[2020] IEHC 683

THE HIGH COURT

[2020 No. 42 MCA]

IN THE MATTER OF AN APPLICATION BY THE TEACHING COUNCIL OF IRELAND AND IN THE MATTER OF A PERSONAL INJURIES ACTION IN WHICH AN ORDER WAS MADE UNDER SECTION 27(1) OF THE CIVIL LAW (MISCELLANEOUS PROVISIONS) ACT 2008

JUDGMENT of Mr Justice David Keane delivered on the 21st December 2020

Introduction

1. The Teaching Council of Ireland ('the Teaching Council') moves for an order providing it with the title and record number of a certain personal injuries action that it has seen described in two newspaper reports or, in the alternative, an order providing it with the names of the defendants in that action.

2. The Teaching Council presents the legal issues at stake as beguilingly simple, although in my judgment they are not. At the same time, the Teaching Council characterises its failure to identify the appropriate respondents or notice parties to its application; the appropriate form of order to secure for it the information it seeks; and the appropriate person or persons to whom that order should be directed, as the exercise of restraint in deference to the wide discretion of the court, rather than as an inappropriate invitation to the court to advise, as well as adjudicate, upon that application.

The newspaper reports

3. The first newspaper report has been retrieved from the website of the Irish Examiner ('www.irishexaminer.com'), where it appears under the headline 'Man who claimed he was sexually assaulted by scout leader and two Christian Brothers settles case' ('the Examiner story'). It is written by Ann O'Loughlin and is dated Thursday, 25 July 2019. In material part, it reads as follows:

> 'A 56-year-old man who claims he was sexually assaulted by two Christian Brothers teachers and a Scouting Ireland scout leader when he was a schoolboy has settled his High Court action.
>
> The man who is from the south of the country cannot be identified by order of the court.
>
> The action had been taken against the Christian Brothers in Ireland, two named Christian Brothers, Scouting Ireland and a former scout leader for alleged sexual assault in the 1970s.
>
> On the second day of the case today, Mr Justice David Keane was told that it had been settled. The man's counsel Sasha Louise Gayer SC said the case could be struck out.
>
> It will be mentioned before the court next October in relation to the implementation of the settlement.
>
> ...

At the outset, Mr Justice David Keane was told the case against the State defendants was being discontinued.

Against the Christian Brothers in Ireland and two named Christian Brothers, it was claimed that there was an alleged failure to take any proper precautions for the child's safety and there was an alleged failure to take any proper steps to protect him from the potential of sexual assault, battery or trespass to his person.

There was it was claimed an alleged failure to warn the boy of the dangerous nature of the schools he was attending. The claims were denied by the Christian Brothers in Ireland which claimed the case was statute-barred.

One of the Christian Brothers had admitted the abuse. Neither of the Christian Brothers has attended court for the case.'

4. The second newspaper report is one retrieved from the website of the Irish Times ('www.irishtimes.com'), where it appears under the headline 'Scouting and child abuse case settled for six figure sum' ('the Times story'). It is dated Sunday, 28 July 2019, and is written by Jack Power. In relevant part, it reads as follows:

'A man who claimed he was sexually assaulted by two Christian Brothers teachers and a scout leader, when he was a schoolboy in the 1970s, has settled his High Court action for a six figure sum.

Scouting Ireland and the Christian Brothers are understood to each be paying half of the cost of the settlement. The religious order had indicated that it would not contribute more than half of the sum, sources said.

The settlement, reached last Thursday, is subject to a confidentiality clause but several sources confirmed it runs into six figures.

The man, aged in his 50s, cannot be identified by order of the court. The action had been taken against the Christian Brothers in Ireland, two named Christian Brothers, Scouting Ireland and a former scout leader.

Last Thursday, the second day of the case, Mr Justice Keane was told it had been settled. Sasha Louise Gayer SC, for the man, said the case could be struck out.

...

Against the Christian Brothers in Ireland and two named Christian Brothers, it was claimed there was a failure to take proper precautions for the child's safety and to protect him from the potential of sexual assault, battery or trespass to his person. It was also claimed there was failure to warn the boy of the dangerous nature of the schools he was attending.

Both the Christian Brothers in Ireland and Scouting Ireland had denied the claims and contended the action was statute barred.

> Ms Gayer said one of the Brothers was later prosecuted in relation to an assault on the boy when he was in fifth class in national school. At the time, the Christian Brothers in Ireland said when the man made a complaint in 1998, the Christian Brother was removed from teaching and sent for counselling.
>
> ...
>
> The man had been represented by Coleman Legal Partners, which specialises in abuse cases. The firm has a further 20 individuals alleging they were abused while in legacy scouting organisations, according to partner Dave Coleman.'

The Teaching Council and the regulation of the teaching profession

i. the regulatory role of the Teaching Council – the Register of Teachers

5. The Teaching Council of Ireland was established on 28 March 2006 under the Teaching Council Act 2001. That Act has been amended by several later statutes, and they are now collectively cited with it as the Teaching Council Acts 2001 to 2015 ('the Teaching Council Acts').

6. The objects of the Teaching Council, under s. 6(a) of the Teaching Council Acts, include the regulation of the teaching profession. The functions of the Teaching Council include the establishment and maintenance of a register of teachers, under s. 7(2)(c), and the conduct of inquiries into and, where appropriate, the imposition of sanctions in relation to, the fitness to teach of any registered teacher, under s. 7(2)(i).

7. The instrument through which the Teaching Council exercises its regulatory function is the Register of Teachers ('the Register'). So, for example, the ultimate sanction that may be imposed on a teacher at the conclusion of a fitness to teach inquiry is removal from it. The force of that sanction and of the lesser one of suspension from the Register derives from s. 30 of the Teaching Council Acts, which makes current valid registration a necessary condition, subject to limited exceptions for short periods, of a teacher's remuneration out of State funds.

8. Under s. 7(3)(d) of the Teaching Council Acts, the Teaching Council is required to have regard, in the performance of its functions, to the need to protect children and vulnerable persons.

ii. fitness to teach complaints

9. Part 5 (ss. 42 to 47 inclusive) of the Teaching Council Acts deals with fitness to teach. It came into operation in its current form on 25 July 2016. Under s. 42(1), a person – including the Teaching Council itself – may make a complaint about a registered teacher to the Teaching Council's Investigating Committee in relation to certain specified matters. Those matters include professional misconduct, under s. 42(1)(b), and conviction in the State for an indictable offence or conviction in another state for conduct equivalent to an indictable offence under the law of the State, under s. 42(1)(g). A person who makes a complaint must specify the conduct alleged; s 42(1A).

10. Separately, under s. 42(1D), the Teaching Council may make a complaint in relation to information contained in a vetting disclosure in respect of a registered teacher that gives rise to a bona fide concern that the teacher poses, directly or indirectly, a risk of harm to any child or vulnerable person. And, under s. 42(1E), the Teaching Council may make a complaint on the basis of information contained in a vetting disclosure that it has received that the registered teacher concerned has been convicted of a criminal offence triable on indictment or has been convicted in another state of a criminal offence comprising conduct that would amount to an offence triable on indictment if it had occurred in the State.

11. An investigation can extend to conduct committed prior to 25 July 2016 in a number of different circumstances. First, the Investigating Committee may consider a complaint of professional misconduct alleged to have occurred prior to 25 July 2016, either where that conduct would have constituted a crime when it occurred or where it is of such a nature to reasonably give rise to a bona fide concern that the teacher represents a risk of harm to a child or vulnerable person directly or indirectly; s. 42(1B). Second, the Investigating Committee may consider a complaint based on a conviction covered by s. 42(1)(g) for conduct that occurred prior to 25 July 2016; s. 42(1C). Third, the Investigating Committee may consider a complaint from the Teaching Council based on information contained in a vetting disclosure it has received about conduct alleged to have occurred prior to 25 July 2016 that would have constituted a criminal offence when it occurred, where that conduct gives rise to a bona fide concern that the teacher may pose a risk of harm to any child or vulnerable person directly or indirectly; s. 42(1D). And fourth, the Investigating Committee may consider a complaint from the Teaching Council based on information contained in a vetting disclosure it has received about a conviction covered by s. 42(1)(g).

iii. consideration of fitness to teach complaints

12. Broadly speaking, there are up to four stages in the consideration of any complaint about the fitness to teach of a registered teacher.

13. First, under s. 42(3) of the Teaching Council Acts, the chief executive officer of the Teaching Council (known as 'the Director') must be satisfied that the complaint meets the formal requirements of the process and that it is neither frivolous, vexatious, made in bad faith, or an abuse of process ('the screening stage'). If the Director is so satisfied, he or she must refer the complaint to the Investigation Committee.

14. Second, under s. 42(5), where a complaint has been referred to it, the Investigation Committee must hold an inquiry into the fitness to teach of the registered teacher concerned ('the investigation stage'), unless procedures established under s. 24 of the Education Act 1998, as amended, have not been exhausted, save where there are good and sufficient reasons for considering the complaint notwithstanding that fact. Section 24(11) of that Act, which came into operation on 6 June 2012, provides that the board of a recognised school, in accordance with procedures to be determined by the Minister for

Education after consultation with various stakeholders, may suspend or dismiss a teacher who is, or who is to be, remunerated out of State funds.

15. Third, if following its inquiry, the Investigating Committee is of the opinion that there is a prima facie case to warrant further action being taken in relation to the complaint, then, under s. 42(10), it must refer the complaint, in whole or in relevant part, to the Disciplinary Committee ('the inquiry stage'). A panel of the Disciplinary Committee must then hold a formal inquiry into the complaint, under s. 43 of the Teaching Council Acts. Under s. 43(17), the panel must set out in a report the details of an adverse finding against a registered teacher. Under s. 44(1), the panel is then empowered to make a decision concerning the appropriate sanction to be imposed. Under s. 44(2), notice in writing of that decision and of the reasons for it must be furnished to the registered teacher and the various interested parties

16. And fourth, under s. 44(3), a registered teacher who is the subject of an adverse finding and a consequential decision to rescind, suspend or make conditional his or her registration, may apply to the High Court for the annulment or variation of that decision, subject to the possibility of a further appeal on a point of law to the Court of Appeal with the leave of the High Court ('the judicial review and appeal stage').

iv. public nature of the fitness to practice procedure

17. Where a hearing takes place before a panel of the Disciplinary Committee as part of a disciplinary inquiry, then, under s. 43(9), the default position is that it will be in public unless the panel considers it appropriate to accede to a request from either the teacher concerned, a witness, or someone about whom personal matters may be disclosed that part or all of the hearing be held in private.

18. Under s. 46B, at the conclusion of the process the Council is empowered to advise the public of an adverse finding against a registered teacher and, following consultation with the Disciplinary Committee, to publish (with or without the anonymisation of any party to the inquiry) the findings and decision of the Disciplinary Committee, if satisfied that it is in the public interest to do so.

v. vetting

19. Under s. 29(3)(a)(xi) of the Teaching Council Acts, the information that the Register must hold in respect of each registered teacher includes the most recent vetting disclosure in the possession of the Teaching Council. Under s. 31(5B), the Teaching Council cannot register a person unless it receives a vetting disclosure and is satisfied that he or she is a fit or proper person to be admitted to the Register, having considered that vetting disclosure, any submissions made, and any evidence submitted. Under s. 31(5C), the Teaching Council is expressly empowered to consider information contained in a vetting disclosure that relates to conduct prior to the commencement of that section on 29 April 2016, if that conduct would have been a crime when it occurred.

20. The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 came into operation on 29 April 2016. It is now collectively cited with Part 3 of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, as the National Vetting Bureau (Children and Vulnerable Persons) Acts 2012 to 2016 ('the Vetting Acts'). Under s. 21(1) of the Vetting Acts, a 'relevant organisation' – a broadly defined concept evidently intended to capture any entity engaged in work or activities relating to children or vulnerable persons – had to apply for a retrospective vetting disclosure for any person already engaged in that work or those activities within a prescribed period, which was to end not later than 31 December 2017. Thus, the National Vetting Bureau of the Garda Síochána ('the Bureau') should have been in receipt of a vetting disclosure application for all registered teachers in the State no later than that date.

21. Under s. 14 of the Vetting Acts, the vetting process involves the Bureau in making inquiries of the Garda Síochána and interrogating its own database to establish whether the person has a criminal record or whether there is any 'specified information' relating to the person. Under s 2, 'specified information', in relation to a person who is the subject of an application for a vetting disclosure, means information concerning a finding or allegation of harm to another person that is received by the Bureau from the Garda Síochána or a 'scheduled organisation' (one of a list of professional regulatory bodies and State agencies that includes the Teaching Council) and that is of such a nature as to reasonably give rise to a bona fide concern that the person represents a risk of harm to any child or vulnerable person directly or indirectly.

iv. powers of compulsion

22. Under s. 43(5)(b) of the Teaching Council Acts, a panel of the Teaching Council's Disciplinary Committee holding an inquiry into a registered teacher's fitness to teach has the same powers, rights and privileges as those vested in the High Court to enforce the attendance and examination under oath of witnesses and to compel the production of documents. But, under s. 43(1), an inquiry can only be held when a complaint has been referred to the Disciplinary Committee by the Investigating Committee under s. 42(9)(a). While the Investigating Committee has the power to require: a complainant to provide testimony, evidence or information, under s. 42(8)(a); a registered teacher under investigation to provide information or documents, under s. 42(8)(ab); and a school or other person it reasonably believes to be in possession of material information to provide information or documents, under s. 42(8)(ad), those powers are only exercisable once a person has made a complaint to the Investigating Committee.

23. The Acts do not confer any power on the Teaching Council to compel a person to provide it with testimony, evidence or information for the purpose of enabling it to decide whether it wishes to make a fitness to teach complaint to the Investigation Committee.

24. The implicit premise of the present application is that the perceived lacuna in the statutory framework that the absence of such a power represents should be filled by the exercise of the inherent jurisdiction of the High Court to compel the provision of such testimony, evidence or information whenever the Teaching Council forms the view that it

is useful (or, perhaps, necessary) for that purpose, at least where the requirement upon the Teaching Council to have regard to the need to protect children and vulnerable persons in the performance of its functions is engaged. This in turn requires acknowledgment of an antecedent (fifth) stage in the complaints process, in the form of an investigation by the Teaching Council into whether it wishes to exercise the right available to any person to make a complaint under s 42(1) of the Teaching Council Acts, notwithstanding its separate and exclusive right to make a complaint to the Investigating Committee under either s 42(1D) or s 42(1E) of those Acts.

Background to the application

25. From the limited evidence before me, these are the relevant facts.

26. The Examiner story appeared on 25 July 2019 and the Times story appeared on 28 July.

27. On 2 August, the Teaching Council, through its solicitors, wrote to Coleman Legal Partners ('Coleman'), the firm of solicitors that the Times story identifies as representing the plaintiff in the personal injuries action it describes. In that letter, the Teaching Council pointed to its regulatory function in carrying out fitness to teach inquiries, having due regard to the need to protect children and vulnerable persons, before stating that the newspaper reports had come to its attention. The Teaching Council acknowledged its understanding that the terms of the settlement agreement reached between the parties were confidential and that the proceedings were the subject of reporting restrictions preventing the publication of any information likely to identify the plaintiff, but went on to express the further understanding that those reporting restriction did not extend to information regarding the identity of the two Christian Brother defendants. The Teaching Council then requested that Coleman provide it with that information to enable it to determine whether the persons concerned were on the Register and, if so, what action may be necessary.

28. Coleman replied by email on 14 August, noting that the terms of the settlement agreement between the parties to the personal injuries action were confidential 'save as required by law' and asserting that they could not provide the information requested unless and until they could be satisfied that they were legally required to do so. That email did not refer to reporting restrictions.

29. On 7 October, the Teaching Council wrote to Coleman again, requesting – in effect – that they identify the legal representatives for the Christian Brother defendants, so that the Council could correspond with them concerning the identity of their clients.

30. Coleman replied by email of the same date, informing the Teaching Council that the Congregation of the Christian Brothers was represented by Frank Buttimer & Company ('Buttimer'), although that firm of solicitors did not represent either of the Christian Brother defendants.

31. The Teaching Council wrote to Buttimer on 23 October, asking it to identify the two Christian Brother defendants or, if unable to do so, to identify the legal representatives of

each of them. Buttimer replied on 14 November, asking the Teaching Council to set out the legal basis, if any, for its request.

32. The Teaching Council wrote to Buttimer again on 13 December, explaining that it was seeking to identify the two Christian Brothers concerned to enable it to carry out its statutory functions under the Teaching Council Acts. The Teaching Council went on to request that, if unable to identify the two persons concerned, the Congregation of Christian Brothers confirm instead whether the name of either appears on the Register. The letter concluded that, if Buttimer or the Congregation did not provide that information, the Teaching Council reserved the right to apply to the High Court to identify the persons concerned and to permit it to be provided with a copy of the Digital Audio Recording ('DAR') of the personal injury proceedings.

33. Buttimer responded tersely, by letter dated 30 January 2020, that, while the Teaching Council had identified the legal basis upon which it was seeking the information concerned, it had not identified any legal basis upon which either Buttimer or the Congregation were required to provide it.

Procedural history

34. On 5 February, Mr McDowell BL came before me *ex parte* on behalf of the Teaching Council, though without an *ex parte* docket or any evidence on affidavit, seeking directions on how an application might be brought for, at a minimum (in Mr McDowell's formulation), the disclosure of the names of the two Christian Brother defendants in the personal injuries action. Mr McDowell submitted that the Teaching Council was in a catch-22 situation in that it could not join anyone to its application as respondent or notice party because it did not know who any of the relevant persons were. I directed that the Teaching Council should put both Coleman and Buttimer on notice of whatever application it wished to bring, as they had not disputed in correspondence that they were the solicitors who had represented the plaintiff and the Congregation of the Christian Brothers, respectively, in the personal injuries action described in the newspaper reports. By reference to the Teaching Council's duty of candour, Mr McDowell informed me that it had been given to understand that neither of the Christian Brother defendants had been legally represented in that action. I directed that the relevant motion be returned on 19 February.

35. The Teaching Council's motion, which was duly issued and served, is dated 12 February. It seeks one of two alternative reliefs; an order providing the Teaching Council with the title and record number of the personal injuries action or an order providing the Teaching Council with the names of the defendants in those proceedings. It does not identify the person or persons to whom that order should be directed. It does not seek an order permitting the Teaching Council to be furnished with a transcript of the DAR of those proceedings.

36. The motion is grounded on an affidavit of Brian Hammond, solicitor, sworn on the same date. Both the two newspaper reports and the solicitors' correspondence that I have already described are exhibited to it.

37. On 19 February, the return date, Raymond Comyn SC appeared on behalf of the nominee of the Congregation of the Christian Brothers who had been one of the defendants in the personal injuries action, instructed by Buttimer.

38. Mr McDowell informed the court that Coleman, having been put on notice of the application, had written to the Teaching Council indicating that the plaintiff in the personal injuries action did not propose to take any part in it but would abide by any order the court might make.

39. Mr Comyn was able to remind me that, at the commencement of the trial of the personal injuries action, I had acceded to the application of Ms Gayer on behalf of the plaintiff for an order, under s 27 of the Civil Law (Miscellaneous Provisions) Act 2008 ('the Act of 2008'), prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the plaintiff as a person having a particular medical condition.

40. Mr McDowell made reference to the efforts that his instructing solicitor had made to obtain the information the Teaching Council is seeking from the Central Office of the High Court. I directed that those efforts should be evidenced on affidavit and adjourned the application for that purpose to 25 February.

41. On 24 February, Mr Hammond swore a second affidavit in accordance with my direction. In it, Mr Hammond avers that he took the following steps after the newspaper reports appeared. First, he consulted the Legal Diary on the Courts Service website. On perusing the Personal Injuries list for the week in question, he found that the Minister for Education was a defendant in one case listed on 23 July 2019. Using the details provided for that case in the Legal Diary, Mr Hammond then consulted the High Court Search database on the same website. That gave him the details of a case involving the same plaintiff and the Minister for Education. Those details include the record number of that personal injuries action and the names of the various defendants to it.

42. There was just one minor discrepancy between the information recorded on the database and the information in the newspaper reports; a firm other than Coleman was recorded as representing the plaintiff. However, the record number discloses that the proceedings were issued over a decade before they came on for trial and a change of legal representation in the course of litigation is not uncommon, especially when – for whatever reason – that litigation is protracted. While a change of solicitor, if it occurred, ought properly to have been recorded on the database, no system of record keeping is perfect. As one would expect, neither the Congregation of Christian Brothers nor Scouting Ireland is identified by name as a defendant. Each is an unincorporated association and, increasingly frequently, such entities take the sensible step of nominating one of their members as a representative defendant. Hence, by the process of deduction just described Mr Hammond formed the view (correctly, as it turned out) that this was in all likelihood the case referred to in the newspaper reports.

43. Turning to the Teaching Council's interaction with the Courts Service, Mr Hammond avers that on 22 October 2019, a colleague in his office e-mailed a registrar in the High Court. That email informed the registrar that the Teaching Council was seeking to establish whether either of the two Christian Brothers referred to in the newspaper reports was currently on the Register, having failed to obtain that information from the plaintiff's solicitor. The email continued that Mr Hammond's office had formed the view that the next step was apply to court for an order compelling the release of that information. The email was not clear about the specific information that was to be sought and was entirely unclear about who should be compelled to provide it. The email concluded by asking the registrar to advise on the procedure that the Teaching Council should adopt.

44. On the same date, the registrar replied, very properly in my view, that she could not offer legal advice and that Mr Hammond's office should seek the advice of counsel.

45. Mr Hammond emailed the same registrar just after close of business on Friday, l7 January 2020, almost three months later, requesting her to provide his office with the record number of the High Court personal injuries action involving the Minister for Education and Science that appeared in the Legal Diary for 23 July 2019 to enable the Teaching Council to make an application for the DAR of those proceedings.

46. The registrar replied by email on the morning of Monday, 20 January, stating that she was not in a position to disclose the record number of those proceedings and suggesting that the Teaching Council seek directions from me concerning whether it might be given leave to issue a motion in the personal injuries action seeking the DAR or would be required to issue fresh proceedings seeking that relief. That seems to have been the impetus for the ex parte application that Mr McDowell then made to me on 5 February.

47. When the matter came back before the court on 25 February, Mr McDowell submitted that, in light of what had been disclosed at the hearing of 19 February, the Teaching Council's application was now in substance one for an order lifting – for a specific purpose and in a limited way – the reporting restrictions under s 27 of the Act of 2008 that had been imposed in the personal injuries action. Mr McDowell expressed the understanding that the imposition of those restrictions had resulted in an embargo of some sort on the information about the personal injuries action available on the High Court Search database. I indicated that I would wish to have evidence on affidavit of the nature and extent of any such embargo and of the efforts that the Teaching Council had made to obtain the information it was seeking from other sources to enable me properly consider that application. To facilitate the Teaching Council in that regard, I adjourned the matter once again to 31 March.

48. Unfortunately, due to the arrival in Ireland of the Covid-19 pandemic, the President of the High Court subsequently directed, on 16 March 2020, that all matters listed for the remainder of that legal term were to stand adjourned generally, with liberty to re-enter each when either necessary or appropriate to do so.

49. In the meantime, Declan O'Leary, who is the head of the Disciplinary Committee Unit in the Teaching Council, swore an affidavit on its behalf on 23 April 2020. In material part, Mr O'Leary avers as follows. Through the inquiries already described, he became aware of the names of the defendants to the High Court personal injuries action believed to be the one the subject of the newspaper reports, although he did not know which of the various defendants named were the two Christian Brothers alleged to have sexually assaulted the plaintiff.

50. On or about 25 March 2020, Mr O'Leary searched the Register against the name of each defendant as it appears in the English language on the High Court Search database and against various Irish language variants of each of those names. He found no match between any such name and that of any teacher currently on the Register old enough to have been teaching in the 1970s. Nonetheless, Mr O'Leary could not be certain about the result because of the possible use of an unusual Irish language variant of a given surname. For that reason, Mr O'Leary averred, the Teaching Council was still seeking the relief set out in its notice of motion.

51. However, that was not strictly correct because events had moved on since the issue of the motion. The Teaching Council had already obtained the relief it had sought; namely, the title and record number of the personal injuries action and the names of the defendants (at least, to a high degree of probability). Having since learned that the reporting restrictions referred to in the newspaper reports had been imposed under s. 27 of the Act of 2008, the Teaching Council was now seeking to have them modified or lifted – in the evident belief that this would have the effect of making additional information available on the High Court Search database that would enable it to identify with greater precision the relevant defendants in the personal injuries action.

52. Mr Hammond also swore an affidavit – his third – on 23 April 2020, to which he exhibited the correspondence that had passed between his office and the Courts Service on foot of the direction that I gave on 25 February. On 3 March, his office wrote to Angela Denning, the Chief Executive Officer of the Courts Service. Having set out the sequence of events already described, that letter stated:

> 'We are now corresponding to ascertain whether we can be furnished with the information referred to above, and if not, why not. The information is the names of the two Christian Brothers, as listed in the case name which was before Mr Justice Keane on 23 July 2019.
>
> Accordingly, we now ask you to please address the questions we have set out below. This is for the purpose of enabling us to effectively provide this information to Mr Justice Keane when the matter is back before him for mention on 31 March 2020:
>
> a) Whether the proceedings which are referred to in the media reports and which settled before Mr Justice Keane on 26 July 2019 (sic) are the proceedings entitled '...', bearing record number ...;

b) If not, what is the title of the proceedings which settled before Mr Justice Keane on that date;

c) If the Courts Service is restricted in confirming the above information, whether that restriction is an ordinary restriction that applies in every case, or whether it flows from an Order made by Mr Justice Keane restricting publication of certain information concerning that case;

d) If the Courts Service cannot confirm the information sought in (a), its legal basis for that position;

e) Whether, per the email of [the registrar] dated 20 January 2020, the Courts Service requires an Order of the High Court in order to provide the relevant information to the Teaching Council; and

f) Whether the Courts Service is relying on S.I. No. 659/2018 – Data Protection Act 2018 (Section 159(1) Rules 2018 – in relation to this application.

`Section 159(7) of the Data Protection Act 2018

Separately, can you confirm whether section 159(7) of the Data Protection Act 2018, which applies to documentation which has been opened or is deemed to have been opened in Court applies to the Teaching Council.

Although the Teaching Council is not a '*bona fide member of the press'*, we would respectfully suggest that the Teaching Council may be similarly entitled to access the documentation referred to above in the performance of its functions as set out on affidavit. We ask you to consider releasing the documentation to us on behalf of the Teaching Council in one of three ways specified in the Data Protection Act, namely;

1. Supervised inspection of the Court record,
2. Provision of a copy, or allowing a copy to be made, of the relevant document within the Court record on an undertaking that any copies made will be returned when the reporting of the case is completed, or
3. Provision of a press release or by the information in an oral or written form.'

53. I pause here to note that the questions just quoted range beyond the matters I had requested the Teaching Council to address in evidence, which were, first, the nature and extent of the embargo (if any) placed on information otherwise available on the High Court Search database because of the reporting restrictions imposed in the personal injuries action and, second, the efforts made by the Teaching Council to obtain from other sources the information that it was now seeking to have the court order someone else to provide it with. To that point, it had not been suggested that the Teaching Council was seeking to rely on any of the provisions of the Data Protection Act 2018, or any of the Rules made pursuant to ss. 158 or 159 of that Act.

54. By letter of 24 March, Linda Memery, a Courts Service data protection officer, replied in detail on behalf of the Courts Service CEO as follows:

'Please be informed that Article 23 of the General Data Protection Regulation (GDPR) allows EU Member States to restrict the scope of data subjects' GDPR rights

and organisations' GDPR obligations by introducing derogations to national data protection law in certain situations. As you are aware, the national legislation, which, amongst other things, gives effect to the GDPR and sets out derogations, is the Data Protection Act 2018 (the Act).

In response to your question: a) and b)

Please be advised that all records created in relation to court proceedings are considered "court records".

In the case of personal data processed by or on behalf of a court when acting in a judicial capacity, the rights of a data subject and the obligations of a controller of that data, as referred to in section 158(1) of the Data Protection Act 2018, are restricted to the extent that the restrictions are necessary and proportionate to safeguard judicial independence and court proceedings.

Furthermore, any processing of personal data held on a Court record is under the control of the Courts and not the Courts Service, in accordance with section 65 of the Courts Officers Act, 1926 which states that "*all proofs and all other documents and papers lodged in or handed in to any court in relation to or in the course of the hearing of any suit or matter shall be held by or at the order and disposal of the judge or the senior of the judges by or before whom such suit is heard*".

The personal data to which you refer pertain to the business of the court and therefore fall within the control of the judge concerned.

c) If the Courts Service is restricted in confirming the above information, whether that restriction is an ordinary restriction that applies to every case, or whether it flows from an Order made by Mr Justice Keane restricting publication of certain information concerning that case:

I understand that the Court has directed that section 27 of the Civil Law (Miscellaneous Provisions) Act 2008 [will apply] and accordingly, [that] direction applies to the Courts Service and its staff, therefore by providing the necessary information pertaining to the case to a non-party, constitutes publication and could identify the relevant person for whose benefit the Court Order was made.

Furthermore, the Courts Service has no role in deciding who may or may not make an application to the High Court and the Courts Service is not permitted to offer legal advice to any party. It is a matter for a party to decide whether, in given circumstances, an application to the High Court would be appropriate, what order to ask the Court to make and who is to be bound by that order. Only a judge can decide whether to hear the application, whether to make an order and, if so, what order to make, and who is to be bound by that order.

d) If the Courts Service cannot confirm the information sought in (a), its legal basis for that proposition;

See response at "a".

e) Whether, per the email of [the registrar] dated 20 January 2020, the Courts Service requires an Order of the High Court in order to provide the relevant information to the Teaching Council, and

See response at "c".

f) Whether the Courts Service is relying on S.I. No. 659/2018 – Data Protection Act 2018 (Section 159(1) Rules 2018 – in relation to this application.

The Data Protection Act 2018 (Section 159(1)) Rules govern the processing on behalf of a court of personal data controlled by that court when acting in a judicial capacity:

Data Protection Act 2018 (Section 159(1)) Rule 4(5)(d)

"4.(5) A Processor may, subject to the provisions of statute, the Rules of Superior Court, any applicable practice direction of the court concerned and any order of that court, disclose by transmission, dissemination or otherwise, personal data contained in a court record:

...

(d) to any other person or persons (including an artificial legal person(s)) directed by the court concerned for any other purpose which the court concerned may determine to be appropriate having regard to the provisions of the Data Protection Regulation, the Directive and the 2018 Act...."

Please be advised that access to court files of the Superior Courts is governed by Practice Direction HC86, which states at Paragraph 2 that "files maintained in the (...) offices of the Superior Courts shall not be made available to any person attending at any of those office; (...) this includes the parties to the proceedings and the solicitors on record."

Finally, you have respectfully suggested that your client may be entitled to access the documentation concerned under section 159(7) of the Act in the performance of its functions.

Section 159(7) provides that rules may be made authorising the disclosure of information contained in a record of proceedings before a court to a bona fide member of the media for the purpose of the fair and accurate reporting of court proceedings.

The conditions for granting a request under section 159(7) are that the requestor has sufficiently verified his/her identity and status as a bona fide member of the media to whom the request is made. Therefore, section 159(7) does not apply in the circumstances which you have set out.

An application for access to court records held on a Court file under the control of the High Court must be made directly to the court where the case was heard and put before the Judge for decision.'

55. Mr McDowell came before me again *ex parte* on 16 September, seeking the re-entry of the application as an urgent one due to the requirement upon the Teaching Council to have regard to the need to protect children and vulnerable persons in the discharge of its functions, which include the conduct of fitness to teach inquiries. I acceded to that application and fixed 21 October 2020 for the hearing.

The Teaching Council's Argument

56. The Teaching Council relies principally on the decision of Barr J in *Eastern Health Board v Fitness to Practice Committee of the Medical Council ('the EHB case')* [1998] 3 IR 401 and, in particular, the following three of the twelve enumerated propositions for which it is authority (at 429):

> '5. There is an established practice at common law recognised in England and in this jurisdiction (see *P.S.S. v. Independent Newspapers (Ireland) Ltd*. (Unreported, High Court, Budd J., 22nd May, 1995) that the court in proceedings held in *camera* has a discretion to permit orders on such terms as the judge thinks proper to disseminate (and in appropriate cases to disseminate himself/herself) information derived from such proceedings where the judge believes that it is in the interests of justice so to do, due and proper consideration having been given to the interest of the person or persons intended to be protected by the conduct of the proceedings in *camera*. In given circumstances, the judge may find that a crucial public interest, such as the prosecution of crime or the protection of vulnerable children, takes precedence over the interest of the protected person in non-disclosure of the information in question.
>
> 6. In considering a conflict between the public interest or the interest of a person seeking disclosure on the one hand, and the interest of an individual in retaining the full benefit of the in *camera* rule on the other hand, the court is bound by the concept that the paramount consideration is to do justice – see *In re R. Ltd*. [1989] I.R. 126.
>
> 7. The use of evidence emanating from an in *camera* hearing in other legitimate proceedings where the public interest or the interest of the protected person or some other interested party requires, includes not only related litigation in court but also other non-judicial proceedings such as a statutory inquiry by a professional body into complaints made to it about professional negligence or incompetence of one of its members – see *A County Council v. W*. [1997] 1 F.L.R. 574.'

57. Separately, the Teaching Council submits that the s. 27 order made in the personal injuries action was intended to protect the plaintiff from identification as a person with a particular medical condition, where that would have been likely to cause him undue stress, and was not intended to protect, or ensure, the anonymity of either of the two Christian Brother defendants.

58. Further, the Teaching Council points out that it has clearly identified the public interest it asserts as the basis for its application; that of the proper and effective regulation of the

teaching profession with due regard to the particular need to protect children and vulnerable persons in that context. This, the Teaching Council argues, is fully consistent with the requirement – identified by O'Donnell J for the Supreme Court in *Gilchrist v Sunday Newspapers Ltd* [2017] 2 IR 284 (at 314) – to squarely identify the competing interest or pressing circumstance relied upon in seeking a qualification upon the fundamental requirement under Article 34.1 of the Constitution that justice shall be administered in public (albeit, what is in issue here is a claimed exception to a statutorily prescribed qualification upon the public administration of justice requirement, rather than a claimed qualification upon that requirement as such).

59. Still further, the Teaching Council submits that the relief it seeks – a variation of the s. 27 order, coupled with a direction that it be provided with either the full title and record number of the personal injuries action or the names of the two Christian Brother defendants to it – is a narrow one, fully consonant with the approach endorsed by the Supreme Court in *Gilchrist* (at 314), in that it does not require the court to make a binary choice between the unqualified application or disapplication of an in *camera* requirement.

60. Finally, the Teaching Council suggests that the decision on its application is unlikely to create a significant precedent because: (a) instances where professional disciplinary concerns arise from matters at issue in civil proceedings covered by reporting restrictions under s. 27 are likely to be rare; and (b) the court is not being asked to establish or apply a new principle, nor to depart from any established line of authority.

The personal injuries action

61. Lest anything should turn on precisely what happened in the personal injuries action that is the subject of the newspaper reports, I listened to the Digital Audio Recording to refresh my recollection. In broad outline, this is what occurred.

62. The action was called on for trial very late on the afternoon of 23 July 2019. I was informed that the proceedings had been discontinued against the State defendants, who were the Minister for Education and Science, Ireland and the Attorney General. Appearances were taken on behalf of the plaintiff and those of the remaining defendants who were legally represented or present in court. Neither of the two Christian Brother defendants was represented or present. I was then apprised of a number of routine procedural matters, after which the trial ended for the day.

63. When the trial resumed the following morning (24 July 2019), Ms Gayer applied for an order under s. 27 of the Act of 2008 on behalf of the plaintiff. Although, strictly speaking, under s. 27(6) the application should have been made to me in chambers, that did not occur. Instead, a report – in the form of a letter of 18 June 2019 from the plaintiff's general practitioner – was handed to me without objection by, or on behalf of, any of the defendants present, or represented, in court. The report disclosed that the plaintiff, who had been a patient of that doctor since 2012, had previously developed a serious psychiatric disorder, which had resulted in his admission to hospital for treatment on 25 separate occasions, and was suffering from a separate, though related, mental health condition that was a cause of continuing concern for his life and health. Ms Gayer

submitted that the identification of the plaintiff as a person with that condition would cause him undue stress and that there was no reason to apprehend that it would be in any way prejudicial to the interests of justice to make the order sought. None of the defendants opposed the application. As I was satisfied on the evidence before me that the statutory test had been met, I made an order, under s. 27 of the 2008 Act, prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the plaintiff as a person having that condition.

64. Following that ruling there was a short delay to enable certain technical issues to be addressed, so that it was just before lunch when Ms Gayer began to open the case for the plaintiff.

65. Ms Gayer explained that the interval of approximately 16 years between the issue of the proceedings in 2003 and the commencement of the trial in 2019 was attributable to the decision to await clarification of the law on a number of issues, including: the vicarious liability of the State for the actionable wrongs of a teacher in the State's education system (*O'Keeffe v Hickey* [2009] 2 IR 302); the State's liability for failure to put in place appropriate mechanisms to protect primary school pupils from sexual abuse by a teacher (*O'Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014)); and the vicarious liability of a religious order as an unincorporated association for the sexual abuse of pupils by a teacher who, at the material time, was a member of that order (*Hickey v McGowan* [2017] 2 IR 196).

66. Ms Gayer continued her opening by outlining the competing claims and denials advanced in the pleadings that had been exchanged between the parties, before sketching the procedural history of the action and identifying, in conclusion, the various witnesses that the plaintiff proposed to call and a broad summary of the evidence that each was expected to give. That brought the trial to the close of the first (and only) full day of hearing.

67. When the trial resumed on the following day, Thursday, 25 July 2019, Ms Gayer informed the court that the action had settled and that, with the consent of the remaining defendants, the plaintiff was seeking an adjournment to 10 October 2019 to enable the terms of the settlement reached to be implemented. I acceded to the application.

68. On 10 October 2019, a technical issue arose on the confirmation of all of the consents necessary to enable the proceedings to be struck out and the action was adjourned for one week to allow that issue to be addressed. On 17 October 2019, that issue was disposed of and, on the application of the plaintiff with the consent of the remaining defendants, I struck out the proceedings with no further order.

Analysis

i. the nature of the application

69. Although the Teaching Council had indicated to both the Congregation (in a letter to Buttimer of 17 December 2019) and the Courts Service (in an email to the registrar of 17

January 2020) that it was contemplating an application for an order directing that it be provided with a copy of the DAR of the personal injuries action (that is to say, an order under O. 123, r. 9 of the Rules of the Superior Courts ('RSC')), it has not brought an application of that kind.

70. Similarly, although the Teaching Council had suggested in correspondence with the Courts Service that it was contemplating an application under the relevant rules made under s. 159 (1) or (7) of the Data Protection Act 2018, it has not brought an application of that sort either.

71. Instead, relying upon the *EHB* case, it seeks an order that it be provided with the title and record number of the personal injuries action that it has seen described in two newspaper reports or, in the alternative, an order providing it with the names of the defendants in that action.

72. The *EHB* case involved an inquiry before the Fitness to Practice Committee of the Medical Council under s. 45(3) of the Medical Practitioners Act 1978 (since repealed and replaced by the Medical Practitioners Act 2007) arising from complaints made to the Medical Council by a number of parents of different children about a physician who was a specialist in the diagnosis and treatment of child sexual abuse and who had concluded in each case that the child concerned had been sexually abused by a relative. The complaints concerned the standard of clinical judgment and competence that the physician had demonstrated in coming to that – the parents asserted, erroneous – conclusion.

73. Under s. 45(6) of the Act of 1978, the Fitness to Practice Committee of the Medical Council was expressly given the same power to order the production of documents for the purpose of a fitness to practice inquiry that the High Court has in proceedings before it. The Teaching Council's Disciplinary Committee has the same power under s. 43(5)(b) of the Teaching Council Acts, but the present application is not brought against the background of an extant Disciplinary Committee inquiry. In the EHB case, the Fitness to Practice Committee made orders under s. 45(6) of the Act of 1978 directing the chief executive of the EHB to make available to it the medical records of the children concerned. Relying on the decision of Laffoy J in *M.P. v. A.P. (Practice: in camera*) [1996] 1 IR 144 and that of Carney J in *The People (DPP) v. W.M*. [1995] 1 IR 226, the EHB argued that it was precluded from doing so because those records had been introduced *in* evidence in court proceedings involving those children and were, thus, protected by the in *camera* rule, In distinguishing each of those two authorities, Barr J concluded that a statutory requirement that proceedings of a particular kind be heard i*n camera* does not imply an absolute embargo on the disclosure of the evidence adduced in those proceedings in all circumstances, before enumerating what he considered to be the applicable principles of law, including the three propositions already quoted that the Teaching Council relies upon here.

74. In identifying those principles, Barr J drew in significant part on the analysis of Cazalet J for the High Court of England in Wales in *A County Council v W (Disclosure)* [1997] 1 FLR

574 ('the W case'). In that case, the UK General Medical Council ('the GMC') sought leave for the disclosure of documents relied upon in earlier childcare proceedings heard *in camera* by Cazalet J under the Children Act 1989 in which specific and detailed findings had been made that the child's father, a registered medical practitioner, had sexually abused the child. Arising from that finding, the GMC subsequently received complaints from both a senior police officer and the relevant local authority involved in those proceedings that the father was unfit to continue practising medicine.

75. Under the applicable fitness to practice complaint procedures, once a duly constituted complaint was received by the GMC's Registrar, it was passed to a medical member of the GMC nominated as 'preliminary screener', whose task was to consider whether the case should be referred to Preliminary Proceedings Committee ('PPC'), which in turn would have to decide whether the case should be referred to the Professional Conduct Committee ('PCC') to hold an inquiry. In *W*, the preliminary screener wished to have access to the documents relied upon in the childcare proceedings to assist in deciding what further action, if any, should be taken.

76. Under s. 12 of the UK Administration of Justice 1960, as amended by the Children Act 1989, it was a contempt of court to publish information relating to proceedings that had been brought before a court sitting in private under the Children Act 1989. However, *Practice Note (Infants: Transcript*) [1972] 1 WLR 443 provided that, notwithstanding that provision of the Act of 1960, the President of the Family Division had determined that the parties to such proceedings may obtain transcripts of the evidence without leave and other persons may do so with the leave of the court. Further, r. 4.23 of the UK Family Proceedings Rules 1991 provided that, outside specified categories of persons involved in family law proceedings entitled as a matter of right to disclosure of documents held by the court relating to those proceedings, any other person could apply to the court for leave to obtain the disclosure of any such document. In the *W* case, the GMC specifically sought leave to obtain disclosure of documents pursuant to that established rule.

77. It is evident that, in the *EHB* case, the Fitness to Practice Committee of the medical council was able to compel production of documents by a third party in exercise of a specific statutory power. Similarly, in the W case, the UK GMC was able to obtain disclosure of court documents under a specific rule of court. In each case, the relevant procedure was invoked in aid of an extant fitness to practice complaint. Here, the Teaching Council can point to no such power or rule and there is no extant complaint. Instead, the Teaching Council invites the court to exercise an inherent jurisdiction to compel someone else to provide it with certain information to enable it to decide whether it wishes to make a fitness to practice complaint under s. 42(1) of the Teaching Council Acts.

78. While I do not doubt that I have an inherent jurisdiction under the common law to disseminate information about proceedings that are the subject of reporting restrictions where it is appropriate to do so in seeking to secure some other right or interest, the analysis of where the balance of justice lies in this instance is complicated by the

Teaching Council's failure to identify the person or persons against whom an order should be made. It seems to me that, if an order is to be made, I am left with two alternatives: first, an order equivalent to an order for discovery against one of the parties to the personal injuries action (as a rather novel discovery order in favour of, rather than against, a non-party to that action); or second, an order directing disclosure of the relevant court documents by the Courts Service. It is thus necessary to consider the competing interests at stake by reference to the public interest in the regulation of the teaching profession and the principle of open justice, on the one hand, and privacy rights of certain vulnerable persons and the regulation of access to court documents, on the other.

79. Before embarking on the necessary assessment of the balance of rights and interests in this case, I have two further observations to make about the form and circumstances of the present application.

80. The first concerns the form of the application. The requirements of judicial and administrative impartiality prevent either the judiciary or the Courts Service from dispensing legal advice, as distinct from imparting appropriate information, to past, present or intending, future litigants. For that reason, it was inappropriate for the Teaching Council to apply to court *ex parte* for directions about the form of application it should bring; the form of the relief it should seek; the persons it should seek that relief against; and the persons who should be on notice of that application.

81. In making that observation I acknowledge that the registrar had suggested in correspondence that the Council might seek directions from the court about whether it could bring a motion in the personal injuries action seeking the DAR of those proceedings or would have to bring separate proceedings in order to do so. But the registrar had already pointed out in correspondence that she could not give the Teaching Council legal advice; indeed, it was incumbent upon the Teaching Council to take its own advice on how such an application for directions might properly be brought. There is an obvious distinction between an application for directions in existing proceedings (a perfectly proper and routine invocation of the exercise of the judicial function), and an *ex parte* application for directions about the sort of proceedings or application an intending litigant should bring and against whom that intending litigant should bring them (an impermissible request for the provision of legal advice by the court). The court is an impartial adjudicator, not a legal advisor.

82. In February 2020, the Teaching Council resolved to bring an application to court to obtain further information about the subject matter of the personal injuries action that had come to its attention through newspaper reports published in July 2019. While I accept that, in doing so, the Teaching Council was hampered by the effect of the reporting restriction that had been imposed in that case (indeed, that was the very rationale for its proposed application), I do not accept that the correct solution was to appear before the court *ex parte* to seek directions on the nature and scope of the application it should bring.

83. The newspaper reports indicated that the personal injuries action had settled in July 2019 and had been adjourned to the following October to permit implementation of the terms of settlement before the proceedings were struck out, bringing the action to an end. Thus, the overwhelming likelihood – and the reality, as it turned out - was that the personal injuries action no longer existed in February 2020, precluding the court from hearing any further application in it, even if the Teaching Council had been able to ascertain the title and record number of the proceedings to enable it to bring one.

84. On the other hand, the Rules of the Superior Courts provide a comprehensive code for the conduct of civil litigation. Under O. 84B, r. 2 of the RSC a relevant authority, expressly defined to include any council established by or under any enactment and authorised to exercise powers under any enactment, is required to bring a relevant application, including an application for the directions of the court, by originating notice of motion. If the Teaching Council took the view that the application it wished to make somehow fell outside the terms of O. 84B, then the default procedure under O. 1, r. 6 would have been to issue a plenary summons; *Murphy v. G.M*. [2001] 4 IR 113 at 128. Once the appropriate originating document had properly issued, the directions of the court could then have been sought on the appropriate notice parties, if any, to that application.

85. The second observation I wish to make concerns the ground of urgency contended for by the Teaching Council in seeking to have its motion relisted during the period of litigation restrictions necessitated by the Covid-19 pandemic. As I understand it, that ground is the need to address the child protection risk that might exist if either of the Christian Brother defendants in the personal injuries action is still on the Register.

86. I leave aside for the present the question of whether the entitlement of any person (including the Teaching Council) to make a fitness to teach complaint to the Investigation Committee under s. 42(1) of the Teaching Council Acts, as distinct from the sole and exclusive entitlement of the Teaching Council to do so under s. 42(1D) and 42(1E) on foot of information contained in a vetting disclosure, can be properly described as a child protection function of the Teaching Council. I leave aside also the question of whether the comprehensive vetting procedure established under the Vetting Acts, in conjunction with the powers vested solely and exclusively in the Teaching Council under s. 42(1D) and s. 42(1E) of the Teaching Council Acts, is the appropriate mechanism through which to address that risk.

87. What I would observe is that the Teaching Council's characterisation of the present application as an urgent measure necessary to address a child protection risk evident from newspaper reports published in July 2019 is difficult to reconcile with the sporadic correspondence in which the Teaching Council engaged variously with Coleman, Buttimer and the Courts Service between the beginning of August 2019 and the issue of the motion at hand in February 2020, which nowhere betrays a sense of urgency.

ii. the public interest in the regulation of teachers and the protection of children

88. The Teaching Council cites its potential exercise of the entitlement that every person (including the Teaching Council) has to make a complaint about a registered teacher to the Investigating Committee, under s. 42(1) of the Teaching Council Acts, as a public interest sufficient to warrant the exercise of the inherent jurisdiction of the High Court to direct that the Teaching Council be provided with information otherwise covered by reporting restrictions imposed under s. 27 of the Act of 2008, at least where it is attempting to decide whether to make a complaint based on the need to protect children or vulnerable persons.

89. In the course of argument, Mr McDowell acknowledged that the potential child protection considerations in this case are significantly more attenuated than those that were at issue in either the *EHB* or W case because the abuse alleged here occurred in the 1970s and because after the plaintiff – then an adult – made a criminal complaint in 1998, one of the two Christian Brothers concerned was prosecuted and convicted. Given the fact that those two Christian Brothers were already teaching over forty years ago and, more significantly, given the duty of care that the Congregation and all schools owe to every student who comes under their authority, the possibility that either defendant is still teaching seems remote. In the *EHB* and the W cases, the child protection risk was both immediate and proximate.

90. However, a number of other attenuating factors apply here.

91. In the *EHB* case (at 430), Barr J identified the imperative public interest in ensuring that serious complaints of professional misconduct are fully investigated by the relevant body with the statutory authority to do so. In the *W* case (at 588), on the evidence presented Cazalet J concluded that there was an overwhelming public interest in ensuring that the appropriate GMC Conduct Committee could properly consider whether to bring charges relating to serious professional misconduct against a medical practitioner who had been found in civil proceedings to have sexually abused his daughter, taking due account of the view that the public might reasonably take of the implications of that finding for his position – and the status of his registration – as a medical practitioner.

92. But the application at hand does not involve the investigation of a fitness to teach complaint or, differently put, an investigation into whether charges of serious professional misconduct should be brought against a teacher. Under s. 42 of the Teaching Council Acts, any such investigation and decision is the preserve of the Teaching Council's Investigation Committee, once a complaint has been referred to it by the Director. Where that occurs, the Investigation Committee has an express statutory power, under s. 42(8)(ad), to require any person it believes holds information material to the complaint to provide such documents or information as may reasonably be required by the Committee within such reasonable period of time as it specifies in writing. The *EHB* and *W* cases establish the imperative or overwhelming public interest in vindicating the proper exercise of the Investigation Committee's powers where it is investigating an allegation or allegations of serious professional misconduct by a teacher. One can readily envisage a court upholding a requirement made of a person under s. 42(8)(ad) to produce

documents or information the publication or broadcast of which is otherwise prohibited under s. 27 of the Act of 2008.

93. But, in this instance, the Teaching Council contends for something quite different, namely, the exercise by the court of its inherent jurisdiction to create – out of whole cloth, as it were – a power or entitlement of the Teaching Council to require the production by any person of any information or documentation that it reasonably requires to enable it to decide whether it wishes to make a complaint under s. 42(1) of the Teaching Council Acts. In support of that contention, the Teaching Council points to the requirement upon it to have regard to the need to protect children and vulnerable persons in the performance of its functions.

94. In the affidavit that Mr Hammond swore on behalf of the Teaching Council on 12 February 2020, he avers:

> 'The Teaching Council can, as set out in Section 42(1), make a complaint where, for example, a matter of concern has come to light but there is no complainant. Examples of instances in which the Council may become a complainant are where a teacher has been convicted of a criminal offence, where an allegation of misconduct is made but the complainant is unidentified, or in circumstances where the information has come to the attention of the Teaching Council via a media article.'

95. Yet nowhere in the Teaching Council's submissions or in the evidence it has adduced is any reference made to the Vetting Acts or the specific and exclusive entitlement vested in the Teaching Council under s. 42(1D) and s. 42(1E) of the Teaching Council Acts to make a complaint to the Investigating Committee in relation to information contained in a vetting disclosure that it has received that: (a) reasonably gives rise to a bona fide concern that the teacher is a risk to children; or (b) that discloses that a teacher has a conviction in the State for an indictable offence or a conviction in another state for conduct that would amount to an indictable offence if it occurred in the State. I have already noted that, under s. 31(5B) of the Teaching Council Acts, the Teaching Council cannot register a teacher unless it receives a vetting disclosure and is satisfied that he or she is a fit or proper person to be admitted to the Register and that, under s. 21(1) of the Vetting Acts, all schools (as 'relevant organisations') had to apply for a retrospective vetting disclosure no later than 31 December 2017 for all of the teachers that they employed.

96. The decision in the *EHB* case long predated the introduction of the first of the Vetting Acts in 2012 and the material provisions of the Teaching Council (Amendment) Act 2015, just as the decision in the W case significantly predated the introduction of the equivalent UK legislation, which – as far as I can tell – was, initially, the Care Standards Act 2000.

97. The requirement upon the Teaching Council to have regard in the performance of its functions to the need to protect children is most obviously and directly engaged in the context of those provisions. Unless it is being suggested that the comprehensive vetting procedure they reflect is inoperative or in some way ineffective, then it is difficult to see

how it does not already directly address the child protection risk that the Teaching Council relies upon in asking the court to make an order in aid of the novel pre-complaint investigation procedure upon which it now seeks to embark and in aid of which it prays the exercise of the court's inherent jurisdiction. Indeed, it could be convincingly argued, on the authority of the decisions of the Supreme Court in *G. McG. v. D.W. (No. 2) (Joinder of the Attorney General)* [2000] 4 IR 1 (at 27-8) and *Mavior v Zerko Ltd* [2013] 3 IR 268 at 275, that this court cannot assert an inherent jurisdiction to make orders in aid of an improvised pre-complaint investigation procedure in child protection cases, to run in parallel with the comprehensive child protection procedures specifically and comprehensively delineated by the Oireachtas in the Vetting Acts and the Teaching Council Acts.

98. Further, I am compelled to say that any system of child protection that relies for its effectiveness, whether in whole or significant part, on the monitoring by a professional regulator of media reports of personal injuries litigation is one that cries out for urgent reform or replacement. The vast majority of personal injuries actions settle before trial with the result that neither the nature of the claims they involve nor the evidence relied on in support of those claims is disclosed in open court, leaving nothing for the media to report upon, save whatever information the parties choose to disclose. And while there is, I believe, a general consensus that the standard of court reporting by the media in Ireland is generally very high, resource constraints mean that not every legal proceeding can, or will, be the subject of a report in the media where a trial does take place.

99. A final significant point of distinction between the present case and both the *EHB* and *W* cases is that each of the latter concerned the exercise of what might be termed a true regulatory – and, hence, public interest – function. In *EHB*, the Fitness to Practice Committee of the Medical Council was engaged, pursuant to s. 45 of the Medical Practitioners Act 1978, in an inquiry into the conduct of a registered medical practitioner – a regulatory function vested solely in the Medical Council under that statute. Similarly, in *W*, the GMC was engaged, pursuant to the UK Medical Act 1983, in a screening process to determine whether to refer a complaint to the GMC's Preliminary Proceedings Committee – a regulatory function vested solely in the GMC under that statute.

100. In considering the Teaching Council Acts, there can be no doubt that the screening of a fitness to teach complaint by the Director under s. 42(3)(b); the conduct of an investigation into a complaint by the Investigation Committee under s. 42(7); and the conduct of a disciplinary inquiry by the Disciplinary Committee under s. 43(1) each reflect the overwhelming public interest in ensuring that the Investigation Committee can properly consider whether a disciplinary inquiry should be conducted and the imperative public interest in ensuring that serious complaints of professional misconduct are fully investigated by the Teaching Council. It can also be strongly argued that the sole and exclusive authority of the Teaching Council, under s. 42(1D) or s. 42(1E) to make a complaint to the Investigating Committee based on information contained in a vetting disclosure reflects an overwhelming or imperative public interest. It is much less clear – to put it no higher – that the making of a complaint under s. 42(1) – something that any

person, including the Teaching Council, can do – reflects an overwhelming or imperative public interest just because the person making it, or considering whether to make it, is the Teaching Council.

101. It could be argued that, since the functions of the Teaching Council under s. 7(1) of the Teaching Council Acts include, as a catch-all, 'all things necessary or expedient in accordance with this Act to further the objects of the Council'; since one of the objects of the Council under s. 6(a) of the Acts is to regulate the teaching profession and the professional conduct to teachers; and since the Council is required under s. 7(3)(d) to have regard in the performance of its functions to the need to protect children, that it is acting in the public interest when it contemplates making a fitness to teach complaint under s. 42(1) arising from child protection concerns, whereas other persons contemplating a similar complaint arising from the same concerns are not (conceivably, by analogy with the distinction between a public and private prosecution). As the point was not argued in any detail, I do not propose to decide it.

102. Overall, for the reasons I have given, I conclude that the public interest that the Teaching Council relies upon here provides a much weaker and less potent argument for the disclosure it seeks than the corresponding public interest did for the disclosure sought in the *EHB* and *W* cases.

iii. open justice, reporting restrictions and privacy interests

103. Article 34.1 of the Constitution of Ireland enshrines a core aspect of the principle of open justice by providing that justice shall be administered in public, save in such special and limited cases as may be prescribed by law. In *Irish Times v Ireland* [1998] 1 IR 359 ('*Irish Times*'), Hamilton CJ described the rationale underpinning that constitutional norm in the following way (at 382):

> 'Justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done but must be seen to be done. Only in this way can respect for the rule of law and public confidence in the administration of justice, so essential to the workings of a democratic state, be maintained.'

104. In *Re Ansbacher (Cayman) Ltd* [2002] 2 IR 517, two persons brought proceedings seeking to challenge their identification in a company inspectors' report as clients of the company under investigation and sought to have those proceedings heard *in camera* on the basis of their reputational and privacy rights. In rejecting that application, McCracken J addressed what he considered to be some necessary incidents, and the fundamental importance, of the open justice principle, stating (at 531-2):

> 'The fact that Article 34.1 requires courts to administer justice in public by its very nature requires the attendant publicity, including the identification of parties seeking justice. It is a small price to be paid to ensure the integrity and openness of one of the three organs of the State, namely, the judicial process, in which

openness is a vital element. It is often said that justice must not only be done, but must also be seen to be done, and if this involves innocent parties being brought before the courts in either civil or criminal proceedings, and wrongly accused, that is unfortunate, but is essential for the protection of the entire judicial system. I do not believe I am called upon to consider any hierarchy of rights in the present case, but if I had to do so, I have no hesitation whatever in saying that the right to have justice administered in public far exceeds any right to privacy, confidentiality or good name.'

105. In *Roe v Blood Transfusion Service Board* [1996] 3 IR 67 ('*BTSB*'), a plaintiff who had contracted the Hepatitis C virus after treatment with infected blood products brought a personal injuries action against the Blood Transfusion Service Board and others, using a pseudonym to protect her privacy. When the defendants objected, she sought the court's permission to maintain the action in that way. Citing the judgment of Walsh J in the Supreme Court in *Re R. Ltd* [1989] 1 IR 126 (at 134), Laffoy J refused the application, explaining (at 71):

> 'In my view, in the context of the underlying rationale of Article 34.1, the public disclosure of the true identities of parties to civil litigation is essential if justice is to be administered in public. In a situation in which the true identity of a plaintiff in a civil action is known to the parties to the action and to the court but is concealed from the public, members of the general public cannot see for themselves that justice is done.'

106. However, the law has developed in two significant ways since those cases were decided: first through the enactment of an express power under s. 27 of the Act of 2008 to impose reporting restrictions in specific circumstances; and second, through the Supreme Court's identification in *Irish Times* and, more particularly, *Gilchrist* of an inherent jurisdiction under the common law to prescribe restrictions on the public administration of justice where satisfied that, otherwise, weighty constitutional interests and values may be damaged or destroyed.

107. Section 27(1) of the Act of 2008 permits a party or witness in civil proceedings who has a medical condition to make an application to the court for an order prohibiting the publication or broadcast of anything which would, or would be likely to, identify that person as a person having that condition. Thus, s. 27 prescribes a special and limited category of cases in which justice may be administered otherwise than in public to the limited extent it envisages.

108. The test for an order is set out in s. 27(3), which provides that court shall only grant one if satisfied that –

(a) the relevant person concerned has a medical condition,

(b) his or her identification as a person with that condition would be likely to cause undue stress to him or her, and

(c) the order would not be prejudicial to the interests of justice.

109. Under s. 27(7), the publication or broadcast of any matter in contravention of an order is an offence for which a person is liable on conviction on indictment to a fine of up to €25,000 or imprisonment for up to three years, or both.

110. It might have been imagined, given the status of s. 27 as a prescribed exception to the fundamental constitutional norm of the administration of justice in public, that it would be strictly or narrowly construed, just as Finlay CJ construed the provisions of s. 205(3) of the Companies Act in *Irish Press Plc v Ingersoll* [1993] ILRM 747, 'bearing in mind that the entitlement of the Oireachtas pursuant to Article 34.1 to prescribe by law for the administration of justice otherwise than in public is confined to special and limited cases' (at 754). But, it might equally be suggested that s. 27 of the Act of 2008 was intended by the Oireachtas as a remedial measure that should be construed 'as widely and liberally as can fairly be done'; *Bank of Ireland v Purcell* [1989] IR 327 (at 333). The jurisprudence on s. 27 shows a clear preference for the latter approach over the former.

111. In *Children's University Hospital Temple St. v CD* [2011] 1 IR 665 ('*Temple Street*'), the High Court was presented the dilemma of a three month old baby who required an urgent blood transfusion but whose parents objected to it on religious grounds. The hospital issued plenary proceedings against the parents, and sought an interlocutory order sanctioning the transfusion, together with an order imposing reporting restrictions under. s. 27 of the 2008 Act. The hearing took place in the early hours of the morning of the day after St. Stephen's Day and, due to heavy snowfalls that made travel difficult, had to be conducted at the judge's home.

112. In considering the potential application of s. 27 of the 2008 Act, it was clear that the infant could have no consciousness of his identification as a person with that grave medical condition and, hence, could suffer no undue stress as a result. Another potential disqualifying factor on the plain words of the section, though one not adverted to, was that the infant was not a party to the proceedings as they had been constituted (between the hospital and the infant's parents) and could not be a witness in them for obvious reasons, so was not, therefore, a 'relevant person' in respect of whom an order could be made under s. 27(11).

113. In making the order sought, Hogan J identified s. 27 as, essentially, a remedial provision designed to complement the traditional concept of medical confidentiality in a legal setting, though one which, interpreted literally, would prevent the court from imposing reporting restrictions to protect the medical confidentiality of any infant or other person who lacks the capacity or state of consciousness necessary to comprehend his or her identification in civil proceedings as a person with a medical condition and who, in consequence, cannot be caused undue stress by it. In the view of Hogan J, that brings s. 27(3) squarely within the provisions of s. 5(1)(b) of the Interpretation Act 2005, whereby a provision that on a literal interpretation would fail to reflect the plain intention of the Oireachtas can be given an interpretation that does reflect that intention.

114. In *D.F. v Garda Commissioner & Ors* [2013] IEHC 312, (Unreported, High Court, 11 June 2013), Hogan J was presented with the same issue in a different guise. The plaintiff was a severely autistic and extremely intellectually disabled man who was arrested by members of An Garda Síochána at the scene of an incident where he was alleged to have chased two women with a tree branch or stick at a public place in the vicinity of his grandparent's house. Through his testamentary guardian, he brought an action for false imprisonment, trespass to the person and negligence against the Garda Commissioner and other State defendants in respect of which he sought an order imposing reporting restrictions under s. 27 of the Act of 2008. Adhering to the views he had expressed in the *Temple Street* case, Hogan J concluded that he was entitled to make the order sought, even though, due to the plaintiff's intellectual disability, he would have no consciousness of his identification as a person with that condition in connection with the litigation.

115. Nonetheless, the application for reporting restrictions failed because Hogan J was not satisfied that it was in the interests of justice to accede to it. That was so for three reasons. The first was the Constitution's preference for open justice, as evidenced by the requirement that the exceptions to the application of that principle prescribed by law be limited to 'special and limited cases'. The second reason was that, in *Re R. Ltd*, the Supreme Court had identified publicity as an indispensable aspect of the administration of justice. The third reason was that an inequality of treatment would result if the plaintiff and his family could impugn the professionalism and good name of identified members of An Garda Síochána while themselves protected by a cloak of anonymity.

116. It is significant to note that, at the conclusion of his judgment, Hogan J stated for completeness that, insofar as he had an inherent jurisdiction to place limitations on the public administration of justice, independent of the statutory one conferred by s. 27, he must decline to exercise it for the same reasons.

117. The case came before the Supreme Court on appeal in *D.F. v Commissioner of An Garda Síochána* [2015] 2 IR 487. Giving judgment for the court, Charleton J found that the plaintiff was entitled to an order imposing reporting restrictions under s. 27 of the 2008 Act.

118. Charleton J was satisfied that reporting restrictions imposed under that section are a minor and exceptional departure from the principle of open justice that occurs in circumstances that the Oireachtas has determined to be appropriate, through the application of a test that the Oireachtas has stipulated (at 502).

119. Further, despite having earlier noted the plaintiff's claim that the arresting gardaí had acted in bad faith and subjected him to inhuman and degrading treatment and punishment for which he was seeking aggravated and exemplary damages, as well as claiming damages for false imprisonment, assault, battery and trespass to the person, Charleton J identified the issue at the core of the plaintiff's action as whether he had been lawfully arrested and detained (at 492). Thus, Charleton J concluded (at 503), that the case was an ordinary damages claim in which the plaintiff was accusing no one. That being so, there was no issue of inequality of treatment in his being accorded anonymity

by reference to his medical condition, since any other party or witness with a medical condition would have the same statutory entitlement.

120. Charleton J quoted from his judgment in *M.A.R.A. (Nigeria)(an infant) v Minister for Justice and Equality* [2015] 1 IR 561, delivered after the judgment of the High Court in *D.F.*, in which he described the different degrees of restriction upon the administration of justice in public that a court may direct under different statutory provisions – from a hearing in public but with reporting restrictions, at one end of the scale, to a hearing *in camera* from which the public and press are entirely excluded, at the other. Charleton J reiterated several times in his judgment that, being at or near the lowest point on the scale, the anonymisation of a party or witness through reporting restrictions under s. 27 is, therefore, an exception of a limited kind; a minor adjustment to the fully public nature of court proceedings under Article 34.1; a lesser form of legislative restriction; a minor diminution of a full open and fully reported hearing; and a lesser form of protection than might otherwise be granted.

121. It is interesting to compare this view on the limited extent to which court-ordered anonymity encroaches upon the principle of open justice with those expressed elsewhere. In describing the freedom of expression based arguments against an anonymity order when giving judgment for the UK Supreme Court in the case of *In re Guardian News & Media Ltd & Ors; HM Treasury v Ahmed & ors* [2010] 2 AC 697, Lord Rodger explained (at 723):

> '63 What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalist usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 [of the ECHR] protects not only the substance of ideas an information but also the form in which they are conveyed: *New Verlags GmbH & Co KG v Austria* 31 EHRR 246, 256, para 39.... A requirement to report in some austere form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on.'

122. Although s. 27(3)(c) of the 2008 Act requires the court to be satisfied that the imposition of reporting restrictions would not be contrary to the interests of justice, Charleton J nonetheless found that the section does not require a judge hearing an application under that section to rebalance any rights but merely to decide if the party or witness concerned comes within its terms as a matter of fact (at 505).

123. While acknowledging the finding of Hogan J in *Temple Street* that s. 27 should be interpreted teleologically to apply to any witness or party whose identification as a person with a particular medical condition would breach medical confidentiality, rather than interpreted literally to apply only to a witness or party likely to be caused undue stress by being identified as someone with a particular medical condition, the Supreme Court found

that the plaintiff in *D.F*. was able to meet the latter test (at 505). Charleton J explained that, as we live in a world where people can be harried and undermined by anonymous internet malice, it was an all too unfortunate and predictable consequence of the identification of the plaintiff in media reports that people of malice would intrude upon his life, causing undue stress.

124. It is thus necessary, on an application under s. 27, to consider not only the stress likely to be caused to the party or witness concerned by being identified as a person with a particular medical condition in media reports but also the stress likely to be caused to that person by the predictable actions of malicious persons in response to those reports. That is not a narrow test. Nor is the alternative test favoured by Hogan J, based on a teleological interpretation of s. 27(3)(b).

125. Finally, Charleton J addressed the argument advanced on behalf of the State defendants that it would be prejudicial to the interest of justice to make an order under s. 27 because reports of the case that properly identified the plaintiff and the location at which the disputed events occurred might prompt material witnesses to come forward before the conclusion of the trial.

126. Charleton J described that argument as inventive, although it is a conventional one in principle. The judgment of Lord Woolf in the England and Wales Court of Appeal in *R v Legal Aid Board ex p. Kaim Todner* [1999] 1 QB 966 is widely considered to be the leading modern exposition of the open justice principle. In it, after quoting a passage from the judgment of Sir Christopher Staughton in *Ex parte P.,* The Times, 31 March 1998; Court of Appeal (Civil Division), about the need for vigilance when considering an application for anonymity, Lord Woolf continued (at 977):

> 'The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.'

127. Although the reported and observed actions and demeanour of the plaintiff prior to, and at the time of, his arrest, as contended for by the State defendants, appear to have been fundamentally in dispute on the pleadings described in the judgment and, hence, directly

relevant to the issue of the lawfulness of the plaintiff's arrest, Charleton J nonetheless concluded that no argument could be validly made on the pleadings that a fair hearing would be imperilled by the imposition of reporting restrictions, nor could the requirement to avoid prejudice to the interests of justice under s. 27(3)(c) be recast to permit considerations of open justice to be taken into account under Article 34.1 of the Constitution. It is, of course, impossible to argue with the proposition that s. 27 would be rendered nugatory if the public administration of justice as a constitutional norm could be invoked as an interest under s. 27(3)(c) sufficient to negate the very purpose of the section overall – *i.e*. the grant of anonymity to a person whose identification as someone with a particular medical condition would cause that person undue stress. It is far less obvious, that s. 27(3)(c) does not allow considerations of open justice to taken into account at all as part of the overall assessment of the interests of justice in a given case, or that it would have to be recast to enable it to do so.

128. The decision of the Supreme Court in *D.F*. is, of course, binding on this court.

129. The second significant development in the law concerns the identification of an inherent jurisdiction under the common law to prescribe restrictions on the public administration of justice where satisfied that, otherwise, weighty constitutional interests and values may be damaged or destroyed.

130. The view of Walsh J in *In re R. Ltd* (at 135) that a law prescribing an exception to the administration of justice in public under Article 34.1 is to be construed as limited to a statute enacted, re-enacted or applied by an enactment of the Oireachtas, is difficult to reconcile with the subsequent jurisprudence of the Supreme Court. In the *Irish Times* case (at 384), Hamilton CJ expressly rejected the argument that the discretion of a judge conducting a criminal trial to prohibit reports of proceedings that would frustrate or preclude the proper administration of justice is limited to that conferred by statute.

131. In Gilchrist (at 289-290), O'Donnell J noted that every statement of the importance of the principle of open justice, including Article 34.1 as a powerful example, recognises that it is not an absolute principle and may be subject to exceptions, before elaborating (at 311):

> 'The rule that justice must be administered in public except in specific cases provided by post-1937 legislation, and furthermore only where a court was satisfied that justice could not be done otherwise, has the advantage of appearing both simple and principled. However, it had the unfortunate consequence that it has been understood as imposing an almost blanket rule which precluded even minor adjustments of the obligation such as permitting a litigant to use a pseudonym, or initials, or directions that parties not be identified.'

132. O'Donnell J later observed (at 312):

> 'Once it is recognised, however, as indeed it was by Keane J. in *Irish Times Ltd. v Ireland* [1998] 1 I.R. 359 and by Lord Scarman in *Att.-Gen. v. Leveller Magazine* [1979] A.C. 440 that there is a continuing common law power to direct a trial *in*

camera where it is required, and that such a course could be particularly justified when constitutional values are engaged, then much of the difficulty is removed.'

133. O'Donnell J elucidated further (at 313):

> '[41] The absence of a statutory provision is not however irrelevant. Where the Oireachtas has considered it appropriate to permit the possibility of a trial in private in respect of certain subject matters, that is an important legislative judgment on the importance of the subject matter. Where the Oireachtas has not seen fit to legislate for the possibility of a hearing *in camera*, the court should only exercise an inherent jurisdiction to depart from a full hearing in public where it is shown that the interests involved are particularly important, and the necessity is truly compelling.'

134. Earlier in his judgment, O'Donnell J identified the proper technique for resolving the tensions between competing principles and interests in a given case (at 310):

> '[37] I have reservations about the language of balancing of rights and the hierarchy of rights referred to in *Irish Times Ltd. v. Ireland* [1998] 1 IR 359 and relied on in the judgment of the Court of Appeal. The Constitution does not itself rank the rights and obligations it provides for, nor does it tell us how to divine any hierarchy. The obligation of a court is to uphold all the provisions of the Constitution. Furthermore, as Denham J. observed at p. 399 in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359, the ranking of rights does not in any event answer the question in any particular case. An important further consideration is the extent to which the right is impaired. In theory if such an approach is taken, a court would have to try to weigh a complete denial of a lower ranked right against a lesser intrusion on a higher ranked right. The Constitution gives no guidance as to how this might be done. In truth the Constitution should not too readily be interpreted to require any hierarchical ranking of rights with the consequent possibility of subordination of one right to another. The Constitution was intended to function harmoniously, and where there were points of conflict between the rights and obligations provided for, that should be sought to be resolved without the subordination or nullification of one provision.'

135. O'Donnell J took the view that the decision in In *Re R. Ltd*. had been arguably no more than an over-correction of the practice that had developed under s. 205(7) of the Companies Act 1963 in determining whether minority shareholder oppression petitions should be heard wholly or partly *in camera* where the disclosure of information seriously prejudicial to the relevant company's interests was involved (at 302). On the other hand, O'Donnell J felt that the exercise of the inherent jurisdiction to depart from the administration of justice in public, particularly where constitutional values are engaged, is not radically different from the approach hitherto adopted, so that most if not all cases would be decided in the same way (at 312).

136. The Supreme Court presented its decision in *Gilchrist* as a minor course correction, rather than a major sea-change, in the law. Nonetheless, the inherent jurisdiction it identifies provides a more obvious foundation for an order granting anonymity to an infant (or other person lacking full capacity), than either a purposive or a strained interpretation of s. 27 of the Act of 2008 does. It is instructive to note that under Part 39 of the England and Wales Civil Procedure Rules ('CPR'), made under the Civil Procedure Act 1997, which regulates the exercise of the inherent jurisdiction under the common law to depart from the general rule that a hearing must be held in public, a hearing, or any part of it, may be held in private where it is necessary to protect the interests of a child or other person who lacks capacity (CPR 39.2(3)(d)), and the court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of Justice and in order to protect the interest of that party or witness (CPR 39.2(4)). In personal injuries actions brought on behalf of children or vulnerable persons in that jurisdiction, anonymity orders are now usually made by default: *JX MX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96, [2015] 1 WLR 3647; GB v Home Office [2015] EWHC 819 (QB).

137. In contrast, s. 27 of the Act of 2008 has a more narrow focus. As Charleton J pointed out in *D.F*. (at 501), it stands in isolation amidst a miscellany of unrelated provisions, so it is not susceptible to any schematic or contextual analysis. However, it was enacted against a legal and social backcloth that cannot be overlooked. In *The Claimant v Board of Saint James' Hospital* (Unreported, High Court, 10 May 1989) (*Saint James' Hospital*), Hamilton P gave an *ex tempore* judgment refusing an application made to him on behalf of a number of persons who were haemophiliacs and who had contracted the HIV virus from infected blood products for an order permitting them to issue and maintain proceedings pseudonymously. Hamilton P referred to the public administration of justice requirement in Article 34.1 of the Constitution and concluded that he could find nothing in the law or in any of the rules of court that would permit him to accede to the application.

138. In *Roe v Blood Transfusion Service Board* [1996] 3 IR 67, a plaintiff who had contracted the Hepatitis C virus from infected blood products applied for permission to maintain a personal injuries action under an alias. The plaintiff wished to do so to protect her privacy and to avoid embarrassment and, what she claimed would be, an injustice if she was denied that permission. Citing the decision of Hamilton P in the *Saint James' Hospital* case, Laffoy J concluded that the court had no jurisdiction to accede to that application.

139. Section 27 of the Act of 2008 mirrors s. 181 of the Criminal Justice Act 2006. The latter provision deals with the anonymity of certain witnesses in criminal proceedings. Section 181(3) of the Act of 2006 is in almost identical terms to s. 27(3) of the Act of 2008, save that the judge concerned is required to be satisfied that the identification of the witness concerned as a person with a particular condition would be likely to cause undue 'distress', rather than undue 'stress', to that person. The enactment of each of those provisions occurred against the backdrop of an ever increasing recognition in our society of the prevalence of, and extent of the psychological injury caused by, sexual violence

and sexual abuse; see, for example, the Law Reform Commission *Consultation Paper on Child Sexual Abuse* (August, 1989) (at p. 2).

140. Thus, given the narrow and specific focus of s. 27 of the Act of 2008 on the entitlement to anonymity of a party or witness in civil proceedings whose identification as a person with a particular medical condition would be likely to cause undue stress to him or her, I do not think it unreasonable to conclude that the provision was not intended to address the wider question of the general circumstances in which children and other vulnerable persons who are parties to, or witnesses in, civil proceedings may be entitled to anonymity. For that reason, while I share the view expressed *obiter* by O'Donnell J in *Gilchrist* (at 315) that there is something grotesque in the argument that a person who, through infancy or intellectual disability, lacks the capacity to appreciate his or her identification as a person with a particular medical condition – and, by extension, the capacity to suffer undue stress as a result – should be publicly identified for that reason alone, it seems to me that the exercise of the court's inherent jurisdiction, and not a strained interpretation of s. 27 of the 2008 Act, is the appropriate mechanism for providing such a person with any necessary protection against identification.

141. Returning to the application at hand, the plaintiff in the personal injuries action obtained an order under s. 27 of the 2008 Act because the court was presented with cogent evidence that his identification as a person with a serious psychiatric condition would cause him undue stress.

142. Further, it strikes me that each of the newspaper reports took sedulous care in its adherence to the terms of the order and to the specific guidance given by Charleton J in *D.F*. (at 507) that, while the media could use a pseudonym to refer to the plaintiff, they could not identify him and could identify the location of the events at issue only as a place 'in the west of Ireland'. In this instance, the Examiner report describes the plaintiff as a 'man who is from the south of the country'.

143. The Teaching Council's point that the s. 27 order made in the personal injuries action was intended to protect the anonymity of the plaintiff and not that of either of the two Christian Brother defendants in the personal injuries action, though incontestable, adds nothing to its argument. The sole reason that neither of the two Christian Brother defendants was identified was, I must presume, to protect the plaintiff from what is known as a jigsaw identification. Hanna and Dodd, *McNae's Essential Law for Journalists* (25th edn) (Oxford, 2020) provides a useful definition of the concept (at p. 123): 'Jigsaw identification' describes the effect when someone to whom the law has given anonymity is nevertheless identifiable to the public because of a combination or accumulation of detail published.

144. In this instance, the reader already knows that the plaintiff is from the south of the country; was 56 years old in 2019; was educated by the Christian Brothers as a schoolboy in the 1970s; was in the boy scouts; and was sexually assaulted by a Christian Brother while in fifth class – an offence for which that Christian Brother was convicted in 1998. Against that background, the identification of either or both of the Christian Brother

defendants would provide significant additional detail, as many persons would no doubt be aware of the particular school or schools in which each of those persons taught in the 1970s. That additional detail, combined or accumulated with the detail already disclosed, might permit the identification of the plaintiff by such persons. It is worth reiterating that, under s. 27(7) of the Act of 2008, the publication or broadcast of any matter in contravention of an order is an offence for which a person is liable on conviction on indictment to a fine of up to €25,000 or imprisonment for up to three years, or both.

145. The Teaching Council argues that the decision on its application is unlikely to create a significant precedent. That argument is based on the unsupported assertion that instances where professional disciplinary concerns arise from matters at issue in civil proceedings covered by reporting restrictions under s. 27 are likely to be rare. I am unable to agree. Applications for reporting restrictions under s. 27 are commonplace. Unhappily, civil proceedings seeking damages for the psychological injury caused by the alleged sexual abuse of a child by a teacher or other professional person are far from unusual. To address that problem, the Oireachtas has established a comprehensive vetting procedure for teachers and others who work in schools with children and vulnerable persons by enacting the Vetting Acts in conjunction with the Teaching Council Acts (in particular, the Teaching Council (Amendment) Act 2015). I am not at all persuaded that, in acceding to the present application in the terms in which it has been made, I would not be creating a very significant new jurisdiction that would, at best, merely duplicate the intended effect of that vetting procedure. Nor am I persuaded, for the reasons I have already set out, that it would be appropriate to do so.

iv. open justice, data protection and public access to court documents

146. In *Dring v Cape Intermediate Holdings Ltd* [2020] AC 629 (‘*Cape Intermediate Holdings*’), the UK Supreme Court succinctly described the difficulty that modern litigation poses for the application of the open justice principle (at 635):

> ‘[W]hereas in the olden days civil proceedings were dominated by the spoken word – oral evidence and oral argument, followed by an oral judgment, which anyone in the room could hear, these days civil proceedings generate a great deal of written material – statements of case [or, as we still describe them, pleadings], witness statements, and the documents exhibited to them, documents disclosed by each party, skeleton arguments and written submissions, leading eventually to a written judgment. It is standard practice to collect all the written material which is likely to be relevant in a hearing into a “bundle” – which may range from a single ring binder to many, many volumes of lever arch files. Increasingly, these bundles may be digitised and presented electronically, either instead of or as well as in hard copy.’

147. In *Cape Intermediate Holdings*, the issue was how much of the written material placed before a court in a civil action should be accessible to people who are not parties to the proceedings and how it should be made accessible to them.

148. In *Re Carlin* [2013] NICA 40, Morgan LCJ concisely stated the fundamental principle (at para. [4]): 'Any restriction on public access to information about what happens in the justice system must be kept to the absolute minimum.'

149. There can be no doubt that the impact of the principle of open justice on the issue of public access to court documents is an underdeveloped area of our law, although that is starting to change.

150. Section 65(3) of the Court Officers Act 1926 states:

> 'All proofs and other documents and papers lodged in or handed in to any court in relation to or in the course of the hearing of any suit or matter shall be held by or at the disposal of the judge or the senior of the judges before whom such suit or matter is heard.'

151. However, the effect of that provision is necessarily circumscribed by the limited range of documents that parties are required to lodge in the relevant court office under the RSC and by the practice of returning or disposing of the documents and papers previously handed in to court once judgment has been given and final orders have been made.

152. The purpose of Practice Direction HC86 of 9 April 2019 is to safeguard the integrity of court files maintained in the relevant court offices, including the Central Office of the High Court. It arises from the case of *Michael and Thomas Butler Ltd & Ors v Bosod Ltd & Ors* [2018] IEHC 702, in which Kelly P found that a court file had been interfered with, before concluding that the procedure by which High Court files could be inspected in an unsupervised fashion was completely unsatisfactory. In consequence, the practice direction stipulates that court files will not be made available for personal inspection in the relevant court offices by any person, including a party to proceedings or solicitor on record, although a copy of a document on file may still be provided to an unrepresented party or solicitor on record in proceedings upon payment of the relevant fee.

153. Under s. 42 of the Freedom of Information Act 2014, court records – other than court administrative records and records relating to proceedings heard in public that the court did not create and has not prohibited the disclosure of – are excluded from the application of that Act.

154. The Data Protection Act 2018 gives effect to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the General Data Protection Regulation or 'GDPR'). Under s. 158(1) of that Act, the rights of the data protection subject are expressed to be restricted to the extent that such restrictions are necessary to safeguard judicial independence and court proceedings. Under rule 4 of the Data Protection Act 2018 (Section 158(3)) Rules 2018, made under s. 158(3) of the 2018 Act, the relevant provisions of the Act and of the GDPR are deemed not to apply to the processing of personal data by, for or on behalf of a court when acting in a judicial capacity.

155. Under s. 159(1) of the Act of 2018, the Superior Court Rules Committee is empowered to make processing rules in respect of personal data contained in a record of a superior court of record. Under rule 4(5)(f) of the Data Protection Act 2018 (Section 159(1)) Rules 2018 (S.I. No. 659 of 2018), subject to any applicable statute, rule of court, practice direction or other order of the court, personal data contained in a court record may be disclosed to a person in compliance with an order or direction of a court requiring production or discovery of the personal data concerned.

156. Thus, neither the Act of 2018 nor the rules made under it represent any impediment to the exercise of the statutory power of the court to hold or dispose of proofs, documents or papers filed or lodged in court, or the inherent jurisdiction of the court to permit the dissemination of personal information contained in court records where the judge believes that it is in the interests of justice to do so.

157. Section 159(7) of the 2018 Act permits rules to be made authorising the disclosure of a record of court proceedings upon request to a *bona fide* member of the press or broadcast media to facilitate fair and accurate reporting, subject to appropriate conditions. We now have the Data Protection Act 2018 (Section 159(7): Superior Courts) Rules 2018 (S.I. No. 660)('the s. 159(7) Rules'). Those rules, which came into operation on 1 August 2018, stipulate (in rule 3(3)) that disclosure may be made by: (a) allowing supervised inspection of the court record of the proceedings; (b) providing a copy, or permitting a copy to be made, of a document forming part of the court record of the proceedings, on the provision of an undertaking to return it following the completion of the hearing; or (c) providing a press release or other information in written or oral form concerning the proceedings. Rule 3(4)(i) makes it a condition of granting a request that the requester has sufficiently verified to the satisfaction of the person requested his or her identity and his or her status as a bona fide member of the Press or broadcast media.

158. It will be remembered that the Teaching Council wrote to the Courts Service on 3 March, suggesting that it should be deemed to have an entitlement equivalent to that of a *bona fide* member of the press under those rules. The Courts Service replied on 24 March, expressing the view that only a *bona fide* member of the press, whose identity and status have been verified, can avail of that entitlement under both those rules and the enabling statutory provision. Wisely, in my view, the Teaching Council has not challenged that conclusion.

159. *Allied Irish Bank plc v Tracey (No. 2)* [2013] 3 IR 398 ('*Tracey*') is a case that arose out of a successful summary judgment application by a bank against a property developer for monies due and owing under a loan agreement. As part of the defence of that application, it had been alleged on affidavit that the bank had wrongly permitted monies drawn down by a company owned and controlled by the defendant and a business partner to be misappropriated by the latter. The legal representatives of the business partner maintained a watching brief during the application and, at its conclusion, sought a copy of the affidavits containing those allegations. The defendant objected and Hogan J

conducted a separate hearing, and gave a separate judgment, on that issue, concluding (at 404-405):

'[21] These allegations were ventilated in civil proceedings in open court and, as I have already found, the affidavits were effectively openly read into the record of the court. Given that these proceedings were in open court pursuant to the requirements of Article 34.1 of the Constitution, it follows that any cloak of confidentiality or protection from non-disclosure vanished at that point. In this respect therefore, the present case is a very different one from *Breslin v McKenna* [2008] IESC 43, [2009] 1 I.R. 298 [a case concerning the potential use of material contained in a book of evidence served in a criminal prosecution in the State for the purpose of civil proceedings in Northern Ireland].

[22] The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse.

[23] In these circumstances the public are entitled to have access to documents which were accordingly opened without restriction in open court. This is simply part and parcel of the open administration of justice which the Constitution, subject to exceptions, enjoins. Entirely different considerations would naturally arise in respect of material which was not opened in open court or which was protected by the *in camera* rules or by reporting restrictions imposed, for example, pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008.'

160. A short time later, Hogan J returned to the issue in *Kelly v Byrne* [2013] 2 IR 389, an application brought by the Director of Public Prosecutions for access to a witness statement that the defendant had made in those proceedings, which were heard in the Commercial Court, for use in the pending criminal prosecution of the defendant for offences under the Criminal Justice (Theft and Fraud Offences) Act 2001. Having quoted the passage from *Tracey* set out above, Hogan J continued (at 393):

'[11] I might take the opportunity to stress that this principle applies only to documents which have *already* been freely opened in open court and in respect of which there are no reporting or other restrictions. It does *not* apply to the generality of other types of court files and documents. But where the document has been opened, without restriction, in open court, it then effectively forms part of the public record relating to the public administration of justice which Article 34.1 of the Constitution enjoins must (subject to exceptions) be in public. All that [*Tracey*] decided was that, in principle, at any rate, the public are entitled to know the contents of material which was opened, without restriction, in open court.'

161. It is pertinent to note that, having reached the conclusion that there was a public right of access to the defendant's witness statement (and that, even if there was not, the DPP

was entitled to an order granting access to it due to the obvious and compelling public interest in the prosecution of crime), Hogan J granted an order directing the Courts Service to provide the DPP with a copy of that statement, 'assuming always that a copy has been so retained by them for the purposes of the court file' (at 394).

162. Finally, I should note that change is afoot. On 13 November 2020, the President of the High Court issued Practice Direction HC101, which is to come into effect on 11 January 2021. When it does, it will permit any member of the public to seek access to the written submissions provided to the court by the legal representatives of parties in civil proceedings, once an order has been made to that effect by the court when giving judgment. However, no such order will be made in a case heard *in camera* or in a case that is the subject of reporting restrictions. Submissions must be redacted by the relevant party where they contain information the publication of which is restricted or prohibited by law. Access is to be sought by request to the Principal Registrar at the Central Office of the High Court, who can either comply with it directly or seek the direction of the trial judge who made the order.

163. In England and Wales, the supply of documents to a non-party from court records is principally governed by CPR 5.4C. The general rule is that non-parties will have access to all pleadings (described in the CPR as 'statements of case') and to any judgment or order given in public, subject to certain identified limitations and restrictions (CPR 5.4C(1) and (3)). A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person (CPR 5.4C(2)). A party or person identified in a pleading may apply for an order preventing or restricting access to the pleadings (CPR 5.4C(4)). A non-party may nonetheless apply for permission to access pleadings the subject of a prohibition or restriction order (CPR 5.4C(5)). Separately, under CPR 32.13, a witness statement which stands as evidence in chief is open to inspection unless the court otherwise directs during the course of the trial.

164. Returning to the judgment of the UK Supreme Court in *Cape Intermediate Holdings*, it is worth quoting at some length the analysis it contains (at 646-647):

> '42 The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In *A v British Broadcasting Corporation* [2015] AC 588, Lord Reed JSC reminded reminded us of the comment of Lord Shaw of Dunfermline, in *Scott v Scott* [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" (para 24).
>
> 43 But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the

evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.

44 It was held in *Guardian News and Media* [2013] QB 618 that the default position is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. It follows that it should not be limited to those which the judge has been asked to read or has said he has read. One object of the exercise is to enable the observer to relate what the judge has done or decided to the material which was before him. It is not impossible, though it must be rare, that the judge has forgotten or ignored some important piece of information which was before him. If access is limited to what the judge has actually read, then the less conscientious the judge, the less transparent is his or her decision.

45 However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in both Kennedy [2015] AC 455, at para 113, and A v British Broadcasting Corpn [2015] AC 588, at para 41, the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle" and "the potential value of the information in question in advancing that purpose".

46 On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". The most obvious ones are national security, the protection of the interests of children or mentally disable adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case.

47 Also relevant must be the practicalities and the proportionality of granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge

is in day-to-day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting that access. People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving the material may be out of all proportion to benefits to the open justice principle, and the burden placed upon the trial judge, in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge. On the other hand, increasing digitisation of court materials may eventually make this easier. In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate."

165. Subject to the necessary qualification that the public right of access to written submissions in this jurisdiction is soon to be directly governed by the terms of Practice Direction HC101, the analysis just quoted seems to me to be entirely consistent with the requirements of Article 34.1 of the Constitution and a correct statement of the law.

166. A number of the facts and circumstances of the case at hand are highly material in considering the application of the principles just discussed.

167. The first is the nature of the relief sought. I have already highlighted the problems created by the failure of the Teaching Council to identify the specific nature of the relief it seeks or the specific person or persons against whom that relief should be granted. As clearly as I can formulate it in its ultimate incarnation, it is an order varying the s. 27 anonymity order imposed in the personal injuries action to permit the publication to the Teaching Council of information that may be likely to identify the plaintiff in the action, coupled with an order directing someone – either the Courts Service or one of the parties to the personal injuries action – to furnish the Teaching Council with the record number of those proceedings and the name of each of the two Christian Brother defendants that the plaintiff has accused of sexually assaulting him.

168. However, I can find no precedent in the jurisprudence for an order directing the provision of information, rather than the disclosure of documentation, and none was identified to me. Yet, if I am to treat the application as, in substance, one for a discovery or disclosure order, it is necessary to identify the category or categories of documents to which that order would apply. In the *EHB* case, it was certain medical records; in the W case it was certain specified documents that were in evidence in family law proceedings; in *Tracey* it was certain affidavits, sworn in an application for summary judgment; and in *Kelly v Byrne* it was a particular witness statement in Commercial Court proceedings.

169. On a related point, assuming for this purpose the validity of the Teaching Council's present enquiry, it is difficult to see how it can or should be limited to establishing whether either of the two Christian Brother defendants is still on the Register. The whole

premise of the application at hand is that, if that is so, the Teaching Council would wish to consider making a complaint to its own Investigation Committee under s. 42(1) of the Teaching Council Acts. How could the Teaching Council consider that question without some knowledge of the nature and scope of the allegations of sexual assault that the plaintiff made against those persons before compromising his civil claim? As I cannot accept that it would be an efficient use of court time to contemplate successive applications, even on a contingent basis, it seems to me that the logic of the Teaching Council's position is that it would wish to know not only whether either person is still on the Register but also, if that is so in either case, what precisely that person is alleged to have done, and when and where he is alleged to have done it.

170. It seems to me that the information concerned is most likely to be contained in the pleadings in the personal injuries action. It follows that, in ease of the Teaching Council's position, the most sensible way of approaching its application is to treat it as an application for discovery of those pleadings (and, in so far as may be necessary, as one for a further order varying the existing s. 27 anonymity order to permit the publication to the Teaching Council of the information contained in those pleadings).

Conclusion

171. Is the Teaching Council entitled to an order for the disclosure of the pleadings in the personal injuries action?

172. The Teaching Council has failed to persuade me that the need to protect children, which is undoubtedly a vital public interest, properly arises in the circumstances of this case. That is because the Teaching Council's application completely ignores the existence of the comprehensive vetting procedures that the Oireachtas has established through the Vetting Acts and the Teaching Council Acts for the specific purpose of addressing that need.

173. In contrast to the *EHB* case, which concerned the discrete statutory power of the Fitness to Practice Committee of the Medical Council to compel production of documents by a third party, and the *W* case, which concerned the entitlement of the UK General Medical Council to obtain disclosure of court documents under an identified rule of court, in this case the Teaching Council can invoke no such specific power or rule but suggests instead that I should assert an inherent jurisdiction to make an equivalent order. That would entail, in effect, the creation of a new non-statutory pre-complaint investigation stage of the statutory fitness to teach inquiry process, as a fifth stage antecedent to the existing four-stage procedure (comprising screening, investigation, inquiry, and judicial review/appeal).

174. Given the existence of a comprehensive statutory vetting procedure for teachers and others who work with children, there is a cogent argument to be made that any inherent jurisdiction that the court might otherwise have had to make orders in aid of a parallel improvised investigation procedure has been implicitly displaced by the Oireachtas. However, as the point was not argued, I do not propose to decide it. I conclude only that, unlike the *EHB* and *W* cases, in which the protection of children was an immediate and

proximate concern, in this case that concern is wholly attenuated by the existence and application of a comprehensive statutory vetting procedure designed to provide – as far as is possible – that protection, and by the results of the Teaching Council's inquiries to date, which strongly suggest that neither of the relevant defendants is on the Register.

175. Thus, while I accept that I have an inherent jurisdiction under the common law to disseminate information about proceedings that are the subject of reporting restrictions where it is appropriate to do so in seeking to secure some other right or interest, the public interest in this case, while a crucially important one in principle, does not provide a forceful or potent argument for disclosure in the particular circumstances of this case. The countervailing interest of the protected person – the plaintiff in the personal injuries action – is that he not be subjected to undue stress by being identified as someone who has suffered, and continues to suffer, significant mental health problems. Article 27 of the Act of 2008 cannot be narrowly construed and, even if it could, the plaintiff's consciousness of his own medical condition would still bring him clearly within it. In seeking a harmonious balance between the various constitutional values and interests at stake in this case, I conclude that the relevant public interest is weakly engaged at best, whereas the plaintiff's right to protection under s. 27 of the Act of 2008 strongly and squarely arises. The disclosure of the names of the relevant defendants in the personal injuries action would imperil that protection by increasing the risk of a jigsaw identification of the plaintiff.

176. Approaching the matter from the perspective of access to court documents under the open justice principle does not alter the result. Hogan J pointed out in *Tracey* that the open justice principle must give way in respect of material protected by reporting restrictions imposed under s. 27 of the Act of 2008. There is nothing unorthodox in that view, as the UK Supreme Court confirmed in *Cape Intermediate Industries* when it identified the risk of harm to the interests of children or mentally disabled adults as a factor militating against the disclosure of court documents. The Teaching Council's position in this respect is further weakened by its failure to bring the appropriate application for access to court documents between July 2019 and February 2020.

177. But that is not the end of the matter. There is one other factor present here that was not present in either the *EHB* or the *W* case. In each of those cases, the regulator's application for disclosure was vigorously opposed. In this case I am told, and therefore must accept, that the plaintiff in the personal injuries action has indicated to the Teaching Council through his solicitors that he will abide by any order the court makes. In the usual way, I take that to mean that, while the plaintiff does not consent to the disclosure of the relevant information, he does not object to it. The absence of any objection tilts the balance in favour of ordering disclosure, however weak the argument for that disclosure may otherwise be. In the first instance, it is for the plaintiff to weigh in the balance the protection of his own privacy interests, on the one hand, against the provision of assistance to the Teaching Council by waiving that protection (at least, to some extent), on the other. For that reason, I propose to make an order.

178. As I have already indicated, in my view the appropriate order is one for discovery of the pleadings that have been exchanged between the parties in the personal injuries action. I do not propose to make that order against the Court Service because the RSC no longer requires all of the pleadings exchanged in plenary proceedings to be filed. Instead, I propose to order that the plaintiff in the personal injuries action make discovery to the Teaching Council of all of the pleadings exchanged in that action, subject to the provision by or on behalf of the Teaching Council of an undertaking to pay the plaintiff's reasonable costs of that discovery. Further, I propose to order that the terms of the s. 27 order made in the personal injuries action be varied to permit the publication of the contents of the information contained in the pleadings in that specific and limited way.

179. Mindful of the power of the court, identified by Barr J in the *EHB* case (at 430), to impose such terms on a disclosure order as it deems necessary to protect the interests of those intended to have the benefit of a restriction on the public administration of justice, I impose the following restrictions on the Teaching Council:

(a) Any hearing that takes place before a panel of the Disciplinary Committee as part of a disciplinary inquiry on foot of any complaint made by the Teaching Council under s. 42(1) of the Act of 2008 based on the documentation discovered shall occur otherwise than in public in so far as is necessary to protect the anonymity of the plaintiff.

(b) Any adverse finding against a registered teacher at the conclusion of the fitness to teach process shall be anonymised in so far as is necessary to protect the anonymity of the plaintiff.

(c) An undertaking shall be given on behalf of the Teaching Council that the documentation discovered by the plaintiff in the personal injuries action shall not be divulged to anyone other than the parties to any resulting fitness to teach complaint, the Director, the relevant Investigating Committee, the relevant Disciplinary Committee and those persons otherwise necessarily associated with the fitness to teach inquiry process.

(d) All persons who learn of the contents of the documentation discovered (or any of them) in the course of the fitness to teach inquiry process or in any subsequent proceedings or in any other way are bound by the s. 27 order which is varied by the court only to the limited extent already specified and subject to these conditions.

Final matters

180. On 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, in light of the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered electronically and posted as soon as possible on the Courts Service website. The statement continues:

'The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of deliver subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate.'

181. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be electronically filed in accordance with the directions of the registrar to enable the court to adjudicate upon it. Allowing for the intervention of the Christmas Vacation, I will direct that that be done within 14 days of the commencement of the new legal term, which is to say on or before 25 January 2021.