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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE OFFICIAL SOLICITOR ON BEHALF OF N AND R FOR JUDICIAL REVIEW

GILLEN J

Introduction

[1] In this matter the Official Solicitor as next friend of a child N born 22 October 1992 and a child R born 25 July 1995,both of whom are subjects of pending Care Order proceedings before a Family Proceedings Court issued by a Community Hospital Trust ("the Trust"), seeks the following relief:

(i) A declaration that the learned Resident Magistrate hearing this case had no jurisdiction to make an Order of 22 June 2005 ordering that the guardian ad litem make disclosure of her notes of conversations with the mother of these children and with the children themselves to the mother and to the other parties in the proceedings .

(ii) Further, or in the alternative, if the learned Resident Magistrate did have jurisdiction to make the said Order for disclosure, a declaration that he erred in law in exercising his discretion to order disclosure against the guardian ad litem ("gal") to the extent that he did or at all.

(iii) An Order of Certiorari to remove into this Honourable court and quash the said decision.

(iv) An Order of Mandamus to compel the learned Resident Magistrate to consider the application for disclosure according to law.

The grounds upon which relief is claimed are, as amended, set out as follows by the applicant:

"(1) The learned Resident Magistrate had no power, no authority and/or jurisdiction to make an Order for disclosure against the guardian ad litem given that his powers are restricted to those set out in the Children (Northern Ireland) Order 1995 and the Magistrates Courts (Children (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996. These powers do not include the power to order disclosure. (By way of contrast, a judge in the County Court or High Court does have a power to order disclosure. The Family Proceedings Rule (NI) 1996 provide at Rule 1.4 that the Supreme Court Rules and County Court Rules apply with the necessary modifications to "the practice and procedure in family proceedings". This means that the Rules in each of those courts on discovery apply (for example, Order 24 of the Supreme Court Rules applies to all family proceedings).

(2) If the learned Resident Magistrate did have power to order the said disclosure he erred in law in exercising his discretion to do so in that:

> "(a) He failed to recognise that the Guardian ad Litem is not, in fact, a party to the proceedings but rather a person appointed under Article 60 of the Children (NI) Order 1995 with a duty to safeguard the interests of the child.
>
> (b) He failed to consider whether, and explain why, any disclosure was necessary for the fair disposal of the proceedings.
>
> (c) He failed to consider whether, and explain why, disclosure was necessary beyond the guardian ad litem's record of the disputed conversation with the child's mother.

(3) To the extent that it is or may be contended that disclosure is necessary for the purposes of a fair trial pursuant to Article 6 of the European Convention on Human Rights:

> (a) Parliament has deliberately decided not to allow orders for disclosure to be made in the Family Proceedings Court.
>
> (b) The fact that there is a power to order disclosure in the County Court and the High Court does not mean that it is necessary for a fair trial in the Family Proceedings Court – see in this context the judgment of Gillen J in Re Butler [2004] NI 93 at page 109, paragraph 36."

[2] The relevant facts in this case are very few, but the legal issue is difficult. The relevant factual matters are well set out in the affidavit of Brenda Donnelly, Official Solicitor ("the OS") of 16 September 2005. The following are the unchallenged salient facts that form the background to this application:

(i) The two children are the subjects of pending care proceedings issued by the Trust. The Gal was appointed by direction of the Family Proceedings Court on 25 August 2004.

(ii) It is not without significance that Ms Donnelly records at paragraph 1 of her affidavit:

> "I am making this application on behalf of the children as the gal can only act in `any specified proceedings' which does not include an application for judicial review."

(iii) On 25 August 2004 the Trust was granted Emergency Protection Orders in respect of the two children at the Family Proceedings Court. The Orders were extended on 25 August 2004 and Interim Care Orders were granted on 2 September 2004. Interim Care Orders have consistently remained in place since that date. The parents of the children are respondents to the applications. On 4 July 2005, the matter was timetabled for a full hearing and the full hearing was listed for October 2005 although this has been subsequently adjourned until December 2005 (and thereafter in light of this judicial review).

(iv) On 13 April 2005 the mother filed an interlocutory application requesting, inter alia, seven specific items of discovery and also a request for "such other relevant material held by the Trust, the gal or their appointed experts as may arise." The Trust consented to the first six items. The outstanding matter was a request for discovery from the gal in the following terms:

> "Copies of all written records/minutes/notes etc of conversations held by the gal of her conversations with the respondent mother and separately with the subject children."

In addition she sought "such other relevant material held by the Trust, the gal or their appointed experts as may arise."

(v) On 9 May 2005 the Resident Magistrate made directions for the hearing of the application. Skeleton arguments were produced and filed by all the parties and the guardian ad litem agency.

(vi) On 22 June 2005 the Resident Magistrate acceded to the mother's application and handed down a written judgment dated 4 July 2005 which has been set before me. The Order itself of 22 June 2005 declared: "disclosure granted". At the termination of the judgment at page 5 the Resident Magistrate stated:

> "Having regard to the circumstances of the present case it seems to me that that the request for the notes of conversations with the mother and the children passes the relevant threshold test and I therefore order disclosure of those notes to the respondent mother and to the other parties."

It was agreed by all counsel before me that whilst the Order is not without any ambiguity three categories of documents were in fact included in this order. First, documents concerning a disputed conversation between the mother and the guardian ad litem which were relevant to the issue as to whether or not the mother had indicated in an interview/conversation with the gal that she and her husband were presenting as a couple (as alleged by the gal) or whether the mother was presenting as a sole carer. This was an important conflict between the gal and the mother. Secondly, the order was for disclosure of all other notes of conversations between the mother and the gal. Thirdly the order was for disclosure of all conversations between the gal and the children. The Resident Magistrate records in his judgment that the respondent mother has a mild learning disability and has no notes or records of any meetings with the gal.

Preliminary Matters

[3] (i)Under Order 53 rule 4 as amended of the Rules of the Supreme Court (NI) an application for leave for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made. Suffice to say, everyone agreed in this case that no point was being taken about the delay in bringing these proceedings particularly in light of the fact that the issue was an important one for determination by the court. I do not propose therefore to go into the reasons for the delay other than to say that all parties agree that it was appropriate that the court should proceed to hear the matter. I therefore am satisfied that the applicants were not disqualified from seeking the relief before me.

(ii) In the interim since the matter had been before the Resident Magistrate, the gal had agreed to disclose to the mother the notes of the conversation concerning the issue of a joint assessment. Nonetheless the

order was much wider than this and accordingly the issue still falls to be determined in this forum.

(iii) It was agreed by all the parties that the title of the matter should be amended to preserve the anonymity of the children and for that reason I have also anonymised the contents of this judgment by naming the children by letter, by withholding the full name of the relevant Trust and indeed the location of the Family Proceedings Court. Nothing should be reported in this case which serves to identify these two children or members of their family.

(iv) It was common case that the gal is not a party to the proceedings. The gal is appointed by the court pursuant to Article 60 of the Children (NI) Order 1995 ("the 1995 Order") for the purpose of specified proceedings. Article 60(6)(a) of the 1995 Order defines "specified proceedings" as including "an application for a care or supervision order". That the gal is not a party to the proceedings but has only a specified role under Article 60 of the 1995 Order, is highlighted by the fact that Rule 15 of the Magistrates' Courts (Children (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996 ("the 1996 Rules") states where relevant:

> "15.-(1) In this rule `party' includes the guardian ad litem and where a request or direction concerns a report under Article 4, the welfare officer."

The guardian is clearly identified as a party for the purposes of directions under Rule 15. Accordingly, save at a directions hearing, the guardian ad litem will not be a party to proceedings but is confined to the role set out under the 1995 Order and the 1996 Rules. It is perhaps significant that this was not a finding made by the Resident Magistrate nor an issue referred to by him. Hence no reference was made to Rule 8 of the 1996 Rules which records at Rule 8(1) that "The respondents to relevant proceedings shall be those persons set out in the relevant entry in Column (iii) of Schedule 2 to these Rules". Schedule 2 proceeds then to set out a number of respondents but does not include a gal.

The Applicant's Case

[4] Mr O'Hara QC, who appeared on behalf of the Official Solicitor together with Ms Steele, made the following points in the course of a comprehensive skeleton argument and well marshalled oral submission:

(i) Unlike a County Court or High Court judge, a magistrate has no statutory power to order discovery. In particular he submitted that neither the Magistrates' Court (NI) Order 1981 ("the 1981 Order") nor the Magistrates' Courts Rules (NI) 1984 ("the 1984 Rules") provide a power to

order discovery. He contrasted this with the High Court and the County Court where orders for discovery can be made. In the High Court, these can be made pursuant to Order 24 of the Supreme Court Rules and in the County Court pursuant to Order 15 of the County Court Rules (NI) 1981. In the High Court this power is derived from Rule 1.4 of the Family Proceedings Rules (NI) 1996 which specifically states:

> "1.4-(1) Subject to the provisions of these Rules and of any statutory provisions, the Rules of the Supreme Court (Northern Ireland) 1980 and the County Court Rules (Northern Ireland) 1981 … shall apply with the necessary modifications to the commencement of family proceedings in, and to the practice and procedure in family proceedings pending in, the High Court and a County Court respectively."

In contrast in the Family Proceedings Court the equivalent Rules are the 1996 Rules which do not include the power to order discovery and obviously do not apply the Rules of the Supreme Court (NI) 1980 and the County Court Rules (NI) 1981. Mr O'Hara argued that there is nothing in the Magistrates' Courts Rules 1984 which can be read across to give a power to order discovery. Indeed there is nothing in the judgment of the learned Resident Magistrate which suggests anything to the contrary.

(ii) Whilst Mr O'Hara accepted that both the guardian ad litem agency and the Resident Magistrate are public authorities for the purposes of Section 6 of the Human Rights Act 1998 and as such have obligations to ensure a fair trial, Article 6 does not impose the same obligation in all types of cases. He drew my attention to a decision I have given in Re Butler's and Police Ombudsman for Northern Ireland Application for Judicial Review [2004] NI 93:

> "I recognise that art 6 is to be given a broad and purposive interpretation and that it should apply throughout the judicial system. But that does not mean that the same procedure must be followed in all courts whether dealing with Crown Court proceedings or summary proceedings. It has long been recognised that there are differences both of substance and procedure in the different courts. For example there are no juries in Magistrates' Courts, provision for legal aid is not as generous as in the Crown Courts etc. Proceedings in the Magistrates' Courts are summary issues and it is

> important that hearings in trials should proceed, consistent with fairness, without delay…"

Accordingly Mr O'Hara submitted that the learned Resident Magistrate had erred in imposing an absolute duty under Article 6 whereas in fact the extent of the duty varies with the level of the court and the nature of the proceedings.

(iii) It is accepted that the gal is a non party. There is power in the Rules of the Supreme Court (Northern Ireland) and the County Court Rules to make limited discovery against non parties. In the High Court under Order 24 Rule 8(2) applications can be made under Sections 31 or 32(1) of the Administration of Justice Act 1970 for disclosure of documents by a person who is not a party to the proceedings but that is only in the limited circumstances under the Administration of Justice Act 1970 in dealing with personal injury cases. Similarly under Order 15 Rule 5(a) of the 1981 Rules. However once again there is no equivalent rule in the 1996 Rules which govern the Magistrates' Court.

(iv) Mr O'Hara dealt in some detail with the authorities relied on by the learned Resident Magistrate namely:

> "(a) Re R (Care: Disclosure: Nature of Proceedings) [2002] 1 FLR 755. ("Re R").
>
> (b) Re B (Disclosure to Other Parties) [2001] 2 FLR 1017. ("Re B").
>
> (c) Re L [2002] 2 FLR 730. ("Re L").

The thrust of these cases was to the effect that both local authorities and gals should be increasingly willing to exhibit their notes of relevant conversations and incidents at the time of preparing their reports and that gals should be more willing than many are at present to disclose contemporaneous notes when asked for by the other parties. In particular there is a need for all professionals (social workers, social work assistants, children's guardians, expert witnesses and others) to keep clear accurate full and balanced notes of all relevant conversations and meetings between themselves and/or with parents, other family members and others involved with the family. Social workers and guardians should routinely exhibit to the reports and statements notes of relevant meetings, conversations and incidents." (See Munby J in Re L (supra).

(v) Counsel argued that these judgments were given in the context of High Court proceedings and to that extent were of limited value in considering proceedings in the Family Proceedings Court. It does not appear that the

question of whether the gal was herself a party was considered directly in any of them. He also emphasised that it was acknowledged in Re B that whilst an entitlement to a fair trial under Article 6 of the Convention was absolute, that did not mean that there was an absolute and unqualified right to see all the documents.

(vi) Mr O'Hara submitted that even if a magistrate could grant discovery, the discretion to do so should be exercised sparingly in family cases and that in this instance there was no identified basis upon which the guardian's notes involving conversations with the mother or the children other than the context of the disputed conversation with her should be disclosed.

(vii) Mr O'Hara submitted that it was highly significant that no application had ever been made since the inception of the Children's Order on the basis of that now before the court and this illustrated that not only was the system working well but that no one until now had ever envisaged that an order of discovery could be made against the gal. He argued that one of the reasons for this was because under Rule 12(11) of the 1996 Rules, "a party may question the guardian ad litem about oral or written advice tendered by him to the court under this rule". This in his submission meant that any gal could be asked about a document upon which his evidence was based and thus the question of obtaining documentation was only one of timing. Should any prejudice occur as a result of the late revelation of a note or record, the magistrate could always temper this by an adjournment or take such other step as would be necessary to ensure that the revealed document could be adequately dealt with by the cross-examining party.

The Submissions on Behalf the Resident Magistrate

[5] Mr McAlister made the following submissions in the course of a well-presented skeleton argument augmented by oral submission:

(i) He acknowledged that the Resident Magistrate had made his decision based purely on the principles under Article 6 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") and had not sought to rely on the 1996 Rules. It was the thrust of his argument that the proper manner in which this case should be approached was to make use of the Human Rights Act in interpreting the 1996 Rules to permit disclosure to be made. Although this had not been the approach of the learned Resident Magistrate, I was prepared to entertain his submissions in the form that they were now to take.

(ii) Counsel submitted that the cases earlier adverted to pointed to a failure in the past of public bodies involved in care proceedings to provide adequate disclosure. He drew my attention to Munby J in Re L at page 770 para 149 where he stated:

> "Too often in public law proceedings both the level of disclosure and the extent of a parent's involvement in the crucial phases of the out of court decision-making processes falls short not just of the well-established requirements of domestic law … but also of the standards which are now demanded by Arts 6 and 8 of the Convention."

He relied on the comments of Munby J about the need for clear accurate notes routinely exhibited to reports and statements to which I shall later make reference in this judgment.

(iii) Mr McAlister submitted that these English authorities indicate that the position of the gal in relation to disclosure is no different to that of the other professionals involved in care proceedings.

(iv) Counsel argued that it would be inappropriate to have a different procedure for disclosure by the gal in the Family Proceedings Court than that in the Family Care Centres and High Court. He relied in particular on two rules under the 1996 Rules. They were as follows:-

(a) Rule 12(10) provides where relevant:

> "In addition to his duties under other paragraphs of this rule, the guardian ad litem shall provide to the court such other assistance as may be required."

Mr McAlister submitted that this is a very widely drawn provision and he argued that it would seem to permit the court to require the gal to disclose to the court documentation in the gal's possession which the court considered it required.

(b) Rule 15 of the 1996 Rules which deals with directions provides where relevant:-

> "(1) In this rule `party' includes the guardian ad litem …
>
> (2) In any relevant proceedings the court may, subject to paragraph (4) give, vary or revoke directions for the conduct of the proceedings including –
>
> (a) The timetable for the proceedings;

> (b) Varying the time within which or by which an Act is required, by these Rules, to be done;
>
> (c) The attendance of the child;
>
> (d) The appointment of a guardian ad litem whether under Article 60 or otherwise, or of a solicitor under Article 60(3);
>
> (e) The service of documents;
>
> (f) The submission of evidence including experts reports;
>
> (g) The preparation of welfare reports under Article 4;
>
> (h) The transfer of their proceedings to another court in accordance with the Allocation Order;
>
> (i) Consolidation with other proceedings."

(v) Mr McAlister submitted that this is a similarly widely drawn rule. The use of the word "including" indicated in his submission that the areas in which directions may be given are not confined to those set out in sub-paragraphs (a) to (i) and therefore directions as to disclosure by a gal could be given under Rule 15. In particular Rule 15(2)(f) could be interpreted to include such directions.

(vi) Counsel emphasised Section 3(1) of the Human Rights Act 1998 which reads as follows:

> "So far as is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

In his submission this should be used to interpret the 1996 Rules in order to ensure a fair trial under Article 6 of the Convention. Mr McAlister argued that the court should not be dependent on the mere good will of the gal to disclose relevant documentation and that it was no less important in the

Family Proceedings Court than in any other court in the Family Division that such powers be at the disposal of the court. He distinguished the situation in the case of Butler where, at the Magistrates' Court hearings, relatively minor criminal matters are dealt with whereas in the Family Proceedings Court, the court has the most draconian powers at its disposal namely to break the bond between parent and child and to take steps inconsistent with the aim of reuniting natural parent and child which should underlie family proceedings. In such circumstances parties should have all the documents relevant to the case in advance of the trial to enable parties to analyse and consider at length relevant material. He also argued that it would save time and expense in preventing an adjournment if documentation is produced at the last moment for example during cross-examination.

(vii) Turning to the width of the learned Resident Magistrate's disclosure order Mr McAlister argued that there were issues in this case much wider than the narrow issue of the conversation between the mother and the guardian about the nature of the assessment. This was a woman with learning difficulties who was disputing her current suggestion that she wanted to be treated as a sole carer. The conversations in general with the guardian and with the children might have some relevance to this aspect.

The Submissions of the Mother

[6] Ms Walsh QC, who appeared on behalf of the mother with Mr Edmondson had submitted an equally impressive skeleton argument and again had augmented the contents with oral submissions, in the course of which the following salient points emerged:

(i) Counsel submitted that the correct applicant was not making this application. In her submission the correct applicant should have been either the gal herself or the guardian ad litem agency. She submitted that it was not in the children's best interest that the gal should be allowed to avoid disclosing the notes of the conversations with the mother and children. It was her case that the gal had represented on 1 February 2005 to the Resident Magistrate that the mother had told her that she and her husband were presenting as a couple. The mother denied this conversation and maintained that she presented as a sole carer seeking the rehabilitation of the children to herself as sole carer. Counsel submitted that it was a fiction to state that the children through the Official Solicitor were the correct applicants and that they had an interest in preserving the privacy of the gal's documents. In essence, she argued, the fiction was being used by the Official Solicitor to obtain legal aid to challenge the RM's decision instead of the gal funding the case. She drew my attention to an unreported case in the Court of Appeal in Northern Ireland In the matter of Applications by Noel Anderson, a minor and Shea O'Doherty, a minor for Judicial Review, delivered 23 October 2001. In that matter applications for a judicial review were brought on behalf of

children, rather than the parents of children, to challenge decisions of the Board of Governors of a school not to admit the appellants to the college. Ms Walsh referred to the criticism by the court of the standing of the children as applicants when it ought to have been the parents who brought the application for judicial review challenging the admission decisions of school governors. At page 18 Carswell LCJ (as he then was) said:

> "Unless sufficient ground has been established for such an exception to operate, we consider that judges ought to refuse leave for applications for judicial review of governors' or tribunals' decision in relation to school admission to be brought in the names of the pupils. By the same token legal aid should be refused when sought such applications to be brought in pupils' names, unless sufficient cause is shown why they and not their parents should be the applicants."

Ms Walsh argued that there was an analogy in this case where the Official Solicitor was operating a fiction and fronting a claim that ought to have been brought by the gal agency.

(ii) Ms Walsh borrowed the arguments of Mr McAlister as to the interpretation of Rule 12(10) of the 1996 Rules and Rule 15(2) of the same Rules in light of s 3 of the Human Rights Act 1998.

(iii) Counsel also argued that if there is no facility for disclosure in the Family Proceedings Court, then courts will simply avail of the provisions of the Children (Allocation of Proceedings) Order (Northern Ireland) 1996 ("the Allocation Order") to transfer cases up to higher courts from the Family Proceedings Court in order to avail of disclosure provisions. She drew my attention to a decision I had given in T, C, P, M and B (The Children (Allocation of Proceedings) Order 1996) [2003] NI Fam 9 in which I had said in the context of proposed transfers under Article 10 of that 1996 Order:

> "Whilst the category of cases appropriate for determination in the High Court is never closed examples of appropriate criteria will include cases which possess one or more of the following features:
>
> (a) Voluminous and/or complex issues of law.
>
> (b) Unusually complex psychological or emotional issues.

(c) Considerable expenditure of public monies.

(d) Particularly vulnerable parties and/or unusually cooperative litigants.

(e) An unusually long defended case."

She indicated that that made clear that the categories were not closed and that the need to obtain disclosure could become a category for transfer.

Conclusions

[7] I have come to the conclusion that the application of the Official Solicitor in this case is well-founded and accordingly I have determined to grant the applicant the following relief:

(1) A declaration that the learned Resident Magistrate had no jurisdiction to make the Order on 22 June 2005 ordering the gal to make disclosure of her notes of conversations with the mother and the children to the mother and to the other parties.

(2) I make an Order of Certiorari quashing that decision.

(3) In the circumstances I consider the application for an Order of Mandamus to be redundant.

[8] I have come to this conclusion for the following reasons:

(1) I am satisfied that Parliament did not intend to confer a power on a Family Proceedings Court to order disclosure under the Magistrates' Courts (NI) Order 1991 the Magistrates' Courts Rules (NI) 1984 or the Magistrates Courts (Children (NI) Order 1995) Rules (NI) 1996. The stark contrast with the provisions of the Family Proceedings Rules (NI) 1996 which provide that the Rules of the Supreme Court (Northern Ireland) 1980 and the County Court Rules (Northern Ireland) 1981 apply could not be clearer. Had Parliament intended to confer similar powers on the Family Proceedings Courts, then it would have been tolerably easy for the 1981 legislation, the 1984 Rules or the 1996 Rules to have contained similar provisions. Judicial activism must be tempered by due restraint. In my view to adopt an interpretation of the legislation which would empower a magistrate to order disclosure in these circumstances would amount to an unwarranted extension of what Parliament has intended.

(2) I consider it neither possible nor necessary to extract from Rule 12(10) or Rule 15 of the 1996 Rules an interpretation which would empower the Resident Magistrate to make an Order of disclosure even under the spur of

the Convention and the Human Rights Act 1998. Rule 12 deals with the powers and duties of a gal. The Rule sets out a large number of powers and duties. Such is the detail contained in that rule, that I have no doubt that if Parliament had intended that one of the duties of the gal was to provide disclosure, that would have been expressly stated. In my view it is inconceivable that it was intended that Rule 12(10), imposing an obligation on a gal to provide for the courts such other assistance as may be required, was intended to embrace disclosure. Disclosure is a concept well known throughout the court system and is specifically dealt with at great length in both the Supreme Court Rules and the County Court Rules. It was never intended to be introduced in the Family Proceedings Court by a catch all phrase in Rule 12(10). Moreover it would be incongruous if Parliament intended the court to have power to order disclosure only against the gal but not against any other party. It would be curious to say the least if the Trust, who are in possession of the vast majority of the papers and documents in most of these cases, was not subject to such an order but that a gal was, especially when no specific reference thereto was made. I consider that Rule 15(2)(f) which permits the court to give, vary or revoke directions for the conduct of the proceedings including "the submission of evidence including experts' reports" was never intended to include a direction for disclosure. These words must take their colour from their context. The directions in Rule 15(2) are largely administrative matters to ensure the seamless running of the process. There is no doubt that an enabling Act can use the term "direction" for what amounts to an order in certain circumstances. However I consider that the term direction is perhaps more properly reserved for purely executive instructions (see Bennion 4th Edition "Statutory Interpretation" p. 223). In my view Rule 15 falls within that category and is not intended to embrace an order for discovery. In any event the construction of the phrase "the submission of evidence including experts' reports" does not permit of such a wide interpretation as to embrace therein an order for disclosure. In no other area of the law would a direction that an experts' report be provided be interpreted as implying in addition that an order for disclosure of documents could be attached under the same provision. I am therefore satisfied that had it been the intention of Parliament that Rule 15 was to embrace disclosure, specific provision would have been made. There is no warrant for reading additional words into that simple text. It may not be without significance that this experienced Resident Magistrate did not seek specifically to rely on this interpretation of Rules 12(10) or 15(2)(f). I find it unsurprising that he did not seek to interpret these rules in the manner now submitted by counsel.

(3) The learned Resident Magistrate did rely on Section 6 of the Human Rights Act which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. He went on to record that Article 6 of the European Convention provides the absolute right to a fair trial. It was on the basis of Article 6 that he made his determination. I consider that the learned Resident Magistrate has painted the canvas of his

judgment with too broad a brush. In this context, I find no reason to change the view that I expressed in Re Butler's Application at para 36:

> "I recognise that art 6 is to be given a broad and purposive interpretation and that it should apply throughout the judicial system. But that does not mean that the same procedure must be followed in all courts whether dealing with Crown Court proceedings or summary proceedings. It has long been recognised that there are differences both of substance and procedure in the different courts."

I consider that the principle applies equally well throughout the divisions in the Family Courts. I am conscious that the powers vested in a magistrate when dealing with cases under Children Order (Northern Ireland) 1995 are draconian in nature. That Order came into force after the Magistrates' Courts legislation and regulations to which I have been referring. Nonetheless magistrates have always had enormous powers in cases dealing with children and I have no doubt that Parliament was well aware of them when enacting the pre 1995 legislation to which I have adverted. Cases under the 1995 Order which come before magistrates must proceed, consistent with fairness, without delay. The volume of such cases is far greater than that which comes before either of the higher courts and it is imperative that, again consistent with fairness, cases do not become weighed down or unduly delayed with interlocutory applications. Fairness does not require uniformity of procedure and what is fair depends on circumstance and context. Already there are a number of protections built into the Family Proceedings Courts which would obviate any question of unfairness arising out of a failure to order disclosure against a gal. In the first place, Rule 12(11) of the 1996 Rules permits a party to question the gal about oral or written advice tendered by him to the court under Rule 12. This means that the gal can be cross-examined about all matters arising out of his powers and duties. That in itself affords protection should any issue arise as to the contents of a note or record made by that gal because he or she can be asked to produce them if it proves to be relevant to an issue in cross-examination. Secondly, as the learned Resident Magistrate pointed out, there is a growing need for transparency in the whole process of family law. Whilst the authorities that he relied on applied to High Court proceedings, in many instances the principles therein set out apply equally well to proceedings in the Family Proceedings Court save where they specifically refer to disclosure. This court has in several instances adopted much of what Munby J said in Re L [2002] 2 FLR 730 where the Judge stated at p771 para 154:-

"If those involved in cases such as this are in future to avoid the criticism which, understandably and, it seems to me with no little justification, had

been levelled against some of those involved in the present case they would be well advised to bear the following precepts in mind:

> (i) Social workers should, as soon as ever practicable:
>
> > (a) notify parents of material criticisms of and deficits in their parenting or behaviour and of the expectations of them; and
> >
> > (b) advise them how they may remedy or improve their parenting or behaviour.
>
> (ii) All professionals involved (social workers, social work assistants, children's guardians, expert witnesses and others) should at all times keep clear, accurate, full and balanced notes of all relevant conversations and meetings between themselves and/or with parents, other family members and others involved with the family.
>
> (iii) The local authority should at an early stage of the proceedings make full and frank disclosure to the other parties of all key documents in its possession or available to it, including particular contact recordings, attendance notes of meetings and conversations and minutes of case conferences, core group meetings and similar meetings. Early provision should then be afforded for inspection of any of these documents. Any objection to the disclosure or inspection of any document should be notified to the parties at the earliest possible stage in the proceedings and raised with the court by the local authority without delay.
>
> (iv) Social workers and guardians should routinely exhibit to their reports and statements notes of relevant meetings, conversations and incidents.
>
> (v) Where it is proposed that the social workers and/or guardian should meet with a jointly appointed or other sole expert witness instructed

in the case (what I will refer to as a `professionals' meeting', as opposed to a meeting of experts chaired by one of the legal representatives in the case – usually the children's guardian's solicitor):

(a) there should be a written agenda circulated in advance to all concerned;

(b) clear written notice of the meeting should be given in advance to the parents and/or their legal representative, accompanied by copies of the agenda of all documents to be given or shown to the expert and notice of all issues relating to or criticisms of a parent, or a non-attending party, which it is intended to raise with the expert;

(c) the parent, or non-attending party, should have a clear opportunity to make representations to the expert prior to and/or at the meeting on the documents, issues and/or criticisms of which he or she has been given notice;

(d) a parent or other party who wishes to should have the right to attend and/or be represented at the professionals' meeting;

(e) clear, accurate, full and balanced minutes of the professionals' meeting (identifying in particular what information ahs been given to the expert and by whom) should be taken by someone nominated for that task before the meeting begins;

(f) as soon as possible after the professionals' meeting the minutes should be agreed by those present as being in accurate record of the

> meeting and then be immediately disclosed to all parties."

Whilst I am firmly of the view that the comments as to disclosure apply only to the High Court and the Family Care Centres for the reasons I have set out, nonetheless the remaining guidelines are good practice to be adopted by all other parties and gals in such cases. Indeed in our jurisdiction the system by which bundles of documents are prepared for every contested case must invariably include all the documentation adumbrated by Munby J as a matter of routine. These guidelines should therefore operate in the Family Proceedings Court as much as in any other court and accordingly there is ample protection for the right to a fair trial in this context. Article 6 does not of course in any event mean an absolute unqualified right to see all documents even in the higher courts. I turn again to Munby J in Re L when he said at p773 para 1577:

> "General discovery – for that is what this would amount to – has never been the practice in children cases …
>
> (159) Now of course practice and procedure in such cases has moved on enormously since 1970, not least under the spur of the Convention and since 2000, the Human Rights Act 1998 … But the fact remains, … that what (to use pre-Woolf terminology) one might call automatic general discovery by list is not, and never has been part of the procedure in cases under the Children Act 1989 – neither in private law proceedings nor even in public law proceedings."

(4) The conclusions I have come to are in this particular instance underlined by the fact that the gal is not a party. In all divisions orders for disclosure against third parties are limited eg under Order 24 Rule 8(2) of the Rules of the Supreme Court (Northern Ireland) 1980 applications for disclosure of documents by a person who is not a party to the proceedings must be made pursuant to Sections 31 or 32(1) of the Administration of Justice Act 1970 which is confined to a particular category of cases. No similar provision is made to govern the Family Proceedings Courts or Magistrates' Courts and this in my view underscores the absence of power in this particular case for the learned Resident Magistrate to have taken the course that he did.

(5) I have no doubt that the Official Solicitor has appropriate standing to bring this application and that this case is easily distinguishable from that of Noel Anderson. In this instance, an order has been made directly concerning

the children in that disclosure was ordered of conversations between the children and the gal agency. That in itself would afford the Official Solicitor appropriate standing to bring these proceedings. Moreover, as a party to these proceedings, the Official Solicitor is entitled to comment on aspects of the case which would directly concern the interests of the children. In my view the documentation touching upon conversations between the mother and the guardian ad litem come within this category.

(6) I find no weight in the argument that Family Proceedings Courts may feel constrained to allocate cases requiring disclosure to higher courts. I have no doubt that Resident Magistrates will adhere strictly to the provisions of the Allocation Order and that cases will only be appropriately allocated when the clear and unequivocal statutory requirements are met. Disclosure by itself will not fall into such a category.

I will hear the parties now on the issue of costs.