THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 57

[2018 222]

Irvine J.
Baker J.
Kennedy J.

BETWEEN/

ANDREW HALPIN

RESPONDENT/PLAINTIFF

- AND -

NATIONAL MUSEUM OF IRELAND

APPELLANT/DEFENDANT

JUDGMENT of Ms. Justice Irvine delivered on the 22nd day of February 2019

1. This is an appeal by the defendant, the National Museum of Ireland ("the Museum"), against an order of the High Court (Murphy J.) dated the 1st May 2018.

2. By notice of motion dated the 23rd October 2011, the defendant applied for an order pursuant to Ord. 31, r. 12 of the Rules of the Superior Courts requiring the plaintiff to make discovery of "all documentation concerning, evidencing or relating to the plaintiff's mental health including but not limited to any of the following; stress; pressure; anxiety; depression and counselling under gone by him including GP and other clinicians' consultant notes and reports and counselling notes to cover the period of 1st January, 2005 to date."

3. By her order, the High Court judge directed the plaintiff to swear an affidavit making discovery of the above-described "category (vi)" documentation. Somewhat unusually, she further required that this affidavit and the documents produced thereunder "be sealed and placed on the Court file to be available to the trial court in respect solely of the issue of remedy and depending on the outcome of the trial".

4. This dispute in respect of discovery occurs in the wider context of the plaintiff's claim in his substantive proceedings, which have yet to be heard, that he was suspended unlawfully from his employment by the defendant, and that he should not be required to undergo medical assessment at its insistence.

Background

5. The plaintiff has been employed by the defendant and its predecessor since 1994. He currently holds the office of Assistant Keeper of Irish Antiquities.

6. In 2006, the defendant conducted an investigation into a complaint of sexual harassment against the plaintiff. It is not in dispute that, as a result of this investigation, the plaintiff was found guilty of sexual harassment and was subject to the imposition of certain sanctions, including the loss of salary increments for a three-year period and a requirement to undertake counselling. According to the replies to particulars, dated the 19th May 2017, the plaintiff attended counselling from 2006 until approximately 2011.

7. In 2015, a further complaint of sexual harassment against the plaintiff was made by an intern to management. This coincided with a complaint from another source regarding material on the plaintiff's work computer, which consisted of several hundred images of tall women, some of which had been digitally altered to make the women seem taller.

8. An investigation was undertaken on the part of the defendant into these events in 2016. The intern who had made the complaint of sexual harassment did not participate in this investigation. Its outcome was that the plaintiff was directed to have no physical content with his colleagues beyond a normal handshake; that he was not to work alone with female colleagues/interns; that his internet access was to be withdrawn with the exception of a small number of official websites; that he was to seek professional assistance from the employee assistance programme. It was envisioned that the plaintiff would be subject to quarterly review meetings regarding his work performance, however these meetings did not materialise, nor was the plaintiff's internet access ever in fact restricted. The computer images were not deemed to be pornographic.

9. It is perhaps worth noting that around this time, and in particular since the appointment of a new Board to the defendant in or around mid-2016, the defendant had been subject to some media scrutiny, with several reports appearing in the media alleging a long-standing dysfunctional working environment. In late 2016, the Board undertook a survey of wellbeing amongst its employees which found very low levels of morale and a lack of trust in management. On foot of these findings, the Board sought a report from management on all human resources issues, which was due for discussion at a board meeting on the 16th March 2017.

10. On the 16th February 2017, an article appeared in the Irish Independent newspaper under the headline "Man keeps job at Museum despite sexually harassing colleague". On the following day, the same newspaper published an article titled "National Museum Board 'urgently examining' sex pest case". The plaintiff was not named in these articles. However, it is common ground that the articles referred to him and in particular the complaint of sexual harassment made against him in 2006. Further, the plaintiff contends that he was identified as the subject of the articles on social media.

11. On the day of the publication of the second article, the 17th February 2017, the plaintiff attended a meeting with Raghnall

O'Floinn, the Director of the Museum, at a Dublin hotel. At this meeting, it appears that the plaintiff was asked to take a leave of absence on full pay, and told that he would otherwise be suspended. The plaintiff agreed to take leave with pay and confirmed this by a letter to Mr O'Floinn on the same date. A number of days later, the plaintiff changed his mind. He considered that he had been pressured into taking leave, and so by email he revoked his decision and indicated his decision to attend work on the 1st March 2017. In his email, he rejected the reason which had been proffered for his placement on leave, namely that the stress of the media coverage may cause him to again engage in behaviour which would place his colleagues at risk, and suggested that the true reason for the decision was the publication of the article in the *Irish Independent* on the 16th February 2017.

12. On the 28th February 2017, Mr O'Floinn replied to the plaintiff, reminding him that the complaint investigated in 2006 was not the only complaint made against him, and warning him that should he attend for work on the 1st March he would be formally suspended. Following a further exchange of correspondence, Seamus Lynam, the Head of Operations of the Museum who was deputising in the absence of the director, sent an email formally notifying the plaintiff of his decision to suspend the plaintiff on full pay with immediate effect, pending a review by the Board of all human resources matters, and directing that he should not attend work. In his email, Mr Lynam set out the reasons for his suspension of the plaintiff in the following terms:-

> "As you are aware there has been adverse negative publicity about the NMI in the national media in the last number of weeks. In particular, and while you have not been named, the Irish Independent has published two articles which are directly related to you. I am also aware that you have been made aware of comments made on-line.
>
> In light of their contents, I must consider what you believe is best for both of you and all staff within the NMI. I have not taken this decision lightly, however, having read the investigation reports into the two allegations of sexual harassment made against you, I note that in the report prepared by [names of investigators] you indicated that your behaviour was linked to stress and a level of depression. I have no doubt that the publication of these articles will by their very nature cause you stress and anxiety and therefore, I consider it necessary to suspend you in order to prevent a repetition of the conduct previously complained of and to protect individuals at risk from such conduct."

13. The situation of the plaintiff, who remained suspended on full pay, came up for consideration at a meeting of the Board on the 16th March 2017. On that date, the Board resolved that it would require the plaintiff to undergo medical assessment by a forensic psychiatrist and clinical psychologist. This decision was conveyed to the plaintiff in a letter dated the 20th March 2017, wherein the names of the proposed medical assessors were furnished and the plaintiff advised that he would remain suspended until such time as those assessments had been carried out. In its letter, the Board requested the plaintiff to confirm that he would participate in the proposed assessments and, where necessary, would allow the appointed specialists access to his own medical advisors. The plaintiff, on receipt of the aforementioned letter, objected to the request made by the Board that he should undergo medical assessment and further objected to any information concerning his health being passed to the named specialists. On the 4th April 2017, the plaintiff issued proceedings against the Museum by way of plenary summons in which he sought nine declaratory reliefs, three injunctions and damages under ten headings. Of particular relevance to the present appeal in relation to discovery are the equitable reliefs sought by the plaintiff, which include, *inter alia*, a declaration that his suspension is without lawful authority, a declaration that the Museum is not entitled to require him to undergo assessment by a clinical psychologist or consultant psychiatrist and that it is not entitled to require him to permit access to his own medical advisers for such purpose. I will return later to refer to a number of other reliefs pleaded on the plaintiff's behalf.

14. In its defence delivered on the 13th July 2017, the defendant denied that its decision to suspend the plaintiff was unlawful. At para. 25, it pleaded that these decisions were lawful by virtue, *inter alia*, of:-

> "(a) the Defendant's duties pursuant to Health & Safety legislation and in particular pursuant to section 23 of the Safety, Health & Welfare at Work Act, 2005;
>
> (b) the contractual and legal powers available to the Defendant including by virtue of the power contained in section 13(1)(b) of the Civil Service Regulation Act, 1956 as amended; and
>
> (c) the implied power of the Defendant contained in the contract of employment."

The defendant, at the same paragraph, proceeded to list 22 particulars in support of this plea.

High Court judgment

15. As aforementioned, the matter came before Murphy J. in the High Court in the context of the defendant's application for discovery of category (vi) documentation, which is described as:-

> "all documentation concerning, evidencing or relating to the plaintiff's mental health including but not limited to any of the following; stress; pressure; anxiety; depression and counselling under gone by him including GP and other clinicians consultant notes and reports and counselling notes to cover the period of 1st January, 2005 to date."

16. In her judgment, Murphy J. held that the requested medical records were not relevant to, or necessary for, the fair disposal of the core issues. She explained that:-

> "In defending the plaintiff's claim the defendant will have to justify the actions taken on three specific dates by officers of the defendant and by the board of the defendant, *based on the knowledge which each had at the time of their respective decisions"* (emphasis provided).

The High Court judge further found that, given that the contents of the medical records sought were not known to the decision makers at the material times, they could have had no possible bearing on the decisions made. Accordingly, she held that it would avail the defendant nothing to now discover these medical records which might provide some ex post facto justification for the impugned actions, and so the requested documents were immaterial to the core dispute.

17. However, the High Court judge did not conclude her analysis there. At para. 16, she explained that, in light of the fact that the plaintiff was seeking equitable relief in the form of, *inter alia*, an injunction restraining the defendant from requiring the plaintiff to undergo psychiatric and psychological assessment, it was appropriate to order discovery of the medical records, which would be sealed and only used in respect of the issue of remedy. This concluding section, which is central to a cross-appeal on the part of the plaintiff, warrants quotation in full:-

> "In his pleadings, the plaintiff has sought equitable relief in the form of declarations and injunctions. In particular, the

plaintiff seeks a perpetual injunction restraining the defendant from requiring him to submit to psychiatric and psychological evaluation. In the event that the defendants are unsuccessful in their defence of the plaintiff's claim that he is unlawfully suspended, the court of trial will be called upon to exercise its discretion as to the reliefs it will afford the plaintiff. Should that eventuality arise then it appears to this Court that the court of trial in determining the appropriate remedy should have available to it all of those documents relating to the plaintiff's mental health which are now sought by the defendant on discovery. In determining whether or not such injunctive relief should be granted, the court of trial, if only on the basis of the principle that *he who seeks equity must come with clean hands*, should have access to these medical mental health records. The challenge for the Court lies in ensuring that the medical mental health documentation is available if required, without giving the defendant a potentially unfair advantage in the conduct of the substantive action. To achieve this aim, the court pursuant to its inherent jurisdiction proposes to make the following order:

> The court will direct the plaintiff to make discovery on oath of all documentation concerning, evidencing or relating to the plaintiff's mental health… [lists category (vi) documentation]…
>
> To ensure that the defendant will not obtain any unfair advantage by having sight of the discovery and the documents prior to the hearing, and to avoid the possibility that the defendant's evidence on the substantive issue might unwittingly be contaminated by having sight of the plaintiff's mental health history, the court directs that the affidavit of discovery and the documents produced are to be sealed and placed on the court file. In this way they will be available if required by the court of trial in respect solely of the issue of appropriate remedy. Depending on the outcome of the claim, the court of trial will decide the ultimate use to which these documents may be put. The court realises that this is an unusual form of order, but considers that it is one that is necessary and appropriate, for the fair disposal of the entire matter."

Legal principles

18. The starting point when considering an application for discovery is Ord. 31, r. 12 of the Rules of the Superior Courts. From this rule, and the case law which built on it, it is well established that a judge must have regard to three principles when considering an application for discovery: relevance, necessity and proportionality.

19. According to Delany & McGrath, *Civil Procedure in the Superior Courts* (3rd ed., Round Hall, Dublin, 2018) at p. 402, the requirement of relevance is "the touchstone of the discovery process". Order 31, rule 12(1) of the Rules of the Superior Courts permits discovery of documents that are in the possession, power or procurement of a party "relating to any matter in question" in a cause or matter. The classic statement of the test of relevance may be found in the judgment of Brett L.J. in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55:-

> "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." (Emphasis in original)

This statement has been approved and applied on many occasions in this jurisdiction, including by Fennelly J. in *Ryanair v. Aer Rianta* [2003] IESC 62, [2003] 4 I.R. 264, who further described relevance as "the primary requirement for discovery".

20. It is well established that relevance must be determined solely by reference to the pleadings. This principle was considered and approved by this Court in *BAM PPP PGGM Infrastructure Cooperatie UA v. National Treasury Management Agency* [2015] IECA 246, where it was stated at para. 35 that the court "does not possess a power to engage in a roving investigation of the relationship between the two parties or of the circumstances that gave rise to the proceedings".

21. Furthermore, as was stated by Murray J. in *Framus Ltd. v. CRH plc* [2004] IESC 25, [2004] 2 I.R. 20 at p. 34, an applicant is not entitled to discovery "based on mere speculation or on the basis of what has traditionally been characterised as a fishing expedition". In his judgment in *Hartside Ltd. v. Heineken Ireland Ltd.* [2010] IEHC 3, Clarke J. described the requirement to balance the need to provide a party who may have a legitimate claim with access to information only available to its opponent in order to fully plead and ultimately substantiate that claim, against the need to prevent a party from being able to have a wide range of access to its opponent's documentation by making a mere allegation. It was clear that Clarke J. felt that the requirement that pleadings go beyond a mere allegation applies with particular force where the documents are confidential, as at para. 5-9 he emphasised the "undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information." Accordingly, and as was stated in the judgment of Ryan P. in *O'Brien v. Red Flag Consulting Ltd.* [2017] IECA 258, it is legitimate to seek discovery to support or advance a case, but not in order to formulate or make a case which does not otherwise exist.

22. The second principle is that an order for discovery should not be made if it is not necessary either for disposing fairly of the cause or matter or for saving costs, as stated at Ord. 31, r. 12(5) of the Rules of the Superior Courts. In *Ryanair v Aer Rianta*, Fennelly J. stated that the concept of "litigious advantage", which had previously been used by Kelly J. in *Cooper Flynn v Raidio Telefis Eireann* [2000] 3 I.R. 344 and in English authorities referred to therein, could be of some guidance in relation to the meaning of the requirement of necessity. In the same case, Fennelly J. also held that:-

> "[The court] should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation."

23. The third principle, albeit that it is not explicitly referred to in Ord. 31, r. 12, is proportionality, to which reference is consistently made in the case law. In *Framus Ltd. v. CRH plc*, Murray J. stated that:

> "there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial."

24. The principle of proportionality is playing an increasingly large role in the determination of discovery applications. In his judgment in *IBB Internet Services Ltd. v. Motorola Ltd.* [2015] IECA 282, Hogan J. observed that it is necessary for the court to ensure that the discovery ordered does not overwhelm the action. He identified a number principles applicable to discovery applications, one of which being that where discovery potentially imposed an "unusual scale and burden" on a party, the court must examine "whether what is sought is likely to produce genuinely useful evidential material".

25. In *Boehringer Ingelheim Pharma GmbH v. Norton (Waterford) Ltd.* [2016] IECA 67, Finlay Geoghegan J. noted that a relevant consideration for a judge considering whether to order discovery of relevant documents would be whether the party against whom the discovery is ordered would be afforded a litigious advantage in the absence of discovery. In addition, she suggested that the court ought to consider the grounds of objection raised by the party against whom discovery is sought, including, where relevant, the number of documents sought, the costs of making discovery and potential confidentiality issues. The issue of confidentiality was further considered by Clarke J. in his judgment in *Independent Newspapers (Ireland) Ltd. v. Murphy* [2006] IEHC 276, where he stated that, although confidential information clearly must be disclosed if it would otherwise give rise to a risk of an unfair result in the proceedings, it is appropriate to interfere with the right to confidence "to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing." Indeed, McGovern J., in his judgment in *Flogas Ireland Ltd. v. Tru Gas Ltd.*, developed on this by observing that "a party may be required to specify legitimate bases for seeking information which is of a confidential nature because of the undesirability of allowing a mere allegation to give rise to an entitlement to access such information."

26. While it is plainly the case that documents found to be relevant will tend to be discoverable, it is also clear that proportionality must now be considered under its own heading, separate to relevance and necessity. As was noted by Kelly J. in his judgment in *Astrazeneca AB v. Pinewood Laboratories Ltd.* [2011] IEHC 159, the public interest in the administration of justice "is not confined to the relentless search for the perfect truth." Nonetheless, it is not sufficient for a party to baldly assert that the discovery sought is disproportionate, indeed it appears from the judgment of Costello J. in *Irish Bank Resolution Corporation v. Fingleton* [2015] IEHC 296 that the onus of proof rests on the party seeking to resist discovery to prove that it is unduly burdensome.

Appellant Submissions
27. In appealing the order of Murphy J. of the 1st May 2018, the Museum essentially contends that the High Court judge erred in failing to order discovery in the conventional way. Thus, whilst it submits that the High Court judge was correct in ordering discovery of the category (vi) documentation, it takes issue with the *form* in which the order was made, *i.e.* that discovery would be sealed. Without prejudice to the foregoing, insofar as the respondent in his cross-appeal claims that no discovery ought to have been made, the appellant submits that the High Court judge was correct in ordering sealed discovery.

28. In its written submissions, the appellant argues that the category (vi) documentation is of "central relevance" to:-

> (1) the core issues to be tried, i.e. the lawfulness of the suspension and the requirement that the respondent under psychological and psychiatric assessment;
>
> (2) the question of the final orders which the trial judge might make.

29. The appellant argues that the unusual form of the order is contrary to Ord. 31, r. 15 of the Rules of the Superior Courts which provides that "every party to a cause or matter" shall be entitled to inspect the documents referred to in his opponent's affidavit of discovery. In this respect it relies upon the statement of Ryan P. at para. 20 of his judgment in *O'Brien v. Red Flag Consulting* [2017] IECA 258 that:-

> "The overriding principle is that discovery is a procedural device designed to promote fairness in litigation by making relevant documents equally available to the parties of the action."

30. In relation to the relevance of the discovery to the core issues, the appellant submits that, insofar as the respondent makes the case that it was unlawful for the appellant to require him to undergo medical examination, it is implicit that he contends that he has been fit to work at all times during the currency of this dispute. The appellant argues that the medical records sought have a clear bearing on the question of the respondent's fitness for work. Consequently, it says, the refusal of the High Court judge to allow the appellant to view these documents confers an unfair evidential advantage on the respondent at trial, and additionally impedes the ability of the appellant to prepare for trial.

31. It must be said that, at the hearing of the matter, the appellant appeared to pursue less enthusiastically the argument that the desired discovery was relevant to the core issues to be tried. Instead, counsel for the appellant, Mr Quinn SC argued forcefully that the discovery sought was relevant and necessary to determine the plaintiff's right to the particular relief claimed in his pleadings. In particular, the appellant draws attention to two aspects of the reliefs sought.

32. First, it submits that the reliefs taken as a whole are capable of having the effect of a mandatory order directing that the appellant allow the respondent to return to work. The appellant places reliance upon *Carroll v. Bus Atha Cliath* [2005] I.R. 184, where Clarke J. in his judgment stated that the existence of "a jurisdiction to make a mandatory order which would have the effect of entitling an employee to return actively to work" was "open to significant doubt", and that, even if such a jurisdiction existed, it could only be exercised "where it was clear that no other difficulties could reasonably be expected to arise by virtue of making an order." The appellant argues that, in light of the judgment of Clarke J., there is necessarily a step subsequent to a finding that a suspension was unlawful, where a judge must consider if they will, in light of any "other difficulties" direct that the employee be returned to work. It appears to be the case of the appellant that, upon such an inquiry, the trial judge would be entitled to consider whether the respondent was in fact fit to be returned to work, and that in this respect the category (vi) documentation would be of great relevance.

33. Second, the appellant notes that the respondent in its statement of claim seeks equitable relief in the form of:-

> "An Injunction restraining the Defendant its servants or agents from requiring the Plaintiff to attend either neuropsychological or psychiatric assessment."

It argues that, in circumstances where it will call upon the trial judge to exercise his or her discretion to make an order in the above terms, the trial judge could not possibly make such an order without having sight of the relevant mental health records of the respondent. The appellant emphasises that the respondent has previously stated, during the course of the 2006 investigation, that stress is a factor which increases the likelihood of his inappropriate behaviour. Consequently, it says, insofar as the respondent seeks a perpetual injunction against psychological and psychiatric examination, the medical records have a clear relevance and indeed it would be appropriate for such an order to be made in ignorance of them.

Respondent Submissions
34. In both written and oral submissions, the respondent defends the finding of the High Court judge that the disputed discovery was neither relevant to, nor necessary for, the fair disposal of the core issues in the claim. He submits that it is unclear why the appellant regards the medical records as central to its preparation for trial, in circumstances where the relevant issue to be tried is not

whether, generally, he was fit to attend work, but instead whether the actions taken by the appellant, in suspending him and in requiring him to undergo medical assessment, are lawful. The respondent argues that the lawfulness of these decisions must be judged with respect to the information that the appellant had at the time. Accordingly, it would avail the appellant nothing to discover his medical records, as it was not aware of their contents at the time it made the disputed decisions.

35. Insofar as the appellant relies upon the relevance of the category (vi) documentation to the issue of remedy, which relevance is in any case denied, the respondent rejects the implication that remedy can give rise to a discrete issue for the purpose of a discovery application. At the hearing of this matter, counsel for the respondent, Mr. Callanan SC, argued that discovery should be confined to the core issues to be tried, namely whether the decisions of the appellant to suspend the respondent and to require him to undergo medical assessment were lawful. Discovery beyond these issues, grounded solely on the matter of remedy, would in his submission invite the trial court to embark on an entirely separate inquiry into whether the respondent was, in a general sense, fit for work. This, he says, would exceed the remit of the trial court, under which it ought only to give judgment on the merits of the claim that is pleaded, and not on the situation more generally.

36. The respondent emphasises that, unlike in *Carroll v. Bus Atha Cliath* [2005] I.R. 184, the plaintiff has not been dismissed. Accordingly, it is submitted, whatever discretion a trial court might have in relation to equitable relief must exist "within a narrow band". Indeed, he submits that "it would only be in the most exceptional circumstances that where it was established that an employee or office holder was wrongfully suspended, that a court would refuse to restrain that suspension." It would be deeply unfair, he argues, if it were open to the appellant, upon a finding that the suspension was unlawful, to rely upon substantially the same grounds to urge a court to then exercise its discretion to withhold injunctive relief restraining that which has been held unlawful, namely the suspension.

37. Finally, the respondent submits that while the appellant's inability to demonstrate necessity and relevance should be fatal to its application, the discovery request is also not proportionate. In written submissions, it is contended that the appellant's request is:-

> "a fishing expedition in that [it] is hoping to acquire documentation that would retrospectively justify its actions without any basis for believing that any such documentation exists and more fundamentally without being able to explain how it could ever rely on such documentation to retrospectively legitimise its actions."

In circumstances where a large quantity of highly personal information is sought, the respondent submits that a "speculative" discovery request, which seeks to abuse the entire process, cannot be justified upon the application of a proportionality test.

Discussion and decision
38. As the submissions made on behalf of the appellant differentiate between the core issues in the proceedings and those issues likely to arise for the court's consideration if the respondent succeeds in establishing that he was wrongly suspended, I will briefly set out what appear to me to be, first, the core issues and, second, the issues concerning the relief to be afforded to the respondent should the core issues be determined in his favour.

Core Issues
39. The principal issue to be decided at the trial will be whether or not the respondent's suspension was, having regard to the prevailing circumstances, justified and lawful. The second core issue will be whether or not the appellant, in the prevailing circumstances, was entitled to require the respondent to attend for psychological and psychiatric review on the terms and for the purposes set out in its letter of the 16th March 2017, an issue which is not wholly divorced from the principal issue.

40. On the hearing of the appeal, counsel for the appellant did not formally "run up the white flag" on the contention that the respondent's medical records were necessary and relevant to its defence concerning either of these issues. However, he did not advance any legal argument to demonstrate that the High Court judge had acted otherwise than in accordance with the prevailing principles when she concluded that the said records were not relevant to those issues and that the appellant should not be entitled to access them for the purposes of seeking retrospectively to justify its actions.

41. In light of the manner in which the appeal was pursued, there is little need to engage with the reasoning of the High Court judge which led her to conclude that the respondent's medical records were neither necessary nor relevant to the proper and just determination of the aforementioned issues. She was clearly correct in her conclusion that, in circumstances where the appellant was not aware of the content of the respondent's medical records either at the time when he was suspended or at the time he was notified of its requirement that he submit to psychiatric and psychological assessment, those records could never be relevant to the issue as to whether or not the appellant's actions were justified or lawful. Either there was or was not evidence or other good reason to justify the decisions taken by the Board of the Museum.

42. I am satisfied that the High Court judge correctly categorised the discovery, insofar as it was sought for the purposes earlier described, as a classic fishing expedition which might result in the improper use of the respondent's medical records for the purposes of providing "*ex post facto* justification for its actions". That such an exercise had been the intention of the appellant in seeking discovery of the respondent's medical records is not in doubt as is clear, for example, from ground no. 7 in the notice of expedited appeal wherein it is claimed that the failure of the High Court judge to order discovery had impaired its "ability to properly instruct expert witnesses in advance of the trial of the proceedings". Indeed, in my view, counsel for the appellant was wise not to pursue the argument before this Court that it was entitled to obtain the records so that they could be given to medical experts who might then be called to give evidence, which would presumably be directed at lending retrospective support to the decision to suspend the respondent. At para. 25 of its defence, the appellant has sought to justify the lawfulness of its decision to suspend the respondent. Accordingly, it will be for the appellant, based upon the circumstances known to it at the time of the suspension to justify its action. Knowledge of what was in the respondent's medical records played no part in the appellant's assessment or decision and accordingly could not be relevant to whether the decision made was justified and lawful in the circumstances that pertained.

What issues concerning the relief claimed by Mr. Halpin arise from the pleadings?
43. The appellant also argues that the High Court judge, having decided that the respondent's medical records might be necessary or relevant to the *relief* claimed should he succeed on the core issues, erred in law in failing to order unconditional discovery of those records. Accordingly, it is necessary to clarify some aspects of the relief sought in the plenary summons and then to consider what is pleaded in the defence concerning that relief. This is an important exercise because the issues to be determined in any proceedings are defined by the pleadings and discovery can only be ordered where it is established that it is both necessary and relevant for the proper determination of those issues.

44. Before moving to consider those reliefs which I consider to be central to the substantive issues in these proceedings, I would comment that, to be frank, and without wishing to influence or restrict the view that might be taken by the trial judge, a number of

the declarations sought, such as those pleaded at paras. 5 and 6 of the general indorsement of claim, are in my view quite unnecessary. After all, if the respondent's suspension is declared to be unlawful, does it not follow that he must be considered to be in what I might term as "unsuspended" employment? And, given that the appellant accepts that at the time he was suspended he was carrying out his role without complaint and with no allegations of misconduct pending against him, would it not seem to follow that he would have to be considered to be in good standing? However, I shall not further dwell on the nature of these declarations as, in my view, they are entirely peripheral to the substantive issues in the proceedings and could never, for reasons that I will later refer to, provide a basis for requiring the respondent to discover his past medical records.

45. I think it is fair to say that from the general indorsement of claim it is not as clear as it might have been that the declarations sought at paragraphs 2, 3 and 4 are directed solely to the appellant's request of the 16th March 2017 that the respondent agree to undergo psychological and psychiatric assessment and for that purpose would permit the appellant's experts to have access to his medical advisors. Likewise, it is important to clarify that the injunction sought at para. 12 is claimed for the sole purpose of restraining the appellant from persisting with the demand made in its letter of the 16th March 2017 that the respondent attend for psychological and psychiatric assessment.

46. Not only has it been confirmed by counsel for the respondent that the extent of the declaratory and injunctive relief sought at paragraphs 2, 3, 4 and 12 of the general indorsement of claim is as I have just outlined, but counsel for the appellant has also confirmed that the relief sought in those paragraphs was always understood to be so restricted. The declarations and injunctions claimed were never intended to tie the hands of the appellant in relation to future events or circumstances as might arise concerning the respondent's conduct. It is perhaps not unsurprising that counsel for the respondent accepts that no court could be asked to make an order that would permanently deny an employer the right to require an employee to undergo psychological and/or psychiatric assessment. Such an order could have the effect of precluding that employer from discharging their common law and/or statutory duties to not only that particular employee but also to other employees and possibly members of the public.

47. Notwithstanding that the declarations and injunctions pleaded were never intended to be so, it is clear that the High Court judge, in directing the respondent to make discovery of his medical records, albeit it on the restricted basis earlier referred to, was influenced by her belief that the injunction which he sought to restrain the appellant from requiring him to attend for psychological or psychiatric review, was to be perpetual in nature. If she had understood that the relief claimed was so restrictive, I consider it highly unlikely that she would have made the discovery order which she did.

48. The basis upon which the respondent seeks the relief claimed in his plenary summons is set out in considerable detail in his statement of claim. Following the receipt by the appellant of the respondent's replies to its notice for particular dated the 19th May 2017, a full defence was delivered. The thrust of the defence is that because of information in its possession concerning the respondent's past conduct, as was known from investigations into his conduct in 2006 and 2016, the Board considered it likely that adverse negative publicity about the appellant in the newspapers and online would likely cause him stress and that this would foreseeably result in him engaging in inappropriate and unacceptable behaviour which would place members of the public and other employees at risk. His suspension was in such circumstances both justified and lawful.

49. Insofar as the appellant seeks to set aside the conditions imposed by the High Court judge on the discovery order based on a submission that the respondent's medical records are necessary and relevant to any issues to be determined concerning the relief to which he claims to be entitled should he succeed on the core issues, it is necessary to identify precisely what issue or issues concerning that relief may be said to arise from the pleadings. Perhaps it is to state the obvious, but, in the context of the pleadings which I am about to discuss, I consider it important to highlight the basic principle that any party, whether they be plaintiff or defendant, is confined at trial to making the case which they have pleaded. And, as is well established and understood, this restriction exists because the principles of natural and constitutional justice demand that each party should know in advance the case which they are expected to meet.

50. There are only two paragraphs in the defence which might be said to address the remedies to which the respondent might be entitled should he succeed on the core issues. These are paras. 48 and 49 of the defence. Given that the High Court judge was only entitled to order discovery of the respondent's medical records if the appellant had established that they were both necessary and relevant to the proper and fair determination of an issue identified in the pleadings, I shall set these paragraphs out in full:-

> "48. Without prejudice to any other plea herein, this Honourable Court ought to exercise its discretion against granting the equitable reliefs sought by the Plaintiff, having regard to the Plaintiff's unreasonable refusal to engage with the Defendant's reasonable request that he attend for medical assessment.
>
> 49. Without prejudice to any other plea herein – and whilst it is not clear from the Plaintiff's case as pleaded that he is seeking such relief – if the Plaintiff seeks what is in reality mandatory injunctive relief, the same should be declined on the basis what (sic) it would constitute specific performance of a contract of service. Further or alternatively, in the circumstances herein, the Defendant respectfully contends that the granting of such relief would not be appropriate."

51. Insofar as para. 48 of the defence is concerned, whether the appellant's demand that the respondent submit to psychological and psychiatric assessment was or was not unreasonable could never provide a basis upon which the court might refuse the respondent relief that might be described as equitable. As already stated, one of the core issues which the court will have to determine is whether that demand was or was not justified or lawful. If the court decides that the demand was justified, given the respondent's refusal to comply therewith, he will have no entitlement to the relief claimed. If, on the other hand, the court concludes that the request was unjustified and/or unlawful, that is the end of that issue. The respondent could not in such circumstances be considered unreasonable for failing to comply with what the court concluded was an unjustified or unlawful demand. Thus, it is impossible to see how this plea could be relied upon as one which raises an issue in respect of which the respondent's medical records could be considered to be both necessary and relevant.

52. There are two separate aspects to para. 49 of the defence. The first is the plea to the effect that the relief sought by the respondent should be declined because it bears the hallmarks of a mandatory injunction that requires specific performance of a contract of service. In my view, this is a purely legal issue and one which, should the appellant wish to pursue it in the event that the respondent establishes that his suspension was unjustified and unlawful, will be determined following such submissions as may be made by the parties and the court's consideration of the prevailing authorities. It is not an issue that falls to be considered in the context of what may or may not be contained in the respondent's medical records. That this is so is clear from para. 21 of the reply to defence in which it is specifically pleaded that an order lifting the suspension would not amount to an order for specific performance of a contract of service given that in such circumstances the respondent's contract of employment would remain extant.

53. Accordingly, I am satisfied that the issue raised by the aforementioned plea provides no lawful basis for the appellant's claimed

entitlement to discovery of the respondent's medical records which are clearly neither necessary nor relevant to the resolution of that issue. They are of no conceivable relevance to the issue as to whether or not the relief sought, if granted, would amount to an order for specific performance of a contract for service.

54. As to the second aspect of the plea at para. 49 of the defence, once again, this plea arises for consideration only if the respondent succeeds in establishing that his suspension was unjustified and unlawful. Rather extraordinarily, the appellant appears to contend that even if it is found to have acted unlawfully in suspending the respondent that "in the circumstances herein" any relief claimed should be denied him because it would "not be appropriate". This plea clearly flags the intention of the appellant, should it be found to have acted unlawfully in suspending the respondent, to nonetheless argue that he should be denied the relief to which he would otherwise be entitled.

55. What is striking about the aforementioned plea, confined as it is to 21 words at the end of a nine-page defence, is that it provides the respondent with not the slightest hint or clue as to the facts and circumstances upon which the appellant intends to rely to achieve the grave and serious outcome signposted. Whilst it is clear that the words "in the circumstances concerned" must refer to facts known to the appellant at the time it sanctioned this challenge to the relief claimed, it is striking that none are pleaded in order that the respondent might understand why, having established the unlawfulness of the appellant's conduct, he should be denied the said relief.

56. It seems to me reasonable to infer from the highly unusual claim made in the last sentence of para. 49 of the defence that, as matters stand, the appellant knows of no circumstances which might justify the court withholding from the respondent the relief claimed but is hopeful that if it obtains access to his medical records before the final order is made it might find something it could use to argue that the court should refrain from acting upon any illegality found against the appellant. It is difficult to conceive of a more clear and offensive example of an fishing expedition, especially when one considers that the discovery sought in this case is destined to allow the appellant access to information and documentation of a seriously confidential and private nature.

57. It follows from what I have earlier stated that the Museum's appeal must fail for the fundamental reason that the plea contained in the last sentence of para. 49 of the defence raises no valid issue as to the entitlement of the respondent to the relief which he claims should he succeed on the core issues. Without a valid issue to be determined, discovery does not arise. This is because the appellant does not set out the facts which, if established, would provide a legal basis for the court declining the relief claimed, as is required by O. 19, r. 3 of the Rules of the Superior Courts and the rules of natural justice. I would here observe that, where a court is to be urged by a defendant to deny a plaintiff the relief to which they would otherwise be entitled having regard to the court's finding of wrongdoing on the part of the defendant, the rules of natural justice and fair procedures would demand that such a defendant make known all of the circumstances upon which it proposes to rely for such purpose. This must be done at the pleadings stage of the proceedings. It is not open to a defendant, at the conclusion of the proceedings wherein it has been found to have acted wrongfully and where equitable relief is sought by way of declaration or injunction, to ask the court to carry out some type of inquiry into the conduct of the plaintiff to determine whether the relief sought should be granted. If a defendant wishes to make the case that, regardless of their own wrongdoing, no order should be made against them, it is for them to set out chapter and verse the facts they intend to prove to secure that objective. Only then can the plaintiff know the case that they will have to meet.

58. As already stated, the purpose of pleadings is to allow the court and the parties to know the issues that will have to be determined at the trial. To this end the parties must set out all of the facts necessary to formulate any claim or defence which they propose to advance. This is so that their opponent will not be taken by surprise and disadvantaged at the trial of the action by the introduction of materials which could not be fairly be anticipated from the pleadings. Thus, the appellant was obliged to set out with particularity those facts which, if established, would entitle it to argue that the relief sought by the respondent should not be granted notwithstanding a conclusion that his suspension was unlawful. It has failed to meet this requirement. Accordingly, no issue is identified for the court's consideration by the plea advanced in the last sentence of para. 49 of the defence with the result that this particular plea could never be relied upon to support any application for discovery.

59. I regret to say that, in making the order which she did, the High Court judge, in my view, failed to give due consideration to the issues actually identified in the pleadings. I say this because in her judgment she refers to the court potentially adjudicating upon whether the respondent would be entitled to the injunctive relief which he seeks in light of the principle that "he who seeks equity must come with clean hands".

60. However, in its defence, the appellant does not claim that the respondent should be denied the injunction which he seeks because he invoked the court's jurisdiction at a time when he had unclean hands. Such a claim is a very serious one and would require the appellant to set out all of the facts which, if proved, would entitle it to ask the court to exercise its discretion to refuse the relief sought. Indeed, in its defence the appellant accepts that there was no investigation in progress concerning the respondent's conduct when he was suspended and likewise accepts there was no allegation of misconduct pending against him. While it may be true to say that at various points in its defence the appellant criticises certain aspects of the respondent's past conduct, that criticism falls far short of a plea to the effect that specified and particularised conduct of the respondent is such as to warrant a finding that he has "unclean hands" and therefore can be refused equitable relief. In fact, it would be almost impossible to deduce such a meaning from the defence as pleaded. In the absence of such a plea properly formulated, the appellant has not validly raised the question of whether the respondent is precluded from being awarded the relief claimed by operation of the clean hands doctrine and the High Court judge erred in ordering discovery of his medical records based on the said doctrine. Indeed, the discovery sought by the appellant was precisely the type of discovery that Clarke J. condemned in Hartside Ltd. v. Heineken Ireland Ltd. [2010] IEHC 3 when he decried the use of a mere allegation as a basis upon which one party might seek access to an opponent's confidential documentation.

61. For the aforementioned reasons I am satisfied that the High Court judge erred in law in acceding to the appellant's application for discovery, even on the restricted basis earlier described.

Procedural consequences

62. In light of my conclusion that discovery of the respondent's medical records was neither necessary nor relevant to the determination of any issue in the proceedings, it is perhaps unnecessary to consider other factors which, in my view, serve to highlight the error made by the High Court judge when she directed that the respondent swear an affidavit of discovery concerning his medical records and that he make those documents available to the trial court for potential consideration in relation to the issue of remedy. I will do no more than make a few brief ancillary observations.

63. The order, insofar as it directed the respondent to make discovery of his medical records and to place his affidavit and copies of the documentation scheduled thereto in a sealed envelope to be available to the High Court judge for potential consideration in relation to the remedy that he might be afforded, is not one which is envisaged by the Rules of the Superior Courts. That is not to

state that the court does not have an inherent jurisdiction to order that discovery be made otherwise than strictly in accordance with the Rules of the Superior Courts should it be established that only an order in such terms could meet the justice of the case. However, for the reasons earlier explained, the justice of this case did not warrant the making of an order in such exceptional terms.

64. Save where it is sought in aid of execution, discovery must take place prior to trial, as too must inspection. Significant adverse consequences would flow from a decision of the court to consider copies of discovery documentation after it had found liability in favour of a plaintiff in order to decide whether or not the relief claimed should be granted. In the present case, the trial judge would not be entitled to consider records discovered by the respondent, unless they were furnished to the appellant. Then, assuming that the respondent refused to permit his records be admitted into evidence as proof of their contents, the appellant, if it wished to rely upon those records, would have to prove them. This would result in an adjournment which would be followed in turn by a further hearing and round of legal submissions, a scenario that does not sit comfortably with the expectation that discovery will have the effect of saving time and costs, apart altogether from the fact that to adopt such an approach to discovery would, in my view, offend the principles of proportionality and equity.

65. The order made was one which, in my view, had the potential to visit upon the respondent a serious injustice. Whilst the High Court judge was clearly motivated by what she considered to be equitable principles when she made the order which she did, I regret to say that her order is not one which, in my view, sits comfortably with said principles.

66. Whilst the defence pleads in general that the behaviour of the plaintiff has been unreasonable to the extent that relief should be denied, (para. 48) and that his behaviour has been in breach of his obligations of trust and confidence (para.31) the defence primarily relies on express and implied contractual rights and the case has no features that suggest that broad equitable principles will ever fall for consideration at the trial.

67. It is important not to lose sight of the fact that the respondent was not dismissed from his position but merely suspended. It would seem that the discretion of the court, subsequent to a finding that his suspension was unlawful, to refuse to reverse the effects of that suspension must, if it exists at all, be very narrow indeed. Furthermore, carefully scrutinised, no such reversal is sought by way of declaration or injunction. What is claimed as ancillary to the declaration that the suspension was without lawful authority is "a declaration that the plaintiff is an employee of the defendant in good standing" a plea consistent with the alleged continuance of his contract of employment.

Conclusion

68. For the reasons earlier set forth in this judgment, I am satisfied that the High Court judge erred in law in making the order for discovery which she did on the 1st May 2018. The discovery of the respondent's medical records was neither necessary nor relevant for the proper and fair determination of any issue in the proceedings. Furthermore, the order made by the High Court judge was not in accordance with the Rules of the Superior Courts. Whilst the court has in inherent discretion to make an order for discovery which is not strictly in accordance with the rules where it is necessary in order to achieve justice between the parties, no such departure was warranted on the facts of this case.

69. For these reasons and those earlier advanced, I would dismiss the appeal and allow the cross appeal.