COURT OF APPEAL
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Court of Appeal Record No.: 2014/1131
High Court Record No.: 2013/307 JR

Donnelly J.
Ní Raifeartaigh J.
Murray J.

BETWEEN

MARK BEATTY

APPELLANT

- AND -

THE MILITARY JUDGE AND THE DIRECTOR OF MILITARY PROSECUTIONS

RESPONDENTS

- AND –

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Murray delivered on the 12th day of March 2021

Background

1. This appeal arises from the application of the applicant pursuant to Order 31 Rule 29 Rules of the Superior Courts ('RSC') for non-party discovery against the Court-Martial Administrator (the 'CMA'). It raises three questions. First, whether and if so to what extent, the process of discovery is properly used as a vehicle for obtaining documentation to which a party has an independent statutory right and/or the relevance

of the fact of such an entitlement to an application for such discovery. Second, the extent to which a party is entitled as of right to obtain non-party discovery of a transcript of a judicial or quasi-judicial hearing simply on the basis that he is challenging the outcome of those proceedings. Third, whether in this case the applicant has established that there is a sufficient dispute between the parties to render such transcript discoverable in this action.

2. The CMA is an officer of the Permanent Defence Forces appointed by warrant of the Judge Advocate General pursuant to the provisions of the Defence Acts 1954 to 2007. He is charged with certain functions in relation to the Court-Martial system in military law. His functions are similar to those undertaken by the Courts Service *vis a vis* proceedings before the ordinary civil and criminal courts.

3. As of 2013, the applicant was a non-commissioned officer in the Permanent Defence Forces. On October 12 2012 he was summarily investigated by his Commanding Officer in respect of three alleged offences. One of those charges was dismissed by the Commanding Officer, the other two being found by him to have been proven and a punishment being awarded in the form of a fine of €300. There is an absolute right of appeal to a summary Court-Martial against such a determination and/or the punishment. The applicant availed of that appeal, the hearing of which proceeded before the Military Judge ('the MJ') on the 5, 6 and 7 February 2013. The appeal was by way of a complete re-hearing.

4. One of the charges in question was laid pursuant to s. 168(3)(a)(iii) of the Defence Act 1954, and the other pursuant to s. 133 of the same Act. The charge pursuant to s. 168(3)(a)(iii) (which provides for the offence of conduct to the prejudice of good order and discipline) alleged a failure to produce a sick certificate. That under s. 133 alleged as follows:

> '*that he … did behave in an insubordinate manner when paraded … when given a verbal order did "ask for the confirmation of the order in writing" or words to similar effect'*.

5. At the hearing the prosecutor offered no evidence as to the first charge and that charge was duly quashed. In respect of the second charge, the applicant submitted that the offence was bad in law on a variety of related grounds. These came back in one form or another to the complaint that the charge was void for vagueness, was not sufficiently particularised or that the conduct alleged did not come within the terms of the statutory offence. That submission was rejected by the MJ. The applicant was then arraigned on the single remaining count. He formally denied the charge.

6. The applicant's solicitor advised the Judge that all of the elements of the charge under s. 133 were conceded as proven and that he did not require any proofs in evidence. However, the prosecutor adopted the position that, notwithstanding the applicant's concession, he should nonetheless call evidence to prove the charge. He says that the plea of not guilty meant that the defence was not conceding the elements of the offence as charged and that it was for the prosecution to proceed with its case as it deemed appropriate. After making an opening address the prosecutor proceeded to adduce oral evidence.

7. Three witnesses were called. They gave evidence of the content of Barrack Standing Orders of Cathal Brugha Barracks, of the Unit Standing Orders of the 2nd Cavalry Squadron together with evidence to the effect that the applicant had at the time relevant to the charge been in contravention of '*car parking standard operating procedures*'. Evidence was given that the applicant had disobeyed a lawful command of a superior officer in not removing his car from a specific location, and that having been so directed the applicant asked if he could have that in writing in a manner that was '*demanding, defiant, arrogant'*. The evidence was to the effect that the applicant used a tone of irritation in making that request. Evidence was given of a failure of the applicant to knock on a door or to salute and of the view of two witnesses that the applicant was questioning of the authority of the officer. The applicant's solicitor did not cross examine any of these witnesses but objected that the evidence of each was irrelevant and/or inadmissible. The defendant did not give evidence. The determination made by the Commanding Officer was affirmed by the MJ. A fine of €300 was imposed on the applicant.

The request for the transcript

8. Shortly after the hearing, the applicant's solicitor sought transcripts of the hearing from the CMA. These were refused. The reasons for refusing the transcript were set out in letters from the CMA to the applicant's solicitor of March 8 and March 26. These letters made reference to provisions of the Rules of Procedure (Defence Forces) 2008 (SI 204/2008) ('RoP') to which I will return later. For the moment it suffices to say that in that correspondence the following was said:

(i) The practice since the enactment of the Defence (Amendment) Act 2007 and the commencement of a new Court-Martial system in September 2008 has been that a Digital Audio Recording ('DAR') is made in respect of every case.

(ii) There is no statutory requirement for a DAR in respect of appeals to the summary Court-Martial.

(iii) Where it exists in the case of an appeal to a summary Court-Martial '*a DAR does not form part of the official records of the case'*.

(iv) It was said: '*we can see no provision in the Rules which provides that a transcript of proceedings forms part of the records of an appeal to the Summary Court-Martial. Accordingly no transcript exists in respect of this case'*.

(v) In reference to Rule 39 of the RoP it was stated that the retention by the CMA of the records of *inter alia* appeals to the Summary Court-Martial is subject to any direction of the presiding Military Judge. This was stated to reflect the position in the civilian criminal court system.

(vi) Pursuant to the relevant rules, it was said, the CMA must abide by the order made by the MJ in relation to the production of the DAR. The MJ had made no such order.

(vii) Insofar as the applicant's solicitors had said that there was a '*refusal'* to provide the applicant with a '*transcript'*, the following was said:

'*the factual position is that no transcript exists or existed in respect of this case'*.

(viii) The CMA furthermore adopted the position that '*in circumstances where a transcript does not form part of the records of the Court-Martial, a party's entitlement under Rule 40 to obtain a transcript of the proceedings from the Court-Martial Administrator does not arise'*.

The proceedings

9. Leave to bring these proceedings was sought and obtained from Peart J. on 29 April 2013. The applicant thereby sought an order quashing his conviction by the MJ on 8 February 2013 of an offence of behaving in an insubordinate manner towards a superior officer contrary to s. 133 of the Defence Act 1954. The applicant contends that the particulars alleged against him did not disclose an offence known to the law, stressing that the particulars of the offence did not disclose the offence of insubordination as defined by the relevant provision. It is further pleaded that the appeal was conducted in breach of constitutional justice and fair procedures. It is important to observe that the latter complaint is confined to a single proposition, the alleged breach of fair procedures being explained solely as follows:

'*in that despite the objections of the solicitor for the Applicant considerable irrelevant and prejudicial evidence was admitted in evidence. Accordingly, justice was not done in the circumstances of the case.'*

10. The applicant also seeks declaratory relief, and damages. His application was grounded on an affidavit outlining the facts as I have described them above. At no point in the course of that affidavit did the applicant express any difficulty in recalling the evidence at the trial, actually making reference to the fact of his solicitor taking contemporaneous notes. At one point in his affidavit, he averred as follows of the evidence of one witness (Lieutenant Forde):

'*The witness gave evidence that I … had disobeyed a lawful command of a superior officer … in not removing my car and he also made reference to 'issues' he had with me.'*

11. The final paragraph of his affidavit summarised the applicant's complaint as follows:

'*the learned trial judge erred in law in holding that the particulars of the single charge laid under Section 133 of the Defence Act 1954 constituted an offence known to law … most of the evidence adduced at the trial and particularly the evidence itemised above and to which my solicitor made objection at trial was entirely prejudicial and irrelevant to the charge before the Court. Accordingly … the learned trial judge should not have relied upon such evidence in finding me guilty of the single charge before the Court and that he erred in law in so doing.'*

12. The applicant's affidavit was responded to in an affidavit of Fintan McCarthy, a Commandant within the Permanent Defence Forces and a qualified barrister. Commandant McCarthy acted as prosecutor for the Director of Military Prosecutions (the 'DMP'). That affidavit (which was sworn on the 29 July 2013) also dealt with the detail of what had transpired before the MJ and, while it provided further information in respect of the trial, it disputed what the applicant had said in his affidavit in only one respect. Commandant McCarthy averred as follows of Lieutenant Forde's evidence:

'*Lieutenant Forde did not state that the Applicant had disobeyed a lawful command of a superior officer pursuant to section 133 of the Defence Act 1954, but rather he stated that the Applicant was the only one of the four individuals paraded the previous week who had not complied with the order which had been given and hence the requirement for the parading in front of him as the unit Adjutant on Monday 16 July 2012 to explain why the Applicant had failed to comply with the order the previous week.'*

13. Commandant McCarthy also explained that while the applicant had averred that Lieutenant Forde had made reference to '*issues'* he had with the applicant, what Lieutenant Forde had actually said was that there had been issues on a previous

occasion with the applicant's privately-owned vehicle being without tax and insurance while parked in the barracks.

The application for non-party discovery

14. Order 31 Rule 12(6) requires a party seeking non-party discovery as a precondition to issuing a motion to that effect, to seek the relevant discovery by letter giving reasons for the request. On 9 September 2013 the applicant's solicitor wrote such a letter to the CMA, referring to the proceedings and seeking non-party discovery on a voluntary basis of documents:

> '*referring to all of the summary Court-Martial proceedings entitled "The Director of Military Prosecutions v. No. 861073 Corporal Mark Beatty of the 2nd Cavalry Squadron" which commenced at the Military Justice Centre McKee Barracks Dublin on the 5th February 2013 under reference number SCM(A) 2012/006'*

15. The reason given for that request was this:

> '*1. To provide an accurate record of the said proceedings for the administration of justice in the High Court Judicial Review proceedings mentioned herein including the prevention of any disparity in the position of the respective parties thereto;*
>
> *2. to assist in the efficient discharge of the said Court's time;*
>
> *3. To save costs'*

16. The Chief State Solicitors Office responded to this request on behalf of the CMA by letter dated 24 September. Three points were made. First, it was stated that the proceedings raised a legal issue rather than questions of a factual nature. Second, objection was taken that the request was made in terms that were described as '*broad and vague'.* Third, the previous correspondence in relation to the requests for the

transcript was noted. It was stated that CMA did not have a transcript of the proceedings and that such a transcript had never been created. It continued:

> '*The CMA is not in a position to obtain a transcript or indeed the DAR recording in relation to this case … without the Judge's consent. In this case no transcript has been ordered by the Judge .. there is nothing in being for CMA to discover ..* ***Should the Applicant require the creation of a transcript, the appropriate manner in which to achieve this is to make an application to the Military Judge who heard the case and upon the making of such an order a transcript is then prepared.'***
>
> (Emphasis added).

17. His request for voluntary discovery having been thus refused, on 19 September 2013 the applicant issued the motion seeking non-party discovery giving rise to this appeal - seeking this same category of documents. The motion was grounded on a short affidavit sworn by the applicant's solicitor. That affidavit did not engage with the contents of the replying affidavit that had been sworn by Commandant McCarthy, and no substantive affidavit responding to that affidavit had been delivered by the applicant as of the issuing of the motion. However, in the course of the affidavit grounding the application for non-party discovery, the position was adopted that under the RoP the applicant as a party to the Summary Court-Martial Proceedings was entitled as of right to the transcript. Furthermore, it was stated that it would be inappropriate for any party to have recourse to the Military Judge where he was a party to judicial review proceedings.

18. That affidavit was replied to on behalf of the CMA by Mr. Conway, a solicitor in the legal staff of the Defence Forces Director of Legal Service. Mr. Conway averred that there was no transcript of the hearing in existence stating that it was only where such a transcript had been ordered by the Court on foot of an application by a party to the MJ in the course of a summary trial or where such a transcript had been ordered by the MJ himself that such a transcript would be created. He said that no such order had been made in the applicant's case and accordingly that there was no transcript as part of the proceedings.

The High Court judgment

19. The High Court judgment records (at para. 4) that the application before the Court had narrowed in scope to one seeking discovery of the DAR. At one point in his written submissions to this Court the applicant submits that the motion for discovery is expressed in terms that '*well exceed a 'transcript' alone whether in printed or electronic format'.* However, the assumption on which the trial Judge proceeded is not the subject of any reference in the notice of appeal and the argument before this Court was presented on the basis the parties accepted that the documents thus sought reduce themselves to the DAR of the Court-Martial proceedings the subject of the proceedings. This recording has never been transcribed.

20. The High Court ([2013] IEHC 575) refused the application on the following basis:

(i) It was not necessary to decide whether the applicant was entitled as of right to require a transcript to be prepared so that he could obtain a copy of it as of right from the CMA under the terms of Rule 40 of the Rules of Procedure (Defence Forces) 2008.

(ii) The applicant was in error insofar as he contended that it would have been inappropriate for him to seek a direction from the MJ under Rule 39 of the Rules of Procedure (Defence Forces) 2008 that the DAR be released because this would be to '*improperly draw the first respondent into the forensic fray in these proceedings'.* Therefore, the Court was not satisfied that the discovery sought by the applicant was not otherwise available from an existing party in the proceedings.

(iii) The applicant had failed to identify any specific factual issue or controversy that required to be resolved by reference to a copy of the DAR or a transcript drawn from it. The affidavit evidence disclosed that the applicant sought the discovery for the purpose of '*the prevention of any disparity in the position of the respective parties'*. The High Court Judge felt that to order discovery of the DAR on the basis of that justification would be to effectively decide that it

would be appropriate in every case rather than as an exceptional measure. That conclusion, he felt, would be inconsistent with comments of Hogan J. in *Hudson v. Judge Halpin and anor.* [2013] IEHC 4.

(iv) The Court stated that insofar as it might be suggested that there was any conflict of fact on the face of the affidavits exchanged between the parties in the case as to what transpired during the Court-Martial, it was for the applicant to specifically identify such a conflict and to explain why it was central to an issue or issues between the parties that it is necessary to resolve it in order to do justice between them. The applicant, the High Court judge held, had failed to do this.

(v) In particular, the court felt that insofar as one of the grounds on which the relief was claimed was that the offence of which the applicant was found guilty was not known to the law, the only factual component of that question concerned the particulars of the offence that were actually provided in the case. That was not the subject of a conflict that required to be resolved by reference to the DAR.

(vi) Nor did the Court believe that the applicant had established that there was a factual issue between the parties arising from the ground advanced by him that irrelevant or unfairly prejudice evidence was admitted over his solicitor's objections thereby depriving him of a fair trial. The trial Judge noted that the only potential conflict of fact between the parties concerned that part of the evidence of Lieutenant Forde to which I have referred earlier. However, the applicant had not made clear either in the context of the application before the Court or otherwise whether he was joining issue with the evidence of Commandant McCarthy or was accepting his correction of the applicant's earlier description of the evidence given. Nor had anything been offered by the applicant that would allow the Court to determine whether such controversy was relevant to the any issue that the Court was required to address.

The fresh evidence

21. Following the judgment of the High Court (which was delivered on 18 November 2013) the applicant delivered a new affidavit sworn by his solicitor upon which he sought to

rely for the purposes of this appeal. That affidavit was sworn on 20 January 2020 (approximately one month prior to the hearing of the appeal). It purports to reply to Mr. Conway's affidavit. Much of the content of this affidavit comprises submission and is, in fact, repeated (in some respects verbatim) in the applicant's actual written legal submissions to this Court. However the final paragraph purports to identify certain '*factual conflicts'* by reference to '*issues'*. One of these is framed as follows:

> '*Contrary to the denial given by affidavit, there continues to be a conflict about the evidence given by Lieutenant Forde (as a witness) of an alleged failure on the part of the Applicant to obey a lawful order which offence … was not before the Court-Martial'*.

22. The CMA objects to the admission of this affidavit, stressing that the applicant was specifically asked by the High Court Judge for any submissions he had regarding any factual matters and asserting in its written submissions to this Court that notwithstanding this inquiry of the Court the applicant failed to put any matter which was relevant to the judicial review before the Court. That this happened is not disputed by the applicant. The CMA says that the Court should disregard this evidence and submits that the application must be determined based on the evidence that was before the High Court.

23. An application for discovery is an interlocutory order, and as such a party does not require special leave in order to adduce further evidence in such an appeal (Order 86A Rule 4(b) RSC). However, the admission of additional evidence remains subject to the over-riding discretion of the Court, irrespective of whether leave is required for its admission under special rules to that effect (see *Fitzgerald v. Kenny* [1994] 2 IR 396: *University College Cork v. Electricity Supply Board* [2017] IECA 248). While noting that the fact that special leave is not required leans towards admission, the critical consideration in the exercise of that discretion is whether the evidence should be admitted in the interests of justice (Delaney and McGrath, '*Civil Procedure'* (4th Ed. 2018) at para. 23-156). What, precisely, that means falls to be determined having regard to the nature of the application, and reason for the rule dispensing for special leave in the first place. In the case of interlocutory applications the justification for that dispensation lies in the legal character of the relief claimed and the fact that the

admission of fresh evidence in such an application does not undermine the objectives of finality of litigation that present themselves in appeals against determinations that are not interlocutory.

24. However, 'the interests of justice' is not a synonym for the interests of the party seeking to adduce the evidence. The position of the other party to the litigation, the obligation of the Court to insist on the efficient disposition of proceedings, the avoidance of a frittering of Court time and the importance of ensuring that the parties bring their case in its entirety at the hearing before the Court of first instance also have to be considered. What that involves in any given case will, obviously, depend on the circumstances. It would be wholly exceptional for an appellate Court to exercise its discretion against the adduction of new and relevant evidence in the appeal of an interlocutory matter where that evidence was not in existence or not available at the time of the original hearing. To do so would defeat the objective of efficiency because a party can make a second interlocutory application on the basis of changed circumstances. Where the evidence was available and obtainable, a more rigorous test will necessarily be applied. Even then, when the evidence can be admitted without prejudice to the opposing party (so that they can respond to it in good time for the hearing) and without the necessity for an adjournment the case for exercising the discretion of the Court in favour of admission of the evidence will often be coercive. As explained by Watson LJ in the context of applications to admit further evidence on appeal in an interlocutory application in *Canada Trust v. Stolzenberg* [1998] CLC 1171 relevant to the exercise of the Court's discretion are '*the nature of the interlocutory application, the reason why the evidence was not adduced in the court below, the opportunity provided for putting in evidence in the court below and the nature of the evidence sought to be put in'*.

25. In this case, the application for non-party discovery was made before Keane J. without the applicant contradicting the evidence of Lieutenant Flynn. The applicant knew that the question of whether there was a conflict of fact as to what happened during the hearing was central to the application for non-party discovery and the matter proceeded without any such conflict being disclosed. It has not been disputed that the applicant was requested by the High Court Judge to address the specific question of what the conflicts of evidence between the parties actually were. The High Court judge heard the application, considered the respective contentions of the parties in that context and

on that basis, and delivered a comprehensive reserved judgment reflecting this. To admit new affidavit evidence now, averring to matters that could have been addressed at the time of the hearing, and to do so over six years after the hearing before the High Court on foot of an affidavit delivered four weeks before the hearing of the appeal would require the most exceptional of circumstances and compelling of justifications.

26. Neither have been proffered here – indeed the applicant has not even made a formal application to admit the evidence. He just delivered it, and unilaterally relied upon it as the basis for his written legal submissions to this Court. The contention that the applicant was awaiting the transcript before completing the evidence in the substantive proceedings before responding to the evidence of Mr. Conway does not explain why the application for non-party discovery was permitted to proceed without a clear delineation by the applicant of the precise basis on which the evidence sought from the non-party was said to be necessary. More-over and most importantly I do not see that the additional affidavit evidence moves matters much further along. Most of it is submission and, where it engages with issues of fact, is vague. I will return to this when I look at the specific nature of the dispute between the parties. However were it necessary to decide the issue I would not admit this additional affidavit into evidence in this appeal.

Control of, and access to, the Court record

27. Although this matter came before the Court as an application for non-party discovery, the applicant relied heavily on his asserted entitlement to the transcript under the RoP. The proposition that he had such a right which had been denied to him occupied by far the greater part of his written legal submissions to this Court. It is necessary to say something about this issue, as it is germane to the first question I identified at the commencement of this judgment – the relevance of the fact that a party has an independent legal right to obtain a document to his entitlement to proceed to seek that record by way of non-party discovery.

28. In this regard, it is important to understand what the parties say. Their positions derive from differing interpretations of Rules 39 and 40 of the RoP. Rule 39 provides as follows:

> '*at the conclusion of the court-martial the proceedings shall be retained and preserved by the Court-Martial administrator, subject to any direction of the military judge'.*

29. Rule 40 provides:

> '*A party to a court-martial may obtain from the Court-Martial administrator a copy of the proceedings, including a copy of any transcript. Any other person may apply to the military judge for copies and the military judge may order that copies may be obtained subject to such conditions, including a condition as to the payment of a fee to cover the cost of the provision of copies'.*

30. It is (at least now) common case between the parties that the DAR is comprised within '*the proceedings'* as referred to in both of these provisions. That appears to me to be correct. If the position were otherwise it would mean that the DAR was not under the control of the MJ as provided for in Rule 39. Clearly, it is. Given that the term '*the proceedings'* must (at least presumptively) have the same meaning in Rule 40 as in Rule 39, it must for the purposes of Rule 40 include the record of the proceedings, and it is clear that the DAR forms part of that record. This is so irrespective of whether a transcript of that digital recording has been produced. It necessarily follows that the fact that a transcript has or has not been brought into being is beside the point: the DAR is a record of the proceedings and (by whatever means) Rule 40 envisages some mechanism being available by which persons can ***seek*** access to that record – that right to ***seek*** the record being granted to both parties to proceedings and persons who are not parties. What is critical to the dispute between the parties here is the question of who has ultimate control over the decision of whether to grant that access where it is sought by a party to the proceeding.

31. That being so, the applicant adopts a literal construction of Rule 40. The first sentence, he says, means that he may obtain the DAR from the CMA. His argument is that he

has this as of right. In that regard his position contrasts with that of a person who was not a party to the case, who must, in accordance with the second sentence of the Rule, bring an application to the MJ. The applicant's construction, thus understood, has the advantage of adhering closely to the language of the Rule, while also explaining why the MJ is the subject of specific reference in the second sentence, but not in the first. It has the disadvantage that it requires placing a construction on the first sentence which converts into a legal entitlement to be given the record a phrase that does not very clearly so state ('*may obtain from'*). Most critically, it does not accommodate the potential implications of the continuing control of the MJ over that record as envisaged by the immediately preceding Rule.

32. The CMA, on the other hand, says that Rule 40 must be interpreted in the light of Rule 39. Thus, the governing principle as provided for in the latter provision is that the record is under the control of the MJ to be released only as he directs. That carries through to Rule 40, so that the consent of MJ to release is always required, whether the release of a record is sought by a party or a non-party. On this interpretation the difference between the first and second sentences of Rule 40 revolves around the rigour applied to the release of the record: the burden on the party seeking release is lighter than the burden on the non-party asking for it. Moreover, reference was made in oral submissions by counsel on behalf of the CMA to a '*practice direction'* or '*standing order'* of the MJ which (it was said by counsel) reflected and implemented this interpretation. That direction or order does not appear to have been committed to writing, nor has it been averred to in the affidavit evidence adduced for the purposes of this application.

33. CMA's argument has the disadvantage that it involves interpolating into Rule 40 something that is not expressly there – the requirement for the consent of the MJ where release is sought by a party. It also draws a cumbersome distinction between the nature of an application by a party and by a non-party which is not reflected in the text of the Rule. However, it has the advantage both that it reflects the general principle expressed in Rule 39 and enables those provisions to be read harmoniously. It also has the advantage that it both reflects the approach adopted in the civil courts and gives effect to a principle generally recognised at law.

34. Thus, s. 65(3) of the Court and Court Officers Act 1926 provides that documents and papers lodged in a court in relation to or in the course of the hearing of any suit or matter '*shall be held by or at the order and disposal of the judge or the senior of the judges by or before whom such suit or matter is heard'.* This has been interpreted as imposing a *prohibition* on disclosure unless there has been a dispensation by the Judge (*Minister for Justice v. Information Commissioner* [2001] 3 IR 43, 50). Order 123 RSC provides for the recording of proceedings in the Superior Courts and makes provision (Rule 9) for application by parties to the Court for the release of the record. These sections and Rules (and similar provisions addressing the record in criminal proceedings) reflect the power of the court to regulate the conduct of court business (*Minister for Justice v. Information Commissioner* at p. 49 (per Finnegan J.)). This, in turn, is a corollary of the requirement that the judge be independent in the discharge or his or her functions (*BPSG Ltd. v. Courts Service* [2017] IEHC 209, [2017] 2 IR 343 at para. 66). While the MJ is not a Judge for the purposes of Article 34 or 35 of the Constitution, his independence and consequent control over his own processes are equally critical to his functioning, and it is to be expected that the RoP were drafted, and clear to me that they should be interpreted, with this in mind.

35. For reasons I shall explain shortly it is neither necessary, nor in the absence of a reasoned decision by the MJ as to the correct interpretation of these provisions, desirable for this Court in a discovery application to decide which of these interpretations of the relevant provisions is the right one. Both are arguable. What is important, in my view, is that there is an entitlement extraneous to the discovery process by which access to the documents can be sought. If the applicant is correct, access can be obtained as of right upon application to the CMA (and indeed he has so applied). If the CMA is correct, an application can be made by the applicant to the MJ for the production of a transcript and release thereof. Whichever party may be right, I can see no basis for the applicant's objection that it might be in some sense improper that the MJ adjudicate upon production of the DAR while a respondent in these proceedings. This happens in the ordinary court system all the time and I agree with the view of Keane J. that there is and can be no principled objection to it. There is, as Keane J. said, a significant difference between a judge descending into the forensic arena by swearing an affidavit in Judicial Review proceedings and the making of an application to that judge for a direction that a transcript be provided in the interests of justice.

The attempt to find a resolution

36. The hearing of the appeal against the judgment and Order of Keane J. first before this Court on February 18 2020. It appeared to the members of the Court at that time that the facility for the production of the DAR outside the discovery process might afford a solution to, this application. In particular, it was in part on account of their adherence to a position of principle, deriving in turn from differing interpretations of the relevant rules that the applicant insisted on seeking discovery and the CMA declined to provide it. The applicant declined to apply to the MJ to seek the DAR because he felt that he had the right to it and the MJ was in some sense compromised by such an application. The CMA resisted the application (in part) because it believed that it could not produce the record without consent of the MJ and there was in any event an alternative method of obtaining access.

37. The Court suggested that the parties might see if they could resolve the matter by application to the MJ but without compromising their positions in principle. This took time, for reasons which are not relevant to this judgment. By the time the matter came back before the Court – a little over a year later - the end point was that the second named respondent – the DMP - agreed to make an application to the MJ. Of course, the DMP could not guarantee that that application would be successful. He cannot fetter the discretion of the MJ nor can he assume the outcome of an application before him. The respondents agreed to bear the costs of the production of the transcript. However, the CMA adopted the position that this required the agreement of the applicant.

38. This was not acceptable to the applicant, who wants the transcript to be produced by the CMA. His commitment to his view on this is such that rather than accept the proposal of the CMA (which would involve no cost to him) he insists upon obtaining discovery (the costs of which he would have to indemnify pursuant to Order 31 Rule 29). Nonetheless, as was made clear at the hearing of this matter on March 3 2021, the offer stands.

Non-party discovery and the availability of an alternative mechanism for obtaining access to the documents

39. It is an unavoidable cost of suing or being sued that a party to legal proceedings will have to undergo the expense, inconvenience and intrusiveness of discovery. The imposition of such an obligation on non-parties, however, presents distinct issues and requires rigorous justification. For this reason, the courts have tended to interpret facility extended by Order 31 Rule 29 for such discovery in '*a rather restrictive fashion'* (*Re National Irish Bank* [2006] IEHC 35, [2006] 2 ILRM 266 at pp. 276-277), and '*much stricter requirements'* fall to be observed before a litigant can obtain discovery from a non-party (*Kennedy v. Law Society*, Unreported, Supreme Court 28 November 1997 per Keane J.). It follows that the discretion of the Court in addressing such an application is broader than in negotiating an application for *inter partes* discovery, and is more heavily stacked against the grant of that relief. In particular, the case law makes it clear that the Court should only accede to such an application where it is necessary (*Keating v. RTE* [2013] IESC 22 at para. 51). In *Byrne v. Sunday Newspapers Ltd.* [2015] IEHC 764 Barrett J. observed that the '*rigorous test of necessity'* required that an order for non-party discovery should not be made where the documents could have been obtained by other means (at para. 22). Many of the cases have expressed this in the terms that non-party discovery will only be discovered where '*there is no realistic alternative'* (*Chambers v. Times Newspapers* [1999] 2 IR 424: *Re National Irish Bank* [2006] IEHC 35, [2006] 2 ILRM 263).

40. While the applicant adopts the position that he had no realistic alternative to this application, having sought the documents from CMA and been refused, it has been open to him from the outset to make an application to the MJ as he was exhorted to do. His objection in principle to adopting this course of action – that it was inappropriate to involve the MJ in the matter given that he was a respondent to these proceedings - was, as I have earlier observed, not correct. While the bringing of such an application may well have been viewed by the applicant as an acquiescence by him in a process which he did not believe was enabled by the provisions of Rules 39 or 40, I do not believe that this was a reasonable basis for his not seeking the documents in this way before bringing an application for non-party discovery. It is clear that the CMA and the DMP both adopt the position that such an application may be made and, as I have made clear, there are two ways of viewing the relevant Rules. In any event, as of now the applicant does not himself have to make such an application. He merely has to agree to it. He can

agree to it without prejudice to his view of the correct legal position. If the MJ does not accede to the application, then the position will be different and the applicant's contention that he should obtain the documents as of right (a position he has already contradicted by seeking their discovery – which he does not have as of right) may become a live one. However as of now that position has not presented itself nor was it the position at the time that this application was heard in the High Court. In my view, the Court in its discretion should refuse this application on the basis that there is an alternative mechanism available to the applicant for seeking access to the transcript.

41. I should make one final observation in this context. I have already noted that much of the applicant's legal argument has been addressed to the proposition that he has a right to the documents under Rule 40. This is tendered on the assumption that he can agitate that right in an application for non-party discovery. In that regard I believe the applicant was mistaken. An application for discovery is an interlocutory matter in the course of which the Court determines whether it is appropriate that a person should be required to discover on oath for the purposes of proceedings (and only for the purposes of those proceedings) specified documents or categories of documents. The Court is concerned solely with whether the non-party has the documents sought, whether they are necessary or relevant and whether in all of the circumstances it is appropriate to exercise its discretion in favour of granting the relief sought. The question of whether a party has an enforceable *right* at law to obtain documents presents entirely different issues.

42. Such an application is not an appropriate vehicle for the determination of whether a party has a legal right independently of discovery to obtain access to the documents in question. In fact, as I have explained, if the party has such a right it leans *against*, not in favour of discovery. I do not wish to unduly criticise the applicant in this case for adopting the course of action he did – there is an obvious sense of economy to his so doing. However, it is not appropriate that an interlocutory application for discovery would be used as the basis for a determination of an issue of law which could be of potential significance to the general administration of the military court system. It is for that reason that I have declined to express any final view on the issue arising between the parties in this regard.

The need for the record in the proceedings

43. The applicant also suggests that he should obtain non-party discovery of the transcript because this is, in a general sense, required by the very nature of the proceedings. The applicant says that the affidavit grounding the application for non-party discovery was sworn from personal recollection and without the benefit of the transcript. He then says that '*the administration of justice requires compliance with the legal maxim of affording "the best evidence" to the Court and accordingly the original proceedings of the summary Court-Martial including any transcript (in whatever form) should preferably be available to the Court'*. Reference is made in this regard to the difficulties facing the solicitor representing the applicant in maintaining a note of the proceedings, it being suggested that the prosecutor is likely to have been in the same position.

44. So stated, I do not believe this contention to be well founded. There is no universal requirement that a Court hearing proceedings by way of judicial review of the proceedings of an inferior court or tribunal have before it the full transcript of the proceedings. Certainly, there will be cases in which it will be in the interests of all the parties and the High Court that such a transcript be available, and often the parties will agree on this. *Hudson v. Halpin and anor.* is an example of such a case. There, Hogan J. made an order by way of *inter partes* discovery of the DAR of District Court proceedings the outcome of which was sought to be reviewed on the basis of a claim that the proceedings had been conducted unfairly by the District Judge. Neither the Judge nor the parties objected to the making of such an order and Hogan J. believed that the order was an appropriate one. However, it is clear from his judgment that Hogan J. did not feel that this followed automatically, stressing that he was making the order because of the specific factual allegations that were central to the case. Where, as here, the parties are not agreeable to make discovery I do not believe that the Court can assume, without some interrogation of the particular basis on which it is said that the documents are required, that simply because a challenge is being brought, it is to be assumed that he transcript of the underlying proceedings are relevant and necessary.

45. The final point made by the applicant is related but distinct. He says that there are a number of conflicts of fact as between the parties that can only be resolved by production of the transcript. In his written submission, he identifies such alleged conflicts '*by topic only'.* These are reflected in the points made in the affidavit which,

I have already indicated, I do not believe is properly before the Court. However, for the avoidance of any doubt I will address them, not least because most do not actually involve facts at all.

46. First it is said that an application for legal aid was made by the applicant and that this was opposed by the prosecutor resulting in the applicant being required to submit details in excess of that required by the relevant regulations. I can see no basis on which this issue intrudes into the pleaded case. There is no pleading in this action directed to or arising from the provision or non-provision to the applicant of legal aid. The issues are (a) whether the charge proffered against the applicant was known to the law and (b) whether his rights to fair procedures were breached. The issue as regards fair procedures is not open ended, and is pleaded exclusively by reference to the contention that '*irrelevant and prejudicial evidence was admitted'*.

47. Second, reference is made to the preliminary objection to the charge laid and significance of that plea '*in terms of procedure and the burden and standard of proofs'*. This appears to me to be a matter of law which is not affected by the availability or non-availability of the transcript. No conflict of evidence of any kind has been identified as underlying it.

48. Third, reference is made to '*the factual role of the Military Judge and the omission of the prosecutor to adduce any evidence in rebuttal*.' I am unable to discern what precise proposition is thus alluded to, and certainly cannot see in the evidence any conflict of fact that lies within it.

49. Fourth, complaint is made that the affidavit accompanying the Statement of Opposition declines to acknowledge:

> '*the precise issues and procedures which arose for example, in respect of legal aid, the preliminary issue and plea, delay, the duplicity of the charge, the absence of any identification of any 'order' in the charge, the admissibility of evidence generally and the significance of evidential "relevancy" in the considerable evidence offered of multiple alleged offences etc.'*

50. This observation – whether correct in substance or not – does not disclose any pleaded issue dependent upon facts that require the transcript.

51. Fifth, it is said that the '*factual ruling of the Military Judge, to one or any of the multiple objections, is not provided at all.'* It is not apparent to me that either party has had any difficulty in recording in their affidavits what the MJ decided and those affidavits record no dispute of fact as to that issue. In fact, the applicant details in his affidavit precisely what the MJ said in his judgment which is for the purposes of these proceedings, the critical issue. That account of the decision of the MJ is not disputed by the respondents in their evidence.

52. Sixth, reference is made to the claim that it is not agreed that the objection to the provision of opinion evidence by a lay witness was withdrawn. This appears to be a reference to the (agreed) evidence of one witness (Corporal Kennedy) to the effect that it was his '*feeling'* that the applicant was insubordinate. In his grounding affidavit the applicant says that his solicitor objected to that evidence on the basis that it was opinion evidence. Commandant McCarthy avers in his affidavit that the MJ asked the applicant's solicitor whether or not he was challenging the evidence of Corporal Kennedy on that basis whereupon the applicant's solicitor (it is averred) expressly withdrew his claim that the Corporal was giving opinion evidence. I find it very hard to see how this dispute – if there is a dispute – in itself could justify the making of an order for non-party discovery, even if there were evidence before this Court that there was a conflict on the issue. The critical question before an experienced tribunal is not the admission of such evidence, but the weight given to it in the ultimate decision.

53. Seventh, it is said that there is a conflict about the evidence given by Lieutenant Forde as a witness. It is here that the new affidavit is relevant. As I have stated, I would exercise my discretion against the admission of that evidence. Even if I am wrong in adopting that course of action the fresh evidence fails to explain what the actual conflict is.

54. Eighth, it is said that the applicant was arraigned on two charges at the summary Court-Martial before one charge was withdrawn. This is not identified as an issue in the Statement of Grounds.

55. Ninth, the following is said:

> '*The absence of precise responses to issues raised, summing up, rationale or final judgment on part of Military Judge is unsatisfactory. Given the wording of the novel and subjective charge laid in respect of alleged insubordination and the complete absence of any mens rea creating words therein, the basis for a finding of 'insubordination' and the further reference to 'aggravating factors' apparently justifying a doubling of the original punishment, is not available to this Honourable Court as a matter of fact and it is respectively submitted that it should be'.*

56. This appears to me to be a replication of the argument that the applicant is entitled to the transcript simply for because of his challenge to the underlying decision, which submission I have addressed above.

Conclusion

57. I am of the view that this appeal should be dismissed and the decision of the trial Judge affirmed. I have reached this view for the following reasons:

(i) It is not appropriate in an application of this kind to determine the applicant's contention that he has a legal right to obtain the DAR from the CMA.

(ii) The applicant has had at all times a viable basis for seeking the transcript of which he seeks discovery. He ought to have availed of that mechanism, as he is still free to do via the proposals made by the CMA. It is my view that if the applicant wishes to obtain the transcript, this is how he should access it. It is not proper to direct non-party discovery of documents that can be obtained by other means.

(iii) The applicant does not make out a basis for obtaining the non-party discovery sought in his application by simply pointing to the fact that he is challenging a decision of the MJ in proceedings of which there is a complete transcript. He

must relate the necessity for the transcript to the specific issues in the proceedings.

(iv) In this case, that requires the applicant to identify material and relevant conflicts of fact as between his evidence and that of the respondents such as would justify the necessity for discovery of the transcript. He has failed to discharge that burden.

Costs

58. There is a strong presumption that a party of whom non-party discovery is sought will obtain his costs of the application for that discovery. This follows from the stipulation in Order 31 Rule 29 that the party seeking discovery must indemnify the party against whom the order is sought *in respect of all costs thereby reasonably incurred'.* Moreover, CMA has been wholly successful in resisting this appeal. At the time of the application to the High Court the Court was enjoined to make an award of costs save where it was not possible to justly adjudicate upon liability for costs on the basis of the interlocutory application (Order 99 rule 1(4A) RSC as it then was). At the time of the hearing of this appeal, the provision was Order 99 Rule 2(3) which requires in respect of an interlocutory application that the Court '*shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.'*

59. However, it is clear that there may be exceptions to this approach. I am of the provisional view – most unusually – that in this case it is appropriate that no order for costs should be made in either Court. I have reached this provisional view for the following reasons.

60. First, insofar as the applicant is concerned, he has brought an application for non-party discovery which, for reasons I have explained here, must fail. Therefore, there is no question of his obtaining his costs.

61. However, and at the same time, this application arose in a very particular context. The applicant may not have had a legally enforceable right as a person involved in proceedings before the MJ to obtain a copy of the transcript of those proceedings, but he did have the right to absolute clarity around the legal route by which this might be

made available to him. While I have avoided expressing any view as to the correct interpretation of the relevant provisions, it suffices for present purposes to restate what I have said regarding the relationship between Rules 39 and 40. These provisions are not clear in their effect and there are two different ways of looking at them. It may well be (and I do not express a concluded view on this either) that that lack of clarity could be abated by the issuing of generally applicable and generally available practice directions or orders – but these should be documented and available. Absolute clarity on this issue would avoid applications of the kind that presented themselves here. While it will not be necessary that a transcript be available in all proceedings of this kind, and while the applicant has failed to make out the strict requirements for seeking non-party discovery, there is some sense in this case to the transcript being before the Court – and no-one seems to dispute that. And finally, while the CMA is an independent agency and while I do not for a moment suggest otherwise, it has a particular relationship with the actual respondents in the proceedings (they in fact shared legal representation) which renders the making of no order as to costs less burdensome than might otherwise be the case in an application of this kind.

62. This is only a proposal – which either party is free to dispute. If either party wishes to dispute the proposal, they should notify the Court of Appeal Office within seven days of the date of this judgment, whereupon the Court will direct the exchange of written legal submissions on the question of costs. The parties should note that costs of that process will generally be awarded against a party who disputes a proposal of this kind, and fails to prevail in that objection.

63. Donnelly J. and Ní Raifeartaigh J. are in agreement with this judgement and the order I propose.