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

Delivered: 05/10/12

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN MARK CHRISTOPHER BRESLIN AND OTHERS

Plaintiffs

AND

MICHAEL COLM MURPHY AND SEAMUS DALY

Defendants

Gillen J

Application

[1] On 8 June 2009 Morgan J, following a protracted trial, concluded that the 12 plaintiffs in this action, who had sought damages against a number of defendants for personal injuries sustained by them as a result of the explosion of a bomb in Omagh town centre on 15 August 1998, had sustained their claim for damages for trespass to the person against, amongst others, the two defendants in this action ("the first trial").

[2] In a judgment on 7 July 2011 the Court of Appeal in Northern Ireland allowed the appeals of Murphy and Daly and ordered a retrial of the claims against both these defendants. That retrial is fixed to commence on 10 October 2012.

[3] On 14 September 2012, in the course of an ex tempore judgment I acceded to an application by the plaintiffs pursuant to Section 3 of Council Regulation (EC) No: 1206 (2001) of 28 May 2001 on Co-operation between the Courts of the Member States in the taking of evidence in civil or commercial matters (hereinafter called "The Regulation") granting leave to make a request to the High Court of the Republic of Ireland using form A for examination of certain witnesses set out in a schedule attached thereto. I further granted leave under Article 4 of the Regulation to make a request to the High Court of the Republic of Ireland using form A for the documents set out in the schedule attached thereto. I refused an application on behalf of the defendant Daly to refer as a preliminary question the interpretation of

this Regulation to the ECJ (see paragraphs 10 and 11 below). At that hearing I undertook to set out my reasons in writing.

[4] Mr Lockhart QC appeared with Lord Brennan QC and Mr McGleenan QC on behalf of the plaintiffs and Ms Higgins QC appeared on behalf of the second defendant Daly.

[5] After hearing representations from each counsel, I acceded to the plaintiffs' applications in respect of:

(a) Denis O'Connor. The plaintiffs allege he is a material witness in relation to a conversation that took place on the day of the Omagh bombing between himself and the defendant Daly together with earlier contacts between the two men. Without going into detail in this judgment on matters that I may have to determine at trial it is clear from the judgment of the Court of Appeal judgment of 22/11/11 at paragraph 3 that the statement of O'Connor on this issue was crucial to the case. Hence the plaintiffs wish to question him about these matters.

(b) Jim Faughan is an employee of Vodafone. Mr Lockhart informed me that Mr Faughan was the subject of a similar application in the course of the earlier trial. Although he did attend court his evidence was ultimately read to the Court with the agreement of Mr Daly's then senior counsel. The questions to be asked touch on his compilation of documents relevant to telephone calls made to and from a mobile 0862662371, a mobile which the plaintiffs allege is relevant to this trial.

(c) Garda Officers Grennan and Costello. The former is required to deal with the issue of Mr O'Connor identifying the defendant Daly in circumstances allegedly relevant to this trial. The latter is required to deal with evidence allegedly of previous contact between O'Connor and a telephone attributed to the defendant Daly in the months prior to the Omagh bombing.

Background

[6] The background to this matter is that on 31 March 2008 Morgan J had made an order in similar terms in relation to the taking of evidence of Garda and other witnesses in the Republic of Ireland. Evidence was subsequently taken in Dublin with the attendance of the trial judge. The plaintiffs now wish to again examine those Garda (i.e. the two Garda identified and the other witnesses in relation to the defendant Daly). In the course of their application, the plaintiff set out the witnesses that they requested to give evidence in Appendix 4 to form A setting out in brief form the reasons that the witnesses were being sought to be called. Reference should be made in the court papers to the proposed form A together with the questions proposed to be asked of the witnesses.

[7] Although no objection had been raised to a similar application before Morgan J, Ms Higgins did object on this occasion.

The Regulation

[8] The Regulation in the course of its introductory paragraphs records, where relevant, as follows:

> "Whereas:
>
> (1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt among others, the measures relating to judicial co-operation in civil matters needed for the proper functioning of the internal market.
>
> (2) For the purpose of the proper functioning of the internal market, co-operation between courts in the taking of evidence should be improved, and in particular simplified and accelerated.
>
> …….
>
> (5) The objectives of the proposed action, namely the improvement of co-operation between the courts on the taking of evidence in civil or commercial matters, cannot be sufficiently achieved by the Member States and can therefore be better achieved at community level. The Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that article, this Regulation does not go beyond what is necessary to achieve those objectives.
>
> (6) To date, there is no binding instrument between all the Member States concerning the taking of evidence. The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters applies between only 11 Member States of the European Union.

(7) As it is often essential for a decision in a civil or commercial matter pending before a court in a Member State to take evidence in another Member State the Community's activity cannot be limited to the field of transmission of judicial and extrajudicial documents in civil or commercial matters which falls within the scope of Council Regulation (AC) No: 1348/2000 of 29 May 2000 on the serving in the Member States of judicial and extrajudicial documents in civil or commercial matters. It is therefore necessary to continue the improvement of co-operation between courts of Member States in the field of taking of evidence.

(8) The efficiency of judicial procedures in civil or commercial matters requires that the transmission and execution of requests for the performance of taking of evidence is to be made directly and by the most rapid means possible under Member States' courts."

[9] Under Chapter 1 of the General Provisions, Article 1, provision is made as follows:

"Scope.

1. This regulation shall apply in civil or commercial matters where the Court of a Member State in accordance with the provisions of the law of that State, requests:

(a) the competent court of another Member State to take evidence; nor

(b) to take evidence directly in another Member State.

2. A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated."

[10] Chapter II , where relevant, provides as follows:

"Article 4

Form and content of the request

1. The request shall be made using form A or, where appropriate, form I in the Annex. It shall contain the following details:

(a) the requesting and, where appropriate, the requested court;

(b) the names and addresses of the parties in the proceedings and their representatives, if any;

(c) the nature and subject matter of the case and a brief statement of the facts;

(d) a description of the taking of evidence to be performed;

(e) Where the request is for the examination of a person:

- the name(s) and address(es) of the person(s) to be examined;

- the questions to the put to the person(s) to be examined or a statement of the facts about which he is (they are) to be examined;

- where appropriate, a reference to a right to refuse to testify under the law of the Member State of the requesting court;

- any requirement that the examination is to be carried out under oath or affirmation in lieu thereof and any special form to be used;

- where appropriate, any other information that the requesting court deems necessary.

(f) Where the request is for any other form of taking of evidence, the documents or other objects to be inspected.

……..

Article 8

Incomplete requests

1. If a request cannot be executed because it does not contain all of the necessary information pursuant to Article 4, the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex and shall request that they send the missing information, which should be indicated as precisely as possible.

2. If a request cannot be executed because a deposit or advance is necessary in accordance with Article 18(3) the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex and inform the requesting court how the deposit or advance should be made."

The Defendant's Objections

[11] Ms Higgins in the course of a helpfully prepared speaking note prior to the hearing, augmented by oral submissions before me, made the following points by way of objection to this application:

- The Regulation confines the process to the taking of straightforward depositions from witnesses and does not embrace contentious litigation. The described process in the Regulation is more akin to the taking of a deposition. The lack of any reference in the Regulation to any assessment of the credibility of a witness, the need for a list of written questions to be provided and the failure to provide for the recoupment of costs incurred by the requested state and the absence of a procedure for rulings to be given during the course of the hearing all pointed in that direction.

- If this court does have jurisdiction to hear this application, the procedural matters under Article 4 are mandatory. Hence the failure to provide an address for Denis O'Connor is fatal.

- The court has no power to ask the requested court to hear hearsay evidence as this is contrary to the law of the Republic of Ireland. That excluded the evidence of all statements made by Denis O'Connor whether written or oral. It would also exclude the evidence of the Garda witnesses who Miss Higgins alleged were being called to give hearsay evidence.

- The application is defective in failing to provide a proper explanation of what the case is about, the specific evidence the plaintiffs are seeking to call, why

the evidence is relevant and fails to attach relevant documentation. In short the application fails to provide a draft form of request in the prescribed form.

- The form of questions as presently drafted offend against the laws of evidence in both jurisdictions as they include leading questions.

[12] If I was against her on these points, Ms Higgins argued that the meaning of the Regulation was unclear and contended I should make a reference to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty for the Functioning of the Union (TFEU) as to the meaning of the Regulation in respect of the matters mentioned above.

My Conclusions

Is the procedure under the Regulation confined to the taking of non-contentious evidence such as a deposition or proof of a document such as a birth certificate etc.?

[13] The ECJ has developed the requirement of effectiveness of EU law as a general legal principle which includes an obligation on National Courts to ensure they give adequate effect to EU law in cases arising before them. The effect of Miss Higgins' submission will be to grossly dilute the effect of this Regulation. Unsurprisingly, in my view, notwithstanding that this Regulation has been in force since 2001, counsel was unable to point to a single authority where any counsel had argued the point or which substantiated the proposition now being put forward for such a narrow interpretation of the Regulation.

[14] There is not the slightest reference in the course of this Regulation to any principle confining its operation to non-contentious cases. On the contrary, the introductory paragraphs are couched in the widest terms to ensure co-operation between courts and the taking of evidence in all civil or commercial matters. In my view it would be entirely contrary to a purposeful and meaningful construction of this Regulation to confine it in the manner sought by Ms Higgins. In effect it would impede an effective use of a Regulation specifically calculated to provide co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters. I consider that had it been intended to confine this Regulation in the manner now asserted, express provision would have been included to this effect. In the wake of such a narrow provision, I am certain there would have been a deluge of academic and judicial criticism. There can be no logical reason why the Regulation would be so confined creating, as it inevitably would, a dilution of the principle of co-operation between courts in the Community.

Article 4 of the Regulation

[15] Mr Lockhart emphasised to me that as yet the address of Mr O'Connor is not known to the plaintiffs save that it is known to the Garda who are responsible for

protecting him and ensuring his safety. If of course the Garda refuse to furnish the address or to pass on any court order, then the matter will have to be re-thought. Mr Lockhart, whilst understanding a certain reticence on the part of the Garda to publicise Mr O'Connor's address at this stage on the basis that it could endanger his life, however assured me that the Garda must be aware of his address because they have produced him at previous hearings, have previously taken statements from him and have liaised with him for previous court appearances.

[16] Accordingly, I am satisfied that one must make a purposive interpretation of Article 4 and provide the best details available of an address of a witness. Otherwise witnesses in fear and under police protection could never be brought within the ambit of this Regulation. That can never have been the intention of the Council. In this instance a reference to the Garda is the best address possible. If the court in the Republic of Ireland is dissatisfied with this it has the power to refuse to execute the request or indeed to request further information from the requesting court under Article 8 of the Regulation. I am satisfied that the best information available by way of an address has been furnished in this instance.

Lack of specificity in the background information given , evidence which it is alleged is required to be taken and the documents to which reference is made

[17] Doubtless the application could have been drafted in a more fulsome manner with greater detail given. However appended to the application is a copy of the statement of claim which fully sets out the background and complies with the thrust of the requirements of Article 4. I have seen a copy of the questions which are to be put to these to these witnesses and the documents sought. I am satisfied that these are sufficiently specific. If counsel at the hearing attempts to go outside the general remit of those questions, then I assume that the court in the Republic of Ireland will refuse to allow it. If however, this Regulation is to achieve the purpose set out in the preamble, then an over technical, inflexible approach will only serve to impede its effectiveness.

[18] There has been a change in public law in the way the courts approach the consequences in any event of non-compliance with a procedural requirement in the exercise of a statutory power. Courts have adopted a more flexible approach which, because of its flexibility, is difficult to reduce to a clear formula. Lord Steyn reviewed the development of this branch of the law in R v Soneji (2005) (2006) 1 AC 340. He also examined the way in which the law had developed in New Zealand, Australia and Canada.

[19] From New Zealand, he cited with approval (at para 20) the statement of Cooke J in New Zealand Institute of Agricultural Science Inc v Elsmere County (1976) 1NZLR 630, 636:

> "Whether non-compliance with a procedural requirement is vital turns less on attaching a perhaps

> indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree in seriousness of the non-compliance."

[20] From Australia, he cited with approval (at para 21) the judgment of the High Court in Project Blue Sky Inc v The Australian Broadcasting Authority (1998) 194 CLR355, which criticised the use of "the elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not as a classification which had outlived their usefulness.

[21] Lord Steyn concluded (at para 23) by expressing his agreement with a view that rigid mandatory and directory distinction and its many artificial refinements, had outlived their usefulness. Indeed, he said that the emphasis ought to be on the consequences of non-compliance and on the question of whether Parliament could fairly be taken to have intended total invalidity.

[22] I consider this is the appropriate way to approach an interpretation of this Regulation. I do not believe that the Community ever intended that the width of the principle set out in the introduction to this Regulation should be confined or applications under it invalidated because of some technical non-compliance or strict interpretation. On the contrary the most important way in which the ECJ has encouraged the effectiveness of Directives despite denying the possibility of direct horizontal enforcement, has been by developing a principle of harmonious interpretation which requires national law to be interpreted "in the light of Directives". The trend throughout not only the Commonwealth but European jurisprudence is to emphasise the consequences of non-compliance and ask whether the Directive/Regulation intended that the Articles in question should be invalidated by technical interpretation or technical breach. Article 8 provides ample remedy if the requested court considers the request does not contain all of the necessary information pursuant to Article 4 and permits it to ask for more information. This Article is the antithesis of the approach advocated by Ms Higgins whereby she advocates instant dismissal of an application not strictly complying with Article 4

[23] I am satisfied that this application does comply with the Regulation. If I am wrong in this conclusion any breach is a mere technical breach and is not one of substance.

The Hearsay Evidence

[24] There is a clearly a measure of dispute between Ms Higgins and Mr Lockhart as to the extent to which many of the questions which are to be posed involve hearsay evidence. I am satisfied that the requested court can make an infinitely better assessment of such questions in light of the law obtaining in that sovereign

state. It is invidious for this court to interpret the law of the Republic of Ireland. When such matters came before the Dublin court in the course of a similar application in the earlier trial, that court made its rulings on that issue at the hearing. That is the procedure that should be adopted again.

Article 267 Reference

[25] Formerly known as a Reference under Article 177 of the Treaty of Rome or Article 234 of the EC Treaty, a procedure exists under Article 267 of the TFEU whereby national courts in the course of proceedings before them, can put questions to the Court of Justice of the European Union (ECJ) either on the interpretation of relevant parts of the TFEU or relevant secondary legislation or on the constitutionality of relevant secondary legislation. The purpose is to try and ensure a uniform application of EU law throughout the European Union.

[26] However, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. If that condition is satisfied the national court may refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. This exception is known as the *ACTE CLAIR* doctrine.

[27] I am conscious that the strict conditions to which implementation of the ACTE CLAIR doctrine is subject are designed to prevent national courts from abusing the doctrine in order to evade their obligations to seek a preliminary ruling where they are disinclined to adhere to the court's case law. The leading case on this matter is Case 283/81 CILFIT (1982) ECR 3415, which was set in the context of Article 234 of the EC Treaty. At para 16 the court said; "the correct application of Community Law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.

[28] If that condition is satisfied the national court may refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

[29] I am satisfied that in this instance the exception of *ACTE CLAIR* can be invoked. For the reasons that I have set out above, I have determined that the matters which Ms Higgins wished to be referred to the ECJ are so obvious as to leave no scope for any reasonable doubt as the manner in which the question would be resolved if referred to the ECJ. This is an instance of *ACTE CLAIR*.

[30] I therefore accede to the application of the plaintiffs and refuse the defendant's submissions.