[2020] IEHC 307

THE HIGH COURT

[2015 No. 844 P]

BETWEEN

PAUL BARRY

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of June, 2020

1. The plaintiff alleges that, since 10th December, 2010 when he was serving as a Garda sergeant, he has been the victim of a campaign of bullying, harassment and intimidation in which he alleges Supt. Michael Comyns played a prominent role. He says that this intensified after a criminal complaint was made on 2nd February, 2012 in relation to alleged child sexual abuse.

2. The complaint was that two adult males had carried out sexual acts with a child on separate dates; on the first date she was 13, on the later one, 14. One of the suspects was a person best described as someone associated with a Garda superintendent, Supt. John Quilter. The way Supt. Michael Comyns was to tell the story to the DPP's office, the injured party met the suspects on a particular website on which she represented herself as being 21. The complaint was instigated not so much by the injured party herself, but by her parents, after they found sexual material on her phone. The DPP's office, which saw photographic evidence that is not before the court, *did* think that she looked of legal age, and directed no prosecution.

3. Going back to the making of the complaint, the plaintiff obtained a statement from the injured party late on a Friday evening. That evening he says he got a telephone call from Supt. Comyns asking about the allegation and requesting the plaintiff to fax a copy of the statement to Togher Garda Station in Cork, which he did. According to the plaintiff, Supt. Comyns told him that because of the suspect's relationship with Supt. Quilter, the suspect would have to be "*looked after*", and also suggested that the girl represented herself as being older. That latter part certainly seems to be consistent with what Supt. Comyns was to say later.

4. According to the plaintiff, Supt. Comyns instructed that the report should record that the girl was the instigator of the sexual acts. The plaintiff and the investigation team then decided to arrest both suspects simultaneously. However in the meantime, according to statements later made to GSOC, Supt. Comyns told Supt. Quilter about the complaint against the latter's associate, and apparently passed on some details from the injured party's statement. Supt. Quilter then attended at his associate's home, advised him of the complaint, that he might be arrested and that he should get legal advice. Separately, Supt. Comyns decided not to arrest the suspect, but to have him interviewed voluntarily, at which point the suspect presented a prepared statement and offered no comment to all questions.

5. In the submission to the DPP, Supt. Comyns made the point of saying that in effect since he knew persons associated with one of the suspects, he wasn't making any recommendation as to prosecution. Going to such pains to advertise a show of neutrality does not automatically sit easily with what seems to have been quite a degree of prior private contact between Supts. Comyns and Quilter, including what GSOC said was ongoing phone contact. Whether there is an explanation for this possible contradiction, or indeed more importantly whether there was any legal justification for the contact with Supt. Quilter at all (which, as noted above, allowed the latter to alert his associate to possible arrest), may presumably be answered at the trial of the action.

6. The plaintiff says he did not support the idea of favourable treatment of the suspect on the basis of him being an associate of a superintendent, and says that he submitted a report on 30th July, 2012 recommending that the two suspects be arrested. He claims that the payback for this stance of not going along with Supt. Comyns' view of the matter began two days later when he was served with a disciplinary notice on 2nd August, 2012 for being 15 minutes late for duty. He also alleges that this was done by Supt. Comyns in a sneering manner.

7. He made a disciplinary complaint against Supt. Comyns in October 2012 which was the subject of some form of investigation by Chief Supt. Catherine Kehoe, resulting in the rejection of his complaints some eight months later on 17th June, 2013. The plaintiff contends that the inquiry was inadequate and flawed. On the face of things, Chief Supt. Kehoe's investigation doesn't seem to have been at all as effective as GSOC's inquiries, and for some reason it doesn't seem that Supt. Comyns himself was interviewed as part of that internal investigation. Chief Supt. Kehoe partly decided that no action was warranted on the basis of "*insufficient information to prove that anyone leaked information to [the suspect] before he was interviewed*", a finding that is not altogether readily reconcilable with the information made available to GSOC.

8. Pursuant to a PIAB authorisation dated 8th August, 2014 the plaintiff issued a personal injuries summons on 3rd February, 2015 seeking *inter alia* damages for the alleged campaign of harassment. He made a further complaint against Supt. Comyns which was referred to GSOC on 30th March, 2016, and on foot of which a submission was made to the DPP's office. The DPP decided not to charge Supt. Comyns with perverting the course of justice (perhaps it's worth adding for completeness that Supt. Quilter's actions in giving advance warning to his associate about the investigation don't seem to have been assessed under that particular heading).

9. The DPP took the view that there was no evidence to corroborate the allegation that Sgt. Barry was pressurised to deal with the suspect in a particular way. It was asserted that Supt. Comyns was entitled to direct that the suspect be interviewed voluntarily, that there was insufficient evidence that anyone leaked information to the suspect and that the evidence did not establish inappropriate contact between the two superintendents that would constitute an attempt to pervert the course of justice.

10. It is not altogether clear whether all of those elements square with other known facts. In particular, the question of whether Supt. Comyns was entitled to direct a voluntary interview depends on *why* he did so. If it was because of his view about whether an offence had been committed at all, that would be one thing; if influenced by the fact that the suspect was an associate of Supt. Quilter, that would be quite another. Again that is a matter that can only be answered at the trial.

11. After the DPP and the Garda Síochána decided that no action was warranted on foot of the matter, GSOC was the only remaining institution willing to look into it. On foot of the plaintiff's complaint, GSOC came to the view that Supt. Comyns showed very poor judgment and compromised the investigative process and that his actions were wholly inappropriate. Informing one suspect of potential arrest gave an opportunity for the two suspects to discuss the circumstances of the alleged crimes. Those findings were all later to be quashed on *certiorari*, as we will see.

12. On 13th December 2017, GSOC wrote to the plaintiff saying that "*The fact that the criminal and disciplinary elements of your complaint have already been adjudicated places GSOC in a difficult position . . . there is little avenue for GSOC to consider recommending any criminal disciplinary action*", but decided to forward the full report to the Minister for Justice and Equality and the Garda Commissioner. Supt. Comyns then launched a judicial review of the decision to do so, contending essentially that he had not been given the opportunity to respond to the allegation prior to the decision to forward the report to other interested parties.

13. Separately, on 29th January, 2018 the plaintiff wrote to GSOC looking for disclosure of relevant files. GSOC replied on 13th March, 2018 stating that they did not provide voluntary disclosure in such cases, but would comply with any court order. A formal discovery letter then issued on 17th May, 2018. GSOC replied on 18th May, 2018 reiterating that they would not provide voluntary discovery.

14. The plaintiff's motion for non-party discovery from GSOC was then issued on 18th May, 2018. On 11th June, 2018 McDonald J. made an order for discovery of documents relating to the investigation into the complaints the subject matter of the proceedings; such discovery to be made by GSOC within six weeks. On the same date he also made a separate order for discovery against the defendants in the action. On that date the plaintiff's lawyers were told for the first time about the existence of Supt. Comyns' judicial review, but the plaintiff was never served with a notice of motion or any other pleadings prior to the finalisation of the latter action.

15. On 19th June 2018, Noonan J. made a consent order in the judicial review [*Comyns v. GSOC* 2018 No. 213 JR], quashing GSOC's findings with its consent. The order does not contain any provision for the matter to be referred back to GSOC for consideration in accordance with fair procedures, and it is not entirely clear why that approach was taken.

16. GSOC then set about responding to the order for discovery and on 17th August, 2018 Mr. Thomas Flanagan B.L., a Senior Legal Officer for GSOC, wrote indicating that he had

collated the relevant documents in a colour-coded format. Category A were the documents being discovered which were not coloured in his schedule. Category B were to be discovered unless the DPP, the CSSO or other relevant parties claimed privilege. Those coloured green were ones subject to a potential claim of privilege by the DPP herself, and those coloured red were subject to a potential claim of privilege by other parties. Category C then were the documents over which GSOC was asserting a claim of privilege, which were coloured in yellow, and those were the documents which GSOC considered were potentially affected by the order of Noonan J. and it is that category with which we are now concerned. The objection to production hinges essentially on what is said to be the possible effect of Noonan J.'s order or is put more or less as a concern to ensure that there is no inadvertent non-compliance with Noonan J.'s order.

17. On 16th October, 2018 the plaintiff replied stating that Noonan J.'s order was made without any reference to him, and making the core point that *"The order the parties consented to purports to quash documents, whatever that may mean. It does not afford any particular legal status to the documents that they did not have a week earlier*". GSOC replied on 17th November, 2018 stating that *"Your client was not a party to those proceedings therefore GSOC was not obliged to afford him an opportunity to take a role … it was for the court to make an order that your client be joined as a notice party if it considered this appropriate"*. I will return to this answer later.

18. On 13th November, 2018 the plaintiff issued a motion seeking an order striking out the defendant's defence in default of discovery. That motion was compromised and struck out before the Master on 12th April, 2019. A further motion to same effect was brought on 18th October, 2019 and again a consent order was made by the Master on 12th December, 2019. The plaintiff also sought to progress the non-party discovery, and the present motion was filed on 12th November, 2019 the reliefs sought being an order under O. 31, r. 29 of the Rules of the Superior Courts for discovery or inspection of the documents which GSOC were ordered to discover or an order directing GSOC to comply with the order for non-party discovery, and directions in relation to the manner in which compliance should take place. In the meantime, on 11th December, 2019 the defendant's affidavit of discovery was eventually sworn.

19. In relation to the present motion I have received helpful submissions from Mr. Barney Quirke S.C. (with Mr. David Perry B.L.) for the plaintiff and from Mr. Rónán Prendergast B.L. for GSOC. Ms. Sarah Corcoran B.L. (with Mr. Micheál O'Connell S.C.) for the defendants appeared to inform the court that the defendants were neutral on the motion, but that such neutrality was without prejudice to any issues that might arise at the trial relating to the admissibility or content of the documents. O'Mara Geraghty McCourt solicitors wrote on behalf of former Supt. Comyns, who I had directed should be put on notice of the application because it involves a possible interpretation of an order in proceedings in which he was involved. The letter states that he was not aware of the order for discovery at the time of the compromise of his judicial review and that he has no observations on the present application. Simultaneously his solicitors wrote to GSOC adding an additional sentence to the effect that he was concerned that the terms of the

resolution of his proceedings and the terms of the order in those proceedings would be adhered to.

Should an order in judicial review proceedings be held to affect a party not notified of those proceedings despite being directly interested in the decision impugned?

20. Mr. Prendergast initially suggested that there was a certain parallel problem here in that the present motion relating to discovery was not initially notified to Supt. Comyns, which he suggested paralleled Supt. Comyns' non-notification of Sgt. Barry of the bringing of the judicial review. However, that parallelism is more apparent than real because there is no statutory provision or rule of court that would have required Supt. Comyns to be notified of the present application. That notification arose out of a direction of the court (which, maybe, was made out of an abundance of caution). However, by contrast, the situation in judicial review is very clear.

21. Order 84, r. 22(2) of the Rules of the Superior Courts provides that "*The notice of motion or summons must be served on all persons directly affected"*. There can be absolutely no question but that a complainant in a statutory complaints process, the procedures or result of which is challenged in judicial review, is such a person. Thus, if a person complained against wants to review the legality of the procedures of, or quash the findings of, a complaints body, then they are obliged by O. 84, r. 22(2) to serve the judicial review proceedings on the person who made the complaint to the decision-maker that triggered the process in the first place.

22. The onus to comply with rules of court is on the parties; and there is also a corresponding and consequential onus to draw to the attention of the court any non-compliance, whether by oneself or another party. The primary onus to ensure that persons directly affected are served is therefore on the applicant in any given judicial review. In the present case, despite a request in that regard being included in the correspondence sent to Supt. Comyns' legal advisers, no information whatsoever has been provided as to why that rule of court wasn't complied with, although I should note in fairness to O'Mara Geraghty McCourt Solicitors that they did not act for Supt. Comyns in the latter's judicial review.

23. At the same time, if there is non-compliance by an applicant with O. 84, r. 22(2), a respondent in any given case should be aware of the provision and has a fall-back obligation to draw it to the attention of the court if the applicant doesn't. It is not a correct posture or an adequate answer for a respondent to claim (as GSOC did in correspondence here) that it is a matter for the court and essentially that they don't have to do anything. The court has to rely on the parties to ensure that rules are complied with, and would need an army of legal researchers if it was to be visited with some onerous new obligation of its own motion to check compliance with all rules of court in every case. In particular, where a complaint by a third-party triggers a process that leads an administrative body to potentially make a decision against a person complained about, the appropriate parties for judicial review purposes are not just the party complained against and the decision-maker, but also the party who made the complaint originally. That applies not just to GSOC complaints, but to any such statutory or administrative

complaints mechanism, and *mutatis mutandis* to other adjudicatory processes that affect multiple parties.

24. Unfortunately here, GSOC did not seem altogether alive to these requirements; and I would certainly encourage them and any other analogous statutory decision-makers to review their processes so that there is always a check to ensure that any judicial reviews are properly served on all affected parties or if not that the court is properly informed of the non-compliance. That is especially important in any context where there is a possibility of a consent order being made without an interested party getting a look-in, so that any omission in service on the part of the applicant is brought to the court's attention.

25. In principle an order (even a consent order) made in breach of O. 84, r. 22(2) can simply be set aside on the application of the party who was not so served. However, the plaintiff here does not seek that relief but simply asks that the order made in breach of that requirement must be taken as not affecting his rights. That conclusion almost has to go without saying under these circumstances.

Is an order of *certiorari* a basis to preclude discovery?

26. Independently of the foregoing, there is a separate issue as to whether the order of *certiorari*, even if it could be said to have affected the plaintiff here, is a proper basis to preclude discovery of the materials before the decision-maker. The technical procedure for orders of *certiorari* was changed significantly by the Rules of the Superior Courts (Judicial Review) 2011, which introduced a provision that the order of *certiorari* is essentially self-executing. Prior to that, the procedure appears to have been that the records were physically brought up to the High Court and a separate order was made in the name of the Chief Justice. The decision below was then physically endorsed as having been quashed on *certiorari*.

27. The rule for the making of a formal order in the name of the Chief Justice still remains in the Rules of Court as O. 84, r. 1(1): "*Orders of habeas corpus, orders of certiorari, orders of mandamus, orders of prohibition and orders of attachment shall be witnessed in the name of the Chief Justice or, if the office of Chief Justice be vacant, in the name of the President of the [Court of Appeal], sealed with the seal of the High Court and bearing date of the day of issue*." Indeed I should add that that historic order remains in Appendix T, form No. 3 of the Rules, in the following form:

> *"No. 3.*
>
> *ORDER OF CERTIORARI.*
>
> _____
>
> *[Title]*
>
> *To/*
>
> *C.D.*

Judge of the Circuit Court, (or

Justice of the District Court,

or as the case may be.)

Whereas it appears that all and singular the order(s) made by you on the ..... day of ..... at ..... whereby [set out shortly the substance of the order(s) or proceedings to be removed] ought to be sent by you to the High Court.

NOW THIS IS TO COMMAND YOU, the said C.D. to send forthwith under your hand and seal to the High Court, Four Courts, Dublin, all and singular the said order(s) [or as the case may be] with all things touching the same as fully and perfectly as they have been made by you and now remain in your custody or power, together with this order of certiorari, that the same may be quashed

BY ORDER, &c. [as in Form No. 1] [i.e., ... Chief Justice of Ireland, the ..... day of ..... 19 .

(Signed) ..... (Seal)

Master of the High Court.

By order of the Honourable Mr. Justice ..... made the ... day of ..... 19... at the instance of A.B.

This order was taken out by ..... of ..... solicitor for the said A.B.]."

28. However that elaborate procedure has essentially become defunct by reason of the introduction in 2011 of O. 84 r. 27(3) which makes the court's order self-executing: "*Where an order of certiorari is made in any such case as is referred to in sub-rule (2), the order shall, subject to sub-rule (4), direct that the proceedings shall be quashed forthwith on their removal into the High Court.*" This removes the need for the further order in the name of the Chief Justice following the order of the judge hearing the judicial review. But the history of the order of *certiorari* makes clear that the making of the order was not to result in destroying or removing any and all legal relevance for the documents against which the order was made. As reflected in traces in the wording of the present rules, one original purpose of the order was to "*remove*" the documents from a lower tribunal to a more convenient tribunal, in which the proceedings would then be continued. Writing of the Register of Original Writs of 1531, Edward Jenks ("The Prerogative Writs in English Law", (1923) 32 *Yale Law Journal*, 523 (April 1923, No. 6) at pp. 528-529) writes that "*The numerous writs* of Certiorari *given in the Register make it difficult to summarize the purposes for which the procedure was originally designed. It was largely concerned with documents, and especially those very important documents which were known as "*records." *The "*Originals" *collected in the Register appear to deal merely with the internal ramifications of the vast system of administration which had grown up out of the* Curia Regis *of the twelfth century, and whose limbs, stretched out like tentacles over the land, appeared to have lost touch with one another. One point is worthy of remark. Unlike the ordinary "*Originals" *which start civil proceedings, the* Certiorari *is seldom addressed to the sheriff; it goes to justices of assize, escheators, coroners, chief justices, treasurers and Barons of the Exchequer, mayors of boroughs, the clerk of the Common Bench, bidding them send records in their custody, or certify the contents thereof. Some of these*

records were of pending proceedings; and then, what more easy than for the authority to which the record was handed to continue the proceedings itself?"

29. Hence the very notion of removing the records by *certiorari* is antithetical to any notion of their destruction, their privilege or immunisation from any further use. The language of removal is preserved in O. 84, r. 27(2) which provides for a requirement to produce the original order "*where the reliefs sought is or includes an order of* certiorari *to remove any proceedings for the purpose of quashing them".*

30. The Law Reform Commission, in "*Judicial Review of Administrative Action: the problem of remedies*" (LRC WP 8-1979), noted at para. 2.5 that when an order of *certiorari* is made *"this quashes – i.e. positively invalidates – the impugned decision. The person who (or body which) took that decision is thus free to consider the matter afresh*". That brings out two points: first of all, that the effect of *certiorari* for the purpose of quashing a decision is to "*invalidate*" a decision, not to create a privilege against disclosure; and secondly that in the absence of a decision, the body is free to consider the matter afresh. Implicit in that is the notion that the materials previously before the decision-maker remain before the decision-maker. At para. 1.5, the Law Reform Commission referred to the latter point, saying that the order of *certiorari "will quash the administrative decision, thereby conferring implicit authority to reconsider the matter*".

31. There is now a specific provision in the Rules of Court for referral back *"in accordance with the findings of the Court"* (O. 84, r. 27(4)). That was a new provision introduced in 1986 (originally as r. 26(4)) and had not been included in the Rules of the Superior Courts 1962. However, strictly speaking, given the legal position as noted by the Law Reform Commission, the order for reference back seems to be declaratory in the sense that that possibility follows from *certiorari* anyway. The new rule goes beyond the declaratory if there are to be specific directions given by the court as to how the referral back is to take place. So even in the absence of an order for remittal back, the decision-maker can make a fresh decision, albeit that in special contexts such as the criminal one, there may be particular legal constraints: see Mark de Blacam, *Judicial Review* (3rd ed., Dublin, Bloomsbury Professional 2017) pp. 670 – 671.

32. The order of *certiorari* here uses the formula that "*the aforesaid findings and all records and entries relating thereto to be quashed without further order*". That phrasing is a little wordy. What are "*entries*" as distinct from "*records*"? (Even wordier is the formula in Appendix T, form No. 3, which refers to "*the said order(s) [or as the case may be] with all things touching the same as fully and perfectly as they have been made by you and now remain in your custody or power*"). GSOC raises the question as to whether the order means that the records so quashed are now privileged from disclosure. That concern has no logical basis. An order of *certiorari* is not intended either to destroy, to make secret or to make privileged any records. The purpose of it is to ensure that the document quashed is deprived of legal effect. It is probably worth noting that as emphasised in the passage from Jenks' article cited earlier, *certiorari* is directed to records and documents and not to amorphous, unembodied decisions. Hence the power in rules of court to direct

a decision-maker to make a written record of the decision if no record exists, so that that record can be quashed on *certiorari* (O. 84 r. 27(2)).

33. The other consequence of a decision being deprived of legal effect is that any consequences of such purported legal effect must be unwound. Typically, deprivation of legal effect of a decision has at least two such logical consequences. First of all, the decision has to be treated in any records of the decision-maker as not having such effect, typically by removing it from the file that will be before any subsequent decision-maker. Secondly, any steps that were taken that were premised on the decision having legal effect would need to be reversed, whether by way of publication or the making of subsequent decisions.

34. To that extent, *certiorari* is not a wholly negative order. It inherently involves a positive obligation to unwind the steps of the process to a point prior to the legal error. That follows automatically and does *not* require that an applicant also has to have sought *mandamus* for such an unwinding process. The steps of the process that must fall in consequence may be formal or informal steps.

35. It may assist if I give a couple of examples of this. In terms of formal steps, any subsequent decisions that are logically premised on an invalid decision need to be withdrawn. For example, a deportation order that is premised on a prior protection refusal must be revoked if the protection refusal is quashed. In less formal terms, an invalid decision that, premised on its validity, was published on an official website or otherwise made officially available, needs to be taken down and withdrawn; and there may be other specific steps required in particular circumstances. For example if a quashed document is laid before the Oireachtas, its status as a laid document must be removed. Likewise for a decision or document that, on the erroneous premise that it is valid, is given any other particular status or dealt with in any other particular way. Even if the order of *certiorari* does not spell out that effect, that is what *certiorari* means. And it means that irrespective of whether some ancillary mandatory order is, out of an abundance of caution, unnecessarily sought. However, that has nothing to do with conferring any privilege on the document quashed, which an order of *certiorari* does not.

Does an order of *certiorari* affect the underlying documents, as opposed to the records of the decision quashed?

36. Independently of the foregoing, quashing a decision or the records of that decision doesn't quash the underlying materials that were before the decision-maker, unless exceptionally there is some specific legal reason for doing so, in which case that will be expressly addressed by the order of *certiorari* for reasons identified by the court. Consequently, an order such as the one in this case only quashes the records embodying the actual decision of GSOC, not the material that was before GSOC.

37. Here, the form of the order of *certiorari* is maybe slightly wordier than necessary insofar as it refers to all records and entries. Properly interpreted that means records and entries of the decision, not the records and documents that were before the decision-maker. Such a conclusion is clearer in the more typical case where the decision-maker will simply

reconsider the matter in accordance with any court directions. Subject to any such directions, it reconsiders the matter on the basis of the material before the original decision-maker together with any new material; so that the underlying papers are typically in no way affected. But for the same reasons as noted above, even if a particular order of *certiorari* did in particular circumstances direct itself to a document before the decision-maker as opposed to the decision, that does not require the document's destruction or confer secrecy or privilege or make it immune from discovery. Thus, the present case is very different from cases such as *Breathnach v. Ireland (No. 3)* [1993] 2 I.R. 458 or *McLaughlin v. Aviva Insurance (Europe) plc* [2011] IESC 42, [2012] 1 I.L.R.M. 487, where an objective basis was sought to be put forward for a claim of privilege. Here, the reservation about disclosure relates simply to Noonan J.'s order, but that order does not provide a basis for an objection of privilege. Indeed, disclosure could only potentially add further clarity to some of the events the subject matter of the proceedings. There is thus no contradiction between the order of McDonald J. and the subsequent order of Noonan J.

Order

38. Accordingly, I will make the order sought at paragraphs 1 and 2 of the plaintiff's notice of motion; and pursuant to paragraph 3, I will order that GSOC will be required to allow inspection of and provide copies of all documents marked in yellow in the schedule furnished to the plaintiff within seven days and provide copies to the defendant within that timeframe.

Postscript - costs

39. Having heard the parties on this issue, both parties seek their costs. Order 31, r. 29 provides that the party seeking non-party discovery should indemnify the non-party in relation to the costs of making discovery. That provision is not affected by anything that I may decide on costs, and the plaintiff will have to continue to indemnify GSOC in relation to the actual costs of making the discovery. However, that provision only applies to the costs of *making* the discovery. It doesn't have a read-across as sought by Mr. Prendergast that if a non-party unsuccessfully contests any aspect of discovery sought in a court application, such non-party is automatically not only immune from a costs order, but is also entitled to its own costs. A non-party has the option of neutrality. If it makes a claim of privilege giving rise to a requirement on the party seeking discovery to incur court costs, that in turn creates the risk of a costs order against the non-party.

40. In relation to the costs of any contested matter, those costs follow the event under O. 99 as a default unless otherwise ordered: see *Dunne v. Minister for the Environment, Heritage and Local Government and Others* [2006] IESC 49, [2007] 1 I.R. 194. That is reinforced now by s. 169(1) of the Legal Services Regulation Act 2015. Even if that latter provision is not applicable to a motion against a non-party (which I am very far from deciding), at a minimum it only reinforces by analogy the general approach anyway, especially in a context where the present motion finalises matters as between the plaintiff and GSOC.

41. In addition to the general default position, there are a number of fact-specific aspects to the present application that are worth mentioning.

42. Firstly, the objection made here was a form of *jus tertii* on behalf of Supt. Comyns' rights. We subsequently found out, when he was consulted after the present motion was brought, and when he sent in an effectively one-line reply, that he was not getting involved in the present application. That doesn't hugely help GSOC's position here, even acknowledging the point made in reply that these were GSOC's documents rather than Supt. Comyns'.

43. Secondly, GSOC has a definite general policy of not agreeing to voluntary discovery. That policy is clear from the correspondence. That seems motivated by concerns around data protection and the statutory duties of GSOC. On the one hand, blanket policies are normally somewhat suspect, and it is not clear that it is totally right that they should be enforced at the expense of litigants such as the plaintiff. On the other hand, one cannot say (at least on the very limited information that I have) that it is a totally unreasonable policy either. As in many things, much depends on the manner of implementation. Maybe in a more typical case it would be more appropriate for GSOC's response to be that they had no objection to providing the documents provided that the court so orders. If the necessity for court intervention is limited to that kind of brief application with no particular submission or even appearance by GSOC, that might well result in no order as to costs or an order that GSOC's costs will be covered by the indemnity (which was what McDonald J. ordered when making the discovery order here originally).

44. Thirdly, in the particular circumstances here, GSOC's claim that it was simply seeking clarity is a search for a solution to a somewhat self-inflicted problem. GSOC did not tell Noonan J. that there was a pre-existing order for discovery, did not ask him to clarify that that order wasn't affected, and only subsequently claimed that there was lack of clarity about whether the order *was* so affected. They could easily have addressed this issue and nipped it in the bud; and more importantly had the power and opportunity to do so, which the plaintiff didn't. Essentially, and with of course the benefit of hindsight, GSOC don't seem to have fully thought the matter through before agreeing to compromise the judicial review. The somewhat self-generated nature of the issue that underlay GSOC's claim for privilege does not greatly assist their position in terms of costs.

45. Fourthly, a conclusion that costs should follow the event and that countervailing reasons have not adequately been demonstrated is not hugely diluted by the fact that GSOC did not notify Noonan J. that the plaintiff was not put on notice of the judicial review contrary to rules of court. That was something of an omission, and does not do much to enhance GSOC's case for departing here from the general principle of costs following the event.

46. Fifthly, while for present purposes I do not hold it against GSOC that there was not any real explanation for not seeking an order for remittal back of the complaint or even for the failure in the absence of such an order to take the matter up again after the previous decision was quashed on consent, and accordingly for letting the plaintiffs' complaint die, the fact that GSOC was not in a position to give such an explanation doesn't hugely assist

the argument made that costs following the event should be departed from on the basis that GSOC has acted reasonably throughout. It only now seems to be emerging that there might possibly have been terms to the compromise going above and beyond what was in Noonan J.'s order; and in particular that there might have been some jurisdictional issue about taking any further action on foot of the plaintiff's complaint. Although it is not clear what the jurisdictional issue really was, or whether there was any solid legal basis to that, what does seem clear is that GSOC never told the plaintiff that they concluded that they did not have jurisdiction to deal with his complaint. Maybe they should consider doing so now, if that's what they actually think. Or maybe if the complaint had been re-examined and a definite conclusion reached, perhaps matters would have looked differently in terms of where we are now in relation to discovery. Anyway, while as I say I can't positively hold this against GSOC on the basis of the somewhat cryptic information being haltingly presented to me here, what I can say is that the situation under this heading does not hugely assist their position in terms of the submission made that the default order should be departed from.

47. Bearing in mind all of the circumstances, the order will be an order for the plaintiff's costs of the present motion as against GSOC.

Second postscript – set-off and stay

48. Having heard the parties further I will direct that to avoid the inconvenience of payment and recoupment, there can be set-off as between the plaintiff's costs of the present motion and the costs of making discovery against which the plaintiff has undertaken to indemnify GSOC, with only the net balance to be paid by whichever party is subject to a higher liability. As the latter costs are subject to a stay until the determination of the action, the plaintiff's costs of the present motion will also have to be so stayed.