The Loughinisland Saga

Now that the heat has died down, it may be a good time to reflect on two issues.

First, the impact of this decision on the families and second on the behaviour of Michael Maguire and Barra McGrory.

McCloskey J. in his judgment , said this about the effect of this litigation on the families:

*“I have conceived it appropriate to stand back at this stage and to attempt an assessment of the broad, multi-faceted and multi-layered equation which has developed, organically so, in these proceedings. In undertaking this exercise I find myself focusing increasingly on the situation of the families of the murdered victims. They have found themselves actively involved in the Northern Ireland legal system during much of the past six years. Their interaction with this legal system has been far from simple and straightforward. To begin with, they found themselves obliged to bring legal proceedings to challenge the first of the Ombudsman’s Loughinisland reports. This had a positive outcome for them, the Ombudsman agreeing to an order quashing the report. Next, the Ombudsman published a new report which satisfied many of the concerns and anxieties of the families. This, however, was followed abruptly by a legal challenge to such report. At the conclusion of the most recent litigation period of approximately 11⁄2 years duration, the families have received a judgment which accedes to this legal challenge.*

*To describe the events which have materialised in the aftermath of this judgment as unpredictable and unprecedented is to indulge in understatement. The families have become engulfed in a veritable maelstrom. In the midst of this they have found themselves repeatedly travelling to and from the High Court and they have had to try to absorb a concoction of evolving legal advice, further legal submissions, new evidence, a change of counsel, repeated adjournments and intense public and media attention. They have also had to endure all that flows from the persisting uncertainty and lack of litigation finality which these recent events have engendered. Furthermore, I consider that the families cannot be expected to grasp the legal intricacies and complications of the court’s evaluation of the application to recuse.*

*While it is evident that the families have travelled this lengthy, unpredictable and uncertain litigation road with both fortitude and admirable dignity and restraint, the toll on the persons concerned – surviving spouses, children, nieces, nephews and others – must have been immense. I would expect that they have found their six year encounter with our legal system bewildering and confusing.*

*In these circumstances, I consider it necessary to reflect on the question of whether the families can have genuine confidence in the outcome which would follow if the court were to give effect to its judgment and choice of remedy by the usual medium of a formal final order. In considering this question, it is essential for the court to detach itself as far as humanly possible from the conscientious and dispassionate judicial exercise which has given rise to its substantive judgment and, further, its assessment that the test for apparent bias is not satisfied. I consider that, in the truly unique and unprecedented circumstances of this case, the interests of justice will not be furthered by a formal and final outcome which gives effect to the court’s substantive judgment and choice of remedy. Trust and confidence in the legal system are critical ingredients of the rule of law which binds and governs all of society .*

*In these circumstances, yet another balancing exercise falls to be performed by the court. It is a complex and challenging one, admitting of no obvious or easy answer. Following anxious reflection, my evaluative conclusion is that our legal system will not have served the families well if they are not given the opportunity of having this case heard by a differently constituted court. While I am alert to the remedy of an appeal, this, in my view, is not sufficient to displace this assessment. On the other side of the scales, the Applicants will enjoy all of the guarantees and safeguards which every litigation process provides and, further, they will be at liberty to urge another judge that this court’ s analysis of the law is the correct one. They will also be the beneficiaries of a further specific case management direction. “*

He then went on to give his ruling:

1. *“ (i)  I decline to draw up an order giving effect to my substantive judgment and assessment of the appropriate consequential remedy.*
2. *(ii)  There will be a fresh hearing before a differently constituted court.*
3. *(iii)  The judgment of this court will be neither binding on any party nor executory in nature. It will, rather, assume a hybrid status, somewhat akin to that of an advisory opinion, which features in legal systems other than ours.”*

Some observers have described this as unprecedented or unusual. But there is an interesting consequence. McCloskey J has relisted the case before another Judge and ordered that the Police Ombudsman shall by 23rd February 2018 specify in writing those aspects of the judgment of this court which he will seek to re-litigate before a differently constituted court, with accompanying brief reasons. Given the behaviour of the Police Ombudsman and his lawyers, let’s see if they comply.

Many victims and survivors have been written to by the Police Ombudsman in terms that , because of lack of money, their case will not be considered by the Ombudsman for many years. This issue was the subject of a decision by Maguire J., subsequently overturned by the Court of Appeal. All jolly interesting for lawyers but how much did that , and this current litigation take from the inadequate Police Ombudsman’s budget?

The Police Ombudsman has been characterized by McCloskey as “discourteous” in respect of the Loughinisland proceedings. But buried within the judgment is a greater concern. The behaviour of Michael Maguire and Barra McGrory.

McCloskey J set out the chronology:

*(a) Approximately one month in advance of the substantive hearing, senior counsel representing the Applicants and the Ombudsman discussed the question of whether recusal of the trial judge might be appropriate. They clearly concluded that it would not.*

1. *(b)  On 14 December 2017, the date upon which the substantive hearing was completed, the Ombudsman’s Director of Legal Services requested counsel to advise on the same issue. The written advices of counsel, provided within 24 hours, were that there was no basis for recusal.*
2. *(c)  The Ombudsman and his Director of Legal Services accepted this advice.*
3. *(d)  The Ombudsman’s legal team at all material times consisted of senior counsel, junior counsel, his Director of Legal Services and a highly reputable firm of solicitors instructed to have carriage of the judicial review proceedings.*
4. *(e)  From 21 December 2017 the interested party’s solicitors and counsel were in possession of the same information which prompted the Ombudsman’s request for counsel’s advice about one week beforehand. The outcome of their consideration and deliberations was the same of that as the Ombudsman one week previously: no action was to be taken.*
5. *(f)  The Ombudsman’s legal team reaffirmed their previous stance circa 08 January 2018.*
6. *(g)  Though possessed of expanded material information relating to the 2002 litigation, as of 12 January 2018, the scheduled date for promulgation of the court’s determination of the issues of remedy and costs, neither the Ombudsman nor the interested party had made any application to the court.*
7. *(h)  It was only upon the court’s insistence on clarity that applications to adjourn (not to recuse) were made later that morning.*

*(i)  In circumstances where the interested party’s solicitors have, throughout the flurry of recent correspondence, been especially keen to establish any connections between the second Applicant (Mr White) via the medium of consultations with his counsel relating to the 2002 litigation, the solicitors who represented the judicial review applicant (the Police Association) have stated: “We have no record of Mr Raymond White’s role .... Attendance at consultations with counsel and at Court where by [Mr X – not Mr White] and a Police Federation and Superintendent’s Association representative.”*

In layman’s terms. Throughout the litigation, the Police Ombudsman, despite knowing of McCloskey’s involvement with a Police Federation case , many years ago, declined to make a recusal application. The Police Ombudsman, obtained and accepted advice to that end. Only with the appearance of Barra McGrory, at the eleventh hour, did the stance of Maguire change.

**Barra McGrory**

McCloskey then turned his attention to the state and quality of the supporting documents, relied on by McGrory and then McGrory’s submissions:

*I turn to dispose of another discrete issue. Mr McGrory QC sought to argue that the Police Ombudsman could not reasonably have brought this application any earlier. The impetus for being driven to make this submission is not difficult to discern. The Ombudsman’s legal representatives, in opting to move this application to recuse, were clearly aware of the difficulty presented by the events of 14/15 December 2017, noted in [143] of the judgment. Self-evidently, the Ombudsman could have brought this application at that time. Equally clearly, the Ombudsman and his revamped legal team were also alert to the elephant in the room, namely at the stage when they belatedly decided to advance this application they had, for a period of almost one month, been in receipt of a judgment finding in favour of the Applicants. Furthermore, they evidently considered that they would have to put before the court something to explain why they were, at a belated stage, minded to no longer accept the considered advice of an eminent member of the senior Bar and his junior counsel, given twice – and endorsed by the Ombudsman’s Director of Legal Services - having done so during a (contextually) lengthy preceding period.*

*The suggestion that the information available to the Ombudsman on 14 December 2017 was insufficient to mount a recusal application is in my judgement manifestly unsustainable. The basic, essential facts were known to him as of then. In an attempt to circumvent this hurdle, an elaborate construct has been placed before the court. Its centrepiece is an affidavit sworn by the Ombudsman’s Director of Legal Services purporting to depose to the Ombudsman’s state of mind and knowledge. The Ombudsman has sworn no affidavit. The impropriety involved in the lawyer’s affidavit is unmistakable. It is compounded by the fact that it also fails to comply*

*with Order 41, Rule 5 of the Rules of the Court of Judicature. This is quite unacceptable. Equally improper is the inclusion of certain averments, in paragraphs 13 and 18 thereof especially (“... presumably with Mr McCloskey QC” being a paradigm illustration) which, in addition to being inaccurate rank speculation, are confounded by paragraphs [146] and [156] (i) of this judgment. They also fail to engage with the objectively demonstrable inaccuracies in parts of the ‘Irish Times’ publication. The lawyer’s affidavit further suffers from the impermissible infirmities of expressions of subjective personal opinion, pure comment and sworn argument. An application to receive a further affidavit rectifying these multiple deficiencies would have been favourably received. There was none.*

*Another element of this construct is the suggestion that the Ombudsman declined to take action at the mid-December stage partly because of his lawyers’ assessment following the hearing that the decision of the court was likely to favour the Applicants. This is most difficult to fathom, being couched in terms which appear self-contradictory. It also fails to engage with the reaffirmation of this stance circa 08 January 2018. Furthermore, in this context, it is convenient to nail one particular point. Having regard to the totality of the evidence, the communications between the Ombudsman’s former senior counsel and senior counsel for the Applicants before the hearing began are a paradigm red herring. The Ombudsman was advised immediately after the hearing that there were no grounds for a recusal application and accepted such advice. He would inevitably have been given the same advice before the hearing began. It is inconceivable that he would not have accepted such advice: the events of 14/15 December 2017 and 08 January 2018 establish this fact beyond peradventure. The submissions of Mr McGrory QC on this discrete issue resolve to a desperate attempt to airbrush this unassailable reality. To summarise, I find the evidence and argument put forward on behalf of the Ombudsman pertaining to the aforementioned issue flimsy, artificial and entirely unpersuasive.*

A number of questions remain.

1. What happened to senior counsel who represented the Police Ombudsman initially?
2. Was he fired or did he resign?
3. Did he seek permission to withdraw in the middle of the case?
4. Has McGrory any connection , in his time as DPP , with any aspect of the Loughinisland case?
5. If so , what is the connection?
6. What advice did McGrory give the Police Ombudsman, which led to the recusal application?
7. Given the criticisms of his behaviour , will he report himself to the Bar Library disciplinary committee?
8. Will he continue to represent the Police Ombudsman in this case?
9. Will the Police Ombudsman’s Director of Legal Services, characterized by McCloskey, as guilty of “impropriety” , resign and report himself to the Law Society?
10. Will the Attorney General intervene?
11. Will the Police Ombudsman seek to ignore McCloskey’s ruling?
12. Will the victims and survivors of this outrage ever get justice?
13. Is the office of the Police Ombudsman fit for purpose?

Norse Sagas could go on for generations.