Neutral Citation No. [2006] NIQB 36

Ref: **COGC5555**

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

Delivered: **26/05/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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IN THE MATTER OF PAUL PATRICK DALY (DECEASED)

-and-

IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

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BETWEEN:

THE DIRECTOR OF THE ASSESTS RECOVERY AGENCY

Plaintiff;

-and-

THE PERSONAL REPRESENTATIVES OF PAUL PATRICK DALY (DECEASED)

First Defendant;

-and-

AVON INSURANCE PLC

Second Defendant;

-and-

JACQUELINE CONROY

Third Defendant.

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COGHLIN J

[1] By an originating summons dated 24 March 2005 the Director of the Assets Recovery Agency (hereinafter referred to as "the Agency") initiated proceedings seeking a recovery order pursuant to Section 266(1) of the Proceeds of Crime Act 2002 (hereinafter referred to as "POCA"), an order pursuant to Section 267(1) of POCA appointing a trustee for civil recovery and an order pursuant to Section 266(2) of POCA vesting any recoverable property in the appointed trustee.

[2] Thereafter, on 15 September 2005 the third defendant issued a summons for discovery in accordance with the provisions of Order 24 of the Rules of the Supreme Court (Northern Ireland) 1980 and, on 20 September 2005, I made orders requiring the Agency to serve upon the third named defendant a list of documents in accordance with Order 24 Rule 3 and to provide the third named defendant's solicitors with facilities for the inspection of all documents referred to in the affidavit of Mr Kelso pursuant to Order 24 Rule 11. The Agency subsequently provided the solicitors for the third named defendant with a substantial number of documents.

[3] On 6 October 2005 I was informed by Mr Stevens QC on behalf of the Agency that it was likely that a claim for Public Interest Immunity privilege ("PII") would be made in respect of the complete contents of some documents and in relation to redactions to be performed on other documents. I was informed that Mr Simpson QC had been instructed on behalf of the Police Service of Northern Ireland ("PSNI") to advise the Chief Constable in respect of the PII claim so as to enable him to perform the balancing exercise. On 9 December 2005 Mr Stevens QC confirmed that the Chief Constable wished to claim PII privilege and intended to seek an appropriate certificate from the Secretary of State for Northern Ireland.

[4] On 3 February 2006 Mr Simpson QC, acting on behalf of the Chief Constable of the PSNI, made an ex parte application before me seeking to establish PII privilege in respect of some 87 intelligence documents referred to in the affidavit of Acting Detective Chief Inspector John Kelso sworn on 23 March 2005. In advancing this claim Mr Simpson QC relied upon a certificate from the Secretary of State for Northern Ireland dated 17 January 2006, a copy of which has been furnished to the defendant. After giving careful consideration to each of the documents and taking into account detailed submissions advanced by Mr Simpson QC and the relevant authorities I directed that the total contents of some 25 documents that attracted PII should not be disclosed to the solicitors for the third named defendant but that the remainder of the documents should be so disclosed subject to redaction of the portion of each document that attracted PII.

[5] On 3 March 2006 Mr John O'Hara QC, who appears on behalf of the third named defendant with Mr O'Rourke, made an application submitting that, having carried out the ex parte exercise to which I have referred above, I should recuse myself from sitting as the judge for the purpose of determining the substantive recovery order proceedings. Mr Stevens QC appeared on behalf of the Agency. I am grateful to both sets of counsel for the care and industry with which they prepared their skeleton arguments and advanced their oral submissions.

The submissions of the parties

[6] On behalf of the third named defendant ("the defendant") Mr O'Hara QC referred to the affidavit sworn by Acting Detective Chief Inspector Kelso in which he recorded that he had viewed a total of 87 separate intelligence documents. He also referred to the affidavit sworn by Edward Marshall, Financial Investigator on behalf of the Agency, in which Mr Marshall confirmed access to "information provided by the PSNI." Mr O'Hara QC also referred to the PII Certificate furnished on behalf of the Secretary of State for Northern Ireland. Having done so, he submitted that the test set out by Lord Hope in Porter v Magill [2002] 1 All ER 465 at p. 507 paras. 101 – 103 was applicable, namely, that:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was bias."

While accepting that recovery proceedings under POCA 2002 are civil rather than criminal in character, Mr O'Hara QC made the analogy with criminal procedure in a Diplock case and also referred to the approach taken by Sheil LJ with regard to bail in Re Donaldson's Application [2003] NI 93. Mr O'Hara QC also relied upon In Re NIES's Application [1987] NI 271 in which Nicholson J, as he then was, conducted the balancing exercise with regard to the documents subject to a PII Certificate from the Secretary of State for Northern Ireland and, having done so, decided that the substantive application should be heard by McCollum LJ. Mr O'Hara QC emphasised that the concept of "fairness" embodied in Article 6 of the European Convention on Human Rights applied to the overall circumstances of the litigation and noted that, in these proceedings, the Agency and the judge but not the defendant had been given access to the unredacted documents in question. He drew the attention of the court to the words of Lowry LCJ, as he then was, in R v Foxford [1974] NI 181 at 212 relating to the difficulties

attendant upon a procedure in which the judge of law is also the tribunal of fact.

[7] On behalf of the Agency Mr Stevens QC submitted that there was a distinction between civil and criminal proceedings with regard to the application of the relevant principles relating to public interest immunity arguing that, for example in criminal proceedings, the balancing exercise required greater weight to be attached to the liberty of the subject and relying upon R v Governor of Brixton Prison ex parte Osman [1993] Crim. App. Rep. 208 and Archbold (2006 edition) at paras. 12 – 29. He agreed that the concept of a fair trial according to Article 6 of ECHR should not be treated as if it existed in a vacuum but ought to be considered in the context of the overall circumstances of the litigation in question taking into account not only the parties concerned but also the administration of justice as a whole. Mr Stevens QC sought to distinguish the case of Lamothe and Others v Commissioner of Police of the Metropolis (EWCA 25 October 1999) and submitted that the Court of Appeal decision in R v May [2005] 3 All ER 523 had important parallels to this application and should be considered by the court as highly persuasive authority.

Conclusions

[8] I accept the submissions advanced on behalf of both parties that the concept of "fairness" enshrined in Article 6 of ECHR should be considered in the context of all the relevant circumstances and not simply as a rigid isolated principle. Such an approach is consistent not only with Strasbourg and domestic jurisprudence but also with the flexible and dynamic philosophy inherent in the Convention itself.

[9] I also accept that, in appropriate circumstances, in addition to the interests of the parties to the specific piece of litigation, the efficient operation of the justice system may possibly be a factor to be taken into consideration including additional delays, expense and frustration on the part of other litigants likely to result from a decision to split the function of determining disclosure from that of determining the substantive issues between two different judges. On the other hand such a factor, if relevant at all, is unlikely to be determinative and I bear in mind the words of Mummery LJ, in relation to the issue of bias, in AWG Group Limited v Morrison and Another [2006] 1 All ER 967 at p. 976 para. [29]:

> "Sixthly, while I fully understand the judge's concerns, (see para. [15] of his judgment quoted at [16], above) about the prejudicial affect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the

> real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values; the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having."

Earlier in his judgment, at p. 971, the learned Lord Justice had referred to judicial impartiality as being the "fundamental principal of justice both at common law and under Article 6 of the ECHR "adding that:

> "If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance."

Taking into account these various matters, the basic test remains that of Article 6 fairness and as Lord Steyn observed in Lawal v Northern Spirit Limited [2004] 1 All ER 197 at para. [22] high standards are set by the "indispensable requirements of public confidence in the administration of justice."

[10] Essentially, the defendant's application is based upon the proposition that it is inherently unfair for the judge of fact to be the same judge who determined the PII application upon the ground that he could not put out of his mind or be entirely uninfluenced by the documents and/or portions of documents to which he and the plaintiff had access but which were not disclosed to the defence as a consequence of being subject to the PII Certificate. In order to assess the validity of such a proposition it is always essential to consider the specific circumstances of the individual case

[11] Depending upon the circumstances, it seems to me that the proposition sought to be established by Mr O'Hara QC might be easier to accept in respect of documentation containing material that was clearly adverse to an accused in a fully contested criminal trial neither the nature nor content of which could be disclosed. In R v H [2003] 1 WLR in the course of giving the judgment of the Court of Appeal Rose LJ said, at para. 31:

> "No doubt there are very exceptional cases in which, in the course of a PII application, a judge learns something unknown to the defence which although not undermining the prosecution or helping the defence, is so prejudicial to the defendant that thereafter the judge could not be expected fairly to make a factual decision if called upon to do so. In such a case if the judge does not seek the appointment of a special independent counsel, as this appeal envisages, so as to inject an adversarial element into the proceedings he can be expected to recuse himself and, if he does not do so, any conviction is liable to be quashed on appeal."

[12] However, in this case the general nature of the material which has been disclosed to me during the course of the PII application has been known to the defendant since the date of Acting Detective Chief Inspector Kelso's affidavit of 23 March 2005 in which it is described as a total of 87 separate intelligence documents covering the period from 1995 until 2005 resulting from contacts between a number of police officers and specific individuals providing information in relation to the deceased's activities. The general nature of these documents is set out at paragraphs 12 – 15 of Mr Kelso's affidavit. Paragraphs 14 to 20 of the same affidavit describe the intelligence as asserting the involvement of the deceased in drug dealing, violence and other crimes. The deceased, Mr Daly, had a significant criminal record which is exhibited to that affidavit. Much of the documentation disclosed to me during the PII application has now been made available to the defendant and her legal advisors albeit in redacted form. It should be clear from a consideration of these materials that they relate to information and/or observations reported and/or recorded by individuals. The basis for the PII application was that the disclosure of such documentation in its unredacted form would inevitably identify individuals prepared to provide the PSNI with information, individuals under investigation and sensitive police procedures and that such disclosure would not only have an adverse impact upon the administration of justice and prosecution of offences but would also give rise to a very real risk to the personal security of the individuals concerned.

[13] In Lamothe and Others v Commissioner of Police of the Metropolis, a case upon which Mr O'Hara QC placed considerable reliance, the defendant had made an ex parte application without notice to the plaintiff in the course of which the judge at first instance was asked to consider PII material and, having done so, to rule on the substantive issue as to whether police officers had reasonably grounds for believing that a person whom they were seeking was present in certain premises. Lord Bingham CJ, as he then was, in the course of giving judgment recognised that the central issue in the appeal was

the propriety of the procedure which had led to the order by the judge at first instance and noted that the CPR rule upon which the trial judge had relied did not provide him with the requisite authority to entertain the application. The trial judge himself accepted that the procedure adopted had been unorthodox, not apparently warranted by any rule of court and potentially prejudicial to the claimants. In allowing the appeal Lord Bingham summarised what had taken place as the:

> "Resolution of a central issue in the action in the absence of the claimants and without notice to them, and without any evidence being called, in a matter which would in due course be the subject of jury trial."

May LJ felt that there was:

> "… a clear distinction between, on the one hand, a procedure such as that described in C v S [1999] 2 All ER 343 for determining whether sensitive material need not be disclosed, and so would not become available for evidence, and, on the other hand deciding a substantive issue in the proceedings upon evidence which is given and is used in the absence of the claimants."

Both of their Lordships felt that the substantive action should proceed before a different judge and Bingham CJ said:

> "I would direct that the matter be heard before a different judge, since Judge Knight has been exposed to material which he should not have seen an on which he has founded an opinion."

[14] In R v May [2005] 3 All ER 523 each of the defendants had been charged with conspiracy to cheat the public revenue. Before the date fixed for trial the judge considered whether certain materials should be disclosed by the prosecution or whether that material was covered by PII. Having ruled in the Crown's favour certain of the defendants had pleaded guilty and others were convicted in due course. After further PII applications, the same judge then went on to deal with confiscation proceedings brought under the Criminal Justice Act 1988 and, when considering the issue as to whether the defendants had withheld some of their realisable assets from view, he ruled that he was entitled to have regard to the information disclosed by the Crown but stated that he had ignored anything that had been revealed to him which had attracted PII. The defendants appealed on the ground, inter alia, that, during the course of PII hearings the judge might have been provided with

evidence relevant to the confiscation proceedings and, in particular, to the credibility of one of the defendants who gave evidence in those proceedings and that, accordingly, he should have recused himself or appointed special counsel. The appellant relied upon the decision of the Strasbourg Court in Edwards v UK [2004] ECHR 39647/98 arguing it was a decision that "abolishes compartmentalism of the judicial mind."

[15] In May a great deal of material adverse to the appellants or some of them derived from surveillance operations that had been disclosed to the defence albeit it in a redacted form. When he came to deal with the issue as to whether the conspirators had withheld some of their realisable assets from view the trial judge ruled that he was entitled to take into account the information disclosed by the Crown, in particular, recorded conversations between a number of the conspirators in which they had referred to various sums of money that they had obtained, but he went on to say at para. 8.5 of his decision:

> "I emphasise that I ignore anything revealed to me which attracts public interest immunity."

In the Court of Appeal Keene LJ attributed considerable importance to that statement by the judge as distinguishing the case from the decision in Edwards v UK. He noted that in Edwards the Strasbourg Court had not been pronouncing upon a situation in which the judge had expressly stated that he had ignored the undisclosed material for the purpose of a subsequent ruling but had been concerned with a situation in which the judge had made a determinative ruling on an issue of fact which he had decided by reference to undisclosed material. At paragraph [21] Keene LJ said:

> "In such a situation we would entirely accept that consideration should be given to the appointment of special counsel. Indeed, if the trial judge forms the view that, despite his best efforts, he is unlikely to be able to ignore the undisclosed material he has seen to the detriment of the defendant, then such consideration may have to be given. As so often, the test will be one of fairness. But there will be many cases were the judge is confident that he can put such material out of his mind for the purposes of a later decision. That is a familiar process in judicial decision-making in this country."

[16] I respectfully adopt the words of Lord Bingham in R v H [2004] 1 All ER 1269 when he said, at para. [33]:

> "It is entirely contrary to the trend of Strasbourg decision-making to hold that in a certain class of case or when a certain kind of decision has to be made a proscribed procedure must always be followed. The overriding requirement is that the guiding principle should be respected and observed, in the infinitely diverse situations with which trial judges have to deal, in all of which the touchstone is to ascertain what justice requires in the circumstances of the particular case."

In this case, as I have already noted above, the general nature of the material has been revealed to the defendants albeit in redacted form. The details that have been edited therefrom are details that would lead to the identification of relevant sources, sensitive police practices and procedures and other persons under investigation. The specific identification of such sources and the other details redacted have no significance for me and I do not propose to take such identification or details into consideration. Furthermore, I am quite satisfied that I can exclude from my consideration those reports/observations the entire contents of which have been withheld from the defendants. I propose to conduct the substantive hearing solely on the basis of the disclosed material and I note the words of Keene LJ at para. [22] of his judgment in R v May when he said:

> "We note that an appellant does have the advantage of a safeguard in practice. If the disclosed material provides no proper basis for a judge's ruling, in circumstances where he has seen undisclosed material, this court may be the more ready to infer that the judge was influenced by the latter, perhaps unconsciously. In reality there will be little need for such an inference, because the absence of any proper evidential foundation for the judge's ruling will itself be enough to indicate that something has gone wrong."

I also consider that such an approach will enable me to discharge my continuing duty to review and monitor the issue of disclosure. In the circumstances, I do not propose to accede to the defendant's application to recuse myself from the substantive hearing.