

THE HIGH COURT

[2021] IEHC 352
[2020 No. 102 M]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989
AND IN THE MATTER OF THE FAMILY LAW ACT 1995, AS AMENDED BY THE FAMILY
LAW (DIVORCE) ACT 1996**

BETWEEN

A

APPLICANT

- AND -

B

RESPONDENT
[2020 No. 95 M]

**IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, AS AMENDED, (AND
IN THE MATTER OF THE CHILDREN AND FAMILY RELATIONSHIPS ACT 2015 AND IN
THE MATTER OF [STATED NAMES], INFANTS**

BETWEEN

B

APPLICANT

- AND -

A

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 11th May 2021.

SUMMARY

This is a successful application for costs made pursuant to O.31, r.29 RSC by the Commissioner as a non-party of whom discovery was sought in the within proceedings. This summary is part of the court's judgment.

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1. This is an application for costs made by the Commissioner of An Garda Síochána, following on the court's judgment of 12th February 2021 in the above-entitled proceedings (see [2021] IEHC 96). Subsequent to the judgment of 12th February and following a further hearing on the substantive issues presenting between the parties, reserved judgment was delivered by the court on 6th April which, because of the nature of the matters addressed therein, is not being made public, though a copy has been supplied to the Commissioner. Consequent upon that later judgment, the parties to the above-entitled proceedings have resolved matters between themselves, with the result that the proceedings between them have now become moot. This obviates the necessity of having an order made directing the production to either of the parties of the material that the court had ordered, by order of 15th February (following on its judgment of 12th February), to be provided to it in the first instance. As a consequence of the foregoing, the parties have sought of the court that it vacate *all* of its orders relating to disclosure and non-party discovery and the court is satisfied so to order. (The court notes that this has the result that there will be no order effective against the Commissioner as regards the production of any documentation/material).
 2. The within application is made by the Commissioner pursuant to O.31, r.29 of the Rules of the Superior Courts, which provides, amongst other matters, as follows:

"Any person not a party to the cause or matter before the Court who appears to the Court to be likely to have or to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is or is likely to be in a position to give evidence relevant to any such issue may by leave of the Court upon the application of any party to the said cause or matter be directed by order of the Court to answer such interrogatories or to make discovery of such documents or to permit inspection of such documents. The provisions of this Order shall apply mutatis mutandis as if the said order of the Court had been directed to a party to the said cause or matter provided always that the party seeking such order shall indemnify such person in respect of all costs thereby reasonably incurred by such person".

3. Counsel for the Commissioner, in his written submissions, has helpfully summarised the most relevant facts in the following terms, which the court respectfully adopts:

"The history of these proceedings is well known to the court. From the perspective of the Commissioner as the non-party subject to an application for discovery pursuant to Order 31 rule 29, RSC and/or the inherent jurisdiction of the Court, the following facts are relevant and material to the costs of the Commissioner:

- "i. The Commissioner had no involvement whatsoever in the substantive disputes between the parties.*
- ii. The material the subject of the non-discovery application was generated solely and exclusively by the parties.*
- iii. The non-party discovery application was consequent upon the non-delivery of the documents by Ms B of the recordings, whether by way of inability to do so or otherwise....*
- iv. There were ultimately two applications before the Court: (a) an application by Mr A...for discovery and inspection of the recordings, and (b) an application by Ms B...for disclosure of the recordings to the section 32 assessor.*
- v. The court directed by order perfected on the 15th February 2021 that the Commissioner provide to the Court...within five working days the USB stick onto which the relevant material had been copied and provided to the Commissioner. This was complied with.*
- vi. The Commissioner asserted a claim to public interest privilege, also referred to as investigative privilege. The Court delivered a judgment of the 23rd February 2021 in which the claim to privilege was acknowledged to apply on the facts but which Barrett J. ruled was overridden and not upheld for the reasons outlined therein.*

vii. *Further to a subsequent judgment of the High Court on the substantive issues, the parties have resolved matters which...obviates the necessity of having an order made directing the production of the material”.*

4. The following matters, it seems to the court, are of particular relevance in determining the within application. First, the necessity for bringing the application for discovery rests with the parties. Second, the Commissioner raised the public interest (investigative) privilege point as he is required by law to do (see *McLaughlin v. Aviva Insurance (Europe) plc* [2011] IESC 42). Third, the Commissioner is entitled under the indemnity contemplated by O.31, r.29 to “*all costs...reasonably incurred by*” the Commissioner. Fourth, as is clear from Delany and McGrath, *Civil Procedure in the Superior Courts*, 4th ed., para.10-124, the entitlement to costs extends both to the costs of making the discovery *and* any costs incurred on the motion, which here includes the privilege hearing. Fifth, the judgment of Laffoy J. in *Dunne v. Fox* [1999] 1 IR 283 buttresses the court in adopting the view that none of the costs of the Commissioner would have arisen but for the orders sought and obtained by the parties for the purposes of their own private litigation.
5. Pursuant to the foregoing one would typically issue an order for costs in favour of the Commissioner without further ado. However, the parties to the proceedings have pointed to the fact that the Commissioner accepts that the privilege hearing/judgment concerned issues of public importance, that those issues raise their head in very many different types of proceedings, including in the District Court, and that this would justify the court in making no order as to costs. To this, the court’s response is as follows. The court’s judgment may *perhaps* prove generally useful in the future (who knows?) but there are many cases which yield judgments that prove generally useful and where costs nonetheless follow the event in the proceedings in which judgment is rendered. And even if the court was inclined to make no order as to costs, when it comes to O.31, r.29 RSC, the court is presented with a rule of court that is mandatory in nature (“*...provided always that the party seeking such order shall indemnify such person in respect of all costs thereby reasonably incurred by such person*”) (Emphasis added). The observations of Laffoy J. in *Dunne v. Fox* copper-fasten the sense that this provision is mandatory. It was suggested before the court, that the observations of Laffoy J. in *Dunne v. Fox* are *obiter* as, in that case she was concerned with what the costs were, rather than whether the order for costs should have been made in the first place. But *obiter* or not, her observations have the redeeming feature, if the court might respectfully observe, of being patently correct – which is why we continue to look to a decision decided in 1998 as a decision of continuing relevance in this area. And there is, as it happens, the best of reasons for mandatoriness to present: why on earth should a non-party bear any costs for disclosure/discovery in proceedings where s/he did everything right and nothing wrong? Courts, of all creatures, must do what is required of them by law, here the clearest of law in the form of O.31, r.29 RSC, as worded, made, if anything, still clearer by the judgment of Laffoy J. in *Dunne v. Fox*.

6. For the reasons aforesaid, the court will make an order in favour of the Commissioner for the costs of the initial motion, complying with the order of 15th February, raising the assertion of privilege, the hearing of the claim to privilege, and the stay application. As between the parties to these now moot proceedings, having regard to their particular circumstances, the court shall order that the burden of meeting the costs order be borne 75% by Mr A and 25% by Ms B.