Obtaining documents and evidence from civil litigation for use in professional regulatory proceedings

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1. Introduction

1.1. This short paper explores the ability of professional regulatory bodies to apply for and obtain access to documents produced during litigation before the courts for use in disciplinary or fitness to practice hearings. As will be demonstrated, the contours of the jurisdiction to grant access to court documents to non-parties are poorly-defined in Ireland by comparison to the position in England and Wales, and have received very limited consideration by the Superior Courts here.

1.2. This paper considers the right of access to court documents on the part of non-parties generally, as well as the specific case of regulatory bodies. It then reviews several Irish decisions which address the disclosure to regulatory bodies of material generated in the course of *in camera* court proceedings.

2. A right of access to court documents

2.1. It is generally considered that both the constitutional requirement that justice be administered in public and the related common law concept of open justice provide a right of access to court documents to the public at large, though the scope of that right and the means by which it can be vindicated have not been explored in any great detail by the Irish courts.

2.2. In *AIB v. Tracey (No. 2)* [2013] IEHC 242 (a set of proceedings seeking summary judgment), the defendant's affidavits were opened in court, the contents of which sought to directly implicate a third party, a Mr Agar, in a course of conduct which, if true, would have amounted to a breach of fiduciary duty. Mr Agar, a non-party to the proceedings, brought an application seeking access to copies of those affidavits. Hogan J. allowed the application, holding that the court's permission for access to the documents was not required, because the affidavits were effectively openly read in court. As the proceedings were in open court pursuant to the requirements of Article 34.1, the public was entitled to have access to documents that were opened without restriction. The judgment also

observed, however, that entirely different considerations would 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.

2.3. In *Kelly v. Byrne* [2013] 2 I.R. 389, the defendant, Thomas Byrne, a former solicitor, was charged with over 50 counts of offences under the Criminal Justice (Theft and Fraud Offences) Act 2001. It had been alleged that throughout his work as a solicitor, Mr Byrne engaged in defrauding a number of banks and credit institutions in the course of property transactions. The Director of Public Prosecutions brought an application seeking access to a statement made by Mr Byrne during civil proceedings brought against him by John Kelly. Mr Byrne objected to the application, on the basis that the statement would be inadmissible during his criminal prosecution. Granting the DPP's application, Hogan J. held that the admissibility of the statement was a matter for the trial judge. The DPP, as a person with the authority to prosecute crimes 'in the name of the People', was held to have good reason to access such documentation.

2.4. A difficulty facing non-parties seeking access to court documents is that the Rules of the Superior Courts make no provision for such applications to be brought. Whereas the High Court can clearly exercise its inherent jurisdiction to provide non-parties with court documents, the absence of a specific provision setting out the procedure to be adopted means that judges may be required to manage such applications in an *ad hoc* and non-uniform manner.

2.5. By contrast, the Civil Procedure Rules (CPR) in England and Wales provide provide a clear procedural avenue to a non-party seeking to exercise its right of access to a court document. CPR 5.4C states:

> '(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
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> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to paragraph (1B) […]
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> (2) 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.'

2.6. In *Cape Intermediate Holdings Ltd v Graham Dring (for and on behalf of The Asbestos Victims Support Group)* [2018] EWCA Civ 1795, Lord Justice Hamblen undertook a

detailed review of the precise ambit of the right of public access to court documents, by reference both to the Civil Procedure Rules and to a series of English High Court decisions. He held that the words 'records of the court' as they appear at CPR 5.4C(2) do not generally include the trial bundles, the trial witness statements, the trial expert reports, the trial skeleton arguments, or opening or closing notes or submissions, The trial transcripts. He also held that the court's inherent jurisdiction allowed the courts to grant access to witness statements to non-parties (as reflected in CPR 32.13) and skeleton arguments, but not to trial bundles or to exhibits of witness statements.

2.7. Lord Justice Hamblen considered the test to be applied to the exercise of the court's discretion under CPR 5.4C in the following terms:

> '127. As to the principles to be applied when the court is considering whether and how to exercise its discretion to grant permission for copies to be obtained by a non-party of the records of the court under 5.4C(2) the court has to balance the non-party's reasons for seeking copies of the documents against the party to the proceedings' private interest in preserving their confidentiality. Relevant factors are likely to include:
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> (1) The extent to which the open justice principle is engaged;
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> (2) Whether the documents are sought in the interests of open justice;
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> (3) Whether there is a legitimate interest in seeking copies of the documents and, if so, whether that is a public or private interest;
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> (4) The reasons for seeking to preserve confidentiality;
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> (5) The harm, if any, which may be caused by access to the documents to the legitimate interests of other parties.
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> 128. I would endorse the general approach…that the court is likely to lean in favour of granting permission under 5.4C(2) where the principle of open justice is engaged and the applicant has a legitimate interest in inspecting the identified documents or class of documents. Conversely, where the open justice principle is not engaged, the court is unlikely to grant permission unless there are strong grounds for thinking that it is necessary in the interests of justice to do so.
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> 129. In relation to the court's inherent jurisdiction, the factors relevant to the exercise of discretion are likely to be such as those set out in paragraph 127 above…'

2.8. Whereas no equivalent to CPR 5.4C exists under the Rules of the Superior Courts in this jurisdiction, it is submitted that relevant factors identified by Lord Justice Hamblen provide a useful template for an Irish court considering an application for documents made by a non-party.

2.9. From the perspective of regulatory bodies and regulated professionals, an application of this type would ordinarily arise where the evidence in a set of civil proceedings discloses potential wrongdoing on the part of a professional. The fact that a regulator's interest in obtaining such documents from a court is a public (rather than private) interest is likely to weigh heavily in favour of access to such documents being granted, notwithstanding any legitimate privacy concerns a regulated professional may have.

3. Applications to court by professional regulatory bodies

3.1. In light of the foregoing analysis, it is worthwhile to consider the capacity of a regulator to apply to court for access to documents opened during the course of civil proceedings. This issue has received almost no treatment by the courts in this jurisdiction, though it is one which comes before the courts of England and Wales with some frequency. Such an application would most obviously arise where a regulatory body learned of evidence adduced in the course of civil proceedings which could give rise to the making of a complaint against a regulated professional, or could be used as evidence in the course of an existing complaint.

3.2. In *A County Council v. W* [1997] 1 F.L.R. 574, the General Medical Council (GMC) sought leave for disclosure of documents in earlier care proceedings before the High Court. A finding has been made in the care proceedings that sexual abuse by a doctor of his daughter had occurred, and the GMC had received letters from the police and the local authority regarding the care proceedings. Pursuant to its statutory duties, which included its duty to protect members of the public, the GMC sought disclosure from the care proceedings to establish whether charges of serious professional misconduct should be brought against the doctor. The application was brought pursuant to Rule 4.23 of the Family Proceedings Rules 1991, which in material terms mirrors CPR 5.4C.

3.3. In determining the application, Cazalet J. observed that the following factors weighed against disclosure being made to the GMC:

i) If some disclosure was made to the GMC, there were likely to be further inquiries made of the family by the GMC, which would inevitably cause the children trauma and upset.

ii) Although all matters before the GMC's Professional Conduct Committee (PCC) were in private, if and when a charge was made against the father, the nature of the charge would have to be specified publicly. If the charge was found proved, there would be further additional dangers of identification at that stage so far as the child was concerned.

iii) The GMC did not have the power to order the press not to publish details about proceedings.

iv) The child now maintained her denial that any impropriety had occurred, despite her earlier statement that it had. The PCC had a discretion to admit evidence beyond that which would be admitted in a criminal trial, and the PCC might consider this to be a case suitable for the exercise of its discretion.

v) It was submitted that the reality was that the father, in his particular field, would never be any risk to the child community at large.

vi) A decision adverse to the father would inevitably affect his income and cause financial detriment to his family.

vii) In a previous decision concerning wardship, the High Court had in mind the extent to which justice would be at risk if access to the undisclosed material was allowed, in circumstances where an assurance of confidentiality given to those who had provided evidence was breached.

3.4. The factors in favour of disclosure were:

i) If the father were to find himself unable to practise in his present field he might have to look for work on a broader front, where he could find himself working with children. There might therefore be a risk to the community.

ii) Whilst the GMC might have difficulty in proceeding if the child concerned continued to maintain her denial of any sexual abuse, the discretion of the PCC (described at (iv) above) could be significant.

iii) The GMC was fully prepared to co-operate as appropriately as it could to reduce the risks of publicity or any leak. General injunctive relief could also be sought to reduce any publicity that there might be if a charge were to be brought. If evidence was further disclosed, the PCC would be expected to exclude the public and media from hearing any such evidence, and the matters which would eventually be in the public domain would deal

solely with the specific charges, with anonymity for the child and no detail of evidence publicly stated.

3.5. Ultimately, Cazalet J. acceded to the GMC's application for disclosure, on the following basis (at page 588):

> 'In my view in this case there is an overwhelming and overriding public interest that the appropriate GMC Conduct Committee should be in a position to consider whether it should bring charges relating to serious professional misconduct against a practitioner who has been found in civil proceedings to have sexually abused his daughter and to consider carefully from the standpoint of the public the position and status of his registration as a medical practitioner. I bear in mind the inevitable anxiety that may be caused to the children as a result of their evidence being taken further, even though in private; this could lead on to the father losing his job in his chosen profession with all the adverse effects including serious financial consequences which may follow.
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> In my view the public interest, as I have stated it to be, is a very strong and potent argument for disclosure, and the balance comes down firmly in favour of some appropriate disclosure.'

3.6. It should be noted that the existence of the care proceedings had come to the GMC's attention through a letter sent to it by a police authority. Because the care proceedings were brought under the Children Act 1989, and were therefore held *in camera*, the sending of that letter to the GMC was arguably in contempt of court. This raises the wider issue of the difficulties a regulatory body will naturally encounter in becoming of aware of the existence of civil proceedings where evidence relevant to its regulatory function will be adduced. This is particularly so in the case of *in camera* proceedings.

4. Applications in the context of in camera proceedings

4.1. The *A County Council v. W* decision has been cited (broadly with approval) in a number of subsequent Irish cases, such as *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399 and *HSE v. McAnaspie* [2012] 1 I.R. 548.

4.2. In the *Eastern Health Board* case, the Eastern Health Board (EHB) judicially reviewed a decision of the Fitness to Practice Committee of the Medical Council directing the EHB to make available certain documents in the EHB's possession which related to *in camera* childcare proceedings. The EHB argued that it was prohibited by the *in camera* rule from making the documents sought available. In refusing the EHB's judicial review proceedings, Barr J. found that there was no absolute embargo in Irish law on the

publication of information derived in *in camera* proceedings. He found that court had discretion to permit the subsequent disclosure of *in camera* information in the interests of justice, and that where justice required disclosure of *in camera* information, all reasonable steps must be taken to protect minors and the court could impose such terms as were necessary. This was so irrespective of whether the private nature of the proceedings arose from statute or from the court's inherent jurisdiction.

4.3. In doing so, Barr J. expressly rejected the High Court decision *The People (Director of Public Prosecutions) v. WM* [1995] 1 I.R. 226, where Carney J. held that where statute required that proceedings were held *in camera*, a court was precluded from disclosing any documents from those proceedings. Barr J. noted that the EHB (who were the applicants for the documents in *WM*) were not represented at hearing before Carney J., and implied that, had Carney J. heard arguments from the EHB in relation to the matter and had certain English cases been opened to him, he would have decided *WM* differently.

4.4. The *Eastern Health Board* decision is difficult to reconcile with the judgment of Murphy J. in *RM v. DM (Practice: in camera)* [2000] 3 I.R. 373. There, the applicant in divorce proceedings (held *in camera*) applied to the Circuit Court for permission to use certain documents (including pleadings) from those proceedings for the purposes of a complaint against a barrister before the Barristers Professional Conduct Tribunal. His application was refused by the trial judge, and the applicant appealed to the High Court.

4.5. Murphy J. confined the *A County Council v. W* and *Eastern Health Board* decisions to cases involving minors only, and held that the *in camera* rule provided for Judicial Separation and Family Law Reform Act 1989 and the Family Law (Divorce) Act 1996 imply an absolute embargo on the production, in subsequent proceedings, of information which derives from or was introduced in proceedings protected by the rule. That distinction, it appears, arose from an effort to reconcile the *Eastern Health Board* decision with the judgment of Laffoy J. in *MP v. AP (Practice: in camera)* [1996] 1 I.R. 144. In the latter case, a complaint had been made to the Psychological Society of Ireland in relation to evidence given by a psychologist in the course of *in camera* family law proceedings. Laffoy J. held that the nature of the *in camera* provisions in the Judicial Separation and Family Law Reform Act 1989 were 'mandatory', and that the complaint to the Psychological Society of Ireland had breached this requirement.

4.6. Unlike the *Eastern Health Board* and *A County Council* decisions (and, indeed, unlike the *RM v. DM* case), *MP v. AP* did not involve an application to a court for the dissemination of material from *in camera* proceedings. Rather, it involved a *post hoc* application by the psychologist in question seeking declaratory relief concerning the complaint to his regulatory body. Accordingly, the question of the court's discretion did not arise.

4.7. That being said, *RM v. DM* and *Eastern Health Board* have each given rise to their own separate and mutually incompatible strands of case law. On the one hand, the *RM v. DM* line of cases (e.g. *B(A) v. D(C)* [2013] 3 I.R. 383) distinguishes between matters involving minors (where disclosure could be allowed) and matters under the 1989 and 1996 Acts (where disclosure could not be allowed). On the other hand, the *Eastern Health Board* line of authorities (including the judgment of Abbot J. in *JD v. SD* [2014] 3 I.R. 483) draws no such distinction, and is perhaps best summarised by the following conclusion reached by Barr J. (at pages 428 and 429 of *Eastern Health Board*):

> 'A statutory imperative that proceedings of a particular nature be held in private…does not imply that there is an absolute embargo on disclosure of evidence in all circumstances. Such an embargo requires specific statutory authority to displace judicial discretion at common law to permit disclosure in appropriate circumstances…A major far-reaching change in the law, which sets aside established practice, could not arise merely by implication derived from a mandatory statutory requirement that certain proceedings shall be held in private but, in my view, would require specific statutory authority.
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> I have been unable to discover any specific statutory provision in Irish law which provides that there is an absolute embargo in all circumstances on the publication of information deriving from proceedings held in camera.
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> There is an established practice at common law recognised in England and in this jurisdiction…that the court in proceedings held in camera has a discretion to permit others 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 interest 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.'

4.8. The position adopted in the *Eastern Health Board* case has, to a certain extent, been placed on a statutory footing by section 40(6) of the Civil Liability and Courts Act 2004, which states:

> 'Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the

production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings, to:

*(*a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter…'

4.9. It should also be noted that a court order granting a regulatory body access to documents from an *in camera* hearing may be subject to certain conditions. Most obviously, such conditions might be imposed in order to protect the privacy of innocent third parties. For example, in *Re A (A Minor) (Disclosure of medical records to GMC)* [1998] EWHC J0623-2, Cazolet J. stated that (in light of the fact that the GMC's hearing are presumed to be held in public) he would 'expect in the normal case the court to make anonymity [of third party individuals] an express condition of any disclosure to the GMC'.

5. Conclusion

5.1. On the basis of the foregoing, the law can be summarised as follows:

a) A professional regulatory body, as with any member of the public, has a *prima facie* entitlement to apply to court for access to documents which were opened during the course of proceedings. This would include affidavit evidence and, potentially, the Digital Audio Recording (DAR) of the proceedings.

b) Insofar as the contours of the court's jurisdiction to hear and determine such applications are, as a matter of Irish law, unclear, the statutory functions underpinning regulatory bodies and the public interest protected by them are likely to weigh in favour of such an application being acceded to where it is brought by such a body.

c) Where a regulatory body applies to court for access to documents which were not opened in open court (e.g. were opened *in camera* or were the subject of reporting restrictions), the judge hearing the application has a discretion to make the documents available, notwithstanding the fact that the proceedings are in private and irrespective of whether the private nature of the hearing was on the basis of a statutory provision.

d) This discretion would allow the court to make only certain material available to the regulator, and/or to make that material available on limited terms or for a specific purpose only.

e) In determining whether to accede to an application to make documents available, a court must engage in a weighing exercise between the public interest in the material being disclosed to a regulator, and the private interests of the parties to the litigation (see the comments of Lord Hamblin in *Cape Intermediate Holdings* at paragraph 2.7 above and the comments of Cazalet J. in *A County Council v. W* at paragraphs 3.4 to 3.6 above).

f) There is a strong public interest in documents from legal proceedings (whether heard in public or otherwise) being disclosed to the appropriate regulatory body upon request, and as such, a strong private interest in the confidentiality of such material being maintained would have to be established for an application of that nature to be refused.