THE HIGH COURT

[2026] IEHC 445

Record No: HP 2025/6435

BETWEEN

THE CHIEF INSPECTOR OF SOCIAL SERVICES

PLAINTIFF

AND

RAIDIÓ TELIFÍS ÉIREANN

DEFENDANT

JUDGMENT of Ms. Justice Egan delivered on the 6th day of July, 2026

Introduction

1. This is an application for a *Norwich Pharmacal* order, which is a particular type of disclosure order where the only cause of action is discovery.
2. The plaintiff, the Chief Inspector of Social Services ("the Chief Inspector"), is designated by the Board of the Health and Information Quality Authority ("HIQA") to inspect and regulate nursing homes. This application concerns a television programme broadcast by RTÉ on 4 June 2025, *RTÉ Investigates: Inside Ireland's Nursing Homes*. The programme included anonymised extracts from a substantial volume of covertly recorded, unedited footage ("the complete unedited footage") obtained by undercover researchers at two nursing homes: The Residence Portlaoise and Firstcare Beneavin Manor (together, "the Nursing Homes"). The footage appeared to reveal staff practices which RTÉ interpreted as demonstrating prolonged and systemic failures of care. Prior to broadcast, RTÉ furnished HIQA with immediate and detailed reports of its findings.
3. The Chief Inspector considers the practices depicted in the programme to be wholly unacceptable and to raise serious concerns regarding the safety and welfare of residents. He requested that RTÉ provide the complete unedited footage, which he regards as essential to the discharge of his statutory regulatory functions.
4. RTÉ, while welcoming regulatory action by HIQA, maintained that it could only release the complete unedited footage pursuant to a court order.

5. The Chief Inspector now seeks a *Norwich Pharmacal* order directing RTÉ to provide that complete unedited footage. For the reasons set out below, I have decided to grant the order sought.

Legislative Framework

6. The Chief Inspector is a statutory officeholder under the Health Act 2007 ("the 2007 Act"). He is responsible for the registration and inspection of nursing homes and for ensuring compliance with the statutory regime governing designated centres. This regime—comprising the 2007 Act, associated regulations, and national standards—is directed towards safeguarding vulnerable persons residing in such centres.

7. HIQA's functions include the setting of safety and quality standards for nursing homes. For example, the *National Standards for Residential Care Settings for Older People in Ireland* (2016) require, at Standard 3.1, that each resident be safeguarded from abuse and neglect and that their welfare be actively promoted. Registered providers must comply with the *Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013* ("the Regulations"), which require, *inter alia*, that providers take all reasonable steps to protect residents from abuse and that persons in charge investigate any allegation of abuse. "Abuse" is broadly defined to include physical, psychological, sexual, discriminatory, financial, or material mistreatment, as well as neglect.

8. The Chief Inspector carries out inspections of designated centres to assess compliance with the Regulations and national standards.

9. The Chief Inspector may attach conditions to the registration of a designated centre, vary or cancel a registration, or seek District Court orders—including urgent *ex parte* orders—where there is a risk to the life or welfare of residents. He may also issue compliance notices and initiate prosecutions for breaches of the Act or Regulations. Convictions may result in fines or imprisonment.

10. The statutory scheme therefore relies on the Chief Inspector having access to sufficient information—whether obtained through inspections or other sources—to determine what regulatory action is necessary to protect residents. To this end, section 65 empowers the Chief Inspector to require registered providers, such as the Nursing Homes, to furnish information necessary for the performance of his functions. However, this power does not extend to entities other than registered providers. As RTÉ is not a registered provider and the footage is not in the possession of the Nursing Homes, section 65 cannot be invoked to compel the disclosure of the complete unedited footage.

11. Section 84 further prohibits the unauthorised disclosure of confidential information by HIQA. The Chief Inspector will therefore be subject to appropriate legal constraints in respect of any onward disclosure of the complete unedited footage.

Factual and Procedural Background

The RTÉ investigation, the programme and its immediate aftermath

12. The complete unedited footage was gathered by two undercover researchers who worked up to four twelve-hour shifts per week over a two-to three-week period. Additional footage was captured via motion-sensor devices. I accept that the welfare of residents was RTÉ's top priority. Throughout the investigation it sought expert advice to ensure that any immediate risks to residents could be appropriately escalated. The undercover operation was terminated once RTÉ was advised that the footage demonstrated prolonged and systemic failures of care. At that point, RTÉ provided immediate and detailed reports to HIQA. RTÉ also provided detailed reports to the HSA, An Garda Síochána, and Emeis (the corporate group owning the two nursing homes). In June 2025, RTÉ furnished "relevant material"—which appears to include the complete unedited footage—to An Garda Síochána pursuant to a court order.

13. The broadcast programme highlighted substandard care and what RTÉ considered systemic failures. The programme also alleged inaction or delayed responses by HIQA to credible disclosures. The Chief Inspector considers the programme to raise extremely serious concerns, including:

- residents being treated roughly or left unattended for prolonged periods;
- inadequate access to, and changing of, bedding and incontinence pads;
- disrespect for residents' privacy and dignity, including one clip in which a resident's trousers were pulled down inappropriately;
- falsification of records;
- a poor culture of respect for residents and an institutionalised approach to care;
- failure to respect residents' stated preferences with regard to their care;
- staff openly acknowledging that they were engaging in practices contrary to their training and contrary to what would be expected if a supervisor had been present.

14. The Chief Inspector regards these practices as wholly unacceptable and contrary to the residents' human rights. Given the volume of raw, unedited footage from which the broadcast programme had been compiled, the Chief Inspector considered it necessary to review all footage held by RTÉ in order to assess compliance with the 2007 Act, the Regulations and the national standards, and to inform any regulatory action.

15. Following the broadcast, the Chief Inspector wrote to the Director-General of RTÉ seeking the complete unedited footage, emphasising that full information was necessary to determine

appropriate regulatory action. RTÉ accepted the seriousness of the issues and the need for urgent regulatory intervention but maintained that its journalistic guidelines and confidentiality obligations prevented voluntary disclosure absent a court order. RTÉ also raised GDPR concerns, noting that the journalistic exemption under section 43 of the Data Protection Act 2018 does not extend to sharing material with third parties, including regulatory or law enforcement bodies.

16. As RTÉ declined to release the footage voluntarily, the Chief Inspector therefore brought the present application.

17. RTÉ states that it is neutral on the Chief Inspector's application: it neither consents to nor objects to the reliefs sought. RTÉ has agreed on a without-prejudice basis to the terms of a draft *Norwich Pharmacal* order. Its position is that, if any order is made, it should be carefully limited and should not require disclosure of the complete unedited footage to the nursing homes/designated centres.

18. A further affidavit of the Chief Inspector sets out the regulatory response in respect of the Nursing Homes both before and after the broadcast of the programme.

The Chief Inspector's regulatory response

The Residence Portlaoise

19. On 22 April 2025, the Chief Inspector attached a restrictive condition to the provider's registration in respect of The Residence Portlaoise prohibiting the admission of new residents until the provider had in place a governance and management structure and personnel with the knowledge, competence and skills required to supervise the delivery of care to residents. This followed inspections in late 2024 and early 2025, which found that the provider had failed to ensure an effective system of governance and management to keep residents safe and to provide high-quality, person-centred care.

20. The Chief Inspector avers that such a restrictive condition serves three purposes: first, it prevents new admissions where there are concerns about residents' care; second, it creates space for staff to review and reset systems of care; and third, the financial consequences of reduced resident numbers provide an incentive for the provider to take corrective action, including by allocating additional resources where required.

21. Following the airing of the programme on 4 June 2025, a three-day inspection of The Residence Portlaoise took place in early June 2025. While some findings were positive, significant deficits were identified, particularly concerning the extensive use of agency staff. An urgent compliance plan was sought and put in place to ensure adequate supervision of agency staff.

22. Inspectors also raised safeguarding concerns with the provider and concluded that the provider had failed to take reasonable steps to ensure that residents were appropriately safeguarded and protected from the risk of abuse. Further findings concerned inadequate use of residents' care

plans, which were not being properly reviewed or updated, with the result that residents' care needs were not being met. Provider meetings were then held in early July to follow up on the issues identified and to drive improvement.

23. On 13 June 2025, the Chief Inspector made a referral, pursuant to reporting obligations under the Criminal Justice (Withholding Information on Offences against Children and Vulnerable Persons) Act 2012, to An Garda Síochána arising from serious concerns that suspected offences may have been committed against vulnerable residents in the centre.

24. A further inspection took place on 15 July 2025. Although some issues of concern remained, the inspection reflected a nursing home showing improved regulatory compliance, including improvements to staff numbers and skill mix, which were sufficient at that time to meet residents' needs. The restrictive condition limiting admissions remained in place, and the provider was required to demonstrate that improvements could be sustained.

25. Another inspection took place on 17 September 2025, which showed that the provider was continuing on a pathway of improved regulatory compliance. On 29 September 2025, the provider indicated that it intended to apply to remove the restrictive condition and to open the centre to a maximum of 101 residents. The Chief Inspector was not satisfied that this was appropriate, given the regulatory history and remaining concerns about safe operation. The provider ultimately applied to vary conditions to accommodate 73 residents, but the Chief Inspector adopted a more cautious approach and amended the restrictive condition to permit admission of up to 61 residents, being 10 more than the number then living in the centre.

26. A further inspection took place in February 2026, which found in broad terms that the provider was largely sustaining improved regulatory compliance, although some issues remained. A further inspection took place in March 2026, the report of which was still being finalised at the time of the affidavit. The provider had also applied to increase the number of residents from 61 to 73, and that application remained under consideration.

Firstcare Beneavin Manor

27. Following the programme, a three-day inspection of Firstcare Beneavin Manor began on 5 June 2025. Its purpose was to provide assurance that residents were being safely cared for and that the provider had sufficient resources to meet residents' needs. The inspection raised concerns about staffing levels, skill mix, and overreliance on agency staff unfamiliar with the nursing home and its residents. Significant concerns were also raised about governance and management, including that the management systems were not sufficiently robust to ensure that the service was safe, appropriate, consistent and effectively monitored.

28. Following that inspection, the provider voluntarily agreed to stop admissions immediately and to submit weekly staffing updates to the Chief Inspector. On 13 June 2025, the Chief Inspector made a referral to An Garda Síochána in respect of Firstcare Beneavin Manor, again arising

from serious concerns that suspected offences may have been committed against vulnerable residents.

29. On 29 August 2025, a decision by the Chief Inspector to attach an additional restrictive condition to the provider's registration took effect, prohibiting the admission of new residents. The provider was required to apply to the Chief Inspector to remove that condition before recommencing admissions. At the same time, an application to vary condition 1 of registration was granted, increasing the minimum number of staff required and removing the provider's ability to admit residents with a tracheostomy, because inspectors were not satisfied — and the provider accepted — that the required resources were in place to meet such residents' needs.

30. A further inspection took place on 6 October 2025. At that time, there were no residents living on the third floor of the premises, and the inspection identified progress towards improved regulatory compliance. However, the Chief Inspector continued to have concerns about high staff turnover and about management systems not being sufficiently robust to drive and sustain improvements.

31. A further inspection was completed on 18 March 2026, which found significant and consistent improvements across most areas inspected, including a more stable workforce and appropriate arrangements for supervising residents' care. Following that inspection, and receipt of applications to vary conditions 1 and 3, the Chief Inspector removed the restrictive condition prohibiting new admissions on 5 May 2026. At the same time, the maximum number of residents permitted in the centre was reduced from 111 to 75, and the provider agreed to a cautious approach to resuming admissions, with a maximum of two additional residents per week.

Further potential regulatory action and the asserted need for the complete unedited footage

32. The Chief Inspector avers that, without having seen the complete unedited footage, it is very difficult for him to identify the full nature of further regulatory action that may be required.

33. The Chief Inspector says that the programme showed examples of very poor behaviour and practices. Of particular concern was the portrayal of staff who appeared to understand good practice but deliberately chose not to follow acceptable practices. He emphasises that staff who behave in this way are unlikely to do so when an inspector is present during an inspection.

34. The Chief Inspector's position is that the broadcast footage is only a partial and potentially limited account of what was observed in the two centres. From engagement with RTÉ, he says HIQA was advised that there were further examples of poor or harmful care practices which were not aired.

35. The need for the complete unedited footage is put on the basis that the Chief Inspector must be able to evaluate the poor behaviours and practices in full, rather than relying only on the edited

programme. His overriding concern is to ensure that registered providers are taking appropriate steps to secure residents' safety and wellbeing, and that residents' care and support needs are being met. In short, the complete unedited footage is said to be necessary not only to understand what happened, but also to decide whether further enforcement action, protective steps, prosecution, or referrals to other agencies are warranted.

Legal principles

36. The classic form of a *Norwich Pharmacal* order compels:

- A defendant who has become mixed up in the alleged wrongdoing of a third party, in some manner either innocently or knowingly
- to disclose information that would assist in identifying this third-party wrongdoer to the plaintiff with the purpose
- of placing the plaintiff in a position to identify and seek redress against a previously unknown wrongdoer.

37. The authority to grant *Norwich Pharmacal* relief was founded on the court's equitable jurisdiction and it is therefore a versatile remedy granted at the discretion of the court. In determining whether or not to grant *Norwich Pharmacal* relief, the court will consider whether it would be proportionate and necessary to grant such relief in all the circumstances of the matter.

38. In *Blythe v. The Commissioner of An Garda Síochána* [2023] IECA 255, Collins J. noted that there is broad consensus in the case law from England and Wales that certain threshold conditions must be satisfied before any disclosure order may be made. He endorsed the following "*useful synopsis"* of those conditions by Saini J. in *Collier v. Bennett [2020] EWHC 1884 (QB), [2020] 4 WLR 116.*

> *"Based principally upon the above case-law (and specifically upon the way in which more recent cases have refined and explained the original tests), I suggested to the parties, and they accepted, a broad formulation of a workable and practical test under CPR r 31.18 as follows:*
>
> *(i) The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person ("the Arguable Wrong Condition").*
>
> *(ii) The respondent to the application must be mixed up in so as to have facilitated the wrongdoing ("the Mixed Up In Condition").*

(iii) The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ("the Possession Condition").

(iv) Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction ("the Overall Justice Condition").

The Arguable Wrong, Mixed Up In, and Possession, Conditions each raise threshold hurdles and one does not get to the Overall Justice Condition unless the applicant overcomes those three hurdles. However, certain matters which arise in relation to the Arguable Wrong Condition, such as the strength of what has been established as a good arguable case, will feed into the court's assessment when considering the Overall Justice Condition."

39. Although those are the classical features of a *Norwich Pharmacal* order, as Collins J. pointed out in *Blythe*, significant uncertainty remains as to: first, the scope and purpose of the disclosure jurisdiction; second, the threshold conditions for its exercise; and third, the factors to be considered in assessing whether to make a disclosure order in any given case. As in many other areas of law, significant tensions arise between the desire for flexibility and the values of certainty and predictability - what Collins J. refers to as the age-old struggle between equity and the law.

40. The *Norwich Pharmacal* jurisdiction was first received into Ireland in *Megaleasing UK Ltd v. Barrett* [1993] ILRM 497. Finlay C.J. expressed the view that the authorities of the English courts, in fact, confined the remedy to cases *"where a very clear proof of a wrongdoing exists"* and, *"possibly"* – at least as far as actions for sole discovery are concerned – to cases where what is sought is the names and identities of the wrongdoers, rather than factual information concerning the commission of the wrong. McCarthy J. agreed that the jurisdiction should be sparingly exercised as it was plainly open to abuse which the courts must be alert to prevent.

41. This concern is also evident in *Blythe.* Collins J., whilst acknowledging that the jurisdiction is undoubtedly a valuable one, observed that it involved the involuntary imposition of disclosure obligations on a third party against whom no claim of wrongdoing may be made and furthermore impacts the interests of a person not before the court who was therefore not afforded any opportunity to be heard in response. In many, but not all, cases the party from whom disclosure is sought may have no real interest in opposing the order and may not be in a position to speak for the alleged wrongdoer in any meaningful manner.

42. *Norwich Pharmacal* applications are therefore analogous to an *ex parte* application in which a duty of candour rests on the applicant to put all material facts before the court and to identify all relevant legal principles. No issue of lack of candour or good faith arises in this application. Indeed, the opposite is the case. In this particular case, I am satisfied that the Chief

Inspector has very fully outlined not only the relevant facts but also the relevant legal principles including those which arise from the atypical nature of the present application.

43. In particular, the Chief Inspector acknowledges that three aspects of his application are atypical. First, he does not seek the unedited footage for the purpose of bringing civil proceedings against the wrongdoers, but instead for the purposes of considering what regulatory action may be appropriate to ensure that the welfare of residents is protected in accordance with his statutory functions. This is relevant to two threshold conditions: the Arguable Wrong Condition and the Possession Condition threshold (which incorporates a test of necessity). It is also relevant to the Overall Justice Condition. Second, a question arises as to whether the Mixed Up In Condition can be satisfied given that the Chief Inspector does not argue that RTÉ facilitated the wrongdoing of the Nursing Homes in any way. Third, unlike in a more typical *Norwich Pharmacal* application, the Chief Inspector seeks more than the mere identification of the alleged wrongdoers but wishes to capture a fuller account of the actions alleged to constitute the wrongdoing to inform his regulatory response. This is relevant to the Possession Condition threshold and also to the Overall Justice Condition.

44. In addressing each of these three issues, I acknowledge that the parameters of the disclosure jurisdiction have expanded significantly in England and Wales but that, as Collins J. states, it is not clear whether these developments can or should be followed here. It is also important to acknowledge that the threshold conditions in particular are intended to act as a safeguard against unwarranted expansion of the remedy. As emphasised by Collins J. at para 117 of *Blythe,* while any threshold condition, however formulated, may be described as *"arbitrary",* to approach the making of an order of this kind as wholly a matter of discretion would be unsatisfactory.

Further consideration and application of the legal principles to this case

The Arguable Wrong Condition

45. Two separate considerations arise here.

46. The first is whether the *Norwich Pharmacal* jurisdiction covers the particular form of wrong alleged here, which is essentially a breach of statutory duty and Regulations informed by the applicable national standards. I consider this separately below and conclude that the wrongdoing alleged is capable of falling within the *Norwich Pharmacal* jurisdiction.

47. The second consideration concerns the standard to which the Chief Inspector must demonstrate wrongdoing on the part of the alleged wrongdoer, in this instance, the Nursing Homes. This question has been authoritatively answered in *Blythe*. Collins J. was not persuaded that the approach taken in England and Wales, namely, the application of a good arguable case threshold should be followed in this jurisdiction. In his view, such a threshold would set too

low a bar and the adoption of such a standard would not be consistent with the thrust and tenor of *Megaleasing*. Rather, as a threshold requirement, an applicant for a *Norwich Pharmacal* order should be required to demonstrate that he or she has a strong case against the alleged wrongdoer. This requires the court to be satisfied that the applicant's putative claim against the alleged wrongdoer is "likely to succeed at trial". Whilst the court must critically assess the intended claim and satisfy itself that it has real substance and is not speculative or vexatious, that does not involve the court in a trial of the action or require it to adjudicate on complex or contested issues or on the merits of any defence potentially available to the wrongdoer.

48. Whilst it remains essentially neutral in relation to the application, RTÉ notes the Chief Inspector's averment that he "*will not be able to assess whether further regulatory action is required"* until he views the complete unedited footage. RTÉ observes that it must therefore follow that the Chief Inspector has not established a "*prima facie demonstration of wrongful activity",* or a "*strong case of wrongdoing*" or a *"strong case against the alleged wrongdoer likely to succeed at trial".* To my mind, however, this is a misinterpretation of the Chief Inspector's position. In light of the seriousness of what was aired, the Chief Inspector has already undertaken significant regulatory action, including a substantially increased regime of inspection and supervision and restrictive conditions on admissions in both nursing homes. The Chief Inspector's point is simply that further enforcement remains open, including attaching further restrictive conditions, issuing a compliance notice, cancelling the registration of the nursing homes, initiating criminal prosecution, and, where appropriate, referrals to other relevant agencies.

49. Having viewed the programme as broadcast, I am satisfied that the wrongdoing requirement is met. The incidents and practices depicted are accurately described in the Chief Inspector's application papers as summarised at para. 13 above. Whilst I fully acknowledge that some of the footage could, in its fuller context, be subject to a different interpretation, it nonetheless provides genuine and plausible evidence that the Nursing Homes have acted in breach of statutory duty and in breach of the Regulations and national standards. Indeed, a strong case for such breach is made out.

50. It follows from the foregoing that the Arguable Wrong Condition is satisfied here by the demonstration of a strong case of breach of statutory duty and of the Regulations.

The Possession Condition

51. As stated by Collins J. in *Blythe*, the "Possession Condition" incorporates the test of necessity. In *Blythe*, Collins J. held that a Norwich Pharmacal order ought not to be made unless the court is satisfied that: (i) the information sought is likely to be in the possession of the defendant; (ii) the information is necessary for the purposes of bringing court proceedings (or, it may be, for

the purpose of pursuing some other legitimate remedy arising from the alleged wrongdoing); and (iii) the applicant has no other practicable or more appropriate means of obtaining that information.

52. I will consider each of these in turn.

(i) the information sought is likely to be in the possession of the defendant; and (iii) the applicant has no other practicable or more appropriate means of obtaining that information.

53. RTÉ indicates that it has retained the complete unedited footage and will be in a position to furnish it within two weeks. This footage is therefore in the possession of RTÉ.

54. Because the parties whose interests may be impacted by the order sought do not have a right to be heard, the court must approach the application with circumspection, and such orders should only be granted where there is no realistic alternative available. I am satisfied that the Chief Inspector has no other practicable or more appropriate means of obtaining the information. Thus, although CCTV is in operation in the Nursing Homes, there is no suggestion that it would be capable of capturing the level of detail included in the television programme, still less in the complete unedited footage. This footage captures events in the bedrooms of different residents, in and around toilet areas, and in all public areas. It also captures conversations between the undercover carers and the residents of the Nursing Homes as well as between the undercover carers and other members of staff and as between individual members of staff. It could not realistically be contended that this information could be obtained by the Chief Inspector in any other way.

(ii) the information is necessary for the purposes of bringing court proceedings (or, it may be, for the purpose of pursuing some other legitimate remedy arising from the alleged wrongdoing);

55. Is the complete unedited footage necessary for court proceedings or for pursuing another legitimate remedy?

56. This, in turn, raises two sub issues. The Chief Inspector has not indicated a present intention to bring court proceedings arising from the alleged wrongdoing depicted. He does not seek redress for himself against the Nursing Homes. The first sub issue therefore is whether the Chief Inspector's intention to use the material for the purposes of potential regulatory enforcement provides a sufficient basis to invoke the *Norwich Pharmacal* jurisdiction. The second sub issue is whether I can be satisfied that the information sought - i.e. the complete unedited footage – is in fact necessary for the purposes of such regulatory action.

57. The first sub issue raises a question of legal principle. Applicants seeking *Norwich Pharmacal* relief commonly seek to demonstrate that they have a cause of action against the alleged wrongdoer.

58. In this case, the wrongdoing in question does not give rise to any obvious tortious claim which might be brought by the plaintiff against any potential wrongdoers. This, however, is not a precondition to the granting of relief. In formulating the Possession Condition, in *Blythe* Collins J. did not confine the remedy to tortious wrongdoing but refers to *"the bringing of court proceedings"*.

59. It is clear that the courts of England and Wales have extended the jurisdiction to all forms of legally cognisable wrongs, including tort, breach of contract, breach of confidence and criminal conduct.

60. Indeed, there is authority from the courts of England and Wales that the Arguable Wrong Condition and the Possession Condition might be applied more broadly still. In *Ashworth Hospital Authority v. MGN Ltd* [2002] UKHL 29, 1 WLR 2033 ("*Ashworth*"), the plaintiff hospital sought *Norwich Pharmacal* orders in relation to a patient's medical records which had been disclosed to the defendant newspaper. The hospital's concern was that the source which provided the medical records to the newspaper must have been an employee of the hospital. This gave rise to very obvious concerns that the employee in question had breached their duty of confidentiality under their contract of employment by disclosing patient records to the newspaper. The hospital's internal investigation was unable to find who had disclosed the materials and sought an order that the newspaper explain how they had come by the information and identify any employee involved in the disclosure. The purpose of seeking such information was not to bring proceedings but essentially, so that the hospital could dismiss the source of the information. The House of Lords upheld the granting of *Norwich Pharmacal* relief in these circumstances. While much of the judgment in *Ashworth* dealt with the right of the press to protect their sources, the House of Lords gave particular consideration to whether it was the intention of the Plaintiff to "bring proceedings" in the Norwich Pharmacal sense. Lord Woolf observed that, although the *Norwich Pharmacal* case itself concerned a clear case of tortious wrongdoing, Lord Reid had taken a common sense non-technical approach when justifying the jurisdiction. Similarly, the other speeches do not link the jurisdiction to any requirement that the information should be available only for the purpose of enabling him to vindicate a tortious wrong by bringing proceedings. The court concluded that it was not necessary for disclosure to be ordered that the hospital intended to bring legal proceedings, provided that some other legitimate purpose in seeking disclosure was identified.

61. I have been referred to no decided case in this jurisdiction which determines whether *Norwich Pharmacal* relief can be granted in aid of disciplinary proceedings. The issue was considered by Simons J. in *Board of Management of Salesian Secondary College v. Facebook Ireland Limited* [2021] IEHC 287 in which a school sought a *Norwich Pharmacal* order compelling social media platform, Instagram to identify anonymous individuals behind an account which had posted derogatory remarks about school staff and students. Notably, the disclosure was

sought not for the purpose of bringing proceedings against the person(s) but rather for the purpose of "*dealing with*" them by way of what the school described as a "*disciplinary or pastoral response*". The school argued that the jurisdiction was available where disclosure was sought for the purpose of taking disciplinary proceedings or imposing disciplinary sanctions arising from a breach of an employment contract, which of course is what the House of Lords had decided in *Ashworth Hospital Authority.* In Simons J.'s view, acceptance of the school's position would represent a *"significant departure"* from existing case law. He was also concerned that, whereas disclosure in the context of intended legal proceedings might be permitted by the Data Protection Act 2018 and consistent with the GDPR and the EU Charter of Fundamental Rights, the same might not be said of the stated purpose of disciplining members of the school community. Simons J. queried whether this was a public interest objective capable of justifying an interference with rights to privacy, data protection and freedom of expression. Simons J. therefore referred a number of questions seeking clarity on these issues to the CJEU pursuant to Article 267 of the TFEU. Ultimately, however, the school withdrew the application and the application was not the subject of final judicial determination. In *Blythe*, Collins J. readily understood the evident reluctance of Simons J. to make the order. Quite apart from the legal issues arising, it is not easy to see how the High Court might have concluded on the evidence that the order sought by the school was a proportionate and appropriate remedy in the circumstances.

62. In *Blythe,* Collins J. stated that the question whether this aspect of *Ashworth* should be followed in this jurisdiction must await determination in a case where it actually arises. However, without deciding the issue Collins J. allowed for the possibility of granting relief for the purpose of pursuing some other legitimate remedy arising from the alleged wrongdoing.

63. On the other hand, Collins J. acknowledged that it appeared that an order for disclosure solely for the purpose of seeking redress other than by way of court proceedings has not been made in this jurisdiction at any stage. The *Norwich Pharmacal* jurisdiction involves burdening innocent third parties by the imposition of obligations of disclosure on them. This is in principle justifiable as a necessary means of vindicating and protecting the right of access to the courts. However, he cautions that extending the jurisdiction beyond disclosure for the purpose of invoking the jurisdiction of the courts would decouple it from that justification as well as departing from its historical roots in the bill of discovery in equity. Collins J. then continues:

> *" Even so, the vindication of legal rights by means other than court proceedings (or by court proceedings in a foreign jurisdiction, domestic or international)…arguably constitutes a sufficient interest as to justify the approach taken in Ashworth Hospital*."

64. However, Collins J. stated that, even if such a broader jurisdiction were to be recognised, it may be that less weight should be attached to the interests in disclosure where it is sought for a purpose other than the bringing of court proceedings.

65. It must be emphasised that the present case is distinguishable from both *Ashworth* and *Salesian*. Here disclosure is not sought for the purposes of a disciplinary or pastoral response but for the purposes of the effective application of a statutory regulatory regime developed to protect the welfare of some of the most vulnerable in society. The relief sought is for the purpose of regulatory investigation and enforcement in which there is a strong public interest.

66. I am satisfied that the wrongdoing that appears to be depicted in the programme in this case reflects staff behaviour that would impact significantly on the safety and well-being of residents. The Chief Inspector is the statutory officeholder responsible for ensuring that certain minimum standards are maintained in nursing homes and that where such conduct is identified, efforts are made to ensure that it is not repeated. These functions are directed towards protecting residents' safety and welfare.

67. Whilst the order sought by the Chief Inspector is not sought to prevent wrongdoing against himself, he clearly has a sufficient and legitimate interest in the regulation of these Nursing Homes and in the enforcement of standards. The order sought is to protect and vindicate the rights of others whom it is his statutory function to protect and vindicate. I accept that given the functions conferred upon him by the Oireachtas for the protection of others, this exercise of statutory function can be equated with taking action to protect oneself against wrongdoing. I am therefore satisfied that the complete unedited footage is sought for the purposes of pursuing a legitimate remedy arising out of the alleged wrongdoing and that to this extent the exercise of the *Norwich Pharmacal* jurisdiction is justified.

68. The second sub issue is whether the disclosure of the complete unedited footage is in fact necessary for the purposes of such regulatory action.

69. Thus, the Chief Inspector does not seek the mere identification of the alleged wrongdoers. He wishes to capture a fuller account of the actions alleged to constitute the wrongdoing to inform his regulatory response.

70. In *Megaleasing,* Finlay C.J. was inclined to confine the remedy to cases where what is sought are the names and identity of the wrongdoer rather than factual information concerning the commission of the wrong.

71. However, as pointed out by Collins J. in *Blythe*, it is established in England and Wales that relief can be ordered where the identity of the wrongdoer is known but where the claimant requires disclosure of a missing piece of the jigsaw. The following passage strongly suggests that Collins J. considered that there was force to this approach:

> *"For the purpose of determining this appeal, it is not necessary to decide whether the Norwich Pharmacal jurisdiction extends, or ought to extend, to circumstances where what is sought is not the identity of the alleged wrongdoer but a "missing piece of the jigsaw" needed to confirm that an actionable wrong has indeed been committed and/or to enable a claim to be properly brought (particularly perhaps claims which are*

required to be verified on oath). Where an applicant has substantial grounds for considering that they may have a good cause of action or complaint but lacks a specific and limited piece of information (or documentation) which is needed in order to confirm that such a cause of action or complaint is well-founded in fact, there would appear to be much force in the argument that the court should, in principle – but exceptionally – be entitled to order disclosure".

72. At the same time, Collins J. noted that several of the authorities from the courts of England and Wales emphasise the narrow limits of the jurisdiction and stress that it is *"impermissible to use the jurisdiction as a fishing expedition to establish whether or not the claimant has a good arguable case or not"*. Collins J. stated that this line of authority emphasised the exceptional nature of the "jigsaw" cases and read them as limited to circumstances where a specific piece of information that the claimant needed in order to confirm that a (reasonably) suspected cause of action or complaint was in fact well-founded was missing. Collins J. appeared to agree with this and stated:

"Any such jurisdiction should – as indeed the Judge observed – be strictly limited to disclosure sought for the purpose of bringing a claim and would not extend to the disclosure of material required to prove that claim: that would be a matter for discovery in the ordinary way."

73. It is reasonable to conclude that exceptionally, the court may order disclosure of the missing piece of the jigsaw.

74. As the Chief Inspector points out, the programme appears to show incidents and behaviours which would impact significantly on the safety and well-being of the residents and be highly relevant to the Chief Inspector as the statutory officeholder responsible for upholding minimum standards in that regard. The Chief Inspector believes, on reasonable grounds, that the complete unedited footage is likely to contain equally poor or harmful care practices which may lead to further regulatory action.

75. The disclosure is therefore necessary for several reasons. First, it is necessary to confirm whether other wrongdoing is revealed in the complete unedited footage. Second, it is sought to confirm the occurrence of the wrongdoing that it reasonably suspects on foot of the aired materials. Third, it is sought to confirm that further regulatory action is in fact well-founded and what precisely that further regulatory action should be. This is because it is not possible to ascertain from the edited footage how long, for example, residents were left unattended without care or attention: or for how long sanitary pads were not changed. In order to piece together what occurred in this case, the Chief Inspector requires access to the full footage.

76. Indeed, even the compete unedited footage may not provide a full and reliable timeline as it may not demonstrate the beginning and end of these incidents of residents being left unattended

or having inadequate access to sanitary wear. Demonstrably, however more information will be provided by the many hours of unedited footage than by the footage edited into the programme. This is important on two levels. Not only will it assist the Chief Inspector in formulating his regulatory response on an incident-by-incident basis, but it will also, of course, prevent the Chief Inspector from drawing a conclusion that certain incidents disclose poor practices when, actually, the full footage may demonstrate otherwise.

77. Quite simply, any form of regulatory action informed by the broadcast material alone may lead to erroneous results. Staff members might be subjected to inquiry where they ought not to be and vice versa.

78. Whilst, therefore, the edited and spliced broadcast material provides a strong case that there have been breaches of statutory duty, it is not sufficient in and of itself to ground a comprehensive regulatory response. Clearly, relying on the editorial choices of another party, even a responsible public broadcaster is not a safe or satisfactory basis for the exercise of statutory duty.

79. I am therefore persuaded that access to the complete unedited footage is necessary for the stated regulatory purpose.

The Mixed Up In Condition

80. This is the most controversial of the issues arising. It is common case that, in order for a *Norwich Pharmacal* order to be granted, there is no requirement that the person against whom the application is brought should be an actual wrongdoer who has committed a tort, breached a contract, or committed some other civil or criminal wrong. In *Norwich Pharmacal*, the plaintiffs obtained an order for discovery against the Customs and Excise Commissioners to compel the defendants to reveal the identity of importers who, as statistics published by the defendants revealed, were importing a chemical compound in alleged infringement of the plaintiff's patent. The Customs and Excise Commissioners were an entirely innocent party. However, because of their statutory responsibilities, they became involved or mixed up in the illicit importation. As Collins J. noted, one of the essential elements of that decision, which he stated may or may not be definitional, was that the Commissioners' involvement was significant. According to Lord Reid, they had "unwittingly facilitated" the infringement which was significant; the infringement could never have been committed without their involvement. They were as all the Law Lords emphasised "in control" of the infringing goods to the extent that they could properly be said to have been involved in their importation.

81. As Collins J. pointed out, there has been significant development of the Norwich Pharmacal jurisdiction in England and Wales in relation, *inter alia,* to the requirement for the defendant to have some connection to the alleged wrongdoing. The trend has been to expand the concept

of involvement in this context such that it may suffice if the defendant is something more than a *"mere witness"* or *"mere bystander"*.

82. However, at para. 134 of *Blythe*, Collins J. states:

> *"In my view, a threshold test that turns on whether the defendant can be characterised as something more than a "mere witness" or "mere bystander" would be difficult to apply with any consistency or predictability and would appear to set the bar too low in any event. In my opinion, it is only if the defendant had some involvement in the allegedly wrongful transaction (or series of transactions) such that, absent such involvement, the transaction(s) would not have taken place in the manner it did that a jurisdiction to direct disclosure properly arises"*.

83. Thus, Collins J. appears to take a causal approach, holding that a meaningful requirement for involvement is essential if the jurisdiction is to be properly delimited.

84. On the other hand, it seems to me that this analysis is perhaps primarily concerned with what Collins J. characterised as "police cases". Collins J. was clearly concerned to ensure that bodies who have the statutory or public duty to investigate crime are not to be *de facto* co-opted as the inquiry agents of potential private litigants. To regard public bodies investigating crime as having "involvement" in any suspected wrongdoing they investigate, thereby potentially exposing them to orders compelling disclosure of information obtained in the course of (and for the purpose of) such investigations would have significant implications both for the public bodies concerned and more broadly for persons who provide information to them.

85. However, in the present case, the reverse is the case. The body with statutory authority to investigate the practices in issue here is the very party seeking a *Norwich Pharmacal* order. There is no question of the Chief Inspector being *de facto* co-opted as the inquiry agent of any other person.

86. Crucially, Collins J. whilst being concerned to ensure that the making of an order of this kind was not wholly a matter of discretion, continued:

87. *"But the threshold conditions identified in the case law are not set in stone and are subject to further judicial development (at least in the absence of legislative intervention defining the conditions for the exercise of the jurisdiction)."*In this particular case, I view RTÉ's role as one of significant involvement, albeit not causal involvement. RTÉ took steps to gather evidence of the practices in issue and to broadcast part of it in order to expose these practices. The wrongdoing in issue here was ongoing at the time of RTÉ's involvement; indeed, RTÉ deliberately recorded it in real time. What is sought here is that record of events. It is also relevant that RTÉ took specific steps to notify HIQA of the practices witnessed. Not only does RTÉ welcome HIQA's involvement, but it in fact also believes that HIQA ought to have done more to investigate these matters.

88. RTÉ has made it clear that it is neutral in relation to the application but cannot release the

complete unedited footage without a court order. On the particular facts of this case, it would be illogical to hold that RTÉ should not release the material to the Chief Inspector to facilitate the regulatory investigation which it has itself called for.

89. RTÉ is acting in a role analogous to a whistleblower and has reported matters of public concern to the regulator, HIQA. This is not therefore a case in which RTÉ is a mere witness or a bystander. It was actively engaged, not in the wrongdoing itself but in the investigation, recording and exposure of the wrongdoing.

90. The *Norwich Pharmacal* jurisdiction is developed on an incremental basis. This case represents an appropriate incremental development of that jurisdiction.

The Overall Justice Condition

91. The Overall Justice Condition reflects the fact that the courts recognise that satisfaction of the threshold conditions does not mean that an order is available as of right. Even where such threshold conditions are satisfied, the order is a matter of judicial judgment or discretion. The interests favouring disclosure must be balanced against those weighing the other way. In *Blythe,* Collins J. noted that the judgment of Lord Kerr in *Rugby Football Union v. Consolidated Information Services Ltd* [2012] UKSC 55, [2012] 1 WLR 3333 ("*Rugby Football Union"*) helpfully identifies many of the relevant factors likely to guide the exercise of this judicial discretion. The principles outlined in *Rugby Football Union* were also recently cited with approval by Sanfey J. in *Moore v. Harris and Twitter International Company* [2022] IEHC 677 and by Dignam J. in *ESB v. Richmond Homes* [2023] IEHC 571.They are as follows:

> *"(i) the strength of the possible cause of action contemplated by the applicant for the order … (ii) the strong public interest in allowing an applicant to vindicate his legal rights … (iii) whether the making of the order will deter similar wrongdoing in the future … (iv) whether the information could be obtained from another source … (v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing… (vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result … (vii) the degree of confidentiality of the information sought … (viii) the privacy rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed … (ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclose … (x) the public interest in maintaining the confidentiality of journalistic sources*

92. I have already discussed several of these factors above and they can be briefly dealt with.

93. (i) I am satisfied that a strong case has been made out that there have been regulatory breaches by the Nursing Homes; (ii) there is a strong public interest in permitting the Chief Inspector to have access to the maximum amount of material to enable this to be investigated. The facilitation of regulatory investigation of the matter as depicted on the programme is in the public interest. Although I accept that regulatory investigation may be an interest to which less weight is given than the right of access to the courts, it is nonetheless a significant interest. (iii) the making of the order will facilitate such regulatory investigation which may deter similar wrongdoing; and (iv) the complete unedited footage cannot be obtained from another source.

94. As regards (vi), I am satisfied that the order sought will vindicate the rights of vulnerable residents of Nursing Homes. The order is unlikely to cause any harm to innocent parties. No resident or member of a resident's family will be required to participate in any regulatory investigation should they not wish to do so.

95. As regards (vii), (viii) and (ix), the information depicted is private in nature and engages privacy rights under Article 8 of the Convention and indeed the EU Data Protection regime. In this case, the court must engage in a balancing exercise as between the rights and interests of the applicant, in this case the Chief Inspector, and those of the parties depicted on the footage.

96. The parties depicted on the footage fall into two categories: the staff members and the operators of the Nursing Homes on the one hand and the residents on the other. In *EMI Record (Ireland) Limited v. Eircom Limited* [2005] 4 IR 148, Kelly J. required the defendants to disclose to the plaintiffs the names, postal addresses and telephone numbers of certain registered owners of internet accounts where there was *prima facie* evidence of wrongful activity namely the infringement of the plaintiffs' copyright by the defendant's subscribers. Kelly J. conducted such a balancing exercise. Kelly J. agreed with the views expressed by the Federal Court of Appeal of Canada in *BMG Canada Inc v. Doe* [2005] FCA 193 that any privacy concerns on the part of the putative wrongdoers must yield to the public interest in the protection of intellectual property rights.

97. I am of the view that any privacy concerns on the part of the staff members and the operators of the Nursing Homes must similarly yield to the effective implementation of the statutory scheme devised by the Oireachtas where there is a strong case that wrongful activity has occurred.

98. The position in relation to the residents themselves is slightly more complex. Clearly, they have privacy and data control rights which ought not be abridged without a lawful basis. Such lawful basis has been identified by the Chief Inspector. In the present case, however, there is a sound basis for processing the data in question: Article 6(1)(e) of the GDPR/Section 38 of the Data Protection Act 2018. In this regard, the processing is necessary for the performance of the functions of the Chief Inspector in relation to designated centres for older persons as set

out in the Health Act 2007 (as amended and supplemented by regulations). Furthermore, for special category data, including health data, the legal basis for processing the data in question is Article 9(2)(g)/(i) and Section 53 of the Data Protection Act 2018. The processing is necessary for reasons of substantial public interest, as set out in law (functions under the Health Act), and for reasons of public interest in the area of public health and ensuring high standards of care. The Chief Inspector has undertaken that any of the personal data that is furnished will be processed in accordance with his obligations under the GDPR. In this instance, however, the privacy of the residents is protected by the draft order. The draft order protects the privacy, autonomy, bodily integrity and dignity of the residents.

99. In short, therefore, the data protection and privacy rights of the alleged wrongdoers are in my view overridden by the urgent requirement of regulatory investigation. In this particular case, the aim pursued is the exercise of statutory duty which is itself directed towards the protection and safeguarding of the particular data subjects i.e. the residents. For this reason, I am satisfied that balancing the Chief Inspector's statutory functions and interests against the privacy rights of both the residents and their families, the balance favours the disclosure order.

100. As regards factor (x), it is important that this case is not viewed as authority for any broader proposition. I do not suggest that in other cases involving investigations by media organisations disclosure will be ordered. In this particular case, it is vital to note that RTÉ does not allege any infringement of journalistic privilege or freedom of expression. The footage does not depict confidential information being imparted by the subjects of the documentary to RTÉ. The release of the footage does not compromise any sources. The existence of the covert footage and involvement of the undercover researchers will already be apparent from the material broadcast itself. In short, the public interest in maintaining the confidentiality of journalistic sources is not engaged in this case.

101. Only factor (v) is not met in this case as RTÉ did not facilitate any wrongdoing. It did, however, place undercover researchers in the Nursing Homes with the express purpose of capturing footage of the suspected wrongdoing. Having gathered that evidence, RTÉ reported its findings to the relevant regulator, HIQA, which indeed it publicly criticised in the broadcast programme in respect of its response to earlier reporting. In such circumstances, I think it reasonable that RTÉ should make available to the regulator the maximum amount of information required to enable the Chief Inspector to carry out his regulatory functions in an efficient and complete manner. The release of the complete unedited footage is not onerous for RTÉ. Rather it is an order with which RTÉ can easily comply. The release of the complete unedited footage is, moreover, proportionate to the aim pursued, namely the facilitation of regulatory investigation, which RTÉ supports and has called for in general terms.

Conclusion

102. Conscious as I am that orders such as this must be approached with circumspection, I am nonetheless of the view that the requirements of flexibility and pragmatism demand the order made. This is a case in which at the end of the analysis, it would be surprising if the jurisdiction could not be exercised. In this particular case, the nature of the wrong alleged, its reporting by RTÉ and the requirement that such wrongdoings are redressed and prevented in the public interest, justify the granting of the order. I will therefore make the order sought in terms of the draft order, subject to any final submissions as to form.