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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY THE SECURITY INDUSTRY AUTHORITY FOR JUDICIAL REVIEW

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Before: Keegan LCJ, McCloskey LJ and Maguire LJ

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Appearances:

Applicant: Mr Tony McGleenan QC and Mr Andrew Brownlie, of counsel, instructed by Walker McDonald Solicitors

Respondent: Unrepresented

Police Service of NI: Mr Philip Henry, of counsel, instructed by the Crown Solicitor

Interested party: Mr Jamie Bryson, self-representing

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McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] By order of a single judge of this court made *ex parte* in chambers dated 24 August 2021 the Security Industry Authority ("*SIA*") was granted leave to apply for judicial review. The target of its challenge is described in the following terms:

> "*A decision of the District Judge sitting in Newtownards Magistrates' Court on 24 May 2021 whereby he ordered* [SIA] *to disclose to Mr Bryson the materials grounding a production*

> *order obtained by the Police Service of Northern Ireland at Belfast Crown Court on 17 October 2018.*"

We shall describe the author of the impugned decision as "*the judge.*" The central question in these proceedings is whether the judge was legally empowered to make the impugned order.

The Underlying Proceedings

[2] The impugned order unfolded in the following way. SIA is a statutory entity which regulates the private security industry in the United Kingdom. On 05 December 2018 SIA initiated a summary prosecution of the person described above as the interested party. The summons alleges that the interested party committed the offence of making to the SIA a statement that he knew to be false in a material particular or, alternatively, recklessly making a statement which was false in a material particular, namely that JJ Security Services Ltd had never traded, contrary to section 22(1)(a) and (b) of the Private Security Industry Act 2001 (the "*2001 Act*").

[3] A second affidavit sworn by the SIA solicitor elaborates on the factual matrix in these terms:

> "*On 16th August 2018 as part of a joint operation with* [PSNI] *a number of warrants were executed at various addresses in connection with an ongoing investigation into the supply of unlicensed security industry operatives. Mr Bryson was arrested and interviewed …*
>
> *On 17th October 2018,* [PSNI] *applied to the Crown Court for a production order under section 345 of the Proceeds of Crime Act 2002. HHJ Crawford granted the Production Order.*"

The next material development occurred on 05 December 2018 when the summons underlying these proceedings was issued.

[4] Upon the direction of this court the materials served with the summons were provided. These comprise, in summary, the witness statement of a SIA investigating officer; email exchanges with the interested party; a "JJ Security Services" invoice dated 11 July 2017 addressed to an identified "*Bonfire committee*" and describing the services provided as "*SIA Licensed Event Supervisors … 5 men for 6 hours at £15 ph*"; the transcript of a PACE interview of the interested party; two further SIA witness statements, one of which confirms a Crown Court Production Order (see *infra*); some 154 pages of Ulster Bank statements relating to accounts in the name of the interested party, evidently obtained pursuant to the last mentioned order; and, finally, the interested party's criminal record.

The Crown Court Production Order

[5] At this juncture mention of the Production Order is appropriate. This order emanated from Belfast Crown Court, is signed by a Crown Court Judge and is dated 17 October 2018. It records that an application was made to the court under section 345(4)(a) of the Proceeds of Crime Act 2002. The moving party was the Police Service. The order records the judge's satisfaction that the requirements for making same had been fulfilled. The order is addressed to Ulster Bank Limited, in these terms:

> "*You are ordered to produce to …… material, specifically, statements of account, electronic banking records, account opening documentation, paperwork and records in relation to all credits, debits and transfers relating to* [the interested party, specified date of birth and of a specified address] *…. for the period of two years to the date of this Order which does not include material or information that is or consists of items subject to legal privilege or excluded material* [and] *to provide it within seven days.*"

This order can be linked with a Police Service pro-forma which records, in terms, that on 30 October 2018 materials were obtained from the Ulster Bank.

Timeline of the prosecution

[6] Following the issue of the summons against the interested party on 05 December 2018, the timeline of the proceedings in Newtownards Magistrates' Court is the following:

(a) 15 March 2019: initial listing and adjournment. On this occasion the interested party intimated an application to stay the prosecution as an abuse of process. Per the SIA solicitor's second affidavit:

> "*The basis of the abuse of process application was that the proceedings should be stayed due to a lack of evidence and the complainant allegedly failing to comply with the duty of candour in procuring the summons and materially misleading the Magistrate by concealing relevant facts that may have led to the Magistrate coming to a different conclusion.*"

(b) 14 March 2019: service of certain documentary evidence on the interested party upon which SIA intended to rely in the summary prosecution. These materials included bank statements obtained by PSNI and the witness statement of a PSNI financial investigator indicating that the bank statements had been obtained by a production order under section 345 of the Proceeds of Crime Act 2002 (the "*2002 Act*").

(c) March 2019: the interested party wrote to the Crown Court requesting a copy of the production order, without success.

(d) 05 April 2019: further listing before the Magistrates' Court, both parties making submissions about the issue of whether the interested party was entitled to receive the materials giving rise to the production order. The court made no formal order.

(e) 09 April 2019: letter from SIA to the interested party, copied to the court, contending that the court had no power to order disclosure of the production order as the interested party had not served a defence statement under the Criminal Procedure and Investigations Act 1996.

(f) Thereafter: sporadic listings and adjournments.

(g) 24 May 2021: further *inter-partes* listing. Having considered submissions from both parties the court ordered SIA to disclose to the interested party (per the subsequent PAP letter) –

> "*… the materials grounding a production order obtained by the Police Service of Northern Ireland at Belfast Crown Court on 17 August 2018.*"

[6] Thereafter, the chronology continues:

(h) 28 May 2021: PAP letter.

(i) 07 June 2021: further listing before the Magistrates' Court and adjournment.

(j) 15 June 2021: initiation of these proceedings.

[7] The Northern Ireland Courts and Tribunals computer printout, another document produced on the direction of this court, shows that since 15 March 2019 there have been 24 listings of this prosecution in Newtownards Magistrates' Court. The next listing is scheduled for 25 November 2021. The third anniversary of the summons is imminent. The interested party has not yet made his plea. No timetable has been set for either the interested party's abuse of process application or, on a contingent basis, the hearing of the summons. It appears that this is one of the most elderly summary prosecutions in Northern Ireland. This extreme delay is a matter of obvious concern.

The Abuse of Process Application

[8] The intention of the interested party to apply for a stay of the summary prosecution on the ground of abuse of process was communicated at an early stage and reduced to a skeleton argument dated 18 July 2019. It is necessary to expand the context a little. On 14 May 2019 a different constitution of this court gave judgement in the interested party's application for judicial review against the Police Service: *Re Bryson's Application* [2019] NIQB 51. This was a challenge by the interested party to the legality of searches of his premises carried out by the police on foot of warrants granted by a Lay Magistrate. The court held that the warrants should have been granted under a different provision of PACE. Having considered the parties' submissions on remedies, the court declined to grant any discretionary relief to the interested party. Of some note is the following passage at [44]:

> "*We emphasise that the judgement of this court does not call into question the legal validity of the prosecution of the Applicant. Article 76 of PACE* arms him with an efficacious weapon to be deployed in the forum of the criminal proceedings.*"

[*The Police and Criminal Evidence (NI) order 1989]

[9] In his abuse of process skeleton argument, compiled some two months later, the interested party made reference to "*the ongoing proceedings.*" This denoted the circumstance that the Police Service was applying for leave to appeal to the United Kingdom Supreme Court. This explains and illuminates the following passage in the skeleton argument:

> "*In the context of the ongoing proceedings it is my submission that this case cannot properly proceed before the Magistrates' Court given the Security Industry Authority are relying upon at least some material seized as the fruit of the unlawfully procured warrants …. At least one key part of the evidence relied upon to procure the summons is subject to live proceedings before the United Kingdom Supreme Court.*"

The interested party then highlighted the possibility of the latter court quashing the search warrants. The skeleton argument continues:

> "*It is my submission that to proceed at this point would in itself be an abuse of process and I strongly assert that the proper course of action is for this application, and as a consequence the criminal proceedings, to be held in abeyance pending the decision of the United Kingdom Supreme Court.*"

[10] In a later passage of the skeleton argument it is stated:

> "*This application is challenging the issuing of the summons and as such the court should only properly decide the matter*

> *based upon the material placed before the Magistrate at the time of procuring the impugned warrant.*"

It is clear from this skeleton argument as a whole that the focus of the interest party's abuse of process application was the procurement of the summons. His fundamental contention was that the prosecution is an abuse of process because the complaint made to the District Judge which procured the summons was based on *inter alia* a single piece of evidence – the above mentioned invoice – secured on foot of a search warrant which, he claimed, was unlawful on the basis of the *Bryson* decision. There is a further, related contention that the summons should not have been issued at a time when the issue of the legality of the search warrants was pending in the first High Court proceedings.

[11] There is an identifiable third contention, namely that SIA subsequently interviewed another director of JJ Security Services giving rise to a witness statement asserting that the company had never traded, thereby undermining the merits of the prosecution. (There is no such witness statement before this court). Next, mention is made of the interested party's desire to see the application giving rise to the Production Order. In this context he states "*… this court has already formed the view that I am entitled to see this material*", a reference to the listing on 05 April 2019 documented above. This is followed by the interested party's complaint and assertions about events on this date.

[12] Regarding the Production Order the skeleton argument states further:

> "*The PSNI have informed me that they are asserting public interest immunity over the application and as such they refuse to provide it …*
>
> *Clearly* [SIA] *will be unable to provide the material I am entitled to given the source of the material has asserted public interest immunity …*
>
> *In these circumstances this case cannot conceivably be permitted to proceed as it would be a clear breach of my Article 6 rights.*"

It is apparent from the final paragraphs of this detailed skeleton argument that the abuse of process application was being mounted on two grounds:

> "*It is my submission that the assertion of public interest immunity …. ensures there could not possibly be a fair trial given some of the material relied upon has been procured from a third party, namely the PSNI, who are refusing to hand over material the court has already formed the view that I am entitled to see …*

> *It is my further submission that it was an abuse of process to procure a summons based upon material that was at the materially relevant time subject to judicial review proceedings and which has subsequently been found to have been obtained as the fruit of an unlawful warrant."*

[See paragraphs 35 and 39.]

Some two and a half years on the interested party's abuse of process application remains undetermined.

The Application for the Impugned Order

[13] Prior to the hearing in the Magistrates' Court when the impugned order was made the interested party made his case by electronic communication in the following way:

> "*… the application* [is] *based upon the principles set out in* ***Re McVeigh's Application*** *[2017] NIQB 61, specifically paragraph 45 of same. The application advanced* [is] *not a traditional 'disclosure application' within the ambit of CPIA 1996, but rather an application to a Magistrate for an order to disclose the material grounding the production order in line with the process set out in* ***Re McVeigh*** *…*"

Having (in terms) referred to the earlier listing on 05 April 2019, this communication continues:

> "*I would therefore seek to renew the application and accordingly seek a fresh order that the material should be provided. If there are PII concerns that are to be raised by the SIA or PSNI, then they are at liberty to make the relevant application.*"

In the affidavit grounding this judicial review application sworn by the SIA solicitor the contrary argument advanced to the Magistrates' Court, via the submissions of counsel representing SIA, is outlined in the following terms:

> "[The interested party] *had two options: (i) apply to the Crown Court that granted the Order; or alternatively (ii) lodge a defence statement and make an application under section 8 of the* [1996 Act] *… unless the procedural requirements were complied with, including the service of a defence statement, the Magistrates' Court had no power to order disclosure of the materials sought. The court was further advised that* [PSNI] *was asserting public interest immunity in respect of the requested materials.*"

This was followed by a further listing before the Magistrates' Court on 24 May 2021, when the impugned order was purportedly made.

The Impugned Order

[14] Magistrates' Courts are not courts of record. The impugned decision was made orally and is not available in any written form. We shall revisit this issue *infra*. In what terms did the judge express himself? According to the SIA solicitor's first affidavit:

> "*District Judge Hamill ordered that the materials be disclosed and stated that if they were not disclosed he would hear …* [the interested party's] *application to stay as an abuse of process.*"

[There is no definition of "*the materials*"]

And at a subsequent listing on 07 June 2021:

> "[The judge] *stated, inter alia, that he would be bending over backward to help a personal litigant and help as best he can, that it was not appropriate to require a defence statement from a personal litigant and a different approach was to be taken …* [and] *public interest immunity should not apply in a case like this.*"

In common with other judicial review cases of this kind the Judge has not sworn an affidavit, nor was he represented before this court. There is, however, a letter dated 30 September 2021 from the Departmental Solicitor's Office, written on his behalf:

> "*My client has instructed as follows:*
>
> *'I do not wish to provide an affidavit. I do not demur from Mr Bryson's account and I want it made expressly clear to the Divisional Court that not only am I dealing with a litigant in person but I am dealing with a case in which the Complainant and the prosecuting authority are one and the same with all the attendant issues regarding disclosure.'*"

[15] The judge did not elaborate on the word "*account.*" However, the court construes this to denote the affidavit of the interested party sworn on 31 August 2021. No party demurred from this construction. This affidavit, in the main, recounts the interested party's version of the events in the Magistrates' Court on 05 April 2019 and 24 May 2021, together with subsequent listings on 07 June and 25 August 2021. In this way the judge has confirmed the following averments in the interested party's affidavit:

> "*The District Judge … referred to his obligations under ECHR Article 6 and stated that he had already determined disclosure was required to ensure a fair trial and that was his overriding obligation … the District Judge was aware that this material was required not only under Article 6 ECHR but specifically also for my abuse of process application which was prior to any plea ….*
>
> *On 07 June 2021 … he said that the divisional court should be made aware that he was -*
>
> *'Ensuring a litigant in person received a fair trial … SIA will not be permitted to railroad this litigant in person in my court. There will be a fair trial in my court room and claims of public interest immunity in this private prosecution will not wash in my court. This case is a dog's dinner and the SIA needs to reflect on whether this is worth the candle.'"*

The Criminal Proceedings and Investigations Act 1996

[16] Part 1 of the 1996 Act consists of sections 1–27. Together these provisions establish a comprehensive code (subject to our further analysis *infra*) for the disclosure of materials by the prosecution in both summary and indictable prosecutions. Section 1 lies at the apex of this code. S 1(1) provides:

> "**Application of this Part**
>
> 1. - (1) This Part applies where a person is charged with an offence, the court proceeds to deal summarily with the charge and that person pleads not guilty."

The remaining provisions of section 1 are of no moment in the context of these proceedings. The important point is that the statutory disclosure regime in prosecutions for both summary and indictable offences applies only where the accused pleads not guilty. It is unnecessary in the present context to consider the extent of any common law disclosure obligations in cases where the accused pleads guilty.

[17] In those cases where it applies the statutory disclosure regime operates in the following way:

(i) By section 3 the initial duty of the prosecutor is to disclose to the accused any material not previously disclosed which might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused or providing a written statement that there is no such material.

(ii) Section 5 makes provision for the obligatory provision of a defence statement in trials on indictment following service of the indictment and the documents containing the evidence on which the charge is based.

(iii) By section 6 a defence statement is optional in summary prosecutions.

(iv) In accordance with section 6A, every defence statement must set out the nature of the defence, specify the matters of fact on which the accused takes issue with the prosecution and why, specify the matters of fact on which the accused intends to rely for the purposes of his defence and specify any point of law, with supporting authority, which he intends to invoke.

(v) Section 6(b) provides for an updated defence statement.

(vi) By section 7A the prosecutor has a continuing duty to disclose any material which might be reasonably expected to undermine the prosecution case against the accused or assist the case for the accused.

(vii) In accordance with section 8, in cases where a defence statement has been served the accused may apply for further disclosure on the ground of reasonable cause to believe that there is undisclosed prosecution material which might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused.

(viii) Section 21, in conjunction with Schedule 4, which addresses the issue of common law disclosure, is considered further *infra*.

[18] The 1996 Act is supplemented by rules of court. In the case of summary prosecutions these are contained in the Magistrates Courts (Criminal Procedure and Investigations Act 1996 disclosure) Rules (NI) 1997. By rule 7(2) an application under section 8 must be made by notice in writing and shall specify:

> "*(a) The material to which the application relates;*
>
> *(b) That the material has not been disclosed to the accused;*
>
> *(c) The reason why the material might be expected to assist the applicant's defence as disclosed by the defence statement given under section 6; and*
>
> *(d) The date of service of a copy of the notice on the prosecutor in accordance with paragraph (3).*"

The Contours of this Challenge

[19] It is necessary to draw attention to a matter of some importance. The order under challenge in these proceedings is not before the court. In response to various case management directions it has been confirmed to the court that the order does not exist. If and insofar as the judge purported to make an order on 24 May 2021, this has not been drawn up and issued. Thus, as our resume of the evidence above makes clear, all that is before this court is the parties' accounts of what the judge stated verbally.

[20] This is not a matter of technical formality. Rather, it is an issue of some substance. Rule 14 of the Magistrates' Courts Rules provides:

> *"**Form of warrant or order***
>
> *14.-(1) Subject to paragraph (2), a warrant or form of order issued to give effect to the order of a magistrates' court shall be signed by the resident magistrate or justice of the peace [or lay magistrate] who made the order or by the clerk of petty sessions."*

The remaining paragraphs of rule 14 relate to warrants issued by Magistrates' Courts. Rule 19(1) – (3) provides:

> *"(1) In every proceedings (other than one to which Part VI of the Order applies) the clerk of petty sessions shall enter the particulars of the proceedings and the substance of the decision upon it in a book to be known as the "Order Book" and such particulars may, subject to any directions given by the [Department of Justice] or a resident magistrate, be entered by reference to any other proceedings, particulars of which have previously been fully so entered.*
>
> *[There is a separate Order Book for the Youth Court.]*
>
> *(2) Subject to paragraph (3) such entry shall be signed by the resident magistrate or justice of the peace [or lay magistrate] who determined the proceeding or, where he is unavailable, by the clerk of petty sessions, and after such signature shall be deemed a conviction or order, as the case may be.*
>
> *(3) Where a page of the Order Book contains more than one consecutive complete entry relating to proceedings determined by the same resident magistrate or justice of the peace [or lay magistrate] on the same date, it shall be sufficient compliance with paragraph (2) as regards each entry if the appropriate*

resident magistrate or justice of the peace [or lay magistrate] or, where he is unavailable, the clerk of petty sessions, signs all the end of the last such entry."

An entry in the Order Book is conclusive evidence of the court's decision. Failure to sign is a curable defect: *R (Donnell) v Londonderry JJ* [1910] 2 IR 458.

[21] Per Article 112 of The Magistrates' Courts (NI) Order 1981:

"Enforcement of orders other than for the payment of money [am. 2015 NI c.9 on 31 Oct 2016]

112.-(1) Where power is conferred under any enactment upon a magistrates' court to require any person to do or to abstain from doing anything other than the payment of money and no mode is provided for the exercise of such power, the court may, subject to the provisions of this Order, exercise such power by order.

(2) The court may annex to any order requiring any person to do or abstain from doing anything other than the payment of money any condition as to time or mode of action and may by order on complaint suspend or rescind such order on any undertaking being given or upon the condition being performed.

(3) Where a person fails to comply with an order such as is mentioned in paragraph (2) by either failing to do, within the time specified in the order or (if no time is so specified) forthwith, the thing he is required to do or, as the case may be, doing the thing he is required to abstain from doing and the enactment under which the order was made prescribes no punishment for such failure, a resident magistrate or other justice of the peace [now lay magistrate] may upon complaint made to him at any time-

(a) issue a summons for the appearance of the person by whom that thing is required to be done or not done before a court of summary jurisdiction; or

(b) by warrant cause such person to be brought before a resident magistrate.

(4) A warrant shall not be issued under paragraph (3) unless the complaint is in writing and substantiated on oath.

(5) Where a person has been taken into custody in pursuance of a warrant issued under paragraph (3) for the purpose of causing him to be brought before a resident

magistrate he shall, if it will not be practicable to bring him before a resident magistrate within twenty-four hours after he was so taken into custody, be brought, as soon as practicable, before a justice of the peace [now lay magistrate] who may, if he thinks fit, discharge such person upon his entering into a recognizance for a reasonable amount to appear before a resident magistrate at the time and place named in the recognizance; but where such person is not so discharged the justice of the peace [now lay magistrate] shall commit him to prison and direct that he shall be brought before a resident magistrate as soon as practicable thereafter and in any case not later than eight days from the date of such commitment.

(6) Upon the appearance of a person summoned before a court of summary jurisdiction under paragraph (3) or on proof that the summons was duly served on him the court or, where a person is brought before a resident magistrate pursuant to a warrant issued under that paragraph, the resident magistrate-

(a) may order that person to pay a sum not exceeding £50 for every day during which he fails to comply with the order or a sum not exceeding £5,000; or

(b) may commit him to prison for a fixed period not exceeding two months or until he either complies with the order or satisfies a court of summary jurisdiction that he intends to comply with it (and the court may issue a warrant to enforce the order of commitment);

but a person who is ordered to pay a sum for every day during which he fails to comply with the order or who is committed to prison until he complies or satisfactorily indicates his intention to comply with the order shall not by virtue of this Article be ordered to pay more than [£5,000] or be committed for more than two months in all for doing or abstaining from doing the same thing contrary to the order (without prejudice to the operation of this Article in relation to any subsequent failure to comply with the order).

(8) Payment of any sum ordered to be paid under paragraph (7) shall be enforceable in the same manner as payment of a sum adjudged to be paid by a conviction."

[22] The net effect of the above statutory provisions is that no formally valid order was made by the Judge on 24 May 2021. Furthermore, a formally valid order in this instance would have had to specify a time limit for compliance in any event. While the formal shortcomings were capable of correction no correcting steps have been taken. As a result, no issues of compliance or enforcement arise.

[23] Subject to the immediately preceding conclusion, this is a *vires* challenge. As stated in [1] above, the sole question for this court is whether the judge, if and insofar as he made a formally valid order, was legally empowered to do so. For the purpose of determining this question we consider that the following bases of possible legality must be examined:

(i) The decision of this court in *Re McVeigh* [2017] NIQB 61.

(ii) The 1996 Act.

(iii) The common law.

(iv) Article 6 ECHR, via the Human Rights Act 1998.

Re McVeigh

[23] In *Re McVeigh* [2017] NIQB 61 a person whose home had been searched pursuant to a search warrant issued by a Magistrates' Court sought disclosure of the information upon which the warrant had been made. The Divisional Court held that the householder had a common law right to receive the information in play. The court further held, describing the grant of the search warrant as a "*function of the Magistrates' Court*", that in the event of a dispute between the householder and the PSNI the Magistrates' Court had adjudicative jurisdiction, adding that the householder's entitlement to disclosure of the material would be subject to public interest immunity: see [45].

[24] There are marked differences, both legal and factual, between the context in *McVeigh* and that of the present case. Fundamentally, *McVeigh* addressed an issue of disclosure in a context other than that of criminal prosecutions. In contrast, in the present case the disclosure issue in the underlying criminal proceedings is one of fairness. Furthermore, as we shall explain *infra* this subject is governed by a bespoke statutory regime. *McVeigh* is therefore of no precedent value and, accordingly, it provided no basis for the impugned order of the Magistrates' Court.

The 1996 Act

[25] The array of statutory provisions falling to be considered in this respect are those arranged in sections 1 – 8 of the 1996 Act. We consider it abundantly clear that in summary prosecutions the service of a defence statement is a pre-requisite to an application to the court for further disclosure under section 8 and *ipso facto* the making of any such order. No defence statement has been served in the present case. Accordingly, the impugned order of the judge cannot be legitimised by reference to any of the provisions of the 1996 Act. In the paragraphs which follow we shall return to this theme.

The Common Law

[26] Section 21 of the 1996 Act specifically addresses the interaction of the common law with the statute. It provides:

> "*Common law rules as to disclosure.*
>
> *21.-(1) Where this Part applies as regards things falling to be done after the relevant time in relation to an alleged offence, the rules of common law which-*
>
> *(a) were effective immediately before the appointed day, and*
>
> *(b) relate to the disclosure of material by the prosecutor,*
> *do not apply as regards things falling to be done after that time in relation to the alleged offence.*
>
> *(2) Subsection (1) does not affect the rules of common law as to whether disclosure is in the public interest.*
>
> *(3) References in subsection (1) to the relevant time are to the time when-*
>
> *(a) the accused pleads not guilty (where this Part applies by virtue of section 1(1)),*
>
> *(b) the accused is committed for trial (where this Part applies by virtue of section 1(2)(a))*
>
> *(c) the proceedings are transferred (where this Part applies by virtue of section 1(2)(b) or (c)),*
>
> *(d) the count is included in the indictment (where this Part applies by virtue of section 1(2)(d)), or*
>
> *(e) the indictment is presented (where this Part applies by virtue of section 1(2)(e)).*
>
> *[Amndmt by 2003 c.44 does not apply to NI]*
>
> *(4) The reference in subsection (1) to the appointed day is to the day appointed under section 1(5) [1st January 1998].*"

[27] By Schedule 4, there is a substituted version of section 21(1) and (2) for Northern Ireland. The most relevant of these provisions is the substituted section 21(1):

> "*This Part applies where a person is charged with an offence, the court proceeds to deal summarily with the charge and that person pleads not guilty.*"

The term "*this Part*" denotes Part 1 of the 1996 Act, which enshrines all of the provisions considered above. The thrust and effect of section 21 are that at the point where the criminal justice process reaches a specified stage – in this jurisdiction, the recording of a not guilty plea - any previously applicable common law disclosure rules have no operation. We shall return to this issue *infra*.

[28] The interplay between the 1996 Act and the common law is illustrated particularly in *R (Nunn) v Chief Constable of Suffolk Police* [2015] AC 225. This case concerned the prosecutor's duty of disclosure in a context where the litigant concerned had been convicted, had been refused permission to appeal and continued to seek disclosure of materials from the Chief Constable with a view to making an application to the Criminal Cases Review Commission. The key consideration was that his quest for disclosure was not governed by any provision of the 1996 Act.

[29] The Supreme Court held that the governing principle on which the prosecutor's duty of disclosure is based is that of fairness more specifically, in prosecutions on indictment the statutory disclosure regime displaced the pre-existing common law duty. However, following completion of the trial on indictment the common law applied, albeit in a modified form. Thus, recourse to the common law was required in order to determine whether the police owed any duty of disclosure and, if so, the ambit of such duty in the context of a prisoner who had been convicted of murder several years previously, who had been refused permission to appeal and was subsequently seeking the provision of all police records – officers' notebooks, computer files, incident logs, CID journals *et al* – in a context wherein he and his lawyers, with the assistance of scientific experts, were proposing a full re-investigation of the case with a view to referring it to the Criminal Cases Review Commission.

[30] Bearing in mind the issue addressed in this discrete chapter of our judgment, there is an important passage at [18] of the judgment of Lord Hughes, with whom all other members of the Supreme Court concurred:

> "*The Criminal Procedure and Investigations Act 1996* ***put the common law prosecution duty of disclosure into statutory form****. It recognised a two-stage process of disclosure, initially under section 3 and continuing under what is now section 7A….*
>
> *The Act somewhat modified the test for disclosure from that variously articulated in* ***R v Ward*** *and in* ***R v Keane*** *[1994] 1 WLR 746 at 752, while maintaining its purpose.*"

In the passages which follow there is much emphasis on the 1996 Act providing the basis for a prosecutor's duty of disclosure in the criminal trial process. As regards section 21, Lord Hughes made the following pithy statement at [19]:

> "*By section 21,* ***where the statutory duties created by the Act apply, they displace the former common law duties which cease to operate****. The Act then recognised the two-stage disclosure procedure described above and it defined the period during which its statutory duties of disclosure are imposed.*"
> [Emphasis added.]

Nunn was considered and applied in the recent decision of the Northern Ireland Court of Appeal in *R v McCafferty* [2021] NICA 22.

[31] The interested party's written submissions to this court make abundantly clear that his case has at all times been that his application for disclosure by SIA (the prosecutor) was based on common law principles and Art 6 ECHR:

> "*I made a common law disclosure application ….*
>
> *It did not rely purely on* ***Re McVeigh's*** *application, rather it advanced the following propositions: (i) that the court retained a common law power of disclosure and could order disclosure if it felt natural justice required it; (ii) that the court was bound by section 6 of the Human Rights Act 1998 and if the court was persuaded Article 6 ECHR required disclosure, then it was bound to order disclosure of the material; (iii) that CIPA 1996 was not relevant because its provisions did not (and still do not) abolish the common law rules of disclosure at the relevant period of proceedings.*"

The court considers this argument unsustainable for the reasons which follow.

[32] In matters of disclosure by the prosecution and the related issue of defence statements the 1996 Act establishes a model which is both orderly and coherent. It is trite that Parliament intended that this model should be applied in every case. In summary prosecutions its effect is:

(i) The cornerstone of the whole of Part 1 of the 1996 Act is a plea of not guilty: per section 1(1).

(ii) The prosecutor must make initial disclosure.

(iii) Following the aforementioned primary disclosure by the prosecutor, the accused has the option of providing a defence statement.

(iv) If the accused opts to provide a defence statement it must be compliant with section 6A.

(v) Where the accused has opted to provide a defence statement he may apply to the court for further disclosure, invoking section 8. The provision of a defence statement is a pre-requisite to such application.

(vi) The prosecutor has a continuing duty of disclosure come what may, irrespective of whether any application is made under section 8 or any order is made thereunder.

[33] In the present case, the course which was taken by the interested party in applying to the Magistrates' Court for specific disclosure and the ensuing order in his favour bypassed and nullified the statutory regime. This cannot be upheld. The analysis in *Nunn*, a decision binding on this court, has the following effect. The regime established by the 1996 Act is designed to operate in substitution of the pre-existing common law principles, with limited exceptions. We consider that this regime cannot be circumvented by the circumstance that the accused has made no plea. The starting point for the court below should have been that of whether the interested party was pleading guilty. However, it is clear that this was not required of him. Rather the interested party has been permitted by the court to make no plea during the protracted history of this summary prosecution. We consider that this should not have been permitted to occur.

[34] A plea, in whatever terms, is a fundamental element of every prosecution and, in pursuance of the overriding objective and the orderly and efficient disposal of the proceedings in every case, it must be made at the earliest stage possible. It is understandable that in some instances the court of trial may allow some latitude for good reason: for example, where an unrepresented accused person in a complex case is actively seeking legal representation; or, alternatively, where the prosecution signals that further material evidence is to be served; or, where it emerges that the indictment or summons is to be the subject of an amendment application; or where medical evidence on the defendant's fitness to plead is awaited; or where the accused is at risk of some other tangible unfairness by having to elect to plead at a particular stage of the proceedings. However, in the general run of cases there will be no reason not to require that a plea be made at the earliest stage possible: in trials on indictment, upon arraignment and in summary prosecutions upon the first listing before the court.

[35] That the present case had no exceptional features in this respect was confirmed by the interested party himself upon enquiry by this court. He stated unequivocally that no prejudice would have accrued to him had he been required to make his plea at an early stage of the summary criminal prosecution, that no prejudice would be suffered by having to do so at this stage and, finally, that his plea will be not guilty. In the foregoing circumstances this court considers that the

Magistrates' Court should not have entertained a disclosure application, under whatever guise, without first requiring the interested party to make his plea.

[36] Had this occurred this court is satisfied that no unfairness or other detriment to the interested party would have resulted. His application for further disclosure would have proceeded under section 8 of the 1996 Act. Furthermore, he was unable to demonstrate to this court that the position which he adopted before the Magistrates' Court, namely that of basing his further disclosure application on the decision in *McVeigh* and Article 6 ECHR, conferred any material advantage on him. As regards *McVeigh*, we have held that reliance thereon was misconceived. As regards Article 6, we shall make clear *infra* that this added nothing to the interested party's rights under the statutory disclosure regime.

[37] There is a further consideration of substance defeating the interested party's contention. The present case is an illustration of one central rationale of the statutory model, namely the need for a coherent framework for every section 8 application. That framework is provided by the charge/s levelled against the accused, the plea of not guilty, the initial disclosure made by the prosecution and the defence statement. This framework is an essential pre-requisite to the sensible and informed determination of applications for further disclosure under section 8. It did not exist in the present case at first instance because two of the essential ingredients were absent, namely a plea of not guilty and a defence statement. The Magistrates' Court in effect permitted the interested party to substitute an extra-statutory model devised by him for the orderly, logical, sequential and efficient regime established by the 1996 Act. This cannot on any analysis be upheld.

[38] The rationale of section 21 is not difficult to discern. The various stages of the criminal justice process in any given case conventionally encompass most or all of the following: the initial police investigation, arrest, interview, further evidence gathering, charge, initial court appearance, subsequent court appearances, possibly bail applications and, in the particular case of prosecutions on indictment, committal for trial and arraignment. Many of these stages unfold prior to the section 21 trigger. At the pre-section 21 stages the 1996 Act has no application.

[39] From this it follows that at the pre-section 21 stage any duty of disclosure on the part of the police or Director of Public Prosecutions or other prosecutor rests on some other legal basis, typically common law principles or specific rights conferred by PACE or, possibly, Article 6 ECHR. Familiar illustrations of this are provided by pre-police interview disclosure and disclosure by the prosecution in bail proceedings. Both the common law and Art 6 ECHR apply here. The section 21 trigger unfolds at a later stage. When it does, common law duties of disclosure have no application in the trial process.

[40] An example of the prosecutor's common law duty of disclosure is provided by *R v DPP, ex parte Lee* [1999] 2 All ER 737, where the issue was that of prosecution disclosure prior to committal proceedings in a case triable only on indictment.

Noting that the 1996 Act regime is not engaged until after committal for trial, the Divisional Court recognised that there may be a narrowly circumscribed duty on the prosecution to make disclosure in advance of committal: see the sixth and seventh propositions in section 9 of the judgment of Kennedy LJ. Also of note is the second proposition:

> "*Part 1 of the 1996 Act introduced* ***a completely new regime*** *in relation to disclosure. It replaces most, if not all, of the provisions of the common law from the moment of committal …*"
> [Emphasis added.]

Two comments are apposite. First, later experience has shown that the common law survived the advent of the 1996 Act a little more extensively than predicted. Second, as noted above, in this jurisdiction the 1996 Act regime is fully triggered when the accused pleads not guilty.

Article 6 ECHR

[41] Article 6 ECHR is the fourth of the possible bases of legality canvassed by this court in [21] above. Both Article 6 and the 1996 Act regime are founded upon fairness to the accused. In theory a lack of convergence between these two regimes might be demonstrable in some individual case. However, having considered decisions including *Edwards v United Kingdom* [1993] 15 EHRR 417, *Rowe and Davis v United Kingdom* [2000] 30 EHRR 1 and *HM Advocate v Murtagh* [2009] UKPC 36 we find it impossible to discern any lack of convergence in the present case. In particular, it is abundantly clear that no unfairness would be visited upon the interested party by resorting to section 8 of the 1996 Act having first pleaded not guilty. As noted above, this was conceded by the interested party, who further accepted that section 8 provides him with a route to securing the materials which he pursues. But this must be subject to the following *caveat*.

[42] We would add, emphatically, that should an application under section 8 materialise in the underlying proceedings the threshold requirement specified in subsection (2) will have to be fully addressed. In this context we draw attention to the cautionary words of Hart J in *R v McCrory and Others* [2005] NICC 37 at [9]:

> *"In R v H at p. 1384 Lord Bingham stated "neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands." Therefore, where the prosecutor has made that assessment and states that no material requires to be disclosed, the service of a notice by the defendant under Section 8 (2) of the 1996 Act cannot of itself require the court to consider the disputed material. Section 8 (2)(a) provides that an application may be made "If the accused has at any time reasonable*

cause to consider " that there is material in respect of which there is a duty of disclosure. "Reasonable cause" is not established by a bald assertion that it is thought that there may be material in existence which "might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6." To succeed the defendant must be able to point to something which gives a reasonable basis for suggesting that the material will assist the defendant."

General

[43] In response to the other discrete arguments advanced by the interested party:

(i) A preponderance of the evidence indicates that no order was made by the Magistrates' Court on 05 April 2019. Furthermore, no formally valid order pertaining to that date (or subsequently) exists in any event. It follows that there has been no failure by SIA to comply with the time requirement in Order 53, rule 4 of the Rules of the Court of Judicature.

(ii) The suggestion that this application for judicial review should be dismissed because SIA should have pursued the alternative remedy of appealing by case stated is untenable. Fundamentally, this court considers that the impugned order of the Magistrates' Court does not fall within the relevant statutory language of "*… any decision of the court upon any point of law involved in the determination of the proceeding or of any issue as to its jurisdiction …*": Article 146(1) of the Magistrates' Court (NI) Order 1981. Stated succinctly, the impugned order did not entail either "*the determination*" of the summary prosecution or "*the determination*" of any issue concerning the jurisdiction of the court. Furthermore, the decision of this court in *Re DPP's Application* [2000] NIQB 2 makes clear where an appeal by case stated does lie the initiation of an application for judicial review instead of pursuing the case stated mechanism is not fatal. Carswell LJ stated at [12]:

> "*The trend of modern authority is to be more ready to look at the balance of cost and convenience between an application by judicial review and resort to an alternative remedy …*"

Finally, this court cannot overlook the reality that the invocation of the case stated mechanism in the present case, if available, would have resulted in this court examining and deciding precisely the same issues.

(iii) This is manifestly not satellite litigation within the compass of the *Kebeline* principle. If and insofar as a formally valid disclosure order has been made in the court below there is no mechanism whereby SIA can challenge same in those proceedings. Recourse to this court by an application for judicial review is the only remedy available to SIA.

[44] This court has reviewed in a little detail the interested party's abuse of process application in the underlying proceedings. A careful examination of the two central contentions on which this application rests indicates that the interested party has been able to formulate his application without any difficulty or handicap. In the event of an application under section 8 materialising in the wake of this judgment, the Magistrates' Court will doubtless focus carefully on the question of whether the material which the accused is pursuing (a) constitutes "*prosecution material*", the statutory phraseology, which denotes that SIA must be in possession or control thereof and, if 'Yes', (b) "*might reasonably be considered capable of … assisting … the accused*" (the statutory language) in pursuing his application for a stay of the prosecution as an abuse of the process of the court. This is the sole purpose for which the accused pursues disclosure of the materials constituting the application to the Crown Court for the production order.

[45] This does not exclude the possibility that the interested party might pursue still further disclosure for the purpose of undermining the prosecution case or supporting his defence in the event of the abuse of process application being dismissed. Furthermore, SIA must be alert to its continuing duty of disclosure, which is free standing of the section 8 regime. Standing back, furtherance of the overriding objective would dictate that all aspects of prosecution disclosure be finalised in a single exercise.

[46] This court declines to express any view on the merits of either the interested party's abuse of process application or any application for further disclosure under section 8 of the 1996 Act which may materialise. The Magistrates' Court, duly guided by this judgment, will be the sole arbiter.

[47] Finally, the interested party initiated, but did not pursue, the mechanism of securing the materials underlying the Production Order application by resort to the Crown Court. Without formally determining this issue, this court makes two observations. The Proceeds of Crime Act 2002 makes no provision for such an application. However, subject to further argument in an appropriate case, the *McVeigh* principle by logical extension *prima facie* supports this course.

Our Conclusions

[48] First, the Magistrates' Court did not make a formally valid order. While the formal invalidities were capable of cure, this did not occur. Thus no binding or enforceable order existed. Second, and in any event, jurisdiction to make the impugned order was not conferred on the Magistrates' Court by the decision in

McVeigh, the 1996 Act, the common law or Article 6 ECHR. There being no other possible jurisdictional basis, if the impugned order had been formally valid it would have been substantively unlawful.

[49] For the reasons given the application of SIA succeeds. While the impugned order lacks formal validity, it nonetheless subsists by virtue of the principle of presumptive regularity (the *omnia praesumuntur* principle). Having given an opportunity to the parties to make submissions, the appropriate remedy is an order of *certiorari* quashing the impugned order of the Magistrates' Court. This will have the virtues of clarity and certainty. Furthermore it will not preclude a further/renewed application to the Magistrates' Court by the interested party under section 8 of the 1996 Act, which will be determined in accordance with the governing legal rules, as expounded in the judgment of this court.

Costs and Ancillary Issues

[50] In light particularly of [14]-[15] of this judgment, it would be appropriate that the proceedings at first instance be conducted henceforth by a District Judge other than the respondent Judge. Having considered the parties' submissions, the court orders that all parties will bear their respective costs, with no order as to costs *inter – partes.*