Neutral Citation No.: [2008] NIQB 115 | *Ref:* **MOR7297**

Judgment: approved by the Court for handing down | *Delivered:* **22/10/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MARK CHRISTOPHER BRESLIN AND OTHERS
PLAINTIFFS

-AND-

SEAMUS MCKENNA AND OTHERS
DEFENDANTS

RULING NO 12

MORGAN J

[1] The plaintiffs in this action include some of those injured and the relatives of some of those killed as a result of a bomb explosion in Omagh on 15 August 1998. They contend that the defendants in various ways were responsible for the detonation of the bomb. In respect of the third named defendant, Michael McKevitt, the plaintiffs allege that his responsibility arises a result of a leadership role held by him in the Real IRA, an organisation which the plaintiffs say was responsible for causing the explosion.

[2] In support of their case the plaintiffs want to call evidence which has been referred to in this case as the Woolwich material. In particular it is alleged that in January 2001 a representative of the British Security Service contacted the public relations officer of the 32 County Sovereignty Committee purporting to represent a foreign government and offering arms, support and financial assistance to dissident republicans. Between 19 January 2001 and the end of March 2001 it is alleged that there were 19 telephone calls between members of the British Security Service acting in this capacity and a person called Karl whom the plaintiffs say is in fact the third named defendant. The telephone calls were apparently taped.

[3] The plaintiffs say that as a result of this operation three persons were arrested by the Slovenian authorities on 5 July 2001 and subsequently extradited to the United Kingdom for trial. In connection with this application I heard evidence from a retired officer from the Metropolitan Police Service, Detective Superintendent Pearce. It appears that for this criminal trial a tape was prepared containing a compilation of the conversations between Karl and the members of the British Security Service. The admissibility of this material was the subject of an application before the trial judge. The original of this compilation was part of the prosecution case against the defendants but was never played in open court. It appears that some parts of the transcripts of these conversations may have been referred to in interlocutory hearings in the criminal trial but again these were not referred to in the main trial. The third named defendant was not involved in the criminal trial.

[4] Mr Pearce was advised that his attendance as a witness in these proceedings would be required in late September 2008. He reviewed his statement and it leapt from the pages that a copy of the compilation tape was likely to be useful. He decided that he needed a steer from the legal department at an early stage. The legal adviser at the Metropolitan Police Service referred him to the legal adviser in the Security Service. He then obtained a copy of the compilation tape held by the Metropolitan Police Service. He said that the originals of the tapes are held by the Security Service. The plaintiffs wish to play the tapes for the purpose of establishing both the content of the tapes and the recognition of the voice of the third named defendant.

[5] For the third named defendant Mr O'Higgins SC contended that the Security Service Act 1989 created a statutory framework for the functioning of the Security Service.

> "1. The Security Service
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> (1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State.
>
> (2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.
>
> (3) It shall also be the function of the Service to safeguard the economic well-being of the United

> Kingdom against threats posed by the actions or intentions of persons outside the British Islands.
>
> (4) It shall also be the function of the Security Service to act in support of the activities of the police forces, the Serious Organised Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.
>
> (5) Section 81(5) of the Regulation of Investigatory Powers Act 2000 (meaning of "prevention" and "detection"), so far as it relates to serious crime, shall apply for the purposes of the provisions of this Act as it applies for the purposes of the provisions of that Act not contained in Chapter 1 of Part 1."

Section 2(2)(a) impose duties on the Director-General in relation to disclosure.

> "(2) The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure—
>
> (a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of preventing or detecting serious crime or for the purpose of any criminal proceedings;"

He submitted that the disclosure made by the Security Service in the Woolwich case consisted of copies of tapes from which transcripts were prepared for the purpose of the criminal proceedings. In light of the policy underpinning the 1989 Act that disclosure should as far as possible be limited, he contended, so that any further disclosure by the Metropolitan Police Service could only be lawfully made for the purposes set out in the 1989 Act. In particular disclosure could not be made to aid the maintenance of civil proceedings. In any event Mr O'Higgins SC submitted that the material was irrelevant because it related to events in 2001 far removed from the time of the Omagh bomb in August 1998.

[6] The plaintiffs relied on the ruling in the Woolwich case to establish that the method of obtaining the tapes did not constitute an interception for the purposes of the Regulation of Investigatory Powers Act 2000. They contended that once the tape was disclosed the 1989 Act had no further role to play as the material was no longer subject to the statutory scheme.

[7] I have no reason to doubt that the copies of the tape provided by the Security Service to the Metropolitan Police Service were lawfully disclosed

and it seems likely that the disclosure was considered necessary for the purpose of preventing or detecting serious crime or for the purpose of criminal proceedings. Either the Security Service or the Metropolitan Police Service further disclosed these materials to the Crown Prosecution Service. If such disclosure was made by the Metropolitan Police Service the third named defendant takes no issue with it since it clearly fell within the terms of the 1989 Act.

[8] The 1989 Act imposes no express separate duty on the recipient of the information once disclosure has been made. If, therefore, any such duty is to be imposed on the recipient of the information it could only arise as a result of reading into the statue by way of interpretation some such duty. Since the Metropolitan Police Service, like any other police service, is subject to existing legal constraints on its entitlement to disclose information in its possession to third parties I can see no purposive reason for reading such a duty into the statute.

[9] The common law obligations of public bodies such as the Metropolitan Police Service in relation to the disclosure of confidential information must be exercised in the public interest (see Marcel v Commissioner of Police of the Metropolis [1992] Ch 225 per Nolan LJ). It is also necessary to take into account the private interest of the person to whom the duty of confidence is owed. The disclosure of damaging information about individuals requires specific public interest justification (see Wood v CC of the West Midlands [2004] EWCA Civ 1638 and ex p Thorpe [1999] QB 396). These constraints on the disclosure of such information are further reinforced by article 8 of the ECHR. I accept that the recording of a conversation with Karl was an interference with private life and that its disclosure would constitute a further interference. Under the convention, however, the balance would have to be struck between those rights and the rights and freedoms of others.

[10] There is no information before me as to the basis upon which the disclosure of the tape was made by the Metropolitan Police Service to the plaintiffs. I am aware that discovery of the Woolwich materials was made by the plaintiffs in 2006 although the release of the tape was not known to the third named defendant until 2 October 2008. I consider that release of the tapes would have involved careful consideration of the public interest in disclosure and the private rights of the individual. I do not consider that I should assume that there was any error in the balance struck by the Metropolitan Police Service on the basis of the materials before me and accordingly I have no reason to conclude that the disclosure was unlawful.

[11] The last point made on behalf of the third named defendant is that the material is in any event irrelevant. I accept that this material relates to events several years after the time of the index event. The plaintiffs rely on it because they say it supports their contention that third named defendant was

indeed the leader of the Real IRA as alleged by David Rupert in his e-mails and also that it supports Rupert's reliability because it demonstrates the third named defendant acting as he told Rupert he intended to do.

[12] I consider that the evidence is admissible. The weight to be given to it will be a matter for submissions and the fact that it is so far removed from the time of the bomb may well be significant.