

Neutral Citation No: [2024] NIMaster 9	ICOS No: 16/3205, 16/3209, 14/74992
<i>Judgment: approved by the court for handing down (subject to editorial corrections)</i>	Delivered: 11/04/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

(1) PATRICK ASKIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PATRICK ASKIN (DECEASED) AND ON BEHALF OF THE DEPENDANTS OF THE DECEASED

(2) ALAN WHITE BY HIMSELF AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET PEGGY WHITE (DECEASED)

(3) DEREK BYRNE

Plaintiffs

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

First Defendant

and

MINISTRY OF DEFENCE

Second Defendant

and

SECRETARY OF STATE FOR NORTHERN IRELAND

Third Defendant

Mr Frank O'Donoghue KC leading Mr Stephen Toal BL
(instructed by KRW Law) for Mr Askin

Mr Brian Fee KC leading Mr Nick Scott (instructed by KRW Law)
for Mr White

Mr Cormac Ó Dúlacháin SC leading Mr Malachy McGowan
(instructed by KRW Law) for Mr Byrne

Mr Paul McLaughlin KC instructed by the Crown Solicitor for the Defendants
Mr Adrian Colmer KC leading Ms Julie Ellison instructed by the Attorney General,
proposed fourth Defendant

MASTER HARVEY

Introduction

[1] The initial application by the plaintiffs was pursuant to Order 15 rule 6 of the Rules of the Court of Judicature (Northern Ireland) 1980 seeking an order that the Attorney General for Northern Ireland (“the AGNI”) be substituted as the third defendant in the actions, in place of the Secretary of State for Northern Ireland. It was clarified at hearing and subsequently in written submissions that instead the plaintiffs seek to add the AGNI as a fourth defendant.

Plaintiff's submissions

[2] The plaintiffs contend there is reasonable doubt whether the alleged liability of the Crown arises in respect of the government in the UK or Northern Ireland, as provided for by section 17 of the Crown Proceedings Act 1947 (“the 1947 Act”) as amended by Article 12 of the Crown Proceedings (NI) Order 1981 (“the 1981 Order”), and they seek joinder on that basis. At all material times, executive power in Northern Ireland vested in the Crown pursuant to Northern Ireland Constitution Act 1973.

[3] The plaintiff’s solicitor states that they initially sought the consent of the defendants to discontinue the action against the Secretary of State for Northern Ireland and to substitute the third defendant with the AGNI. They state they were advised by the Crown Solicitor’s Office that the identity of the appropriate third defendant should await the outcome of the defendant’s application in relation to limitation.

[4] The AGNI is the guardian of the rule of law and has a responsibility to represent the public interest and ensure that all persons, institutions and entities, public and private, including the state, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with fundamental human rights.

[5] The reason for adding the AGNI as a fourth defendant stems from the Secretary of State’s insistence that he is not responsible for the actions of 4 Field Survey Troop or the actions of Captain Robert Nairac. As such, there is some uncertainty, or reasonable doubt, as to which government department is responsible.

[6] The plaintiffs argue the AGNI should therefore be added pursuant to the 1981 Order.

Submissions from the Attorney General

[7] The Secretary of State (as head of a department of the United Kingdom) has, according to the skeleton argument filed, insisted that he is not responsible for the events which are the subject of the litigation.

[8] Unless there is a suggestion that there was an agency arrangement in place, the only issue in the current instance, leaving any potential liability of the PSNI aside, is that of determining which UK department might be subject to the alleged liability, presumably the Ministry of Defence or another UK department (noting that references to a Secretary of State are construed as references to any Secretary of State). Section 17 (3A) of the 1947 Act would not seem to apply in this case.

[9] Section 17 (3) of the 1947 Act, on the face of it, enables civil proceedings to be brought against the AGNI where no authorised UK department is appropriate or the person instituting the proceedings has any reasonable doubt whether any and, if so, which of the UK departments is appropriate.

[10] As a matter of policy, it would not seem appropriate for the AGNI to determine which UK department is an appropriate party in a particular case, as the AGNI has a role only in relation to devolved matters. There are two versions of the 1947 Act as modified to extend to Northern Ireland, one which deals with Westminster departments and one which deals with Northern Ireland departments. Section 38(2) of the 1947 Act, as modified, may assist in this respect. It defines “Attorney General” for the purposes of the Act as meaning the “Attorney General for Northern Ireland” except where the context otherwise requires, or it is otherwise expressly provided. The 1981 Order extends only to Northern Ireland.

Legal principles

[11] As far as is relevant, Order 15 rule 6 of the Rules of Court of Judicature is in the following terms:

“Misjoinder and nonjoinder of parties

6.-(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter (whether before or after final judgment) the Court may on such terms as it thinks just and either of its own motion or on application-

(a) order any person who has been improperly or unnecessarily made a party or who has for any

reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely-

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter..."

[12] The 1947 Act makes provision for the enforcement of civil liabilities and rights of the Crown.

[13] The 1981 Order sets out the law as it extends to Northern Ireland. Part 3 of the Order sets out the details of the extension in so far as it relates to His Majesty's Government in the United Kingdom and Part 4 of the Order sets out those details as they relate to His Majesty's Government in Northern Ireland. The Order includes two Schedules setting out the law as it extends to Northern Ireland by virtue of the Order.

[14] Schedule 2 to the 1981 Order sets out the law extending to Northern Ireland as it applies to His Majesty's Government in the United Kingdom. Schedule 3 sets out the law extending to Northern Ireland as it applies to His Majesty's Government in Northern Ireland. The substance of the law is set out in the body of the Order.

[15] Section 17 of the Act deals with the mechanics of joining government departments as parties to proceedings initiated by or against the Crown. The plaintiffs rely upon subsection (3A) of section 17 of the 1947 Act, stating that since there is "reasonable doubt as to which government department is responsible", section 17(3A) applies to allow the AGNI to be named as a defendant.

[16] Article 12(2) of the 1981 Order inserted section 17(3A) into the 1947 Act stating:

"(3A) Civil proceedings against the Crown may be instituted in Northern Ireland against the Attorney General if the alleged liability arises out of the performance of any function pursuant to an agency arrangement or the person instituting the proceedings has any reasonable doubt whether the alleged liability of the Crown arises in respect of His Majesty's Government in the United Kingdom or in respect of His Majesty's Government in Northern Ireland."

[17] Article 26 of the 1981 Order defines "Attorney General" as the "Attorney General for Northern Ireland". The 1981 Order defines the "Attorney General", which is a term used in section 17(3A), for the purpose of the application of the 1947 Act to Northern Ireland as AGNI rather than the Attorney General in England. Schedule 2 of the original Statutory Instrument, which shows a consolidated text of the 1947 Act as extended to Northern Ireland following the 1981 Order, demonstrates that the combined effect of section 17(3A) and section 38(2) is that the correct defendant is AGNI rather than the UK Attorney General for England and Wales.

Consideration

[18] The plaintiffs' application is based on their doubt as to whether liability of the Crown arises in respect of the government in the UK or Northern Ireland and that section 17(3A) applies to allow for the AGNI to be named as a defendant.

[19] One of the purposes of the 1947 Act is to ensure that a plaintiff is not left without a government department to sue. As highlighted by the AGNI in their submissions, the reasoning for conferring such a role on the AGNI in the 1947 Act is likely to be that, at the time when the 1947 Act was enacted, and at the time it was extended to Northern Ireland in 1949 and further adapted in 1971 and 1981, the AGNI would have been a member of the Northern Ireland government or, during the period from 1973 to 2010, a member of the UK government, as the UK Attorney General was also the Attorney General for Northern Ireland throughout this period and relevant functions of the Northern Ireland departments were exercised by UK ministers.

[20] As part of the government, the Attorney General would have been in a position to determine which government department should be the appropriate party to a civil claim. Since the establishment of the Office of the AGNI in 2010, by virtue of the Justice (Northern Ireland) Act 2002, the AGNI has a different role to that which the office holder had in 1947 and 1981. The AGNI is not a member of the government/Executive, but is independent, even though she is the chief legal adviser to the Northern Ireland Executive and attends Executive meetings. The UK Attorney General is a politician and a member of the UK government. Though the AGNI is in a better position than others to determine which department is the

appropriate party to litigation, she is not part of the government, unlike the UK Attorney General.

[21] It would therefore not seem appropriate to join the Attorney General for Northern Ireland as a party to the instant proceedings where the issue is one of determining which UK department is potentially liable.

Conclusion

[22] I am persuaded by the assertion of the AGNI that if proceedings were to be initiated against the AGNI, section 17(4) of the 1947 Act appears to enable the Attorney to apply to the court to have such of the authorised UK departments as may be specified in the proceedings to be substituted for the Attorney in the proceedings (and vice versa). This would seem to be pointless if, as appears to be the case, the only UK department in contemplation is the Northern Ireland Office.

[23] This is not a case where the plaintiffs have been left without a government department against which to bring their claims and the Secretary of State for Northern Ireland and Ministry of Defence are already named defendants in the proceedings. I am not persuaded that joinder of the AGNI at this stage is either necessary, just or convenient to ensure that all matters in dispute are effectually and completely determined and adjudicated upon to satisfy the test under Order 15 rule 6 of the Rules of Court of Judicature.

[24] I therefore refuse the plaintiffs' application and direct that costs shall be costs in the cause.