Neutral Citation No: [2010] NIQB 34 | *Ref:* **TRE7791**

Judgment: approved by the Court for handing down | *Delivered:* **10/03/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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JR42's Application [2010] NIQB 34

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY JR42

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TREACY J

Introduction

[1] The applicant is a solicitor, who seeks leave to review the decision of the Solicitors' Disciplinary Tribunal ("the Tribunal") of 20 November 2009 to convene a substantive hearing of disciplinary charges against him.

[2] The evidence being relied upon by the Tribunal was obtained from the applicant during the discovery process in contentious divorce proceedings. As such, it is asserted that the documents are subject to an implied undertaking, binding on the proposed respondent, that they would not be used for any collateral or ulterior purpose without the leave of the Court.

[3] The provision of this discovery material led to the commencement of proceedings before the Tribunal on 5 June 2008 and this was grounded on the affidavit of the Chief Executive and Secretary of the Law Society, Mr Alan Hunter, dated 23 April 2008. In his affidavit he recounts some of the background in the following terms and, under a section which is entitled 'Evidence', he states:-

> **"Mr C. of Millar Shearer and Black, solicitors [hereafter "C"], acted on behalf of…the respondent's wife, in matrimonial proceedings against the respondent. During the course of the discovery process he became aware of serious issues and discussed the same with the deputy Secretary of**

> **the Law Society prior to Christmas 2006. The deputy Secretary advised C to write formally to the Law Society about the matter and he sent a letter dated 16 January 2007 enclosing documents in relation to the matrimonial litigation."**

It was the provision of this material which grounded the charges which were preferred against the applicant.

[4] The applicant filed a replying affidavit sworn on 12 August 2008 in response averring that the material before the Tribunal had been improperly disseminated without permission of the Trial Judge, Mr Justice Gillen. Following an exchange of skeleton arguments and oral hearings the Tribunal dismissed the applicant's preliminary objection that the disciplinary allegations should be struck out on the basis that the information relied upon had been improperly obtained and to proceed would amount to a contempt of court.

[5] On 2 December 2009 pursuant to a request from the applicant the Tribunal gave written reasons for its decision.

Legal Background

[6] The general principle relied upon by the applicant is stated in the following terms:

> **"The courts have long since recognised that any party on whom a list of documents is served or to whom documents are produced on discovery or pursuant to an order of the court impliedly undertakes to the court that he will not use them or any information derived from them for a collateral or ulterior purpose without the leave of the court or consent of the party providing such discovery."** (see "Disclosure" by Matthews & Malek 3rd Ed. Para.15.01)

It was common case that leave of the Court had not been sought or obtained by C or by the Law Society, nor was the applicant's consent sought or obtained.

[7] The learned authors went on to observe that the general principle (stated above) was part of the wider principle that:

> **"… Private information obtained under compulsory powers cannot be used for purposes other than those for which the powers were conferred."** (see ***Marcell v Metropolitan Police Commissioner*** **[1992] Chancery 225** at p.237)

[8] In ***Distillers v Times Newspapers Ltd*** **[1975] 1 QB 613** Talbot J stated:

> **"Those who disclose documents on discovery are entitled to the protection of the Court against any use of the documents otherwise than in the action in which they are disclosed. … This protection can be extended to prevent the use of the documents by any person into whose hands they come unless it be directly connected with the action in which they are produced … It is a matter of importance to the public, and therefore of public interest, that documents disclosed on discovery should not be permitted to be put to improper use. …"**

[9] The implied obligation not to make improper use of discovered documents is owed not to the owner of the documents but to the court – see ***Home Office v Harman*** **[1983] AC 280** per Lord Keith at p308.

[11] Para.15.21 of "Disclosure" states:

> **"It would appear that the exposure of wrong doing revealed by documents disclosed on discovery to the appropriate law enforcement authorities amounts to a breach of the undertaking and accordingly leave of the court is required before so doing."**[1]

The authors observe that it is for the court and not the party to the litigation that should be the final arbiter as to what should be provided to the authorities.

[12] I am satisfied that there is an arguable case that the proposed respondent is bound by the implied undertaking and that to use the documents as intended may constitute a violation thereof.

[13] Whether the proposed use of the documents by the Tribunal was of greater advantage to the public than the public's interest in the need to protect the confidentiality of discovered documents is a matter which can be examined at the substantive hearing.

[14] The Court was referred to Regulation 25 of the Solicitors Practice Regulations 1987 – made by the Law Society with the concurrence of the Lord Chief Justice under the Solicitor's (NI) Order 1976. Regulation 25 provides:

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[1] See *EMI Records Ltd v Spillane* [1986] 1 WLR 969; *Rowlands v Al- Fayed* The Times July 20, 1998

> **"A solicitor *shall* bring to the notice of the Society (having where necessary first obtained his client's consent) any conduct on the part of another solicitor which appears to him to be a breach of these regulations."**

[15] Whether Regulation 25 and the duty on the Society, in the public interest, to investigate allegations of serious wrongdoing by a solicitor and officer of the Court constitute a sufficient competing public interest to prevail over the undertaking (itself in the public interest) will require detailed attention at the substantive hearing.

[16] Mr Coll, on behalf of the proposed respondent submitted that this present judicial review was an impermissible form of satellite litigation. He relied on the decision of Weatherup J in ***O'Connor and Broderick*** **[2005] NIQB** at p.40 and in particular paras.22-24. Having reviewed the authorities Weatherup J stated at para.24 that it was only in exceptional circumstances that it would be appropriate for judicial review proceedings to take place in the course of criminal proceedings and that all issues should be dealt with in the proceedings whether at trial or on appeal. Similarly in disciplinary proceedings the issues that arise should be dealt with in the proceedings whether at the initial hearing or on review or on appeal where permitted and normally judicial review proceedings would only be appropriate at the conclusion of those disciplinary proceedings. (The Court in ***O'Connor*** concluded there were in fact exceptional circumstances). I consider this is also an exceptional case since the disputed issue goes to the very core of the viability and justiciability (ie before the Tribunal) of allegations based on allegedly out of bounds or prohibited material. If the applicant is right he should not be subject to this process at all. Given the public importance of the issues at stake I am satisfied that it would not be proper to refuse leave on this ground.