**Neutral Citation No. [2010] NIQB 57** | *Ref:* **HAR7839**

*Judgment: approved by the Court for handing down* | *Delivered:* **10/5/2010**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**2006 No. 14917**

**KEVIN KENNEDY**

**Plaintiff;**

**-and-**

**CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND**

**Defendant.**

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**QUEEN'S BENCH DIVISION**

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**2005 No. 20855**

**FRANCIS DEVLIN**

**Plaintiff:**

**-and-**

**CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND**

**Defendant.**

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**HART J**

[1] In each of these actions an issue has arisen regarding applications by the plaintiff for discovery under Order 24(7) and (12) of the Rules of the Court of Judicature, and when the matter came before the Master it was agreed that the issues were such that the matters should properly be dealt with by the judge, and they were by consent transferred to the Senior Queen's Bench judge. Although the orders made by Gillen J at a review record that the

actions were to be listed for trial on 29 April 2010, this was an error when the order was drawn up because counsel were agreed that what was intended, and ordered by Gillen J, was that the discovery issue should be determined as an interlocutory application.

[2] The two cases therefore came on for hearing together before me on the discovery issue only. Mr Desmond Fahy appeared on behalf of each of the plaintiffs, and Mr Paul Maguire QC appeared for the defendant, in Kennedy's case with Mr McMillan, and in Devlin's with Mr Paul McLaughlin. Although the legal issues are broadly the same in each case, there are some factual differences between them. I therefore propose to set out the relevant matters in relation to each case before considering the matters of law which arise.

[3] By his statement of claim Kevin Kennedy, who was born on 21 September 1955, asserts that on 21 May 2004 he commenced employment with the Northern Ireland Policing Board as a staff officer. Subsequently he was refused security clearance, and was informed of this on 5 July 2004 when he was requested to leave the building and not to return. By a letter of 22 July 2004 the PSNI explained the refusal of security clearance on the basis that he was the brother of one Dermot P Kennedy, in respect of whom it was said that there was "historical and recent intelligence", although this was not specified. The plaintiff claims that this implied that he was somehow connected with, or involved in, terrorism or criminal activity when there were no grounds or justification for so suggesting, and that this gives rise to the causes of action of: (i) malicious falsehood; (ii) negligent misstatement; and (iii) misfeasance in public office.

[4] The plaintiff sought discovery of the security advice given by the PSNI, and of various documents relating to the drafting and preparation of that advice. In due course the defendant made discovery of a number of documents in redacted form. These fall into two categories. The first consists of all journal entries by Detective Chief Superintendent Hunter relating to the inquiry which resulted in the refusal of security clearance. The second consists of a number of intelligence reports which contained specific assertions that Dermot Kennedy was an active PIRA member in various capacities. The plaintiff now seeks discovery of the entirety of the unredacted documents in both categories.

[5] Francis Devlin, who was born 12 March 1961, applied in June 1991 for a position in the Northern Ireland Civil Service as an administrative assistant. He was told by letter of 15 September 1992 that he was being recommended as suitable for appointment "subject to the satisfactory outcome of various pre-appointment enquiries", but by letter of 21 October 1992 was informed that his application had been unsuccessful.

[6] By a letter dated 30 April 1993 from the Department of Finance and Personnel it was stated that his appointment was not made "on security advice". He now alleges that the security advice took the form of two letters from Superintendent Fulton of the PSNI to the Security Officer of the Department of Finance. The letter of 29 September 1992 alleged that the plaintiff "appears on records in some detail from the late 80s to late 1992 as an active member of the PIRA". The letter of 5 January 1993, which was written after the plaintiff had been told that his application was unsuccessful, stated that "The information supplied to you on 29 September 1992 has been rechecked and is accurate. He continues to be an active PIRA terrorist."

[7] Mr Devlin asserts that these allegations were false and that they give rise to the causes of action of: (i) malicious falsehood; and (ii) negligent misstatement.

[8] He also has sought discovery from the defendants of (i) "intelligence reports"; and (ii) "fully unredacted versions of four pages of text served with the defendants amended lists of documents dated 13 August 2009". The unredacted portions of the four pages contain a number of extracts alleging that on various dates he was alleged to have been a member of the Cookstown PIRA, and that on an occasion which is not specified by date he was sworn into the PIRA.

[9] Mr Fahy on behalf of both plaintiffs accepted that they were covered by the vetting procedure applied to applicants for certain posts. The material parts of the policy behind the vetting procedure are said to be as follows in the defendants replies to the plaintiff's notice for further and better particulars.

> "It is government policy, in the interests of national security and safeguarding parliamentary democracy, that no one should be employed in connection with work the nature of which is vital to the security of the State who:
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> (a) is, or has been involved in, or associated with any of the following activities threatening national security:
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> (i) espionage;
> (ii) terrorism;
> (iii) sabotage; and
> (iv) actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means; or

(b) is, or has recently been, a member of any organisation which has advocated such activities; or

(c) is, or has recently been, associated with any such organisation, or any of its members, in such a way as to raise reasonable doubts about his or her reliability; or

(d) is susceptible to pressure from any such organisation or from a foreign intelligence service or a hostile power; or

(e) suffers from defects of character which may expose him or her to blackmail or other influence by any such organisation or by a foreign intelligence service or which may otherwise indicate unreliability."

[10] In Mr Devlin's case the affidavit sworn by his solicitor on 20 November 2009 in support of this application states at paragraph 6 that the plaintiff's case will fail without access to the full text of the disputed documents because the onus is on the plaintiff to establish that the statement(s) made by the police were false, and this would be impossible without access to the full text. This argument was developed and repeated at paragraph 11 in the skeleton arguments lodged on behalf of both plaintiffs, and Mr Fahy maintained the same stance in his oral submissions.

[11] Mr Fahy contended in each case that the plaintiff was entitled to discovery of the unredacted versions of the documents already referred to because each plaintiff has put the truth of the assertions made by the PSNI on the basis of these documents in issue and denies that they are true. He submitted that there were two principles which supported the claims by both plaintiffs for discovery.

(1) That the causes of actions in these cases were significantly different from other types of litigation where considerations of Public Interest Immunity (PII) have prevailed to prevent discovery of certain types of documents, or discovery of the contents of particular documents which may have been disclosed in part.

(2) That the principles of equality and open justice outweigh any public interest that there might be in favour of non-disclosure.

He developed these arguments by saying that the redacted information may give rise to many enquiries and that there was fundamental unfairness to the

plaintiff whose cause of action would inevitably fail were PII to be successfully invoked by the defendant.

[12] In support of his argument he pointed to the decision of Carswell J (as he then was) in McSorley v The Chief Constable (1993) 2 NIJB. In that case Carswell J had to consider whether PII should be extended to cover statements made by police officers in the course of investigations into allegations of police misconduct carried out by the Complaints and Discipline Department of the RUC. Having reviewed the then authorities, and in particular Neilson v Laugharne [1981] QB 736, he concluded that:

> "… The public interest of avoiding the injustice which upholding immunity would involve in the present case outweighs the public interest which underlies the immunity. An exception would be justified which would extend to cover the circumstances of this case. I therefore propose to permit the plaintiff's counsel to call for a copy of a complaint statement made by any police witness who has refreshed his memory of the incident by reading it before giving evidence and, if he wishes, to cross-examine him out of it."

In so ruling Carswell J anticipated the decision of the House of Lords in R v Chief Constable of West Midlands Police ex parte Wiley [1995] 1 AC 274. Mr Fahy submitted that the facts of the present cases cry out for an exception to the normal PII approach because of the implications of the material being covered by PII for the plaintiff's case, and he emphasised that in Mr Devlin's case the incidents alleged occurred over 20 years ago and in a different political climate to that which exists today. He conceded that because this was a civil matter it was not possible to rely upon the fair trial provisions of Article 6 of the European Convention, but submitted that they should be applied by analogy.

[13] Mr Maguire QC for the defendants characterised the application for discovery in Mr Devlin's case as a pure fishing exercise because the nature of the material already disclosed on discovery related to him personally and made it abundantly clear the basis upon which the police acted. He further submitted that no reason had been advanced in Mr Devlin's case that would justify the court in ordering discovery of the redacted elements because there was no basis upon which it could be argued that they had any bearing on the case brought by Mr Devlin.

[14] So far as Kennedy is concerned, he submitted that it has not been alleged in his statement of claim that there was a suggestion that he had been personally involved with a terrorist organisation, rather that he was affected

by his association with his brother whose activities were alleged in the unredacted portions of the documents provided by the defendants.

[15] In both cases, relying upon the decision of the Northern Ireland Court of Appeal in McCorley v The Northern Ireland Office and The Governor of HMP Maghaberry [2000] NICA 23, he submitted that the court was required to approach this question in a number of stages. These four stages were not disputed by Mr Fahy and I am satisfied that they are in accordance with authority. The first stage is to determine whether the documents possess sufficient possible relevance to the issues in each action, and this is done by applying the well known test enunciated by Brett LJ in the Peruvian Guano case (1882) 11 QBD 55 at pages 62 to 63. The test is that a document must be disclosed:

> "… which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary."

Mr Maguire conceded on behalf of the defendant that in each action the documents sought do meet the Peruvian Guano test as the Minister conceded in his PII Certificate.

[16] Even if the documents possess some actual or possible relevance, a second stage has to be met, because it does not follow that the court will require all such documents to be produced. Order 24 Rule 15(1) states that:

> "… the judge shall not make an order for inspection of such documents if and insofar as he of opinion that it is not necessary either for disposing fairly of the proceedings or for saving costs."

In this context Mr Maguire relied upon the passage from the speech of Lord Scarman in Air Canada v Secretary of State for Trade (No. 2) [1983] 2 AC 394 at 445 cited with approval by Carswell LCJ in McCrory at [27].

> "In my judgment documents are necessary for fairly disposing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts on which the decision in the cause will depend."

[17] Mr Maguire argued that the disclosed facts in Mr Kennedy's case said nothing about him, as opposed to his brother, the documents were therefore

remote from the plaintiff, and in those circumstances it was impossible for the court to be satisfied that the documents could give any assistance, let alone substantial assistance, to the court on the hearing of the action. It was therefore not necessary for the court to go to the third stage of inspecting the redacted portions. However, Mr Maguire emphasised that he had no objection to the court inspecting the redacted portions of the various documents if the court thought that was necessary. He reiterated that in Mr Devlin's case the application was simply a fishing expedition and therefore he could not satisfy the second stage test.

[18] The fourth and final stage is that if the judge determines that production of the documents is necessary for the fair disposal of the action, then the judge must carry out the balancing exercise established by the authorities. Mr Maguire submitted that in this case the documents were clearly subject to PII and that the balancing exercise, if necessary, should be determined in favour of the defendant.

[19] In the case of Mr Kennedy I am not persuaded that the documents which he seeks are necessary for disposing fairly of the proceedings. They do not relate to him, and the information given in relation to his cousin is sufficiently comprehensive to enable the plaintiff to seek to controvert those assertions in whatever fashion is open to him. So far as Mr Devlin is concerned, I entertain considerable doubts as to whether the documents could be said to be necessary for disposing fairly of his action. It is open to him to give whatever evidence he wishes in relation to his conduct over the years, nevertheless some of the allegations against him are lacking in detail and go back for many years to the late 1980s, although it was asserted in January 1993 that he "continues to be an active PIRA-terrorist". Not without some hesitation I have come to the conclusion that the lack of detail in the allegations against Mr Devlin, and the fact that they go back for so many years and are therefore very difficult to controvert because of the passage of time, are sufficient to justify the court concluding that the unredacted material may be necessary for disposing fairly of the proceedings. However, if I am wrong in relation to Mr Kennedy, the documents in his case are not voluminous, and as I have decided that I should inspect the documents in relation to Mr Devlin, I consider it appropriate to inspect the documents relating to Mr Kennedy as well.

[20] At this point I must deal briefly with a procedural matter I raised with counsel. The Rules of the Court of Judicature do not provide for any *ex parte* hearing in the absence of the plaintiff of the kind that is provided for in the Crown Court when applications are made to the disclosure judge under the provisions of The Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (NI) 1997. In the present case Mr Fahy submitted that if I considered it necessary to require further submissions from the defendant in relation to the content of the redacted documents I should not

hear any applications *ex parte*. Mr Maguire opposed this, and said that the defendant did not wish to reveal any of this material to any one on behalf of the defendant, and that in such circumstances the court should conduct an *ex parte* hearing. In the event I inspected the documents and did not consider that an *ex parte* hearing was necessary.

[21] Mr Maguire referred me to the unreported decision of Stephens J in McKeever v Ministry of Defence from which it appears that an *ex parte* hearing was heard in that case where PII had to be determined by the judge. In the absence of a rule of court specifically applying to such circumstances it may be appropriate for the court to develop its own procedures, in which case resort could be made to its inherent jurisdiction to conduct an *ex parte* hearing. However, in the absence of more detailed argument, and as it did not arise in the circumstances of the present case, I need say nothing further than to suggest that the relevant Rules Committees for the Court of Judicature and the County Courts might wish to consider whether Rules should be enacted for PII hearings in civil cases given the relative frequency with which such issues occur.

[22] It is well-established that public interest immunity extends in civil cases to prevent the disclosure of information which might reveal the identity of an informer, see Marks v Beyfus (1890) 25 QBD 494, although in a criminal case if the judge considers that the disclosure of this information is necessary or right in order to establish the prisoner's innocence then the information must be disclosed. This principle has been repeatedly reaffirmed in more recent times, and the principle extended to individuals who provide information to other bodies concerned with law enforcement such as the Customs and Excise Commissioners, see Alfred Crompton Amusement Machines Limited v Customs and Excise Commissioners (No. 2)[1974] AC 405; the Gaming Board, see Rodgers v The Home Secretary [1973] AC 388; or who are concerned with the protection of children in D v NSPCC [1978] AC 171.

[23] It is equally well-established that the principle applies not merely to criminal proceedings but to civil proceedings also as was stated by Bowen LJ in Marks v Beyfus. Mr Fahy argued that a number of decisions in recent years indicate that the courts are taking a more generous view of what should and should not be disclosed under this principle. Whether that is the case or not, I am quite satisfied that none of the authorities relied upon by Mr Fahy support an argument that the long-established practice of protecting the identity of informers has been weakened or circumscribed in any fashion. Were it necessary to decide in the present case whether the portions of the unredacted material which I have examined require to be disclosed then it would be necessary to give more detailed consideration to this principle, its extent and application. However, having examined the documents I am satisfied that they contain nothing which requires the defendant to make

further discovery to the plaintiff because the redacted or undisclosed material is not necessary for fairly disposing of the trial of the action and could not advance the case sought to be put forward by either plaintiff. I therefore refuse to order further discovery in either case and dismiss these applications.