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COURT OF APPEAL SUGGESTS NEW APPROACH TO DEALING WITH DISCLOSURE IN LEGACY CASES

Summary of Judgment

The Court of Appeal today proposed a new approach to dealing with the issue of disclosure of documents in a case seeking documents connected to the Ballast Report. The Court suggested this proportionate approach may be suitable for legacy cases with a view to ensuring that the issue of disclosure can be dealt with expeditiously and fairly.

Background

In January 2007 the Police Ombudsman for Northern Ireland ("PONI") published the Ballast Report which was the result of an investigation into the police handling and management of identified informants in the early 1990s onwards. The Report concluded that RUC/PSNI Special Branch officers colluded with terrorists by facilitating the situation in which informants were able to continue to engage in paramilitary activity, some of them holding senior positions in the UVF, despite the availability of extensive information as to the alleged involvement in crime. The report stated that rather than investigate their crimes, police officers in effect protected them.

One of the informants, "Informant 1", is referred to in the report as pointing a gun at John Flynn ("the respondent") on 12 March 1992 and trying to shoot him. The weapon failed to discharge. Informant 1 then made a physical attack on the respondent who managed to fight him off. On 6 May 1997, an improvised explosive device was placed underneath the respondent's car by Informant 1 or persons acting on his behalf. The device did not detonate.

On 3 March 2008, the respondent issued civil proceedings against the Chief Constable of the PSNI ("the applicant") and his servants and agents arising out of these incidents. The statement of claim and defence were not served until 10 February 2012 which is the date on which the pleadings are deemed to be closed. Order 24, Rule 2(1) of the Rules of the Court of Judicature ("RCJ") requires each party to make and serve on the other party a list of the documents relating to matter in question in the action within 14 days. The applicant did not comply with that Order and on 21 June 2013 the Master made an Order that the applicant's defence should be struck out unless a list of documents was served within 21 days. Further extensions to this period of time were made by agreement between the parties in order to await the outcome of investigations by PONI regarding potential charges against PSNI officers.

In or around October 2014, PONI indicated that it was not going to pursue criminal proceedings against the relevant PSNI officers and on 17 November 2014 the applicant served an amended defence in which it admitted that Informant 1 was acting as a covert

human intelligence source at all material times, that he had assaulted the respondent and placed an explosive device under his car, and that the police officers under his direction were guilty of misfeasance in public office. This meant that liability was no longer an issue in the action. The applicant submitted that he had complied with the obligation under Order 24 but the Master rejected this and made an Order that the applicant should make discovery of 94 categories of documents as sought by the respondent.

A summons was issued on 21 August 2015 and heard by Mr Justice Colton. He was satisfied that notwithstanding the admissions that had been made by the applicant, there remained a number of significant matters in issue between the parties including whether Informant 1 was acting as a servant or agent of the applicant and what was the extent of the misfeasance in public office committed by the police officers. The judge was satisfied that at some stage there had been documents within the applicant's possession which were material to the outstanding issues in the case. Affidavits lodged on behalf of the applicant indicated that extensive work would be required in order to complete discovery and then each document would have to undergo a detailed assessment to identify material requiring consideration for Public Interest Immunity (PII"). It was estimated that this process could take around two years. Mr Justice Colton, on the question of proportionality, concluded on 16 June 2016 that the Order for discovery should issue in respect of 13 categories of documents and not the 94 categories ordered by the Master. Mr Justice Colton's decision was upheld by the Court of Appeal on 24 February 2017.

On 8 March 2017 the discovery application was relisted before Mr Justice Stephens. Affidavit evidence was presented which stated that the applicant would have to start from scratch as there was no list of documents that had been made available by PSNI to PONI. A later affidavit referred to folders "recently" located which contained a number of receipts relating to documents provided to PONI. The judge said it was clear that there was no need to start from scratch as considerable work had already been undertaken to compile material for the Ballast Report. Mr Justice Stephens acknowledged that the discovery process was resource intensive but that years had passed without compliance and there was no clear, acceptable plan for future compliance. He indicated that he would have refused the applicant's application had it not been for the respondent's agreement to an extension until noon on 1 October 2017. His ruling was the subject of this application for leave to appeal.

Application for Leave to Appeal

Counsel for the applicant took issue with Mr Justice Stephens' conclusion that there had been no attempt to comply with the Orders made by the Master but accepted that there had been delay. He claimed the applicant had expeditiously complied with Order 24 once it became clear that there was unlikely to be any prosecution of police officers. Counsel for the applicant was also critical of the trial judge's comments on the delay in identifying and recovering the potentially relevant material from the PONI and contended that there had been no failure to comply with the Order of Mr Justice Colton but rather that the applicant had pursued "entirely legitimate appeals".

The Court of Appeal said that leave to appeal should only be granted in a case where the applicant demonstrates an arguable case with a reasonable prospect of success that the trial judge had gone plainly wrong. The issue for the Court was whether it was permissible for the trial judge to reach the conclusion that there had been no attempt to comply with the

Orders made by the Master. In order to succeed in that submission the applicant had to identify a mistake in the judge's evaluation of the evidence that was sufficiently material to undermine the conclusion:

> "We entirely accept that the learned trial judge was entitled to make his trenchant criticisms of the failure by the applicant to gather in the relevant documentation which had largely been in the possession of PONI. The availability of the documentation had been noted by Colton J in 2016 and the Court of Appeal in February 2017. It was not until April or May 2017 that the applicant had sought and recovered the documentation."

The Court of Appeal, however, did not accept that there was no evidence of any attempt by the applicant to comply with orders of the Master over many years. The Lord Chief Justice said it was clear that the consideration by PONI to the prosecution of police officers explained why the documents were retained by PONI and not returned to PSNI. The litigation was rejuvenated in late 2014 when the decision was made not to prosecute and that decision prompted the applicant to lodge an amended defence and a list of documents on the basis that liability was no longer an issue. In his judgment, Stephens J had noted that the respondent at that stage should have pursued an application for specific discovery under Order 24 Rule 7 but despite that the Master made an Order in March 2015 requiring disclosure of 94 categories of documents:

> "The point is that it was the Master who extended time in respect of the Unless Order obtained in June 2013 until the end of 2014. One can well understand the basis for such extensions since consideration of prosecution was still active during that period and disclosure of the documents at that stage may have given rise to difficulties in pursuing that prosecution. The Order made by the Master in March 2015 was appealed and thereafter fell into abeyance as a result of the fresh application made under Order 24 Rule 7 for specific documents. In our view this cannot be characterised as non-compliance with the Orders of the Master over many years and the judge was wrong to so conclude. We accordingly grant leave to appeal. Since this matter was material to the exercise of his discretionary judgment we must address the application for an extension of time for compliance with the Order afresh."

Discovery principles

The Report by Lord Justice Gillen on Civil and Family Justice (published in September 2017) ("the Gillen Report") notes that Order 24 of the RCJ makes provision for automatic disclosure by list after proceedings are closed and for discovery of particular documents. The test for disclosure is set out in the Peruvian Guano[1] case and requires that if it is a document which may fairly lead to a train of enquiry which may have the consequences of either enabling a party to advance his own case or to damage that of his adversary it must be disclosed. The Lord Chief Justice noted, however, that concerns have been raised about the volume of materials generated as a result of this test in both larger clinical negligence and commercial type actions:

[1] Peruvian Guano [1882] 11 QBD 55

> "The no stone unturned approach often resulted in an expensive and largely wasteful exercise. The Gillen Report at paragraph 10.13 suggested that greater regard might be had to issues of proportionality for individual cases rather than the current same-size-fits-all approach. The Gillen Report (paragraph 10.38) recommended an approach based on the principles of standard disclosure and reasonable search that apply in England and Wales with the safeguard of an application for specific discovery on Peruvian Guano lines, if appropriate. Standard disclosure requires a party to disclose only the documents on which he relies and those which adversely affect his own case, adversely affect another party's case or supports another party's case."

The Lord Chief Justice referred to Order 1 Rule 1A of the RCJ which contains an overriding objective to enable the court to deal with cases justly and requires the court to give effect to this when exercising any power given to it by the rules or interpreting any rule. The Gillen Report, however, recognised that in some cases ever increasing searches for any document that might be relevant to the issues can place an inordinate and disproportionate burden in terms of time and cost. The Lord Chief Justice proposed that a new approach in any case where the existing approach to discovery or disclosure may give rise to onerous obligations or would prevent a case being dealt with expeditiously and fairly may be that the court should intervene with a view to finding a proportionate response, saving expense and ensuring that the parties are on an equal footing:

> "The nature of that intervention will respond to the particular circumstances of the case and may require some greater case management but the court should be careful to ensure that any increase in case management is appropriate. Not every legacy case will require detailed case management but cases such as this which involve applications for disclosure of material quantities of sensitive information are likely to require a tailored approach."

The Court said the approach to redaction presently employed by PSNI "appears extremely wasteful and inevitably will add considerable time to the disclosure process". It said there is no indication within the process that there is any examination of the unredacted documents before the redaction process commences to establish which documents actually need to be disclosed and what means could be adopted in order to ensure that all relevant information is disclosed to the respondent without having to undergo a lengthy redaction process

> "We consider that it is essential that the material gathered in by the PSNI as potentially relevant … should be provided initially in unredacted form to the lawyers representing the Chief Constable so that an informed independent approach can be taken to the documents that actually need to be disclosed. Initially disclosure should be on the basis of standard disclosure as discussed above. That will not, of course, obviate the need for appropriate redaction of the identified documents. Such redaction will also need to be assessed for its proportionality. There are likely to be considerable opportunities to avoid laborious and time-consuming redaction by providing a gist of the relevant information or alternatively making formal admissions in relation to the effective content of the documents. Since the documents are in the custody, power or possession of the applicant the onus to ensure a proportionate approach to disclosure rests primarily with those representing the Chief Constable."

The Lord Chief Justice said that the identification of a proportionate approach in each of these cases will be fact sensitive. Any judge dealing with such a case will have to make appropriate discretionary judgements as to the extent of search, the degree of appropriate redaction and the opportunity for dealing with issues by way of gisting or formal admissions. Any appellate court should be very slow to interfere with such discretionary fact specific decisions. The Lord Chief Justice said that, although the principal object of this approach is to ensure that there is a proportionate approach which ensures the cases are dealt with expeditiously and fairly, it is also intended to significantly reduce any requirement to use the closed material procedure provisions in the Justice and Security Act 2013 as they are likely to add considerably to delay and, in cases such as this where considerable time has already elapsed, such a course should be avoided if at all possible:

> "There is a pressing obligation on the parties in this and similar litigation to work co-operatively with a view to progressing the litigation expeditiously. Where difficulties arise the parties should be alert to the possibility of mediation as a means of resolution. It should be made clear, however, that the purpose of this approach is to bring this and other cases to trial expeditiously and any failure to co-operate in that exercise is likely to lead to adverse consequences for the party concerned."

Conclusion

The Court of Appeal considered that the approach outlined in this judgment represents a plan for the future which is required in this litigation. It accepted that the applicant has been at fault in failing to comply with Orders in 2012/13 and in failing to recover the relevant files shortly after being encouraged to do so by Colton J in January 2016 and agreed that the affidavit evidence lodged by the applicant about the availability of records identifying the documentation sent to the Ombudsman was "contradictory and unsatisfactory":

> "Despite these failures we consider that a fair trial of the issues in this case is still possible if the parties positively and willingly embrace the approach that we have outlined above. We consider, therefore:
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> - that the documents relevant to the issues and facts identified by Colton J should be provided forthwith in unredacted form to the lawyers representing the applicant;
> - that those documents should be considered by the legal representatives in order to determine the most effective way in which to make disclosure;
> - that the parties should meet within 4 weeks of the delivery of this judgment to prepare a timeframe for the completion of the disclosure process; and
> - that this case should be listed before the Queen's Bench Judge 5 weeks from today in order to determine whether any further extension of time for compliance should be given."

In order to facilitate the matters set out above the Court of Appeal extended time for compliance by five weeks from today adding that whether any further time should be allowed will depend upon the applicant demonstrating its commitment to facilitate an

expeditious and fair trial. The Court considered its suggested approach seems appropriate for other similar cases and appropriate steps should now also be taken in such cases.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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