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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION

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BETWEEN:

JOHN FLYNN

Plaintiff/Respondent;

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant/Appellant

_____

Before: Gillen LJ, Weir LJ and Keegan J

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KEEGAN J (delivering the judgment of the court)

Introduction

[1] This is an appeal with leave from Colton J of an interlocutory order in relation to discovery in on-going civil proceedings. Colton J delivered a ruling on 13 March 2016 in which he ordered that certain discovery should be provided. He then made an order on 16 June 2016 whereby he ruled that 13 classes of discovery should be provided within 6 weeks. It is that order which is appealed. Mr Hanna QC appeared with Mr Joseph Mc Evoy BL on behalf of the appellant (also referred to as the defendant herein). Mr Brian Fee QC appeared with Mr Donal Flanagan BL on behalf of the respondent (also referred to as the plaintiff herein). We are grateful to all counsel for their written and oral submissions.

Factual background

[2] The plaintiff is a 57 year old man without any criminal history. He alleges that in or about 12 March 1992, he was assaulted by a person now known as Informant 1, a servant or agent of the defendant, and that he suffered personal injury, loss and damage as a result. On that occasion the plaintiff alleges that Informant 1 pointed a gun at him and tried to murder him. The gun failed to discharge but Informant 1 attacked the plaintiff physically before running off. The second incident occurred on 6 May 1997, when it is alleged that an improvised explosive device was placed under the car of the plaintiff by Informant 1 or persons acting on his behalf. The device failed to explode but again the plaintiff claims for personal injury, loss and damage as a result of this episode.

[3] In relation to both of these incidents, the plaintiff claims against the defendant because he asserts that Informant 1 was a Covert Human Intelligence Source ("CHIS") acting as a servant or agent of the defendant. The plaintiff's claims are based upon the torts of negligence, assault, battery and trespass to the person, conspiracy to commit trespass, conspiracy to injure and misfeasance in public office.

[4] The plaintiff brought his claim after publication of the Ballast Report by the Police Ombudsman in January 1997. That Report dealt with police handling and management of identified informants from the early 1990s onwards. It included reference to Informant 1 and linked him and his associates to the two incidents described by the plaintiff.

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

[6] The plaintiff issued a writ on 3 March 2008. His Statement of Claim is dated 24 November 2011. A defence was served on 17 January 2012. Liability was denied. An amended defence was served on 17 November 2014. In this amended defence, the defendant admitted that the person described by the cipher, Informant 1, was at all material times a CHIS providing information to the defendant. The defendant further admitted misfeasance in public office, including each of the individual particulars of the misfeasance alleged by the plaintiff. It is clear from this that the defendant also accepted its liability to pay both compensatory and exemplary

damages to the plaintiff. Subsequently, the defendant further amended the defence on 28 October 2015 to specifically deny that Informant 1 was ever an employee of the defendant. The previous admission was therefore clarified and qualified in this respect.

Discovery

[7] The issue of discovery in this case has a rather long and tortuous history which we summarise as follows. The defendant did not provide a list of documents or any discovery at the close of pleadings. After correspondence was exchanged on this issue, a summons was issued by the plaintiff dated 13 February 2012, pursuant to Order 24, rule 3 of The Rules of the Court of Judicature (Northern Ireland) 1980 ('the Rules'). On 2 March 2012, the Master made an order providing for a list to be provided within 12 weeks. It appears that there was no compliance with this and so an application was made to strike out the defence pursuant to Order 24, rule 19. Then there was an order of the Master of 21 June 2013. That was an 'unless order', allowing 21 days for provision of the list. It is common case that subsequent to this order some latitude was allowed for the discovery to be dealt with. On 11 November 2014 an application was made to amend the defence and a list was filed. However, that list did not refer to any new discoverable documents. On 15 March 2015, there was a hearing before the Master in relation to this issue. Pursuant to that hearing there was an order made in favour of the plaintiff which required the plaintiff to identify specific documents that could then be disclosed. The plaintiff did this by letter of 25 March 2015. In that letter, 94 categories of discoverable documentation were identified. The appellant appealed this order and on 17 June 2015, Stephens J made an order that a formal application for specific discovery should issue.

[8] A summons was issued on 3 August 2015. This sought specific discovery. This summons was heard as a contested matter before Colton J on 29 January 2016. In his judgment, Colton J ordered that discovery of 13 categories of documents should take place. Subsequent to this order the court was informed that 5 documents had been identified. During the course of this hearing we were informed that 4 of these documents were only provided during the preceding week.

Legal context

[9] Order 24, rule 7 of the Rules reads as follows:

> "7. – (1) Subject to rule 9, the Court may at any time, on the application of an party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or a class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then is his possession, custody or power when he parted with it and what has become of it.

> (2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavits under rule 2 or rule 3.
>
> (3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified in described in the application and that it relates to one or more of the matters in question in the cause or matter."

Then Order 24, rule 9 states:

> "9. On the hearing of an application for an order under rule 3, 7 or 8 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

[10] In this application it is necessary for the respondent, pursuant to Order 24, rule 7 to establish;

(i) that there is sufficient evidence that the documents sought exist;

(ii) that the documents relate to matters in question;

(iii) that there is sufficient evidence the documents were in the power, custody or possession of the defendant.

[11] Both parties have cited the relevant test for discovery as set out by Brett LJ in Compagne Financiere du Pacifique v Peruvian Guano Company [1882] 11 QBD 55 at paragraph 62 to 63 which reads as follows:

> "… any document, which it is reasonable to suppose, contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences, must be disclosed."

[12] The authority of Taylor v Anderton [1995] 2 ALL ER 420 further states that relevance is framed in the widest possible terms. In this case the subject matter of the proceedings must be borne in mind as this is a case involving allegations of misfeasance on the part of the State and collusion. This engages the European Convention on Human Rights, in particular Article 2. This is significant because

where Article 2 is engaged there is an obligation imposed on the State to act with exemplary diligence and promptness.

The reasoning of the learned judge.

[13] Colton J in his judgment summarised the issues remaining between the parties at paragraph 25 as follows:

> "(a) Was 'Informant 1' acting as a servant or agent of the defendant in relation to the attacks on the plaintiff and in particular is the defendant vicariously liable for the assaults committed by Informant 1 or on his behalf on the plaintiff?
>
> (b) Is the defendant liable in negligence to the plaintiff?
>
> (c) Did the defendant conspire to assault and injure the plaintiff?
>
> (d) What was the extent of the misfeasance in public office committed by the defendant its servants and agents? In particular is it limited to the "untargeted malice" which has been admitted?
>
> (e) What is the measure of compensatory damages to which the plaintiff is entitled?
>
> (f) What is the measure of exemplary damages to which the plaintiff is entitled?"

[14] The judge decided that in relation to category (e) there was no discoverable documentation in the possession, custody or power of the defendant relevant to that issue. However, he decided that there was material in relation to the other issues. At paragraph 27 of his judgment, he states that the documentation is relevant to establishing the following type of factual matters which may arise in this case-

- How often did Informant 1 meet or talk with police officers?
- How much was he paid and when?
- What did police officers know about the extent of his activities?
- Did the police officers know the plaintiff was or remained a target?
- What steps did police officers take to protect Informant 1 from being either apprehended or prosecuted?
- What was the degree of control exercised over Informant 1?
- Did police officers approve or instigate any of Informant 1's activities and in particular the assaults on the plaintiff?

[15] The learned judge decided that the answer to questions such as these would determine whether or not the defendant is responsible for the torts alleged and also the extent of any misfeasance in public office. The learned judge considered that

there must be material relevant to the issues that he had identified. Further at paragraph 41 the learned judge said:

> "In a case such as this given the grave allegations that have been made against the agents of the state, resources arguments are unattractive."

[16] The judge also referred to the discovery history and at paragraph 44 he made a clear statement about the apparent lack of any attempt to address the issue expeditiously. In particular, he referenced the fact that no attempts had been made by the defendant to contact the Ombudsman's Office given that information would have been collected by it for the Ballast Report. Finally, the judge accepted that any process would take some time and that it would involve issues of public interest immunity.

Arguments made by the parties.

[17] Mr Hanna, on behalf of the appellant, made two core arguments against the provision of discovery. Firstly, he argued that discovery was not relevant or necessary in the context of the admissions made. Secondly, he contended that discovery of this nature was disproportionate. Mr Hanna drew in aid the case of Gould v National Provincial Bank Limited [1960] 1 Ch 337. He said that this case was authority for the proposition that if there is no issue between the parties, for example, where matters are admitted, discovery is not required. He also referred to Molnlycke AB and another v Proctor & Gamble Ltd & Anor [1990] RPC 498 and again he drew support from this case for the proposition that if the benefit is small, discovery may not be appropriate.

[18] Mr Hanna took us to the admissions made. He stressed that it was only whether the informant was employed that was at issue. He reiterated the fact that misfeasance in public office was admitted. He contended that negligence adds nothing and in any event he argued that there was a legal impediment in relation to that tort flowing from the House of Lords decision in Smith v Chief Constable Sussex Police [2009] 1 AC 225. Mr Hanna said that the issue really was the measurement of exemplary damages and that could be assessed without recourse to discovery. He referred to two cases which are relevant in this area, namely Thompson v Commissioner of Police for Metropolis [1998] QB 498 and Muuse v Secretary of State for Home Department [2010] EWCA Civ. 453. Mr Hanna referred to the monetary bracket set out in those cases in relation to damages and argued that the law was clear.

[19] Mr Hanna then referred to the second limb of the appellant's argument that it is disproportionate to order discovery. In making this case Mr Hanna referred to 3 affidavits which have been filed in this regard, namely the affidavit of Assistant Chief Constable William Kerr dated 5 November 2015, the affidavit of Superintendent Wendy Middleton of 5 November 2015 and the affidavit of Superintendent Zulema Rossborough of 18 January 2017. Drawing on these affidavits, he said that it

would take years for the Chief Constable to complete the discovery task. He submitted that the process would be extremely expensive and that it would involve allocating resources from other areas. Upon questioning by the court as to why the Ballast documents could not simply be provided, Mr Hanna said that the person concerned in assembling them had retired. He also confirmed that nothing had been done to contact the Ombudsman's Office in relation to this issue notwithstanding the signposting of this by the judge as an efficient route to identify discoverable documents. Upon further questioning by the court, Mr Hanna helpfully analysed the 13 categories ordered by Colton J. During this discussion he made certain concessions that some of the discovery was not really objectionable if ordered by the court.

[20] We now turn to the arguments made by Mr Fee on behalf of the respondent. At the outset, Mr Fee referred to the importance of context. He said this case involved very grave allegations. He referred to the conduct of the appellant during the discovery process. He said that the respondent had narrowed the application for discovery from the broader request which had encompassed an information search against all agents and victims. He said that, in a nutshell, the detail of discovery was needed to assess the nature and extent of the misfeasance. He said that this was particularly important because no detailed statement of the misfeasance had been provided by the appellant.

[21] Mr Fee characterised this case as one of benefit versus burden. He referred to the fact that the Ballast Report was based upon papers which must have been made available by the appellant. He also said that there was no explanation given as to how the 5 documents now identified had come to light. Mr Fee referred to the outcome of the Ballast Report in terms of the outrageous conduct it exposed. He referred to the fact that issues were identified such as the the destroying of records, the failure to arrest informants and sham interviews. Mr Fee accepted that there would be delay in this discovery process but he made the point that this plaintiff is simply not going to give up. Mr Fee asked the court to affirm the order of Colton J, save one ruling where Colton J had said that the discovery was not needed for the assessment of compensatory damages.

Consideration

[22] This is an appeal from an interlocutory order. As such a considerable discretion is placed with the trial judge. We note the recent dicta in DB (Appellant) v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7 at paragraph 80 wherein Lord Kerr states as follows:

> "[80] On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in Anderson that the first-instance trial should be seen as the "main event" rather than a "tryout on the road" has resonance even for a case which does not involve oral testimony. A first-instance judgment provides a

> template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she had reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent. In the present appeal, I consider that the Court of Appeal should have evinced a greater reluctance in reversing the judge's findings that they appear to have done."

[23] It follows from this that caution should be exercised when the application is to upset an order of the lower court, even where no oral evidence has been heard. We are particularly guided by the fact that the learned judge applied a considerable attention to the issues in this case demonstrated by the careful judgment that he delivered.

[24] The context of this case is significant. We find it hard to contemplate a more grave subject matter. This case relates to alleged activities of informers acting within the structure of the State which have resulted in significant harm to persons such as the plaintiff.

[25] We consider that the learned judge applied the correct legal principles in dealing with a discovery request. The test that emanates from Order 24 is whether discovery is necessary to dispose fairly of the case and to deal with costs. It seems to us that this test is comprised of 3 limbs. Firstly there is the necessity requirement which is related to relevance. The second limb relates to subject matter and comprised within that is deference to the aim of achieving justice in a particular case. The third limb relates to costs which is a factor raised in this case in terms of the burden of discovery.

[26] The real question is whether the admission of misfeasance by the appellant effectively deals with this case and leads to a situation where no discovery should be ordered. We do not consider that the issue is quite as simple as that. To dispose fairly of the case the court must be able to assess the nature and extent of the misfeasance. In our view that requires discovery. We consider that this applies even in the case of default judgment as that would involve an assessment of damages. During the hearing, counsel helpfully referred to the issue of the extent of misfeasance as a continuum, where at one end the appellant knew all about the actions of the informant to the other end where the informant was acting of his own volition. There are of course gradations in between. In our view, any court needs to have the relevant details to make an assessment as to where a particular case lies on the continuum and assess damages accordingly.

[27] The Peruvian Guano test is wide in relation to discovery. It is also significant in our view that the two cases relied upon by Mr Hanna, where discovery was not seen to be required due to the particular admissions, were in a private context. The complexion of this case involving as it does matters of alleged State collusion is of a very different genre. We were referred to no case which deals specifically with this subject matter and as such we consider that the two cases relied on by the appellant cannot have such a direct application as was suggested. Further we do not see that the English cases referred to us regarding exemplary damages form a binding code in terms of the level of achievable damages. We consider that there is a valid argument that the subject matter of these proceedings extends beyond those bounds.

[28] We accept that to date the appellant's actions in relation to discovery have not been prompt. We also consider that Mr Fee has raised a valid argument that there may be a need for discovery to deal with compensatory damages. We do not need to reach any more concluded view on this given that we consider that the discovery is required to assess exemplary damages in any event.

[29] In relation to the resource argument, we have considered carefully the submissions made by the parties. We have also considered the affidavits filed by the appellant. In our view there are a number of distinguishing factors in this case which inform our conclusions. Firstly there is the issue of the Ballast Report. This was a significant report which involved the gathering together of extensive information. We find it hard to believe that one person who was involved in that exercise and who is now retired is the only person who has knowledge about this. We also find it astonishing that the appellant has not contacted the Police Ombudsman's Office to obtain assistance and a schedule of information previously provided. Further, it appears clear to us that the discovery exercise in this case is not one which is starting from scratch because considerable work has already been undertaken to compile the material for the Ballast Report. This, in our view, significantly undermines the argument that the burden of discovery outweighs the benefit.

[30] Also, in this case, after a scoping exercise which has been described at some length in the affidavits filed on behalf of the appellant, 5 documents appeared. There has been no real explanation given for this. So we are not convinced by the arguments in relation to proportionality. We accept that discovery may be a complicated process and there will be expense involved but we consider that the benefit of providing this discovery outweighs the burden.

[31] We do not accept the categorisation of this case as the plaintiff obtaining a 'windfall.' With respect, that description is not an appropriate reflection of the subject matter of this case. We do not underestimate the nature of the case being made in the civil courts and the potential findings that could be made against the defendant and the measure of damages that the plaintiff may achieve depending upon the nature and extent of the misfeasance in public office.

[32] We do acknowledge that the appellant has made an admission in this case. That is not insignificant and we wish to record that such a concession is welcome. However, it is not the end of the matter and we cannot see that the discovery process should come to an end simply on the basis of this admission which we note came at a relatively late stage in the proceedings.

Conclusion

[33] Accordingly, we can find no error in the learned judge's reasoning or his application of the legal principles. We agree with the outcome he reached. We dismiss this appeal. Any further matters may be referred to the trial judge. Finally, given the time that has already passed in this case, we hope that the discovery process can now begin and progress in as prompt a manner as possible.