Neutral Citation Number: [2009] IEHC 484

THE HIGH COURT

2007 52 CA

BETWEEN

PATRICK KELLY

PLAINTIFF

AND

THE NATIONAL UNIVERSITY OF IRELAND, ALSO KNOWN AS UNIVERSITY COLLEGE, DUBLIN

DEFENDANT

AND

THE DIRECTOR OF THE EQUALITY TRIBUNAL

NOTICE PARTY

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 5th day of May 2009

Background and Submissions

1. This ruling arises out of a motion brought by the Plaintiff, and grounded upon his affidavit sworn 25th December, 2008, which was before this Court on 17th February, 2009. This motion sought:

> *"1. An order setting aside the judgement delivered by Mr Justice McKechnie on July 31, 2008, on the ground that it was obtained by fraud.*
>
> *2. Alternatively, any order the effect of which is the appliance of the substantive rule that a person who procures a judgement to be given in his or her favour [sic.] by fraud ought not to be allowed to profit from the fraud.*
>
> *3. An order directing the Defendant to pay the Plaintiff's expenses relating to this application."*

2. The substantive proceedings between the plaintiff and the defendant arise out of a decision by U.C.D. communicated to Mr. Kelly on 15th March, 2002, wherein he was informed that he was not being offered a place, on first round offers, on a course leading to a Masters in Social Science (Social Worker) Mode A for the academic period 2002 – 2004. He challenged this on the ground of gender discrimination. His complaint was dismissed by a written decision given on behalf of the Notice Party on 2nd November, 2006. An appeal from this decision is pending in the Circuit Court.

3. As part of the appeal process, Mr. Kelly sought an Order from the Circuit Court under O. 57A, r. 6(6) of the Circuit Court Rules, whereby he wanted inspection of documents submitted by those who had been offered and took up a place on the course. It was opposed by U.C.D. on a number of grounds, including, *inter alia*, that the personal and sensitive information contained within them was given in confidence, and that such confidence should be protected by the courts. The application was refused by the President of the Circuit Court, Mr. Justice Deery, and by way of appeal, eventually came on for hearing before me.

4. In a ruling which I gave on 31st July, 2008 I upheld the confidentiality of the documents, and refused their disclosure to the Plaintiff. I did so on the ground that they contained information which was personal in nature, and which related to abuse or other sensitive personal events, experienced or witnessed by the successful applicants. I held that, even were the names removed from such documents, the same could still be used to identify the affected individuals. Evidence opposing Mr. Kelly's application was given on behalf of the Defendant, by a Suzanne Quin, who was cross examined on her affidavit. It is the Plaintiff's contention that Ms. Quin perjured herself in giving evidence as to the contents of the application forms over which confidentiality was claimed. In particular where she stated:

> *"the personal statements sought in the course of the aforementioned application process elicited in many cases the furnishing of private, confidential and intimate details about the personal circumstances and background of many of the prospective applicants to the course. In certain cases, such disclosures included personal revelations about the individuals' personal family and background experiences of such sensitive and personal issues as, for example, sexual abuse, suicide, incest, substance abuse and traumatic family breakdown. I say and believe that the said occurrences of a deeply personal and intimate nature in many cases amounted to a catalyst for said candidates to pursue a career in social work and hence to apply for a place on the course the subject of the within proceedings."* (Affidavit of Suzanne Quin sworn 28th February, 2007, para. 7)

5. The Plaintiff in his grounding affidavit draws attention to a memorandum contained in the Book of Appeal (at p. 877), that is the book of documents in the substantive appeal, and previously exhibited by Suzanne Quin. In that are listed examples of such personal and family matters as including bereavements, suicide of family or close friends, drug or alcohol addictions of family, friends or themselves, disabilities in their immediate family, and physical and sexual abuse.

6. It is the above two statements by Suzanne Quin, who is Head of the School of Applied Social Science at U.C.D., which Mr. Kelly examines in light of the cross-examination of that witness on 6th May, 2008. The crux of his argument, in support of which he quotes extracts from the cross-examination, is that Suzanne Quin admitted that she had probably

not read, nor was she acquainted in detail with, all of the applications made in 2002. She also admitted that the examples given by her in paragraph 7 of her affidavit and in the aforesaid memo were not necessarily from the 2002 documents, and was unable to definitively state that there were.

7. The Plaintiff, in submissions dated 5th December, 2008, argues that the case law makes it clear that a judgment which is obtained through fraud is "*a mere nullity*" (*P v. P* [2001] IESC 76, Murray J. quoting Murphy J. in *Tassan Din v. Banco Ambrosiano SPA* [1991] I.R. 569 at 580). Further, it is contended, from *Hip Foong Hong v. J. Neotia & Co*. [1918] 1 A.C. 888 at 894, that:

> *"A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail..."*

Therefore where a judgment is "*tainted*" by fraud the whole of judgment must fail.

8. The Plaintiff thus contends that the whole of the judgment of 31st July, 2008 must be nullified given the "*fraudulent*" representations of Ms. Quin in her affidavit, which were revealed through her cross-examination, and given that such representations appear to be material to the ultimate decision of the judgment.

9. The last few paragraphs of the submissions relate to Ms. Quin being an "agent" of the defendant. The Plaintiff draws attention to the fact that her affidavit contained the phrase "ma[de] on behalf of", and draws the conclusion that the deponent is thus an agent of the Defendant.

10. In response to these allegations of perjury, Ms. Quin has filed a Supplemental Affidavit dated 9th February, 2009, which states in no uncertain terms what her position is. She reiterates her objections to providing any application forms to the Plaintiff, since even if large amounts of the information contained in them was to be redacted, it could still be possible for the Plaintiff to ascertain whom the applicants therein were. Further she is concerned as to the use which Mr. Kelly may put these documents. She finally prays that the Court prevent Mr. Kelly from repeating the allegations of perjury against her, either in Court or elsewhere.

11. The Plaintiff replies to this Supplemental Affidavit by arguing that the Court must administer justice in public and that there is a constitutional protection on freedom of expression; so that the Court may not grant such an order to Suzanne Quin. Further, he states that the claim for such relief is not properly before the Court and should have been brought by separate Motion.

Perjury

General Principle of Privilege:
12. It is appropriate at this point to make some observations in relation to the nature of perjury in general. It is accepted jurisprudence that generally no civil action lies following the perjury of a witness on foot of evidence given in open court. In *Fagan v. Burgess* [1999] 3 I.R. 306, O'Higgins J., considering *Looney v. Bank of Ireland* [1996] 1 I.R. 157, felt that there was an absolute privilege with respect to statements in court or documents prepared for judicial consideration by witnesses. He notes that he was referred to Halsbury's *Laws of England* (4th Ed. Vol. 28), which states:

> *"97 Absolute Privilege. No action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognised by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. The privilege extends to documents properly used and regularly prepared for use in the proceedings."*

O'Higgins J. at p. 308 noted that:

> *"Counsel for the plaintiff accepts that the law in England is well settled but contends that the position is different in Ireland. He concedes that the Irish decision of Looney v. Bank of Ireland [1996] 1 I.R. 157, is against him but argues that different criteria should apply to perjury cases than for defamation cases because firstly, perjury is a graver matter than defamation and, secondly, perjury, unlike defamation is always intentional. Furthermore he argues that the public policy considerations for granting privilege do not stand up to scrutiny."*

13. He quoted from the Supreme Court judgment in *Looney v. Bank of Ireland* (Unreported, Supreme Court, 9th May, 1997) where, in an ex tempore judgment at p. 3, O'Flaherty J. held:

> *"However, there is at issue a far more fundamental point which is the need to give witnesses (and also indeed, the judge) in court, a privilege in respect of oral testimony and also with regard to affidavits and documents produced in the course of a hearing. Such persons, either witnesses or those swearing affidavits, are given an immunity from suit. Otherwise, no judge could go out on the bench and feel that he or she could render a judgment or say anything without risk of suit. Similarly, witnesses would be inhibited in the way they could give evidence. The price that has to be paid is that civil actions cannot be brought against witnesses even in a very blatant case, which of course this case is not, but even in a case of perjury - which would be such a case - the law says that an action cannot lie."*

Further in the same judgment O'Flaherty J. says, at pp. 3 and 4, that:-

> *"The necessity to give immunity in respect of oral testimony and documentary evidence in courts was so well established at the time the Constitution came into force that it was not thought necessary to provide expressly for it in the way that an absolute privilege is given in respect of utterances in the chamber to all members of Dáil Éireann and Seanad Éireann; cf. Article 15.12."*

O'Higgins J. thus concluded that:

"The law therefore is very well settled. Even if the reference to perjury in the judgment of O'Flaherty J. was obiter, it is still of persuasive authority. I do not accept that different principles should apply in respect of privilege where perjury is involved than where defamation is involved." ([1999] 3 I.R. 306 at 309).

14. Although certainly a side issue in this motion, it is worth noting that generally no action may lie for perjury before the Court. I respectfully concur with the statements of O'Higgins and O'Flaherty JJ. in this regard, and would note its purpose thereto.

Setting Aside for Fraud / Perjury

15. Nonetheless, it is accepted that where a judgment has been obtained through fraud this may be a ground for setting aside the judgment. It was stated, for example, in Meek v. Fleming [1961] 2 Q.B. 366 at 379, *per* Pearce LJ. that:

*"Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment as unfairly procured." (*Considered by the Privy Council in *Boodoosingh v. Ramanarace (Trinidad and Tobago)* [2005] UKPC 9, para. 19*)*

16. However Langley J. in the Court of Appeal, in Sphere *Drake Insurance plc and Alexander Howden Holdings plc v. The Orion Insurance Company plc* [1999] EWHC 286, stated that:

"There is … no doubt that the courts have been concerned to ensure that the circumstances in which claims to set aside judgments on [the perjury] ground … are defined and restricted to secure the obvious public policy interest in the finality and sanctity of judgments between the same parties…"

17. Referring to section 1(1) of the Perjury Act 1911 (not enacted in Ireland), he stated:

"If any person lawfully sworn as a witness … in a judicial proceeding wilfully makes a statement material in that proceedings, which he knows to be false or does not believe to be true, he shall be guilty of perjury.

The standard of proof is the civil standard, the balance of probabilities. In Re H [1996] AC 563 Lord Nicholls, at pages 586-7, said that the more serious the allegation to be proved the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. He also referred to 'the instinctive feeling' that 'a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.' Perjury is on any view a serious allegation to make… [However] I accept the way [counsel for the plaintiff] put the matter in [his closing] … 'the courts should find perjury if, in all the circumstances of the case, it remains a distinctly more probable explanation than any other."

He continued that:

"Before turning to the authorities, I would make the following comments:

(1) As I have said, the acknowledged limitations on this jurisdiction presuppose that <u>not all fraud or perjury leads to the setting aside of a judgment</u>.

It follows that <u>the juridical basis for the jurisdiction cannot be … that any judgment obtained by fraud is 'vitiated', or 'fraud unravels everything'</u>

(2) Knowledge is a familiar concept both with individuals and corporations. What is 'unjust' must depend on the circumstances of each case and would potentially extend the category of cases in which collateral attacks on judgments could be made and so prejudice the established public policy interest in the finality of judgments.

(3) There is a recognisable justice and policy in depriving a party the fruits of a victory which he has knowingly obtained dishonestly and which can readily be seen to justify an exemption to the finality principle.

There is not the same ready justification for an exception in the case of perjury for which the winning party has no moral responsibility, perhaps particularly so in a jurisdiction to which no limitation period would apply." (Emphasis added)

18. Langley J. thus ultimately finds that:

"[W]hat is required in law on their part for [the plaintiff] to succeed would be actual knowledge that [the witness'] evidence was perjured. It would not suffice that [the witness] committed perjury but that was unknown to those responsible [for the defendant] for conducting the claim. <u>Nor would it suffice … that it was only believed that [the witness'] evidence was wrong or unreliable</u>… The principle is that a judgment is only to be set aside in circumstances where the successful party has obtained it by knowingly procuring or relying on perjured evidence…" (Emphasis added)

19. Further he held that any alleged perjury must be material to the impugned decision, stating that:

"[T]he test in law which I must apply is that even if [the witness] did commit the alleged perjury it would not entitle [the plaintiff] to an order setting aside the judgment in the First Action unless evidence was such that it entirely changed the aspect of the case."

20. Similar views were expressed in the Privy Council decision in *Boodoosingh v. Remanarace* [2005] UKPC 9, where Lord Eaton-under-Heywood stated at para. 26:

> *"Perjury, assuming it to have been committed, is, of course, a serious matter and always unacceptable, irrespective of the particular circumstances in which it is committed and the particular issue to which it goes. No court will ever condone it. But that is by no means to say that if any part of a judgment is procured by perjury the whole judgment will necessarily be set aside. Plainly that would be a wrong approach."* (Emphasis added)

21. Therefore, having reviewed the relevant case law, in my view, a court may set aside a judgment where it is proven on the balance of probabilities, that such judgment was obtained through the fraudulent testimony of one or more witnesses, that such perjury was known of or instigated by the successful party (in this case the Defendant), and that such testimony was material to the decision. I thus explicitly reject the Plaintiff's contention in this motion that if any perjury is found it will "*taint*" the decision and it will automatically follow that the judgment must be set aside.

Agency

22. As stated above (see para. 9 *supra*.), the Plaintiff contends that Suzanne Quin is an agent of the Defendant. He concludes this from the averment in her affidavit which she swore on behalf of the Defendant. The reason for such a contention would seem to be that if she is such an agent, then any act of fraud or perjury by her could be directly attributed to the Defendant. Given my findings below it is ultimately unnecessary to rule whether Ms. Quin was in fact an agent of the Defendant in this case. However, I would make a brief comment in relation to the Plaintiff's contentions in this regard.

23. The phrase "on behalf of the defendant" is not a declaration of agency, but is in fact a generally accepted form of compliance with the Superior Court Rules; in particular Order 40, rule 11 RSC*: "There shall be on every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the Court shall otherwise direct."* Thus the phrase "on behalf of" in an affidavit does not connote agency, but is merely a statement of on whose behalf the affidavit was filed. This on its own would not be enough to render the deponent an agent of the Defendant.

24. Nonetheless, there may be factual circumstances which could support a finding of agency as against a deponent. It is not necessary however to decide that issue in this case, suffice to say that given Ms. Quin's position within UCD, that situation, in the context of this case, may very well be sufficient to impute to the college her statements and averments. She is therefore not an independent witness in that sense. With regard to an application to set aside a ruling on the basis of fraud I accept that if an agent gave fraudulent evidence this would be deemed to have issued from his or her principal. However, more important in an application of this nature would be the issue of knowledge, rather than agency. As stated by Langley J. in *Sphere Drake Insurance plc*, the requirement is that "*the successful party has obtained [the ruling] by knowingly procuring or relying on perjured evidence*". Thus, was the evidence in this case perjured by Ms. Quin, there would be strong grounds for imputing knowledge of that to the Defendant, which in turn would entitle the Plaintiff to have the ruling set aside. Indeed, Ms. Quin accepted in cross-examination that she felt she was an "agent" of the Defendant, although such an admission would not be conclusive as to whether in law she was in fact such; although it might go towards showing the Defendant's level of knowledge. However, I reiterate that I have made no finding in this regard.

25. Comments were also made by the Plaintiff in Court that there would seem to be some similarity between the writing style of Counsel for the Defendant and that evident from the affidavit of Suzanne Quin. Even if this is so, no adverse implication can be taken from it. It is quite usual for Counsel, or solicitors, to perform the task of drafting an affidavit, and provided that the deponent is aware of, appreciates and approves of its contents, there is nothing improper in such a practice. It is certainly no interference with, or slur on, the deponents evidence, nor does it undermine her credibility.

Conclusion

26. Before concluding I would just make a few comments of a general nature about applications made in this case. Although it is the Plaintiff's right to bring whatever motions he might see fit, in my opinion applications brought merely as collateral challenges upon matters on which the Court has already ruled, serve only to frustrate and protract proceedings. The Plaintiff, on a regular basis, has made multiple submissions which relate to many matters already fully heard and ruled upon by this Court, as such these submissions seek to undermine the principle of finality in respect of court rulings. Without the parties' acceptance of matters ruled upon, especially interlocutory matters, a case is unlikely to ever meaningfully proceed. Although where truly aggrieved a matter may be appealed, the same issues should not be brought before the same judge on multiple occasions. To ask a judge to overturn his own prior decision, where to do so would be an effective admission by him of a fundamental error either as to evidence or law, is wholly improper. Such a procedure, apart from being irregular, is most unhelpful.

27. I would also note that generally submissions are limited to one *per* party, *per* application. Attention should be drawn to the Practice Direction of Murray C.J. dated 19th December, 2008, which states at section 8(a) that:

> *"The written submissions should summarise succinctly the arguments of the parties. In the majority of cases submissions significantly less than 25 pages should suffice but such submissions should not in any event exceed 25 pages unless, for exceptional reasons, leave of the Court is obtained for longer submissions. Leave of the Court may be sought, for specified exceptional reasons, ex parte at the Thursday mention list (see paragraph 10 below) or other convenient occasion."*

28. This is a useful statement of what should be contained in legal submissions. Although it relates to the length of the submissions, it is clear that multiple submissions should also be discouraged, especially where their multiplicity causes them to become voluminous in nature. I would comment that it would have been better for the Court to receive one succinct submission, rather than receive the same arguments over the course of several submissions. Apart from the obvious resultant duplication within these submissions, such piecemeal submission fails to assist the Court in narrowing the legal issues between the parties. Further, no submissions should be tendered to the Court, unless otherwise directed, following the hearing of an action or motion, but before the Court has delivered its judgment. The Court cannot take such submissions into account as to do so would breach the fundamental principle of *audi alteram partem*. It would also undermine the purpose of the hearing, since it is at that time, and not subsequent to it, that all of a party's arguments should be aired to the Court in oral submissions. Nonetheless, in the current case I have read all of the submissions submitted to me, and merely pass comment so as facilitate the smoother operation of the litigation in the future; hopefully saving time for both the parties and the Court.

29. Finally, the pouring over of the *minutiae* of transcripts is not a useful exercise. Inevitably there will be some inaccuracies, especially where a witness is cross-examined for some period of time. Such inaccuracies, should they be identified, in no way amount to fraud or perjury, and any application based on such inevitable inconsistencies is bound to fail. As stated by Langley J. in *Sphere Drake Insurance plc: "it [would not] suffice … that [the witness'] evidence was wrong or unreliable…"* for it to amount to perjury. Nonetheless, as stated, this does not prejudice my findings whatsoever in the motion at hand.

30. In relation to the allegation of perjury, the statements by Suzanne Quin, originally on affidavit, which the Plaintiff contends were untruthful, were fully opened before the Court. This Court had the opportunity to hear and observe Ms. Quin being cross-examined on this very point by the Plaintiff. There is for me, no evidence that the court was being deliberately misled by the Defendant. The Court has had the opportunity, as stated, of considering the situation together with all of the statements by Ms. Quin. The Plaintiff has submitted numerous submissions outlining where he feels the contradictions contained in the evidence lie, however none of these amount to perjury. The onus on the Plaintiff, although measured on the balance of probability, is nevertheless of a rigorous standard. Given both the implicit finality of the Court's ruling and the serious nature of the allegation, there would have to be significant evidence of perjury before such a finding could be made. I thus conclude, having had regard to the above, that there is no evidence of perjury in this case, and Ms. Quin's evidence is beyond reproach in this regard. I am satisfied that at all times she acted in good faith, and with the intention of sincerely assisting the Court.

31. With regards to the allegations of agency I make no finding, except to say that even were I to hold that Ms. Quin was an agent of the Defendant, or that the Defendant had full knowledge of the circumstances of her evidence, this would have no bearing on my findings as I have not found any evidence of perjury.

32. In relation to the request by Ms. Quin to restrain the Plaintiff from further publication of accusations of perjury against her, I find it unnecessary to make any order on this point, given my ruling above and the fact that there was no motion for such, properly before me. However, I note, albeit *obiter*, that given the above finding that she was not guilty of perjury this should be sufficient to clear her name. Any further allegations of perjury published by anyone, which arise out of the same above set of facts upon which I have ruled, would undoubtedly amount to defamation.

33. I thus dismiss the Plaintiff's application.