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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **15/03/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

MARK CHRISTOPHER BRESLIN and OTHERS
Plaintiffs/Respondents

and

SEAMUS McKENNA, THE REAL IRISH REPUBLICAN ARMY, JOHN MICHAEL HENRY McKEVITT, LIAM CAMPBELL, MICHAEL COLM MURPHY and SEAMUS DALY
Defendants/Appellants

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Before Kerr LCJ, Campbell LJ and Higgins LJ

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KERR LCJ

Introduction

[1] This is an appeal brought by the leave of this court against a ruling of Morgan J in which he ordered production of a number of documents held by the solicitors who act in the Republic of Ireland for the fifth and sixth defendants (the appellants in this appeal). The material consists of evidence from and transcripts of criminal proceedings at the Special Criminal Court in Dublin.

Factual background

[2] Proceedings were issued in the High Court on 10 August 2001 by a number of victims and relatives of victims of the bomb explosion in Omagh on 15 August 1998. Compensation was sought from a number of persons and groups alleged to have planted the device which caused the explosion.

[3] The plaintiffs sought discovery of documents from a number of the defendants. In relation to Michael Colm Murphy, the fifth-named defendant, it is alleged that he provided telephones which were used in the operation to transport the bomb and in other Real Irish Republican Army operations. At the Special Criminal Court in Dublin on 22 January 2002 he was convicted of conspiracy to cause the Omagh bomb explosion. His conviction was overturned on appeal in January 2005 and retrial is imminent.

[4] In relation to Seamus Daly the sixth named defendant, it is alleged that he was involved in the operation to plant the Omagh bomb and used the fifth named defendant's telephones to do so. On 26 February 2004 he pleaded guilty to membership (as of 20 November 2000) of the Real IRA at the Special Criminal Court.

History of the proceedings

[5] The application for discovery was first heard on 16 March 2005, when Morgan J made orders pursuant to Order 24, rule 7 of the Rules of the Supreme Court (Northern Ireland) 1980 that the first, third, fourth, fifth and sixth defendants should disclose by affidavit whether they had a book of evidence and transcripts in relation to previous criminal proceedings.

[6] On 6 April 2005 the fifth and sixth defendants lodged a Notice of Appeal from the orders that related to them. This was heard by the Court of Appeal on 19 May 2005, and it was ordered that Morgan J's order be varied so that affidavits should be made and filed under Order 24, rule 3(3) rather than Order 24, rule 7. The affidavits sworn objected to the production of the specified documents on the grounds *inter alia* that the defendants did not have the authority to release the documents as they remained within the control of the Special Criminal Court in Dublin.

[7] The plaintiffs then issued a summons on 19 April 2006 under Order 24, rule 12, for an order that the documents in the two lists of documents be produced for inspection. Both defendants objected. The evidence in question, contained in the books of evidence and transcripts of the criminal proceedings, is as follows: -

(a) In relation to the fifth named defendant, evidence in relation to telephones and their use;
(b) In relation to the fifth named defendant, evidence as to alleged admissions made by him in the criminal investigation;
(c) In relation to the sixth named defendant, the plaintiffs say that it is likely that the book of evidence contains material supporting the proposition that the sixth-named defendant was a member of the

> Real IRA during the period between 29 April 1998 and 20 November 2000.

Morgan J's ruling

[8] Morgan J made an order for production of the documents on 23 November 2006. He found that this was necessary in order to dispose fairly of the action. He held that the overriding objective of Order 1 Rule 1A of the Rules of the Supreme Court (Northern Ireland) 1980 was to enable the court to deal with cases justly and to ensure that the parties were placed on an equal footing. Where one party was in possession or control of relevant evidence, as a general rule, the other should not be deprived of the opportunity of considering and deploying it.

[9] On the issue of whether the leave of the Special Criminal Court was required for the release of the documents, expert evidence was provided by both parties, from Mr Maurice Collins SC on behalf of the plaintiffs and Mr Gerard Hogan SC for the defendants. Mr Collins gave as his opinion that there was no impediment under the law of the Republic of Ireland to the production of the documents. Mr Hogan contended that the books of evidence were subject to the implied undertaking described by Lord Hoffman in *Taylor v Serious Fraud Office* [1998] 4 All ER 801 and that the defendants could only be released from that undertaking by the Special Criminal Court. That release would only occur in exceptional circumstances. As neither expert gave evidence, Morgan J stated that he was unable to reach a view on this aspect of the defendants' claims. He decided, however, that this did not preclude him from making the order for production.

[10] The defendants had argued that they could not be required to produce documents that might tend to incriminate them (*Rank Film v Video information Centre* [1982] AC 380). The judge held that this principle did not apply to documents generated by third parties. Since the documents sought came within that category, the privilege against self incrimination was not a reason for refusing the order for production.

[11] It had also been argued that the judge should refuse to make an order on public policy grounds. It was suggested that if the materials had been held by solicitors in Northern Ireland for the purpose of criminal proceedings within this jurisdiction, their disclosure would not have been ordered because of the implied undertaking referred to in *Taylor* (*supra*). Morgan J rejected this argument. He stated: -

> "That implied undertaking is subject to the court's exceptional power to order disclosure where the public interest requires it. In respect of the sixth named defendant the proceedings [which are] the

> subject of the book of evidence are now complete. The application is made by the plaintiffs for the purpose of the expeditious conduct of litigation which has proved lengthy and involves a considerable number of parties. In those circumstances I consider that the exceptional ground [has] been made out …"

[12] Because the fifth named defendant faced a retrial in Dublin before the Special Criminal Court which would involve the adducing of evidence, some of which was in dispute, the learned judge did not make a similar order in his case. He concluded, however, that there was no controversy surrounding the "factual telephone evidence". This had not been challenged in the earlier trial. Morgan J therefore ordered the production of "the telephone material [from] both the transcripts and the book of evidence".

The appeal

Disposing fairly of the action

[13] On the issue whether the order for production was necessary in order to dispose fairly of the case, Ms Higgins QC for the appellants submitted that this was to be judged against the background that this was not a case where the documents were required in order to confirm or bolster evidence against the defendants that the plaintiffs already possessed. The plaintiffs had acknowledged that they were unable to make a case against the appellants unless they obtained the documents. This rendered the making of the order manifestly unfair.

[14] Ms Higgins prayed in aid article 6 of the European Convention on Human Rights and Fundamental Freedoms which guaranteed the appellants a fair hearing. A principle deeply embedded in English law, she said, was that the burden of proof is upon him who affirms, not upon him who denies. It was repugnant to the principles of fairness to require the appellants to make a case against themselves where they are private individuals and the plaintiffs are not otherwise in a position to establish a case against them. These were matters that a court should take into account, whether at common law or in accordance with article 6, when considering whether an order for production was necessary for the fair disposal of the trial. In failing to take account of them, and in failing to find that an order for production for the documents would breach the appellants' rights under article 6, the learned judge misdirected himself.

[15] Ms Higgins pointed out that in his most recent affidavit the plaintiffs' solicitor had accepted that the plaintiffs had already had possession of the telephone evidence, Mr Murphy's book of evidence, and statements made

under caution and by gardai. These documents were not retained for reasons that remained unexplained. There was no evidence before the court to establish that the plaintiffs could not obtain these documents once again and rely upon them in seeking to establish their case. In these circumstances, Ms Higgins suggested, the judge was wrong to conclude that production of these documents was necessary for the fair disposal of these proceedings.

The leave of the Special Criminal Court

[16] Ms Higgins submitted that it was not open to the court to make an order for production of these documents because they were outside the jurisdiction and the law of the Republic of Ireland erected impediments to such production. The principle of mutual respect required that the judge should have been satisfied that there was no such impediment to the making of the order.

[17] Alternatively, Ms Higgins argued, even if it was open to the judge to make the order he should not have done so because he ought to have recognised that such an order could not be enforced in the Republic of Ireland. He should have been aware that his order would be produced to the courts in the Republic of Ireland in order to persuade them to change their minds, (and to create a change of circumstance to avoid an objection of *res judicata* to their application) and these were serious grounds of objection to such an order on grounds of principle and comity.

The privilege against self incrimination

[18] The privilege against self-incrimination was so deeply embedded in English law, said Ms Higgins, that it should prevail unless it has been modified or abrogated by statute. That had not occurred in the present case. The judge's conclusion that the principle does not apply to documents generated by third parties had not been raised in the first instance hearing. It was therefore not clear which documents in the book of evidence for the trial of Mr Daly would come within this rubric. Any statement taken by the gardai from Mr Daly would clearly be covered by the principle, Ms Higgins argued.

[19] Counsel submitted that the right to silence and the right not to incriminate oneself lay at the heart of the notion of a fair procedure under article 6. The latter right in particular presupposed that the prosecution in criminal proceedings should prove the case against the accused without resort to evidence obtained through methods of coercion or oppression. In criminal proceedings, the article 6 right not to incriminate oneself has had a narrower scope than the privilege at common law because of the need to balance the rights of the public to be protected from the effect of criminal activity against the rights of the individual. The ambit of article 6 in relation to the right not to incriminate oneself in civil proceedings had not been the subject of judicial

decision but it was clear that in civil proceedings the powerful public interest arguments in detecting and prosecuting crime did not arise to justify a restriction on the individual's right to the privilege. It was therefore reasonable to argue that article 6 offers wider protection in civil proceedings than in criminal proceedings.

The burden of proof on the plaintiffs

[20] It was submitted that a finding that the documents are within the custody control or power of the party against whom the order is sought was a pre-condition of an order for production. On the basis of the opinion of Mr Gerard Hogan, SC the appellants suggest that they do not have the right to obtain the documents and that they are therefore not in a position to disclose them. When questioned about whether the appellants' solicitors in the Republic of Ireland had these documents, Ms Higgins was unable to say that they had them. In any event, she contended that a defendant in criminal proceedings in the Republic of Ireland is only entitled to the books of evidence, other witness statements and the transcripts for the purposes of his defence and prosecuting his appeal and not for any collateral purpose. Documents supplied by prosecution authorities are subject to an implied undertaking and the appellant and his legal team are not entitled to use the transcripts or any documents provided by the prosecution authorities for any other purposes without the leave of the court. Any breach of the implied undertaking without either waiver by the other party or by express leave of the court would amount to a contempt of court.

The imposition of a penalty

[21] Ms Higgins argued that because there has been no criminal prosecution in this case, the civil proceedings represent an action for a penalty. They are intended by the plaintiffs to hold the defendants to account. She submitted that the appellants should not be called on to incriminate themselves in an action for a penalty, and that a civil action can be an action for a penalty just as much as a criminal action (*Mexborough (Earl of) v Whitwood Urban District Council* [1897] 2 QB 111, per Lord Esher at p 115).

[22] To expose the appellants to the risk of such a penalty also violated their rights under article 7 of the Convention, Ms Higgins claimed. She argued that because there has been no criminal prosecution in this case, the civil proceedings represent an action for a penalty.

The telephone evidence

[23] Finally, Ms Higgins submitted that the judge had misdirected himself in concluding that there was no controversy about the factual telephone evidence.

Conclusions

Disposing fairly of the action

[24] It was not accepted by the respondents that their case against the appellants depended exclusively on the documents that they seek by the order for production but, even if this were the case, they contend that this is not a reason that the order should be refused. We accept that submission. The entire basis of discovery in *inter partes* litigation would be undermined if a defendant could resist discovery on the ground that the documents to be disclosed provided the only material on which his liability would be established. Ms Higgins was unable to cite any authority for the proposition that where the sole evidence against a defendant was contained in documents which are the subject of a production order, it would be unfair to make such an order. This is not surprising. Not only is it not unfair to a defendant that he be required to produce documents that establish that he was guilty of the wrong charged in the proceedings, it would be incongruously unfair to the plaintiff to deny him access to the very documents that would make good his claim.

[25] For essentially the same reason we reject the claim that to require the appellants to produce the documents would violate their right to a fair trial under article 6 of ECHR. There is no dispute that these documents are intensely relevant to the issues that will arise in the trial of the action between the parties. The concept of fairness both at common law and under the Convention involves an acknowledgment of the legitimate interests of both parties. Fairness plainly requires that the material contained in the documents, if it serves to provide evidence on vital issues in the trial, should be accessible by both sides.

[27] Likewise the absence of an explanation for the respondents' solicitors having parted company with the documents (an accusation not accepted by the respondents and on which we express no view) cannot render it unfair that the appellants be required to produce them. The fairness of the requirement to produce must depend primarily on the impact that the documents will have in disposing of the action, not on tactical considerations such as the loss of a forensic advantage to the defendants in withholding them. It is beyond dispute that the documents contain material that will – at least potentially – be pivotal to the outcome of the case. In our judgment, the interests of justice unmistakably call for their production.

The leave of the Special Criminal Court

[28] The contention that the law of the Republic of Ireland would prohibit the production of the documents is disputed. Faced with competing claims as to

the legal position in that jurisdiction, the judge was, in our view, perfectly correct in declining to adjudicate on that dispute. Indeed, for the judge to have ruled on this issue might well have involved a failure to apply the principle of mutual respect.

[29] It is clear that the burden of establishing that an impediment to the production of the documents exists rests on the party who asserts it, in this case the appellants. That burden has not been discharged and there was no reason that the judge should have considered that there was an inhibition to his making the order. Quite apart from that, however, there is no lack of comity involved in the judge's decision. He made it clear that his order was not intended to trespass on the jurisdiction of the courts of the Republic of Ireland and that any order that those courts made would be binding on the parties. The notion that the judge's order would be used in the courts in the Republic of Ireland in order "to persuade them to change their minds" appears to us to be preposterous. There is absolutely no reason to believe that the courts in that jurisdiction would be swayed by Morgan J's order to a course other than that dictated by the law of the Republic.

The privilege against self incrimination

[30] The central proposition of the appellants that the privilege against self incrimination is absolute unless abrogated by statute was not supported by reference to any decided authority to that effect. Indeed, it is difficult to reconcile such a principle with the many cases in which the qualifications on the privilege have been recognised. In *AT&T Istell Limited and Another –v- Tully and Another* [1993] A.C. 45 the House of Lords held that although the privilege against self incrimination subsisted and could only be removed or altered by Parliament, there was no reason to allow a defendant in civil proceedings to rely on it, thus depriving a plaintiff of his rights, where the defendant's own protection was adequately secured by other means.

[31] Lord Templeman stated at page 55: -

> "Having regard to the fact that Parliament has not abolished the privilege against self-incrimination Mr Tully would be entitled to rely on that privilege if but only if and so far as compliance with the order of Buckley J would provide evidence against him in a criminal trial. There is no reason why the privilege should be blatantly exploited to deprive the plaintiffs of their civil rights and remedies if the privilege is not necessary to protect Mr Tully."

[32] Lord Lowry at page 57 said that the privilege must prevail unless it has been modified or abrogated by statute but went on to explain, by reference to the judgment of Goddard LJ in *Blunt v. Park Lane Hotel Limited* [1942] 2 KB 253 at 257, that the rule was that no one was bound to answer any question if the answer would expose him to any criminal charge, penalty or forfeiture. For reasons that we will give below, we do not consider that such a consequence will arise in the present case. The appellants will not be exposed to the risk of a criminal charge *as a result of producing this material to the respondents*. The material has already been used in criminal proceedings and may be employed again in future proceedings but that will not arise as a result of its production in these civil proceedings.

[33] In *Taylor v Serious Fraud Office* the privilege was described as being necessary to ensure that a person's privacy and confidentiality are not invaded *more than is absolutely necessary for the purposes of justice*. That the privilege must yield to the interests of justice is consistent with the approach evident from a number of authorities that a balancing of competing interests will frequently be required.

[34] In *R v Kearns* [2002] 1 WLR 2815, the Court of Appeal in England conducted a wide-ranging review of the scope of the privilege as discussed in various decisions both in the United Kingdom and Strasbourg. At paragraph 53 of its judgment the court stated: -

> "(3) The rights to silence and not to incriminate oneself are not absolute but can be qualified and restricted. A law which qualifies to restrict those rights is compatible with Article 6 if there is an identifiable social or economic problem that the law has intent to deal with and the qualification or restriction on the right is proportionate to the problem under consideration.
>
> (4) There is a distinction between the compulsory production of documents or other materials which had an existence independent of the will of the suspect or accused person and statements that he has had to make under compulsion. In the former case there was no infringement of the right to silence and the right not to incriminate oneself. In the latter case there could be, depending on the circumstances."

[35] In *Marcell and others v Commissioner for Police of the Metropolis and Others* [1992] Ch 225 a distinction was drawn between documents which had been put in evidence in open court in criminal proceedings and whose contents

could thus be said to have entered the public domain and other documents. The Court of Appeal held that documents seized by the police in the exercise of their powers under the Police and Criminal Evidence Act 1984 could be produced by the police on a subpoena duces tecum for use in civil legal proceedings without the consent of the person from whom the documents had been seized if they were necessary to ensure a full and fair trial on full evidence.

[36] In *Taylor*, the implied undertaking arose where material was disclosed by the prosecution in criminal proceedings. Such disclosure generated an implied undertaking not to use it for a collateral purpose. In *Matthews and Malek on Disclosure* (2nd ed) the authors set out the situations in which the implied undertaking referred to in *Taylor* will cease to have effect: -

> "(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree."

[37] We therefore reject the claim that the privilege against self incrimination advanced by the appellants can only be overridden by a statutory provision. On the contrary, we consider that where, as in this case, there are compelling reasons that the documents should be produced in the interests of justice, the rights of the appellants must defer to those wider interests. Moreover, we are of the view that the documents sought in this case come within the first category adumbrated in paragraph 53 (4) of *Kearns* and on that account also are exigible.

The burden of proof on the respondents

[38] This argument does not appear to have been advanced to Morgan J. We can deal with it very briefly. It is quite contrary to the principles underlying discovery of documents that an applicant should be required to prove that documents are within the power of the party from whom he seeks them. The duty to discover documents is a pro-active one. In this case, of course, what is sought is production of the documents. If the respondents can successfully aver that the documents are not held and cannot be obtained by them, they may properly decline to comply with the order. But there is every reason to believe that they either already have the documents or they may insist on their being given to them. The arguments advanced on this ground are rejected.

The imposition of a penalty

[39] Ms Higgins relied strongly on the decision of this court in *Belton v Director of the Assets Recovery Agency* [2006] NICA in support of the claim that disclosure of the documents in question should not be ordered because to do so would expose the appellants to a penalty. She suggested that the plaintiffs in the action have expressed a determination to use these civil proceedings as a means of holding the appellants to account, in the absence of criminal charges being preferred against them in this jurisdiction. She has contended that a civil action can be an action for a penalty just as much as a criminal action (*Mexborough (Earl of) v Whitwood Urban District Council* [1897] 2 QB 111, per Lord Esher at p 115).

[40] Article 7 (1) of ECHR provides: -

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

[41] In *Belton*, it was held that Assets Recovery Agency proceedings for recovery are not an action for a penalty. Nicholson LJ, who delivered the judgment of the court, conducted a wide-ranging review of the relevant case law including the leading ECHR case (*Welch v United Kingdom* [1995] 20 EHRR 247) on the meaning of a penalty within the meaning of article 7. The relevant passages from the decision of ECtHR in *Welch* were identified by Nicholson LJ as follows: -

> "The wording of Article 7(1), second sentence, indicates that the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a `criminal offence'. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity". (paragraph 28)
>
> "The preventive purpose of confiscating property that might be available for use in future drug trafficking operations as well as the purpose of

> ensuring that crime does not pay are evident from the ministerial statements that were made to Parliament at the time of the introduction of the legislation. However, it cannot be excluded that legislation which confers such broad powers of confiscation on the court also pursues the aim of punishing the offender. Indeed, the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment." (paragraph 30)
>
> "… The sweeping statutory assumptions in Section 2(3) of the 1986 Act that all property passing through the offender's hands over a six year period is the fruit of drug trafficking unless he can prove otherwise; the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit; the discretion of the trial judge, in fixing the amount of the order, to take into account the degree of culpability of the accused; and the possibility of imprisonment in default of payment by the offender – are all elements which when considered together, provide a strong indication of, inter alia, a regime of punishment." (paragraph 33)

[42] The central theme to emerge from these passages, as the Court of Appeal in *Belton* observed, was that the purpose of the measure in question provides the key to the question whether it constitutes a penalty. In this context, the expressed intention of the plaintiffs in pursing the civil claim cannot be taken as the authoritative statement of the purpose of the proceedings. This is supplied by the nature of the proceedings themselves. An action for damages is in its essential nature a requirement to pay compensation for a civil wrong. This is not a penalty as that term requires to be construed for the purposes of article 7. The purpose of the proceedings is to obtain due recompense for the wrong that the plaintiff has suffered. We are satisfied that the order to produce documents does not involve the imposition of a penalty on the appellants.

The telephone evidence

[43] Ms Higgins' claim that the judge misdirected himself in holding that there was no controversy about the factual telephone evidence was not developed to any particular extent in the course of the appeal. The judge was

told that the evidence was given at Mr Murphy's trial without objection. In these circumstances we cannot see how legitimate objection can be taken to the judge's conclusion that there was no controversy about the factual telephone evidence.

Final observations

[44] None of the many grounds advanced by the appellants has succeeded and the appeal must be dismissed. This appeal has been characterised by the inclusion of every conceivable technical objection to the judge's order. The case generally has spawned much interlocutory litigation where, again, every possible ground on which the action might be frustrated has been canvassed. There has been satellite litigation challenging the grant of funds to the respondents for the legal costs of the action. The time has now arrived for this case to proceed with all dispatch. It is clear that the learned trial judge has bent every effort to achieve this. We now expect the legal representatives of all the parties to give their full co-operation to him to realise what has obviously been his aspiration of bringing this action to trial without further delay.