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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **16/01/2007**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

APPLICATION BY COLM MURPHY & SEAMUS DALY FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of decisions of the Lord Chancellor and the Legal Services Commission. The applicants are defendants in proceedings in the High Court between Breslin & Ors v McKenna & Ors. This is the action that relates to the Omagh bombing. Legislation was introduced to grant powers to make exceptional grants to plaintiffs to cover legal costs. There are three decisions under challenge as set out in the amended Order 53 Statement. The first is the decision of the Legal Services Commission to request exceptional authorisation from the Lord Chancellor to fund the plaintiffs' legal costs in the action. Second is the decision of the Lord Chancellor made on 11th February 2006 to grant this exceptional funding. Third is a decision to pay the plaintiffs' solicitors the sum of some £25,000 in respect of legal costs that were incurred before the 11th February 2006.

[2] The present applications have been made by the applicants for discovery of documents against the Legal Services Commission and the Lord Chancellor. There is a general application for disclosure under Order 24 rules 3 and 7 that relates to documents which have been specified in the grounding affidavit at paragraphs 39 and 40. Secondly there is an application for documents that have been referred to in the replying affidavits which is made under Order 24 rules 11 and 12 and there are two schedules of documents, the first relating to the replying affidavit from Paul Andrews and the second relating to the replying affidavit from Gerry Crossan.

[3] Before examining the application for discovery it is necessary to look at the particular grounds for judicial review that are relied on by the applicants. The first ground is that the Lord Chancellor acted illegally in directing the Legal Services Commission to pay the sum of £25,000 as being in excess of the powers under Article 10A of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Further it is alleged that the Legal Services Commission did not have power to make that

retrospective payment. I describe these grounds as "the retrospective issue" and they are directed to the Lord Chancellor and the Legal Services Commission.

[4] Next there is a claim that the Lord Chancellor was guilty of procedural impropriety and unfairness. This broadly covers two aspects. First of all it is said that the applicants had a legitimate expectation that they would be consulted before the legislation which gave the power to make this grant of costs was introduced. The second aspect is that fairness required that the applicants be consulted, given that the Government had consulted with the plaintiffs in the action. I describe these aspects as "the consultation issue."

[5] The next matter also concerns the Lord Chancellor and alleges that he pre-determined the question of whether to make an exceptional grant to the plaintiffs and that this amounted to apparent bias. In the alternative it is said that the Lord Chancellor fettered his discretion by pre-determining the issue whether he would make the grant. I describe this as "the predetermination issue."

[6] Next it is said that the Legal Services Commission acted unreasonably and unfairly and failed to take into account certain matters in assessing the application for the grant, namely the propriety of the proposed expenditure, the value for money and proper financial controls. I describe this as "the assessment issue."

[7] Turning then to the principles in relation to discovery I should refer to Tweed v The Parades Commission for Northern Ireland [2006] UKHL53, a decision of the House of Lords from Northern Ireland, which has changed the law in relation to disclosure of documents in judicial review proceedings. The former cases that governed the position in Northern Ireland were Rooney's Application and McGuigan's Application and required that in order to obtain discovery it was necessary to establish that there was some insufficiency, some inconsistency, some omission in the respondent's affidavit evidence. That position no longer prevails in the light of the decision in Tweed and there is now a less restrictive regime in relation to disclosure of documents. The new approach appears from Lord Bingham at paragraph 4 -

> "Where a public authority relies on a document as significant to its decision it is ordinarily good practice to exhibit it to the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant seeking sight of the document to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may however be reasons (arising, for example, from confidentiality, or the

> volume of the materials in question) why the documents should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made".

[8] The principal judgment was delivered by Lord Carswell who refers to the requirement under the Northern Ireland Rules that the Court should refuse to make an order for disclosure if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter of receiving costs. Having referred to the previous authorities it is stated at paragraph 32:

> "I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with requirements to the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents".

Lord Carswell concludes at paragraph 41 of the judgment that he would have ordered disclosure of the documents in issue in the Tweed case. Much of the contents of the documents appeared to have been based on information and opinions obtained on the basis of assurances of confidentiality and it is stated -

> "I think that the judge considering disclosure should first receive and inspect the full text of all the documents …. so that he may decide whether they would give sufficient extra assistance to the appellants' case on proportionality, (*being the issue in the case*) over and above the summary already furnished, to justify its disclosure in the interests of fair disposal of the case. If he does so decide, then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the court. If he decides to the contrary in the case of any of the documents, the documents will not be disclosed to the appellant. Only after this has been settled should the question of public interest immunity receive any necessary consideration."

[9] Thus a number of steps arise in the process of disclosure. First, if a document is of significance to a decision it is good practice to exhibit it as primary evidence. Secondly, there may be reasons to retain the document from disclosure, or parts of it, perhaps on the grounds of confidentiality or the volume of the material in question, and if that is the position then the matter will be referred to the judge to decide

whether or not the summary in the respondent's affidavits is sufficient to meet the case or whether the documents ought to be disclosed in the interests of fairness and justice. Thirdly, if disclosure is required then the question of redaction might arise, perhaps because of confidentiality or for any other reason and the Judge may hear argument in relation to redaction. Fourthly public interest immunity might arise for consideration by the Judge. There has thus been a change from the former restrictive approach to the present more flexible approach.

[10] In the light of the new regime for disclosure in judicial review I turn to the documents being sought. As far as the Lord Chancellor is concerned the documents are set out in paragraph 39 of the grounding affidavit at sub-paragraphs 1 to 13. This to some extent corresponds with a schedule of documents that had been sent by the applicants to the respondent's solicitors and which referred to twenty-three documents. In respect of the schedule there was correspondence from the Crown Solicitors Office on behalf of the respondent on 11th December 2006 which set out the reasons why they were not proposing to make disclosure of any of the documents that have been listed. That reply preceded the decision in Tweed and in some instances relied on the previous law in Rooney's Aplication and McGuigan's Application and to that extent has been overtaken by the House of Lords decision in Tweed.

[11] The grounds that are relevant to the Lord Chancellor for the purposes of this exercise are first of all the retrospective issue which concerns powers under the Order to make retrospective payments. This is essentially a legal issue rather than a factual issue. It does not seem to me that examining the documents in relation to decision-making on the introduction of the legislation or the plaintiffs' application for a grant bears on the issue as to whether or not there is power to make retrospective payments. The second issue as far as the Lord Chancellor is concerned is the consultation issue. It is the case that the applicants were not consulted and that the plaintiffs in the action were consulted about the introduction of the legislation. The issue will be whether or not there is a legal failing in the approach taken on consultation. The consideration of the legislation and the handling of the plaintiffs' application do not have any bearing on the issue as to whether or not consultation about the introduction of the legislation was required. I do not consider that any of the documents sought bear on that issue. The third ground as far as the Lord Chancellor is concerned is the pre-determination issue. It is said that the Lord Chancellor fixed in his mind a desire to make this payment to the plaintiffs, in effect regardless of his statutory powers. This is disputed. Here one is dealing with what is essentially a factual issue in relation to the approach of the Lord Chancellor and his officials to the decision making and that is a fact based issue on which certain documents will be relevant.

[12] Turning then to the documents and bearing in mind that disclosure may only be necessary on the predetermination issue. Item one of paragraph 39 seeks discovery of documents on issues raised on the basis of the McKevitt ruling by Coghlin J in relation to the previous legislation dealing with the grant of costs to the

plaintiffs. This seems to me not to be relevant. This concerns a decision in August 2005 in relation to previous legislation and what is now relevant is the new legislative regime. I refuse disclosure on ground one. Paragraph 39(2) deals with any formal response of the Legal Aid Department in relation to a letter of 10th December 2002. This again relates to the old legislation and is not relevant to the present issue. In the applicant's schedule there was an additional item sought in relation to correspondence but it is sought on the same basis and I do not propose to re-examine the old case. I refuse item two.

[13] Item three of paragraph 39 seeks records of communications and meetings between the Omagh plaintiffs and Government Ministers and officials since 2002. Again this starts with the earlier legislation. The present issues commenced in August 2005 when the McKevitt decision set aside the previous attempt to introduce this grant of legal aid and the present approach commenced. Since August 2005 there are documents that are relevant to the pre-determination issue when the Omagh plaintiffs and the Government Ministers were in communication. There is a point made by the respondents about Article 24 of the Legal Aid Order which I will come to in a moment but subject to that, I propose to order disclosure of the items under paragraph 39(3) from August 2005.

[14] Paragraph 39(4) seeks documents in relation to the Government commitment to fund the Omagh action. Now insofar as there might have been any such Government commitment after August 2005, when the present legislative regime began to be considered, that may be relevant to the issue of pre-determination. Therefore I am proposing to order disclosure of such documents.

[15] Paragraph 39(5) relates to discussions about the formulation of an alternative lawful mechanism. I am going to refuse documents on this ground. Discussion of the formulation of an alternative legal mechanism is not in issue and it cannot be complained about. That there was an attempt to formulate an alternative lawful mechanism is beyond question but it does not speak to the issue of pre-determination. Paragraph 39(6) seeks minutes of meetings about the issue of guidance in relation to these payments. Once again it seems to me that the formulation of the guidance is not a matter on which disclosure will be of any relevance to the issues that have to be decided.

[16] Paragraph 39(7) seeks the legal aid application forms that were completed by the plaintiffs. First of all the forms are not relevant to the issues. The respondents also rely on Article 24 of the 1981 Order under the heading "Secrecy":

> "(1) Subject to paragraph 2, information furnished for the purposes of this part to the Law Society or to any committee or person on their behalf in connection with the case of a person seeking or receiving legal aid, advice or assistance shall not be disclosed otherwise than:

(a) for the purpose of facilitating the proper performance by any committee, court, tribunal or other person or body of persons or functions under this Part; or

(b) for the purpose of any criminal proceedings for an offence thereunder or of any report of such proceedings. "

Paragraph 2 provides that disclosure may be made by consent.

[17] The essence of Article 24 is that there is prohibition on disclosure of information furnished to the Law Society for the purposes of legal aid applications and there are two exceptions. The second exception of criminal proceedings is not relevant. The first exception is for the purpose of facilitating the proper performance of functions under that Part of the Order. I do not consider that that exception applies in the circumstances of the present case. The disclosure that is sought here is not for the purpose of facilitating the performance of functions under that Part. The Court is not performing any such function. The Legal Services Commission is performing a function under that Part but disclosure would not facilitate the proper performance for that function. In any event I do not accept that Article 24 contemplates disclosure on the basis that a judicial review Court would police applications. The general exclusion applies under Article 24 to provide that the information furnished for the purpose of this legal aid application shall not be disclosed.

[18] The applicants object to the operation of Article 24 and contend that it should be read down under section 3 of the Human Rights Act so that there is an additional exception where required for the purposes of a Convention right under the Human Rights Act. As stated above the information that is sought here, namely the legal aid application forms, are not themselves relevant to the issues that arise under the judicial review ground of pre-determination and therefore I do not consider that it is in any event necessary to order disclosure in the circumstances of the present case. In that event there is no incompatibility that has to be considered. An additional Human Rights Act exception is not required in this instance. Paragraph 39(7) seeks the application forms and that is refused as I do not consider them relevant to the issues in the case.

[19] Similarly 39(8) requests the communications with the plaintiffs in respect of the application for the grant and the same point applies. Paragraph 39(9) seeks communications on the application between the Lord Chancellor and the Legal Services Commission and the same point applies. Paragraph 39(10) seeks the case plan from the plaintiffs' solicitors and again that is not relevant. To the extent that Article 24 applies to such information I do not accept that the exceptions apply. It is not necessary to read down the Article for the purposes of the Human Rights Act because there is no incompatibility to be addressed.

[20] Paragraph 39(11) seeks all documents that were furnished by the advisor to the Minister. That information was furnished in relation to the application and will be relevant to the issue of pre-determination and I am proposing to order disclosure of that documentation. Paragraph 39(12) refers to minutes etc in respect of the Minister's assessment of the application and that too is relevant to the pre-determination issue. Paragraph 39(13) concerns the Legal Services Commission so I postpone that for a moment. In relation to the Lord Chancellor I order disclosure of documents under paragraph 39(3), (4), (11) and (12).

[21] I turn to the Legal Services Commission and look again at the grounds. First there is the retrospective issue and as in the case of the Lord Chancellor I do not believe that the documents are necessary to determine what powers have been given by the legislation to make retrospective payments. The other issue as far as the Legal Services Commission is concerned relates to assessment of the application under Article 10A. There is no challenge to Article 10A as such but there is the challenge to the assessment in that it is suggested that procedures that would otherwise be applied are being ignored and the propriety of the expenditure is not being examined, the value for money is not being examined and financial controls are not being examined. The applicant says this is a species of pre-determination based on the absence of assessment. This is a fact based ground concerned with the manner in which the Legal Services Commission is examining the plaintiffs' application.

[22] I return to paragraph 39(13) which relates to the consideration of the application by the Legal Services Commission. Within that group there will be some consideration of the assessment issue and I am going to allow disclosure of such documents and paragraph 39(13) does not add to that. I will deal with the assessment issue disclosure as it emerges under paragraph 40 items 1 to 12. Item 1 of paragraph 40 concerns documents in relation to the McKevitt ruling and is the same as item 1 on the Lord Chancellor's list and I refuse for the same reasons. Paragraph 40(2) is the same as paragraph 39(2) against the Lord Chancellor and I refuse for the same reasons. Paragraph 40(3) relates to minutes of meetings between staff in relation to guidance and it is the same as the Lord Chancellor's paragraph 39(6) and I refuse for the same reasons. Paragraph 40(4) refers to the legal aid application forms and is the same as the Lord Chancellor's paragraph 39(7) and I refuse for the same reasons. Paragraph 40(5) relates to communications in relation to the application and is the same as Lord Chancellor's paragraph 39(9) and I refuse for the same reasons.

[23] Paragraph 40(6) concerns records relating to the costs of providing the funding, value for money and the costing of negotiations. This item includes a clause which seeks documents in relation to the impact upon the general provision of legal services of this grant and Counsel confirms that the payments will have no impact on other services. To the extent that there may be records in relation to the costs of providing further funding of the plaintiffs' action and to the extent that the respondents may have carried out such assessments the documents will be relevant to the challenge that is being made on the assessment issue. It is the applicants' case

that the respondents are determined to push this through regardless and these documents may speak to that issue. I propose to order disclosure under paragraph 40(6).

[24] Paragraph 40(7) refers to documents relating to the decision that the usual rules and procedures should not apply to the plaintiffs' solicitors. Again there is a dispute about that, but the applicants refer to circumstances which they say indicate that the usual rules and procedures have been set aside and that is an issue which is relevant to the assessment. I propose to order disclosure of documents in relation to this item. The text does refer to any documents, records or correspondence "relating to the proposal" and I am not quite sure what the words mean. Was it the proposal to introduce the legislation or was it the proposal to pay the money? I am deleting the words "to the proposal". Paragraph 40(8) refers to financial controls, which is another point about the assessment issue and I propose to order disclosure of documents relating to financial controls.

[25] Paragraph 40(9) refers to communications in relation to the plaintiffs' request, this is the same as Lord Chancellor's schedule item eighteen which was dropped as against the Lord Chancellor and I propose to refuse that ground. Paragraph 40(10) refers to the merits of the case and the assessment of the plaintiffs' application on the merits. I do not consider that the assessment on the merits is relevant. This item is protected by Article 24 but I would not disclose it anyway because it is not relevant. Paragraph 40(11) refers to payments made under the 2003 Order and that is not relevant. The final item is paragraph 40(12) which refers to the records relating to the payment of the invoice. This is a legal issue about whether or not that payment was due. I do not consider that the documents are of any assistance. The payment was made and whether it is valid or not will have to be determined. The result is that as far as the Legal Services Commission is concerned I am ordering disclosure of documents under paragraph 40 (6), (7) and (8).

[26] The next stage in the process as indicated in Tweed may be the issue of redaction. The documents may be referred to the Court on the basis that there are grounds why the documents or parts of them that I have identified should not be disclosed. There may be confidentiality issues or questions of volume, but I suspect that volume may not be a factor in this case. Insofar as there are reasons to seek redaction then the respondents should apply for such redaction as they consider is necessary. Further to that there is the issue of PII. The matter will be relisted on 31 January. If the respondents are going to make any application they should serve a notice of their grounds by 26th January and disclose any documents not affected by the application by that date. Of course the documents to which objection is taken should not be disclosed pending a determination.