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(subject to editorial corrections)*

2008/24246

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between

JOHN FLYNN

Plaintiff

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant

COLTON J

Introduction

[1] The writ in this action was issued on 3 March 2008. In his statement of claim served on 24 November 2011, the plaintiff alleges that on or about 12 March 1992 he was assaulted by "Informant 1" a servant and agent of the defendant and that he suffered severe personal injuries, loss and damage as a result. The particulars are that Informant 1 pointed a gun at the plaintiff and tried to shoot him but it failed to discharge. Informant 1 then made a physical attack on the plaintiff who managed to fight him off. He further alleges that on or about 6 May 1997 an improvised explosive device was placed underneath his motor vehicle by servants and agents of the defendant ("Informant 1" or persons acting on his behalf). Whilst the device did not detonate the plaintiff alleges that he suffered further personal injuries loss and damage of a psychiatric nature. The plaintiff claims damages in respect of those personal injuries, loss and damage together with aggravated and exemplary damages.

[2] His cause of action against the defendant in respect of each incident is grounded in the following torts: negligence, assault, battery and trespass to the person, conspiracy to commit trespass to the person, conspiracy to injure and misfeasance in public office.

[3] The original defence served in the action on 17 January 2012 constituted a comprehensive denial of liability.

[4] The claim was triggered by the publication of the "Ballast Report" by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Jnr and related matters. Arising from that investigation the Ombudsman conducted a wide ranging investigation not only into matters relating to the investigation of Mr McCord's son's murder, but also into the police handling and management of identified informants from the early 1990s onwards. One such informant was "Informant 1". The report linked this informant and his associates to the two incidents involving the plaintiff. The report concluded that police officers colluded with Informant 1 in the full knowledge that he was a UVF terrorist with an extensive criminal record with an ongoing involvement in murders, attempted murders and other serious criminal activity. Rather than investigate the crimes committed against the plaintiff police officers in effect protected Informant 1, paid him money, protected him from prosecution, destroyed records, compiled misleading records, avoided compiling proper records, withheld information from the DPP and the courts, destroyed or lost forensic records and failed to bring him to justice despite his criminal activities being known to them. In short RUC/PSNI Special Branch officers facilitated the situation in which informants were able to continue to engage in paramilitary activity, some of them holding senior positions in the UVF, despite the availability of extensive information as to their alleged involvement in crime.

[5] This judgment concerns the obligation of the defendant to provide discovery to the plaintiff. In relation to that issue the following matters are relevant. The plaintiff issued a summons seeking discovery on 13 February 2012 pursuant to Order 24 Rule 3 of the Rules of the Court of Judicature (N.I.) 1980. On foot of that application the Master made an order on 2 March 2012 ordering the defendant to provide a list of documents to the plaintiff within 12 weeks from the service of that order. No list having been provided the plaintiff then issued a summons pursuant to Order 24 Rule 19 on foot of which the Master made an order on 21 June 2013 ordering that unless the defendant complied with the provisions of Order 24 Rule 2 and serve the list of documents verified by affidavit within 21 days from service of a copy of the order the defendant's defence shall be struck out and the plaintiffs shall have judgment against the defendant. I was told at the hearing that after each order considerable latitude was granted to the defendant as representations were made about the extent of the task involved in providing discovery. However, no documents were provided by the defendant but on 11 November the defendant issued a summons under Order 20 Rule 5 seeking leave to amend his defence. Leave was granted by the Master and an amended defence was served on 17 November 2014.

[6] In his amended defence the defendant admitted that the person identified as "Informant 1" was at all material times acting as a covert human intelligence source

("CHIS") providing information to the defendant. The defendant denied that Informant 1 was ever an employee of the defendant, or that, in committing, or encouraging or instigating others to commit the assaults alleged in the statement of claim Informant 1 was acting on behalf of, or at the instigation of, or as a servant or agent of the defendant.

[7] The defendant admitted the assaults against the plaintiff and admits that the assault on 12 March was carried out by Informant 1 and the improvised device was planted at the behest of Informant 1.

[8] The defendant admitted that police officers for whose conduct he is legally responsible were guilty of misfeasance in public office within the second limb of Lord Steyn's definition of that tort in *Three Rivers District Council v Bank of England (No:3)* [2003] 2 AC 1 in the respects alleged and particularised in the particulars of negligence set out in the statement of claim. This was subsequently amended so that the admission was subject to the denial that Informant 1 was ever an employee of the defendant or that he was acting on behalf of or at the instigation of or as a servant or agent of the defendant.

[9] The defendant further admitted his liability to pay both compensatory and exemplary damages to the plaintiff.

[10] Whilst the defendant did admit the facts alleged to constitute particulars of negligence set out in the statement of claim he denied that having regard to the decision of the House of Lords in *Smith v Chief Constable Sussex Police* [2009] 1 AC 225, as a matter of law, he owed any duty of care to the plaintiff, and for that reason denied that he or any police officer under his direction and control were guilty of negligence. The defendant continued to deny the other torts of assault, battery, trespass of the person or conspiracy to commit trespass to the person.

[11] In short the defendant says that his responsibility in law to the plaintiff arises solely by reason of misfeasance in public office as set out above.

[12] In light of the amended defence the defendant then proceeded to serve a list of documents on the plaintiff's solicitors on 13 November 2014. In effect the list provided no documents to the plaintiff with the only relevant ones identified under Schedule 1 Part 1 being the pleadings and open correspondence in the action.

[13] Pursuant to an application by the plaintiff the Master made the following order on 11 March 2015:

> "It is ordered that the plaintiff shall within 7 days of the date hereof provide the defendant with a list of the documents or classes of documents which he says are relevant to the issues herein, and which are in the possession, custody and control of the plaintiff.

> AND IT IS ORDERED that the defendant do, within 28 days of the date of receipt of the plaintiff's list, file an affidavit in respect of the documents set out therein.
>
> AND IT IS FURTHER ORDERED that this application stand adjourned for further consideration on 17 April 2015."

[14] This order was appealed by the defendant on 12 March 2015. Subsequently, the plaintiff wrote to the defendants on 25 March 2015 in compliance with the Master's order of 10 March 2015 setting out 94 documents or classes of documents which he says are relevant to the issues herein, and which he alleges are in the possession, custody and control of the defendant.

[15] When this matter came before the court as I understand it the plaintiff was directed to prepare a properly constituted Order 24 Rule 7 application and accordingly the plaintiff issued a summons on 21 August 2015 in which the documents set out in the letter of 25 March 2015 were exhibited in a schedule.

[16] It was this application that was heard by me on 29 January 2016. I am greatly obliged to the assistance of counsel in this case; Mr Brian Fee QC and Mr Donal Flanagan BL for the plaintiff and Mr Nick Hanna QC and Mr Joseph McEvoy BL for the defendants for their helpful, concise written and oral submissions.

[17] There was no dispute as to the relevant test for discovery set out as long ago by Brett LJ in *Compagne Financiere du Pacifique v Peruvian Guano Company* [1882] 11 QBD 55:

> "… 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."

[18] In *Taylor v Anderton* [1995] 1 WLR 447 Brett LJs formulation of relevance for discovery purposes was stated to make it clear that the definition of relevance was framed in the widest possible terms.

[19] Dealing specifically with Order 24 Rule 7, in order to obtain such an order an applicant must establish that the party from whom discovery is sought has, or at some time had, in its possession, custody or power the document or class of document, specified as described in the application and that it relates to one or more of the matters in question in the cause or matter.

[20] Order 24 Rule 7 must also be read in conjunction with Order 24 Rule 9 which provides:

> "On the hearing of an application under Rule .. 7 .. 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."

[21] In the course of his submissions Mr Hanna referred me to the case in the Patents Court in England and to the judgment of Mr Justice Mummery in the case of *Mölnlycke A B and another v Proctor and Gamble Ltd and Another* [1990] RPC 498.

[22] Obviously the factual matrix in that case was entirely different from this one but the judge did refer to the general principles for an application for specific discovery. Of relevance to this case the judgment points out:

> "(a) Any discovery of documents in an action must be necessary either for fairly disposing of the cause or matter or for saving costs.
>
> (b) An order of specific discovery was discretionary. An order may be refused on the ground that it is unduly oppressive to the party giving discovery. The court takes account of such considerations as the value of the discovery to the person seeking it and the burden imposed on the party giving it, with a view to restricting the volume of documents and the labour and expense involved to that which is necessary for fairly disposing of the issues in the case.
>
> (c) In an application for specific discovery, a class of documents sought to be discovered must not be defined so widely as to include documents which would not be relevant to the issue.

Applying modern legal language to the issue he says that the court should ask itself two questions, namely is the discovery sought necessary and is it proportionate?

[23] Returning to the issues in this case the plaintiff says that the defendant is attempting to avoid exposing the full truth of the misconduct of police officers

involved with Informant 1 insofar as it relates to the plaintiff's case by making a tactical and partial admission. He contends that notwithstanding the admissions made in the amended defence there remain outstanding issues between the parties in respect of which the plaintiff is entitled to discovery of documents. The defendants say that the admission in this action obviates the need for the disclosure of any documents from the defendant and that the list it has provided is adequate having regard to the relevant principles to which I have referred. (This is subject to a subsequent concession in relation to discovery to which I will refer later.)

[24] The starting point is the question of relevance. Relevance is determined by reference to the issues disclosed in the pleadings. The starting point for my consideration therefore is to identify those matters which remain in dispute between the parties.

Matters that remain in issue

[25] Notwithstanding the admissions that have now been made in this case there remain a number of significant matters in issue between the parties. I would summarise these 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 "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?

[26] In relation to (e) clearly there is no discoverable documentation in the possession custody or power of the defendant in relation to that issue.

[27] In relation to the remaining issues the plaintiff says that in order to determine these matters the court needs to know the full extent and nature of the relationship between the defendant (in the form of serving police officers at the time) and "Informant 1". It is argued that it is necessary for the plaintiff and the court to

analyse the extent of the relationship between the relevant police officers and "Informant 1". In this respect the following types of factual matters arise:

- 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?

[28] The answer to these questions will determine whether or not the defendant is guilty of the torts of assault, negligence, conspiracy to assault and also the extent of any misfeasance in public office. Ultimately they will determine not only the extent of the relevant torts committed but also the measure of exemplary damages to which the plaintiff is entitled. Much of the relevant information will be contained in documents which at one stage must have been in the possession, custody or power of the defendants. Such documents relate to all records in relation to contacts with Informant 1 and in relation to the investigations of the assaults committed on the plaintiff. At this stage I do not propose to go into the specific types of documents which may be relevant and in respect of which the plaintiff seeks discovery subject to the limited documentation to which I will refer below. The defendant states simply that no documentation in his possession is necessary to fairly determine the issues between the parties. It cannot sensibly be argued that there is no documentation in existence which relates to the relationship between the defendant and Informant 1 and in relation to the investigations of the assaults committed on the plaintiff.

[29] In relation to the issues that I have identified above the defendant argues that no issue of discovery should arise in relation to (b) ie the allegation of negligence. This is because the defendant has admitted each of the facts alleged to constitute particulars of negligence and confines his argument in relation to that tort to a legal submission that as a matter of law he owed no duty of care to the plaintiff. In other words, so far as negligence is concerned, the only issue between the parties is a point of law. So far as (a) and (c) are concerned the defendant vehemently denies that Informant 1 could be deemed to be either an employee or a servant or agent of the defendant. In summary however he says that irrespective of this issue even if these torts were established it will not bring the plaintiff any further in terms of his action because of the admission by the defendant of misfeasance in public office and also the admission that the plaintiff is entitled to exemplary damages at a high level. The defendant submits that the tort of misfeasance in public office in the context of this case constitutes an admission of a serious tort and even if either assault or conspiracy to assault were proven by reason of a form of vicarious liability this would not advance the plaintiff's case. It would not entitle him to any greater

damages than those to which he is entitled under the tort of misfeasance in public office.

[30] In essence given that this is a private claim seeking damages, the ultimate issue resolves on the extent of exemplary damages to which the plaintiff is entitled. Mr Hanna drew my attention to the English guideline cases in relation to exemplary damages. The leading authority is the English Court of Appeal decision in *Thompson v Commissioner of Police for the Metropolis* [1998] QB 498. In that case it was held that a figure of £50,000 should be regarded as the absolute maximum for exemplary damages, and that this would only be attracted in cases involving directly police officers of at least the rank of superintendent. In *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ. 453 this figure was adjusted for inflation to a figure of £68,000. In his submissions on behalf of the defendant Mr Hanna recognised that this case was a very serious one and having regard to the allegations which have been alleged and admitted, it is likely to attract a high award of exemplary damages which allowing for subsequent inflation would have a ceiling of between £70,000 to £75,000.

[31] Thus in the context of what is a discretionary power it is argued that further discovery in this case is not "necessary" to dispose of the remaining issues between the parties.

[32] Overall I am not persuaded by the defendant's submissions on this point. I take the view that there clearly must be material which is relevant to the issues that I have identified. For example, it seems to me that the issue of negligence may well turn on the extent of any knowledge the defendant had of Informant 1's attentions in relation to the plaintiff. In particular this also arises in relation to the issue of targeted or untargeted malice which will determine whether or not the defendant's liability under this tort is limited to the category which has been admitted. Whilst the defendants say that only untargeted malice has been pleaded it seems to me that in the pleadings the plaintiff has specifically averred that the defendants knew that the plaintiff was a specific target and that there is a triable issue on this point. In any event any documentation which relates to the extent of the relationship between Informant 1 and the relevant police officers will clearly be central to determining any issue concerning vicarious liability or employment which relates to the torts of assault and conspiracy to assault. Should the defendant be found liable for these torts it seems to me that this would impact on the measure of damages to which he would be entitled and would constitute a step beyond the misfeasance in public office admitted in the defence.

[33] In terms of exemplary damages Mr Fee argues that such is the gravity of the allegations contained in the statement of claim the court in this jurisdiction will not or should not be constrained by the guidance in the *Thompson* case. Certainly the allegations against the police in this case are way beyond what was alleged in *Thomson.* Whilst it is undoubtedly a trite observation it must be observed that it is difficult to imagine more grave allegations than the ones that are made in this case

which have been partially admitted. Whilst obviously I make no determination on this issue it seems to me that it would certainly be open for the plaintiff to argue for a higher degree of exemplary damages in this type of scenario.

[34] Accordingly I have come to view that there clearly is an argument that there is documentation which has at some stage been in the possession, custody or power of the defendant which is material to the outstanding issues in this case. I also consider that some of that documentation is likely to be necessary to properly determine the issues between the parties.

[35] In this regard I note the assertion by the defendants, initially through the list of documents filed and also in the affidavit of Superintendent Middleton filed on 5 November 2015 to the effect that no relevant documentation exists. It is difficult to know how this can be asserted in that it appears the only actual effort to identify any discoverable document is that described by Superintendent Middleton in her affidavit. If no further efforts have been carried out to seek documentation then how can it be asserted that no relevant documentation exists? At the hearing I was told by Mr Fee that when Stephens J pressed the defendant on 17 June 2015 as to whether or not there was any documentation in relation to prior knowledge on behalf of the police of an attack on the plaintiff he was told that there was no documentation in relation to this matter. This is dealt with in paragraph 5 of Ms Middleton's affidavit which states:

> "For the purpose of the scoping exercise I tasked the unit to seek documents relevant to the single question of why there may have been any pre-emptive intelligence available to the RUC relating to either of the two assaults on the plaintiff (in 1992 and 1997) to which reference is made in the statement of claim."

The affidavit goes on to describe how this involved taking a "cursory" look at more than 4,500 documents. This involved an exercise comprising six officers, one administrative assistant which took a total of 207 hours. This does not appear to have produced any relevant material.

[36] However subsequent to the plaintiff's skeleton argument being submitted in this action in which reference is made to the passage in the Ballast Report that the police were aware in April 1997, a month before the second attack, the plaintiff was a prospective UVF murder target, the skeleton argument submitted on behalf of the defendant on 26 January 2016 states at paragraph 18:

> "At the time of service of the defendants list of documents on 13 November 2014 the defendant had not identified any document in the defendant's possession, custody or power that was relevant under the *Peruvian Guamo test* to either of the issues (1) or (2)

> in paragraph 15 above. Recently a very small number of potential relevant documents (albeit if relevant at all, of marginal relevance) has come to light which will require the service of an amended list. They relate to the fact that information had been received by the police on 20 April 1987 of a non-specific threat from one identified Loyalist paramilitaries to a number of named individuals, one of whom was the plaintiff, and that on the same date he was warned orally about that threat by the police. Before an amended list can be served it will be necessary to consider whether public interest immunity should be claimed in respect of any part of this documentation."

[37] No explanation has been provided as to how or when this documentation was identified and why it had not been identified earlier. The plaintiffs say that this is a further demonstration of the fact that the defendant has not taken its approach to its obligation to provide discovery to the plaintiff seriously and is determined to avoid any proper scrutiny of the extent of the relationship between the plaintiff and the defendant.

[38] This leads me to the issue of proportionality and whether the plaintiff's application should be refused on this ground.

[39] The defendant says that it would be disproportionate and unduly oppressive for the court to make an order requiring him to disclose the documentation sought in this application, in light of the admissions which have been made.

[40] In support of this argument two affidavits have been sworn on his behalf. The first is from Assistant Chief Constable Kerr. He sets out the steps that would be required to identify the documents sought including the identification of material requiring PII right through to the point at which a list of documents could be sworn. Having described the nature and extent of the work that would be involved he points out that this would have significant resource implications for the defendant and will require a significant period of time before it could be completed. He indicates that the process would be both laborious and time consuming. He asked Superintendent Wendy Middleton to carry out a "scoping exercise" to help provide an estimate of the effort and time which will be required. Ms Middleton in her affidavit sets out the steps which would be required to comply with any order requiring the level of discovery sought by the plaintiff and comes to the conclusion that as per paragraph 10 of her affidavit:

> "My conservative estimate is that, on that basis, it would take approximately two years to reach the point, following completion of the entire process, including all of the PII stages, at which it might be possible to serve a

> list of documents. My conservative estimate of the costs of completing the PII process alone to the point of serving a list of documents would be in excess of £300k. I stress that this cannot be anything other than a best guess given the high degree of uncertainty about the amount of work that might ultimately be required."

[41] In a case such as this given the grave allegations that have been made against the agents of the state resources arguments are unattractive. In the course of the hearing I was referred to various decisions of the European Court of Human Rights in relation to the obligation of a state to comply with its Article 2 obligations. Whilst I accept that a finding on civil liability may be one element of the State's obligation to comply with Article 2, the cases to which I was referred were contextually very different from the circumstances of this case. We are not dealing here with a public inquiry, a criminal investigation into alleged murder committed by or on behalf of the State or with a coroner's inquest. The plaintiff is seeking a private law remedy. He seeks damages for torts alleged against the defendant. The court cannot and does not ignore the fact that significant admissions have been made in this case and indeed this is something which should be encouraged where appropriate. Admissions in this type of case are rare in my experience and the more realistic approach adopted by the defendant in this case is to be welcomed. Discovery is not an end in itself. It is for this reason that I have to consider the question of discovery solely on the basis of the issues that remain between the parties which I have discussed above.

[42] Nonetheless, I think the position is fairly represented by the comments of Moore-Bick LJ in *R (HYSAJ) v Secretary of State* [2015] 1 WLR 2742 as follows:

> "I am well aware that the resources of many public authorities are stretched to breaking point, but in my view, they have a responsibility to adhere to the rules just as much as any other litigant."

[43] Whilst I do accept that an order for specific discovery in this action may well be laborious and time consuming I consider that there is a force in the plaintiff's submission that the defendant has not taken its discovery obligations seriously at least prior to the admission defence. The statement of claim in this action was served on 14 November 2011. Despite a number of court orders and the freestanding obligation to provide discovery irrespective of any application brought on behalf of the plaintiff it appears that no steps were taken by the defendant to prepare a list of documents in this action. On the face of it the question of discovery only appears to have been addressed for the first time when the "scoping exercise" was carried out by Superintendent Middleton solely for the purposes of demonstrating that the exercise would be laborious, expensive and time consuming. Notwithstanding the scoping exercise it appears that relevant material relating to prior knowledge of a potential attack on the plaintiff was not even identified.

[44] In addition to the apparent lack of any attempt to address this issue expeditiously it seems to me that much of the relevant discovery in this case should be capable of being readily identified. I say this because in order for the Police Ombudsman to provide the Ballast Report very significant documentary material must have been provided to the Ombudsman's office at that time. I simply cannot understand why that material cannot be identified. If the defendant cannot identify the documentation then one would have thought that the Ombudsman could do so readily. Similarly, as I understand it the Ballast Report has resulted in ongoing criminal investigation in which the defendant, the DPP and the PONI are involved. I assume that for the purposes of those criminal investigations documentation has been provided by the defendant to both the DPP and the PONI. I do not understand why this documentation cannot be identified at this stage without the requirement to, as it were, start again from scratch.

[45] I appreciate of course that when this documentation is identified PII considerations will need to be investigated.

[46] At the hearing I did not hear submissions in relation to the 94 categories of documents identified in the letter sent on behalf of the plaintiff's solicitor. I accept Mr Hanna is correct when he says that the requests are extremely wide ranging. Mr Fee accepted in his submissions that it may well be that the list will require refinement. Equally however an immediate reading of the request indicates that some of the documentation sought would be readily identifiable and could be the subject matter of an order subject to submissions on relevance. In this regard I refer to items such as the reports referred to at items No 85, 86, 87, 88, 89, 91, 92 and 94.

[47] Accordingly, I have come to the conclusion that the list of documents served in this action does not comply with the defendant's obligations under Order 18 of the Rules of the Court of Judicature. I consider that there is potentially further documentation which has been in the possession, custody or power of the defendant which should properly be disclosed to the plaintiff having regard to the outstanding issues that exist between the parties, notwithstanding the defendant's admission.

[48] I have not come to any conclusion as to whether any of the particular documents set out in the Order 24 Rule 7 Application should be made the subject matter of an order for disclosure.

[49] I therefore direct that the parties should make further submissions in relation to the specific material sought in this application before finally determining the matter. It may well be that the appropriate way forward is to devise a tailored or bespoke approach to discovery in this matter after full discussion with the parties. I therefore would direct further submissions in relation to the specific application from the parties and will arrange to have the matter listed for that purpose.