects the concept of parental choice in the provision of education. Education in this context means and includes therapies. I have already above set out a few of the particulars given in the plaintiff's statement of claim in respect of the alleged negligence and breach of duty including breach of statutory duty against the third named defendant. My understanding is that the plaintiff is suggesting that the Southern Health Board placed the plaintiff as a young child with the Brothers of Charity at Lota House who were to act as the Health Board's agent in respect of the upbringing and personal

development of the plaintiff and that the third named defendant and the Brothers as managers of Lota House were accordingly standing *in loco parentis* in relation to the assessment, care, treatment and development of the plaintiff and in particular they were responsible for ensuring that the plaintiff was properly assessed so that his development would be properly monitored and that suitable and necessary therapies would be arranged for him and that resources, both financial and in the form of trained therapists and staff, would be sought and obtained to provide the necessary skilled treatment to provide the required speech, occupational, behavioural and physio therapy for the plaintiff's special needs. Accordingly, it would be reasonable to draw the inference that most of the relevant records in relation to the plaintiff would be held by the third named defendant and their agents, the management of Lota House, in respect of assessments and reports on the plaintiff and the records with regard to the provision of resources and trained therapists to provide such treatment for the plaintiff. This would also, in the light of the issues in the pleadings, include reports and assessments with regard to the necessary resources whether financial or in terms of the training and provision of skilled therapists and other staff and the financial resources necessary for this provision and accordingly this would include reports and requests in this respect and would include relevant correspondence to and from the other defendants and the third named defendant and its agents in Lota House. Two aspects of this may be helpful to the third named defendant's agent in carrying out the search for the relevant documents. The first is that very full particulars have been given by the plaintiffs in the statement of claim and in the ensuing correspondence between the plaintiff's solicitor and the third named defendant's solicitor which has elucidated the categories of documents required. This includes the clearing up of the clerical error which crept in where at reference number 11 the defendant's solicitor had used the word "assist" instead of the word "assess". Secondly, the plaintiff's solicitor has helpfully furnished to the defendant's solicitor the report of Albert Reid, Chartered Educational Psychologist, and this report provides a helpful narrative and lists a number of reports and assessments which may be a useful guide for Deirdre Scully, the deponent suggested for the affidavit of discovery on behalf of the Health Board and its agents in Lota House. I should make clear at this stage that in my view the schedule in the affidavit of discovery should include all reports on and assessments of the plaintiff and that to except such documents as are listed in the report of Albert Reid, while no doubt meant well and intended to ease the task of those sorting through the relevant documents, is a recipe for the omission of what could be vital documents or addenda to one or other of these reports or assessments. It is essential that no relevant document properly discoverable within the listed categories for discovery should be omitted from the Schedule. This added complication, which involves segregation and omission of some of the relevant documents simply because they have been listed in Albert Reid's report, seems to me to be a recipe for error in that there is an obvious peril that some relevant document might be erroneously excluded from the schedule because it was mistakenly thought that it was covered in a reference in Mr. Reid's report. This further refinement of a segregation of a particular group of relevant material seems to me to be fraught with unnecessary peril of an injustice by omission from the schedule of documents being done unintentionally.

24. A further point which may assist in the recognition of what are material documents is again to refer to what the plaintiff's solicitor in her letter dated 6th April, 2004, wrote at reference para. 6 and to comment on this. She wrote:-

> "The Education Act, 1998 does not apply to the Southern Health Board. However, the Southern Health Board purports to provide therapies to persons in need of same."

25. The plaintiff's case is against five defendants and I think it is very difficult to draw a clear cut line between education and appropriate remedial and therapeutic treatment and the nurture and proper upbringing of the plaintiff in this case. Senior Counsel for the plaintiff referred to the development of the inherent potential of the individual being brought up in Ireland. This seems to me to encompass all documentary records, assessments, tests and recommendations which bear on the appropriate care, treatment and therapies for the plaintiff and the resources required including finance and trained staff to provide such therapies. While it is perfectly proper for the third named defendant's solicitor to ask for particulars as to the particular allegations being made against the third named defendant, both he and the deponent of the discovery affidavit should bear in mind that this action includes claims against four other defendants and the pleadings cover these claims as well and so it would be prudent to include in the Schedule documents relevant to the plaintiff's education in a broad sense and also correspondence relevant to resources, funding, training of therapeutic and other skilled personnel who would be or should be involved in providing therapeutic and broad education for the plaintiff. Thus documents and reports on the school or facility which provided care for the plaintiff would be included. Herbert Spencer said in his Social Statics II.XVII.4 that

> "Education has for its object the formation of character.
>
> Education in this sense means properly -
>
> > a drawing forth, and implies not so much the communication of knowledge as the discipline of the intellect, the establishment of the principles and the regulation of the heart and mind."

26. Senior Counsel for the plaintiff in addressing the matter of the relevance of documentation dealing with funding material to the therapies which were or should have been available to the plaintiff made the helpful point that the plaintiff's advisers were anxious to obtain documents of a general character in this respect but would not regard a mass of what he called "shoe box invoices" as being relevant, unless these implicitly or explicitly had some particular material significance in respect of the issues knit in the pleadings and correspondence. He made the point that requests for funding were and are relevant to show if funding adequate for the plaintiff's needs and therapies was sought but was not provided.

27. One last preliminary point is that the word "document" in the order should be construed so that it would "comprehend the full range of things which could become part of the court file at the end of the hearing of the proceedings". This is taken from the judgment of Henchy J. in the Supreme Court in *McCarthy v. O'Flynn* [1979] I.R. 127 at 129 when he said:-

> "I think that where the word occurs in the discovery rules it should be construed in terms of the scheme and purpose of those rules. Thus read, I consider that the word (document) includes any thing which, if adduced in evidence at the hearing of the proceedings, would be put in, or become annexed to, the court file of the proceedings. All such things are part of the documentation of the case and qualify for preservation as part of the court archives."

28. The *McCarthy* case point concerned the inclusion of x-ray plates or photographs and as they gave information they were regarded as a document and so tape recordings and compact discs and material on computer are now encompassed as containing information which, if relevant to the issues, is to be considered for discovery. Hopefully the Health Board will have much of the relevant information by now on computer and this can be located quickly by way of computer search as well as by extraction from files dealing with the upbringing, instruction and education and therapeutic treatment of the plaintiff, and this would include reports and assessments and recommendations in respect of Lota House and the other institutions to whom his care and upbringing and the development of his talents were entrusted by the third named defendant. I approve of the careful listing by the plaintiff's solicitor, in her letter dated 6th April, 2004, of the categories of documents sought and the setting out of the reasons why such discovery is

required in her numerical paragraphs 1 to 10. The letter dated 14th April, 2004, was perhaps the reaction of a defendant's solicitor who requires some clarifications but also is faced with explaining to the client Health Board that a detailed affidavit of discovery is required. It seems to me that such an affidavit is required and justified in this case. First, the plaintiff was placed at a young age in the care of the third named defendant Health Board and its agents, whether this was the Nano Nagle School, the centre at Fitton Street or mainly in Lota House. Therefore the relevant reports and assessments and other documents and all records relevant in respect of the plaintiff are likely to be in the possession, power or procurement of the Health Board rather than the plaintiff's parents. Secondly, on consideration the view could well be formed that the thoroughness and clarity of the drafting of the plenary summons and statement of claim and the sensible and practical application for liberty to serve the amended endorsement of claim and statement of claim so as to include the claim now more crystallised under the European Convention on Human Rights Act, 2003 might be regarded as a model of clarity in respect of careful particularisation of each aspect of the claim and the reasons for each aspect. As to para. (a) in the letter dated 14th April, 2004, from the third named defendant's solicitor, I would have thought it was clear from the pleadings that the plaintiff's solicitor is seeking all reports and assessments within the possession, power or procurement of the Health Board concerning the plaintiff. These are clearly relevant on the issues knit in the pleadings and this is not too broad a request. As for para. (b) and the suggestion that the request for the file or files of the defendant upon the plaintiff should be made specific to the Southern Health Board, I think that this comment ignores the fact that the plaintiff is making a case against five defendants. The plaintiff is entitled to seek this discovery from the third named defendant, in whose care for the purpose of nurture, therapeutic treatment and educational upbringing generally the plaintiff was, since in the reports, files and other documents relevant to the plaintiff were and are likely to have been in the third named defendant's possession, power or procurement. Very detailed particulars have been given by the plaintiff's solicitor in the pleadings and in the letter requesting voluntary discovery dated 6th April, 2004. Accordingly, the defendant's solicitor should be aware of the matters in contention from the pleadings and particulars given and I would have thought that it was as plain as a pikestaff that all reports and assessments on and of the plaintiff should be fairly easily located and scheduled for discovery. Likewise both in Lota House and in the other schools in which the plaintiff was assessed or placed by the third named defendant there must be files and reports upon the plaintiff. Some of these files may well contain correspondence with the other four defendants from the third named defendant or its agents in Lixnaw or Lota House or Fitton Street, or wherever else the third named defendant has sought nurture, therapies and treatment for and reports on the plaintiff. The plaintiff is entitled to discovery of such documents as are relevant to the plaintiff's case in respect of each of the defendants and not just to the case being made against the third named defendant alone.

29. O. 31, r. 12.1, requires a party to make discovery of documents which are or have been in his possession or power "relating to any matter in question therein". The classic answer to the question as to what documents will be relevant in this context was considered by Brett L.J. in C*ompagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* [1882] 11 Q.B.D. 55 at 63:-

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences."

30. As Murray J. stated in *Aquatechnologie Limited v. National Standard Authority of Ireland*, (Unreported, Supreme Court, 10th July, 2000), at p. 11:

> "There is nothing in this statement which is intended to qualify the principle that documents sought on discovery must be relevant, directly or indirectly, to the matters in issue between the parties."

31. In the present case it may well be difficult for the deponent for the third named defendant to assess how the contents of the documents under her control or within her procurement might advance the case being made by the plaintiff against the defendants or damage the defence being raised by the defendants. Accordingly there is imposed on the solicitor for the party making discovery the duty to take positive steps to ensure that the clients appreciate the extent of their obligation imposed by an order for discovery. The solicitor owes a duty to the court carefully to explain the extent of the duty to the client and to go through the documents disclosed by the client to make sure, as far as possible, that no relevant document has been withheld from discovery and to ensure that the schedule should include those documents and material which it is reasonable to suppose contain information which might enable the plaintiff's advisers to advance his case or to damage that of the defendants. For example, in the present case this would include the manner in which the defendants conducted their business and correspondence between each other relevant to the matters in issue in the case and also the correspondence with experts and assessors and producers of reports and recommendations as to the care, therapies, and educational strategies and facilities either suggested or put into practice as beneficial or advantageous or otherwise for the plaintiff. This would also cover the feasibility and practicality of such strategies and the provision of the facilities for them and the origins of resources available for them. One would expect in the present case that the third named defendant will have in its possession, custody or power, documents, reports and correspondence relating to the plaintiff and the institutions in which he has been maintained and treated and the Health Board will have an enforceable legal right to obtain such documents as are not in files in its own immediate custody. The third named defendant and its solicitor in this case, where the Board is likely to be peculiarly in the position of having the vital reports, records and informative materials in their possession or procurement, must be conscious of the onus on them to be careful to make full and proper discovery.

32. I now turn to the specific matters in issue in the two motions dealing with the Master's order in respect of discovery. I will deal with this by reference to the plaintiff solicitor's request for voluntary discovery in her letter dated 6th April, 2004, by way of relating this to the numerical setting out of her alphabetical order by the Master in his order for discovery dated 3rd February, 2005.

33. The first two categories of documents dealt with by the Master at 1 and 2 of his order relate to paras. (i) and (j) in the plaintiff solicitor's letter dated 6th April, 2004; the defendant's solicitor in his response dated 14th April, 2004, to the request for voluntary discovery agreed that the categories of documents sought at (i) and (j) in the plaintiff solicitor's request would be discovered on consent. Thus in the Master's order by consent it was ordered that the third (then the fourth) named defendant do within twelve weeks from the date thereof make discovery on oath of the following documents which are or have been in their possession or power:-

> 1. All documentation dealing with the provision of speech therapy, occupational therapy, behavioural therapy, physiotherapy and music therapy to the plaintiff since the date of the plaintiff's birth;
>
> 2. All care programmes prepared for the plaintiff.

34. This consensus in respect of paras. (i) and (j) happily persists and these two aspects of the order should be replicated, but preferably relating this to (i) and (j) in the alphabetical sequence for clarity and with a small amendment to (j) set out below also for clarity. Counsel for each party suggested that I might disregard the plaintiff's request at para. (l) because the agreed wording at (i) (Master's para. 1) covered (l) which reads:-

> "(l) All documentation in the possession of the defendant in relation to the provision of therapies to the plaintiff."

35. While I would almost invariably accept the views of counsel on this, I have some anxiety that the present wording is very concise and could turn out to be too restrictively succinct. Five therapies are specifically mentioned. In the circumstances of this case where the plaintiff's solicitor must have difficulty in obtaining instructions from the plaintiff himself and where the plaintiff's parents live at a considerable distance from the north side of the River Lee and the plaintiff is very much in the daily care of the Health Board and Lota House, it could well be that some further therapies or treatment or training have been provided for or been undertaken or attempted by the plaintiff and accordingly it seems to me that the order at 1 (or (i) alphabetically) should be amended to include after the words "provision of" the insertion of the words "therapies including" so that the deponent of the affidavit will know to include documentation dealing with the provision of any other therapies to the plaintiff. I envisage that this slight amendment is for the sake of completeness and that it may transpire to be of benefit or disadvantage to either the plaintiff or the defendants but at least this may help to ensure that facts relating to the real issues are put before the court.

36. At para. (a) the plaintiff's solicitor sought all reports and/or all assessments of the plaintiff. The Master in his second numerical list at 1 granted the order sought but with a variation as follows:-

> "All reports and/or assessments of the plaintiff excepting those of the foregoing documents as are listed in Mr. Reid's report."

37. I propose to give a synopsis of the third named defendant's stance as to discovery for the sake of completeness and also of understanding of the attitude of each party. The defendant's solicitor brought the third motion to this court seeking a discharge of the order of the Master made on 3rd February, 2005, insofar as same deals with paras (a), (b), (c), (f), (k) and (l) of the plaintiff's notice of motion. This motion was grounded on the affidavit of the defendant's solicitor sworn 28th February, 2005. Having averred that the plaintiff was born on 12th October, 1977 and that it was claimed that he was a person of unsound mind suffering from autism together with other disabilities and behavioural difficulties, the deponent set out that various reliefs were sought compelling the provision of education and other therapies for the plaintiff together with damages for negligence, breach of duty, breach of statutory duty and breach of the plaintiff's constitutional rights. In the defence of the third named defendant delivered on 7th February, 2004, the plaintiff's claim was denied and it was denied that the third named defendant was in breach of any obligations imposed on it and it was specially pleaded that the third named defendant had complied with any obligations which are imposed upon it and has provided for the plaintiff in an appropriate fashion. He confirmed that the third named defendant had consented to discovery in the terms of paras. (i) and (j) and that the Master had refused to grant discovery of documents set out in (d), (e), (g) and (h) and otherwise granted the order for discovery as amended by him in the other categories. He went on to state that, in particular, issue was taken with category (f)-

> "No duty is imposed upon the third named defendant in the context of these proceedings by the Education Act, 1998. I say that no specific category of document is identified in para. (f), even as amended. I am further instructed by Deirdre Scully, the appropriate officer of the third named defendant, that it will be practically impossible for the third named defendant to comply with an order of this nature. The application is unduly onerous. Any document which could be relevant will not be categorised in a particular file and in order to complete the affidavit of discovery a trawl would have to be made of thousands of documents to ensure that all appropriate files have been searched. This is unduly burdensome. In any event no issue arises in the proceedings which could relate to any document covered in para. (f)."

38. I propose to confront paras. (f) and (g) in a preliminary way at this stage as they seem to be at the core of the contentions between the parties. In her letter dated 6th April, 2004, the plaintiff's solicitor sought voluntary discovery of: -

> "(f) All documentation in respect of the funding provided by the defendants to the Health Board in relation to the provision of occupational therapy, physiotherapy, speech and language therapy or behavioural therapy or music therapy to the plaintiff in order to meet the plaintiff's special needs in its functional area since the coming into force of s. 6 and s. 7 of the Education Act, 1998, together with such documentation as may be in the possession of this defendant in relation to the request for such funding, the information furnished to the defendants by the Health Board when seeking such funding, how such funding was computed and the amount of such funding actually allocated by the defendants to the Health Board,
>
> (g) All documentation (post dating the coming into force of s. 6 and s. 7 of the Education Act, 1998) in respect of the funding provided by the first and second named defendants to any of the facilities at which the plaintiff attended (and in which he received either education or therapies) during any period in which the plaintiff attended any such facility together with any documentation in relation to the application for or request for such funding with the supporting documentation attached to such request and applications together with all documentation setting out precisely how such funding is computed together with details of how such funding was allocated."

39. In his second numerical list at 4, the Master allowed the plaintiff's para. (f) but with some variation made by the Master in the wording. The Master disallowed the discovery sought at (g). It is necessary to set out the Master's para. 4 for the purpose of comparison with (f) and (g) in the plaintiff's notice of motion dated 22nd October, 2004, as made to the Master:-

> "4. In relation to the provision of occupational therapy, physiotherapy, speech and language therapy or behavioural therapy or music therapy to the plaintiff in order to meet the plaintiff's special needs in its functional area since the coming into force of s. 6 and s. 7 of the Education Act, 1998, such documentation as may be in possession of this defendant in relation to the request for such funding, how such funding was computed and the amount of such funding actually allocated by the defendants to the Health Board."

40. On a cursory scrutiny it would seem that (f) and (g) are twins in the sense that the plaintiff's solicitor in both is seeking documentation and records in respect of what funding requests relevant to the plaintiff and the therapies required for him and his special needs were made and how these requests for funding were dealt with by the defendants. Senior Counsel for the plaintiff said that the funding aspect was a basic part of the case being made in relation to the provision of facilities recommended to be or actually provided and that it should not be onerous for the third named defendant to produce and identify such documents. From the pleadings and particulars it is clear that a bedrock part of the plaintiff's case is that appropriate resources and funding were not made

available to the Health Board to provide appropriate nurturing and therapies and treatment for the plaintiff. Regrettably I do not have before me the reasons in writing why the Master differentiated between paras. (f) and (g) but it may be that he felt that the wording of para. (f) covered adequately the request for documentation in the possession of the third named defendant in relation to requests for such funding in respect of therapies, how such funding was computed and the amount of such funding actually allocated by the defendants to the Health Board. I think that the Master was basically correct in making the order as set out in his para. 4 although his variation of the order of the theme and content of the paragraph leaves "such funding" without the prior explicit description of the relevant funding. However, having granted (f), I would have thought that it followed that (g) in the plaintiff's request should also have been granted as (g) has a similar structure to (f) and similar considerations seem to apply. Both (g) and (f) are very relevant to the issues in the case against all the defendants and one would expect there to be documents recording the liaison and correspondence between the third named defendant and the other defendants on these relevant matters. Senior Counsel for the plaintiff explained that (g) was intended to include and cover such applications and requests for funding for therapies, other than those which the Brothers of Charity in Lota provided, given at facilities which the plaintiff attended to receive education or therapies and which were not covered in (f). Thus (g) was to cover the application for funding of facilities which were not covered in the request for discovery at (f). For instance, I notice in the papers a reference to the plaintiff having been at Beaufort. Senior Counsel made it clear that he was not seeking every petty invoice or micro-document but rather the documentation in the Health Board's possession giving the broad picture of the therapies provided and the funding given or which was sought for this. He submitted that para. (g) was broader than (f) and would extend to requests for funding to improve the provision of facilities or services either at Lota House, or at other facilities attended by the plaintiff, and would encompass facilities which were not peculiarly to the benefit of the plaintiff but from which the plaintiff could have derived a benefit along with others. He further submitted for the sake of clarity that "the use of the word funding" in paras. (f) and (g) made it clear that it was not a request for "shoe box details of funding" but rather for the documentation in the third named defendant's possession or procurement which related to the general picture in respect of funding and that the drawing up of the schedule in respect of this should not be particularly onerous. He further made the point that there was a need for the plaintiff's advisers to know of any other therapies provided other than those specifically listed. The plaintiff's advisers would need to know this for the purpose of putting together the case concisely and would need to know of documents concerning other facilities and therapies of which the plaintiff had availed. He pointed out that this might well in fact be in ease of the third named defendant Health Board.

41. Counsel for the third named defendant contended that the Master's order was inappropriate in respect of (f) and that neither (f) and (g), which both related to funding, should have been allowed. She diligently referred me to two roughly comparable cases. First she referred me to the decision in *Jacqueline Downey (a Person of Unsound Mind, not so found) suing by her Mother and Next Friend, Mary Downey, Plaintiff, and the Minister for Education and Science, the Minister for Health and Children, the Southern Health Board, Ireland and the Attorney General* (Unreported, High Court, Master of the High Court, 14th May, 2002) being similar defendants as in the present case. Again this was an application for discovery to be made by the third named defendant, but differs from the present case in which as yet no application has been made against the four State defendants for discovery. In the *Downey* case the Master mentioned that he had already dealt with the plaintiff's application against the other defendants for discovery. In the *Downey* case it was contended that had the plaintiff been diagnosed correctly at an early age she could then have been given appropriate educational intervention and would now be –

1. Toilet trained,

2. Able to imitate actions and sounds, if not words,

3. Be able to dress and undress herself,

4. Be able to feed herself,

5. Be able to communicate her basic needs, either verbally or non verbally,

6. Show significant reduced obsessive and repetitive behaviour patterns.

41. The Master then went on to stress that the plaintiff was seeking damages to compensate her for the difference between her present state and the state of improvement in her lifestyle had she been educated appropriately by the defendants. The measure was not between her present state as against that of a normal healthy 30 year old. The Master concluded that the case was more likely to be decided on the correctness or otherwise of the defendant's assessment of the child's condition. If the court held that the child was not properly diagnosed, then it seemed to the Master unlikely that the court could then be asked to rule that, its conclusion on diagnosis notwithstanding, the education and health care afforded was nevertheless appropriate when such care had been based on an incorrect diagnosis. He did comment that documentation concerning education and health care may still be discoverable as probative of the facts upon which the competing diagnoses are based, rather than in the context of any dispute as to the adequacy of the care. The Master said:-

> "I am doing no injustice to the plaintiff in refusing to order discovery of documents concerning funding of care services, or training/assessment of care personnel. These are not material facts in the case concerning diagnosis or adequacy of care, in the sense that the constituents of the care actually provided will prove, or not, the plaintiff's case when the court has the benefit of expert assessment thereof. If the actual care provided was not adequate, so objectively assessed, the plaintiff does not need to prove any further fact regarding funding or training. On the other hand, if the care was adequate, there is no basis for a stand alone claim for damages on the strength of lack of funding or training: such a case is not stateable if, in fact, the care provided was acceptable following the Supreme Court ruling in the Sinnott case I will limit discovery to the period prior to the plaintiff's 18th birthday. Accordingly, I will order discovery of the third named defendant's documents in the categories (a), (b), (c), (d), (h), (i) and (j) in the plaintiff's notice of motion reworded as follows:-
>
> (a) All expert reports or assessments of the plaintiff available to the third named defendant during the plaintiff's minority,
>
> (b) The files of the third named defendant concerning the plaintiff during her minority,
>
> (c) All correspondence during the said period (as in notice of motion),
>
> (d) All school, health or care facility files concerning the plaintiff and compiled during her minority which has been copied to the third named defendant;

(h) (As drafted but limited to the period of the plaintiffs minority,)

(i) Ditto,

(j) All I.E.Ps and I.C.P.s prepared for the plaintiff prepared prior to her 18th birthday."

42. Unfortunately, I do not find *Downey v. Minister for Education and Science* (Unreported, High Court, Master of the High Court, 14th May, 2002) helpful in dealing with the present case. I merely have a note of what the Master said in that case and I do not have a copy of the pleadings or an adequate exposition and exploration of the issues joined in those pleadings. He seems to have regarded the crux of that case as being the question of misdiagnosis or wrong assessment of the plaintiff's condition. In the *Clifford* case before me both the failure to make a correct diagnosis of what was required for the education and treatment, including therapeutic treatment, of the plaintiff was clearly put in issue as was also the failure to obtain funding required for facilities for properly trained staff and for appropriate therapies and treatment and education, in the widest sense, for the plaintiff's needs. I accept the submission of Senior Counsel for the plaintiff that the issue of recommendations for the plaintiff's upbringing, and the seeking of appropriate funding for facilities and treatment are at the bedrock of the plaintiff's case against all the defendants and also his submission that the discovery to be made by the third named defendant should encompass the documents material to the issues between not just the plaintiff and the third named defendant, but also between the plaintiff and the other defendants, insofar as the third named defendant holds such relevant documentation.

43. Counsel for the third named defendant went through the paras. (a) to (l) *seriatim*. She pointed out that the Master had refined category (a) by excepting reports or assessments listed in Albert Reid's report. I have already expressed the view that in a formal affidavit of discovery it is safer for the sake of clarity that the schedule should include all such reports and assessments without exception. The first reason for this is that Mr. Reid, as the Educational Psychologist Consultant, may have been given or shown reports which have not been furnished to the plaintiff's solicitor. Secondly I deprecate the creation of a further segregation of discoverable documents which are not to be discovered because they have been furnished supposedly to experts rather than to the plaintiff's solicitor who should be in the pivotal position in the assembling of the relevant documents and should also be in control of the marshalling of the brief. This further segregation adds another complication from the point of view of the deponent of the discovery affidavit when seeking and setting out in a schedule the documents which have to be discovered. This further classification and then peculiar exemption seems to introduce unnecessary complexity. It is preferable that the deponent should list the reports and assessments *seriatim* in chronological order in the usual way, whether or not they have already been seen by Mr. Reid, as to except and exclude these would introduce a procedure fertile for the production of unintentional error by which some germane report or assessment or document related to the issues could easily be left out or forgotten or overlooked. I forbear from expounding on the obvious confusion which such an over-refinement could spawn with easy excuses for an unscrupulous or careless deponent of the discovery affidavit.

44. As to category (b), the Master refined the plaintiff's request for the files of the defendants in respect of the plaintiff to the file or files of the third named defendant upon the plaintiff. Senior Counsel for the plaintiff stated that (b) as ordered met the plaintiff's needs. Accordingly this part of the order can stand unvaried.

45. The wording in the plaintiff's motion for discovery at (c) and the wording of the Master's order in his equivalent at 3 are in the same terms, namely:-

46. All correspondence between the Defendants and the school, Local Authority, or any other body of persons whatsoever dealing with the plaintiff's educational and care requirements and/or the facilities for provision of education (including therapies) for the Plaintiff.

47. Counsel for the third named defendant contended that the Master's order at (c) is too wide and should be confined to correspondence between the third named defendant only and not the defendants. I think that the Master was correct in leaving para. (c) as drafted and not confining it to correspondence between the third named defendant and the school or other bodies mentioned. This would be too narrow as correspondence so material and confined would be likely to be incomplete, mystifying and possibly misleading. It seems likely that such a correspondence would involve letters from the other defendants and this is presumably why the Master sensibly worded the order widely. Counsel helpfully handed me in a copy of the order made by O'Higgins J. in a comparable case between *Ryan O'Hanlon (a person of unsound mind not so found) suing by his mother and next friend Patricia O'Hanlon, Plaintiff and the Minister for Education and Science, the Minister for Health and Children, the Southern Health Board, Ireland and the Attorney General, Defendants,* (Unreported, High Court, O'Higgins J. 16th February, 2004). I am fortified in the view I have taken of para. (c) by finding that in the equivalent para. 3 O'Higgins J. made an order in very similar terms in respect of

> "all correspondence between the defendants and any school, Health Board, Local Authority or any other body or person whatsoever dealing with the Plaintiff's educational requirements and/or facilities for the provision of education and care for the Plaintiff."

48. I should add that the order made by O'Higgins J. in *Ryan O'Hanlon's* case was made after a fully contested hearing which further confirms me in my view that the Master was correct in para. 3 of his order in stipulating the plural "defendants", and not the singular "defendant" or "third defendant".

49. Paragraph (d) was refused by the Master. Since the plaintiff's solicitor, at (d), was seeking discovery of "all files in relation to the plaintiff held by any school or other educational or other facility in respect of which such files are in the power or possession of the defendants", the refusal by the Master was correct and understandable as he had already granted the order at (b) and this would encompass and include the files in relation to the plaintiff described in (d).

50. As for para. (e), Senior Counsel for the plaintiff says that the Master should have granted discovery in respect of the matter in para. (e) but concedes that there are clerical errors therein and that the material documentation sought should be confined more narrowly than as drafted. He submits that discovery at para. (e) should in fact be in respect of reports of assessments or inspections of any school or other educational facility which the plaintiff has attended and at which he has received either education and care or at which he has been in receipt of therapies, which reports are in the power or possession of the third named defendant.

51. Junior counsel for the third named defendant submitted in relation to paras. (b) and (e) that a strict and narrow interpretation of the word "educational" was appropriate and would only concede that the third named defendant should have to make discovery in respect of documentation concerning therapies. I have already dealt with para. (d) on the basis that the Master was correct to regard these files as embraced by (b) namely the file or files of the third named defendant on the plaintiff. It may be helpful if I express the view that the word "educational" is a wide term and should not be confined strictly to "the three Rs" but means the

leading out from a person of their aptitudes and talents. No doubt therapies and treatments thought out and designed for the plaintiff would be devised to encourage him to make the most of his abilities and to improve his quality of life and would not be confined narrowly to bookish learning. Having considered the pleadings and in particular also the ten reasons why such discovery is required as set out in the plaintiff solicitor's letter dated 6th April, 2004 I think it is reasonable that the plaintiff should have discovery in a revised and confined form of para. (e):

> "All reports of assessments or inspections in respect of the schools and facilities where the plaintiff has received education, care or therapies being reports in the power or possession of the third-named defendant."

52. In coming to this conclusion I have taken cognisance of the issues arising in the pleadings and the reasons given in the plaintiff solicitor's letter dated 6th April, 2004 as to why such discovery is required. Lest there be confusion as to the letter dated 6th April, 2004 before me, the references are OP/CON/C742 and DC/EV/SHJR0034 and this four-page letter is from Orla Phelan to Diarmuid Cunningham and includes paras. (a) to (l) and reasons why such discovery is required set out at (1) to (10) and should not be confused with the letter of same date between the same persons threatening a motion for judgment in default of defence. In particular I have taken cognisance of the reasons given at paragraphs 3, 4, 5, 6, 7 and 8, 9 and 10. Part of the plaintiff's case is that there was inadequate provision of facilities and therapies for his particular needs and accordingly it seems to me that discovery of reports material to this plea would be relevant to the plaintiff's case in this respect. Since in practical terms the third named defendant Health Board had been acting *in loco parentis* to a large extent in respect of the plaintiff's education and therapeutic treatment, discovery of the reports on inspections or assessments of the schools and facilities in which the plaintiff has been placed by the third named defendant are very material to the contentious issues. I am conscious of para. 6 of the affidavit of the defendant's solicitor outlining the difficulty of complying with an order which is too broad and is unduly burdensome. His remarks, which were aimed particularly at para. (f), would probably be apposite in relation to para. (e), if the scope of the order was not reasonably confined. On the pleadings it is clearly important to the plaintiff's solicitor, in making the case as pleaded, to have reports on the inspections and assessments of the schools or other facilities which the plaintiff has attended and at which he received either education and care or therapies. The scope of the number of schools and facilities is limited and confined to those at which the plaintiff has attended and the search for the location of such reports should be confined to such documents in the power or possession of the third named defendant. I agree with Junior Counsel for the third named defendant that the necessity for discovery must be defined by the issues in the pleadings but it seems to me that this is a category of documents which is relevant to issues knit in the pleadings. Accordingly, I think that the plaintiff is entitled to discovery of such reports on the schools or facilities attended by the plaintiff while in the care of the third named defendant. While the particulars in the statement of claim make it clear that the plaintiff's solicitor has information to the effect that the plaintiff attended a special school at Lixnaw and subsequently a specialist facility at Scoil Triest in Lota, I do not think that the information gathered by Albert Reid, the educational psychologist, can be regarded as a substitute for the information as to the situation prevailing in such institutions which is likely to be contained in and provided by reports in the hands of the third named defendant. There can only be a limited number of such reports containing information relevant to the issues in contention and concerning the schools and facilities involved and accordingly I think it appropriate that a confined order as suggested should be made in respect of para. (e) as amended. In doing this, I have followed the suggestion made on behalf of the defendant that I should keep an eye firmly on the pleadings. I note that at para. 12 of the statement of claim there is a plea that the defendants (including the Health Board) are obliged by virtue of the provisions of Article 42.4 of the Constitution to endeavour to supplement and give reasonable aid to private and corporate education initiative and, when the public good requires it, to provide other educational facilities or institutions for the education of the plaintiff. Subsequently, it is alleged that the defendants failed to carry out any adequate and proper assessment of the plaintiff to ascertain his needs and failed to carry out an individual education programme (IEP) for the plaintiff and that the third named defendant similarly failed to carry out an individual care programme (I.C.P.) for the plaintiff. It is also alleged that they failed to provide appropriate therapies and failed to retain an adequate and proper number of properly trained personnel to cater for the plaintiff's special needs. It is specifically alleged at particular 14 that they failed to inspect either regularly, adequately or at all the initial facilities that were provided; and at 16 that they attempted to provide education to the plaintiff in an environment that was unsuitable; and at 18 that they failed to provide education in an environment where the plaintiff could have social interaction with other children; and at 20 that they failed to provide for a suitable and proper education facility available to the plaintiff on a continual basis. At particular 45 it is alleged that the defendants failed to provide any or any adequate framework throughout the State to enable education to be provided for persons with special needs to an acceptable standard and, in particular, failed to provide a framework that would enable the plaintiff to be provided with education appropriate to his needs. The reference to framework includes such basic matters as a curriculum for persons with special needs, appropriate courses and training for teachers and therapists to enable them to be trained to provide therapies for persons with special needs. I further note particular 35 is specifically in respect of the Health Board which alleges that it failed to provide sufficient resources to private institutions to enable them to recruit an adequate number of properly trained therapists and assistants to teach and deal with the plaintiff. At 42(j) it is alleged there was a failure *inter alia* to obtain from the Department of Finance sufficient funds to enable education to be provided for the plaintiff. Particulars of the plaintiff's immediate needs were also set out. Accordingly, I do not accept the submission by counsel for the third named defendant that category (e) does not arise out of the pleadings as such reports would be manifestly germane.

53. As for category (f) I had embarked above on some initial comments on (f) which was amended in para. 4 of the Master's order in relation to the provision of occupational therapy, physiotherapy, speech and language therapy or behavioural therapy or music therapy to the plaintiff in order to meet the plaintiff's special needs in the third named defendants' functional area since the coming into force of s. 6 and s. 7 of the Education Act, 1998. The order was in respect of such documentation as may be in possession of this defendant in relation to the requests for such funding, how such funding was computed and the amount of such funding actually allocated by the defendants to the Health Board. I have already above set out the defendants' solicitor's para. 6 of his affidavit taking issue with category (f). He avers that no specific category of documents is identified in para. (f) even as amended. The first point made by the defendant's solicitor is that no duty is imposed upon the third named defendant in the context of these proceedings by the Education Act, 1998. By letter dated 6th April, 2004 it was conceded on behalf of the plaintiff that the Education Act, 1998 does not apply to the Southern Health Board. However, this paragraph then importantly went on to say that:-

> "However, the Southern Health Board purports to provide therapies to persons in need of same. The claim of the plaintiff is that the Constitution protects the concept of parental choice in the provision of education. Education in this context means and includes therapies."

54. Furthermore, in the plaintiff solicitor's letter dated 26th February, 2004 at para. 1, she enclosed the report of Mr. Reid. This report helpfully sets out in readable form the plaintiff's history and how he was identified early as a child with special education needs and was referred to a special school at Lixnaw and then subsequently to a specialist provision at Scoil Triest in Lota. He reports that it would appear that no IEP was prepared at Scoil Triest and that there was an exacerbation of the plaintiff's behavioural difficulties both in Scoil Triest and on his return to his local community. There was no specialist autistic service available at Scoil Triest. He goes on to report that the plaintiff began residential placement at approximately six/seven years of age and from the documentation available he could find no evidence on the part of staff at Lota to ensure consistency of programme to carry over to the home

environment and in fact there was a significant regression in relation to communication skills. By virtue of the challenging behaviour that the plaintiff went on to develop when he went to Lota, it is clear that this was used as an excuse for the failure to provide and decision not to provide him with an appropriate education. In addition they never provided the plaintiff with the behavioural therapy which he clearly needed. It was clear that the plaintiff's behaviour deteriorated following on from the placement at Lota and it is clearly alleged that had appropriate specialist provision been available within the local area, it is likely that the plaintiff's behaviour would not have deteriorated and that he would have made significant progress in relation to communication and self help skills. It is contended that failure to address these issues has increased his level of anxiety, frustration and tense behavioural problems. At para. (c) of the reliefs sought the plaintiff seeks a declaration that the Health Board defendant in failing to provide free and appropriate therapies and care for the plaintiff, appropriate to his needs as a person/child, is discriminating against the plaintiff with respect to the appropriate therapies and care facilities vis-à-vis other children and have deprived the plaintiff of his constitutional rights pursuant to Articles 40 and 42 of the Constitution and in particular Articles 40.1, 40.3.1, 40.3.2 and Articles 42.1, 42.3.1, 42.3.2 and 42.4 and are also in breach of the plaintiff's statutory rights and are in breach of the second named defendant's statutory obligations pursuant to s. 3 of the Child Care Act, 1991 and the Equal Status Act, 2000 and the Health Act, 1970 as amended. I further note from the plaintiff solicitor's letter dated 9th August, 2004 that she informed the third named defendant's solicitor that she noted his letter of 8th April, 2003 in *Downey v. Minister for Education and Science* (Unreported, High Court, Master of the High Court, 14th May, 2002) in which he confirmed that discovery had been agreed in respect of nine aspects including: at para. 5, all documentation with respect to the training of persons to deliver care to the plaintiff since the plaintiff's date of birth; and at para. 8, all documentation in relation to the provision of instruction or training to the plaintiff's parents to enable them to communicate with the plaintiff; also at para. 9, all documentation which would establish the qualification of the teachers, carers or other persons who had been involved in the provision of care to the plaintiff in any school, crèche, playgroup or other class in which the plaintiff was placed since birth. I have not seen the pleadings in that case but the words of para. 5 and para. 9 are reminiscent of the wording in para. 8 of *Alan Clifford's* case. Furthermore para. 8 of the *Downey* case about all documentation in relation to the provision of instruction or training to the plaintiff's parents "to enable them to communicate with the plaintiff" seems to be identical with para. (k) in the present case. I also note that the plaintiff's solicitor goes on to say that Kelly J. in the *Jacqueline Downey* case ordered that in lieu of granting an order for discovery, it was agreed that the Health Board would furnish in writing to the plaintiff's solicitor full particulars of the amounts expended on the plaintiff since the date of her birth and upon what those sums were expended. This aspect was confirmed by counsel in argument. The defendants' solicitor went on to aver that he was further instructed by Deirdre Scully that it would be practically impossible for the third named defendant to comply with an order of this nature and that the application was unduly onerous, also that any document which could be relevant would not be categorised in a particular file and in order to complete the affidavit of discovery a trawl would have to be made of thousands of documents to ensure that all appropriate files have been searched. He said that this was unduly burdensome. He concluded by saying that in any event no issue arose in the proceedings which could relate to any document covered in para. (f). This last statement appears to be quite erroneous as clearly issues arise on the pleadings in respect of these funding matters. There is a plethora of allegations that the defendants failed to provide proper education, properly trained teachers and appropriate therapies for the plaintiff including, at particular 45(k), failing to obtain from the Department of Finance sufficient funds to enable education to be provided for the plaintiff. Among the 45 allegations of negligence and breach of duty and breach of statutory duty alleged against the third named defendant Health Board and its servants or agents, at particular 35 there is an allegation that they failed to provide sufficient resources to private institutions to enable them to recruit an adequate number of properly trained therapists and assistants to teach and deal with the plaintiff and, at particular 36, it is alleged that they failed to provide any or any adequate and proper incentives, financial or otherwise, to persons to entice them into such training programmes or to entice them into the vocation of providing services to persons with a disability, such as the plaintiff. Furthermore, at para. 42(j), there is an allegation of failure in obtaining from the Department of Finance sufficient funds to enable education to be provided for the plaintiff.

55. It seems clear that the failure to provide appropriate and adequate funding to provide facilities and train staff to provide for the plaintiff's special needs is at the core of the plaintiff's allegations and that particulars of the alleged failure on the part of the defendants have been carefully and comprehensively given. From the pleadings it is manifest that funding is at the core of the plaintiff's case.

56. The category of documents required has been clearly set out in both para. (f) in the plaintiff's notice of motion and also in the equivalent wording in the Master's order at para. 4 with the proviso in respect of the lack of clarity about "such funding" mentioned above. Counsel for the third named defendant submitted that paras. (f) and 4 referred to a category of documents which does not exist. This seems to be a different point from that made in the defendant solicitor's affidavit. From counsel's submission I infer that the funding is obtained on a service provider basis and not on an individual person or patient basis. Assuming that this is correct, that the funding is on a service provider basis, then the basic request is still germane. The plaintiff's solicitor is not seeking general discovery but the documentation held by the third named defendant as set out in para. (f) which was granted in a varied form by the Master in para. 4 of his order. Indeed the phrase "such documentation as may be in the possession of this defendant in relation to the request for such funding, how such funding was computed and the amount of such funding actually allocated by the defendants to the Health Board" would appear to be more appropriately in the plural "requests", and if as suggested, funding is on a service provider basis rather than on an individual basis for the various therapies, then this should ease the burden of putting copies of the relevant documents together, as documents presumably were already assembled for each category of therapy in the requests for the appropriate financial resources suitable for the necessary facilities, therapies and training of staff and engagement of qualified therapists in an appropriate environment. I think that the Master was correct in principle in making the order in para. 4 which is a variation of the plaintiff's para. (f) in the notice of motion. I do not accept that the terms of para. (f) as varied slightly would be unduly onerous on the third named defendant and it is clear that the documents covered by (f) are germane and relevant to issues about funding which are in contention on the pleadings. However for the sake of clarity, while it is arguable that what "such funding" in para. 4 implicitly refers to is funding for the therapies required, I think that the clear syntax and meaning in the para (f) as drafted carefully in the plaintiff's solicitor's letter dated 6th April, 2004 and as in the notice of motion is a clear, concise and preferable expression of what is required and should be accordingly contained in the varied order to be made by this court.

57. As for para. (g) the phrasing of this seems to me to be the twin, coming in tandem with and after (f), in that (g) is intended to cover the funding of facilities not already encompassed in (f). The wording has a broader scope than in (f) and covers "All documentation post-dating the coming into force of s. 6 and s. 7 of the Education Act, 1998 in respect of funding provided by the first and second named defendants to any of the facilities at which the plaintiff attended (and in which he received therapeutic treatment (my variation)) during any period in which the plaintiff attended any such facility together with any documentation in relation to the application for or request for such funding with the supporting documentation attached to such request and applications together with all documentation setting out precisely how such funding is computed together with details of how such funding was allocated." This would extend to requests for funding to improve the provision of facilities or services also at Lota which were not peculiarly and particularly for the plaintiff but from which the plaintiff, among others, could have derived a benefit. In view of the issues knit in the pleadings it is appropriate that orders be made for discovery of these categories of documents as set out in the paras. (f) and (g) as varied by this court.

58. Senior Counsel for the plaintiff conceded that the wording of para. (h) would be overly onerous on the third named defendant. However, he then contended that an order should be made in respect of a narrow category of "All documentation in respect of a general or policy character in the power or possession of the third named defendant Health Board relating to the standard of training or level of qualifications appropriate to the care workers or therapists charged with the care of the plaintiff since the date of the plaintiff's birth". It is clear from the pleadings that there is an issue that the defendants failed to provide sufficient resources to make the position of persons dealing with children with disabilities more attractive by way of training, remuneration, support and supervision. Details of the third named defendant's alleged failures in this respect are set out in particular 42 and also (a) to (f). There is included allegations of (a) failure to provide appropriate modules on courses for care workers and therapists (of sufficient duration) to enable them to be trained so that they can deliver education to persons with special needs, and (b) failure to provide ongoing and initial training for such care workers/therapists as exist (and who are willing to enter the special needs area) in the provision of therapies and care for persons with special needs including the plaintiff. At no. 7 in the reasons given in respect of resources allocated to the Health Board, it is stated that the Health Board similarly to the Minister has duties in relation to the allocation of resources. Accordingly it is clear that the plaintiff requires details in relation to the requests for funding and resources from the Health Board in relation to their provision of therapists; how same was calculated, whether the plaintiff was specifically identified or otherwise, how this request for resources was dealt with by the Department of Education and Science and how the monies were actually allocated and spent. I note that in *Ryan O'Hanlon v. Minister for Education and Science*, (Unreported, High Court, O'Higgins J., 16th February, 2004), O'Higgins J. included in the order at para. 7

> "All documentation which would establish the qualifications of the teachers and other personnel who have been involved with the provision of care to the plaintiff in any schools (or other educational facilities) crèches, playgroups or other classes in which the plaintiff was placed since the date of his birth."

59. Clearly there are issues in conflict between the plaintiff and the defendants in respect of the standards of training and level of qualifications appropriate to the care workers or therapists charged with the care of the plaintiff since the date of the plaintiff's birth. Accordingly I think the plaintiff is entitled at (h) to an order for discovery of the narrow category of documentation set out at the start of the paragraph dealing with para. (h).

60. As for para. (k) this was clearly covered in the pleading and is in issue and the Master was correct to make the order in his para. 5 with some slight variation of para. (k). I simply affirm this part of his order at para. 5 but preferably set out as para. (k).

61. I will hear counsel in respect of the precise terms of the order to be made on foot of these findings and in respect of the appropriate order to be made in respect of costs.