

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 8**

**MORGAN J**

[1] This is an application pursuant to section 32 of the Administration of Justice Act 1970 by the Third Named Defendant seeking disclosure and production of documents held by the Security Service.

[2] The plaintiffs seek damages against each of the defendants on the basis of their alleged involvement in the bomb explosion at Omagh on 15 August 1998. In respect of the third named defendant (John Michael Henry McKeivitt) it is alleged by the plaintiffs that he was a leader at the material time of the Real IRA and that it can be inferred that he had knowledge of and a role in directing the bomb explosion.

[3] In order to seek to sustain this allegation the plaintiffs have indicated an intention to rely on hearsay evidence consisting of written statements made by David Rupert and e-mails allegedly sent by him describing meetings and activities of various individuals. It is alleged that Mr Rupert was an FBI agent who infiltrated the Real IRA and also collaborated with the British Secret Service.

[4] It is common case that Mr Rupert was called to give evidence in criminal proceedings in the Central Criminal Court in Dublin when the third named defendant was tried and convicted on a charge of directing terrorism during a period after the Omagh bomb explosion beginning in 1999. During those proceedings the prosecuting authorities in the Republic of Ireland secured the agreement of the FBI and the British Security Service to disclose various materials in respect of Mr Rupert which might tend to undermine his credibility. Some of that disclosure is referred to in judgments in the Republic of Ireland to which I have been referred but the third named defendant has not at this stage disclosed the extent of the material provided to him in connection with those proceedings.

[5] The entitlement to secure the disclosure and production of documents in the possession, custody or power of a third party in a personal injury action is found in section 32 (1) of the Administration of Justice Act 1970.

“32. - (1) On the application, in accordance with rules of court, of a party to any proceedings in which a claim in respect of personal injuries to a person or in respect of a person's death is made, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising out of that claim-

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce to the applicant such of those documents as are in his possession, custody or power.”

By virtue of Order 24 Rule 8 of the Rules of the Supreme Court (NI) 1980 the application is made by summons and must be supported by an affidavit which specifies or describes the documents and shows that they are relevant to an issue arising or likely to arise out of the claim and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power. Only those documents which could be required by virtue of a writ of subpoena duces tecum can be made the subject of an order. Order 24 Rule 9 sets out the tests which the court must apply in determining such an application.

“9. On the hearing of an application for an order under rule 3, 7 or 8 the Court, if satisfied that

discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

[6] The third named defendant's application was grounded on an affidavit by his solicitor setting out the information which he sought.

"(a) details and records of all meetings between MI5 and/or their agents/ representatives and David Rupert. Details and records of all correspondence communications via telephone and internet and letter or otherwise between MI5 and/or their agents/representatives and David Rupert.

(b) a forensic copy of all e-mail traffic between David Rupert and MI5 or their agents/ representatives.

(c) copies of all documents and recordings that David Rupert sent passed or transmitted to MI5 agents.

(d) all material that formed the basis for David Rupert's book that he was planning to write in relation to his deployment in Ireland. In addition to this, the details of all conversations and communications between the MI5 and/or their agents and David Rupert on this topic.

(e) any material that would suggest that David Rupert was coached or hypnotised or trained for the purpose of enhancing his evidence.

(f) details of all contracts, agreements and payments made and/or promises to and/or requested by David Rupert in return for participation in this operation.

(g) any debriefings given by Rupert in relation to Omagh.

(h) details of communications/correspondence between FBI and gardai in respect of David Rupert's deployment in Ireland.

(i) details of the authorisation provided for the deployment of David Rupert in Ireland."

[7] It is the third named defendant's case that the disclosure of these materials will in various ways assist him in seeking to undermine Mr Rupert's evidence. In support that contention Mr O'Higgins SC relied in particular on a file note contained within the disclosure provided to the third named defendant in his criminal trial in the Republic of Ireland. The note was made by a member of the Security Service and suggested that he had spoken to a senior Garda officer about the possible redaction of an e-mail from Rupert which allegedly suggested that the senior Garda officer was not interested in pursuing illegal terrorist activity in Northern Ireland.

[8] For the Security Service Mr McCloskey QC submitted that the disclosure of such information by it was covered by the terms of the Security Service Act 1989 and by virtue of Section 2(2)(a) the disclosure of such material in these proceedings was prohibited.

[9] The Security Service Act 1989 was passed to place the Security Service on a statutory basis. The functions of the Security Service are set out in section 1.

### **"1 The Security Service**

(1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State.

(2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

(4) It shall also be the function of the Service to act in support of the activities of police forces[, the

Serious Organised Crime Agency] and other law enforcement agencies in the prevention and detection of serious crime."

There is no dispute about the fact that the actions of the Security Service in relation to Rupert fell within section 1 (2) of the Act. Section 2 (1) provides that the Security Service shall continue to be under the control of a Director-General and the Director-General's responsibilities are set out in section 2 (2).

## "2 The Director-General

(1) The operations of the Service shall continue to be under the control of a Director-General appointed by the Secretary of State.

(2) The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure –

(a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings; "

[10] Section 2(2)(a) imposes upon the Director-General duty to ensure that no information is disclosed by the Security Service other than in one of the three prescribed situations:-

- (a) to the extent necessary for the proper discharge its function;
- (b) for the purpose of the prevention or detection of serious crime; and
- (c) for the purpose of any criminal proceedings.

Mr O'Higgins argued that the passing of the Act does not affect the power of the court to order disclosure under section 32 of the Administration of Justice Act 1970. I am unable to accept that submission. First it seems to me that the terms of the section are clear in that there is to be no disclosure except as authorised by the provisions of the 1989 Act. Secondly the express power to disclose for the purpose of any criminal proceedings strongly suggests that no such power is available in respect of civil proceedings.

[11] The third named defendant argued that his fair trial rights were impaired by the fact that he could not get access to this information. He relied in particular on the file note to demonstrate that the disclosure provided in

the criminal trial was unlikely to be complete. In my view the latter argument does not follow. The submissions before me indicate that this document was disclosed as a result of a review of the papers by Treasury Counsel on behalf of the Security Service. The disclosure of this document suggests that the review was carefully carried out and that material which might have undermined the prosecution or assisted the defence was disclosed. In these proceedings the third named defendant has not made disclosure of the documents which were provided to him in the course of the criminal trial although the plaintiffs' submissions record that Treasury Counsel gave evidence in relation to disclosure in the Republic of Ireland and the Special Criminal Court in that jurisdiction was satisfied that it should proceed on that basis.

[12] In those circumstances I do not consider that any case has been made to suggest that the nondisclosure of these materials will render the trial unfair and I am conscious of the obligation on the court to take an overall view of the fairness of the trial in relation to the reception of Mr Rupert's evidence. Accordingly I do not consider that it is necessary for me to attempt to read down the 1989 Act for the purposes of section 3 of the Human Rights Act 1998 and I express no view as to whether it is possible to do so. Accordingly I dismiss the third defendant's application.