

Neutral Citation No.: [2008] NIQB 98

Ref: MOR7259

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

Delivered: 16/09/08

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MARK CHRISTOPHER BRESLIN AND OTHERS

PLAINTIFFS

-AND-

SEAMUS MCKENNA AND OTHERS

DEFENDANTS

RULING NO 11

MORGAN J

[1] This is an application by the fifth and sixth named defendants to exclude from the trial all evidence furnished by the PSNI to the plaintiffs in February 2008 including in particular the interview notes, the internal reports, the cell site evidence obtained from network operators and any other material processed for the purpose of any criminal investigation. In order to deal with the application it is necessary to set out some of the background.

The background to the application

[2] In preparation for this trial I have held numerous reviews since September 2004. During 2007 in particular the plaintiffs expressed concern that they were not obtaining the cooperation that they anticipated from the PSNI in relation to the release of evidential material and indeed the absence of that material was relied upon by them to explain why, in part, they were not ready for earlier proposed trial dates. During that period the PSNI were reluctant to release the material because of their ongoing criminal investigations. In recent months senior members of the PSNI have indicated publicly that they think it unlikely that any criminal prosecution will take place in this jurisdiction as a result of events in Omagh on 15 August 1998.

[3] At a review on 7 December 2007 the plaintiffs indicated their intention to issue a Khanna subpoena directed to the PSNI for the purpose of obtaining the documentation that they required. The hearing of the application was fixed for 10 January 2008. On that date the plaintiffs indicated that they were in the process of obtaining clarification in particular about the availability of the telephone matrix evidence and the application for the subpoena was adjourned to 25 January 2008. During the hearing on 10 January 2008 counsel for the first named defendant indicated that he neither consented to or opposed the application. Counsel for the fifth and sixth named defendant adopted the observations of the first named defendant and added that Khanna subpoenas were generally not necessary in personal injury cases because of the availability of the procedure under section 32 of the Administration of Justice Act 1970.

[4] At the review in 25 January 2008 counsel for the plaintiffs indicated that the PSNI had given extensive and helpful assistance. As a result of that assistance it was not necessary to pursue the subpoena at that stage. The PSNI were represented at that hearing by a solicitor from the Crown Solicitor's Office. The return date for the subpoena was further adjourned until 11 February 2008 and the solicitor for the PSNI indicated that by that date she would be in a position to provide the witness statements sought. Counsel for the fifth and sixth named defendant indicated that they needed to know what material was available to the PSNI and further indicated that they were considering an application under section 32 of the Administration of Justice Act 1970 on behalf of their clients. At the review on 11 February 2008 the Khanna matter was further adjourned because of continuing cooperation.

[5] At a review in 29 February 2008 counsel for the plaintiffs brought forward a list of witnesses upon whom the plaintiffs intended to rely and indicated that everybody on the list was the subject of a witness statement supplied by the PSNI. No material had yet been received from the Garda.

[6] Although the case was reviewed in March 2008 on a number of occasions nothing arose in relation to the present application. At a further review prior to the opening of the case on 7 April 2008 counsel for the fifth and sixth named defendants indicated that the telephone matrix report by the expert retained by the plaintiffs in relation to the materials provided by PSNI was only going to be available on that day. No objection was taken to the use of that material by the plaintiffs' experts nor indeed about its provision to the defendants' experts. The case was then opened later that morning with extensive reference to the telephone matrix evidence.

[7] On 8, 9 and 10 April 2008 various witnesses were called and statements read without objection. All of this material was presented as a result of disclosure by the PSNI. On 10 April 2008 there was consideration of the manner in which the telephone matrix evidence might be presented. By that

stage the first, fifth and sixth named defendants had together sought to retain a relevant expert. The plaintiffs advised all parties at the start of April that the telephone matrix experts were scheduled to come to give evidence on Monday 14 April 2008. Counsel for the first named defendant on behalf of his client and the fifth and sixth named defendant indicated on 10 April 2008 that his expert report would not be ready within that time frame but submitted that it appeared sensible for the bulk of the telephone matrix evidence to be introduced as planned on 14 April 2008 with cross-examination to occur sometime thereafter. I accepted that submission.

[8] On the morning of 14 April 2008 counsel for the fifth and sixth named defendant made a submission that the telephone matrix evidence should not be received on the basis that it had been unlawfully disclosed to the plaintiffs by the PSNI. There had been no prior indication that any such submission was planned, no list of authorities was provided in relation to the submission and little or no notice had been given to the plaintiffs of the intention to make it.

[9] Counsel for the fifth and sixth named defendants accepted that the manner and timing of the submission were unsatisfactory. In light of the history set out above and the fact that the experts were in attendance I considered that the correct way forward was to allow the evidence to be given and to direct skeleton arguments on behalf of the fifth and sixth named defendants and the plaintiffs on the issue of whether I should subsequently exclude it. I have now received skeleton arguments from both parties and heard oral submissions on this issue on 26 June 2008.

[10] Although I have been advised that counsel on behalf of the PSNI has a watching brief in relation to this action it appears that no correspondence of any kind has been directed to the PSNI to seek to establish the basis upon which the materials were provided to the plaintiffs. My understanding from enquiries made by me in the course of the hearing is that the fifth and sixth named defendants have not and do not intend to make any inquiry from the PSNI on this issue. No request was made that the PSNI should be put on notice of this application. I am, therefore, asked to deal with this application without knowledge of the basis upon which these materials were disclosed by the PSNI to the plaintiffs. It appears, therefore, that the fifth and sixth named defendants have taken on the burden of establishing that no matter what the basis for disclosure it must have been unlawful. If they succeed in establishing that the disclosure was unlawful I will then have to consider how that affects the admissibility of the material.

The challenge to admissibility

[11] The fifth and sixth named defendants assert that the telecommunications data was obtained by the PSNI for the purpose of

furthering the criminal investigation. I have no reason to doubt that. Although the provision of the data constituted an interference with the private life of the defendants it is accepted that this was proportionate. It is contended, however, that the further provision of the material by the PSNI to the plaintiffs constituted a breach of article 8 of the ECHR.

"ARTICLE 8 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Because the defendants have declined to seek information as to the basis upon which the information was provided I have to be careful not to engage in speculation. As a result of the decision of the ECHR in Jordan v UK there is a legal duty on the PSNI to keep the plaintiffs informed about the investigation to the extent necessary. The plaintiffs also have a legal right to a fair trial in respect of their claim that the defendants are responsible for the bomb and the damage caused by it. Each of these may have provided pressing reasons for the disclosure of information and it may be that there are other reasons unknown to me which would also provide a proportionate basis for disclosure. I am prepared to accept that the PSNI must have known that the material released would be considered for use by the plaintiffs in this trial. I am also of the view, however, that where a public authority such as the PSNI holds relevant evidential material relating to a mass killing of this type the need for disclosure of that material to enable the victims to pursue vindication and compensation constitutes the type of pressing need which is likely to render the disclosure proportionate. In light of the manner in which this application has been launched it is for the defendants to satisfy me that no matter what the basis of disclosure it must have constituted a disproportionate interference with the rights of the defendants. Since I have already identified 2 possible bases upon which the disclosure may have been proportionate I do not consider that there is an evidential base for the proposition that the disclosure by the PSNI to the plaintiffs was contrary to article 8 of the ECHR.

[12] Secondly the fifth and sixth named defendants argue that the disclosure of the information to the plaintiffs represents support and assistance to the plaintiffs which gives rise to the perception of unfairness by

the PSNI towards the defendants. Although this is presented as a freestanding challenge under article 6 of the ECHR it seems to me that it raises little if anything in addition to the article 8 claim above. If the provision of the information is proportionate according to article 8 it is difficult to see how such a provision could give rise to a perception of unfairness. There is no evidence at all that the PSNI has withheld any information from the defendants that they seek and I note that the defendants have not pursued the section 32 application which they contemplated before the trial commenced. As I understand it all of the information provided by the PSNI has been disclosed to all of the parties. That accords with my view that this litigation should be conducted in an open and transparent manner.

[13] The second point raised in relation to article 6 is that the disclosure constitutes or gives rise to an inequality of arms. In my view this suggestion is ill founded. In the course of the trial the defendants have drawn attention to passages of the material disclosed by the PSNI which they consider is in their favour. There is no evidence that the PSNI have failed to disclose information that might be of assistance to the defendants.

[14] The third objection arises from the decision of the English Court of Appeal in *Marcel v Commissioner of Police* [1992] 1 All ER 72. In that case a subpoena had been served on police to produce documents seized by them in the course of a fraud investigation in order to enable the alleged victim to make his case against the defendant. The court of appeal discharged the injunction granted at first instance and held that the police were obliged to comply with a subpoena which could only be resisted on grounds which would have been available to the true owner of the documents. In my view it seems unlikely that there were any such grounds in this case. The court also recognised that there may be circumstances where the documents would be disclosed prior to the subpoena becoming effective. Part of the reason for setting out the history of this application is to demonstrate that the defendants were entirely aware from at least January 2008 of the intention of the police to disclose these materials and no objection was intimated to either the court or the PSNI despite numerous review hearings taking place. In my view *Marcel* is of no assistance to the defendants.

[15] The defendants rely upon section 32 of the Police (Northern Ireland) Act 2000 would sets out the general duty of police officers.

"32 General functions of the police

- (1) It shall be the general duty of police officers –
 - (a) to protect life and property;
 - (b) to preserve order;

- (c) to prevent the commission of offences;
- (d) where an offence has been committed, to take measures to bring the offender to justice."

It is contended that there is no express power to disclose information and that no such power should be implied.

[16] I do not consider that section 32 supports such a construction. The section merely sets out the general functions of police officers but does not purport to say anything about the basis on which police officers should deal with the ancillary issue of the retention and distribution of information. There is no basis for contending that this section provides a prescriptive list of matters which thereby prevent the police distributing information in appropriate circumstances.

[17] Lastly the defendants rely upon the Data Protection Act 1998. It is contended that the disclosure constituted a breach of the data protection principles and that the PSNI is in breach of section 4 of the 1998 Act. As indicated above I do not know the basis upon which the PSNI disclosed the material but it seems to me that they may well have a complete defence to this point by virtue of section 35 of the 1998 Act.

"35 Disclosures required by law or made in connection with legal proceedings etc

(1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.

(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary –

(a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or

(b) for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights."

In those circumstances I cannot conclude that the disclosure must have been unlawful on that basis.

Conclusion

[18] Accordingly I consider that the defendants have not produced any evidence from which I should conclude that there has been any unlawfulness on the part of the PSNI in disclosing this material and I refuse this application.