**OUTER HOUSE, COURT OF SESSION**

**[2024] CSOH 70**

**A84/23**

OPINION OF LORD LAKE

In the cause

EAST RENFREWSHIRE COUNCIL

Pursuer

against

WILLIAM WRIGHT

Defender

**Pursuer: F Whyte, advocate; Clyde & Co**
**Defender: I Halliday, advocate; TC Young LLP**
**Haver: A Black, advocate; Thompsons Solicitors**

23 July 2024

[1] The pursuers in this action, the Council, were previously defenders in an action brought by D. She sought damages from them on the basis that they were liable for the actions of the present defender, Mr Wright. He has been convicted of sexual offences against D. He had been an employee of the Council's statutory predecessors who were vicariously liable for his actions. The Council aver that in the action against them brought by D, decree for payment of £150,000 plus expenses passed against them. The decree arose out of a tender and acceptance and did not proceed to proof. The Council aver that expenses were agreed at £28,250. They seek to recover these two sums from Mr Wright. The action is brought on the basis of the right conferred by the Law Reform (Miscellaneous Provisions)

(Scotland) Act 1940, section 3(2), to recover such contribution towards the sums paid as the court deems just rather than on any breach of contract on the part of the defender with their predecessor.

[2] Mr Wright has sought commission and diligence to recover documents from the firm who were D's solicitors at the time of her claim. As revised, the Specification of Documents in respect of which this was sought seeks all documents lodged in process or intimated to the Council by or on behalf of D to quantify her claim including:

(a) documents showing the nature, extent and cause of D's injuries and medical treatment received by her,

(b) medical reports prepared by an expert witness for D in the earlier action,

(c) documents vouching any loss of earnings by D claimed in the earlier action,

(d) documents vouching any loss of pension by D claimed in the earlier action; and

(e) documents vouching the claim under section 8 of the Administration of Justice Act 1982 made in the earlier action.

[3] As a result of discussions which took place following intimation of the opposition to the motion, the havers and Mr Wright agreed the following matters:

(1) The documents recovered may be used only for the present action and that an order of the court would be required before they were used for any other purpose. This is the position that exists even in the absence of agreement (*Iomega Corp* v *Myrica (UK) Ltd (No 2)*, 1998 SC 636)

(2) Any documents recovered may only be seen by solicitors and counsel instructed in the case. If it is considered that there is a need for them to be considered by any other person, an order of the court will be required before this can be done.

This reflects the standard practice in relation to documents released to the defence in criminal matters.

(3) The recovery of documents engage D's rights under the ECHR, Article 8, and that any recoveries could not be made available to Mr Wright's representatives until D had had an opportunity to be heard in relation to the matter. Again, although this was what was agreed, it is undoubtedly correct as a matter of law (*F* v *Scottish Ministers*, 2016 SLT 359).

[4] Against that background, it was contended for Mr Wright that the information was required to enable him to scrutinise the quantum of the claim made against him and to contest what element of damages it would be just for him to be required to pay. It was argued that he does not know whether the settlement sum was excessive and that he requires to see the documents on which the quantification was assessed by the Council to form a view on this matter. On that basis, it was said that the scope of the order sought was not "fishing". It was noted that, as it was only sought to recover documents that had been lodged in process or intimated to the Council, no issue of privilege would arise. As to why intimation had not been made to D, it was said that it had been to avoid causing her distress and in the belief that the havers were still her solicitors.

[5] It was accepted that the right of Mr Wright to defend the claim against him and to have material to enable him to do so had to be balanced with D's rights under Article 8. It was contended that the court could address the issue of relevancy of the documents now and, if an order was made, any documents falling within the calls could be lodged in court in a sealed envelope as happens in relation to recoverable documents for which confidentiality or privilege is claimed. It was submitted, that D could then be involved in

the motion to open the confidential envelope and that any balancing of competing rights could be considered at that stage.

[6] The Council adopted an essentially neutral position in relation to the motion. However, the havers, D's former solicitors, submitted that the motion should be refused *in hoc statu* pending intimation being made to D. It was accepted that certain aspects of the concerns they had expressed in their opposition had been addressed by the agreements reached with the defender, but the opposition was maintained on the basis that it related to material that was private and confidential to a victim of sexual abuse and she had not had a chance to be heard in relation to its recovery. The havers contended that there might be issues of the relevancy of the documents to the current action and that D should be able to advance arguments in relation to this before a decision is made. It was submitted that the issue that would have to be considered in any action to follow was the basis on which the Council valued and settled the claim and it was noted that there was no attempt being made to seek documents on which the decision to make a settlement offer was made. It was said that these issues of relevancy demonstrate why it is necessary to have D involved in the initial stage of consideration of the motion. I was referred to *F* v *Scottish Ministers*, 2016 SLT 359, paragraphs 45, and *Cowie* v *Vitality Corporate Services Ltd* 2024 CSOH 65, paragraphs 51 - 55.

[7] In view of the agreements reached, it is apparent that the issue for decision was narrowed significantly. The principal issue now before me is whether I can determine the issue of relevancy at this stage and therefore grant commission and diligence on the basis that any documents falling within the calls could be provided in a confidential envelope awaiting further order of the court to address any Article 8 issues.

[8] In *F* v *Scottish Ministers*, after a review of authorities, Lord Glennie concluded:

> "that a haver and any person whose art.8 rights may be infringed by an order for recovery of medical records and other sensitive documents must have the application for recovery intimated to them and must be given the opportunity to be heard in opposition to the application before an order is made or, at least, before the documents are handed over to the party seeking them."

[9] After consideration of the mechanisms that might be employed to protect these rights, he said that it was up to the court in question to determine how best to ensure that a party seeking to vindicate his or her Convention rights is heard before medical and other sensitive records are allowed to be released. In *Cowie*, Lord Sandison quoted with approval a judgment of the European Court of Human Rights in *Francu* v *Lithuania* containing the following passage:

> "The Court accepts that the protection of the confidentiality of medical information - which is in the interests of both the patient and the community as a whole - can in some cases give way to the need to investigate and prosecute criminal offences and to protect the public nature of legal proceedings, *when the latter interests are shown to be of even greater importance*." (The emphasis is mine.)

[10] The nature of the records sought and the circumstances of the connection between the person seeking recovery and the person to whom the records relate are such that they could not really be more sensitive. The balance that has to be struck before the records could be released will require consideration of the extent to which they are necessary to enable the defenders to vindicate his rights. The high test that must be met is apparent from the passage quoted above from *Francu*. While not requiring to decide the matter, I consider that there is force in the argument that, in determining what level of contribution from the defenders is "just" in terms of the 1940 Act, the issue will not turn on what is contained in D's medical records as much as the basis on which the Council reached their decision to make a tender to D. On any view, however, I am of the view that this is a matter on which D must have the opportunity to be heard before an order for commission and diligence is

made. I accept that issue of confidentiality could be determined in future if the documents were to be lodged in a sealed envelope but the issue of the principle that they were recoverable would have been decided. Before getting to that stage, the importance of the interests of each party must be considered and balanced.

[11] This is not a case in which there is a concern that the records in question may be lost or destroyed. I therefore refuse the motion *in hoc statu*. If the defender wishes to re-enrol, it will be necessary that the motion is intimated to D. At the time the motion was heard, the havers had not been in contact with D and she was not their client. In the days following the hearing, they have advised the court that they have been able to make contact with her and that she had instructed them again. It should therefore be possible to ensure that D is made aware of any motion.