Application under Solicitors (NI) Order 1976 – whether summons properly entitled – whether solicitor's name should not be identified – whether hearing of interlocutory injunction application should have been in private – distinction between hearing in chambers and hearing in open court – public access to chambers hearings.

Neutral Citation No. [2003] NICh 5 | *Ref:* **GIRC3963**

Judgment: approved by the Court for handing down | *Delivered:* **19/06/2003**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF A SOLICITOR

IN THE MATTER OF AN APPLICATION UNDER THE SOLICITORS (NORTHERN IRELAND) ORDER 1976

GIRVAN J

[1] This matter comes before the court by way of an application by the solicitor for a ruling that hearings in relation to the matter should have been and in the future should be held privately in chambers rather than in open court.

[2] Following investigations into the affairs of the solicitor's practice a shortfall in client funds was discovered. A special meeting of the council of the Law Society ("the Society") was called on 8 August 2002. A resolution was passed pursuant to the provisions of article 31(1)(b)(ii) of the Solicitors (Northern Ireland) Order 1976 that the Council had reasonable cause to believe that client monies in the practice were in jeopardy. Shortly before the close of business on 8 August 2002 the solicitor signed a power of attorney in favour of the Society. Mills Selig, solicitors were instructed to act as agents for the Society for the purposes of intervention and investigation in to the affairs of the practice of the solicitor. Further investigations brought to light serious irregularities. Forensic accountants were instructed. An overall shortfall of a sum of at £610,000 was identified.

[3] By an Originating Summons issued on 14 May 2003 the Society claimed (inter alia) an order that the Society be appointed attorney of the

solicitor pursuant to paragraph 22A of Schedule 1 part 2 of the 1976 Order and that the Society be at liberty to exercise the powers set out in paragraph 22 of the Schedule. It sought an order that the solicitor give vacant possession of his dwelling house at 16 Castlehill Road, Belfast. The Originating Summons was entitled `In the Matter of a Solicitor' and `In the Matter of the Solicitors (NI) Order 1976' but it went on to identify the Society as plaintiff and the solicitor by name as defendant. The Originating Summons summoned the defendant to attend before the "Judge in chambers" on 22 May 2003. By a notice on motion also issued on 14 May 2003 the Society sought an injunction to restrain the solicitor from selling, leasing or otherwise disposing of his legal and beneficial ownership in the premises at 16 Castlehill Road, Belfast and further that he should not dispose of any other assets belonging to him until the hearing of the Originating Summons or further order. It also required an order that the defendant should file and affidavit setting out the full extent of his assets and an affidavit setting out all sources of income enjoyed by him since he ceased to practiced in or about October 2002.

[4] The matter came on for hearing before the court on 22 May. Mr O'Donoghue QC appeared on behalf of the Society and Mr Stockman appeared on behalf of the defendant. The court made an order that the Society be appointed attorney under the provisions of the 1976 Order and granted injunctive relief.

[5] The hearing of the matter was listed in the ordinary Chancery list. It is the practice for all Chancery matters to be listed in a courtroom at one time including summonses in chambers and motions in court. Often some matters are technically in court and other matters are technically in chambers. In this instance the matter proceeded as if it were in open court. No notice was displayed outside the court stating that the matter was in chambers and the public and press were not excluded from the courtroom. Mr Stockman who appeared on behalf of the solicitor raised no objection to the presence of a newspaper court reporter and the matter was presented and argued in the presence of the public. Following the court ruling on the matter the matter was apparently widely reported in the media.

[6] Subsequent to that hearing Mr McCloskey QC appeared with Mr Stockman on 29 May 2003 to argue that the hearing on 22 May 2003 should have been and all further interlocutory hearings should be conducted privately in chambers. Mr McCloskey drew the court's attention to Order 106 rule 5(2) which provides:

> "The originating summons by which an application for an order under (rule 3) and Schedule 1 (to the Solicitors (Northern Ireland) Order 1976) is made must be entitled In the Matter

> of a solicitor or a deceased solicitor as the case may be, (without naming him), and in the matter of the Order."

Mr McCloskey argued that the rule clearly intended the solicitor's name to remain unidentified in the title and in the connected notices and affidavits in court orders. Mr McCloskey contended that the court should order the rectification of the title in all documents by directing the omission of the solicitor's name. He argued that the court had power to do by virtue of Order 2 rule 1(2) and under its inherent jurisdiction. The proceedings should have been conducted in chambers firstly because interlocutory hearings are generally to be conducted in chambers and secondly because the Society when it had issued the originating summons in relation to the matter had elected to bring the matter in chambers. Order 32 rule 2 makes clear that interlocutory applications are to be heard in chambers unless required or authorised to be brought by motion "except applications for an injunction or an application made in court at the trial or hearing of the cause or matter". Mr McCloskey argued that since the injunction application was interlocutory it should have been in chambers and it would be incongruous and illogical if the initial hearing was assigned to chambers (for that is what the originating summons sought) and interlocutory hearings on foot of the main proceedings are conducted in open court. Counsel referred to a passage from Lord Woolf's judgment in R v Legal Aid Board ex parte Todner [1998] 3 All ER 541 in which Lord Woolf pointed out that interlocutory hearings are normally of no interest to anyone other than the parties. The solicitor was entitled to a right of privacy under article 8 of the European Convention on Human Rights ("the ECHR"). Article 6 of ECHR was not engaged because hearings in this case to date had not entailed the "determination" of any civil right. The Society, on the other hand was not a victim for the purposes of section 7 of the Human Rights Act 1998 and accordingly is not entitled to assert the Convention rights.

[7] Mr O'Donoghue QC on behalf of the Society pointed out that on the hearing on 22 May 2003 no application was made to exclude the public or press from the courtroom. The solicitor had taken steps in the proceedings following the fact that the title to the proceedings was arguably incorrect by naming the solicitor and had not made an application to correct the title in time. In any event he contended that the originating summons was not incorrect. The prohibition on naming the solicitor was in relation to the words "In the Matter of a Solicitor". Subject to rare exceptions, the court must sit in public and justice must be done and seen to be done. Public hearings deter inappropriate behaviour on the part of the court, maintains public confidence, may result in new evidence coming forward and makes unfounded and inaccurate assertions about court proceedings less likely. All these factors favoured a public hearing.

[8] It is clear that two separate though in some respects interconnected issues arise for determination. Firstly, was the title to the originating summons and related documents incorrect since the name of the solicitor was identified and if so should the court at this stage direct a correction of the title of the proceedings and related documents? Secondly, should the hearing on 22 May have been conducted with the public and press excluded and should future interlocutory hearings be so conducted?

[9] So far as the title to the originating summons is concerned Order 106 rule 5 is clear in its requirement that the proper title should be "In the Matter of a Solicitor and In the Matter of the Solicitors (Northern Ireland) Order 1976". The summons was incorrectly entitled because it then went on to identify the solicitor by name. It is not an answer to the point to state that the reference in the hearing was to the words "In the Matter of a Solicitor". The rest of the title went to identify the name of the solicitor. That said, however, in R v Legal Aid Board ex parte Kaim Todner [1998] 3 All ER 541 Lord Woolf MR stated that:

> "There can be no justification for singling out the legal profession for special treatment. The inference that they should be singled out should not be drawn from Order 106 rule 12. The Order certainly presupposes that solicitors in disciplinary proceedings to the High Court should be not be identified in the title to the proceedings. However this is probably a remnant from earlier times when the disciplinary proceedings were themselves in private which is no longer the position. The situation in relation to other professions eg doctors and dentists appealing to the privy council, is that in general they are not granted any anonymity. In our view the rules of the Supreme Court should now be amended to bring the position of solicitors in line with that general practice."

He went on to state that in any event it is of interest to note that the fact that the solicitors were not to be named in the title to the proceedings does not provide the protection of the law of contempt for the publication of the name of the firm.

[10] For reasons that shall become apparent later in this judgment in view of the fact that the press was free to attend the hearing of the application on 22 May and that the judgment and order should be available to the public when requested the incorrect form of title to the proceedings has led in fact to no injustice and is now of academic interest. Moreover the solicitor did not raise any objection to the form of the summons when the matter came on for

hearing and counsel appearing for the solicitor made submissions on his behalf without raising any objection to the title to the proceedings. The solicitor filed affidavits in consequence of the court order made. The circumstances are such that I am satisfied that the solicitor cannot now rely on the technical irregularity.

[11] On the question whether the hearing on 22 May 2003 should have been conducted in private with the public and press excluded it is necessary to look at the distinction between hearings in chambers and hearings in open court. It is of course important to distinguish between a hearing in chambers and a hearing in camera. Although the Latin phrase itself literally means "in a chamber" or "in a room" the term refers to a hearing which is strictly private with the public being entirely excluded. The French "à huis clos" captures the meaning, literally meaning with doors closed. In cases involving, for example, minors or state secrets the court may conclude that it is in the greater public interest that the public be excluded or that the principle of open justice should apply. It is not suggested that the present case is an example of a situation in which it is in the public interest that the public be excluded and that the hearing be conducted in total privacy. The normal principle is that administration of justice should take place in the public eye, summed up in the old adage justice must not only be done but seen to be done. The public nature of the administration of justice represents a constitutional imperative and article 6 of the ECHR underlines the principle that in the determination of civil rights obligations and criminal charges everyone is entitled to a fair and public hearing within a reasonable time. Judgments shall be pronounced publicly. Article 6 does provide that the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Article 6 is not strictly relevant in the present context in that it is dealing with hearings involving the determination of civil rights obligations in criminal charges. Interlocutory hearings which are provisional only and are not determinative of issues probably do not fall within Article 6 as such but Article 6 does underline the same approach as the common law adopts in favour of open justice.

[12] Historically the law has recognised that certain hearings can be properly and justly concluded not in open court but in chambers. Brett LJ in Hartmount v Foster [1881] 8 QBD 82 at 84 pointed out that:

> "A judge sitting in chambers does not mean that he is sitting in any particular room, but that he is not sitting in open court."

Nowadays the distinction between matters being heard in chambers and in open court is increasingly artificial and illogical. Judges practitioners and the public frequently fail to appreciate the subtle distinction, particularly bearing in mind nowadays that summonses in chambers are frequently actually heard in courtrooms to which the public have access as opposed to private rooms of the judges or masters. In the Chancery Division in this jurisdiction summonses in chambers and motions in open court are usually listed in the same list without differentiation. Speaking in the context of English practice Jacob J in Forbes v Smith [1998] 1 All ER 973 stated:

> "A chambers hearing is in private in the sense that members of the public are not given admission as of right to the courtroom. Courts sit in chambers or in open court generally as a matter of administrative convenience. For example in the Chancery Division the normal practice for urgent interlocutory cases is for the matters to be heard in open court the application being by way of motion. Corresponding applications in the Queen's Bench Division are normally made in chambers. There is no logical reason as to why exactly the same sort of case in one division should be in open court and another division in chambers."

[13] In the past hearings in chambers were just that, hearings being held in the judge's chambers. As Lord Woolf points out in Hodgson v Imperial Tobacco [1998] 2 All ER 673 at 686:

> "The word chambers is used because of the association with the judge's room so as to distinguish a hearing in chambers from a hearing in open court. While the public in general are normally free to come into and go from a court (as long as there is capacity for them to do so) during court hearings the same is not true of chambers hearings. Other than the parties and their representatives the public need the permission of the judge to attend."

In Hodgson Lord Woolf pointed out that the public has no right to attend hearings in chambers because of the nature of the work transacted in chambers and because of the physical restriction on the room available, a consideration which often does not apply in this jurisdiction where applications in chambers are listed for hearing in a courtroom. Lord Woolf stressed the great importance of the principle that unless there are compelling

reasons for doing so there should be public access to hearings in chambers and information available as to what occurred at such hearings. The fact that the public do not have the same right to attend hearings in chambers as in open court and that there can be practical difficulties in arranging physical access does not mean that such access should not be granted where practical. Reasonable arrangements will normally be able to be made by a judge or master to ensure that the fact that the hearing takes place in chambers does not materially interfere with the right of public including the media to know and observe what happens in chambers. Sometimes the solution may be to allow one representative of the press to attend. Sometimes the solution may be to give judgment in open court so that the judge is not only able to announce the order which he is making but is also able to give an account of the proceedings in chambers. The decision as to what to do would be for the discretion of the judge conducting the hearing but he must bear in mind the importance of the principle that justice should be administered in as public a way as practical in the particular circumstances and the higher courts will not interfere with the judge's exercise of discretion unless there is good reason for doing so. Lord Woolf summarised the position thus at 687d-g:

> "In relation to hearings the position may be summarised as follows.
>
> (1) The public has no right to attend hearings in chambers because of the nature of the work transacted in chambers and because of the physical restrictions on the room available, but if requested, permission should be granted to attend when and to the extent that this is practical;
>
> (2) what happens during the proceedings in chambers is not confidential or secret and information about what occurs in chambers and the judgment or order pronounced can, and in the case of any judgment or order, should be made available to the public when requested;
>
> (3) if members of the public who seek to attend cannot be accommodated, the judge should consider adjourning the proceedings in whole or in part into open court to the extent that this is practical or allowing one or more representatives of the press to attend the hearing in chambers.
>
> (4) to disclose what occurs in chambers does not constitute a breach of confidence or amount to contempt as long as any comment which is made

> does not substantially prejudice the administration of justice.
>
> (5) The position summarised above does not apply to the exceptional situations identified in section 12(1) of the Administration of Justice Act 1960 or where the court, with the power to do so, orders otherwise."

[14] Order 32 rule 2 provides that an application must be made in chambers where:

(a) The rules or any statutory provision require the application to be made in chambers or by summons;

(b) The court directs that the application is to be made in chambers; or

(c) The application is interlocutory and is not required or authorised by the rules to be made by motion, except an application for an injunction or an application made in court at the trial or hearing of a cause or matter.

By Order 32 rule 3(1) every application in chambers not made ex parte must be made by summons. A motion as a general rule is an oral application made by counsel in open court as opposed to a petition which is a written application and to a summons which is made in chambers. To add to the confusion and illogicality of the current situation in respect of what matters are heard in chambers and what matters are heard in court interlocutory motions are heard in open court unless the court rules that the matter should be heard in chambers. Applications for interlocutory injunctions may be brought by motion or by summons. In England under the rules in force immediately before the Civil Procedure Rules came into force it appears that in the Chancery Division applications for interlocutory injunctions were brought by motion in open court whereas in the Queen's Bench Division applications were made by summons in chambers. In this jurisdiction under Order 32 rule 2(c) applications for interlocutory injunctions are not assigned to chambers and thus are in open court unless the court rules otherwise. Mr McCloskey pointed out that the Originating Summons was expressed to be made to the Judge in chambers and that it was illogical that the application for an interlocutory injunctive relief should be in open court. It is impossible to create a wholly consistent and logical framework to cater for the distinction between chambers and court matters and it may be that this …… just one more illogicality in the current system. In any event it is open to question whether the Originating Summons as issued in this case is entirely in the correct form. Order 7 prescribes that the form of Originating Summons should be one of the four prescribed forms. Where an Originating Summons requires an appearance then it is not expressed to be in chambers. An

originating summons where an appearance is not required is expressed to be in chambers as is an ex parte originating summons and an originating summons brought under Order 113. The rules expressly provides for cases in which an appearance is not required to an Originating Summons (for example Order 99 in relation to family provision cases). Order 12 rule 9(1) requires an appearance to be entered to every originating summons by each defendant named in and served with the summons. No appearance need be entered to an originating summons in any case in respect of which special provision is made. Since the summons is to be entitled so as not to name the solicitor it is arguable that Order 12 rule 9(1) does not apply to require an entry of an appearance. If that is correct then the originating summons as issued was correct. On the other hand while the summons does not on the face of it name the solicitor it is a summons which requires personal service on the solicitor and there is nothing to say that an appearance is not required. Order 106 rule 5 does not expressly exclude the requirement to enter an appearance. On balance I consider that an originating summons served on a solicitor under Order 106 does require an appearance. Such an originating summons accordingly is not intended to assign the proceedings to chambers in the first instance.

[15] Since the application for injunctive relief was strictly a motion in open court the hearing on 22 May 2003 was correctly conducted in open court. Even if contrary to that conclusion the matter was an interlocutory matter that fell to be concluded in chambers the court must bear in mind the approach recommended by Lord Woolf in Hodgson. On 22 May there was no physical constraint that necessitated an exclusion of the public or representatives of the press. What was happening on that occasion was not intended to be confidential or secret and it would have been contrary to the principles of open justice to treat the matter as such. The judgment given by the court was a public judgment and publicly recorded and the public through the press would have been entitled to obtain a copy. The nature of the case was such that the public had a proper and legitimate interest in it. It would be wholly undesirable that cases involving alleged irregularities in the affairs of legal practitioners should be perceived to be matters that should be conducted in secret. Had the matter been raised with me as an issue on 22 May 2003 I would have directed the matter to be heard in open court under Order 32 rule 13. In this jurisdiction where matters in chambers are often listed in conjunction with other matters in open court and where matters in chambers are conducted in courtrooms to which the present public normally have free access it is incumbent on practitioners to raise with the court the question whether the matter should be heard as a private chambers matter if one of the parties wishes the matter to be heard privately. When counsel do make such an application the court must bear in mind the approach recommended by Lord Woolf in Hodgson. In relation to future interlocutory hearings I shall apply the principles discussed in this judgment in the light of Lord Woolf's

rulings and shall rule appropriately in each application as and when the question arises.