

Neutral Citation No: [2017] NIQB 72

Ref: STE10370

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 21/07/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

JOHN FLYNN

Plaintiff:

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF
NORTHERN IRELAND

Defendant:

STEPHENS J

Introduction

[1] This is an application pursuant to Order 3, Rule 2(1) of the Rules of the Court of Judicature (Northern Ireland) 1980 by the defendant, the Chief Constable of the Police Service of Northern Ireland, to extend the time for the defendant to comply with an order dated 8 March 2017 which required the defendant to provide discovery by way of a list of documents by 13 June 2017. The application is based on the proposition that the defendant, despite requesting financial resources, does not have sufficient resources to comply by 13 June 2017. Rather Superintendent Wendy Middleton states that the "timeframe would ... have to be extended to a very considerable degree". Her conservative estimate is that:

"It would take approximately two years to reach the point, following completion of the entire process, including all of the PII stages, at which it *might be possible* to serve a list of documents." (emphasis added)

She also states that her conservative estimate "of the cost of completing the PII process alone to the point of serving a list of documents would be in excess of £300k." She qualifies her estimates as to the time and as to the cost of complying

with the order for discovery by stressing “that this cannot be anything other than a best guess given the high degree of uncertainty about the amount of work that might ultimately be required.”

[2] The application for an extension of time was originally made informally at a review hearing by Mr Hanna QC, who appeared with Mr McEvoy on behalf of the defendant. I directed that a formal application should be made by summons and affidavit. The summons, which was issued on 12 June 2017, came on for hearing on 28 June 2017. Mr Brian Fee QC, who appeared with Mr Flannigan, opposed the application for the extension of time sought by the defendant but was not opposed to an extension until noon on 1 October 2017.

[3] An issue arose as to whether the defendant would have to start from scratch in identifying all the relevant documents in a vast archive of historic documents or as to whether those documents had already been identified as they had been provided by the PSNI to the Police Ombudsman for Northern Ireland (“PONI”) for the purposes of the Operation Ballast investigation which took place between approximately June 2003 and January 2007. There was no doubt that documents had been provided by the PSNI to the PONI but the issue was whether either the PONI or the PSNI had a list of those documents. The hearing on 28 June 2017 was adjourned to 29 June 2017 to enable a further affidavit to be filed on behalf of the defendant in relation to this issue as to whether the PSNI had a list or inventory of the documents that it had made available to the PONI or a list or inventory of the documents returned by the PONI to the PSNI. An affidavit from Assistant Chief Constable Hamilton was sworn on 29 June 2017 and a further hearing took place on 29 June 2017. I also granted the defendant leave to file a further affidavit on or before noon on 20 July 2017. A further affidavit sworn on 20 July 2017 by ACC Hamilton was filed on the same date.

The issues in and the sequence of the proceedings

[4] The plaintiff alleges that on 12 March 1992 a person now known by the cypher Informant 1 tried to murder him by aiming a gun at him which failed to discharge. The plaintiff also alleges that Informant 1 then attacked him physically before running off. It is the plaintiff’s case that Informant 1 was a covert human intelligence source for the defendant and also an employee of the defendant. In these proceedings the plaintiff claims against the defendant both compensatory damages for the personal injuries suffered by him together with exemplary damages.

[5] The plaintiff also alleges that on 6 May 1997 Informant 1 or persons acting on his behalf placed an improvised explosive device under his car. The device failed to explode but again the plaintiff claims for personal injuries loss and damage together with exemplary damages against the Chief Constable.

[6] In January 1997 the PONI published the Ballast report which dealt with police handling and management of identified informants from the early 1990s onwards. That report included reference to Informant 1 and linked him and his associates to the two incidents described by the plaintiff.

[7] In summary the Ballast report concluded that police officers colluded with Informant 1 in the full knowledge that he was a UVF terrorist with an extensive criminal record and with an ongoing involvement in murders, attempted murders and other serious criminal activities. The report further concluded that rather than investigate the crimes committed against the plaintiff, police officers, in effect, protected Informant 1, paid him money and shielded him from prosecution. The report also refers to the fact that records were destroyed or lost, that misleading records were compiled and that records were withheld from the DPP and the courts. It is the conclusion of the report that Informant 1 was not brought to justice despite his criminal activities being known to the defendant. In essence, his criminal conduct, including paramilitary activity and involvement in serious crime including murder, was allowed to continue during the relevant period. This is just a brief summary of the concerning matters that are set out in detail in the Ballast report.

[8] On 3 March 2008 the plaintiff issued a writ. The Statement of Claim was not served until 24 November 2011. A defence denying liability was served on 17 January 2012. The pleadings are deemed to be closed at the expiration of 21 days after service of the reply see Order 18, Rule 20. The plaintiff's reply was served on 19 January 2012 so the pleadings were deemed to be closed on 9 February 2012. Pursuant to Order 24, Rule 2(1) the defendant was required to serve a list of documents by 23 February 2012. The defendant failed to do so. This failure occurred approximately half a decade ago. As will be seen the failure continues.

[9] By Order of Master Bell dated 2 March 2012 the defendant was ordered to serve a list of documents within 12 weeks from the service of the Order. The defendant failed to comply with that order. On 1 March 2013 Master McCorry made an Unless Order that unless the defendant files a list of documents within 6 weeks of the date of service of the order the defendant's defence be struck out. On 4 March 2013 that order was set aside on consent with the application for an Unless Order being adjourned until 14 May 2013.

[10] On 21 June 2013 another Unless Order was made by Master McCorry that is unless the defendant served a list of documents within 21 days of the service of the order the defendant's defence shall be struck out. The defendant failed to comply with that order. Time for compliance with that order was extended on 25 September 2013, on 9 October 2013, on 25 October 2013, on 20 November 2013, on 27 November 2013, on 13 December 2013 and on 7 January 2014. The defendant did not serve a list of documents. It can be seen that the defendant not only failed to comply with the Unless Order within the original timescale set by the Master but also within any agreed extended timescale.

[11] On 6 February 2014 the parties agreed to a stay of the action until 5 June 2014 and this also extended the time for complying with the Unless Order. There were then further extensions to 3 October 2014 and 7 November 2014. Again the defendant failed to serve a list of documents.

[12] On 17 November 2014 the defendant served an Amended Defence. In this Amended Defence the defendant admitted that the person described by the cypher, Informant 1, was at all material times a CHIS providing information to the defendant. The defendant further admitted misfeasance in public office, including each of the individual particulars of the misfeasance alleged by the plaintiff. It is clear from this that the defendant also accepted its liability to pay both compensatory and exemplary damages to the plaintiff.

[13] As well as serving an Amended Defence the defendant served a list of documents which did not refer to any new discoverable documents. On 15 March 2015 there was a hearing before the Master in relation to this issue. Pursuant to that hearing there was an order made in favour of the plaintiff which required the plaintiff to identify specific documents were then to be disclosed by the defendant. The plaintiff did this by letter dated 25 March 2015 identifying 94 categories of discoverable documentation. The appellant appealed this order and on 17 June 2015 I made an order that a formal application for specific discovery should issue.

[14] A summons seeking specific discovery was issued on 3 August 2015. That summons was heard as a contested matter before Colton J on 29 January 2016. In his judgment Colton J ordered that discovery of 13 categories of document should take place. The defendant appealed the decision of Colton J to the Court of Appeal. That appeal was dismissed on 24 February 2017. The matter came back into my list and I ordered that discovery should be complied with by the defendant by 13 June 2017.

[15] I consider that there has been a failure over many years by the defendant to provide discovery and to comply with court orders.

The issue as to whether documents can be identified by reference to a list of those documents made available to the PONI in relation to Operation Ballast

[16] The PONI investigation commenced in or about June 2003 and concluded with a report in January 2007. During the course of that investigation the defendant provided files and folders to the PONI. On 24 February 2017 Keegan J in delivering the judgment of the Court of Appeal stated:

“In relation to the resource argument, we have considered carefully the submissions made by the parties. We have also considered the affidavits filed by the appellant. In our view there are a number of distinguishing factors in this case which inform our conclusions. Firstly there is the issue of the Ballast

Report. This was a significant report which involved the gathering together of extensive information. We find it hard to believe that one person who was involved in that exercise and who is now retired is the only person who has knowledge about this. We also find it astonishing that the appellant has not contacted the Police Ombudsman's Office to obtain assistance and a schedule of information previously provided. Further, it appears clear to us that the discovery exercise in this case is not one which is starting from scratch because considerable work has already been undertaken to compile the material for the Ballast Report. This, in our view, significantly undermines the argument that the burden of discovery outweighs the benefit."

[17] At the hearing before this court it was suggested that in effect the defendant would have to start from scratch because there was no list or inventory of the documents that had been made available by the PSNI to the PONI. Mr Hanna referred to an email dated 13 April 2017 from the Crown Solicitor which stated that enquiries had been made of the office of the PONI. The response was that the PONI held an "inventory" of the documents but this was not a detailed index but a high level guide as to the nature of the material held. The e mail went on to state that the inventory had been requested from the PONI. However in this application that document has not been exhibited to any affidavit. During the hearing of the application on 28 June 2017 the court was informed by Mr Hanna, on instructions, that the PSNI had not kept a list of documents that it made available to the PONI nor did it have a list of the documents that it had received back from the PONI. I directed that this factual assertion be placed on affidavit and adjourned the hearing to 29 June 2017 to enable that to be done. The affidavit of Assistant Chief Constable Hamilton was sworn on 29 June 2017 and then a further hearing took place on 29 June 2017.

[18] In the affidavit sworn on 29 June 2017 ACC Hamilton stated that:

"The Operation Ballast investigation was conducted by PONI over a period of approximately 3½ years and a report was published in January 2007. During the course of the investigation the Chief Constable complied with his statutory obligations under Section 66 by giving the PONI investigators access to all requested documentation. At that time, the practice was that PONI would request access to various categories of documents. The Chief Constable produced the files and folders. PONI would then remove and retain all documentation, which it considered relevant to its investigation. *I am advised and verily believe* that the Police Service of

Northern Ireland (“PSNI”) did not record nor retain a list or inventory of documents removed by PONI.” (emphasis added)

As can be seen ACC Hamilton stated that he was “advised and verily believed that the PSNI did not record or retain a list or inventory of documents removed by the PSNI.” That affidavit was deficient as it did not set out the sources or grounds of ACC Hamilton’s information and belief and therefore did not comply with Order 41, Rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980. The affidavit did not condescend to any detail as to the enquiries made as to whether there was any such lists nor did it set out any of the sources of the deponents information and belief. On the basis of that affidavit I was not persuaded that the defendant did have to start from scratch in relation to discovery.

[19] As I have indicated the defendant was given leave to file a further affidavit before noon on 20 July 2017. A further affidavit was sworn by ACC Hamilton on 20 July 2017 which did condescend to details as to the enquiries that he has made. However it does not say when the enquiries were made. Furthermore, it refers to two folders which were *recently* located and to a folder being located which was collated by a detective constable identified by the cipher Constable A without stating when these two folders were located or when the folder collated by Constable A was located. The affidavit states:

(a) In or about 2001 PONI set up its own dedicated unit to deal with sensitive information and documentation which it required for the purposes of its inquiries known as the PONI Confidential Unit (“PONIC”).

(b) Prior to April 2004 the defendant did not have in place a dedicated unit to deal with requests for documentation and/or information from PONI. Such requests were handled by a detective sergeant (long since retired) who worked for and reported to the Head of Intelligence (“HOI”).

(c) That for the period up to April 2004 requests for information by PONIC were made in writing. When the requested documents had been collated the practice at that time was to provide the originals to PONIC (if in paper form) or to print and provide a copy from the digital database (if in digital form). When copies were printed from the digital database it was not the practice of PSNI to print a second set for its own retention. PSNI compiled receipts which were signed by PSNI, PONIC and HOI.

(d) That two folders have recently been located containing a number of receipts relating to documents requested for the purposes of Operation Ballast between July 2003 and March 2005. Some, but not all, of these receipts are quite detailed and represent a record of documents removed, but others are not at all detailed.

(e) In April 2004 a detective constable ('constable A') was appointed by the PSNI as PONI Liaison officer with specific responsibility to liaise with PONIC, and in particular to deal with requests for documentation and other information by PONIC.

(f) Constable A when she took over from the detective sergeant adopted similar working practices.

(g) A folder has been located, collated by constable A, containing written requests from PONIC for information/documentation made between August 2005 and 28 March 2006. This folder contained mostly written requests, however, there were some receipts.

(h) Any intelligence documentation provided to PONIC was provided in un-redacted form.

(i) Some Operation Ballast documents were returned sporadically by PONIC to the PSNI during the period 2004 to 2009. In the case of original paper documents it was the practice of constable A to return them to the PSNI registry from which they had been removed. Constable A did not reconcile returned documents with receipts (which in any event were not exhaustive).

(j) It was the normal practice of constable A to sign a receipt for the return of the document which was given to, and retained by PONIC.

(k) In April 2009 Constable A retired.

(l) The vast majority of the documentation which had been provided to PONIC for the purposes of the Operation Ballast inquiry was only returned in April/May 2017 following a request made by the PSNI for the purposes of compliance with the court order dated 8 March 2017.

[20] As I have stated there is no information as to when the two folders and the folder collated by constable A were located which leaves open the inference that it is only as a result of this application that they have been located. In addition none of the receipts signed by constable A for the return of documents have been exhibited in order to enable the court to form its own independent assessment as to whether they would enable ready identification of relevant documents. The same point applies in relation to the PONI inventory. Only now is it stated that the vast majority of documents were returned by PONIC in April/May 2017. This is not only new information but also no indication is given as to how long after the order of 8 March 2017 these documents were requested, why they were not requested when the court of appeal gave judgment on 24 February 2017 and why they were not requested years ago.

Discussion

[21] I accept that the discovery process for the defendant is complex and I accept that there is a resource implication though not to the extent suggested. However, years have passed without compliance and there is no clear acceptable plan for future compliance. Furthermore, the application for an extension of time is to be seen in the context that there is no evidence of any attempt by the defendant to comply with its initial obligation under the rules to serve a list of documents or to comply with all the orders made by the Master over many years. I am not persuaded that the identification of relevant documents presents the difficulties suggested by the defendant and in any event inherent in the proposition that the defendant has now to start from scratch is the unacceptable inference that the defendant has done nothing or nothing useful about discovery over many years. The rules of court are there to be observed (*Davis v Northern Ireland Carriers* [1979] NI 19) as are orders of the court. I would apart from the plaintiff's acceptance of an extension until noon on 1 October 2017 have refused the defendant's application. In the event I extend time until noon on 1 October 2017. The defendant should anticipate that there should be no further extension of time and in order to emphasise that point and given the previous failures to comply with orders of this court I make an order that unless the list of documents is served on or before noon on 1 October 2017 the defendant's defence is struck out with judgment being entered for the plaintiff on the basis of all the allegations contained in the statement of claim and with damages to be assessed on the same basis.

Conclusion

[22] I make an order that unless the defendant provides discovery by noon on 1 October 2017 the defendant's defence is struck out with judgment being entered for the plaintiff on the basis of all the allegations contained in the statement of claim and with damages to be assessed on the same basis.