Neutral Citation Number: [2006] IEHC 86

THE HIGH COURT

2004/1131JR.

BETWEEN

JOHN CALDWELL

APPLICANT

AND

JUDGE ALAN MAHON, JUDGE MARY FAHERTY AND JUDGE GERARD KEYS, MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS

RESPONDENTS

Judgment of Mr. Justice Hanna delivered this 15th day of February, 2006

1. This judgment is supplemental to the judgment which I handed down in this matter on the 28th June, 2005. In the latter, I deferred a decision on the issue of the applicant's right to privacy and, more particularly, whether the continuance of the respondent's inquiries into what is termed the Carrickmines II Module, amounts to an unjustified and disproportionate breach of the applicant's right to privacy under Article 40.3 of the Constitution and Article 8 of the European Convention of Human Rights.

2. I have already determined that the decision sought to be impugned by the applicant was made by the respondent in the month of November, 2003, being the decision by the respondent to move from the private phase of their inquiries into the public phase. Because the identification of the material decision was of importance, the case was argued before me on the assumption that the European Convention of Human Rights Act, 2003 was in force, and accordingly, both convention and constitutional issues failed to be determined. Between the conclusion of the case and my delivery and judgment, the Supreme Court delivered a judgment in the case of *Dublin City Council v Fennell* (Unreported, Supreme Court, 12th May, 2005) to the effect that the provisions of the European Convention of Human Rights Act were not retrospective and did not apply prior to the coming into force of that Act, being the 31st December, 2003.

3. Accordingly, I requested further submissions from counsel and these were heard on the 11th November, 2005. It was accepted by counsel on both sides that the decision taken in November, 2003 was not subject to the provisions of the European Convention of Human Rights. During the course of the submissions, however, counsel on behalf of the applicant, Mr Gardiner, SC, sought to argue that the various "decisions", as he termed them, made by the respondents in 2004 were subject to the Convention. At the outset, I should observe that this argument seems to me to be based upon what, for the purpose of this case, is an irrelevant distinction between ss. 2 and 3 of the European Convention of Human Rights Act and, in my view, was endeavouring to evade the effect of my decision in following the judgment of Carroll J. in *Finnerty v Western Health Board* (Unreported, High Court, 5 October, 1998). It is worthwhile repeating the late judge's pithy observation:-

> "A decision which is a reiteration of a previous decision is not a new decision".

4. This view I imported into my decision in this case and I applied it in a manner which rendered the relevant decision, that of November, 2003, and any subsequent transactions thereafter, if I might so term them, were reiterations of that decision. However, although the European Convention of Human Rights, for the purposes of this case, does not form part of the domestic law of Ireland, nevertheless, decisions of the European Court of Human Rights may be of persuasive authority (see judgment of Denham J. - *O'Brien v Mirror Group Newspapers* [2001] 1 IR 1, at p. 33).

5. As stated above, the applicant contends that the respondents are acting in breach of his constitutional (and for that matter convention) rights. To set the background briefly, I refer to my earlier judgment in this case, and I quote from pp. 3 and 4:-

> "This application arises from the Tribunal's investigations conducted in private, public hearings and future proposed public hearings of and concerning certain lands at Carrickmines, Co. Dublin, and other lands. The Tribunal has engaged in the practice of dividing its enquiries into separate modules and, within those modules, separate sections or phases. The module with which we are concerned is referred to and known as the Carrickmines II and Related Issues Module. For ease of reference, save where the context otherwise requires it, I will describe it as the Carrickmines II Module. The lands, the subject matter of this module are specified in the latest amendment to the terms of reference. This module follows on from the Carrickmines I. Module which inquired into allegations of corruption in the planning process relating to certain lands. Public hearings in relation to this module commenced on the 20th November, 2002, and continued until the 16th October, 2003. The Carrickmines II Module concerns the ownership of those lands and other specified lands. In the course of its enquiries the Tribunal has examined and wishes to continue to examine the business affairs and inter-relationship (if such there be) of Mr John Caldwell, the applicant herein, Mr James Kennedy, a businessman, and Mr Liam Lawlor, a former TD", (and I observe, now deceased).
>
> "The applicant says that he is the owner, through a limited liability company of 50% of those lands at Carrickmines upon which the Carrickmines I. Module focused, also known as Jackson Way Properties. The applicant admits that his former firm acted for Mr Kennedy and Mr Lawlor in the past. Mr Kennedy, he says, is the other half-owner of the Carrickmines land. The applicant stoutly denies that Mr Lawlor has any interest whatsoever in the said lands, so apparently does Mr Lawlor. Mr Kennedy has not cooperated with the Tribunal and has not attended to give evidence. Mr Frank Dunlop, another person who has featured prominently before the Tribunal, has alleged that he received a substantial sum in cash from Mr James Kennedy for the purpose of ensuring support for the rezoning of the lands at Carrickmines from agricultural to residential use, and Mr Dunlop further alleges that Mr Kennedy told him that Mr Lawlor had an interest in the said lands".

6. That is a brief statement of the background.

7. Thus, the applicant's complaint is to the effect that the Tribunal's enquiries will engender disclosure of his confidential business affairs. He will be required to render himself available to attend public hearings where such hearings are not necessary, thereby trammelling his constitutional right to privacy and his rights under Article 8 of the European Convention of Human Rights

Constitutional Right to Privacy.

8. It is well established that a person has a constitutional right to privacy. In *Kennedy v Ireland* [1987] IR, 587, Hamilton P. stated:-

> "'The right to privacy is not in issue, the issue is the extent of that right or the extent of the right to be let alone'. Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of

> the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and it is subject to the requirements of public order and morality... The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with. I emphasise the words "deliberately, consciously and unjustifiably", because an individual must accept the risk of accidental interference with his communications and the fact that in certain circumstances the exigencies of the common good may require and justify such intrusion and interference. No such circumstances exist in this case".

9. However, does this right extend to a person's business dealings? In particular, where the respondents are inquiring into, *inter alia*, myriad private companies through which the applicant has sought to conduct his affairs (I stress this statement carries no implication of wrongdoing), does this transport the applicant's business affairs beyond the protective shade of the Constitution and into the sunlight of public scrutiny?

10. The privileges of incorporation and limited liability can only be viewed in tandem with the obligations that attend them, for example:

- Annual accounts.

- Director's and shareholder's meetings.

- Filing of company accounts.

- Details of directors.

- Amenability to enquiries and investigation under relevant company legislation.

11. To a greater or lesser extent, all of these are matters which are open for public perusal. The private citizen conducting his business privately is not subject to the legislative requirements imposed upon private companies.

12. Moreover, *Kennedy v Ireland* dealt with personal, private rights. It is unclear to what extent, if any, *Haughey v Moriarty* [1999] 3 IR 1, upon which the applicant relies, takes us nearer to identifying a right to privacy in the context of business transactions conducted through limited liability companies.

13. Firstly, that case must be seen against the background of seeking a discovery order of a citizen's personal bank account. It does not deal with the questions raised by the applicant. In addition, it does not appear to put even the more personalised right to privacy with which *Haughey* was concerned, beyond question. Hamilton CJ. stated:

> "For the purpose of this case, and not so holding, the Court is prepared to accept that the constitutional right to privacy extends to the privacy and confidentiality of a citizen's banking records and transactions".

14. Nor do I feel that *Hanahoe v Hussey* [1998] 3 IR, 69, is of great assistance to the applicant. That case involves a raid on the offices of an eminent firm of solicitors authorised by a warrant issued by a judge of the District Court, pursuant to s. 64 of the Criminal Justice Act, 1994. The raid was with a view to obtaining documentary information with regard to certain property transactions in which the firm of solicitors had acted. Although invited to do so, the Court refused to impugn the warrant. It did find in damages against the defendants for interference with the solicitor's right to privacy. This arose from a leak, probably from a garda source, to the media about the impending raid.

15. Two points of distinction with the applicants herein are of importance. Firstly, even though the raid was on the solicitor's premises, it was still lawful. Secondly, not only did the solicitor involved sue as a firm, but also they sued personally. There is no doubt as to the existence of a personal right. Therefore, insofar as the focus of the Court was turned upon the "invasion" of the applicant's privacy, it was done so in the context of the solicitors carrying on their practice as solicitors in premises belonging to them. This they did with all the panoply of confidentiality and security attendant upon such practice, long recognised and protected by the courts. And yet in lawfully authorised circumstances, their premises could be "raided" and documents and materials removed.

16. Indeed, we live in an age where the veil of confidentiality and secrecy which used to protect dealings between lawyers and other professional persons and their clients from the exposure to the gaze of others has been pierced, albeit in circumstances mandated by the common good and in pursuit of wrong doing. By way of example, one need look no further than the obligation cast upon various professional advisors by s. 32 of the Criminal Justice Act, 1994, as amended by transposition of Council Directive 2001/97/EC and introduced under S.I. 242/2003 and S.I. 416/2003.

17. Thus, the common good can and does permit interference in appropriate circumstances with the relationship between a client and his professional advisor.

18. An individual' s business affairs, conducted through what the respondents describe as a "maze of offshore companies", must fall well beyond the level of constitutional protection afforded to, e.g., a solicitor/client relationship.

19. Does, therefore, a right to privacy exist at all in connection with the applicant's business affairs?

20. I am reluctant to hold that no such right exists. In truth, I see no logical reason why it should not. This question, I feel, merits far more debate than the context of this case permitted. Notwithstanding this, I am satisfied to proceed on the basis that the right to privacy does extend to business affairs. It seems to me, however, that such right can only exist at the outer reaches of and the furthest remove from the core personal right to privacy.

21. I respectfully adopt the words of Ackerman J in the South-African case of *Bernstein v. Bester* [1996] (4) Butterworth's Constitutional Law Reports (South Africa) 449, where he said:

> "A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public

> authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right to privacy in this context becomes subject to limitation".

22. Given the distance at which the applicant's right to privacy in his business affairs stands from the "inviolable core", such right must become subject to the limitation and the exigencies of the common good and they weigh all the more heavily against it, subject at all times to the requirements of constitutional justice and fair procedures.

23. Turning again to the decision of Hamilton CJ. in *Haughey v Moriarty* [1999] 3 IR 1, at p. 57 and following pages, he said: -

> "There is no doubt but that the terms of reference of the Tribunal of Inquiry and the exceptional inquisitorial powers conferred upon such tribunals under the Act of 1921, as amended, necessarily expose the plaintiffs and other citizens to the risk of having aspects of their private life uncovered which would otherwise remain private, and to the risk of having baseless allegations made against them. This may cause stress and injury to their reputations.

24. There is no doubt but that the plaintiffs enjoy a constitutional right to privacy. What is in dispute in this case is the extent of such right to privacy and in particular whether it extends to the right to confidentiality in respect of banking transactions and whether the exigencies of the common good outweigh, in the circumstances of this case, such right to privacy.

25. The Constitution does not guarantee or in any way expressly refer to a right of privacy. The right to privacy in marriage was however, upheld in *McGee v Attorney General* [1974] IR, 284. In the course of his judgment in *Kennedy v Ireland* [1987] IR, 587 at p. 592, Hamilton P. stated:-

> "Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the state. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality".

26. The right to privacy is not in issue: the issue is the extent of that right and whether that right extends to the confidentiality of a person's banking transactions.

> "For the purposes of this case, and not so holding, the Court is prepared to accept that the constitutional right to privacy extends to the privacy and confidentiality of a citizen's banking records and transactions". This is a right which is recognised at common law.

27. As stated by Lynch J in *National Irish Bank Limited v RTE* [1998] 2 IR, 465 at p. 494:-

> "There is no doubt but that there exists a duty and a right of confidentiality between banker and customer as also exists in many other relationships such as for example doctor and patient and lawyer and client. This duty of confidentiality extends to third parties into whose hands confidential information may come and such third parties can be injuncted to prohibit the disclosure of such confidential information. There is a public interest in the maintenance of such confidentiality for the benefit of society at large.
>
> On the other hand, there is also a public interest in defeating wrong doing and where the publication of confidential information may be of assistance in defeating wrong doing then the public interest in such publication may outweigh the public interest in the maintenance of confidentiality".

28. Just as such public interest in defeating wrong doing may outweigh the public interest in the maintenance of confidentiality, the exigencies of the common good may outweigh the constitutional right to privacy. The exigencies of the common good require that matters considered by both Houses of the Oireachtas to be of urgent public importance be inquired into, particularly when such inquiries are necessary to preserve the purity and integrity of our public life without which a successful democracy is impossible. In this case, both Houses of the Oireachtas deemed it expedient that a tribunal of inquiry be established to enquire into the matters set forth in the resolutions. The effect of such resolutions is undoubtedly to encroach upon the fundamental rights of the plaintiffs in the name of the common good. The encroachments on such rights is justified in this particular case by the exigencies of the common good. Such encroachment must however be only to the extent necessary for the proper conduct of the inquiry. Both Houses of the Oireachtas are entitled to assume that the Tribunal will conduct its investigation in accordance with the principles of constitutional justice and fair procedures and will only interfere with the constitutional rights of the plaintiffs when, and only to the extent that, is necessary for the proper conduct of the inquiry".

29. Dealing with the issue of privacy and Tribunals of Inquiry, Denham J. said in *Desmond v. Moriarty* [2004] (Unreported, High Court, 6th March, 2000) 1 IR 334, at p. 367:-

> "While the powers vested in the tribunal must be exercised within the constitutional framework, the very nature of the tribunal is that it is fact finding, that is the reason for its establishment. Further, this fact finding should, where possible, proceed in public".

30. The learned judge then went to cite Morris P. in *Bailey v Flood* to emphasise the imperative of conducting the proceedings (as opposed to the private inquiries, which I have already dealt with in my earlier judgment) in public.

31. This citation is expressed in terms demonstrative of how high the "bar is set" for those who seek to have such proceedings conducted otherwise than in public and away from public scrutiny:

> "It is clear that it is of fundamental importance that, where possible, the proceedings of a Tribunal of Inquiry should be conducted in public. The very reason for the establishment of such a tribunal is that urgent matters causing grave public disquiet need to be investigated in order either root out the wrong doing or to expose the concerns as misplaced. If a tribunal is to accomplish its purpose on either count it is profoundly important that it is seen to conduct a thorough, methodical inquiry in which no special treatment is accorded to anyone and where matters are shielded from public scrutiny and criticism only where absolutely necessary, such as where to do otherwise would jeopardise the lives of individuals".

32. In her judgment in *Desmond*, Denham J. goes on to say at p. 370, and I quote:-

> "Thus, although the exceptional inquisitorial powers conferred upon the tribunal may interfere with a person's constitutional right to privacy, the exigencies of the common good require that such matters of urgent public importance be inquired into in public and this may outweigh a particular person's constitutional right to privacy."

33. In my view, the line of authority to which I have referred requires the public conduct of the respondents' business, same as where otherwise mandated (that is their private places) or in the most exceptional circumstances. The right to privacy in relation to private dealings with others is not absolute, even at its purely personal nucleus. At the stage where we come to deal with the applicant's business affairs in the context of the Tribunal, such right to privacy as the applicant possesses has long since been overtaken by the exigencies of the common good.

34. There is one further matter of importance. Details of the applicant's business affairs entered into the public domain through the opening statement of counsel for the Tribunal on the 20th January, 2004. That being the case, I cannot see how, to borrow a well-known colloquialism, "the genie can be put back in the bottle". Even if the nature and extent of the applicant's right to privacy could confront with greater force the rights and obligations of the Tribunal, it would seem pointless to contemplate prohibiting the Tribunal from being about its business.

35. I now turn to the question of the provision of the European Convention of Human Rights and, in particular, Article 8. I have already determined that, at the date the Tribunal made its decision to move into a public hearing phase, the European Convention of Human Rights did not form part of the domestic law of Ireland. However, I am mindful of the persuasive authority of decisions of the European Court of Human Rights (see decision of Denham J. in *O'Brien v Mirror Group*, already referred to). Secondly, it may be useful should this matter proceed to a higher court, that I briefly outline my views.

36. Article 8 of the European Convention of Human Rights provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There should be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection and rights and freedoms of others."

37. In much the same way as one posed the question - did the applicant's business affairs and dealings attract a constitutionally protected right to privacy - one must ask if the concept of private life extends to such interests under the European Convention. At pp. 261 and 263 of *Human Rights Law and Practice*, 2nd ed., (2004), Lester and Pannick, the authors, state:-

> "Article 8 protects far more than privacy *simpliciter*. Like other international human rights guarantees, it demands respect for a broad range of loosely allied personal interests: physical or bodily integrity; personal identity and lifestyle, including sexuality and sexual orientation; reputation; family life; the home and home environment; and correspondence, embracing all forms of communication. The closest to a unifying theme for such diverse subjects is the liberal presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private spheres' with or without interaction with others and free from state intervention and free from excessive, unsolicited intervention by other uninvited individuals. Viewed in this way, the notion of privacy is something of a continuum, starting from an inviolable core of personal autonomy and radiating out (yet becoming more subject to qualification or justified interference) into personal and social relationships…The reference to respect for these rights makes it clear that not all acts or omissions of a public authority which have an impact on the exercise of the protected interest will constitute an interference with art 8 rights, let alone an unjustifiable one. Article 8 is, after all, a qualified right susceptible to wide-ranging principled limitation".

38. It may be that the Convention right to respect for privacy does extend to professional practice. (See *Nienitz v Germany* [1992] 16 EHRR 97).

39. But that may not extend out as far as the applicant's circumstances. It seems that in Irish law and under the Convention, a court is faced with broadly the same questions.

40. The core right under Article 8 is the right to personal privacy.

41. In *Goodwin v United Kingdom*, [2002] 35 EHRR 447, at paragraph 72, the Court said:

> "The Court recalls that the notion of "respect "as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case, and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent on the whole of the Convention".

42. Assuming the existence of a right, how does a court go about balancing the individual's rights with those of the purported interfering authority? In Jacobs and White*, European Convention on Human Rights* 3rd ed. at p. 201, the authors state:

> "The Court adopts a three-part questioning where a State seeks to rely on a limitation in one of the Convention articles. First, it determines whether the interference is in accordance with or prescribed by law, then it looks to see whether the aim of the limitation is legitimate in that it fits one of the expressed heads in the particular article, and finally it asks whether the limitation is in all the circumstances necessary in a democratic society. Central to this determination is the proportionality of the interference in securing the legitimate aim. Only the minimum interference with the right which secures the legitimate aim will be permitted. The essence of each of the restrictions is that the interests of society as a whole override the interests of the individual. In such cases, the difficulty the Court will experience is in determining whether the interference goes beyond what is necessary in a democratic society".

43. At page 209, they say:

> "Establishing that the measure is necessary in a democratic society involves showing that the action taken is in response to a pressing social need, and that the interference with the rights protected is no greater than is necessary to address that pressing social need. The latter requirement is referred to as the test of proportionality. This test requires the court to balance the severity of the restriction placed on the individual against the importance of the public interest".

44. Again, assuming that the right the applicant seeks to assert is encompassed by the European Court of Human Rights, it seems to me that the question process referred to by the learned authors is engaged in authoritatively by the judgment of Denham J. in Desmond v Moriarty (already cited) dealing with the issue of privacy. Following on from those portions of her judgment, already cited above, the learned judge said at pp. 371-372, citing a decision of the European Court of Human Rights in *Bladet Tromso v Norway* [2000] 29 EHRR 125, that:

> "The Court considered whether interference with an applicant's right to freedom of expression was necessary in a democratic society. The test of "necessity in a democratic society" requires a court to determine whether the "interference" related to a "pressing social need "was proportionate and whether the reasons given by the national authorities to justify the need were sufficient and relevant. The national authorities have a margin of appreciation in determining this need in order to determine whether the interference was based on sufficient reasons which rendered it "necessary", regard must be had to the public interest aspect of the case".
>
> "However, in this case, the issue arises in a public inquiry established by the public representatives of the people into matters of urgent public importance. The terms of reference set out the matters of public interest in the State, the democracy. The inquiry is "necessary to preserve the purity and integrity of our public life without which a successful democracy is impossible": *Haughey v Moriarty* (1999) 3 Irish Reports 1 at page 57. In this situation, the right to freedom of expression of the Tribunal in the Tribunal is significant, and it would be a heavy burden to discharge".

45. Were I to have held that the decision to move into a public phase was governed by the European Convention of Human Rights as forming part of the domestic law of the State, I would have followed what I understand to be the logic of the decision of Denham J., and I would have concluded as follows:

> Assuming the applicant had a protected right, which was compromised -
>
> 1. That the compromise or interference was authorised by law, and in accordance with it.
>
> 2. That it was necessary in a democratic society.
>
> 3. It related to a pressing social need.
>
> 4. Was proportionate.

46. In all the circumstances, I would have refused the applicant the relief he sought.

47. In the circumstances, I do not consider it necessary that I should revisit or interfere with my findings already given herein with regard to Order 84 of the Rules of the Superior Courts in the matter of today and my decision on that point stands.

48. I find against the applicant under the heading of the issue of privacy.