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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR42's Application [2010] NIQB 95

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW JR 42

TREACY J

Introduction

[1] The applicant is a solicitor, who following leave of the Court[1] granted on 10 March 2010 seeks an order quashing the decision of the Solicitors' Disciplinary Tribunal ("the SDT") of 20 November 2009 to convene a substantive hearing of disciplinary charges against him.

[2] The SDT is a statutory body[2], which, inter alia, is charged with the hearing of complaints[3] by the Law Society as to the conduct of solicitors.

[3] The powers of the SDT conducting an enquiry into a complaint are as set out in Article 48[4] of the Solicitors (NI) Order 1976.

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[1] [2010] NIQB 31

[2] Article 43 of the Solicitors (Northern Ireland) Order 1976 states:
43. — (1) The Lord Chief Justice, after consultation with the Council, shall appoint a tribunal, to be known as the Solicitors Disciplinary Tribunal and consisting of—
(a)practising solicitors of not less than 10 years' standing (solicitor members); and
(b)persons who are neither solicitors nor members of the Bar of Northern Ireland (lay members).

[3] Article 44(1)(e) of the Solicitors (NI) Order 1976

[4] 48. (1) Subject to the provisions of paragraph (2) with respect to the exercise of certain of the powers conferred by this paragraph, the [Tribunal] shall, on an inquiry being held by them, have the like powers, rights and privileges as are vested in the High Court in respect of—
(a) the summoning of witnesses and their examination on oath;
(b) the requiring of the production of documents; and
(c) the issuing, subject to rules of court, of a commission or request to examine witnesses out of Northern Ireland; ...

[4] The evidence being relied upon by the SDT was obtained from the applicant during the discovery process in contentious divorce proceedings. It is asserted that the documents so obtained 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.

[5] Having obtained copies of this discovered material the Law Society commenced disciplinary proceedings against the applicant before the SDT on 5 June 2008.The background to these proceedings is summarised in the affidavit of the Chief Executive and Secretary of the Law Society, Mr Alan Hunter, dated 23 April 2008 which grounded the disciplinary proceedings. In a section of his affidavit which is entitled 'Evidence' he states:-

> **"Mr C. of Millar Shearer and Black, solicitors, 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 is this material which grounds the charges[5] preferred against the applicant.

[6] The applicant filed a replying affidavit sworn on 12 August 2008 in response averring that the material before the SDT had been improperly disseminated without permission of the Trial Judge, Mr Justice Gillen. Following an exchange of skeleton arguments and oral hearings the SDT, on 20 November 2009, dismissed the applicant's preliminary objection that the

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[5] (i) Pursuant to Article 44(1)(e)(ii) of the solicitors (Northern Ireland) Order 1976 (as amended), the Respondent has contravened the provisions of Regulation 23(a) of the Solicitors' Practice Regulations 1987, in that he has not replied with reasonable expedition to all letters addressed to him by the Law Society in relation to his professional conduct.
(ii) Pursuant to Article 44(1)(e)(ii) of the Solicitors (Northern Ireland) Order 1976 (as amended), the Respondent has contravened the provisions of Regulation 2(1)(vi)(b), in that he lodged money into a client account in the name of Elizabeth Reid in circumstances and for purposes he was not entitled or permitted to do so as the said money belonged to him as opposed to a bona fide client for the purposes of a legitimate transaction.
(iii) Pursuant to Article 44(1)(e)(i) of the Solicitors (Northern Ireland) Order 1976 (as amended), the Respondent is guilty of professional misconduct tending to bring the Solicitors' profession into disrepute in that contrary to Regulation 12 of the Solicitors Practice Regulations 1987, he acted in a manner that compromised or impaired or was likely to compromise or impair his integrity and his duty to act in the best interests of his client, the good repute of solicitors in general and his proper standard of work as he operated said client account for his own purpose and benefit.

disciplinary allegations should be struck out on the basis that the information obtained in the course of the matrimonial proceedings could not be used, without the leave of the Court, for any other purpose and that to do so would amount to a contempt of court. On 2 December 2009 pursuant to a request from the applicant the Tribunal gave written reasons for its decision.

[7] Following the grant of leave C (and his client) sought an order pursuant to Order 24 Rule 17 retrospectively discharging them from their implied undertaking and/or pursuant to Rule 7.12(2) of the Family Proceedings Rules (NI) SR&O 1996 No322 for leave to release the relevant documents. Weir J declined to grant the leave sought and his written reasons are to be found at ***H v W*** **[2010] NIFam 12**.

Parties Submissions

[8] At the core of the applicant's submissions was the contention that a third party who comes into possession of materials obtained by way of compulsion is fixed with the same obligation as the party who obtained the document and specifically that the use of those documents by a third party on notice as to their provenance acts in contempt of court. The respondent tribunal and the Law Society submitted that they were not bound by any such implied undertaking.

Discussion

[9] It is important to recall that the challenge in this judicial review is to the convening of a substantive disciplinary hearing at which the prosecuting authority (the Law Society) intend to rely upon materials disclosed by C which, for present purposes, I am prepared to accept were disclosed in breach of *his* implied undertaking. Subsequent to the grant of leave in this judicial review C requested retrospective permission to be released from the undertaking and for leave to release the documents. As noted above this leave was refused.

[10] The existence of the implied undertaking in respect of discovered documents and the reasons for it are well known. But this case raises the issue of the extent to which, if at all, a statutory body such as the respondent tribunal is bound by the implied undertaking. At the heart of the applicant's case is the contention that the tribunal and indeed the prosecuting authority and notice party, the Law Society, are so bound and that use of such documents by them amounts to a contempt of court.

Legal Background

[11] The general legal principle is stated succinctly in ***"Disclosure" Matthews & Malik*** **3rd Ed** at para.15.01 which states:

> **"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."**

[12] 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)

[13] To the same effect Lord Diplock stated in ***Harman v Home Office*** **[1982] 2 WLR 338** at 341:

> **"The use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguard against abuse, and these the English legal system provides, in its own distinctive fashion, through its rules about abuse of process and contempt of court."**

[14] The same point was affirmed by Lord Keith in his speech in that case at 349B:

> **"Discovery constitutes a very serious invasion of privacy and confidentiality of a litigant's affairs. It forms part of the English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place a harsher or more oppressive burden that is strictly necessary for the purpose of securing that justice is done ... The fact that a certain inevitable degree of publicity has been brought about does not, in my opinion, warrant the conclusion that the door should therefore be opened to widespread dissemination of the material by the**

> **other party or his legal advisers, for any ulterior purpose whatsoever, whether altruistic or for commercial gain"**

[15] At para. 5 of the applicant's skeleton argument it was submitted that there was venerable authority in support of the proposition that private information obtained on discovery cannot be used for purposes other than those for which the discovery powers were conferred and in the following paragraph the Court was referred to ***Riddick v Board Mills Ltd*** **[1977] QB 881** where Lord Denning stated at p896:

> **"The memorandum was obtained by compulsion. Compulsion is an invasion of the private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires.** ***The courts should, therefore, not allow the other party – or anyone else – to use the documents for any ulterior or alien purpose. Otherwise the Courts themselves would be doing an injustice".*** [Applicant's Emphasis]

[16] The applicant also relied, in support of their proposition that the respondent is acting in contempt of court in using the documents, upon the decision in ***Distillers v Times Newspapers Ltd*** **[1975] 1 All ER 41** where Talbot J held at p48:

> **"The plaintiffs claim an overriding protection from publication and use of their documents which they were compelled to disclose in the action against them. They claim this protection involves those in whose hands the documents come, particularly where the possession was unlawfully obtained. I do not doubt the correctness of this proposition; I do not think that on the authorities and for the proper administration of justice it can be argued to the contrary.** ***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. I also consider that this protection can be extended to prevent the use of the documents by any person in whose hands they come unless it be directly connected with the action in which they are produced."*** [Applicant's Emphasis]

In the same paragraph however Talbot J continued:

> **"I am further of the opinion that 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 and that the Court should give this protection *in the right case*".** [My Emphasis]

[17] The facts and context of ***Distillers*** are very far removed from the present case. The ***Distillers*** case arose out of the thalidomide litigation when an expert witness, retained on behalf of the claimant parties, sold discovered documents to the defendant newspaper publishers who published a number of articles that were critical of the plaintiff company. They brought an action against the defendants and applied for an interlocutory injunction restraining them from using or disclosing the documents. The defendants unsuccessfully contended that the publication of the documents would not constitute a breach of any duty which they might owe as a result of the disclosure of the documents to them by P and that in any event publication was justified in the public interest. Talbot J held that there was an implied undertaking on discovery that the documents would not be used for any collateral or ulterior purpose. Furthermore he stated that the undertaking was binding on anyone into whose hands the documents might come if he knew that the documents had been obtained by way of discovery and that it was a matter of public interest that documents disclosed on discovery should not be permitted to be put to "improper" use and that the Court should give its protection to prevent such use. The only competing right that the defendants could advance was that there was a public interest in the disclosure of the documents which overrode the public interest in the protection of documents disclosed on discovery. Although the thalidomide story, and any light that it could throw on the matter which might obviate the occurrence of similar events in the future, was a matter of public interest, that interest did not outweigh the public's interest in the proper administration of justice which required that the confidentiality of discovery documents should be protected. Accordingly the injunction was granted.

[18] Insofar as the applicant seeks to extrapolate the absolutist proposition of complete protection for the discovered material unless leave has been granted based on ***Riddick*** and ***Distillers*** it is clear, in my view, that such a proposition is not supported by ***Distillers*** itself and is in any event contrary to later decisions of both the Court of Appeal and the House of Lords.

[19] The scope of the implied undertaking was the subject of consideration by the House of Lords in ***Rank Film Distributors Ltd v Video Information Centre*** **[1982] AC 380.** In that case the plaintiffs obtained *Anton Piller* orders against the defendants on the basis of evidence that the latter were making and selling video copies of films in breach of the plaintiff's copyright. The

order had also required the defendants to give discovery of relevant documents and to answer interrogatories relating to the supply and sale of infringing copies. The House held that the defendants were entitled to rely on the privilege against self incrimination by discovery or by answering interrogatories since, if they complied with the orders, there was a real risk of criminal proceedings for conspiracy to defraud being taken against them.

[20] The plaintiffs had submitted that the privilege ought not to be upheld, since its object could be obtained in a way which would not jeopardise the interests of the appellants, since they could rely on a restriction, express or implied, preventing the use of the information thereby disclosed in subsequent proceedings. This argument was rejected by the House of Lords and Lord Wilberforce stated at p442:

> **"It is certainly correct to say, that existing law and practice *to some extent* prevents matter disclosed on discovery in civil proceedings from being used to the prejudice of the disclosing party. The protection is described with different words: the matter must not be used for an "improper" purpose: *Alterskye v Scott* [1948] 1 All ER 469, or a "collateral object" (*Bray on Discovery, 1st ed.* (1885), p. 238) or, most strongly, "otherwise than in the action in which they are disclosed": *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] Q.B. 613, 621, *per* Talbot J.**
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> **In the most recent case, *Riddick v. Thames Board Mills Ltd* [1977] QB 881, 896, Lord Denning M.R. used the words "for any ulterior or alien purpose." *But it has never been held that these expressions, however wide, extend to criminal proceedings: if they did there would be no need for the privilege.* Mr. Nicholls was therefore obliged to suggest that even granting this, the courts had power positively to decide in a particular case, as the counterpart of the obligation to disclose, that any matter which is compulsorily disclosed as the result of the court's process should be inadmissible in evidence. *But I cannot accept that a civil court has any power to decide in a manner which would bind a criminal court that evidence of any kind is admissible or inadmissible in that court. Certainly a criminal court always has a discretion to exclude evidence improperly obtained if to admit it would unfairly prejudice a defendant. But to substitute for a privilege a dependence on the court's discretion***

> *would substantially be to the defendant's detriment."*
>
> [Emphasis added]

[21] In the same judgment Lord Fraser stated at pp446-447:

> **"At one stage, the argument seemed to depend on the possibility that the court which ordered the discovery might place an express restriction on the use of any information disclosed. In my opinion, any argument on that basis must be rejected.** ***A restriction by the court making the order would, no doubt, be effective to bind the party who obtained the order, but it can hardly be suggested that it would be effective to prevent a prosecutor in the public interest from using, or an English criminal court*** **(a fortiori a Scottish criminal court if a conspiracy were prosecuted in Scotland)** ***from admitting the information in evidence at a trial. All evidence which is relevant is prima facie admissible in a criminal trial, although the trial judge has a discretion to exclude evidence which, though admissible, has been obtained by unfair means from the accused after commission of the offence*****: *Reg. v. Sang*** [1980] AC 402**. But it is obvious that a person who has to rely on an exercise of judicial discretion is in a less secure position than one who, by relying on the privilege, can avoid providing the information in the first place. ..."**

Rejecting the proposition based on ***Riddick*** that the implied undertaking conferred complete protection from further use in civil or criminal proceedings Lord Fraser continued:

> **"The main basis of the argument was an implied rule, said to be derived from the case of *Riddick v Thames Board Mills Ltd*** [1977] QB 881**, to the effect that evidence which has been disclosed under compulsion in a civil action cannot be used against a person who has disclosed it for the purposes of another civil action or of a criminal prosecution. It was argued that any incriminating information disclosed by a person making discovery or answering interrogatories would enjoy *complete protection* by reason of that rule, because the information would have been given under compulsion, in respect that refusal to give it would be contempt of court. I would make one**

preliminary observation on that argument. ***It seems to me to go much too far.*** **If it is well-founded, it means that the established practice whereby judges warn witnesses that they need not answer questions addressed to them in oral examination in court, if the answers might tend to incriminate them, is unnecessary, because refusal to answer would, in the absence of the warning, be contempt of court and any incriminating evidence having been given under compulsion would not be admissible against them in criminal proceedings. I approach a proposition leading to that result with some scepticism. In any event, the case of** ***Riddick*** **was concerned only with the question of the** ***use*** **to which documents recovered on discovery could be put** ***by the party*** **who had obtained discovery. Lord Denning MR at p896H, stated the principle in a sentence thus: "A party who seeks discovery of documents gets it on condition that** ***he*** **will make use of them only for the purposes of that action, and for no other purpose" (emphasis added). That statement of principle would have to be extended to include cases such as** ***Norwich Pharmacal Co v Customs and Excise Commissioners*** [1974] AC 133**, where an order was made for discovery of information for the purpose of its being used in another action.** ***The principle is, I think, that information is not to be used by the party who gets discovery for purposes other than that for which production was ordered. But the case of*** **Riddick** ***had nothing to do with the use of information for prosecution in the public interest.*** **On the contrary, both Lord Denning M.R. at p. 896 and Stephenson LJ at p901, referred with approval to the observations of Talbot J in** ***Distillers Co. (Biochemicals) Ltd v Times Newspapers*** [1975] QB 613**, 621, recognising that** ***there might be a public interest in favour of disclosure which would override the public interest in the administration of justice which goes to preserve the confidentiality of documents disclosed on discovery. That is clearly correct. If a defendant's answers to interrogatories tend to show that he has been guilty of a serious offence I cannot think that there would be anything improper in his opponent reporting the matter to the criminal authorities with a view to prosecution, certainly if he had first obtained leave from the court which ordered the interrogatories, and***

> *probably without such leave.* **If that is right the object of the privilege against self-incrimination would not be completely achieved by relying on any rule which can be derived from *Riddick v Thames Board Mills Ltd*** [1977] QB 881**."**
>
> [Emphasis added]

[22] It is thus clear from ***Rank*** that the implied undertaking does not preclude the use of the material by a prosecuting authority not itself bound by that undertaking.

[23] In ***Attorney General for Gibraltar v May & Ors*** **[1999] 1 WLR 998 *(Hurst, Ward & Robert Walker L JJ)*** a similar issue arose in a somewhat different context. In that case the first defendant was a civil servant employed by the MOD in England who had worked for a period at the Gibraltar Naval Base. After his return substantial thefts from the base came to light in which he was implicated. The Attorney General for Gibraltar obtained a *Mareva* injunction to prevent the first defendant and his family from disposing of certain assets in the jurisdiction. In those proceedings, pursuant to a court order, the first defendant swore an affidavit of assets. He was subsequently extradited to Gibraltar on charges of conspiracy to defraud etc. The AG applied for leave to vary the undertaking, impliedly given *by him* in the *Mareva* proceedings, not to use the affidavit of assets so as to be able to use it as evidence for the prosecution at the first defendant's trial in Gibraltar.

[24] The Court of Appeal overturning the decision of the first instance Judge refusing leave to the Attorney General referred to the passages from ***Rank*** quoted above. The Court then stated:

> **"The *Rank* case clearly establishes, as Mr Howe accepts, that the implied undertaking does not debar the use of the material by a prosecuting authority not itself bound by it. Thus it is common ground that if, say, the Ministry of Defence had been the plaintiff in the civil proceedings (and thus the party bound by the implied undertaking), and if the affidavit had subsequently come into the hands of the Attorney General (eg as a result of a subpoena duces tecum) then in that situation he would be free to use it in the criminal proceedings in Gibraltar.**
>
> **However Mr Howe submits that the situation is quite different where, as here, the Attorney General is himself bound by the undertaking, and in support of his argument he relies on the subsequent decisions of the House of Lords in**

> *Harman v Home Office* [1983] 1 AC 280**, and Crest** *Homes v Marks* **[1987] AC 829, where the scope or the undertaking was fully considered, and its importance emphasised.**
>
> **While recognising that the distinction between the two situations is somewhat artificial, especially in the circumstances of the present case, I have come to the conclusion that, as a matter of principle, Mr Howe is right, and that the undertaking once given must be honoured** ***by the party who gave it. …***
>
> **It was therefore necessary for the Attorney General to make his application to the court in order to obtain** ***his*** **release from it."** [Emphasis added]

[25] In this case the Law Society has come into possession of documents which apparently support the preferment of serious disciplinary charges against the applicant. This evidence has been laid before the statutory tribunal charged with the function of enquiring into disciplinary allegations and they have decided to admit this material in evidence. The protection afforded by the implied undertaking is not as wide as the applicant contends and reliance on ***Riddick*** is, in the context of the present case, misplaced.

[26] If a party, its legal advisers or indeed (as in ***Distillers***) a party's witness unlawfully disseminates discovered material in breach of the implied undertaking, safeguards against abuse by the parties so bound exist for example by way of contempt proceedings, application for abuse of process and injunctive relief. But as the ***Rank*** case makes clear the protection afforded by the implied undertaking is neither complete nor unqualified. The principle identified by Lord Fraser was that the information was not to be used "by the *party*" who gets discovery for purposes other than which production was ordered. If that party breaches his undertaking sanctions exist as discussed above. C is not a party to the proceedings before the SDT. The parties are the prosecuting authority (Law Society) and the applicant. The safeguards in respect of breach of the undertaking by the party bound is liability for contempt and, where relevant, abuse of process, injunctive relief and, in some case, disciplinary proceedings. But neither the SDT nor the Law Society are a party to the undertaking and no *party* bound by the undertaking is seeking to use the documents in other proceedings.

[27] In any event it is plainly in the public interest now that the SDT and the Law Society are fixed with knowledge of documents which support serious disciplinary charges against the applicant that they are not impeded in the exercise of their vital powers of investigation, prosecution and, if justified, disciplinary conviction and punishment.

[28] Frankly, the idea that the SDT and the Law Society would have to ignore or close their eyes to this material is so clearly inimical to the public interest that it is unsurprising that the authorities do not support such a proposition. In fact they point clearly, on proper analysis, in the opposite direction. The SDT no more than any other competent Court or statutory tribunal do not require the leave of another Court to determine the admissibility of evidence before them.

Conclusion

[29] Accordingly, for the above reasons, this judicial review must be dismissed. In the light of this conclusion I do not consider it necessary to address the additional grounds which the applicant was given leave to raise since, in my view, the tribunal would have erred in law had it acceded to the applicant's contention that the SDT (or the Law Society) was, in the circumstances of this case, bound by any implied undertaking.