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

Delivered: 19/12/2016

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between

CIARAN CUNNINGHAM

Plaintiff/Appellant

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN
IRELAND

Defendant/Respondent

Weatherup LJ, Deeny J and Maguire J

WEATHERUP LJ (delivering the judgment of the court)

[1] This is an appeal by way of a Case Stated by Colton J, dated 31 May 2016 concerning the transfer from the County Court to the High Court of proceedings involving the issue of a Public Interest Immunity Certificate. Mr O'Donoghue QC and Mr Summers appeared for the appellant and Mr McGleenan QC and Mr McGuinness appeared for the respondent.

The claim in the County Court

[2] By Civil Bill issued on 3 January 2013 in the County Court for the Division of Belfast, the appellant claimed against the respondent for damages for unlawful arrest and detention on 22 August 2011. The respondent contends that the appellant was lawfully arrested and detained under section 41 of the Terrorism Act 2000 on the basis of a reasonable suspicion that he was a terrorist. The reasonable suspicion was based upon intelligence information received by police involving the appellant in the carrying out of a 'tiger kidnapping' on 17 and 18 August 2011.

[3] The appellant sought discovery of documents from the respondent. The respondent filed a list of documents which included 14 documents in respect of which the respondent objected to the production of parts of the documents unless they were sealed or covered up, as it was claimed there would otherwise be real danger to the public interest. In the event, 10 of the documents were produced with redactions. The appellant then applied to the County Court Judge for specific discovery of those documents in un-redacted form.

[4] On 4 August 2014 a Public Interest Immunity Certificate was issued by the Parliamentary Under-Secretary of State for Northern Ireland on the basis that the redactions were concerned with intelligence gathering and disclosure would be contrary to the public interest.

[5] His Honour Judge Devlin dismissed the appellant's application for specific discovery on 3 November 2014. He considered, first of all, whether the redacted documents possessed sufficient potential relevance to the issues in the actions, a matter conceded by the respondent ; secondly, whether disclosure was necessary, either for disposing fairly of the proceedings or for saving costs; thirdly, carried out an inspection of the documents in un-redacted form; and finally carried out a balancing exercise.

The appeal to the High Court

[6] The appellant appealed to the High Court and a new issue was raised. Colton J stated the issue in paragraph 1 of his judgment of 11 March 2016 as follows:

"As a matter of law does Order 78 Rule 1A of the Rules of the Court of Judicature preclude a judge of the County Court from having jurisdiction in any case, where one party seeks, in the face of a challenge by another party, to withhold making discovery of a particular document or its contents on the ground of public interest immunity?"

[7] Colton J dismissed the appeal, finding that the County Court does have jurisdiction in cases where a disclosure challenge is based on public interest

immunity. Accordingly, the respondent's public interest immunity claim has been upheld and the appellant's claim remains in the County Court.

The Case Stated to the Court of Appeal

[8] By the Case Stated of 31 May 2016 Colton J stated the following questions on points of law for the opinion of the Court of Appeal -

(a) Whether the County Court has the power to transfer proceedings to the High Court by virtue of Article 49 of the County Courts (Northern Ireland) Order 1980?

(b) Whether Order 78 Rule 1A of the Rules of the Court of Judicature has been made pursuant to the powers in sections 8 and 11 of the Justice and Security Act 2013 solely in order to provide a procedure for section 6 applications and therefore does not apply to an application involving public interest immunity?

(c) Whether Order 78 Rule 1A of the Rules of the Court of Judicature precludes a judge of the County Court from having jurisdiction in any case, where one party seeks, in the face of a challenge by another party, to withhold making discovery of a particular document or its contents on the grounds of public interest immunity?

(d) Whether giving Order 78 Rule 1A a literal interpretation would result in an unreasonable consequence or in an inconvenient, anomalous or illogical consequence?

[9] Counsel relied on the scope of the legislation and of the rule making powers in the legislation as well as the powers to introduce amendments to the Rules of the Court of Judicature. For the reader I must declare that what follows is a review of the legislation and the rules and it could not be regarded as easy going. The aspiration to make judgments readable has been seriously challenged.

The amendment to the Rules

[10] Order 78 Rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980 provides -

“Where in proceedings before a County Court the court considers that there is a real possibility that a party would in the course of the proceedings be required to disclose material the disclosure of which would be

damaging to the interests of national security the court must transfer the proceedings to the High Court.

Public Interest Immunity

[11] There is a well-established procedure for dealing with Public Interest Immunity Certificates. In some proceedings statutory provision has been made for a “closed material procedure” where there may be restricted disclosure of sensitive material and the use of special advocates. In the Supreme Court in Al Rawi and others v The Security Service and others [2011] UKSC 34 the issue was whether a court has power to order a “closed material procedure” on the hearing of a claim for damages. The Supreme Court concluded that the issue of principle raised by the closed material procedure was so fundamental that it should only be introduced in ordinary civil litigation if Parliament so provided.

[12] Lord Dyson stated as follows -

47. ‘Closed material’ procedures and the use of special advocates continue to be controversial. In my view, it is not for the courts to extend such a controversial procedure beyond the boundaries which Parliament has chosen to draw for its use thus far. It is controversial precisely because it involves an invasion of the fundamental common law principles to which I have referred....

.... the best way of producing a fair trial is to ensure that a party has the fullest information of the allegations against him and the evidence (both oral and documentary) that is relied on in support of those allegations. Both our criminal and civil procedures set out to achieve those aims. In some circumstances, however, they run into conflict with other aspects of the public interest.....

48. The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved. It is not surprising that Parliament has seen fit to make provision for a closed material procedure in certain carefully defined situations and has required the making of detailed procedural rules to give effect to the legislation.

49. The PII process is not perfect. Perfection cannot be achieved in any system. It has been improved over time as the history of its development shows. One particular development to note is the use of special advocates *to enhance the PII process*. There can be no objection to the use of special

advocates for that purpose, since the PII process fully respects the principles of open justice and natural justice. There is nothing objectionable about excluding a party from the PII process. There can, therefore, be no objection to improving the position of that party in the process by the use of a special advocate.

The Justice and Security Act 2013

[13] The response from Parliament was the Justice and Security Act 2013 Part II comprising sections 6 to 18. Part II deals, first of all, with the disclosure of sensitive material and introduces a statutory closed material procedure in civil claims. The procedure applies to “relevant civil proceedings”, which are civil proceedings in the High Court, the Court of Appeal or the Supreme Court. That court may make a declaration that a closed material application may be made. When a declaration is made, a party may apply for permission not to disclose material. The court is required to give permission where disclosure would be damaging to the interests of national security. To avail of the closed material procedure in relation to civil proceedings commenced in the County Court it will be necessary to transfer the proceedings to the High Court.

[14] Section 6 provides that “the court seised of relevant civil proceedings” may make a declaration, on application or of its own motion, that a closed material application may be made where the disclosure of sensitive material would be required and it was in the interests of the fair and effective administration of justice in the proceedings to make a declaration. “Sensitive material” means material the disclosure of which would be damaging to the interests of national security.

Section 7 provides for the review and revocation of a declaration made under section 6.

Section 8 provides for the determination by the court of applications in section 6 proceedings in which the court will be required to give permission for material not to be disclosed if it considers that the disclosure would be damaging to the interests of national security.

Section 9 provides for the appointment of a Special Advocate to represent the interests of a party in any section 6 proceedings from which the party is excluded.

Section 10 contains a saving that normal disclosure rules otherwise apply to section 6 proceedings.

Section 11 contains general provisions about section 6 proceedings.

[15] Part II of the 2013 Act deals, secondly, with ‘Norwich Pharmacal and similar jurisdictions’ in sections 17 and 18. This concerns the court’s residual disclosure

jurisdiction. This name arises from Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133. 'Norwich Pharmacal' relates to an Order for disclosure that is required to assist the applicant to take action against a wrongdoer. 'Similar jurisdictions' concern other preliminary legal actions to obtain documents.

[16] Section 17 provides for such disclosure proceedings by way of civil proceedings in which the court may not order the disclosure of sensitive information. "Sensitive information" means information held by, obtained from, held on behalf of, derived in whole or part from or relating to an intelligence service. In addition "sensitive information" means information specified or described in a certificate issued by the Secretary of State that, in the public interest, the information should not be disclosed. For this purpose the "public interest" concerns damage to the interests of national security or of the international relations of the United Kingdom.

Section 18 provides for a review by the court of such a certificate issued by the Secretary of State. The court will conduct the review as to whether or not disclosure of the information would be contrary to the public interest. In so doing the court will apply the principles that would be applied in judicial review proceedings. Such proceedings under section 18 are to be treated as section 6 proceedings.

Under section 18(6), if the court seised of the proceedings in relation to which the certificate has been issued is a County Court, the relevant court for the purposes of a review of the certificate is the High Court.

[17] Hence, Part II of the 2013 Act provides, first of all, a scheme to deal with sensitive material by a closed material procedure. A declaration is made by the High Court (or a higher court) when that court is seised of the proceedings. That court may then give permission for sensitive material not to be disclosed if that is considered to be damaging to the public interest. Secondly, Part II provides for non-disclosure of sensitive information under the courts residual disclosure jurisdiction in civil proceedings, subject to review in the High Court (or a higher court) of any certificate issued by the Secretary of State that disclosure would be contrary to the public interest.

[18] These new arrangements do not replace public interest immunity. Part II of the 2013 Act recognises the continuing presence of public interest immunity. The Secretary of State must consider a public interest immunity claim before the making of a closed material application. Section 6(7) provides as follows -

"The court must not consider an application by the Secretary of State under sub-section (2)(a) [that is, an application for a declaration that the proceedings are proceedings in which a closed material application may be made to the court] unless it is satisfied that the Secretary of State has, before making

the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.”

[19] The common law rules on public interest immunity are preserved. Section 14(2) provides as follows –

“Nothing in sections 6 to 13 and this section (or in any provision made by virtue of them) –

.....

(b) affects the common law rules as to the withholding on grounds of public interest immunity, of any material in any proceedings.”

Rule making powers under the 2013 Act

[20] Part II of the 2013 Act also provides for the making of Rules of Court in relation to the operation of the new provisions.

Section 6(9) provides that Rules of Court may provide for notice to the Secretary of State or a stay of proceedings or the joining of the Secretary of State as a party in relation to any declaration.

Section 6(10) provides that Rules of Court must require notice of intention to apply and of the outcome of any application for a declaration.

Section 7(6) provides that Rules of Court must make provision as to how a formal review is to be conducted and when pre-trial disclosure is considered to have been completed for the purposes of a review.

Section 8(1) and (2) provide for Rules of Court, where a declaration under section 6 has been made, as to an application for permission not to disclose material, except to the court or the special advocate or the Secretary of State.

Section 10 provides that Rules of Court relating to section 6 proceedings must otherwise include a saving for normal disclosure rules.

Section 11(1) and (2) make further provision for Rules of Court relating to section 6 proceedings.

Section 18(4) and (5) provide that, in relation to Norwich Pharmacal and similar jurisdictions, proceedings for review of a Secretary of State’s certificate shall be treated as section 6 proceedings for the purposes of sections 8 to 14.

[21] As Counsel for the respondent sought to emphasise, these rule making powers are directed at the two schemes introduced in Part II of the 2013 Act.

The Lord Chancellor's power to amend the Rules

[22] The amendment to Order 78 Rule 1A of the Rules of the Court of Judicature was introduced by the Rules of the Court of Judicature (Northern Ireland) Amendment 2013 (SI 2013 No: 175). The introductory text states -

“The Lord Chancellor makes the following rules in exercise of the power conferred by paragraph 3(6)(a) of Schedule 3 of the Justice and Security Act 2013 (“the 2013 Act”) to make rules under Section 55 and 55A of the Judicature (Northern Ireland) Act 1978 and Sections 6 (9) and (10), 7(6), 8, 10, 11 and 18(4) and (5) of the 2013 Act.”

[23] Thus the powers exercised by the Lord Chancellor to amend the Rules arose under the 2013 Act and the 1978 Act. Schedule 3, paragraph 3, of the 2013 Act provides -

“(1) The first time after the passing of this Act that rules of court are made in exercise of the powers conferred by sections 6 to 14 in relation to proceedings in England and Wales or in Northern Ireland before a court of a particular description, the rules (together with any related rules of court) may be made by the Lord Chancellor instead of by the person who would otherwise make them.

...

(6) Rules of court made by the Lord Chancellor under sub-paragraph (1)–

(a) must be laid before Parliament, and

(b) if not approved by a resolution of each House before the end of 40 days beginning with the day on which they were made, cease to have effect at the end of that period.”

[24] The general power to make Rules of Court is set out in Sections 55 and 55A of the Judicature (Northern Ireland) Act 1978. Section 55 includes -

“(1) Subject to any statutory provision, rules may be made in accordance with Section 55A with respect to –

....

(d) the transfer of proceedings to or from any such court, division, judge, officer or person as mentioned in [paragraph (a), being a reference to the High Court and the Court of Appeal.]”

[25] Section 55A provides for the making of Rules of Court by the Rules Committee submitting rules to the Lord Chancellor who must allow or disallow such rules submitted to him and provide written reasons where rules are disallowed. The Lord Chancellor may give the Rules Committee written notice if he thinks it expedient for rules to include provision that would achieve a purpose specified in the notice. The Rules Committee must make any such rules it considers necessary to achieve the specified purpose and must do so within a reasonable period and in accordance with section 55A.

[26] The amendment was introduced by the Lord Chancellor on 26 June 2013 by amending Order 78 which deals with “Remittal and removal of proceedings”. By section 31(1) of the Judicature (NI) Act 1978 the power lies in the High Court in accordance with Rules of Court to remit proceedings to a County Court. By section 31(5) the power lies in the High Court in accordance with Rules of Court to remove to the High Court any proceedings in the County Court that might be more appropriately heard and determined in the High Court.

[27] Counsel sought to rely on the explanatory notes to the amendment which state that Order 78 Rule 1A was made by the Lord Chancellor for the purpose of implementing Part II of the 2013 Act.

The appellant’s interpretation

[28] The appellant contends that the effect of Order 78 Rule 1A is that where any proceedings in the County Court involve a real possibility that a party would be required to disclose material that would be damaging to the interests of national security, the proceeding must be transferred to the High Court. This is said to apply to all proceedings where public interest immunity is raised and the “real possibility” arises when a party raises a public interest claim to resist disclosure. While Part II of the 2013 Act and the rules made thereunder may all concern the closed material procedure or the courts residual disclosure jurisdiction, the wording of Order 78 Rule 1A nevertheless applies to any proceedings where there is a real possibility of disclosure damaging to national security. Hence, according to the appellant, Judge Devlin did not have jurisdiction to determine the issue of disclosure in the present

case when the public interest immunity claim was raised, as the proceedings should have been transferred to the High Court.

The respondent's interpretation

[29] On the other hand, the respondent contends that Order 78 Rule 1A has effect in relation to proposed closed material applications and Norwich Pharmacal and similar jurisdictions treated as closed material applications. It is said that the amendment provides the mechanism for the transfer of the proceedings from the County Court to the High Court. Public interest immunity claims remain in the County Court until the "real possibility" test is satisfied and the proceedings transfer to the High Court to facilitate the operation of Part II of the 2013 Act in the High Court. It would, according to the respondent, be an absurd and unintended consequence if the introduction of the new procedures had the effect of removing the jurisdiction of the County Court to deal with public interest immunity claims. Thus, according to the respondent, Judge Devlin had jurisdiction to deal with the issue of public interest immunity.

The Court's interpretation of Order 78 Rule 1A.

[30] Order 78 Rule 1A concerns County Court proceedings where the court considers there is a real possibility of disclosure that would be damaging to national security. The court must transfer the proceedings to the High Court. The threshold is the "real possibility" of disclosure. The threshold is not the raising of a claim of public interest by a party with control of the documents nor is it the rejection by the court of the public interest claim. It is an intermediate stage of "real possibility" of disclosure. That requires an assessment of the claim for disclosure and the claim for public interest and the prospects for success or rejection of the competing claims. The "real possibility" of disclosure may not be immediately apparent but may emerge as the application for the disclosure of the documents progresses. The court hearing the application may never consider that disclosure is a "real possibility". In that event the public interest claim will prevail, the application will be dismissed and there will be no disclosure. The County Court will proceed to hear the claim in the absence of the documents. On the other hand, there may come the point at which the court considers that disclosure is a "real possibility" and the court must transfer the proceedings. In that event the court will not reach a decision on disclosure but will transfer the proceedings. The prospect of the closed material procedure will come into play.

[31] Part II of the 2013 Act is concerned with the closed material procedure and Norwich Pharmacal and related jurisdictions. The rule making provisions in the 2013 Act are concerned with the operation of those new provisions. Order 78 Rule 1A is concerned with the related issue of the transfer of County Court proceedings. The new provisions do not remove public interest immunity claims from the County

Court. The amendment to the Rules provides for the transfer of proceedings to the High Court when the threshold of the “real possibility” of disclosure has been reached.

[32] A claim for public interest immunity is not a pre-condition of a section 6 application. What is required is that the Secretary of State, before making the application for a declaration, has considered whether to make or advise another person to make, a claim for public interest immunity.

[33] In the present case Judge Devlin had jurisdiction to assess the claim for public interest immunity. Had there been a point at which he considered that there was a real possibility of disclosure of material that would be damaging to national security the proceedings should have transferred to the High Court. In the event, he dismissed the application for disclosure of the unredacted documents. There was then no need for a closed material procedure. The claim could proceed in the County Court without disclosure of the unredacted documents.

[34] Where, in County Court civil proceedings, a defendant considers that a closed material procedure should be sought, the proceedings have to transfer to the High Court for the two stage procedure to be undertaken. The defendant may make an application to the Master under section 31 of the Judicature Act (Northern Ireland) 1978 for removal of the proceedings to the High Court. If the Master is satisfied on the evidence provided that there is a real possibility that the party would in the course of the proceedings be required to disclose material, the disclosure of which would be damaging to the interests of national security, the Master will transfer the proceedings to the High Court - see Logan v Chief Constable of the PSNI [2015] NI Master 3.

[35] The Logan route is not this case. The defendant has not indicated any intention to seek a closed material procedure and therefore has not sought removal to the High Court. Rather, the defendant has sought to rely on a claim for public interest immunity and, as we have found above, is entitled to follow that route in the County Court until the “real possibility” threshold is reached.

The power to transfer to the High Court

[36] We have noted above that the High Court has power to transfer the County Court proceedings to the High Court. The further issue arises as to whether the County Court has power to transfer the proceedings to the High Court once the “real possibility” threshold is reached.

[37] Under Order 78 Rule 1A “the court” must transfer the proceedings to the High Court once it considers there to be a “real possibility” of disclosure. It is tolerably clear that “the court” is the County Court. Certainly the County Court seised of the proceedings should be well placed to determine if there is a “real

possibility” where the issue of disclosure has been raised in the proceedings. On a more technical level, the use in the Rules of the words “the Court” with a capital “C” means the High Court (Order 1 Rule 3(2) of the Rules) and those words are not used in the amendment. It may be said that the Rules of the Court of Judicature are not the place to find a power granted to a Judge of the County Court. However, that depends on the terms of the Rule and the terms of the power to make the Rule.

[38] As to the terms of the Rule, we are satisfied, as stated above, that “the court” is the County Court. As to the terms of the power to make the Rule, that power arises under section 55(1)(d) of the Judicature (NI) Act 1978 where rules may be made with respect to the transfer of proceedings to the High Court. The rule making provision does not restrict to the High Court the power to transfer to the High Court. The amendment to Order 78 was made *inter alia* under section 55.

[39] The County Court (Northern Ireland) Order 1980 also sets out the powers of the County Court Judge. Certain provisions were canvassed as also providing the County Court with power to order the transfer of proceedings to the High Court. If it were necessary to look beyond section 55(1)(d) of the 1978 Act and Order 78 Rule 1A for a power in the County Court to transfer proceedings to the High Court, that power may also arise under Article 34 of the 1980 Order.

[40] Article 34 provides for the County Court to have the powers of the High Court. A County Court, in relation to any proceedings within its jurisdiction, shall have the like powers as the High Court and in particular (but without prejudice to the generality of the foregoing words of the paragraph) may grant such remedies and give effect to such defence or counterclaim, as the High Court.

[41] The respondent contends that the jurisdiction to entertain an application to remove proceedings from the County Court is founded in the High Court and not in the County Court and therefore Article 34 does not apply in the present case, as the power of removal is not within its jurisdiction. However, the present civil proceedings for damages issued in the County Court by the appellant against the respondent are proceedings within the jurisdiction of the County Court, the first requirement of Article 34. The High Court has power to remove to the High Court such proceedings in the County Court as might be more appropriately heard and determined in the High Court. Thus it might be said that by virtue of Article 34 the County Court has like powers to remove the proceedings to the High Court, although we do not consider it necessary to so find.

[42] Article 49 provides that, in any case not expressly provided for by or under the 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. Colton J, at paragraph 22, concluded that the County Court Judge could transfer proceedings to the High Court under Article 49. We are not so satisfied. This provision relates to matters of “practice and procedure”. A distinction has to be drawn between ‘the mode of proceeding by

which a legal right is enforced' and 'the law which gives or defines the right'. A distinction must also be drawn between the court's jurisdiction, which is a matter of substantive law, and rules which regulate the manner in which the court will exercise that jurisdiction. See the discussion by Lord Goff in McKerr v Armagh Coroner [1990] 1 All ER 865, at 870e to 871b. The jurisdiction to transfer proceedings to the High Court is a matter of substantive law and not a matter of practice and procedure.

[43] Further, in Thompson's Application [2002] NIJB 236 Kerr J stated that Article 49 was intended to supply an answer where there had been an omission in the County Court practice and procedure and it was not intended to confer a jurisdiction where none previously existed. If there is not otherwise the jurisdiction in the County Court to transfer proceedings to the High Court, that jurisdiction would not be found in Article 49.

[44] Article 24 is not of assistance. Article 24 provides for the transfer of civil proceedings commenced in the County Court. If it appears that by reason of any statutory provision the proceedings are not within the jurisdiction of the County Court and ought to have been commenced in the High Court, then on an application of any party or of his own motion the County Court Judge may so certify to the Master (Queen's Bench and Appeals). The power of transfer lies in the High Court.

The questions of law

[45] In answer to the questions in the Case Stated -

(a) Whether the County Court has the power to transfer proceedings to the High Court by virtue of Article 49 of the County Courts (Northern Ireland) Order 1980 -

No, but such power exists by virtue of section 55(1)(d) of the Judicature Act (NI) 1978 and Order 78 Rule 1A.

(b) Whether Order 78 Rule 1A of the Rules of the Court of Judicature has been made pursuant to the powers in sections 8 and 11 of the Justice and Security Act 2013 in order solely to provide a procedure for section 6 applications and therefore does not apply to an application involving public interest immunity -

No, Order 78 Rule 1A also applies where an application has been made for public interest immunity and requires the transfer of the proceedings to the High Court when there is a real possibility of disclosure of sensitive material.

(c) Whether Order 78 Rule 1A of the Rules of the Court of Judicature precludes a judge of the County Court from having jurisdiction in any case, where one party seeks, in the face of a challenge by another party, to withhold making discovery of a particular document or its contents on the grounds of public interest immunity -

No, a Judge of the County Court has jurisdiction to conduct civil proceedings involving a claim for public interest immunity until required to transfer the proceedings to the High Court when there is a real possibility of the disclosure of sensitive material.

(d) Whether giving Order 78 Rule 1A a literal interpretation would result in an unreasonable consequence or in an inconvenient, anomalous or illogical consequence -

No, if a literal interpretation accords with that outlined above, it would not result in an unreasonable consequence or in an inconvenient, anomalous or illogical consequence.