Neutral Citation Number: [2013] IEHC 242

THE HIGH COURT

[2011 No. 2791 S]

BETWEEN/

ALLIED IRISH BANK PLC

PLAINTIFF

AND

GEORGE TRACEY (No.2)

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 21st March, 2013

1. One of the many unpleasant features of what the country has had to endure since the collapse of the property sector in 2008 is the extent to which ties of friendship and family bonds have been placed under enormous strain as a result of the ensuing financial crisis. This is one such case and a falling out between friends has given rise the present application which is one of some novelty and is, indeed, of some considerable importance.

2. Prior to the events giving rise to the present application, the defendant in the present proceedings, Mr. George Tracey, and the applicant, Mr. David Agar, were not only business partners in the property market but were also extremely close friends. The acute downturn in the construction and property sector has evidently put that friendship to the test.

3. In a judgment delivered in these (and related) proceedings on 12th March 2013 I granted summary judgment in favour of AIB (and a subsidiary company) for sums close to €18m. In the course of defending those proceedings Mr. Tracey contended that AIB had mismanaged his affairs, not least by allowing portions of loans supposedly drawn down by various companies jointly owned and controlled by Mr. Tracey and Mr. Agar to be misappropriated by Mr. Agar. Although not directly adjudicating on these contentions, I nonetheless found that (save in one respect) AIB was entitled to summary judgment.

4. During the hearing itself (which lasted some three days) Mr. Agar's legal team maintained a watching brief from the second day onwards, although he was not, of course, a party to the litigation. At the close of the hearing Mr. Agar's legal representative sought a copy of the relevant affidavits which sought to directly implicate their client in a course of conduct, which, if true, would amount to a grave breach of fiduciary duty amounting to the fraudulent misappropriation of funds. It is important to state that Mr. Agar emphatically rejects these allegations.

5. I should also interpose here to say that during the hearing I expressed concern that these allegations were being ventilated in open court in circumstances where Mr. Agar had no formal opportunity to respond or to have his interests formally represented Indeed, I took care to ensure that Mr. Agar's name was not directly mentioned in the written judgment which I delivered.

6. At all events, Mr. Tracey's legal representatives indicated that their client would not consent to the release of these affidavits to Mr. Agar. AIB indicated that, for its part, tit would take a neutral position and would abide by the order of the court. I accordingly directed that if Mr. Agar wished to seek access to these affidavits, he must apply by motion on notice to Mr. Tracey. This was duly done and the motion heard in the aftermath of the main judgment granting summary judgment to AIB. This is now my judgment on this question.

7. It is important to note at the outset that the affidavits in question were in effect fully opened to the Court. While the former practice whereby counsel formally read out all the affidavits which had been filed in the proceedings into the record from beginning to end has largely ceased, nevertheless frequent reference was made in open court to the relevant passages from Mr. Tracey's affidavits which sought to implicate Mr. Agar and some, at least, of the relevant passages were opened either in full or in part. The present case is accordingly one where the relevant documents at issue have been fully opened in open court. As we shall shortly see, this is a very important detail, because different consideration might well obtain, for example, in the case of a document which lay hidden in the discovery documents and to which no reference – or, at least, no reference of any substance – was made.

Access to documents generated for the purposes of litigation

8. It seems admittedly curious that there is no recorded instance of where a non-party has sought access to court documents for this purpose. Counsel for Mr. Tracey, Mr. Marray, emphasised the fact that there was no such direct authority on point as strongly indicating that there was, in fact, no such jurisdiction to permit access to documents for this collateral purpose. This was underscored, Mr. Marray submitted, by the fact that absolute privilege attached to the documents themselves and to their opening in open court, so that, for example, Mr. Tracey could not be sued for defamation. Absent a remedy in defamation, then there would be little point in ordering or permitting access, since it could not accordingly materially assist Mr. Agar.

9. The decision of the Supreme Court in *Breslin v. McKenna* [2008] IESC 43, [2009] 1 I.R. 298 is perhaps the closest case in point. Here the plaintiffs sought access by way of discovery to materials contained in the book of evidence furnished to the defendants for the purposes of their trial as accused before the Special Criminal Court so that they (*i.e.,* the plaintiff) could use that material for the purposes of a civil action in Northern Ireland for damages arising out of the same incident.

10. In the High Court Gilligan J. found that the defendants qua accused held the documentation on foot of an implied undertaking, so that the permission of the Court would be not necessary for the use of the documents for some other collateral purpose.

11. In his judgment for the Supreme Court, Geoghegan J. observed ([2009] 1 I.R. 298, 308) :-

> "….I believe that if the books of evidence are going to be used for some wholly different purpose from their original intended use, the approval of the court should be sought. This will normally be the court of trial but in the case of the Special Criminal Court, an appropriate court would seem to me to be the High Court. Rather than base this

> requirement on an alleged implied undertaking, I would prefer to base it on the courts' overall responsibility to ensure the due administration of justice. In considering whether a court should accede to the application or not, the principles to be applied would be no different than the principles which would apply if there was an implied undertaking as originally suggested."

Geoghegan J. then went to hold that it was appropriate that permission be given for the use of this material in the Northern Irish proceedings ([2009] 1 I.R. 298, 309):-

> "It is neither possible nor indeed desirable to attempt a precise definition of what set of circumstances would be regarded as use of the books of evidence for some other purpose. It would not be the case that the book of evidence was confidential in the sense that an accused could not discuss it with his spouse or members of his family or other advisors. Permission would be required however to use it for wholly different proceedings or indeed for any uncontemplated public or semi-public purpose. These restrictions are necessary in the interest of justice having regard to the ultimate finality of the verdicts of guilt or otherwise in the due process. I, therefore, believe that the learned High Court judge was correct in his exercise of discretion and in the manner in which he exercised it even though I do not agree with the presumption of law on which it was based. This agreement is wholly immaterial in my view because no different principles would have applied in exercising the discretion on the basis which I have suggested."

12. There were, of course, significant differences between the circumstances in *Breslin* and the present case. *Breslin* concerned the potential use of material gathered for the purposes of the book of evidence in a *criminal prosecution* in this State in quite separate *civil proceedings* in Northern Ireland. Nor does the judgment in *Breslin* directly address the status of documents which (as here) have been opened in open court.

Whether permission should be given for the release of the documents?

13. If, however, *Breslin* were to govern the present case – and, for reasons I will shortly consider, I do not believe that it does – then it is clear that Mr. Agar would need the permission of this Court to permit him to have access to these affidavits since under those circumstances the affidavits would be released for a purpose other than originally contemplated by the litigants. Assuming such permission were required, would it be appropriate to grant such?

14. In my view, it clearly would be so appropriate. Article 40.3.2 of the Constitution guarantees each citizen the right to his or her good name. That right would be indeed a hollow one if serious allegations could be made publicly in open court directly against another citizen – even if made for the purposes of defending other litigation brought by a third party – if the person against whom the allegation is made had no right to even learn of the precise nature of the allegations which were so publicly made.

15. In *de Búrca v. Wicklow County Council* [2009] IEHC 54 the applicant, a local councillor, made complaints regarding the ethical behaviour of another councillor. As a result, a formal investigation took place pursuant to the provisions of Part XV of the Local Government Act 2001, which investigation was actually critical of her. She then (successfully) sought to challenge that report on the ground that the investigators had misconstrued and misapplied the relevant provisions of the 2001 Act. The Council had, however, argued that that the issue was non-justiciable by reason of the fact that the publication of the report had not actually infringed her legal rights.

16. Hedigan J. rejected that argument in the following terms:-

> "As a public representative, the reputational rights guaranteed to the applicant by Article 40.3.2º of the Constitution maintain particular importance. It seems to me that, following the publication of the report, much of the criticism which was levelled against her in the print and audiovisual media was unfair and vitriolic. The findings of the report, especially its criticisms of her, were at the foundation of this assault on her reputation.
>
> The fact that the criticisms contained in the report now form part of the public record of the State serves only to amplify the ramifications for her, in particular should she wish to continue her career in public office. To allow such undue criticism of a conscientious local councillor to go unconsidered on the basis that it is of no consequence, or that it has no implications, would in my view involve a kind of legal fiction with potentially far-reaching consequences for the public service as a whole. In my view, therefore, the report did have material implications for the applicant."

17. It seems to me that this reasoning applies by analogy to the present case. It is true that Mr. Agar is not a public representative. He is nonetheless well-known in Dublin business and property circles. Any person in his position would doubtless be greatly exercised by the fact that allegations of this kind were made against him in a public and official forum. The allegations were, moreover, in one sense part of the public record of the State. While Mr. Agar is not actually mentioned in my earlier judgment, it perforce recorded the substance of what Mr. Tracey alleged. Any person familiar with the business affairs of Mr. Tracey could easily have deduced therefrom that the allegations referred to Mr. Agar. Moreover, as Mr. Fenlon, solicitor for Mr. Agar pointed out, these allegations were ventilated in proceedings involving the very bank of which Mr. Agar is also a customer. In these circumstances, Mr. Agar has a very real interest in defending his reputation.

18. In this context I would reject the submission advanced by Mr. Tracey to the effect that the release of the affidavits would serve no useful purpose because Mr. Agar could have no remedy under the Defamation Act 2009 by reason of the established immunity of parties, witnesses and judicial pronouncements from suit and the preservation of those immunities by s. 17(1) and s. 17(2)(e), (f) and (g) of the 2009 Act. It is unnecessary for present purposes to express any view on this topic, because even if it were so that the immunity was absolute in all circumstances, this would not detract in the least from the fact that the protection of Mr. Agar's Article 40.3.2 right to a good name requires – at a minimum – that he is entitled to at least know the *nature* of the allegation.

19. One can easily conjecture circumstances in which a person in Mr. Agar's position might wish to take practical steps to protect that right. Thus, for example, correspondence might be exchanged requesting Mr. Tracey to withdraw the allegations. Alternatively, Mr. Agar might wish to correspond with AIB in the matter. Any such steps would, of course, be entirely a matter for Mr. Agar to consider and to determine.

20. In these circumstances, it would be entirely appropriate for this Court to sanction the release of the affidavits, as the effective protection of Mr. Agar's Article 40.3.2 right to a good name demands no less.

Whether permission is, in any event, required?

21. In any event, I do not consider that the Court's permission was required for this purpose. These allegations were ventilated in civil proceedings in open court and, as I have already found, the affidavits were effectively openly read into the record of the court. Given that these proceedings were in open court pursuant to the requirements of Article 34.1 of the Constitution, it follows that any cloak of confidentiality or protection from non-disclosure vanished at point. In this respect, therefore, the present case is a very different one from *Breslin*.

22. The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse.

23. In these circumstances the public are entitled to have access to documents which were accordingly opened without restriction in open court. This is simply part and parcel of the open administration of justice which the Constitution (subject to exceptions) enjoins. Entirely different considerations would naturally arise in respect of material which was not opened in open court or which was protected by the *in camera* rules or by reporting restrictions imposed, for example, pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008

Conclusions
24. It is for these reasons that I would hold that Mr. Agar is entitled to have access to the affidavits filed by Mr. Tracey in the present proceedings.