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Judgment: approved by the Court for handing down | *Delivered:* **11/11/2021**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND
QUEEN'S BENCH DIVISION

BETWEEN:

FS

Plaintiff;

and

THE DIOCESE OF DROMORE

First Defendant

and

THE BOARD OF GOVERNORS OF ST COLMAN'S COLLEGE, NEWRY

Second Defendant

and

THE DEPARTMENT OF EDUCATION

Third Defendant

Master Bell

INTRODUCTION

[1] This judgment deals with an action concerning allegations of sexual abuse and it has been anonymised to protect the privacy of the plaintiff. I have used the cipher "FS" for the name of the plaintiff. Those are not his initials. Nothing should be published that will identify him.

[2] FS was a pupil at St Coleman's College, Newry for approximately five years. The pleadings identify which years those were but it is not necessary to identify them here. It is sufficient to note that in the statement of claim there is a clearly identified beginning and end to his time as a pupil there. During that period FS alleges that he was both physically and sexually abused by Fr Malachy Finnegan who was employed at the College for a period of approximately 18 years.

[3] The issue before me concerns documents in respect of Fr Finnegan which are held by the Chief Constable of the Police Service of Northern Ireland. I am grateful to Mr Morgan and Miss Lunny of counsel whose written and oral submissions I received during the application.

ORDER 24 RULE 20 APPLICATION

[4] The application before me is an application by the Chief Constable under Order 24 rule 20 of the Rules of the Court of Judicature (NI) 1980 ("the Rules") to vary or revoke an order which I made on 12 March 2021 pursuant to section 32(1) of the Administration of Justice Act 1970 ("the 1970 Act") requiring the Chief Constable to disclose to FS any document relating to an investigation into alleged sexual and physical assaults by Fr Finnegan. The reasons advanced on behalf of the Chief Constable as to why I should vary or revoke the order I made on 12 March 2021 include that:

(i) I did not have sight of the Chief Constable's written arguments at the time I made the order, nor was it made after a contested hearing, as requested by the Chief Constable.

(ii) The documents sought by FS were not necessary to be discovered for the disposal of the action.

(iii) The extent of the documents sought by FS was disproportionately broad.

[5] An initial examination of the order of 12 March 2021 (hereafter referred to as "the order") is necessary. By summons dated 29 October 2020 FS applied for an order under section 32 of the 1970 Act requiring the Chief Constable to disclose whether or not he had documents relating to an investigation into alleged sexual and physical assaults by Fr Finnegan and, in particular, the documents specified in an attached schedule. The schedule contained six items:

"(a) All information regarding allegations of sexual assault by Malachy Finnegan

(b) Interview transcripts of all individuals interviewed.

(c) Statements of all complaints relating to alleged sexual or physical assaults by Malachy Finnegan.

(d) Other witness statements taken, relating to, in any manner, allegations of sexual or physical assault by Malachy Finnegan.

(e) All statements of persons employed at St Coleman's College, Newry.

(f) All statements of persons employed by or acting on behalf of the Diocese of Dromore."

I note that in sub-paragraph (a) the word "information" is a poorly chosen word. The schedule should refer to specific documents. "Information" is not a synonym for "document".

[6] On 12 March 2021, with no submissions having reached me on behalf of the Chief Constable, I made the order sought.

[7] There is a paucity of decided cases on the power under Order 24 rule 20, both in Valentine's Annotated Rules which contains no commentary on the rule and in the 1999 edition of "The Supreme Court Practice" (usually referred to as "the White Book") where the commentary is very sparse.

[8] Order 24 rule 20 reflects the position also contained in the English Rules in force before the introduction of the post-Woolf Civil Procedure Rules. Neither counsel could suggest to me what the intention behind Order 24 rule 20 might be. However the caselaw, such as it exists, indicates that where a court, under Order 24 rule 19, has visited upon a party a sanction for failure to make discovery and has, as a result, dismissed an action or struck out a defence, then there is a power under Order 24 rule 20 to revoke or vary that sanction where sufficient cause has subsequently been shown. See, for example, *Star News Shops Ltd v Stafford Refrigeration Ltd and others* [1997] All ER (D) 47.

[9] The principal authority in respect of rule 20 is the decision of the Court of Appeal for England and Wales in *John Walker & Sons Ltd and Others v Henry Ost & Company Ltd and Another* [1970] R.P.C. 151. In that decision the second defendant, which was a wholesale trader of alcohol based in Ecuador, did not file a list of documents and the plaintiff obtained an order that the second defendant's defence be struck out. On the day of the strike out, a document purporting to be a list was produced but was in no sense adequate. Subsequently, the second defendant instructed new solicitors and served a second list of documents. The second defendant then issued a summons under the English equivalent of Order 24 rule 20 to have the order varied and its defence restored on the ground that the second list was an adequate response to the court's order. The summons initially came before the Master who put certain questions to counsel as to whether the second defendant kept any ledgers, invoices or correspondence in connection with its business. After being told it kept nothing of the sort, he adjourned the matter for a better explanation. A third list of documents was then furnished by the second defendant and its defence was restored by the Master. The issue then came before Foster J who decided he was not satisfied that the second defendant had made full discovery. He made an order that the second defendant's defence should not be restored but gave them liberty to file a further list after which he would then decide whether the discovery was sufficiently adequate to justify the restoration of its defence. The second defendant then appealed Foster J's order.

[10] In the Court of Appeal Harman LJ, delivering the leading judgment with which his judicial colleagues agreed, explained the interrelationship and purpose of

Order 24 rules 16 and 17 (which are the exact equivalents of Order 24 rules 19 and 20 in this jurisdiction):

> "Now as far as the Rules go, the matter depends, I think, on only two Rules: RSC Order 24, Rules 16 and 17. Rule 16 says that if any party required to make discovery of documents fails to do so his defence may be struck out. That is one of the remedies to enforce the discovery rules; and that is what has happened here. That is followed by Rule 17 which says this: 'Any order made under this order … may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the court made or given at or before the trial of the cause …' So that right up to the very trial itself an order, particularly an order of the court striking out a defence, may be revoked if cause be shown; and the question in this case, and I think the only question really, is: 'Has cause been shown?' "

[11] The basic task of a court when interpreting rules is to ascertain and give effect to the true meaning of the rule. A significant element of this function is to fulfil the purpose which the rule-maker intended to achieve when the rule was created. The purpose of rules is not something which exists outside the rules themselves. It resides in its text and structure. As Viscount Simonds said in *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436:

> "… words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context."

[12] I do not consider therefore that I am entitled to view Order 24 rule 20 as existing in isolation, giving me a free standing power to revoke or vary any order made under Order 24 upon sufficient cause being shown. As the Court of Appeal for England and Wales recognised in *John Walker & Sons Ltd and Others v Henry Ost & Company Ltd and Another*, the purpose of our Order 24 rule 20 is to give a power to revoke an order made under our Order 24 rule 19. I therefore do not consider it appropriate to use Order 24 rule 20 as a means of revoking or varying the order of 12 March 2021 in the way that the Chief Constable seeks. Order 24 rule 20 was designed for an entirely different purpose. I must therefore dismiss that application.

INHERENT JURISDICTION

[13] Nevertheless that is not the end of the matter. Prior to the granting of the order, the summons was first listed for administrative review on 12 February 2021. It was adjourned at the request of the Chief Constable so that submissions could be made. It was then relisted on 12 March 2021. In advance of this date, FS's and the Chief Constable's legal representatives collaboratively completed and submitted a QBCI2 form which was emailed after close of business on 9 March 2021. The form

should have been submitted 5 days in advance of the listing and it was not. In that document the stated position of the Chief Constable was that there was no agreed position between the parties and that a remote, contested hearing was sought. I have no recollection of receiving that document prior to the making of the order on 12 March 2021 and the order of 12 March 2021 itself does not indicate that I considered it. All parts of the civil and criminal justice systems have struggled to cope with the tsunami of emails caused by how legal business is being conducted due to the pandemic. I do not therefore criticise either of the parties or the Court Service staff because the email and its attachments did not reach me prior to the making of the order.

[14] I consider that I have the power to revoke the order of 12 March 2021 under the inherent jurisdiction of the court. In *Braithwaite v Anley Maritime Agencies* [1990] 4 NIJB 43, Carswell J defined inherent jurisdiction as follows:

> "… The reserve of fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them".

[15] In my view, making an order in what was clearly stated to be an inter partes application, without giving the Chief Constable the opportunity to be heard does not amount to due process and cannot do justice between the parties. It is obvious that in circumstances where a party wishes to make submissions at an oral hearing they should have the opportunity to do so. For this reason, I am setting aside the order of 12 March 2021 under the inherent jurisdiction of the court.

ORDER 32 APPLICATION

The Law

[16] Having determined at the hearing that I would inevitably have to set aside the order made on 12 March 2021 on the ground that the Chief Constable had not had an opportunity to be heard prior to the granting of the application, I then heard both counsel on the merits of the section 32 application. The Webex hearing in respect of the Order 24 rule 20 application therefore evolved into the contested section 32 application which the Chief Constable had originally been seeking.

[17] Section 32(1) of the 1970 Act provides:

> "On the application, in accordance with rules of court, of a party to any proceedings in which a claim in respect of personal injuries to a person or in respect of a person's death is made, the

> High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising out of that claim-
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce to the applicant such of those documents as are in his possession, custody or power."

[18] It is a regular occurrence that a party involved in civil litigation will seek a court order to obtain the contents of a police investigation file. Obvious examples concern investigation files in respect of serious road traffic accidents and serious assaults. In this particular case, the plaintiff knows that allegations into the activities of Fr Finnegan were investigated by police, that individuals were interviewed, and that witness statements were taken. FS accepts that he is not entitled to the names of any other complainants of sexual abuse allegedly committed by Fr Finnegan and concedes that these must be redacted before the documents are released to him.

[19] The section 32 power has of course been the subject of previous judicial consideration. Lord Diplock in *McIvor v Southern Health & Social Services Board* [1978] 2 All ER 625 at 627 said that the power to order production "of documents by a person who is not a party to the proceedings is discretionary in the sense that the court can decline to make the order if it is of the opinion that the order is unnecessary or oppressive or would not be in the interests of justice or would be injurious to the public interest in some other way."

[20] In *O'Sullivan v Herdmans Limited* [1987] 3 All ER 129 the House of Lords held that the power conferred by section 32 of the Administration of Justice Act 1970 is to be exercised so as to achieve the proper administration of justice and is not restricted by Order 24 rule 12 nor is it subject to a requirement that the party seeking the order must first establish that it is impossible or impracticable for him to conduct his case without seeing the documents. Lord Mackay at [1987] 3 All ER at 134 stated:

> "… it is clear that the documents which may be ordered to be produced under Section 32 are restricted to those which are relevant to an issue arising out of a claim in respect of personal injuries or death and which the holder could be compelled to produce if it had been served with a writ of subpoena duces tecum to produce them at the trial."

Lord Mackay concluded:

"In terms of s 32(1), when an application has been made in accordance with the rules in proceedings of the kind described and in the circumstances specifed in the rules, all of which prerequisites have admittedly been met in the present case, the court has a power in no way expressly fettered to order production of any documents which are relevant to an issue arising out of the claim as these documents admittedly are. Where such an unfettered power is given, in my opinion, it is to be construed as a power to be exercised when its exercise would help to achieve the purpose of the Act which is the proper administration of justice or, to put the matter negatively, in the words of Lord Diplock in *McIvor v Southern Health and Social Services Board* [1978] 2 All ER 625 at 627, [1978] 1 WLR 757 at 760, the court can decline to make an order—

> 'if it is of opinion that the order is unnecessary or oppressive or would not be in the interests of justice or would be injurious to the public interest in some other way.' "

Plaintiff's Submissions

[21] In the application by FS in this action, counsel submitted that:

"There is the possibility that the documentation may reveal witnesses who [FS] would wish to call to either support his case or to undermine the case of the defendants. This is not to suggest victims of abuse who made statements to the [Chief Constable] but may include employees and servants and agents of the defendants.

The documentation may provide the basis to cross-examine witnesses for the defendants on the issue of liability and also their response to allegations of abuse against Fr Finnegan. The issue of certain defendant's responses to Fr Finnegan's abuse of children is an important issue for [FS] and a central point in this case.

The documentation may advance [FS's] case in providing information demonstrating a particular factual pattern of abuse by Fr Finnegan (this could be revealed in witness statements taken by the [Chief Constable] from other victims of abuse or other investigatory documents). This may include the location in St Coleman's College and other locations where he abused children, the specific form of abuse (to include the form of sexual and physical assaults, emotional abuse), what he communicated

> to victims in this context (to include inducements, threats, justifications, explanations), the timings of abuse, (for example in the evening when day students had left and there was reduced staff at St Coleman's College), the age of victims and their personal circumstances applying at the time."

[22] FS also emphasised that what the defendants told the police, and when they did so, is a live issue in FS's case. FS believes that there was a delay or reluctance on the part of the defendants to report Fr Finnegan to the police. FS argues that the documentation may address the point as to when the defendants reported Fr Finnegan to the police and how they pursued this or failed to pursue this, particularly since there is what was described as "a lack of documentation provided by the Diocese of Dromore to substantiate its position that it did refer Fr Finnegan to the police." FS argues that the documentation held by the Chief Constable may therefore go directly to the issue of his claim for aggravated damages. Thus the documents relate to a factual point of dispute in the case against the defendants on the issue of their response to knowledge of Fr Finnegan's conduct.

Respondent's Submissions

[23] The Chief Constable observed that Order 24 rule 8(3)(b) provides that a section 32 application shall be supported by an affidavit which must:

> "… in any case specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of a claim for personal injuries and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power."

The Chief Constable complained that the only pleading from FS's action which accompanied the application was FS's statement of claim. No copies of the defences were attached to the application, nor were they provided in advance of the first review date for the section 32 application although they were furnished some two weeks later. The Chief Constable denies that service of the statement of claim was sufficient to enable either the Chief Constable or the court to identify the issues which the defendants disputed.

[24] The principal plank of the Chief Constable's submission is that FS's application is disproportionally broad. The police investigation file in relation to Fr Finnegan contains in excess of 10,000 pages. The Chief Constable argued that the cost and time required to review and assess this quantity of material, and make article 8 redactions, would be grossly disproportionate. Accordingly, the Chief Constable submits that the nature of the documents sought should be subject to refinement which may be achieved with greater input from the parties to the action

as to the precise nature of the issues which remain between them. The Chief Constable in his argument relies upon the approach to dealing with an application such as this, as was endorsed by the Court of Appeal in *Flynn v Chief Constable of the Police Service of Northern Ireland* [2018] NICA 3. In that decision the court held:

> "We consider, therefore, that in any case where the existing approach to discovery or disclosure may give rise to onerous obligations or would prevent a case being dealt with expeditiously and fairly the court should intervene with a view to finding a proportionate response, saving expense, and ensuring that the parties are on an equal footing. … The identification of a proportionate approach in each of these cases will be fact sensitive. Any judge dealing with such a case will have to make appropriate discretionary judgments as to the extent of search, the degree of appropriate redaction and the opportunity for dealing with issues by way of gisting or formal admissions."

Conclusion

[25] Firstly, I do not regard the Chief Constable's Order 24 rule 8(3)(b) argument as a fatal defect in the application and I exercise the discretion granted under Order 2 rule 1 to overlook this defect. As *The Supreme Court Practice*, 1999 edition, para 2/1/93 states, the authorities, taken as a whole, show that Order 2 rule 1 should be applied liberally in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to the technicalities in the rules of procedure.

[26] Secondly, I must bear in mind that this application is fundamentally different from the position in *Flynn v Chief Constable*. In *Flynn* the Chief Constable was the defendant. In this application, the Chief Constable is a Third Party and not a party to the main action. There is therefore no need whatsoever for the court to try and put FS and the Chief Constable on an equal footing.

[27] That is not to say, of course, that proportionality is an irrelevant concept. The overriding objective set out in Order 1 rule 1A of the Rules provides:

> "1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable -
>
> > (a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate to -

(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

(3) The Court must seek to give effect to the overriding objective when it -

(a) exercises any power given to it by the Rules; or

(b) interprets any rule."

However it must be recognised that it is the function of the court to make the proportionality assessment and the assessment of when to save expense, and not the function of a third party, as in this case the Chief Constable is.

[28] I must also bear in mind that the Chief Constable will on any section 32 application have his costs of producing the documents paid by FS, with those costs being costs in the cause as between FS and the Diocese of Dromore and the other defendants. The Chief Constable argued that the documents amounted to some 10,000 in number. A large lever arch file will typically hold around 500 pages and so that would amount to some 20 lever arch folders of documents. When compared with large commercial actions or legacy actions heard before the High Court, that is actually not a large amount of discovery. I therefore do not regard this application to be in any way disproportionate to the issues involved. One argument before me on behalf of the Chief Constable was that, if FS were to narrow his request for documents, then the Chief Constable could go through the 10,000 documents and detect which were relevant. In my view this argument was entirely misconceived. The position of the Chief Constable in this instance is not that of a defendant in the action (in which case it would be entirely his duty to carry out such an assessment). Rather he is a third party whose duty is to hand over whatever documents the court orders. The only legitimate exercise which the Chief Constable has to perform on the documentation is to redact the names and addresses of other individuals who complained that they too were sexually abused by Fr Finnegan.

[29] Taking all of these factors into account I have no hesitation in making the section 32 order sought by FS referred to above. In my opinion, there is no factor present in the circumstances of this case which would indicate that it would be just to refuse to exercise the power and there are strong factors in favour of the exercise of the power. I make the usual order as to costs for such applications, namely that FS do pay to the third party, in this case the Chief Constable, the costs occasioned by this application, and that as between FS and the defendants the costs of this application shall be costs in the cause. I also, of course, certify for counsel.