Neutral Citation no. [2008] NIQB 9

Ref:	**MOR7051**

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

Delivered:	**25/01/08**

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 5

MORGAN J

[1] This is a further application by the fifth and sixth named defendants for an Order that the plaintiffs' claim be struck out or stayed on the basis that it is an abuse of process. In his grounding affidavit Mr Higgins records that this civil action has been taken by members of the families who lost loved ones when a bomb exploded in Omagh on 15 August 1998 killing 29 people against some of those whom they allege were responsible for the planning and execution of the bomb.

[2] In paragraphs 3 to 9 of the grounding affidavit Mr Higgins refers to the work of the Omagh Support and Self-Help Group. He asserts that this group successfully campaigned to have the Real IRA made a proscribed organisation and now campaigns to have those whom they believe are responsible for the Omagh bomb criminally prosecuted. According to Mr Higgins the group launched a website, considered bringing proceedings in an international jurisdiction, give assistance to television broadcasts and

launched a high-profile campaign through the media in order to gather funds for this action. At paragraph 9 of his affidavit Mr Higgins refers to various reasons which have been given for instituting these proceedings.

> A) to put pressure on the authorities to bring criminal prosecutions and obtain information which will assist in bringing such prosecutions;
> B) to hold those responsible publicly accountable;
> C) to learn more about what happened and air the truth;
> D) to financially penalise some of those responsible for the rest of their lives;
> E) to constantly remind the Real IRA of the horrific shame of Omagh and the fact that it cannot be set swept away;
> F) to give a sense of purpose and future to the victims;
> G) to enable people to say no to terrorism;
> H) to fight terrorism through the media.

[3] At paragraph 11 of the grounding affidavit the circumstances of the authorisation given by the Lord Chancellor on 11 February 2006 to commit substantial public funds to pay for the plaintiffs' costs of the action are set out. Under the authorisation those funds were to be recouped from any damages and costs recovered by the plaintiffs, although the first £2500 recovered in respect of each plaintiff were to be exempt from recoupment. For those who have received or expect to receive criminal injuries compensation nothing would be left after recoupment by the Compensation Agency.

[4] At paragraphs 14 to 39 of the grounding affidavit there is set out a detailed analysis of the history of the funding of this action leading to the authorisation by the Lord Chancellor. This material is designed to support a case that the decision to fund was unlawful and biased. At or about the same time as the making of this application the fifth and sixth named defendants instituted judicial review proceedings against the Lord Chancellor and the Northern Ireland Legal Services Commission in which it was alleged that the decision to fund was predetermined, constituted an unlawful fettering of discretion and was affected by bias. Those allegations were rejected by Gillen J in Murphy and Daly v Lord Chancellor and Northern Ireland Legal Services Commission [2007] NIQB 46 at paragraphs 104 to 139. I see no proper basis upon which I should review that finding.

[5] Paragraphs 40 to 45 of the grounding affidavit raises a question of bias affecting the judiciary by reason of the continuing involvement of the Lord Chancellor in relation to some functions connected with the judiciary. Since the charge of bias has failed it does not seem to me that I need consider this matter further.

[6] Finally there is a reference to the unprecedented publicity not only in Northern Ireland but in England and internationally surrounding this bombing. There are exhibited to the affidavit various examples of that publicity which I indicated to the parties I do not intend to read. I have no positive recollection of seeing, hearing or listening to any of the publicity referred to in the affidavits and since being appointed to hear this action I have sought to avoid any such publicity. Any judge hearing this case will be required to deal with it on the evidence so that any publicity will not affect the decision. The decision will be contained in a reasoned judgment which will be open to scrutiny. Accordingly I do not consider that there is any basis for the view that the publicity to date should prevent this action proceeding.

[7] The principles underlying the court's approach to staying proceedings as an abuse of process were considered by the Court of Appeal in this jurisdiction in Lough Neagh Exploration v Morrice [1999] NI 258. Carswell LCJ relied in particular in a passage from Lord Diplock's speech in Hunter v Chief Constable of West Midlands [1982] AC 529 at 536 to support the proposition that the boundaries of what may constitute an abuse of the process of the court are not fixed.

> "*this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.*"

It is clear from this passage that the critical tests are manifest unfairness to a party or the bringing into disrepute of the administration of justice in the eyes of the public at large. It is with these underlying principles in mind that one has to turn to the details of this litigation.

[8] Professor Birks who has written extensively on the philosophical foundations of the law of tort defines a civil wrong as a breach of a legal duty which the law regards as sufficient to allow that individual to complain on his or her own account rather than as a representative of society as a whole. It is not in issue in this case that each of these plaintiffs asserts that there was a legal duty owing to them by each of the defendants, that they claim a breach

of that duty and damage as a result of the breach. These are the only proceedings in which these issues will be adjudicated by a competent court. Because the breach alleged constituted a threat to physical integrity the plaintiffs claim not just damages but protection by way of an injunction. There is no doubt that the nature of the wrongs alleged by the plaintiffs has the potential to engage the processes of the criminal law and that the overriding purpose of the criminal law is to protect the public by punishing the guilty. It is not surprising, therefore, that those pursuing civil wrongs against these defendants should also adhere to the view that it is in public interest that those responsible for the wrongs should be prosecuted under the criminal law. That, in my view, is the thrust of the reasons noted by the defendants and set out paragraph 2 above. I can see no basis, however, for the assertion that adherence to that view is either manifestly unfair to any of these defendants or contrary to the public interest. The issues which the defendants will have to address in this case are solely those of duty, breach and damage. By contrast it is clear that there would be substantial unfairness and damage to the public interest if the plaintiffs were prohibited from having a hearing on the merits for their claims for compensation on the basis that that they had been the victims of these alleged civil wrongs in the only forum available to them.

[9] The only other outstanding issue is the submission that since the defendants are impecunious and the plaintiffs are, therefore, unlikely to recover any damages to which they establish an entitlement it is either manifestly unfair or contrary to the pubic interest to allow the action proceed. That submission in my view is without merit. It is no defence to a claim for a civil wrong that one cannot afford to pay proper compensation for the damage caused even if liable. It also in my view offends article 6 of the ECHR.

> " *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.* "

The striking out of this claim would, in my view, constitute the denial of the entitlement to a fair hearing.

[10] Lastly, in relation to manifest unfairness, I note that each of the defendants who has chosen to participate in this action has been provided with a measure of public funding for their defence.

[11] For the reasons set out above I consider that there is no merit in this application to strike out or stay these proceedings as an abuse of process.