

**Neutral Citation no. [2008] NIQB 19**

*Ref:* **MOR7087**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered:* **15/02/08**

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

**QUEENS BENCH DIVISION**

**Between:**

**Mark Christopher Breslin and others**

**Plaintiff;**

**-and-**

**Seamus McKenna and others**

**Defendants.**

**Ruling No 7**

**MORGAN J**

1. The plaintiffs are persons who were injured or lost loved ones in the bomb explosion in Omagh in August 1998 and they claim damages against the defendants on the basis that each of them was in some way involved in causing the said explosion. The plaintiffs now seek an Order pursuant to Order 39 Rule 1 of the Rules of the Supreme Court (Northern Ireland) 1980 for the examination on oath by the trial judge of 39 members of the gardai in a place to be agreed in the Republic of Ireland.

*The application*

2. The plaintiffs' grounding affidavit discloses that on 2 September 2003 the solicitor in charge of the case and his senior counsel met with the Republic of Ireland's Minister for Justice, Equality and Law Reform at his Department in Dublin. The focus of that meeting was a discussion as to how the Irish

authorities could assist in the provision of evidence which the plaintiffs sought in order to advance their case. The Minister explained that the authorities in the Republic of Ireland would be willing to allow relevant Garda officers to testify as to their knowledge of the defendants' involvement with the RIRA at the time of the Omagh bombing and, where appropriate, the defendants' direct participation in the planning and implementation of the bomb. It was made clear that such cooperation could only be forthcoming if a way were found for the evidence of these Garda officers to be heard in a court of the Republic of Ireland where they would be entitled to invoke the protection of public interest immunity as prescribed by the laws of that jurisdiction.

3. The plaintiffs' solicitor states that the Minister gave his guarantee that in order to preserve such public interest immunity the Republic of Ireland would provide full court facilities in Dublin for the temporary use of the High Court of Justice, Belfast so that it might be able to hear the Garda evidence necessary to the advancement of the plaintiffs' case.

4. The plaintiffs have provided a summary of those witnesses that they would like to call at a proposed commission hearing in the Republic of Ireland and in it have set out how the evidence of various witnesses identified in the schedule to the summons may be relevant to the issues and trial. In particular they have submitted that witnesses will be able to give evidence in relation to the RIRA and its leadership, corroboration of the evidence of David Rupert who makes allegations principally against the third named defendant Michael McKeivitt, evidence of an interview with the fourth named defendant Liam Campbell, evidence connecting the first named defendant and the sixth named defendant Seamus McKenna and Seamus Daly to the RIRA and evidence of alleged admissions made by the fifth named defendant Colm Murphy.

5. I have examined the schedule attached to the summons for the purpose of identifying those officers relied upon by the plaintiffs as a source of some of the evidence set out above and have concluded that a total of 24 such officers being numbers 2, 3, 4, 5, 6, 7, 9, 11, 12, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38 and 39 fall into that category.

6. The power to order depositions to be taken is found in Order 39 Rule 1 of the RSC (NI) 1980.

"1. - (1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination on oath before a judge, an officer of the Court or some other person, at any place, of any person."

If they are successful in their application under Order 39 Rule 1 the plaintiffs seek the issue of a letter of request to the judicial authorities of the Republic of Ireland pursuant to Order 39 Rule 2.

“2. - (1) Where the person in relation to whom an order under rule 1 is required is out of the jurisdiction, an application may be made-

(a) for an order under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person”

*The submissions of the parties*

7. The plaintiffs submit that the evidence which they wish to adduce is of substantial importance to the case which they wish to make. They point out that a Garda officer giving evidence in this jurisdiction who refused to answer a question because of the public interest in the prevention of disclosure of certain information might in certain circumstances find themselves liable to proceedings for contempt. Accordingly the plaintiffs say that the attitude of the authorities in the Republic of Ireland is understandable. Unless the order is made the plaintiffs may be deprived of the opportunity of bringing this evidence before the court. The order is, therefore, necessary for the purposes of justice.

8. The first, third, fifth and sixth named defendants all oppose the application. They say firstly that the plaintiffs have not established that the proposed course is necessary as the present government in the Republic of Ireland has not yet indicated a firm view as to how if at all it will co-operate with the plaintiffs. Secondly they contend that the reference to the protection of public interest immunity is misplaced since a judge taking evidence on commission will not make any determination in relation to a public interest immunity claim. Thirdly the application did not expressly say that the witnesses would not attend court in Northern Ireland. Fourthly the application did not have sufficient detail about the proposed evidence to enable a decision to be made and finally it would be inappropriate for the judge hearing the trial to take evidence on commission in another jurisdiction at some time during it. In relation to the third named defendant 2 further points were made. Firstly there was an issue about the admissibility of opinion evidence which the plaintiffs intended to adduce from members of the Garda. Secondly the third named defendant would object to the admissibility of the hearsay evidence of David Rupert. Since some of the proposed evidence consisted of corroboration of his evidence it would be inappropriate to take that evidence before making a decision in relation to the admissibility of the hearsay evidence of David Rupert.

## *Conclusion*

9. I accept the submission of the defendants that there is a degree of uncertainty at this stage about the level of co-operation which may eventually be available from the authorities in the Republic of Ireland in terms of the provision of witnesses to any of the parties. I consider, however, that there is evidence before me of a difficulty in relation to issues of public interest immunity which may well prevent Garda officers being able to give evidence in this jurisdiction. We are now less than two months away from the commencement of the trial. In deciding whether it is necessary in the interests of justice to make the order I must take into account the possibility that any further delay might imperil the trial date. These proceedings were issued in August 2001 and I consider that any risk of further delay is unacceptable.

10. I accept the submission of the defendants that if I sit in the Republic of Ireland to take evidence on commission I will not determine issues relating to the public interest in that jurisdiction. If a witness indicates that he or she is not willing to answer a question because of issues connected to the public interest in the Republic of Ireland I will simply note that answer. It will then be a matter for submissions in this jurisdiction to decide what effect, if any, failure to answer may have upon the admissibility or weight of the evidence.

11. Although the affidavit grounding the application did not expressly say that Garda officers would be prevented from testifying in Northern Ireland paragraph 3 did indicate the view of the authorities in the Republic of Ireland that they would only be willing to allow relevant officers to testify in full if they were able to invoke the protection of public interest immunity as prescribed by the laws of that jurisdiction. I consider that this demonstrates a considerable impediment to the ability of those officers to freely give evidence in this jurisdiction and if no order were made I consider that there is a high risk that potentially relevant evidence would not be available.

12. I consider that there was force in the defendants' submissions about the lack of detail in relation to the evidence that the officers propose to give until the plaintiffs produced a schedule indicating the matters to which each of the witnesses was proposing to give evidence. I have already indicated that I have identified 24 witnesses whose evidence has been so described. It is in relation to those witnesses only that I am prepared to entertain the application at present.

13. Although the rule clearly provides that a judge may take evidence on commission in another jurisdiction it is unusual for such a course to be followed. There must, therefore, be some factors which justify taking such an exceptional course. I consider that there are two such factors. The first is that it is proposed that a substantial body of evidence which may well be controversial between the parties should be taken in this way. It may well be necessary to determine whether or not I accept as credible some of the witnesses. Even though I would not be sitting as a judge I would be entitled to take into account the demeanour of the witnesses when answering questions. The second factor relates to the public interest immunity issues. The circumstances in which they might arise cannot at this stage be foretold but it may become necessary as commissioner to give some assistance to the parties as to how they should proceed.

14. On behalf of the third named defendant Mr Doran has already indicated that there will be admissibility issues in relation to any proposed opinion evidence. This is an issue on which I will require full submissions in the course of the trial. In the case of any witness proposing to give opinion evidence it is likely to be necessary to establish their expertise and then to find the matters in respect of which they are entitled to give expert opinion evidence. It seems to me that this will be a matter for the trial once it has been established what evidence the witness proposes to give.

15. The final point is based on article 6 of the ECHR. Mr Doran submits that it is contrary to the fair trial rights of his client to admit the hearsay evidence of Mr Rupert if it is the sole or only substantial evidence against his client. That again will be a matter for the trial. It may be of some importance in relation to that submission to establish what other evidence there is in relation to issues between the third named defendant and Mr Rupert. Some of the proposed evidence is put forward on the basis that it is corroborative of the evidence of Mr Rupert. The existence of that evidence may influence the issue of the admissibility of any hearsay evidence from Mr Rupert.

16. I am satisfied, therefore, that it is necessary in the interests of justice to make the order sought in respect of the 24 identified witnesses. I direct that a letter of request should be issued to the judicial authorities of the Republic of Ireland to facilitate the taking of that evidence. Under Order 39 Rule 3 of the RSC (NI) 1980 it is for the applicant to draft the letter of request and submit it to the court and that should be done as soon as possible.