Neutral Citation No: [2016] NIQB 25 | *Ref:* COL9912

Judgment: approved by the Court for handing down | *Delivered:* 11/3/2016
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

APPEAL FROM THE COUNTY COURT JUDGE FOR THE DIVISION OF BELFAST

_____

CIARAN CUNNINGHAM

(Plaintiff/Appellant);

-v-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

(Defendant/Respondent).

_____

COLTON J

[1] The issue in this case is easily stated but less easily resolved. 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?

[2] The background to this case is that the plaintiff brought a civil claim in the County Court seeking damages for the alleged unlawful arrest, assault, battery, trespass to the person, unlawful detention, trespass to goods and unlawful retention of goods of the plaintiff by servants and agents of the defendant on or about 22 August 2011. In the course of the hearing the defendant objected to the production of certain documents on the grounds of public interest immunity. The County Court Judge upheld the objection, upholding the PII claim. That decision is the subject matter of an appeal. Subsequent to the decision the plaintiff has raised the issue relating to Order 78 Rule 1A and argues that as a matter of law the County Court Judge did not have jurisdiction to hear and determine the matter. It is this

issue which is the subject matter of this judgment. This issue was not raised in the County Court and I understand that there are a number of similar applications raised in the County Court awaiting the outcome of this judgment.

[3] I am obliged to all counsel in this case namely Messrs Frank O'Donoghue QC and Christopher Summers BL for the plaintiff/appellant and Dr Tony McGleenan QC and Mr Andrew McGuinness BL for the defendant/respondent for their helpful, clear and concise written and oral submissions.

[4] 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.*"

[5] The amendment to Order 78 of the Rules of the Court of Judicature was introduced by means of the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2013. The introductory text to the Rules provides that:

> "*The Lord Chancellor makes the following rules in exercise of the power conferred by paragraph 3(6)(a) of the 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 Section 6(9) and (10), 7(6), 8, 10, 11 and 18(4) and (5) of the 2013 Act.*"

[6] The amendment was introduced in the Rules made by the Lord Chancellor on 22 June 2013. Provision was made for identical rules for England and Wales on the said date – the Civil Procedure (Amendment No. 5) Rules 2013 – also by the Lord Chancellor.

[7] The plaintiff/appellant says that the meaning of Order 78 Rule 1A is clear and unambiguous. When, as in this case, a party makes a PII application in respect of material before a County Court then "there is a real possibility that a party would … be required to disclose material the disclosure of which would be damaging to the interests of national security." In the circumstances the court must transfer the proceedings to the High Court.

[8] Mr O'Donoghue argues that no evaluation process is involved on behalf of the County Court Judge. As soon as the plaintiff in this case challenged the right of the defendant not to disclose material on the basis that the disclosure would be damaging to the interests of national security then the real possibility test is met. In

making an assessment of the material the real possibility of requiring disclosure arises. At that point there is a mandatory obligation to "transfer the proceedings to the High Court". The prima facie "golden rule" of interpretation is that words have their ordinary meaning.

[9] In his submissions Dr McGleenan on behalf of the respondent accepted that when reading the text "in the abstract" it would preclude a County Court Judge from determining a PII application. As I understand it he modified this submission somewhat in the course of the hearing when he argued that before a real possibility existed under the rule a County Court Judge was required to carry out an exercise in evaluating the material. He argued that it was only at that stage that the obligation under the rule could arise. He argues that it is only when a County Court Judge rules against a PII certification that the rule comes into play. Thus in this particular case the County Court Judge upheld the PIIs certificate and therefore no question of transferring the proceedings arises under Order 78.

[10] On this point I am against the respondent. I agree with Mr O'Donoghue's submission and it seems to me that once the issue of PII is raised on the basis of damage to the interests of national security then there is a real possibility that a party would in the course of the proceedings be required to disclose the material. The very exercise of making that evaluation and judgment must raise the real possibility that it will be disclosed on the inevitable presumption that the matter will be considered properly and conscientiously by the County Court Judge.

[11] The main thrust of Mr McGleenan's argument however is that the procedure governed by Order 78 Rule 1A has nothing to do with the assertion of public interest immunity claims. Insofar as the wording indicates otherwise then the courts should give a purposive interpretation to the rule. In this regard as in most areas of law context is everything.

[12] In terms of the enabling legislation where amendments are made to Rules of the Court of Judicature in Northern Ireland this is done pursuant to the powers in Section 55 and 55A of the Judicature (Northern Ireland) 1978. In the course of the hearing Mr McGleenan indicated that in all of the 14 statutory instruments enacting amendments to the Rules since 2010 Section 55 and 55A were invoked. Eleven of those instruments were made solely pursuant to those sections.

[13] The remaining three statutory instruments were made on a dual basis pursuant to Sections 55 and 55A in conjunction with another enabling statutory provision. Sections 55 and 55A provide general powers in relation to amending the Rules of the Court of Judicature. As indicated earlier in this particular case the rules were made pursuant to both Sections 55 and 55A and the Justice and Security Act 2013. The clear reference to the Justice and Security Act 2013 as one of the enabling powers for this rule is clearly significant.

[14] A key purpose of the 2013 Act was to introduce a **closed material procedure** in relation to the disclosure of sensitive material. The drivers behind the introduction of such a procedure included the Supreme Court decision in the case of *Al-Rawi v Security Service [2011] UKSC 34* and the view that the operation of PII could lead to inequitable settlements when compensation was paid in unmeritorious claims because the defendants could not rely on material which could provide a defence to such claims. One of the main purposes of the 2013 Act was to put a closed material procedure on a statutory basis. Section 6 provided a statutory basis for closed material procedures in relevant civil proceedings. The statute provided for the making of rules of court relating to Section 6 proceedings.

[15] In relation to Section 6 it is noteworthy that sub-paragraph (7) provides:

> *"The court must not consider an application by the Secretary of State under sub-section (2)(a) 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."*

[16] Thus the closed material procedure is clearly separate to and different from a public interest immunity claim.

[17] It is clear that Order 78 has been made pursuant to the powers provided in Sections 8 and 11 of the 2013 Act with a view to providing a procedure for Section 6 applications and the amendment to Order 78 has been made in that context.

[18] I have not set out the details of Section 8 and Section 11 as all the parties agree that the purpose and intention of the amendment to the Rules was to implement the 2013 Act and in particular Section 6 thereof.

[19] Whilst Mr O'Donoghue accepts that this is the case he argues that the effect of the amendment is to bring PII applications within the rule. There is nothing in the rule which curtails its application to Section 6 proceedings alone. Clearly the rule does fulfil its purpose but in fact it goes further. It may well be that this was an unintended consequence but if that is so then "so be it". There is nothing perverse or absurd about such a consequence and the words should be given their clear and unambiguous meaning.

[20] This rule was considered by the Master in the case of *Roddy Logan v Chief Constable of the PSNI* [2015] NI Master 3. In that case the defendant sought to transfer proceedings from the County Court to the High Court as he intended to seek a declaration under Section 6(2) of the Justice and Security Act 2013. Thus in *Logan* the Master was clearly dealing with an application for transfer to enable a closed material declaration application to be made pursuant to Section 6 of the

Justice and Security Act 2013 and was not dealing with a PII application as in this case.

[21] Dr McGleenan argues that the intention of the rule is clear and should be confined to Section 6 applications. He argues for a purposive interpretation of the rule. He says that the plaintiff's contention is unsustainable and would result in an absurd consequence.

[22] One of the difficulties that arises in relation to this matter is the fact that a draft appropriate for the jurisdiction in England and Wales has been directly imported into the Northern Ireland jurisdiction. In England and Wales all civil claims commence in the County Court and are only transferred to the High Court when certain criteria are met. The equivalent rule in England and Wales is Rule 30.3 of the Civil Procedure Rules which is in the context of transferring cases from the County Court to the High Court. In our jurisdiction the rule appears in that section which deals with the removal and remittal of proceedings. Notwithstanding this the use of the word transfer remains in our rule. This leads to the complication that the obligation to "transfer" the proceedings is on "the Court". However the matter can be overcome by the application of Article 49 of the County Courts (Northern Ireland) Order 1980 which provides that "… In any case not expressly provided for by or under this Order the practice and procedure of the High Court in like matters shall be followed by a County Court with such modifications as the judge may in any particular case permit or direct." Thus the County Court Judge could "transfer" the proceeding to the High Court under this provision. Alternatively, as was the case in *Logan*, the person seeking the Section 6 procedure can initiate the application by way of summons.

[23] It is perhaps regrettable that the rule was not specifically modified to reflect the architecture in this jurisdiction and that in both jurisdictions it did not expressly indicate that the rule related solely to Section 6 applications which would have avoided any of the issues which have arisen in this case.

[24] In terms of a "purposive interpretation" the consideration of the purpose of an enactment is a legitimate part of the process of interpretation.

[25] In this particular case the purpose is clear, namely to provide rules for a procedure for a closed material hearing in accordance with Section 6 of the Justice and Security Act 2013. This is self-evident from the enabling legislation referred to in the pre-amble to the rule, from the language of the rules itself which adopts the identical wording of the 2013 Act – namely "… be required to disclose material the disclosure of which would be damaging to the interests of national security" and is supported by the explanatory notes to the rules which provide:

> "These rules amend the Rules of the Court of Judicature (Northern Ireland) 1980 ('the Principal

> Rules') for the purpose of implementing Part II of the Justice and Security Act 2013 … by –
>
> Amending Order 78 to provide for transfer to the High Court of Proceedings in the County Court in which sensitive material is an issue."

In this regard I bear in mind that one should be cautious in using the explanatory notes as an aid to interpretation but clearly they help identify a mischief which the rules seek to remedy namely the introduction of closed material procedures.

[26] There is no real dispute in this case that the rules achieve their purpose. The real issue relates to the consequences of the rule when given its literal interpretation, which in this case would prohibit a County Court Judge from hearing and determining a PII application.

[27] In effect what the defendant argues for in this case is that the court should seek to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. In Bennion on Statutory Interpretation, 6th Edition Part XXI the author states that:

> "The courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter mischief."

The author goes on to state that:

> "In their dicta on statutory interpretation, the courts by tradition give 'absurd' a far wider import than it has in modern English (where it simply means foolish, ridiculous or silly). Judges keep to the older meaning. The Oxford English Dictionary puts this as; 'out of harmony with reason or propriety; incongruous, unreasonable, illogical'."

[28] This finds echo in the House of Lords decision in the case of *R (On the Application of Edison First Power Limited) v Central Valuation Officer and Another* [2003] UKHL 20. In particular Mr McGleenan referred me to paragraph [25] of the judgment of Lord Hoffman where he was considering the construction of a Finance Act. He states as follows:

> "My Lords, the presumption against double taxation is one facet of a wider common sense principle of the construction of statutes by which courts will often

> imply qualifications into the literal meaning of wide and general words in order to prevent them from having some unreasonable consequence which it is considered that Parliament could not have intended ….. The strength of the presumption depends upon the degree to which the consequences are unreasonable, the general scheme of the legislation and the background against which it was enacted." (My underling)

[29] I have come to the conclusion that Order 78 Rule 1A should be interpreted so that its application should be confined to closed material procedure applications under the 2013 Act. I consider that it does not prohibit or preclude a County Court Judge from hearing and determining a PII application.

[30] I have come to this conclusion having regard to the general scheme of the legislation and the background against which it was enacted which has been set out in this judgment. In addition I note that Section 14 of the 2013 Act which deals with issues of interpretation provides:

> "(2) Nothing in Sections 6 or 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."

This in conjunction with Section 6(7) to which I have already referred points towards an intention against making any changes in relation to how PII applications are dealt with.

[31] Furthermore I have come to the view that the interpretation contended for by the plaintiff would result in an unreasonable consequence as envisaged in the *Edison* case. Alternatively it would result in an inconvenient, anomalous or ill-logical consequence in the context of the presumption against an absurd result.

[32] It would be inconvenient in terms of the administration of justice having regard to the fact that PII claims are raised regularly in low value claims in the County Court. If all such applications were transferred to the High Court this would have the potential of a disproportionate interference with the administration of justice.

[33] More importantly however the distinction between PII and a statutory closed material procedure is fundamental. PII is a common law immunity potentially available in any tribunal that precludes the disclosure of sensitive information. In my view it would be absurd if a County Court Judge could not hear a PII claim and yet other judicial tiers such as Magistrates' Courts, Coroners' Courts, Tribunal hearings or Parole Commissioner hearings could continue to do so.

[34] Accordingly I dismiss the plaintiff's appeal.