

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**IN THE MATTER OF AN APPLICATION BY BRENDAN FLYNN (JUNIOR)
FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF A DECISION BY THE LEARNED DEPUTY
COUNTY COURT JUDGE HER HONOUR JUDGE COLLINS ON THE 6
FEBRUARY 2007**

HIGGINS LJ

[1] This is an application for judicial review of two decisions by District Judge Collins sitting as a Deputy County Court Judge at Newry County Court on 6 February 2007. The decisions were the refusal of an application to adjourn and the dismissal of an application to discharge an injunction.

[2] On 21 March 2006 a civil bill was issued by Buttercrane Centre Ltd (the respondent in these proceedings) against the applicant (the defendant in the Civil Bill). The respondent owns and manages a large shopping centre in Newry, the Buttercrane Centre and in the Civil Bill sought an order restraining the applicant from entering or being within 100 feet of the centre as well as damages for trespass.

[3] On 22 March 2006 on foot of the civil bill, the respondent applied ex parte for an injunction restraining the applicant from entering the shopping centre or being within 100 feet of the centre. His Honour Judge Finnegan QC granted the injunction, which was made ex parte. No return date was sought or specified on the order, though the order did indicate that an application to discharge the order could be made on two days notice to the plaintiff. The application for the injunction was grounded in allegations made about the applicant's trespass on, and conduct in, the plaintiff's premises at the Buttercrane shopping centre. Affidavits and statements from security staff of the plaintiff were placed before the court, but no oral evidence was given.

[4] Following an application before District Judge Collins for substituted service by the police, the applicant was served with the injunction in early June 2006. The applicant then consulted his solicitor. An application for legal aid was made and after a short delay legal aid was granted. Evidence was sought from the police and hospital authorities by the applicant. No immediate application to discharge the injunction was made. Discussions and correspondence ensued between the respective solicitors relating to the disclosure of CCTV footage taken at the centre. This correspondence was not exhibited. The CCTV footage had been viewed by the police when they were called to the scene though no police action was taken.

[5] An application to discharge the injunction was lodged on 2 February 2007 and listed for hearing on 6 February 2007. It appears that other litigation involving the applicant was also listed to proceed on the same date in the second court before a different judge. When the application to discharge the injunction came on for hearing, counsel on behalf of the applicant sought an adjournment. This was opposed by counsel on behalf of the plaintiff in the civil bill proceedings, the respondent in these proceedings. The reason put forward for the application to adjourn was that discovery of CCTV footage was outstanding. Counsel indicated to the court that up to two days before the date of the application, that is 6 February 2007, discovery of the CCTV footage was not disputed and the applicant's solicitors expected to receive it. However the respondent's solicitors then sought counsel's opinion and counsel advised that the CCTV footage was not relevant and that discovery should be refused. The District Judge declined to receive a general application for discovery on 6 February 2007, so counsel on behalf of the applicant determined that a formal application for specific discovery was probably required. Mr Scofield who appeared on behalf of the respondent in the present proceedings did not dispute the potential relevance of the CCTV footage.

[6] The application for the injunction was grounded in allegations relating to the presence and alleged disorderly conduct of the applicant on the respondent's premises, as stated by the plaintiff's security staff. The applicant disputed the alleged disorderly conduct and the version of events given by the plaintiff's security staff. In addition the applicant alleged assault against the plaintiff's employees. After some short adjournments and discussions between counsel, the applicant's counsel formally applied for an adjournment of the application to discharge the injunction. The adjournment was sought in order that a formal application for discovery of the CCTV footage could be made. This application was refused by the Deputy County Court Judge who concluded that no good reason for the applicant to be unprepared for the hearing on 6 February 2007 had been demonstrated. The Deputy County Court Judge was of the opinion that the applicant's legal representative had sufficient time from June 2006 to make and pursue a formal application for specific discovery and this had not been done. The Deputy County Court

Judge indicated that she would hear the substantive application to discharge the injunction that same day.

[7] There is some dispute between the present parties as to how matters then proceeded. It is alleged on behalf of the applicant that, having refused the adjournment application, the Deputy County Court Judge dismissed the application to discharge the injunction without hearing any evidence and did so, impliedly, on the merits. It is undoubtedly correct that the application to discharge was dismissed without any evidence being heard. Attendance notes by the respective solicitors do record submissions by counsel for the applicant that Article 6 of the European Convention on Human Rights gave the applicant the right to be heard. The Deputy County Court Judge, acknowledging that there was the appearance of some confusion, avers that counsel on behalf of the applicant indicated that she was not ready to proceed with the application to discharge the injunction in the absence of the CCTV footage and that she could not call the applicant, whereupon, on the application of the respondent, the Deputy County Court Judge dismissed the application to discharge the injunction. The Deputy County Court Judge avers that this dismissal was without prejudice though this is not recorded on the order drawn up by the clerk of the court and she disputes the suggestion, which she understood was being made, that counsel on behalf of the applicant was prevented from calling oral evidence.

[8] The applicant, with the leave of Mr Justice Gillen, seeks an order of certiorari to remove into this court and quash the two decisions of the Deputy County Court Judge, namely the refusal of the adjournment application and the dismissal of the application to discharge the injunction. The grounds on which the order is sought are that the Deputy County Court Judge failed to have regard to relevant considerations and acted contrary to the rules of natural justice, in refusing the adjournment application and dismissing the application to discharge the injunction, without hearing evidence from the applicant. The respondent contends that the refusal of the adjournment application was within the bounds of the discretion of the Deputy County Court Judge. It was further submitted that, in an application for judicial review in which the circumstances relating to the decision are disputed, the averments of the Deputy County Court Judge should be preferred. Alternatively if the court is unable to resolve, on paper, the differences between the parties, it follows that the applicant has failed to prove his case to the necessary standard, that is, on the balance of probabilities and the application for judicial review should be dismissed.

[9] A fair reading of the affidavits and attendance notes of the hearing would suggest that when the application to adjourn was dismissed, counsel on behalf of the applicant felt unable to proceed in the absence of discovery of the CCTV footage. However counsel's position on that was expressed or

appeared, she was not prevented from proceeding with the application or calling evidence.

[10] The Deputy County Court Judge refused the application for an adjournment on the ground that the applicant had sufficient time since June 2006 to prepare for the application to discharge the injunction, including resolving any outstanding discovery. This, submitted Mr Scoffield, was well within the discretion of the court and is the type of decision taken daily in courts throughout the jurisdiction. Mr Grainger on behalf of the applicant did not suggest that such a decision was irrational, but submitted that this approach failed to have regard to the context. The context was the expectation two days before the hearing that discovery of the CCTV footage would be forthcoming. To this may be added the nature of the proceedings against the applicant. The respondent sought the injunction against the applicant preventing his entry on the premises. The evidence to be relied on was that of security staff at the centre who alleged misconduct by the applicant on the premises. The applicant counter-alleged assault by the security staff and relied on medical evidence from the local hospital. In those circumstances it is understandable that counsel should seek the CCTV footage to see whether it supported the applicant's case or undermined the plaintiff's case and explains why counsel appeared reluctant to proceed in its absence. As counsel on behalf of the applicant she was entitled to stand her ground on this issue, in defence of her client's position.

[11] An extensive note of the exchanges between counsel and the court was taken by both parties. The note taken by the respondent's solicitor suggests that the Deputy County Court Judge observed that "the CCTV footage was unnecessary in this instance as there was primary evidence by way of affidavit evidence before the court from numerous sources." The notes of the applicant's solicitor and her clerk contain references with a similar resonance. If these notes accurately reflect the exchanges in court, then it would appear that the significance that might be attached to the CCTV footage, if discovered, was not fully appreciated.

[12] As Carswell J observed in Re Murphy's Application 1991 7 NIJB 97 a "judge who has a discretion to adjourn a case has the like discretion to refuse an adjournment." The discretion is to be exercised judicially and as Carswell J observed the duration is qualified by the "need to afford a party a fair and reasonable opportunity to present his case" and if an adjournment is "refused unfairly that many constitute a breach of the rules of natural justice whether it arises through an unreasonable or irrational refusal or through having regard to irrelevant consideration or failing to have regard to relevant ones'. In this instance the applicant submits that the Deputy County Court Judge did not have regard to certain relevant considerations. Counsel for the applicant relied on two considerations. First the fact that the applicant's solicitor expected to receive the CCTV footage up to a time two days before the

application to discharge was due to be heard; and second that the potential significance of the CCTV footage was not appreciated as a relevant factor. I consider that submission is unassailable in the circumstances. If the Deputy County Court Judge had been exposed to the situation in this way she would have recognised counsel's position and acceded to the application to adjourn. Therefore in refusing the application for adjournment, relevant considerations relating to the significance of the CCTV footage were not taken into account. There had been delay in progressing the application to discharge the injunction and the Deputy County Court Judge rightly observed that much time had passed since the injunction had been granted.

[13] Accordingly the decision to refuse the adjournment sought will be quashed. In those circumstances it is unnecessary to consider the applicant's alternative submission relating to the dismissal of the application to discharge. However in this regard there does seem to have been some confusion and misunderstanding which it is not now necessary to resolve. It follows from the quashing of the decision to refuse the adjournment that the order dismissing the application to discharge is also quashed.

[14] It is necessary to make a few observations about the progress of this case. The plaintiff issued a civil bill on foot of which an ex parte application for an injunction was made and granted. The order granting the injunction did not contain a return date, though it was indicated on the order that the present applicant could apply to discharge the injunction on two days notice to the plaintiff. When granting an injunction ex parte the court should stipulate a return date (usually a few weeks later) and the return date should be recorded in the order. If that had been done the progress of this case may have been much different and swifter. Other cases are pending in which the applicant claims damages for assault arising out of the incidents which allegedly ground the injunction. As the alleged incidents involve the same parties and witnesses, court time and money would be saved by joinder of these proceedings and a hearing arranged on a specified date before a different tribunal.