

## **Case IC/0128**

### **Ruling dated 3<sup>rd</sup> May, 2002**

#### **The Facts**

In accordance with its function under Section 12 (1) of the Commission to Inquire into Child Abuse Act, 2000 (the Act), the Investigation Committee is carrying out an inquiry into allegations made by the Complainant that he suffered abuse in childhood in a residential institution. The Complainant has been granted legal representation before the Investigation Committee, as have –

- (a) a person who is alleged to be the perpetrator of sexual abuse on the Complainant (the individual Respondent),
- (b) the Applicant, being the religious order which managed the institution at the relevant time and of which the individual Respondent is a member, and
- (c) the Minister for Education and Science (the Minister) as the regulator of the institution, which was a special school recognised by the Department of Education at the relevant time.

The individual Respondent admits that he sexually abused the Complainant as a child in the institution, but the range of sexual activity which the individual Respondent involved the

Complainant in as a child is in dispute. The Complainant also alleges that he was abused by three other members of the Applicant who are now deceased.

The hearing of the Complainant's allegations commenced in March 2002. On that occasion, the taking of the Complainant's evidence was not completed. The matter was adjourned *sine die*. A week later on 21<sup>st</sup> and 22<sup>nd</sup> March the Investigation Committee heard the allegations of another complainant in relation to the same institution and the same individual Respondent (the second hearing). The legal representatives for all parties involved in that hearing were the same as the legal representatives in the Complainant's case. At the end of the second hearing on 22<sup>nd</sup> March, 2002 it was agreed that the Complainant's case would be resumed on 26<sup>th</sup> April 2002.

In the course of his evidence to the Investigation Committee, the individual Respondent testified that he ceased working in the institution in issue in the Complainant's case in 1965 and was transferred to another institution managed by the Order. In the latter institution, in April 1969, an allegation of abuse by him of a child was brought to the attention of his superiors.

In the course of the second hearing it was made clear that the Investigation Committee was contemplating seeking discovery of documents from the Applicant. The name of the Regional Leader of the Order (the Regional Leader), who was considered the appropriate person to swear the Affidavit, was ascertained.

On 25<sup>th</sup> March 2002 the following notifications issued by facsimile transmission:

- (1) A notice to the Solicitors on record with the Investigation Committee for the individual Respondent in compliance with paragraph 6 of the Preamble of the Rules of Procedure of the Investigation Committee notifying the individual Respondent of a discovery direction, a copy of which was attached, which the Chairperson of the Investigation Committee proposed to issue on 2<sup>nd</sup> April, 2002; and
- (2) A notice to the Solicitors on record for the Applicant of the intention to make the discovery direction, attaching a copy of the discovery direction, on 2<sup>nd</sup> April, 2002 and referring them to paragraph 6.

The Solicitors for the individual Respondent not having communicated any objection to the Investigation Committee, or any wish to make representations, the discovery direction in the proposed form issued on 2<sup>nd</sup> April 2002. By letter dated 10<sup>th</sup> April 2002 the Applicant's Solicitors advised the Investigation Committee that every effort would be made to comply with the discovery direction but it seemed unlikely, even at that stage, that the discovery exercise could be completed within the short time frame allowed. An update as to how the exercise was progressing would be furnished in ten days time. By letter dated 18<sup>th</sup> April 2002, the Solicitors for the Applicant were advised on behalf of the Commission that it was expected that the discovery direction would be complied with by the date specified in the Order, namely 23<sup>rd</sup> April 2002, and it was pointed out that the adjourned hearing of the matter was listed for 26<sup>th</sup> April 2002.

On 22<sup>nd</sup> April 2002, an informal request was made by the legal representatives of the Applicant that the Applicant be heard in relation to the discovery direction on the following day. The

response from the Investigation Committee was that it was not possible to schedule a procedural hearing involving the necessary parties at such short notice. However, it was indicated, on behalf of the Investigation Committee, that concerns which the Applicant had in relation to naming third parties in the affidavit of discovery could be met by redaction of the names of third parties.

On 23<sup>rd</sup> April 2002 the Applicant's Solicitors submitted a draft of an Affidavit to be sworn by the Regional Leader, which would be before the Investigation Committee at the resumed hearing on 26<sup>th</sup> April 2002, when an application would be made on behalf of the Applicant in relation to discovery.

When the hearing resumed on 26<sup>th</sup> April 2002, by agreement, the taking of the Complainant's evidence was completed before the Applicant's application was heard.

### **The Discovery Direction**

The Investigation Committee sought discovery on oath by 23<sup>rd</sup> April 2002 of all documents and records of whatever nature that are or have been in the possession or under the control of the Applicant in relation to complaints or allegations that children were abused, whether sexually or physically and whether at the institution in issue in the Complainant's case or elsewhere, by four named members of the Applicant, namely, the individual Respondent and the three deceased members of the Applicant against whom allegations of abuse have been made by the Complainant. The following documents were particularised, namely, documents concerning -

- (i) a complaint made in or about the year 1969 concerning the individual Respondent while he was teaching at the other institution managed by the Applicant,
- (ii) the investigation of the said complaint,
- (iii) the disposition of and the deployment in schools or elsewhere of the individual Respondent following the said complaint until his subsequent imprisonment,
- (iv) the treatment of the individual Respondent at a treatment centre outside the State,
- (v) any other measures adopted to prevent the possible recurrence of the behaviour complained of, and,
- (vi) any reporting or disclosure of the alleged behaviour to the authorities and/or to persons who, or bodies which, might bear responsibility to persons who might be affected by such behaviour.

The direction also sought production by 23<sup>rd</sup> April 2002 of copies of all documents which fall within the scope of the direction for discovery which are currently in the possession or control of the Applicant. It was explicitly provided in the direction that the Regional Leader or any person interested in any of the documents falling within the direction for discovery should have liberty to apply forthwith to the Investigation Committee for a direction varying or discharging the direction.

## **The Application.**

At the hearing on 26<sup>th</sup> April, 2002 Counsel on behalf of the Applicant sought the following relief:

- (a) that the direction be discharged, on the basis that it was invalid on a number of grounds;
- (b) alternatively, that the direction be varied so as to limit its scope;
- (c) that the time for compliance with the direction be extended; and
- (d) that, if the Investigation Committee was not disposed to grant any of the foregoing reliefs, the Investigation Committee should apply to the High Court under Section 14 (3) of the Act for an Order compelling the Regional Leader to comply with the direction.

## **Attitude of the other Parties to the Application.**

On the issue of the validity or otherwise of the direction, Counsel for the Complainant submitted that this was a matter between the Investigation Committee and the Applicant, although she did reserve her position as to the scope of the direction. Counsel for the Minister did not make any submissions, on the basis that the Minister was not affected by the direction. Counsel for the individual Respondent, the only living person directly affected by the direction, indicated that the individual Respondent had no objection to the direction.

### **Alleged invalidity of the Direction.**

The primary ground on which Counsel for the Applicant contended for the invalidity of the direction was that it was in contravention of the constitutional guarantee of fair procedures. In particular, the following passage from the judgment of Hamilton C.J. in **Haughey v Moriarty** [1999] 3 I.R.1, at page 75, was relied on:

“The question, however, remains as to whether in the making of the said orders the Tribunal complied with the requirements of fair procedures.

While the Tribunal is entitled to conduct the preliminary stage of its investigations in private, and to make such orders as it considers necessary for the purposes of its functions, that does not mean that in the making of such orders, it was not obliged to follow fair procedures.

In the making of such orders the Tribunal had in relation to their making all such powers, rights and privileges as are vested in the High Court or a judge of that court in respect of makings of orders.

Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, the person or persons likely to be affected thereby should be given notice by the Tribunal of its intention to make such order, and should have been afforded the opportunity prior to the making of such order, of making representations with regard thereto. Such representations could conceivably involve the submission to the Tribunal that

the said orders were not necessary for the purpose of the functions of the Tribunal, that they were too wide and extensive having regard to the terms of reference of the Tribunal and any other relevant matters.

Such a procedure was not adopted in this case and the learned trial judge held that in the making of such orders the Tribunal did not act in accordance with the requirements of fair procedures.

The Court is satisfied that the trial judge was correct in his findings that the orders sought to be impugned herein made by the Tribunal were made in contravention of the requirements of constitutional justice and that fair procedures were not adopted by the Tribunal in the making of such orders.

Such failure was not remedied by the insertion in such orders of the provision that the person to whom the order was directed or any person thereby affected had the right to apply to the Tribunal to vary or discharge that order. This is particularly so having regard to the circumstances of this case, the nature of the orders made and the time scale within which compliance therewith was ordered.

There may be exceptional circumstances, such as a legitimate fear of destruction of documents if prior notice was given, where the requirements of fair procedures in this regard may be dispensed with. No such circumstances exist in this case.”

The Investigation Committee recognises that in performing its statutory functions it must at all times have regard to the requirements of constitutional justice and that it must adopt fair procedures. In this case, it is considered that fair procedures were adopted in the making of

discovery direction, in that notice of intention to make the direction was given to both the individual Respondent and to the person to whom the direction was addressed. The individual Respondent had no objection to the making of the direction. It was open to the Applicant to indicate to the Investigation Committee before the 2<sup>nd</sup> April, 2002 that it wished to make representations with regard to the direction. This it did not do.

Further, it is the view of the Investigation Committee that the argument advanced on behalf of the Order, that, when a discovery direction is to be made pursuant to the powers conferred by section 14(1) of the Act, the person to whom it is directed must be given notice of the intention to make it and be afforded an opportunity to make representations in relation to it, is misconceived and wrong in law. The *ratio decidendi* of the decision of the Supreme Court in Haughey v Moriarty is that the constitutional guarantee of fair procedures requires that a person likely to be affected by a discovery direction directed to a third party should be given notice and an opportunity to make representations. The constitutional right of such a person is not vindicated by relying on the party to whom the direction is made to alert the former to a proviso in the direction itself that an application might be made to vary or discharge the direction. The interpretation of the judgment of Hamilton C.J. contended for on behalf of the Applicant would gravely inhibit the ability of a Tribunal or Commission of Inquiry to fulfil its functions and, in any event, such interpretation is not necessary to ensure that such functions are fulfilled in a manner which is consistent with constitutional justice.

It was further submitted on behalf of the Applicant that the direction was invalid because the procedure adopted in making it did not conform with the statutory requirements in relation to the

making of discovery directions. The argument advanced was that, as Section 14 (1)(d) of the Act, under which the direction was made, provides that the rules of court relating to the discovery of documents in proceedings in the High Court shall apply in relation to discovery of documents pursuant to paragraph (d) “with any necessary modifications”, the Investigation Committee should have complied with the Rules of the Superior Courts No. (2) (Discovery)1999 (S.I. No.233 of 1999) (the Statutory Instrument). In particular, it was submitted that before a discovery direction is made in pursuance of Section 14 (1) (d) there should first issue a letter requesting voluntary discovery, specifying the precise categories of documents of which discovery is sought and the reasons why each category of documents is relevant and required.

This submission is rejected. The purpose of the Statutory Instrument was to introduce a new rule 12 into Order 31 of the Rules of the Superior Courts, 1986, which would regulate discovery in *inter partes* litigation in a manner which is just and fair and cost efficient. It is primarily concerned with the procedural aspects of an application to court by one party to civil litigation seeking discovery from the other party. The requirement of a pre-application request for voluntary discovery is clearly designed to avoid unnecessary court applications. It is the view of the Investigation Committee that, in applying the Rules of Court relating to discovery of documents in proceedings in the High Court to discovery directions made under Section 14(1), it cannot have been the intention of the Oireachtas that procedures designed to regulate applications to Court in *inter partes* proceedings would apply, either in whole or in part. If it were otherwise, the fulfilment of the Commission’s functions efficiently and with reasonable expedition would be an impossibility. Accordingly, it is the view of the Investigation

Committee that the exclusion of the Statutory Instrument is a necessary modification in the application of the Rules of Court to the making of directions under Section 14(1) (d).

It was also submitted that it was inappropriate to have made the discovery direction at the time it was made and that, on that ground, it should be discharged. In the course of the taking of the Complainant's evidence on 15<sup>th</sup> March 2002, Counsel for the Applicant raised the issue whether the Investigation Committee could make an adverse finding in relation to members of the Applicant who are deceased, who are not in a position to defend themselves or give contrary evidence, and, in particular, whether an adverse finding could be made in relation to the Applicant, as a community, in such circumstances. In response, Counsel for the Complainant submitted that the Applicant was on notice of the nature of the Complainant's allegations against and the identification of the deceased members of the Order and that it was a matter for the Investigation Committee to assess the totality of the evidence in due course. It was indicated on behalf of the Investigation Committee that the issue raised was a matter which the Investigation Committee anticipated but it would not rule on it at that juncture but that the parties would be given an opportunity to address the issue in greater depth before any decisions were made by the Investigation Committee on the Complainant's allegations. It was submitted on behalf of the Applicant that the Investigation Committee should have ruled on this issue before issuing a discovery direction.

The Investigation Committee rejects this submission also. The purpose of the discovery direction in this inquisitorial process is to identify whether evidence may exist, or whether there are lines of inquiry which might be pursued to establish whether evidence may exist, which

would assist the Investigation Committee in its endeavour to ascertain the full and true facts in relation to the allegations made by the Complainant. It is recognised that, where an allegation of abuse is made against a person who is dead an issue does arise as to whether the deceased person may be named in a published report of the Commission as a perpetrator of abuse and whether the institution in which the above is alleged to have occurred may be named. That issue falls to be determined on the facts of a particular case having regard to the totality of the evidence adduced in relation to the particular allegation. It is the view of the Investigation Committee that it would be “putting the cart before the horse” if it ruled on this issue in advance of making a discovery direction and in advance of the completion of the evidence gathering phase of the work of the Investigation Committee.

### **Scope of Discovery Direction.**

It was submitted on behalf of the Applicant that any document in relation to alleged abusive behaviour on the part of the individual Respondent after he left the institution in which the Complainant is alleged to have been abused is irrelevant to the issues which arise in this case, having regard to the two-phased procedure which the Investigation Committee has adopted for itself. In particular, it was submitted that documentation in relation to the complaint made in 1969 while the individual Respondent was teaching in another institution is not relevant. The Investigation Committee rejects this argument. In the first phase of the inquiry into allegations of abuse in the institution managed by the Applicant, the Investigation Committee must reach a conclusion as to whether the allegations made by the Complainant are true or not, applying the standard of proof which the Investigation Committee has decided to adopt, proof on the balance

of probabilities. As has been stated, the range of sexual activity which the individual Respondent engaged in with the Complainant is in controversy. It is the view of the Investigation Committee that, in resolving that controversy, the behaviour of the individual Respondent both before and after the period of his involvement with the Complainant is relevant.

Similarly, it was submitted that any document in relation to any measures adopted by the Complainant to prevent the possible recurrence of the alleged abusive behaviour and any reporting or disclosure of the alleged abusive behaviour to the authorities is irrelevant. This argument is also rejected. For instance, if an allegation of abuse against one of the deceased members of the Applicant who is named by the Complainant was reported to the Garda Siochana or the relevant Health Board and an investigation was carried out by the Garda Siochana or the Health Board during the life time of the deceased member, it is the view of the Investigation Committee that documents relating to such investigation are relevant to the issues at which arise at this juncture. However, in order to lessen the burden of the discovery direction at this juncture, as already indicated, the Investigation Committee will vary the direction made on 2<sup>nd</sup> April 2002 by deleting items (v) and (vi) from the Schedule. However, these items may be pursued at a later stage in this case or in another case.

#### **Redaction of Third Party Names / Identities.**

The Applicant has shown a commendable concern for the constitutional rights of persons who may have made complaints which come within the scope of the discovery direction and, in particular, the constitutional rights of plaintiffs who are suing the Applicant for damages in the courts, on the basis of abuse alleged against the members of the Applicant who come within the

scope of the direction. However, it is the view of the Investigation Committee that such concern is misplaced. At this juncture, the identity of a person who made a complaint against any of the members of Order named in the direction is not relevant. What is relevant is whether the complaint was made, when it was made, to whom, the nature of the complaint and what ensued. Therefore, the Investigation Committee confirms that it is in order for the Regional Leader, when making discovery, to redact the name, and any information which might lead to the identification, of the person who made a complaint. Moreover, in relation to documents relating to civil litigation, it is considered sufficient if discovery is made of the relevant Statement of Claim, if it has been delivered, or the relevant Plenary Summons, if the Statement of Claim has not been delivered, or the relevant preliminary letter threatening proceedings, if proceedings have not been initiated, with the name and any other identifying particulars of the plaintiff redacted. The Regional Leader has been granted liberty to seek permission to redact the names of persons in other categories who may be affected by the direction.

The Investigation Committee is very conscious of the sensitive nature of documentation relating to complaints of childhood abuse in institutions. It is the policy of the Investigation Committee to redact the names and identifying particulars of pupils in an institution which are not relevant to the investigation of a particular complainant's complaint, before making a discovered document available to any party, other than the party who discovered it.

### **Extension of time**

Having regard to the volume of work involved in complying with the discovery direction, as deposed to in the Affidavit sworn by the Regional Leader on 26<sup>th</sup> April 2002, the Investigation Committee has acceded to the request for an extension of the time for delivering the Affidavit of

discovery and the production of copies of the documents which fall within the scope of the discovery direction, which are currently in the possession or under the control of the Applicant, for six weeks up to and including 7<sup>th</sup> June, 2002.

### **Summary of decisions**

- (1) There is substituted for 23<sup>rd</sup> April 2002 in the discovery direction 7<sup>th</sup> June 2002.
- (2) Paragraphs (v) and (vi) of the Schedule to the discovery Order are deleted.
- (3) The deponent may redact the names, and other information which might lead to the identification, of persons, other than the Complainant, who made complaints and may seek liberty to mask the identity of persons in other categories who may be affected by the direction.
- (4) In relation to civil litigation, it will suffice if the deponent discovers the relevant Statement of Claim, if it has been delivered, or, the relevant Plenary Summons, if the Statement of Claim has not been delivered or, the relevant preliminary letter threatening proceedings, if proceedings have not be initiated, with the name of the plaintiff and any other information which might identify the plaintiff deleted.