Neutral Citation No: [2019] NIMaster 3	*Ref:* 2019NIMASTER3
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 01/03/2019*

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Eilish Morley

On her own behalf and as personal representative of the estate of

Eoin Morley (deceased)

Plaintiff

and

The Ministry of Defence

First Defendant

and

Peter Keeley

Second Defendant

and

The Chief Constable of the Police Service of Northern Ireland

Third Defendant

and

The Office of the Police Ombudsman of Northern Ireland

Respondent

(Ruling on Costs)

Master Bell

[1] In my judgment of 1 February 2019 in respect of this application I indicated that I was of the preliminary view that the plaintiff should pay the Ombudsman's costs of the application but, if either party wished to make submissions that the ruling on costs ought to be otherwise, I would hear those submissions. The plaintiff has furnished me with written submissions setting out her view as to what order I should make in respect of costs. The Ombudsman has confirmed that he does not wish to file any submissions.

[2] The plaintiff submits that there should be no order as to costs. She suggests that there are three reasons why this should be the case.

[3] Firstly, the plaintiff considers that I ought to take into account the role of the Ombudsman in encouraging the plaintiff to make the application. The plaintiff referred me to Valentine's commentary on Order 63 Rule 3(3) of the Rules which states *inter alia* :

> "In its discretion the Court may withhold all or some costs from a successful party or, exceptionally, award costs against him, where it is just to do so on grounds such as the following-
>
> …
>
> (2) The plaintiff was enticed into a losing action by the acts or promises of the defendant: *McGrory v DOE* [1977] 5 NIJB (in without prejudice correspondence); *McCarthy v ATGW*, Ch D, NI, 31 January 1966, for example by hinting that he accepted liability: *Buckley v Irish Industrial Benefit Society* (1888) 22 LR Ir 579 (as in JC Campbell v Davidson, Ch D, NI, 27 September 1967, 18 NILQ 461, where a co-defendant responded to the letter of claim by stating justification for the tort, then after the action was brought raised successfully the defence that he was not vicariously liable)"

[4] The plaintiff submits that the injunction proceedings were settled on undertakings which expressly required KRW Law to make an application for Third Party discovery under section 32 of the 1970 Act. She argues that it was apparently only later that the Ombudsman considered that this application was defective for these purposes and that the Ombudsman was at pains to otherwise accept that they had invited the application in the first place.

[5] Secondly, the plaintiff argues that, although the test for relevance in respect of the material sought in the application was not made out in terms of the court's own independent adjudication, the Ombudsman has never positively suggested that to be the case. Indeed the plaintiff submits that the Ombudsman suggested, via paragraph 9 of the affidavit of Louisa Fee, that the documents :

> "…. could and should (at first instance) be provided to the Plaintiff by the defendant through the usual discovery process."

The plaintiff's argument therefore appears to be that, even if the plaintiff was not enticed into making the section 32 application, the fact that the Ombudsman did not assert that documents were not relevant is enough to deny the Ombudsman his costs.

[6] Thirdly, the plaintiff considers that I ought to take into account the seriousness, novelty and complexity of the issue that the plaintiff and her lawyers have sought to grapple with. As to seriousness, the litigation is an aspect of the plaintiff's efforts to vindicate the right to life of her son. Counsel submits that much of the relevant evidence is not yet in the public domain and that the plaintiff should not be penalised for attempting to ensure that the court considering her claim is sighted with all the relevant evidence. As to novelty and complexity, the plaintiff argues that the set of facts which forms the background has not been addressed in previous case law.

CONCLUSION

[7] In relation to the plaintiff's first submission that the plaintiff was enticed into the losing application by the Ombudsman, I do not consider that this is an accurate representation of the facts as presented to the court. In the injunction proceedings, in which the Ombudsman was the plaintiff, Seamus McIlroy, as Director of Legal Services for the Ombudsman, swore an affidavit which stated *inter alia* in paragraph 21 :

> "Having regard to the matters set out above, the potential for harm in refusing to grant the Plaintiff interim relief in this case far outweighs any potential harm to the Defendant or any client of the Defendant. The harm to the Plaintiff is manifestly serious. The potential of harm to the defendant by granting interim relief is remote. If the concern is about the ability to adduce relevant evidence in the Morley case, the option would be open to the Plaintiff in the Morley case to make an application for Third party disclosure against the Ombudsman under section 32 of the Administration of Justice Act 1970 and the merits of such an application could thereby be tested and determined in an entirely appropriate and lawful manner, with the Ombudsman availing of any lawful grounds for refusing disclosure which he is in law entitled to rely upon."

In paragraph 5 of her affidavit in the section 32 application, Louisa Fee, Mr McIlroy's successor as Director of Legal Services in the Ombudsman's office, stated :

> "It can be noted that in that affidavit Mr McIlroy made reference – at paragraph 21 – to the possibility of an application for Third party disclosure under s. 32 of the Administration of Justice Act 1970."

She then continues at paragraph 16 by stating :

> "Rather, at first instance, they seek disclosure of the material directly into the CMP/CLOSED, to be considered by the High Court Judge in due course. I am concerned that this summons is defective as at odds with s. 32 of the 1970 Act. That provision has been *unequivocally* interpreted by the House of Lords as mandating *only* production to the applicant (or their legal representatives), see *McIvor v Southern Health and Social Services Board* [1978] NI 1. As such it is not immediately apparent that the plaintiff can rely on s. 32 to try and compel disclosure, by a third party, of material directly into an extant court process (such as the CMP/CLOSED aspect of the current litigation)."

[8] On behalf of the plaintiff, Claire McKeegan stated in her grounding affidavit in respect of the application:

> "The proposed course is intended to be in keeping with paragraph 4 of the undertakings agreed between KRW and the Respondent, dated 29 June 2017 and presented to the court on that day."

[9] The undertakings in the injunctive proceedings provided :

> "The Defendant KRW Law Advocates Ltd undertakes that the Plaintiff in the case of Morley v Ministry of Defence, Peter Keeley and the Chief Constable of the PSNI will lodge a third party application seeking disclosure into those proceedings of the documents described in the Schedule to the Police Ombudsman's application (hereinafter referred to as "the material") on or before 22 May 2017.
>
> …
>
> The Defendant understands that the Plaintiff has given undertakings to withdraw and/or dispose of this action upon its satisfaction of the Defendant's undertakings. The undertakings are without prejudice to our respective positions if agreement on all is not reached.
>
> These undertakings are offered on the basis that it they (sic) do not amount to an admission of liability, and further on the basis that there will no award of costs and/or damages when the application for the injunction and the writ is withdrawn or dismissed."

[10] The ordinary meaning of the word "entice" means to attract or tempt by offering pleasure or advantage. It is clear from the grounding affidavit and the undertakings themselves that the applicant was not enticed by the Ombudsman into making the section 32 application. Nor does it appear that the undertakings were

imposed upon KRW Law by the Ombudsman. Rather, it is clear that the undertakings were offered by KRW Law to the Ombudsman (although in the normal course of business one might reasonably surmise they were offered only after there had been discussions between the counsel acting for both parties in the injunctive proceedings).

[11] As I set out in the principal judgment in respect of the section 32 application, it is clear that the injunctive proceedings were initiated once the Ombudsman was alerted to the fact that the plaintiff had made discovery of documentation unlawfully obtained by someone from the Ombudsman's office. The factual evidence is consistent merely with the Ombudsman taking a neutral position and effectively suggesting that, if the plaintiff wished to be able to use the documentation, she must obtain them properly. A suggestion that a section 32 application might be made does not amount to an enticement. It is also important to observe that, in particular, there is not even a hint of evidence that it was even suggested to the plaintiff or her solicitors by the Ombudsman that a section 32 application should be made which was in conflict with the House of Lords decision in *McIvor v Southern Health and Social Services Board* [1978] NI 1.

[12] In relation to the plaintiff's second submission, I observe that the quotation from paragraph 9 of Louisa Fee's affidavit is somewhat wrenched out of context and used in the skeleton argument in a manner which does not do justice to what Miss Fee stated in her affidavit. In paragraph 8 of her affidavit she sets out that, as far as discovery of documents is concerned, the test to be applied in this jurisdiction is the *Peruvian Guano* test. In paragraph 9 of her affidavit, Miss Fee then continues her discussion of discovery and notes that, under Order 24 Rule 9 of the Rules of the Court of Judicature, discovery is only ordered if it is necessary to do so. She then explains that this of course means that if any of the material sought from the Ombudsman was also in the possession, custody or power of any of the defendants to the substantive civil proceedings, then disclosure should not be ordered as against the Ombudsman. The next sentence of her affidavit (only part of which is quoted in the plaintiff's skeleton argument) is as follows :

> "In such circumstances, disclosure (from the Ombudsman, as a third party) would not be necessary, as the material could and should (at first instance) be provided to the plaintiff by the defendant through the usual discovery procedure."

[13] Those portions of Miss Fee's affidavit are, in my view, simply a brief and entirely correct summary of the law of discovery and its application in very general terms. They do not, in my view, amount to an assertion either that the documents were relevant or that the documents were not relevant. The qualifying words used by Miss Fee, that "in such circumstances" the documents could be provided through the usual discovery process, are pointing to what she had previously said in paragraphs 8 and 9, namely that if there were a set of circumstances where, upon due consideration, the documents found to be relevant and necessary, then discovery would be obtainable from the defendants via Order 24 Rule 3 and, if

necessary, Order 24 Rule 7. The sentence quoted from Miss Fee's affidavit therefore had nothing to do with a section 32 application.

[14] In relation to the plaintiff's third submission, it is correct to state that the plaintiff's application was novel. However, if the application can be described as novel, it was only novel because the plaintiff caused it to be novel. During the hearing Mr McQuitty on behalf of the Ombudsman submitted that, if the court made a "normal" section 32 order, that is to say an order requiring the Ombudsman to produce the documentation concerned to the plaintiff's solicitors, then the vast majority of the documentation would be redacted on PII grounds and a PII hearing before the judge would subsequently have to follow. Although it was not stated to me explicitly, I gained the impression that such an application might well have been uncontested in the Summons Court and I would not have been asked to assess the relevance of the documentation or the necessity of them being produced. However Mr McGowan made it explicitly clear that the plaintiff declined to make such an application and sought only a very specific order that the documentation be produced into the closed material procedure in the main litigation. *McIvor v Southern Health and Social Services Board* made such an order impossible. This should have been obvious, particular since Deeny J (as he then was) described *McIvor v Southern Health and Social Services Board* as being an insuperable barrier with an indisputable *ratio* to documents being produced to persons other than a plaintiff or a defendant in his decision in *Finn (A Minor by his Mother and Next Friend) v McKee* [2005] NIQB 79.

[15] The normal rule under Order 62 Rule 3(3) is that costs follow the event except when it appears to the court that, in the circumstances of the case, some other order should be made as to the whole or any part of the costs. Thus, whilst the court has a wide discretion on costs, the conventional rule is that the successful party is awarded an order for costs.

[16] The usual order for costs made in this jurisdiction following an application by a plaintiff under section 32 of the 1970 Act is invariably the following :

> "AND IT IS ORDERED that the plaintiff do pay to the above mentioned the costs occasioned by this application, and that as between the plaintiff and defendant the costs of this application to the Court be costs in the cause/and that the plaintiff's costs of this application be costs in the cause."

[17] The thinking behind such an order for costs is that the third party has documents which the plaintiff needs for his litigation but, as the third party is not otherwise concerned in the litigation, why then should he finance the litigation of others? He should have his costs paid. However those costs are costs associated with the litigation and therefore should be costs in the cause.

[18] The plaintiff's skeleton argument twice suggests that it is inappropriate to penalise the plaintiff with an order of costs against her. It is important to state therefore that the order I make today in respect of costs has no element of penalising

the plaintiff for making the application concerned. Costs are simply an inevitable consequence, and one of the normal risks, of losing an application or an action and in this instance are in no way punitive.

[19] Having considered the submissions made upon the plaintiff's behalf, I therefore conclude that there is no sufficient reason for departing from the usual order that the plaintiff, as the applicant in respect of a section 32 application which was unsuccessful, should bear the third party's costs. The Ombudsman is not involved as a party in the main action. That action is between Mrs Morley as plaintiff and the Ministry of Defence, Mr Keeley and the PSNI as defendants. Essentially, the general principle applied in section 32 applications is that third parties should not have to subsidise other people's litigation by paying some of the costs associated with it. The costs of third parties will therefore usually be borne by either the plaintiff or the defendant.

[20] The further question which I am then led to ask is whether the costs of the application should be costs in the cause as between the plaintiff and defendants in the main action. In my view they should not be. The application was a highly speculative one, made despite a clear House of Lords authority in *McIvor* that there was no jurisdiction for the court to make the order sought by the plaintiff and despite a clear High Court ruling that *McIvor* represented an insuperable barrier to what the plaintiff wanted to achieve. To adopt the expression used by Ms Fee for the Ombudsman, the application was defective. In my view therefore the defendants to the main action should not have to be at risk of paying the costs of an application which had no chance of success. I therefore simply award the costs of the application to the Ombudsman and do not order that those costs shall be costs in the cause in respect of the main action.