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Judgment: approved by the Court for handing down | *Delivered:* **22/10/10**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

JOHN CALDWELL PRACTISING AS CALDWELL WARNER SOLICITORS AND IVAN WARNER PRACTISING AS CALDWELL WARNER SOLICITORS

Plaintiffs;

and

MORGAN WALKER SOLICITORS LLP

Defendant.

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GILLEN J

Background

[1] In this matter the plaintiffs claim damages for libel in respect of words published in four individual documents namely:-

- A letter of 3 October 2008 from the defendant to New India Assurance Company Limited ("New India").
- A letter of 22 October 2008 from the defendant to McGrady Collins Solicitors.
- A letter of 24 October 2008 from the defendant to a Mr Paul Casement.
- An email of 28 October 2008 from the defendant to a Mr Cardosi of Garwyn Liability Adjusters.

[2] The first and second named plaintiffs are partners in a firm of solicitors practising as Caldwell Warner. The defendant is a limited liability partnership practising as solicitors in London.

[3] The defendant, by way of a summons dated the 18 day of June 2010 (hereinafter called the "summons ") and affidavit applied for determination of the following questions as preliminary issues under Order 33 rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980 namely:

(a) Whether the words contained in the defendant's letter dated 3 October 2008, of which the plaintiffs made complaint in these proceedings at paragraphs 4 and 5 of the amended Statement of Claim, were published by the defendant on an occasion of absolute privilege .In the event of the court determining this in the affirmative then:

(b) Whether the plaintiffs are to be at liberty, in the absence of any such privilege having been waived or abandoned by New India, to rely upon any subsequent publication of the 3 October 2008 letter by a third party, to claim damages against the defendant as its author.

[4] On 25 June 2010 this action came before me for a review as part of the case management in this matter. It is the events of that hearing and the nature of "directions" that followed thereafter that now form the issue of dispute between the parties.

[5] In the wake of the review hearing, the court issued a document to the parties which, where relevant, provided as follows:

> "Directions given by the Honourable Mr Justice Gillen on 25 June 2010
>
> Whereas this action is in the list this day before the Judge, now upon hearing counsel on behalf of the respective parties, the court directs that;
>
> ……
>
> 3. This case shall be listed for the determination of preliminary issues on 24 September 2010 for 3 hours. . …
>
> 4. The parties shall lodge skeleton arguments dealing with any preliminary issue on or before 17 September 2010."

[6] The matter now for determination is whether at that review hearing and under the terms of the subsequent directions the listing of the preliminary issue on 24 September 2010 was merely a direction for the hearing of the summons or whether it amounted to an order or decision made under Order 33 r 3 ordering the questions in the summons to be determined as preliminary issues.

[7] Order 33 r.33 provides as follows:

> *"Time, etc, of trial of questions or issues*
> 3. The court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

[8] No further exchange occurred between the parties thereafter until 4 August 2010 when a solicitor in the firm of Johnsons who act on behalf of the plaintiffs("the plaintiffs' solicitor "), forwarded to King & Gowdy, solicitors on behalf of the defendant("the defendant's solicitor") , a replying affidavit which disputed inter alia the propriety of hearing this matter as a preliminary issue .In an email of 4 August 2010, he confirmed that the timescale "for any rejoinder you may wish to lodge has been extended until 26 August 2010".

[9] On 23 August 2010 King & Gowdy by way of email to Johnsons indicated "that two witnesses would give evidence on behalf of the defendant. Both witnesses are out of the jurisdiction. We will ask you to let us know if it would be possible for the evidence to be dealt with by video-link".

[10] On 13 September 2010, the plaintiffs' solicitor caused an email to be sent to King & Gowdy couched in the following terms:

> "It is my intention to ask that this matter be relisted for review this week on Thursday (preferably) or Friday, subject to the court, and would inquire which date would suit yourself and counsel".

[11] By email of 13 September 2010 Mr Gowdy caused an email to be sent to Johnsons, inter alia, in the following terms:

> "Bearing in mind that there is an interlocutory hearing on 24 inst, what matter needs to be reviewed?"

[12] The plaintiffs' solicitor responded to that email in the following terms on 14 September 2010:

> "I consider a review is necessary as we are disputing whether the issue raised in the

> summons can proceed as a preliminary point on 24th. Unfortunately the position I adopted at the review was premature and an error on my part. Following counsel's review of the papers and authorities it became clear that it was not appropriate as stated in our replying affidavit. Therefore it would be my intention to request that the matter be listed for review on 17 September".

[13] Thereafter emails were exchanged between the solicitors as to when the alleged change of stance had been adopted by Johnsons and the circumstances in which allegedly consent had been given to the hearing of the preliminary issue. In the course of an email of 15 September 2010 the plaintiffs' solicitor said:

> "4. It became clear to me my consent was inappropriate as the redress sought by your summons was inappropriate".

[14] In a further email of 15 September 2010 from Johnsons to the court office, with a copy to King & Gowdy, the plaintiffs' recorded as follows:

> "I refer to the above matter and would request that it be listed for mention this Friday 17 September in respect of the defendant's summons, listed on 24 September 2010, to determine a preliminary issue regarding whether one of the communications, which is the subject of these proceedings is privileged. It is our intention to make application to Mr Justice Gillen at that the directions made on 25 June be revised and that the court should first determine whether the issue raised in the summons should properly be dealt with by a preliminary hearing.
>
> As a result on 25 June 2010 I was in error by consenting to this course of action and not making any consent conditional on obtaining counsel's opinion."

The issue before this court

[15] It is the contention of the plaintiffs that paragraph 3 of the court record of the events of 25 June 2010 amounts to a direction only and that the court has power to vary or rescind any such direction and in particular should do so where it is just and reasonable. It is contended that in this instance it

would be fair and just to direct that the summons by the defendant for a preliminary hearing be listed for determination.

[16] It is the contention of the defendant that paragraph 3 in the court record is in substance an order or alternatively a ruling by the court that the relief sought in the summons had been granted and a preliminary issue was now to be heard on the questions posed in the summons .Irrespective of the description in the court record of this being a direction it was in substance an order which was made on consent and has not been appealed by the plaintiffs. Accordingly the court should proceed to determine the preliminary issue.

Case Management

[17] The essential background to case management in the Queen's Bench Division is found in Rule 1A of the Rules of the Court of Judicature (NI) 1980 ("the Rules") which provides as follows:

> "*The Overriding Objective*
>
> 1A-(1) The Overriding Objective of these Rules is to enable the Court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an 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; and
> (iv) the financial position of each party.
>
> (d) Ensuring that it is dealt with expeditiously and fairly; and
> (e) Allotting to it 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."

[18] The furthering of the overriding objective of enabling the court to deal with cases justly has in recent years has led to active case management dealing with as many aspects of cases as is practicable on the same occasion. Although in Northern Ireland we do not have the Civil Procedure Rules 1998 ("the CPR"), and in particular the provision in CPR 1.4(1)(i) or even a Practice Direction such as Practice Direction (Civil Litigation) Case Management (1995) 1 WLR 262 which govern proceedings in England and Wales, nonetheless the advent of Rule 1A has given fresh momentum to the court's inherent jurisdiction to control its own process by active case management.

[19] In this context one need look no further for an authoritative source for the power of the court to manage cases under its inherent jurisdiction than that found in the words of Carswell J in Braithwaite v Anley Maritime Agencies [1990] 4 NIJB 43 at pps 69/70 where he defined inherent jurisdiction as follows:

> "… The reserve of fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them".

[20] The significance of current case management procedures is that they mark a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Accordingly, while there is no rule comparable to CPR 1.4(1)(i), I am satisfied that in order to secure the overriding objective of Rule 1A, cases in this jurisdiction should be subject to similar case management steps which will include for example :

(a) encouraging the parties to cooperate with each other in the conduct of the proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which issues are to be resolved;
(e) helping the parties to settle the whole or part of the case;
(f) fixing timetables or otherwise controlling the progress of the case;
(g) considering whether the likely benefits of taking a particular step justify the costs of taking it;
(h) dealing with as many aspects of the case as it can on the same occasion;

(i) dealing with the case without the parties needing to attend court;
(j) making use of technology;
(k) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

[21] Accordingly during the pre-trial stages of a case, the court stands ready to react to the needs of the parties by making necessary orders, decisions and directions either by its own initiative or on the request of the parties. Clearly costs and delays would be increased and court resources wasted if, in dealing with a case for one purpose (whether by a hearing, directions or otherwise) the court did not deal with other matters which had arisen or were looming and which required or justified the court's attention. It is important that parties and judges should not be encouraged to deal with several aspects of a case on successive occasions when it would be practicable to deal with them on one occasion.

[22] In the course of case management however, it is important to recognise that the courts remain constrained by both statutory and regulatory rules. A distinction must be made between directions on the one hand and orders, decisions or judgments on the other. The role of directions is to oil the wheels of case management. As such they can be and are often varied or revoked where it is just and reasonable to do so. On appropriate occasions this could be done administratively by way of letter of consent of the parties with the approval of the court or alternatively before the court without the necessity for pleadings. They do not bear the seal of court orders, decisions or judgments but are nonetheless an integral part of the case management system. Both parties in the instant case have recognised this distinction and have variously drawn attention to statutes and rules which govern orders, decisions, judgments and decrees but not directions. A few instances will suffice to illustrate the point.

[23] Section 35(1) of the Judicature (Northern Ireland) Act 1978 (the 1978 Act) provides:

> "Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof".

Judgment is defined as including "order, decision and decree". It clearly therefore does not include a direction.

[24] Order 58 r 4 provides that subject to Section 35 of the 1978 Act and without prejudice to Section 44 "… an appeal shall lie to the Court of Appeal from any judgment, order or decision of a judge in chambers". Once again

the omission of reference to direction is significant. It is thus arguable that the Court of Appeal does not have an inherent jurisdiction to hear appeals on directions.

[25] Directions are specifically mentioned in some instances in the rules. For example Order 16 rule 4, dealing with third party directions, provides that where a third party has entered an appearance, the defendant who issued the third party notice "may apply to the court … by summons to be served on all the other parties to the action for directions …"

[26] Similarly Order 33 r 3, of particular importance in the instant case, provides that the court may "give directions as to the manner in which the question or issue shall be stated."

[27] Finally I observe that Order 42, which deals with judgments, specifically provides in the interpretation that "in this order `judgment' includes order, decision or direction". Thus where, as under this Order, it is intended that a direction is to come within the ambit of a judgment specific provision is made for it to be so interpreted.

[28] Accordingly it is important to distinguish directions from orders in most instances. Applications under Order 33 r 3 are classic examples of where such caution must be observed. The House of Lords in Tilling v Whiteman (1980)AC1 strongly protested against the practice of the Court of first instance allowing preliminary points of law to be tried before and instead of first finding the facts since this course frequently adds to the difficulties of Courts of Appeal and tends to increase the cost and time of legal proceedings .Moreover a preliminary question of law should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue. Such applications need the careful scrutiny of the court even where the parties are consenting before any such order is made .A directions review would not normally be an appropriate forum for such scrutiny given the purpose and time constraints of such hearings.

[29] Mr Horner QC, who appeared on behalf of the defendant with Mr Devlin , was of course right to contend that courts will look at the substance rather than the form of such issues and where it is clear from the context that the intention of the court was to make an order, decision, judgment or decree, matters of mere form-such as inaccurate nomenclature on the court document -- will not be allowed to impede the proper administration of justice particularly where the parties are all aware of the intention of the court . However, wherever possible, courts should clearly distinguish between directions on the one hand and orders on the other. There should be a

rebuttable presumption that where a matter is referred to as a direction, it will be treated accordingly.

The Transcript of the Directions Hearing

[30] Given the dispute that had arisen in this case as to the direction hearing before me on 25 June 2010("the hearing") and because neither senior counsel who appeared before me had had the advantage of appearing at the review, I ordered that a transcript of the hearing be provided to the court and to the parties several days in advance of the present hearing.

[31] Having obtained that transcript, and having invited the views of counsel on its contents, I am satisfied that the following points are unassailable.

[32] Firstly nowhere within that transcript of the hearing did I find anything resembling a concession by the plaintiffs' solicitor that the relief sought in the summons i.e. that the court should order the issues therein to be tried before the trial of the action, should be granted and that a preliminary issue of those matters referred to in the summons be heard before a judge. Whether he realised it or not, the fact of the matter is that the transcript illustrated that his consent was merely to the hearing of the summons on a date fixed by the court.

[33] It is equally clear that I made no determination other than that the summons was to be heard on a date that was fixed. Indeed, it being merely a review, understandably the parties had neither put nor canvassed before me the contents of the summons and affidavit grounding the application under Order 33. My role was manifestly to process the timetable for hearing the summons. It would not have been appropriate for the court to have acceded to a determination of the summons without inviting counsel to address me on the criteria relevant to the hearing of a preliminary issue irrespective of whether or not the parties were consenting to the application. I reiterate that it is important that an application under Order 33 rule 3 is scrutinised by the court to ensure that it is an appropriate case for making such an order. Moreover even had I done so, it would have been necessary to have given directions *as to the manner* in which the question or issue should be stated. Once again the transcript is silent as to any mention of this. All of this serves to underline my firm conviction that no determination was made on the summons itself other than to fix a date suitable to the parties for hearing the matter together with directions as to the provision of skeleton arguments.

[34] Any lingering doubt on this matter is removed by virtue of the heading "Directions" on the court document dealing with the events of that hearing. No order was made. The Directions do not recite that the court was making an order certifying the precise questions to be tried as a preliminary issue or

making any provision for Directions or costs as would be demanded if an Order was being made under Order 33 r 3. The Direction touching upon this matter is but one of 10 Directions given as part of the case management process whereby parties are encouraged to deal with several aspects of the case at one hearing. To hold otherwise would in my view introduce into case management a climate of unhelpful shortcuts or relaxations of rules and orders which would be anathema to the concept of a fair trial and the administration of justice. Case management must not be used as a tool to dilute the effect of statutes and rules of the Court of Judicature.

[35] I fear that there has been a failure at least on the part of the legal representative of the plaintiffs at the review hearing—which persisted throughout the correspondence to which I have adverted -- to understand the two stage process inherent in the summons now before the court i.e. that there is an initial application to have the court determine if there should be a preliminary issue, and thereafter if that is granted, a hearing to determine the preliminary issue itself. It was the former that was processed at the direction hearing and a date fixed for that matter to be determined. No order was made that any issue be tried before the trial or directions given as to the manner in which such question or issue should be stated. I have varied the Directions today for the hearing date of the summons to determine if such order should be made.

[36] I therefore conclude by reiterating that the court on 25 June 2010 did no more than make a direction that a date be fixed for the hearing of the summons. It did not order that the matter set out in the summons should proceed to be determined as preliminary issues in the action. Since the confusion that has arisen in this case was in no small measure contributed to by the plaintiffs' solicitor I make no order for costs on this issue.