THE HIGH COURT

[2024] IEHC 540

[Record No. 2024/1792P]

BETWEEN

JONATHAN RANDALL

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr Justice Kennedy delivered on the 10th day of September 2024.

1. The Plaintiff instituted these proceedings to obtain discovery of a Garda investigation of sexual abuse allegedly perpetrated on him as a child in 1979. On foot of his complaint in 2019, a suspect was identified, and a file was sent to the Director of Public Prosecutions ("the DPP"). However, no prosecution could be brought as the suspect had died some years earlier. The DPP explained her conclusion to the Plaintiff, who requested the identity of the suspect, but the DPP rejected the request. The Plaintiff now seeks discovery of the investigation file and disclosure of the identity of the deceased suspect. The notice of motion is drafted in broad

terms, seeking a declaration that he is entitled to access to all documents, records, statements and information in the Defendant's power, possession and/or procurement, pertaining to the investigation, and an order directing the Defendant to make discovery accordingly. The Defendant is neither consenting nor objecting to the disclosure of the suspect's identity but does object to the provision of the investigation file.

2. Although the Plaintiff's affidavit provides further detail about the traumatic event, in view of its sensitivity, I do not propose to detail that evidence, save to note that the Plaintiff has stated that, as a 4-year-old, he was subject to a horrific episode of gross sexual abuse, molestation and rape perpetrated by an unidentified priest. Although he was too young to understand the full significance of what had been done to him, the wrongdoing had a significant impact on his development and his mental health. He made a complaint and provided a detailed statement to An Garda Síochána in 2019. The Garda investigation is complete, having identified the (deceased) suspect, but An Garda Síochána require a court order in order to disclose his name. The affidavit states that the Garda documentation, records, statements and information are relevant and necessary to enable him to identify and seek redress against the person who sexually assaulted him, and that there is no alternative way for him to access the information. Without such orders, he will be left without a remedy, as he will be unable to seek advice or to institute proceedings. He undertakes that the materials will only be used for the purposes of identifying the suspect and seeking legal advice with a view to obtaining redress, if available. Although the suspect is deceased, it was recognised in submissions that the Plaintiff could also rely on disclosed material for the purpose of seeking any redress to which he may be entitled from any parties who might be vicariously responsible for the alleged actions. There was no replying affidavit.

The Plaintiff's submissions

3. The Plaintiff submitted that he required the discovery order to compel the Defendant to disclose information which will assist the Plaintiff in identifying the wrongdoer, thereby enabling the Plaintiff to sue the wrongdoer for redress. Such orders are versatile with the terms adapted to fit the circumstances, as appropriate, and granted at the Court's discretion, when necessary and proportionate. He had satisfied the threshold conditions (showing a strong case that a (very serious criminal or civil) wrong had been committed, that the Defendant had become "*mixed up*" in the alleged wrongdoing, that the information sought was in the Defendant's possession and necessary for bringing court proceedings (or for pursuing some other legitimate remedy arising from the alleged wrongdoing) and that he had no other practicable or more appropriate means of obtaining the information). He also acknowledged the judicial discretion which required the Court to balance the disclosure interest against any public and/or private interests or objection and to consider the nature and substance of the case and/or the nature and seriousness of the injury he has suffered.

4. The Plaintiff submitted that the "*Arguable Wrong Condition*" was clearly satisfied (and the Commissioner did not dispute this). The Garda investigation identified a "*possible suspect*", and the Court has the Plaintiff's uncontroverted evidence as to the traumatic assault. The only reason given for not prosecuting was the death of the suspect. The information to identify the suspect and the investigation file are clearly in the Defendant's possession. There is no other way of accessing or obtaining the information. Accordingly, the Plaintiff satisfies the "*Possession/Necessity Condition*".

5. The Plaintiff submitted, citing *Norwich Pharmacal Co. v Commissioners of Customs and Excise* [1974] AC 133 ("*Norwich Pharmacal*"), that the "*Mixed up Condition*" does not require direct facilitation or involvement by a defendant in the wrongdoing, noting that Collins J. left the issue open in *Blythe v Commissioner of An Garda Commissioner* [2023] IECA 255

("*Blythe*"), and also that, as appears from *obiter* comments of Collins J. in *Blythe* (at para. 131), the *Norwich Pharmacal* jurisdiction may extend beyond requiring the disclosure of the identity of the alleged wrongdoer to requiring the disclosure of a "*missing piece of the jigsaw*" to confirm that a wrong has been committed or to enable a claim to be properly brought.

6. Accordingly, the Plaintiff submitted that the application satisfies the three applicable criteria and that, with respect to the "*Mixed Up Condition*", the application falls within the exceptional type of case identified by Collins J in *Blythe.* The Court has jurisdiction to order the disclosure of the investigation file and such disclosure would be proportionate to ensure the Plaintiff will have an effective remedy in respect of a very serious wrong.

The Defendant's Submissions

7. The Defendant accepted that the Plaintiff meets both the strong case threshold and the possession condition, and that the disclosure of the identity of the suspect is necessary for the Plaintiff to institute civil proceedings. However, he does not accept that the Plaintiff has demonstrated that the investigation file is necessary to commence proceedings. The Defendant submitted that if, during the course of any proceedings which might be brought by the Plaintiff, matters arose which left him at an evidential disadvantage, he would be entitled to seek non-party discovery. The Defendant shared the concerns expressed by Collins J. at paragraph 136 of *Blythe,* that investigations into criminal wrongdoing involve, *inter alia*, the taking of statements from individuals who may expect confidentiality and may involve the collection of information in relation to individuals the disclosure of which could engage those individuals' privacy rights. The Defendant submitted that the engagement of those rights should be a major consideration in how this Court exercises its discretion and that the Plaintiff has not demonstrated that the disclosure of the investigation file, beyond the identity of the suspect, was proportionate in the circumstances. The Defendant also submitted that he is entitled to the

costs of this application, noting that these costs may be recovered by the Plaintiff from a future defendant in civil proceedings.

Statutory Provisions

8. Section 62 of the Garda Síochána Act 2005 ("the 2005 Act") provides in relevant part:

"*(1) A person who is or was a member of the Garda Síochána … shall not disclose…any information obtained in the course of carrying out duties of that person's office, employment, contract or other arrangement if the person knows the disclosure of that information is likely to have a harmful effect.*

(2) For the purpose of this section, the disclosure of information referred to in subsection (1) does not have a harmful effect unless it—

…

(c) impedes the prevention, detection or investigation of an offence,

…

(f) results in the identification of a person—

(i) who is a witness in a criminal proceeding or who has given information in confidence to a member of the Garda Síochána, and

(ii) whose identity is not at the time of the disclosure a matter of public knowledge,

(g) results in the publication of information that—

(i) relates to a person who is a witness to or a victim of an offence, and

(ii) is of such a nature that its publication would be likely to discourage the person to whom the information relates or any other person from giving evidence or reporting an offence,

(h) results in the publication of personal information and constitutes an unwarranted and serious infringement of a person's right to privacy.

…

(4) Subsection (1) does not prohibit a person from disclosing information referred to in that subsection if the disclosure—

…

(b) is made to a court,

…

(e) is authorised by the Garda Commissioner, or

(f) is otherwise authorised by law."

The Authorities

9. The Plaintiff seeks a "*Norwich Pharmacal order*", a remedy which takes its name from the order made in *Norwich Pharmacal*. The jurisdiction is well established in common law jurisdictions, including Ireland. As Hyland J. observed in *Grace v. Hendrick & Anor* [2021] IEHC 320, citing Beaumont A.J. in *Colonial Government v Tatham* [1902] 23 Natal LR 153:

> "*The principle …is that where discovery is absolutely necessary in order to enable a party to proceed with a bona fide claim, it is the duty of the court to assist with the administration of justice by granting an order for discovery, unless some well-founded objection exists against the exercise of such jurisdiction*."

10. Collins J. analysed the *Norwich Pharmacal* jurisdiction in detail in the Court of Appeal's decision in *Blythe*, summarising the essential elements at para. 60:

> "*First, it was very clear that the plaintiffs were the victims of tortious wrongdoing…a clear infringement of the intellectual property rights of the plaintiffs. Second, the involvement of the commissioners was significant… According to Lord Reid, they had "unwittingly facilitated" the infringements, which "could never have been committed" without their involvement… Third, by the time that the matter came before the Judicial Committee, all that was being sought was the names and addresses of the importers. No wider disclosure was at issue. Fourth, the purpose of seeking such disclosure was limited and specific, namely the commencement of infringement proceedings against the importers. The fact that, absent the disclosure sought from the commissioners, the plaintiffs would not be in position to vindicate their property rights by action against the infringers was a factor emphasised by all the Law Lords. Thus, as I have already noted, Lord Kilbrandon attached great weight to the fact that the plaintiff was "demanding access to a court of law, in order that he may establish that third parties are unlawfully causing him damage.*"

11. The Plaintiff's onus and burden of proof (including the duty of candour) were considered by Simons J., at para. 22 of *Board of Management of Salesian Secondary College*

(Limerick) v Facebook Ireland Ltd [2021] IEHC 287 ("*Salesian Secondary College*"), (in a passage endorsed by Collins J. at paras. 104 and 114 of *Blythe*). There is no suggestion of any lack of candour or good faith here.

12. The parties agreed that the decision of Collins J. in *Blythe* comprehensively canvasses the applicable principles, noting the consensus that threshold conditions must be satisfied before a disclosure order may be made but that, even where such conditions are satisfied, the order is a matter for judicial discretion. At para. 62, Collins J. endorsed the synopsis provided by Saini J. in *Collier v Bennett* [2020] 4 WLR 116 ("*Collier*"), at p. 5:

> "*(i) The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person ("the Arguable Wrong Condition").*
> *(ii) The respondent to the application must be mixed up in so as to have facilitated the wrongdoing ("the Mixed Up In Condition").*
> *(iii) The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ("the Possession Condition").*
> *(iv) Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction ("the Overall Justice Condition").*"

13. At para. 64 of *Blythe*, Collins J. noted that the *Norwich Pharmacal* jurisdiction may not be confined to the disclosure of an alleged wrongdoer's identity but may extend to other information and documentary material. While appearing sympathetic to that view, at para. 131 he left open the question as to whether the jurisdiction extends, or ought to extend, to circumstances where what is sought is not the identity of the alleged wrongdoer but a "*missing piece of the jigsaw*" needed to confirm that an actionable wrong has indeed been committed and/or to enable a claim to be properly brought (particularly, perhaps, claims which are required to be verified on oath):

> "*Where an applicant has substantial grounds for considering that they may have a*

good cause of action or complaint but lacks a specific and limited piece of information (or documentation) which is needed in order to confirm that such a cause of action or complaint is well-founded in fact, there would appear to be much force in the argument that the court should, in principle – but exceptionally – be entitled to order disclosure. As already noted, access to the courts is a fundamental constitutional value in this jurisdiction and access to court, and the right to an effective remedy, are also enshrined in the ECHR and in the Charter. But it is better to await a concrete case before expressing a concluded view on this issue. Any such jurisdiction should – as indeed the Judge observed – be strictly limited to disclosure sought for the purpose of bringing a claim and would not extend to the disclosure of material required to prove that claim: that would be a matter for discovery in the ordinary way".

14. It was common ground – and I am satisfied – that the Plaintiff has met the "arguable wrong" criterion and also common ground that the information sought is in the Defendant's possession. However, there was a dispute as to the extent to which the entire investigation file (as opposed to the wrongdoer's identity) is necessary to enable the wrongdoers to be pursued. This judgment will accordingly concentrate on (using the *Collier* terminology) necessity, the "*Mixed Up In Condition*" and the "*Overall Justice Condition*". I will simply observe in respect of the requirement to demonstrate a strong case against the alleged wrongdoer that, while the Plaintiff will necessarily face evidential challenges, including in respect of any vicarious liability plea, that is one of the very issues which the disclosure is needed to address.

15. I will deal with necessity first, because it is, in my view, dispositive of the motion, before referencing (without resolving) the more complex question of the "mixed up" condition and considering the discretion/proportionality issue in case I am wrong as to necessity. In principle, the discretion logically only arises at the end of the analysis if the preconditions are met, but in practice issues arising in respect of the threshold conditions also have a bearing on the proportionality/discretion analysis.

Necessity

16. As Collins J. observed in *Blythe*, a *Norwich Pharmacal* order should not be made unless the court is satisfied that: (i) that the information sought is likely to be in the defendant's possession; (ii) it is necessary for the purposes of bringing court proceedings (or pursuing some other legitimate remedy arising from the alleged wrongdoing); and (iii) the applicant has no other practicable or more appropriate means of obtaining that information (in that case it transpired (after the High Court hearing) that the information sought was not, in fact, in the defendant's possession. Remarkably and to the Court's surprise and concern, it transpired that the defendant had failed to disclose that fact to the plaintiff or to the High Court, which would have rendered the application moot).

17. Leaving aside the possession issue, the Court was satisfied that the information sought (as to responsibility for WhatsApp messages about the plaintiff) was necessary. In the present case it is common ground – and I agree – that the disclosure of the identity of the deceased wrongdoer is necessary and I have accordingly already directed the Defendant to disclose that information. However, I am not satisfied that the Plaintiff has sufficiently discharged the onus of demonstrating that the disclosure of the entire investigation file is necessary for the purposes of identifying appropriate defendants, initiating proceedings and seeking redress. The disclosure request has gone far beyond what Collins J. described as a request for

> "*a specific and limited piece of information (or documentation) which is needed in order to confirm that such a cause of action or complaint is well-founded*".

I have no doubt that disclosure of the entire file at this stage would be *helpful* for the Plaintiff, but the Plaintiff's broad assertion is not sufficient to satisfy me that it is essential, rather than helpful. Although not cited by the parties and delivered in a very different context (considering whether limitation periods had been extended because the cause of action was concealed), I consider that the observations of Peart and Costello JJ. in *Komady Ltd v Ulster Bank Ireland*

Ltd [2014] IEHC 325 ("*Komady*") and *European Property Fund Plc v Ulster Bank Ireland Ltd* [2015] IEHC 425 ("*EPF*") are pertinent.

18. In *Komady*, Peart J. concluded that everything that the plaintiffs needed to know in order to get any advice was known to them. If they had gone to a solicitor and sought advice, they would have been in a position to provide all necessary information in order to get such advice. The fact that more detail only emerged subsequently did not change the position. Peart J. observed, at para. 56, that:

> "*The plaintiffs in my view are confusing the emergence of further facts during the course of an action, with facts sufficient for the accrual of a cause of action. They had ample facts at their disposal in order to commence an action for negligence/negligence misrepresentation …. A process of discovery might in due course have strengthened their hand in terms of their ultimate success at trial – or indeed might have weakened their case. But it is not necessary that every fact be known in order to commence proceedings. Sufficient facts are necessary in order to know that a cause of action has accrued. In the present case more than sufficient was known in the immediate aftermath of July 2006...*"

Costello J. cited *Komady* and reached the same conclusion in a similar claim in *EPF*.

19. In the course of any proceedings that may be initiated, the Plaintiff can seek discovery, initially against the other parties, and, if necessary, on a nonparty basis, against the Defendant to these proceedings. In addition, although as matters stand I am not satisfied that the disclosure of the entire file is necessary for the identification of defendants and the initiation of proceedings or other steps to obtain redress, the Plaintiff may bring a further application if, following the disclosure of the identity of the deceased suspect, he still requires further information before he can be properly advised and before proceedings can be initiated.

20. In the event of any further application being required in this or any other proceedings I would observe that, while it is a matter for the Defendant in the first instance as to how he engages in any future application in this or other proceedings, he may wish to furnish his counsel with less generic and more specific instructions in respect of the issues raised with the

investigation file in advance of the hearing of any such application. The Defendant is not expected to have undertaken a comprehensive review (and it is not for the Defendant to advise the Plaintiff on his proofs or strategy). However, it is surprising that rudimentary checks did not appear to have been undertaken to enable counsel to understand what information is actually held and its volume, whether it might or might not be reasonably required by the Plaintiff before proceedings are issued and the extent to which the Defendant would have specific (rather than generic) public policy objections to the disclosure of some or all of the particular file. It would be helpful for counsel to have some sense of such matters. I appreciate that in some cases - particularly whether the file is voluminous, spans a long period or covers sensitive issues - then this may not be appropriate and there may be issues which simply cannot be divulged. However, at least to the extent that it is practicable and appropriate in the particular circumstances, greater visibility of the actual position would be helpful. The Defendant should appreciate that, like any litigant, if he unreasonably elects not to make available information which should be readily accessible to him, then the Court may be less inclined to draw favorable inferences in the absence of such information. Furthermore, in the context of such applications for disclosure orders for against this particular Defendant, constructive engagement in advance of the hearing of such an application could help to narrow the issues. It would be concerning if there were a deliberate policy of dealing with such applications in a vacuum for doctrinaire or tactical reasons (in fairness, the Defendant did not suggest that that was the case). While the Commissioner is certainly not required to do a full file review before an order is made (which would defeat the purpose of the application process), it is highly undesirable that situations such as that experienced in *Blythe* should occur (where two Court hearings were required, both ultimately funded by the taxpayer, although the Commissioner never had any further information to disclose in any case). A more proactive approach by this Defendant (where possible and appropriate) could lead to resolution of some applications

against the Commissioner on an agreed basis (just as such engagement is even more appropriate in the context of *inter partes* discovery applications generally). While the Defendant is certainly not expected to disclose details of exactly what he has done in the investigation and what he has on its files in response to every enquiry and is not under any legal obligation to do so, the onus to engage may be greater in cases such as this one or the *Various Claimants v News Group Newspapers Ltd (No. 2)* [2014] 2 WLR 756 ("*Various Claimants*"), in which a very serious wrong appears to have been committed in respect of which redress could be denied, unless information is made available, as opposed to cases in which the Gardaí are essentially being used as a tool in civil litigation.

21. I would also note that in the event of its being faced with an information vacuum, it is open to the Court to adjourn an application such as the present one to enable the Defendant's counsel to take further instructions in respect of such matters. Indeed, the authorities cited by Collins J. in *A v B and An Garda Síochána* [2024] IECA 95 ("*A v B*") confirm that the Court may itself instead take the opportunity to review the file to resolve the issue which would be another way to address any such lacuna.

22. I would also encourage the Defendant to reflect further on the Court of Appeal's observations at paragraph 27 of the judgment in *A v B* which advocated a more nuanced Garda response in a somewhat analogous context:

> "*that avoids reflexive or routine claims of privilege, that distinguishes appropriately between the different categories of material that the Gardaí hold as part of a criminal investigation and that recognises the significant interest favouring disclosure in proceedings involving the safety and welfare of children*".

In that case, Collins J. noted the range of tools available to regulate and control disclosure, such as redaction and restrictions on the circulation and copying of disclosed material, and also noted that Courts must not indulge speculative applications for discovery/disclosure and seek to ensure that only material of real importance to the resolution of child care proceedings should

be directed to be disclosed by agencies such as An Garda Síochána, concluding that such approaches may avoid, or reduce the incidence of, such disputes before the Court.

23. Of course, the Plaintiff is no longer a child (unlike the situation in *A v B*) but it is relevant that the alleged wrongs appear to have been committed when he was very young and to have involved a gross breach of his constitutional rights, including to bodily integrity. In any event, a nuanced approach would be appropriate in other contexts beyond childcare.

24. Furthermore, as recent authorities, including *Blythe*, confirm, when dealing with costs, the Court may be concerned by any unreasonable failure by the Commissioner to address such issues and may also be less inclined to entertain public interest or proportionality submissions in the absence of a satisfactory articulation of the factual position by the Commissioner. However, I do not need to resolve such issues for the purposes of the current application because, at this stage, the Plaintiff has only, as yet, convinced me of the necessity to disclose the identity of the suspected wrongdoer and the Defendant has adopted an entirely appropriate and responsible position in respect of that issue.

The "Mixed Up In" Condition

25. The extent to which the Plaintiff is required to show that the Defendant was involved in the wrongdoing in some way is a critical issue (and was considered by Collins J. at paragraphs 132 to 139 of *Blythe.* While pre-action disclosure will be ordered somewhat more readily against putative defendants, the Courts are, traditionally, particularly reluctant to impose such requirements on non-parties to the prospective litigation. The exceptional nature of the jurisdiction and the need for some level of *involvement* in order to justify such an order were recognised in *Norwich Pharmacal* itself (and in subsequent authorities). For example, Lord Morris observed (at p. 178) in *Norwich Pharmacal* that:

> "*It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter*

would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information." (Emphasis added)

26. Over the years, *Norwich Pharmacal* orders have frequently been made against "innocent" or "neutral" parties who were not alleged to have acted wrongfully in any way but who were in some way party to the putative defendant's actions and might thus be in a position to disclose their identity. In *Norwich Pharmacal* itself, the innocent involvement of the Commissioners of Customs and Excise featured in the wrongful importation in breach of the plaintiff's rights. Likewise, an innocent bank might be required to disclose details of a fraudulent account holder or transaction. In Ireland, many applications over recent years have involved social media companies in defamation or fraud proceedings, where the social media companies are in a position to help plaintiffs identify the alleged wrongdoer.

27. Different considerations arise where a party, such as the Commissioner, has had no contemporaneous role – innocent or otherwise – in the original events – but has subsequently obtained information which may assist a plaintiff in identifying a defendant and pursuing a claim. This issue has arisen in particular in the context of applications for disclosure of information obtained in criminal investigations (although on the unusual facts of *Blythe*, which concerned a complaint by one Garda about actions of his unidentified colleagues, it appeared that the information had been obtained in the course of a disciplinary investigation, such as may be undertaken by any employer whose employees are suspected of having acted inappropriately, rather than a typical criminal investigation).

28. In *Blythe*, Collins J. noted the evolution of the requirement, expressed variously in *Norwich Pharmacal* in terms of "*involvement*" or "*participation*", of being "*mixed-up*" in or "*facilitating*" the wrongdoing, observing that, notwithstanding significant differences of approach and of emphasis within the post-*Norwich Pharmacal* jurisprudence, the trend had

been to expand the concept and that, notwithstanding the reference in *Collier* to the respondent having *facilitated* the wrongdoing, *facilitation*, or indeed any actual *involvement* in the wrongdoing itself (as opposed to involvement in the wider circumstances) was not always regarded as a strict pre-requisite. Collins J. noted that the defendant's involvement in *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 subsequent to the wrongdoing was regarded as sufficient, and that in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112, Maurice Kay L.J. suggested – *obiter* – that any facilitation requirement went beyond *Norwich Pharmacal* and was inappropriate. Collins J. considered the decision of Mann J. in respect of an application for such an order against the Metropolitan Police Service, in *Various Claimants* (a case based on, it must be said, exceptional facts), observing that:

> "*67. In Mann J's view, the MPS' "engagement with the wrong" was such as to make the force more than a mere witness. The MPS was not like someone who happens to witness an offending act and thereby required* [*sic*] *relevant information. It was "someone whose duty it is to acquire information about the offending act, albeit not for the benefit of victims" (para 55). While that might not be sufficient by itself – Mann J did not need to decide that – there were other significant factors. One was the fact that the MPS had actually provided information which, if a mere witness, it would not have had to have volunteered (this was a reference to the fact that the MPS had already informed the claimants that they were the victims of hacking and disclosing a limited amount of information about it). The MPS also indicated that it did so as a result of "some sort of unspecified obligation (or feeling that it ought to) and then agreeing, in principle, that it would not resist a formal claim for the information to a greater extent and in a more durable (and reliable) form.*"

29. Collins J. appeared more attracted to the approach adopted in *Countess of Caledon v Commissioner of Police for the Metropolis* [2016] EWHC 2214 (QB) ("*Countess of Caledon*"), in which a similar application for disclosure against the MPS was unsuccessful. The applicant claimed that an individual (the Counsellor), who had provided counselling to the

applicant's adult daughter, had poisoned the daughter's mind against her. The MPS had become involved when the daughter made a complaint of harassment against her mother, the applicant. The Counsellor was interviewed during the police investigation. The applicant sought disclosure of the investigation file, including the interviews with the Counsellor, in aid of her intended litigation against the latter. Slade J. held that the applicant had not shown that she had a cause of action against the Counsellor. She nonetheless considered whether the MPS were "*sufficiently engaged*" with the alleged wrongdoing to render it liable to make disclosure. She distinguished *Various Claimants* on the basis that the MPS had not been acting under a duty to acquire information about acts complained of by the applicant but were acting pursuant to a duty to inquire into the safety of her daughter and other young women (para. 53). Furthermore, in contrast with *Various Claimants,* the MPS did not consider itself under any obligation to provide information to the applicant (para. 55).

30. As Collins J. noted, the High Court in *Blythe* essentially adopted the *Various Claimants* approach, rejecting as an "*arbitrary limitation*" any requirement to show that the defendant had been "*mixed up*" in the matter complained of to the extent of facilitating the wrongdoing and concluding that it was sufficient that the Commissioner had been involved "*beyond the mere bystander role*". Collins J. queried this and left this issue open, observing that:

> "*134. I do not, with respect, find the analysis in Various Claimants wholly persuasive. In my view, a threshold test that turns on whether the defendant can be characterised as something more than a "mere witness" or "mere bystander" would be difficult to apply with any consistency or predictability and would appear to set the bar too low in any event. In my opinion, it is only if the defendant had some involvement in the allegedly wrongful transaction (or series of transactions) such that, absent such involvement, the transaction(s) would not have taken place in the manner it did that a jurisdiction to direct disclosure properly arises. ... A meaningful requirement for involvement is essential if the jurisdiction is to be properly delimited. Such a limitation is not, in my view, "arbitrary" ...*
>
> *136. AGS is under a public duty to investigate crime in the State. That is now reflected*

in section 7(1)(f) of the Garda Síochána Act 2005. In addition, there are many statutory agencies, such as the Revenue Commissioners, the Corporate Enforcement Agency, the Health and Safety Authority, the Commission for Communications Regulation (ComReg), and the Competition and Consumer Protection Commission (CCPC) that have significant investigatory duties (and powers). To regard such agencies as having an involvement in any (suspected) wrongdoing they may investigate, thereby potentially exposing them to the prospect of being compelled to make disclosure of information obtained in the course of (and for the purpose) of such an investigations would have significant implications both for the agencies concerned and more broadly, including for the persons who provided such information (whether voluntarily or otherwise) in the expectation that it would be used only for the statutory purposes of the agency concerned. It would not be appropriate to allow such agencies – which are entrusted with very significant investigative powers, including powers of compulsory entry and search – to be de facto co-opted as the inquiry agents of potential private litigants.

137. On the other hand, if a person suffers injury by the act of an unidentified third party, and that third party is subsequently identified by AGS, should it not be obliged to disclose the identity to the victim so as to enable them to pursue civil redress? The Judge clearly thought so and there is, perhaps, an intuitive appeal to that position (though questions immediately arise – where, for instance, AGS and/or the DPP decide that there is no sufficient evidence to justify a criminal prosecution, should a duty to disclose nonetheless arise? What would be the position if AGS merely suspected that X was the wrongdoer, without any clear proof; should it be obliged to disclose its suspicions? Of course it may be said that any such issues can and should be addressed at a later stage of the inquiry but, either way, they illustrate some of the difficulties that potentially arise in disclosure applications involving AGS). Furthermore, it is not clear whether in practice any actual difficulty arises in obtaining information from AGS. Were such a difficulty to arise, it would have to be addressed and, it may be, a different approach might be warranted. The case for applying a different approach in such circumstances would arguably derive support from Doyle where, as already noted, there was no suggestion of any involvement by AGS in any wrongdoing (other than their involvement in investigating the bombings). However, that is not this case.

138.…the reality appears to be that the Garda investigation was disciplinary in character and, albeit that Garda discipline is a matter of public law, the case for

characterising the Commissioner's role in such an investigation as being sufficient to satisfy the requirement for "involvement" is, it seems to me, significantly less compelling than in the hypothetical examples given by the Judge in his Judgment. Many employers – including private employers – carry out workplace investigations into alleged disciplinary breaches at work but it is difficult to see how such employers could properly be said to be "involved" in the wrongdoing on that basis alone and it is not evident why the Commissioner should be regarded as being in a different position simply because of AGS' function of investigating crime.

139. In any event, as I shall explain, it is not necessary to reach a concluded view on this issue for the purposes of determining this appeal." (emphasis added)

31. I can see the force of the considerations enumerated by Collins J. (and the judgments he summarises) for both sides of the argument. The Courts should be slow to place burdensome requirements on the Defendant which are not related to his core statutory public service functions and should avoid encouraging criminal complaints to be used as a tool for pre-trial discovery as is reported to occur in some jurisdictions (but, in fairness, there is no suggestion of that in this exceptional case). I do consider that, in practice, if not in principle, there may be some overlap between the "mixed up in" condition and the overall justice/proportionality assessment. For example, although the Defendant's role is *ex post facto* in each case, I find it easier to justify a direction that the Defendant disclose the identity of the suspect than I would to impose a potentially more burdensome discovery obligation in respect of the entire file and the Defendant appears to take the same position, in terms of the position adopted in relation to the two parts of the request. However, I need not determine the precise position on the "mixed up in" condition as a result of my decision that the Plaintiff has not yet established the necessity of the disclosure of the file. Since the Defendant was neither consenting to nor opposing the disclosure of the name of the suspect and I am not ordering any further disclosure, the question of the precise extent of the involvement required to justify a *Norwich Pharmacal* order and the extent to which such an order can go beyond the mere identification of a wrongdoer are best

left for future determination.

The "Overall Justice Condition"

32. As Collins J. noted at para. 62 of *Blythe*, while applicants only get to the "Overall Justice Condition" if they have overcome the threshold conditions, matters which arise in relation to the conditions may feed into the assessment of the "Overall Justice Condition". At para. 63, Collins J. endorsed the observations of Lord Kerr (speaking for the UK Supreme Court) in *Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation)* [2012] 1 WLR 3333, noting the need for flexibility and discretion in considering whether the remedy should be granted and that:

> "*The need to order disclosure would be found to exist only where it is a "necessary and proportionate response in all the circumstances", though the test of necessity did not require the remedy to be "one of last resort" (para 16). The essential purpose of the remedy is to do justice and that involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various factors had (Lord Kerr went on) been identified as relevant in the authorities, including:*
>
> > *"(i) the strength of the possible cause of action contemplated by the applicant for the order … (ii) the strong public interest in allowing an applicant to vindicate his legal rights … (iii) whether the making of the order will deter similar wrongdoing in the future … (iv) whether the information could be obtained from another source … (v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing … or was himself a joint tortfeasor … (vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result … (vii) the degree of confidentiality of the information sought … (viii) the privacy rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed … (ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclose … (x) the public interest in*

maintaining the confidentiality of journalistic sources, as recognised in section 10 of the Contempt of Court Act 1981 and article 10 ECHR." (para 17)."

33. Collins J. considered *Countess of Caledon*, observing at para. 70 that:

"*Counsel for the MPS had argued that, even if the pre-conditions for making a disclosure order were satisfied, there were powerful policy reasons why disclosure should be refused, given that the information that had been obtained by the MPS in the course of its investigation had been provided to the force in the expectation that it would be kept in confidence and only used for the purpose of which it was gathered, the criminal investigation….The judge accepted that the public policy considerations in maintaining confidentiality in statements and material obtained in the police investigation "overwhelmingly" outweighed the arguments in favour of disclosure...*"

34. Collins J. emphasised policy factors to be considered, observing at para. 142 that:

"*satisfying the relevant threshold conditions does not mean that the applicant is entitled (or, I would add, even presumptively entitled) to disclosure. The interests favouring disclosure must be balanced against those weighing the other way. ... the factors that apply, and the weight to be attached to them, are liable to differ from case to case.*

143. The party against whom disclosure is sought may have legitimate grounds for opposing disclosure in its own right. Here, the Commissioner objected to the order on the ground (inter alia) of confidentiality (citing section 62 of the 2005 Act). That is, in principle, a legitimate ground of objection. Quite apart from the specific provisions of section 62 (which is really concerned with unauthorised disclosure of AGS information by individual members), there is clearly a compelling public interest in maintaining the confidentiality of information obtained by AGS in the course of carrying out criminal investigations. I agree with the analysis of Slade J in Countess of Caledon v Commissioner of Metropolitan Police on that point. That analysis is, in my view, entirely consistent with the jurisprudence here, conveniently discussed in Gama Endustri v Minister for Industry, Trade and Employment [2009] IESC 37, [2010] 2 IR 85 which draws a sharp distinction between disclosure for public and private purposes. Of course, in this context as in many others, that interest may be outweighed by the factors favouring disclosure but the weight of the point does not disappear because, ultimately, a court may direct disclosure.

144. Other grounds may relate to the position and/or interests of the alleged wrongdoer and/or any third party (any party other than the party from whom disclosure is sought) who may potentially be affected by the making of the order. … A party against whom a Norwich Pharmacal order is sought is fully entitled to bring to the court's attention any matters which may weigh against the making of the order, including potential prejudice that may arise to third parties … Those third parties will not be (or will not usually be) before the court to be heard in opposition to the order and justice and fairness require that the party sought to be fixed with the obligation of disclosure should be entitled to assist the court in fully understanding the potential effect of its order as well as identifying any objections that the third party might be in a position to advance if he or she were a party before the court.

145. As already observed, there is – or ought to be – no assumption that the order sought should be made merely because the court is persuaded that the intended plaintiff has a strong case against the third-party wrongdoer. As important as the right of access to the courts/right to an effective remedy undoubtedly is, it may, in the circumstances of any given case, be outweighed by other considerations, such as privacy. The nature and substance of the case and/or the nature and seriousness of the injury that the intended plaintiff has suffered or is likely to be suffer in the future may all be important considerations in that context".

35. Collins J. also considered the separate but related question of the defendant's claim to privilege from non-party disclosure in *A v B*, in the context of family law proceedings and observed that *McLaughlin v Aviva Insurance (Europe) plc* [2011] IESC 42 should not be taken as confirming that the Commissioner enjoys absolute privilege from disclosure (time limited or otherwise). However, public interest factors must be "*put on the scales*" in determining whether to order disclosure, that the authorities emphasise that there is no priority or preference for the production of evidence over other public interests and, if necessary, the Courts, as the ultimate arbiter of such issues, will themselves review the documents to determine what should or should not be released and in some cases, particularly when dealing with live investigations or confidential sources, the balance will usually weigh decisively against disclosure. Collins J. observed that:

"*19.… the court is required to balance the public interest in the proper administration of justice against the public interest in the prevention and prosecution of crime and it is only where the first public interest outweighs the second that disclosure should be ordered: per Keane J in Breathnach, at 469.*

…

21. Conversely, the prejudice likely to arise from the disclosure of certain types of information – such as the identity of confidential Garda sources, confidential intelligence, information that would reveal methods of investigation and so on – is such that the balance will almost always weigh against disclosure (though it may be possible to direct the disclosure of redacted material or, as was discussed by the Supreme Court. …). But, as this appeal illustrates, not all applications for discovery of investigative material necessarily involve sensitive material of that kind.

…

23. …potentially far-reaching decisions affecting the safety, welfare and care of the minor children involved, the High Court (and the section 32 assessor) should have access to all relevant material. That is particularly so in light of the limited and somewhat speculative nature of the Commissioner's objection to disclosure which, at its height, was that it would or might deprive the Gardaí of a potential forensic advantage in the event that Mr A was prosecuted. No question of the disclosure of confidential Garda intelligence or confidential information relating to methods of crime detection or investigation arose here…"

36. I agree with Collins J.'s very helpful summary and would note that there is no live investigation which could be compromised in this case. In any event, I see no issue in terms of proportionality with requiring the Defendant to disclose the deceased suspect's identity. Since I have not concluded that the Plaintiff has established the necessity of disclosing the entire file, I do not need to consider the proportionality of such an order. If I had been required to exercise my discretion and consider the proportionality of such an order, then, while being mindful of the significant public policy factors which may arise and to the provisions of Section 62 of the 2005 Act and sympathetic to the dangers of unnecessarily imposing burdensome discovery obligations on the Defendant, I might nevertheless have exercised my discretion in favour of the Plaintiff, in view of the exceptional circumstances of this individual case and also in view

of the absence of any specific evidence from the Defendant as to why such an order might be disproportionate in this case.

Costs

37. At para. 149 of *Blythe*, Collins J. endorsed the conclusion of Simons J. in *Salesian Secondary College* that:

> "*as a general rule, the respondent ought ordinarily to be entitled to recover their costs from the applicant, at least where the respondent is not itself a wrongdoer*".

Even if a respondent *bona fide* – but unsuccessfully – resists the making of a *Norwich Pharmacal* application, they ought still to have their costs, absent further circumstances that warrant a departure from that general approach. *Blythe* was one of the exceptions that prove the rule in that regard, in view of the Defendant's failure to disclose until after the High Court hearing that there were no documents to be disclosed in any event.

38. The Defendant has correctly noted that the Plaintiff can seek to recover such costs in the event of a successful claim against a wrongdoer. I consider that I should award the costs of the current application to the Defendant, to be adjudicated in default of agreement. While I would not normally entertain an application for a stay, in the exceptional circumstances of the case, I consider that it is appropriate to place a stay on the enforcement of any such award to allow the Plaintiff to bring any such claim against the alleged wrongdoer(s). I will accordingly direct a stay in those terms but with liberty for the Defendant to apply for the stay to be lifted if such proceedings are not issued and prosecuted with as much expedition as may be reasonable in all the (extraordinary) circumstances of this difficult and sensitive case.

Conclusion

I have already directed the Defendant to disclose the identity of the deceased suspect to the Plaintiff on the basis of the latter's undertaking. The Plaintiff has not satisfied me that I should

direct the discovery of the entire investigation file, but I give him leave to bring a further application if it proves necessary to do so (either after issuing proceedings or in order to issue proceedings) and the Court may, if necessary, review the documents in the event of any such application if the parties are not able to resolve the issues through constructive engagement. I award costs to the Defendant subject to a stay as outlined above, to be adjudicated in default of agreement.