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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* 04/03/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

ON APPEAL FROM THE COUNTY COURT

ICELAND FOODS LTD

Applicant/Respondent

and

LIDL (NORTHERN IRELAND) LTD

and

PHILIP RUSSELL LTD

Objectors/Appellants

Mr David Dunlop KC with Mr Robert McCausland (instructed by TLT Solicitors) for the Respondent
Mr Liam McCollum KC (instructed by DWF (NI) Solicitors) for the First Appellant
Mr Stewart Beattie KC with Mr Michael Maxwell (instructed by Mills Selig Solicitors) for the Second Appellant

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ROONEY J

Introduction

[1] By a notice of application dated 21 December 2022, Iceland Foods Ltd (hereinafter 'the applicant/respondent') applied for the provisional grant of an intoxicating liquor licence for premises at Unit 3, Longwood Retail Park, Newtownabbey, pursuant to Articles 2, 5(1)(b), 7, 9 and Schedule 1 of the Licensing (Northern Ireland) Order 1996 (hereinafter 'the 1996 Order'). The first and second appellants gave notice of their intention to object to the application for a liquor licence. Schedule 1, Part 1 para 6 of the 1996 Order requires any person intending to object, to serve upon the applicant a notice of their intention to object, stating briefly their grounds for so doing.

[2] On 31 May 2023, the applicant/respondent served on the objectors a report from an expert witness, Somerville Consulting. In correspondence dated 6 June 2023, solicitors on behalf of Philip Russell Ltd (the second appellant) provided more detail as to the nature of its objections to the application as stated in the initial notice of objection. Similarly, in correspondence dated 8 June 2023, solicitors on behalf of Lidl (NI) Ltd (the first appellant) provided more information as to the nature of their objections.

[3] On 12 June 2023, at a review hearing, the court was told that the core matters in dispute related to the issues of vicinity and adequacy. The case was listed for hearing on Wednesday 15 November 2023.

[4] On 12 October 2023, at a review hearing, HHJ Gilpin directed that expert reports obtained on behalf of the first and second objectors must be served on the applicant/respondent and any other objectors by 26 October 2023. No issues were raised at the review hearing as to the learned judge's direction. However, on 20 October 2023, solicitors on behalf of the first appellant asked for the matter to be relisted for hearing in relation to the court's direction that a report from MBA Planning, obtained on behalf of the first objector/appellant, should be served on the said parties.

[5] On 26 October at a further hearing before His Honour Judge Gilpin (hereinafter "the judge"), the court directed that written submissions must be filed. The matter was listed for legal argument on 8 November 2023.

[6] Following consideration of the written and oral submissions, the judge provided an ex-tempore judgment which contained his interpretation and analysis of the relevant statutory provisions under the County Courts (NI) Order 1980 (hereinafter "the 1980 Order"), the County Court Rules (NI) 1981 (hereinafter "the CCR 1981") and the decision of Gillen J in *Sainsbury's Supermarket Ltd v Winemark and others* [2012] NIQB 45 (hereinafter *Sainsbury's*). The learned judge ruled that if the objectors wish to call expert evidence at the substantive hearing of the application for a provisional grant of licence, they must serve their expert reports on or before a specified date.

[7] The decision of judge will be analysed in more detail below. The objectors/appellants now appeal the said decision.

Issue for determination

[8] The issue for determination under this appeal is whether the judge, in the exercise of his power to make directions under Order 14 rule 3 CCR 1981 and taking into consideration the overriding objective to deal with cases justly as specified in Order 58 CCR 1981, had the power to direct the objectors to serve their expert

reports on the applicant and other objectors if they intended to call expert evidence at the substantive hearing.

[9] Prior to the appeal hearing, I was provided with succinct written submissions by counsel which formed the basis of comprehensive oral legal arguments. I remain most grateful to counsel for their written and oral submissions which I have found most helpful.

The decision of His Honour Judge Gilpin

[10] This appeal involves, inter alia, the interpretation of the County Court Rules (NI) 1981. Article 47 of the 1980 Order devolved rule making power to the County Court Rules Committee, who were appointed by the Lord Chancellor. The general and particular powers of the Rules Committee are specified in Article 48 of the 1980 Order (without prejudice to powers conferred by other statutes).

[11] Article 48 of the 1980 Order provides as follows:

> "48. Without prejudice to the generality of section 21 of the Interpretation Act (Northern Ireland) 1954, the Rules Committee may, notwithstanding anything in any statutory provision, make county court rules with respect—
>
> (a) to all matters of procedure or practice, or matters relating to or concerning the effect or operation in law of any procedure or practice, in any civil proceedings within the jurisdiction of county courts as to which rules of court have been or might lawfully be made for proceedings within the cognizance of the High Court."

[12] In summary, as stated by Valentine, County Court Procedure in Northern Ireland at para 1:13, the Rules Committee "may deal with all matters of procedure and practice in civil proceedings within the jurisdiction of the county courts which might be the subject of rules in the High Court under Section 55 of the Judicature (NI) Act 1978, provided that the rules must relate to procedure and must not transgress the bounds of jurisdiction conferred by statute on the county court."

[13] Article 49 of the 1980 Order provides a mechanism for implementing the practice and procedure of the High Court in "like matters." Article 49 states as follows:

> "49. In any case not expressly provided for by or under this Order the practice and procedure of the High Court in like matters shall be followed by a county court with

such modifications as the judge may in any particular case permit or direct."

[14] At the hearing before the judge, he raised with counsel whether Order 14 rule 3 CCR 1981 gave the court the power to direct disclosure of the expert reports. Neither counsel for the applicant nor counsel for the objectors considered that such a power was derived from Order 14 rule 3 CCR 1981. The matter was not considered in their respective skeleton arguments.

[15] Order 14 CCR 1981 deals with interlocutory applications. Order 14 rule 3 CCR 1981 provides as follows:

> "**Directions**
>
> 3. In any action or matter the judge … may at any time on the application on notice of any party or of his own motion give such directions as he thinks proper."

[16] Article 2 of the 1980 Order is the definition provision. The 1980 Order is governed by the Interpretation Act (NI) 1954. Article 2(2) of the 1980 Order provides the following definitions:

> "'action' includes any proceedings which may be commenced as prescribed by civil bill or petition, or which have been remitted from the High Court to a county court;
>
> "matter" means any proceedings in a county court other than an action;
>
> "proceedings" includes all actions, matters and proceedings whatsoever (whether civil or criminal)"

[17] Order 48 CCR 1981 (as amended) deals with, inter alia, applications for the grant of licences under the Licensing (Northern Ireland) Order 1996 (hereinafter the 1996 Order). It was the view of the judge that such applications fell within the definition of a "matter" or "proceedings" as specified in Article 2(2) of the 1980 Order. Accordingly, the judge considered that he had power pursuant to Order 14 CCR 1981 to deal with interlocutory applications under the 1996 Order and to issue directions insofar as the judge was permitted by the statutory provisions. Having decided that he had such a power, the judge considered that the same statutory provision permitted him to direct that the expert evidence should be shared if it was "proper" for him to do so.

[18] Mr McCollum KC, on behalf of the first objector/appellant, argued that that the powers of the county court are derived from statute and that there was no

provision within the CCR 1981 or the 1980 Order which empowered the court to order the disclosure of expert evidence in licensing matters. In further submissions advanced on appeal as considered below, Mr McCollum KC highlighted that Order 24 CCR 1981 makes express provision for the disclosure of medical evidence in personal injury and death actions and also in relation to medical negligence actions. The fact that no such provision is included in the CCR 1981 for the disclosure of any other expert evidence is further confirmation that such a power is to be excluded. I will return to this submission below.

[19] The major submission advanced by Mr McCausland BL, counsel for the applicant/respondent at the county court hearing, was that the court's power to direct service of the expert's report emanated from Order 58 CCR 1981 and the overriding objective of the rules which enabled the court to deal with the cases justly.

[20] Order 58 CCR 1981 provides as follows:

> "(1) The overriding objective of these rules to enable the court to deal with cases justly.
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> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate to –
>
> (i) The amount of money involved;
> (ii) The importance of the case;
> (iii) The complexity of the issues;
> (iv) The financial position of each party;
>
> (d) Ensuring that it is dealt with expeditiously and fairly; and
>
> (e) Allotting an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
>
> (3) The court must seek to give effect to the overriding objective when it –
>
> (a) exercises any power given to it by the Rules; or

(b) interprets any Rule."

[21] Order 58 CCR 1981 replicates Order 1 rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980 (hereinafter 'RsCJ 1980'). It is axiomatic that Order 1 rule 1A RsCJ 1980 will have application to appeals from the county court to the High Court.

[22] Mr McCollum, both at the county court hearing and at the appeal hearing, submitted that Order 58 CCR 1981 does not confer a freestanding power on the court. Rather, he submits that under Order 58 rule 3 CCR 1981, "the court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules; or (b) interprets any Rule." An identical provision is found in Order 1 rule 1A(3) RsCJ 1980.

[23] The judge accepted Mr McCollum's submission that Order 58 CCR 1981 was not a standalone power. However, having decided that Order 14 rule 3 CCR 1981 gave him the power to direct service of the expert's report provided it was "proper" to do so, it was the view of the judge that he was entitled to take into consideration the overriding objectives in his assessment. In this regard, the judge was particularly influenced by Gillen J's interpretation of the overriding objectives in relation to the case management of licensing cases and appeals as provided in *Sainsbury's Supermarket Ltd v Winemark and others* [2012] NIQB 45, paras [13]-[20], where Gillen J (as he then was) stated as follows:

> "**Case management of licensing cases and appeals**
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> [13] I have already adverted to the overriding objectives of Order 1, Rule 1A. Courts and those appearing before them must adopt a business-like approach in dealing with litigation if resources are to be properly deployed and unnecessary expense and delay are to be avoided.
>
> [14] Hence in all divisions of the High Court, robust case management practices are now invoked. Whilst the ultimate overriding principle is that justice must be done, that aim must be achieved within the ambit of Order 1, Rule 1A.
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> [15] This case extended over seven days. In the course of it I heard on each side experts on planning and road traffic views. These four experts all produced extremely lengthy expert reports which had not been shared and in circumstances where the experts had not met or discussed the issues prior to the hearing. The result was that on

occasions the court had to rise to permit counsel to read the opposing expert report prior to cross-examining. I immediately recognise that such breaks of 30-40 minutes were absolutely necessary if counsel was to assimilate the dense and highly technical arguments contained within these expert reports. Indeed, my only surprise was that counsel was able to assimilate such information within this time and in each instance be able to engage in expert cross-examination.

[16] Similarly, lengthy examination-in-chief occurred particularly in the road traffic survey area, when it became abundantly clear in cross-examination that many of the figures were common and that a great deal of court time had been taken up with matters that were not seriously in dispute.

[17] Moreover, by virtue of the fact that these large bundles of documents were being produced for the first time in court, the judge did not have an opportunity to read them in advance and thus listen to the evidence with an informed ear.

[18] There is no reason why licensing cases should not be subject to similar case management structures as obtained in other areas of litigation. Cases such as the present appeal take up a disproportionate amount of court time and in my view incur a level of expenditure on the part of both parties which could easily be substantially reduced.

[19] In order to meet the overriding objective, in future licensing cases, firm case management prior to the hearing should be invoked and the following steps considered:

- Expert reports, at least so far as they contain factual assertions including for example measurements, distances, surveys etc should be exchanged not later than 14 days prior to the hearing. I am of course conscious that in an adversarial system an objector is entitled to be wary lest by his industry he unwittingly helps to make a case for the applicant. He remains entitled to put the applicant to proof of his case without assistance from the objector's expert evidence. Nonetheless, this is a common problem in

almost all litigation to a varying degree and the greater part of expert reports is usually confined to factual assertions which will emerge in cross-examination. At least those aspects must in future be exchanged in advance of trial to speed up litigation.

- Experts should convene meetings by telephonic communication or otherwise in order to narrow issues and draw up a Scott schedule of matters in agreement/matters in dispute.

- At least two weeks prior to trial experts should exchange any literature or statistics being relied on.

- The bundle of documents prepared for the court hearing should include the expert reports so that the court has an opportunity to read the papers in advance of the hearing and thus accelerate the court process.

- Maps, plans, statistics and drawings to be relied on should be exchanged prior to the hearing and contained in the bundle of documents presented to the court.

- Prior to the hearing the parties should exchange correspondence outlining whether or not there is any issue as to certain of the statutory proofs wherever possible eg on the validity of the subsisting licence to be surrendered, on planning permission granted, is the objector within the vicinity, have the requirements of service, advertisements and notices been complied with etc. Whilst of course it remains necessary for the applicant to present a number of fundamental proofs at such hearings in order to satisfy the court, nonetheless the process can be speeded up without injustice at least at the appeal stage if it is clear that there is no issue that required proofs exist and are in order."

[24] The judge specifically endorsed para [20] of the Gillen J's judgment in *Sainsbury's* in which he stated as follows:

> "[20] In short, litigation by ambush is a relic of the past. The cards up approach to modern litigation must now

> find its way into licensing cases to ensure that justice is done, and cases are dealt with in a timely, efficient and proportionate manner."

[25] The judge also referred to the Review Group's Report on Civil Justice (2017) under the chairmanship of Gillen LJ and the recommendation made at page 330, in relation to licensing cases, namely that "experts to be directed to exchange reports and attend at a minuted experts' meeting pre-trial [CJ220]".

[26] In conclusion, the judge decided that, taking into consideration the overriding objective and in the proper exercise of his power under Order 14 rule 3 CCR 1981, the objectors/appellants must serve their expert reports if they wish to call expert evidence at the substantive hearing of the application for a liquor licence.

[27] It is noted that Mr Beattie KC and Mr McCollum KC, who both appeared as counsel in the *Sainsbury's* case, informed the judge that no submissions on the issue of case management of licensing cases and appeals had been made before Gillen J. Both counsel submitted that Gillen J did not direct the service of any expert reports at the hearing of that case and, therefore, his dicta on this issue should be treated as obiter.

Submissions at the appeal hearing

[28] Mr Dunlop KC appeared on behalf of the applicant/respondent at the appeal hearing. He did not appear at the county court hearing. I will summarise his submissions as follows. Firstly, the judge was correct to invoke Order 14 rule 3 CCR 1981 as a means by which he could issue directions to the parties when dealing with interlocutory matters. Secondly, the judge was correct to address interlocutory matters arising out of Order 48 CCR 1981 in the exercise of his functions under Order 14 CCR 1981. In support of this submission, Mr Dunlop referred to the decision of the Court of Appeal in *Carnahan v Chief Constable of the RUC* [1998] NI 384. Thirdly, having correctly identified the source of his power under Order 14 rule 3 CCR 1981, the judge engaged in a proper exercise of this power in directing the exchange of the experts' reports, taking into consideration the overriding objectives as specified in Order 58 CCR 1981. Fourthly, contrary to the decision of the judge, Mr Dunlop submitted that Order 58 CCR 1981 is a standalone role which, in the circumstances of this case and giving effect to the overriding objective, empowered the court to make the order for disclosure of the experts' reports. Fifthly, Mr Dunlop submitted that there is no difference between the powers of the High Court and the county court when imposing directions in licensing matters. He stated that the county court has equivalent powers of the High Court in the management of its own processes and procedures. In this regard, it was submitted that the *Sainsburys* case clearly demonstrates that the High Court can impose directions regarding practical procedural steps, to include the disclosure of evidence in licensing appeals.

[29] Mr McCollum KC, on behalf of the first objector/appellant, amplified his submissions made to the judge. His submissions may be summarised as follows. Firstly, Mr McCollum emphasised that there is no express provision within the County Court (NI) Rules 1981 or the 1980 Order which confers on the court a power to direct the disclosure of expert evidence in licensing cases. This is to be contrasted with Order 24 CCR 1981 which makes express provision for the disclosure of medical evidence in personal injury and medical negligence claims. Referring also to the Rules of the Court of Judicature (NI) 1980 (RsCJ 1980), Mr McCollum draws attention to the fact that generally there is no power to order disclosure of expert evidence, except as expressly provided in Order 25 RsCJ 1980 (disclosure of medical evidence in clinical negligence actions) and Order 72(9) RsCJ 1980 (exchange of expert evidence in commercial actions). In essence, Mr McCollum submits that, absent any express requirement in the County Court Rules and the Rules of the Court of Judicature, neither the county court nor the High Court has a power to direct the exchange of expert reports in licensing cases.

[30] Mr McCollum further submitted that the judge fell into error when he said that he had power pursuant to Order 14 rule 3 CCR 1981 to direct the disclosure of expert reports, if he considered it proper to do so. In this regard, Mr McCollum advanced two arguments. Firstly, according to him, Order 48 CCR 1981 which deals with licensing matters, makes no provision for interlocutory applications. Secondly, pursuant to Order 14 rule 1 CCR 1981, a court can only deal with interlocutory applications in the course of an action or a matter, provided the application "is expressly or by implication authorised to be made to the court or to a judge …" In tandem with his previous submission, Mr McCollum stated that in the absence of an enabling provision within the statutory code, the court cannot authorise or direct disclosure of expert evidence. Thirdly, Mr McCollum submitted that Order 58 CCR 1981 is not a standalone power. He argued that Order 58(3) CCR 1981 made it clear that a court is permitted "to give effect to the overriding objective when it (a) exercises any power given to it by the Rules; or (b) interprets any rule." In essence, the argument is that if the intention of the Legislature or the Rules Committee was to permit a court to disclose expert reports, specific provision would have been made in the Rules similar to the provisions in Order 24 CCR 1981 in relation to medical evidence, Order 25 RsCJ 1980 in clinical negligence cases and Order 72(9) RsCJ 1980 in relation to expert evidence in commercial actions.

[31] Mr Beattie KC, counsel for the second objector/appellant, opened his submissions by referring the court to the 1996 Order. Schedule 1 para 6 of the 1996 Order sets out the statutory requirements for an objector, namely:

> "6. A person intending to object under paragraph 4 or 5 shall, not less than one week before the time of the opening of the court sittings at which the application is to be made—

> (a) serve upon the applicant notice of his intention to object, *briefly* stating his grounds for so doing;
>
> (c) serve a copy of the notice upon the chief clerk."
> [emphasis added].

[32] Mr Beattie submitted that it is clear from Schedule 1 paragraph 6 above that the objector is required to only state in brief terms the grounds of his objection. He further submits that there is no statutory requirement on the objector under the 1996 Order, the CCR 1981 or the 1980 Order to exchange reports of its expert prior to the date of the hearing. According to Mr Beattie, the reason for the absence of any such statutory requirement is obvious. He states that the 1996 Order recognises that in applications for licenses under the statute, the *lis* is between the applicant for the licence and the court. In essence, the onus is on the applicant to satisfy the statutory proofs. The applicant must prove its case. The role or involvement of the objector is to scrutinise the application and to test the applicant's evidence. The objector may test the applicant's case with or without expert evidence. If the objector has expert evidence, it is submitted that he cannot be required to disclose it in advance.

[33] According to Mr Beattie, support for his submission is found in the judgment of Gillen J in *Sainsbury's* at para [19]:

> "I am of course conscious that in an adversarial system an objector is entitled to be wary lest by his industry he unwittingly helps to make a case for the applicant. He remains entitled to put the applicant to proof of his case without assistance from the objector's expert evidence."

[34] Mr Beattie submitted that, although Gillen J was justified in highlighting the overriding objective in relation to the case management of licensing cases, the learned judge also recognised the legal issues that could arise if an objector was forced to reveal a potentially fatal defect in the applicant's case and, more particularly, the weaknesses in the expert evidence proffered by the applicant.

[35] During the course of legal submissions, the court referred the parties to para 23.49 of the report of the Review Group on Civil Justice (2017) which emphasised the important role of objectors in the scrutiny of licensing applications. The report states as follows:

> "… The interests and involvement of the public in licensing matters has long been recognised in the statutory framework. The statutory right of any person owning, residing or carrying on business in premises in the vicinity of an applicant for a licence underpins the approach that in licensing applications the *lis* is between the applicant for the licence and the court. The courts

> welcome the involvement of objectors in assisting in the scrutiny of applications and the proper control of premises is the subject of the licensing regime. To remove that limit might only serve to widen unreasonably the bracket of those who might wish to object with attendant increased length of hearings and higher costs."

[36] Mr Beattie submits that the above cited passage from the Civil Review Report adds further support to the central argument that a court, even in the exercise of the overriding objective, does not assume to have the power to order the disclosure of expert reports.

[37] The court also referred counsel to para 23.42 of the report of the Review Group on Civil Justice (2017) which provides as follows:

> "… We are in an era of cards-on-the-table, open, cost-efficient, speedy and transparent justice. The days of 'trial by ambush' are over. Not only should all courts, including licensing courts, direct at case-management conferences that expert reports be exchanged in advance, but experts should meet in advance and agree areas of dispute wherever possible so that the time of the clients and the courts is not taken up by wasteful combative style proceedings at the expense of the key issues in dispute being identified from an early stage. We, therefore, *recommend* the early exchange of expert reports and expert meetings in contested licensing cases. The applicant's solicitor should take responsibility for circulating an agreed minute of the experts' meeting pre-trial." (emphasis added).

[38] Both Mr Beattie and Mr McCollum stated that it was abundantly clear from the above passage that the Review Group were putting forward as a recommendation for the early exchange of experts' reports and for early expert meetings in contested licensing cases. Furthermore, if the view of the Review Group was that the High Court and the county court had power contained within the Rules to order the exchange of expert reports in licensing cases, it would not have been necessary for the Review Group to make recommendation CJ220, namely that "experts to be directed to exchange reports and attend at minuted experts' meeting pre-trial." (See page 330).

[39] During further legal submissions, both Mr McCollum and Mr Beattie advanced arguments that the judgment of Gillen J in *Sainsburys* and, in particular, para [19] thereof, must be read carefully to grasp the learned judge's precise interpretation of case management steps in future licensing cases. It was argued that Gillen J was careful not to endorse an automatic or mandatory exchange of expert

reports. Although Gillen J emphasised the overriding objective should be invoked in the case management of licensing cases, he specifically stated at para [19] that various case management steps should be "considered." Secondly, Gillen J did not state that all expert reports should be exchanged, but rather than consideration should be given to the exchange of "expert reports, at least so far as they contain factual assertions including, for example, measurements, distances, surveys, etc." Thirdly, it is argued that Gillen J recognised that due to the adversarial nature of licensing cases, the applicant was required to prove his case, "without assistance from the objector's expert evidence." In such circumstances, it was never envisaged or contemplated that liability issues contained within the expert's report should be exchanged.

[40] A further issue that developed during legal argument was the nature and extent of the evidence, including the expert evidence, which was presented at the county court and on appeal to the High Court. It seems clear from Gillen J's judgment in the *Sainsburys* case, that his directions on case management in licensing cases arose from the fact that the appeal had taken up a disproportionate amount of court time and, in his view, incurred a level of expenditure on the part of both parties which could have been reduced (see para [18]). It became clear from the evidence that there were matters which were not seriously in dispute between the parties. Significantly, Gillen J stated in his final bullet point at para [19]:

> "Whilst of course it remains necessary for the applicant to present a number of fundamental proofs at such hearings in order to satisfy the court, nonetheless the process can be speeded up without injustice at least at the appeal stage if it is clear that there is no issue that required proofs exist and are in order."

[41] Mr Beattie submitted that, in his experience in licensing applications, both in the county court and the High Court, the parties will usually take cognisance of the case management directions as stated by Gillen J in *Sainsburys*. Prior to a hearing, Mr Beattie advised that significant efforts are made to narrow the issues and to reach agreement regarding matters not in dispute. Where possible, maps, plans, drawings are exchanged and agreed. However, for the reasons advanced above, expert reports insofar as they relate to whether the applicant has complied with fundamental statutory proofs are not exchanged.

Litigation privilege

[42] At the appeal hearing, this court raised the issue of litigation privilege which could potentially arise regarding alleged privileged communications between parties or their solicitors and, particularly in this case, between a party and an expert for the purpose of obtaining information or advice in connection with existing or contemplated litigation. This important issue was not argued before the judge or

contained in the written skeleton arguments, both in the county court and in the High Court.

[43] A succinct summary of the doctrine of privilege and the underlying reasons for its existence are as stated by Morgan LCJ in *Ketcher and Mitchell, Re Application for Judicial Review* [2020] NICA 3, at paras [14]-[17]:

> "[14] Legal professional privilege comprises both legal advice privilege and litigation privilege. Legal advice privilege applies to all communications between a client and his legal adviser for the purpose of obtaining advice. The existence or contemplation of litigation is not necessary. Litigation privilege applies to documents produced, not necessarily by a lawyer, predominantly for use in or in the promotion of litigation. Legal professional privilege has been described as a fundamental human right long established in the common law. An intention to override such a right must be expressly stated or appear by necessary implication (*R (Morgan Grenfall Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 per Lord Hoffmann at [7]-[8]). None of that is in issue in these proceedings.
>
> [15] This case is concerned with litigation privilege. The issue is whether these Article 2 coronial proceedings constitute litigation for the purpose of a claim for privilege. Since the privilege was devised by the common law in order to ensure procedural fairness the answer to the question requires some analysis of the underlying reasons for its existence.
>
> [16] Legal advice privilege ensures that what a person tells his lawyer in confidence will never be revealed without his consent. No adverse inference can be drawn from reliance on a claim to the privilege. The result is to deprive investigators and courts of potentially relevant information even where it may be relevant to the guilt or innocence of a third party (*R v Derby Magistrates' Court, ex parte B* [1996] AC 487). The justification was that legal professional privilege was a fundamental condition on which the administration of justice as a whole rested.
>
> [17] Litigation privilege had its roots in the 19th century and was initially based on the proposition that in adversarial litigation the contents of the brief gathered and prepared by a party should not be disclosed to the

> other side. The adversarial nature of litigation has, of course, developed since the 19th century but litigation privilege essentially continues to operate as it always has done."

[44] In *Three Rivers (No.6)* [2005] 1 AC 610 at 675, Lord Carswell outlined the requirements for litigation privilege as follows:

> "Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:
>
> (a) litigation must be in progress or in contemplation;
>
> (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
>
> (c) the litigation must be adversarial, not investigative or inquisitorial."

[45] Applications for liquor licenses under the 1996 Order plainly involve an adversarial process. Expert reports which come into existence for the sole or dominant purpose of giving legal advice with regard to the litigation or for collecting evidence for use in the litigation necessarily attracts the basis of a claim for privilege. The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. As stated by Hamblen J in *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm) at para 11:

> "(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied."

Decision

[46] Pursuant to Order 14 rule 3 CCR 1981, which deals with interlocutory applications, the judge has the power in any "action" or "matter" to "give such directions as he thinks proper." Article 2(2) of the 1980 Order defines an "action" and a "matter." The definition of a "matter" means "any proceedings in a county court." The definition of "proceedings" includes "all actions, matters and proceedings whatsoever (whether civil or criminal). I agree with the learned judge that applications for the grant of liquor licenses under the 1996 Order fall within the said definition of a "matter". Furthermore, in my judgment, the judge was correct in his decision that the power conferred by Order 14 rule 3 CCR 1981 to issue directions, includes interlocutory and case management matters arising out of Order 48 CCR 1981. As stated by Girvan J in *Carnahan v Chief Constable of the RUC* [1998] NI 384 at page 389;

> "The words 'proceedings', and 'claim' are words of wide import and in the 1980 Order the word 'proceedings' is as widely defined as possible in Article 2(2)."

[47] The judge was clearly aware that there is no statutory provision contained within the CCR 1981, the 1980 Order or the 1996 Order which gives the court the express power to direct disclosure of the expert reports in licensing cases. Notwithstanding, relying on the exercise of his power to issue directions under Order 14 rule 3 CCR 1981 and taking into consideration the overriding objectives as specified in Order 58 CCR 1981, the judge considered that it was proper for him to direct the objectors to serve their expert reports if they intended to call evidence at the substantive hearing. The judge claimed to find support in the judgment of Gillen J in the *Sainsburys* case. Accordingly, it is necessary for this court to consider in some detail the precise ambit of the overriding objective in the case management of licensing cases as interpreted by Gillen J in the *Sainsburys* case.

[48] The appeal in the *Sainsbury's* case extended over a period of seven days. The experts produced extremely lengthy reports which had not been shared and the experts had not met to discuss the issues prior to trial. The evidence revealed that some of the issues were not seriously in dispute and that the appeal took up a disproportionate amount of court time. The level of expenditure by both parties could easily have been reduced.

[49] Against this background, Gillen J stated at paras [18] and [19]:

> "[18] There is no reason why licensing cases should not be subject to similar case management structures as obtained in other areas of litigation.
>
> [19] In order to meet the overriding objective, in future licensing cases, firm case management steps should be

invoked prior to the hearing and various steps *considered*."
(emphasis added)

[50] The case management steps to be *considered,* as detailed by Gillen J, included the exchange of expert reports; expert meetings to narrow the issues and to draw up a Scott schedule to highlight matters in agreement/dispute; the exchange of maps, plans, literature, statistics and drawings in advance and contained in a bundle; the exchange of correspondence, "wherever possible", outlining whether or not any issue remained in relation to the statutory proofs.

[51] In my judgment, a close reading of Gillen J's judgment in the *Sainsbury's* case reveals the following. Firstly, Gillen J did not state that the exchange of expert reports in licensing cases was a requirement that could be compelled by order of the court. Rather, the learned judge was careful to state that such exchange formed part of case management steps which a court should consider. The use of the phrase "the following steps [to be] considered" was deliberate. Gillen J was acutely aware that the court could not compel a party to exchange reports which were protected by litigation privilege.

[52] Secondly, as highlighted by counsel for the appellants, it is clear that in para [19] of his judgment, Gillen J expressly stated that in an adversarial system involving the grant of liquor licenses, the objector "remains entitled to put the applicant to proof of his case without assistance from the objector's expert evidence." In other words, the burden is on the applicant under the 1996 Order to satisfy the necessary statutory proofs. The objector cannot be compelled, through disclosure of his expert report, to alert the applicant as to any deficiencies or problems in relation to the application. The fundamental proofs, which include the validity of the subsisting licence to be surrendered, issues of vicinity, adequacy and planning permission and the service of advertisements and notices are matters which are for the applicant to satisfy the court. The exchange of expert reports or correspondence which takes no issue with all or some of the statutory proofs can only take place before a hearing in the county court with the agreement of the objectors. However, at the appeal stage, as stated by Gillen J at para [19] in *Sainsbury's,* "the process can be speeded up without injustice…if it is clear that there is no issue that required proofs exist and are in order."

[53] Thirdly, the conclusion that I draw from the analysis of Gillen J's judgment in *Sainsbury's* is that he did not endorse the view that a court, when considering the overriding objective, had the power to direct the disclosure of expert reports in their entirety. Rather, Gillen J expressly stated at para [19] that a court should *consider* the exchange of "expert reports, at least so far as they contain factual assertions including for example measurements, distances, surveys etc, … and the greater part of expert reports … usually confined to factual assertions which will emerge in cross-examination. At least those aspects must in future be exchanged in advance of trial to speed up litigation."

[54] The underlying rationale for the confidentiality of expert reports is found in the doctrine of litigation privilege which is considered above at paras [43]-[46]. From the moment when litigation is in progress or pending, communications between the client and his solicitor, or between one of them and a third party will be privileged if the sole or dominant purpose is to give or receive legal advice with regard to litigation or to gather evidence to conduct litigation. Provided the litigation is adversarial, reports, documents and proofs generated from an expert can attract privilege and can thereby be protected from disclosure. The principle is that a party should be able to obtain advices and gather evidence, without an obligation to disclose them to its adversary. The burden is on the party claiming privilege to establish the dominant purpose was (a) enabling legal advice to be sought, and/or (b) seeking or obtaining evidence or information to be used in or in connection with litigation which is in progress or pending. These essential ingredients will be carefully scrutinized by the court when a claim for privilege is asserted.

[55] For the purposes of this appeal it is not necessary for this court to make a determination as to whether the expert report obtained on behalf of the objector is privileged in part or in full. In my judgment, applying the relevant criteria as stated by Lord Carswell in *Three Rivers (No.6)* [2005] 1 AC 610 at 675 and the analysis considered above at paras [43]-[46], there is a real possibility that expert reports obtained by objectors in licensing cases have the potential to be protected by the second category of legal professional privilege, often referred to as litigation privilege. For this reason alone, the court cannot order the disclosure or exchange of the said expert reports, or at least part of them, until the claim for privilege has been determined.

[56] The exercise of the judge's power under Order 14 rule 3 CCR 1981 is confined to an application of the Rules as authorised by the relevant statutory provisions and also strict compliance with the rules of evidence, particularly litigation privilege. For the reasons given above on the facts of this case, in my judgment the judge did not have the power under Order 14 rule 3 CCR 1981 and/or under Order 58 CCR 1981 to direct the objectors/appellants to serve their expert reports in advance of the substantive hearing. There is no statutory provision contained within the County Court (NI) Rules 1981, or the 1980 Order, the 1996 Order or, indeed, the RsCJ 1980 which gives the court the express power to order the disclosure of expert reports in licensing cases, or, indeed, engineer reports in personal injury or death actions, arising, for example, out of road traffic accidents, accidents at work or public liability claims. As highlighted by counsel for the objectors/appellants, statutory exceptions have been included in Order 24 CCR 1981 and Order 25 RsCJ 1980 in relation to the disclosure of medical reports in personal injury actions and criminal negligence claims. Order 72 rule 9 RsCJ 1980 makes express provision for the disclosure of expert evidence in commercial actions as the court shall direct. No statutory exception applies to expert reports in licensing cases.

[57] This court is cognisant of the fact that the Review Group's report on Civil Justice (2017) made a recommendation that experts in licensing cases should be

directed to exchange reports and attend experts' meetings pre-trial [CJ220]. To date, this recommendation has not received statutory implementation.

[58] Order 1 rule 1A RsCJ 1980 and Order 58 CCR 1981 equips the High Court and the county court with a vital tool in their arsenal to deliver fair and effective administration of justice. The overriding objective as specified in the Rules, is to enable the court to deal with cases justly, which includes hearing cases expeditiously and fairly, avoiding undue expense and dealing with cases proportionately having regard to the complexity and importance of the case. However, it must not be overlooked, that Order 1 rule 1A(3) RsCJ 1980 and Order 58 rule 3 CCR 1981 specifically provide that a court when seeking to give effect to the overriding objective must (a) exercise its power as given to it by the Rules or (b) in its interpretation of any Rule. As stated by Gillen J in *Sainsburys* at para [14]:

> "Whilst the ultimate overriding principle is that justice must be done, the aim must be achieved within the ambit of Order 1, Rule 1A."