Neutral Citation No. [2015] NIMaster 3 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **27/3/15**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Roddy Logan

Plaintiff;

And

Chief Constable of the Police Service on Northern Ireland

Defendant.

Master Bell

Introduction

[1] On 27 July 2011 Mr Logan was arrested under section 41 of the Terrorism Act 2000 arising out of the investigation into the murder of Constable Ronan Kerr who died when a bomb exploded under his car. Later the same day Mr Logan was released. On 19 September 2013 Mr Logan issued a Civil Bill commencing County Court proceedings against the Chief Constable seeking damages for unlawful arrest, assault, battery, trespass to the person and unlawful detention arising out of the arrest. The Chief Constable now places before the Court an application for removal, arguing that the proper venue for the hearing of Mr Logan's proceedings is the High Court and not the County Court because the proceedings require the disclosure of material the disclosure of which would be damaging to the interests of national security.

[2] At the hearing of this application the Plaintiff was represented by Mr Lockhart QC and Mr Summers and the defendant was represented by Mr Robinson.

I am grateful to both parties for the assistance of their oral submissions and skeleton arguments.

Initial Adjournment application

[3] Mr Lockhart initially sought an adjournment of this application. He submitted that in the case of *Keeley v Chief Constable and Scappatichi*, where the first defendant has sought a Closed Material Proceeding under section 6 of the Justice and Security Act 2013, the plaintiff was intending to seek a declaration of incompatibility under section 4 of the Human Rights Act 1998. He invited me therefore to adjourn the application before me until that application had been heard and granted.

[4] No timetable was initially offered to me in relation to when the application in *Keeley* would be heard. However on the second listing of the removal application, I was informed by counsel that *Keely* is listed for hearing at the end of April 2015. However, regardless of the ruling at first instance, there is the distinct possibility of an appeal to the Court of Appeal by the losing party. In addition, even if the application was successful and a declaration of incompatibility was granted, that does not have the effect of removing the 2013 Act from the statute book. It would then be a matter for Parliament to decide what should be its response. It might well therefore be that, if the removal application was to be adjourned until the ultimate outcome of the *Keeley* application was known, this might take up to two years (and even longer if proceedings on the issue were commenced before the Strasbourg court). I therefore decided that an adjournment of the removal application was not appropriate.

Legislative position

[5] Section 31 of the Judicature Act (Northern Ireland) 1978 provides the general power of the High Court to change the forum within which litigation is heard :

> "The High Court may in accordance with rules of court at any stage remove to that court from a county court and hear and determine the whole or any part of any civil proceedings which could have been commenced in the High Court but have been commenced in that county court if—
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> (a) the parties consent to the removal thereof; or
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> (b) on the application of any party the court is satisfied that there is a triable issue,
>
> and in either such case the court is of opinion that, by reason of the nature of the proceedings, the amount of the claim or the value or annual value of the subject matter, the proceedings are not within the jurisdiction of the county court or that the proceedings could in all the circumstances be more appropriately heard and determined in the High Court."

[6] Rule 78 of the Rules of the Court of Judicature sets down the procedural arrangements for the making of remittal and removal applications.

The Order 78 Rule 1A Test

[7] By virtue of the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2013 the Lord Chancellor made Rules in exercise of the power conferred by paragraph 3(6)(a) of Schedule 3 to the Justice and Security Act 2013. Order 78 Rule 1A of the Rules now provides :

> "Where in proceedings before a county court the court considers that there is a real possibility that a party would in the course of the proceedings be required to disclose material the disclosure of which would be damaging to the interests of national security, the court must transfer the proceedings to the High Court."

[8] I interpret the words "real possibility" as meaning that an application must be evidentially-based. If counsel were simply to make submissions that a party would in the course of the proceedings be required to disclose material the disclosure of which would be damaging to the interests of national security, I might be satisfied that a possibility would exist, but I do not consider that I could be satisfied that there would be a "real possibility". In order to satisfy me therefore that a real possibility exists, the party making that submission requires to submit affidavit evidence.

[9] The defendant initially furnished two affidavits to ground the removal application. The first affidavit is by Tanya Doherty, a solicitor in the Crown Solicitor's office. Her affidavit states, inter alia,:

> "7. In order to defend the claim the Defendant must provide evidence to the court that there were reasonable grounds to suspect that the Plaintiff committed the said offences. This cannot be provided to the court in an open hearing and it is the intention of the Defendant to seek a declaration from the High Court that the proceedings may include a Closed Material Proceeding under section 6(2) of the Justice and Security (Northern Ireland) Order 2013.
>
> 8. I have viewed some of the intelligence material and summaries of the intelligence material. The material cannot be disclosed without it being damaging to the interests of national security. This is on the basis that to disclose the sensitive material may lead to the identification of the source or sources and disclose methodology. It is clear that, to defend the claim disclosure of this information would be required."

(There is of course no "Justice and Security (Northern Ireland) Order 2013". I consider that Ms Doherty has simply confused the primary and secondary legislation in this area and intended to refer to the Justice and Security Act 2013. Nevertheless, the evidence she gives is clear.)

[10] The second affidavit filed on behalf of the defendant is by Chief Superintendent Raymond Murray. He served as the senior investigating officer into the murder of Ronan Kerr. Chief Superintendent Murray outlines the way in which the investigation has progressed and explains two types of sensitive material involved in the investigation. He avers that, because he believes that the Chief Constable must provide disclosure of all relevant documentation justifying the arrest of Mr Logan, he is of the clear view that this would necessitate the disclosure of intelligence information that would be damaging to the interests of national security.

[11] The plaintiff submits that I should not take these affidavits at face value. Neither the plaintiff's legal team nor I have viewed the sensitive material in question. The plaintiff argues that I am therefore unable to make a proper assessment as to whether the test under Order 78 Rule 1A is satisfied. I was not invited by the plaintiff's counsel to view the material in question and, although this point was not argued before me, if I had been invited I do not consider that it would have been appropriate to do so. I conclude that, once a party files an affidavit or affidavits which make the claim that there is a real possibility that a party would in the course of the proceedings be required to disclose material the disclosure of which would be damaging to the interests of national security, that is effectively a "trump card" as far as the removal application is concerned. The safeguard for the other side lies not in the Master hearing the removal application having to be personally satisfied that disclosure of the material would be likely to damage the interests of national security, but in the outcome of the Closed Material Proceeding before the judge. If it turns out that the material has no bearing on national security then that can be a matter of public criticism in a written judgment together with an award of costs. Not only that, but in a particularly bad case where a solicitor had sworn an affidavit averring that he or she had viewed the material and reached a conclusion that its disclosure would be damaging to national security when it patently would not, and it was the view of the judge that such an affidavit was not merely the product of an error of professional judgment but ought never to have been sworn, that solicitor could be reported to the Law Society. Similarly in a particularly bad case where such an affidavit had been sworn by a police officer and it was the view of the judge that such an affidavit was not merely the product of an error of professional judgment but ought never have been sworn, that officer could be reported by the judge to the Police Ombudsman.

[12] A second argument offered by Mr Lockhart is that the pleadings in the County Court litigation are closed and the discovery process has ended and hence there is no real possibility of the disclosure of material which would be damaging to the interests of national security. Following submissions by Mr Lockhart in relation to delay by the defendant, I required to know the reasons for the delay in the

litigation and I adjourned the application for the filing of an affidavit by the defendant. Christine Hewitt of the Crown Solicitor's Office filed an affidavit which dealt with the delay issue but also clarified the position regarding discovery. It states that, although a formal discovery list was not provided by the defendant, informal and initial discovery was provided to the plaintiff. A trawl of documents then commenced. (Those documents are inevitably numerous. Chief Superintendent Murray's affidavit avers that the murder investigation is the biggest investigation in the history of the PSNI.) I therefore do not accept the argument that because the discovery process has ended there is no real possibility of the disclosure of material which would be damaging to the interests of national security. Indeed, even if the discovery process had ended, the argument can still not succeed because discovery is a continuing duty on both parties regardless of the stage that the action has reached.

The Overriding Objective

[13] Mr Lockhart submitted that the effect of the overriding objective was that I should have regard to the delay that would be experienced by the parties if the case were to be removed to the High Court. He therefore submitted that I should utilise the overriding objective to decline in the exercise of my discretion to remove the action under Order 78 Rule 1A. Mr Robinson conceded that I did have a discretion so to do but argued strongly that this was certainly not a case in which the exercise of a discretion could be justified.

[14] I have concluded that counsel are incorrect in their submissions. Neither counsel made reference to Order 126 Rule 2 of the Rules. Order 126 Rule 2 is inserted in the Rules of the Court of Judicature by the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2013 which amends the Rules for the purpose of implementing Part 2 of the Justice and Security Act 2013.

> *"Modification to the overriding objective*
>
> 2.—(1) Where any of the rules in this Order applies, the overriding objective in Order 1, and so far as possible any other rule, must be read and given effect in a way which is compatible with the duty set out in paragraph (2).
>
> (2) The Court must ensure that information is not disclosed in a way which would be damaging to the interests of national security."

[15] If counsel are correct and I do have a discretion to decline to remove a case on the basis that removing it would add undesirable and unwarranted delay to the proceedings, what would be the impact of not removing it to the High Court ? The impact would be that the proceedings would remain in the County Court and the defendant would be faced with a dilemma of choosing between two alternatives. The first is that, in order to defend the action, it would have to disclose the information which led to the arrest of Mr Logan and thereby damage national

security interests. The second is that it declines to disclose the information which it alleges would be damaging to national security interests and either settles the case or offers no evidence and proceeds to an assessment of damages by the court.

[16] What order 126 Rule 2 does is to change the way that a court must implement the overriding objective. Thus, even if a case exists where the removal of proceedings to the High Court could not normally be justified because of the delay in the proceedings or because of the extra costs that would occur and would not be proportional, once the factor of a real possibility of damage to the interests of national security comes into play, the factors of delay and expense must be subservient to the national security factor. That, according to Order 126, is the court's duty.

[17] I therefore conclude that, once I am satisfied that there is a real possibility that a party would in the course of the proceedings be required to disclose material the disclosure of which would be damaging to the interests of national security, then I must transfer the proceedings to the High Court, and, in the circumstances, I do not have a discretion to do otherwise.

[18] I therefore grant the application for removal.