THE HIGH COURT

[2015 No. 63 M.]

IN THE MATTER OF THE JUDICIAL SEPARATION

AND FAMILY LAW REFORM ACT, 1989

AND

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

D.O.R.

APPLICANT

AND

B.O.R.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 28th June, 2017

Background to the case

1. The respondent has issued a notice of motion seeking relief pursuant to s. 40 (8) of the Civil Liability and Courts Act, 2004 granting liberty to the respondent to disclose settlement terms reached between the parties on 26th day of January 2017 or such appropriate parts thereof to his legal advisors in proceedings being brought by the respondent entitled *B.O.R. v. D.O.R., D.O.R., P.O.R and Ulster Bank Limited DAC* record no. 2016/1045 1P.

2. Following case management concerning three sets of proceedings including divorce proceedings brought by D.O.R. against B.O.R under record no. 2015/63M, as well equity proceedings under record no. 2016/1045 1P presently at hearing before this court and adjourned for further hearing to October 2017 and a third set of proceedings involving *Ulster Bank Limited v. B.O.R. & Ano*. The direction of this court was the three sets of proceedings were to be dealt with in three separate modules.

3. The divorce proceedings settled after a number of days at hearing subject to ruling by this court on 5th April 2017 when the matter was ruled.

4. The respondent in the divorce proceedings and moving party in relation to the motion herein specifically sought, to the settlement, the inclusion of paras. 7 and 8 in the terms of settlement (hereinafter referred to as "the relevant terms"). These terms are:

> Para. 6: "the parties agree that the settlement herein is in full and final settlement of all claims between them pursuant to Family Law (Divorce) Act, 1996 and any statutory amendments, the Constitution and other related statutes, save that in the event that the respondent obtains relief, net of costs, in either of the two sets of proceedings relating to F.H., N in the County of K, the said proceedings bearing record nos. 2015/228CA and 2012/N09106P, the applicant herein reserves her right to bring a claim against the respondent in respect of such a relief, net of costs, out of the said two sets of proceedings".
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> Para. 7: "the applicant covenants that she has procured from the trustees of the D.O.R. discretionary trust (DORDT) the agreement that they and she will not take any action to interfere with the respondents, his servants or agents in his sole occupation of the premises at F.H., Co. K, pending the determination of the two sets of proceedings referred to at para. 6 above."
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> Para 8: "the Parties agree that the terms set out at paras. 6 and 7 above are expressly subject to a confidentiality clause over and above the principles provided in the in camera rule, to the extent that the said terms of the said paras. shall not be referred to or be made known at any stage of the two sets of proceedings relating to F.H. in the county of K as referred to above.

5. This court notes that the applicant in the aforesaid divorce proceedings and respondent to this notice of motion, is no longer a defendant in the equity proceedings under record no. 2016/1045 1P. It is also noted that an application to link the within proceedings with the proceedings entitled *Ulster Bank and B.O.R. and Mountview Construction UK Limited* record no. 2012/9106P was rejected by the Court of Appeal.

6. As appears from the pleadings, a number of exhibits were included in the affidavit of the respondent and moving party in this notice of motion which were served by the respondent on the applicant's solicitor under cover of letter of 30th March 2017. Reference is made to exhibit "BOR1" being a letter from Giles J. Kennedy & Company Solicitors, of the 31st January 2017, served on the applicant's solicitors at that time. This, it is pointed out, was the first occasion on which the applicant or her representatives had any knowledge or notice of the said letter. It is submitted that the contents of this letter are of pivotal importance in disclosing the true intent of this application and in this regard reference is made to the second para. thereof:

> "however our client now advises us that there are two additional clauses in the agreement which specifically refer to the equity and bank proceedings. As we are the solicitors for B.O.R. in respect of these proceedings it is in our view appropriate and indeed necessary for us to be aware of the terms of those clauses. While we accepted that the agreement itself is subject to the *in camera* rule we can see no reason as to why a redacted copy of the agreement cannot be provided. In fact we understand from the discussions with our client that there maybe a contractual bar to O'Hanlon J. proceeding to hearing the equity proceedings and again it would be very important that we are aware of the contents of this clause."

7. The respondent further indicated under cover of letter of 3rd April 2017 that; "unfortunately the incorrect correspondence was exhibited for our clients' affidavit sworn on the 24th March 2017 and we now enclose herewith for your attention the correct exhibit BOR 1 and BOR 3".

It is pointed out on behalf of the applicant that the letter of 31st January 2017 is an open letter and it was indicated to the court on 12th May 2017 (albeit incorrectly) that the applicant had knowledge of it prior to the said letter being included in the affidavit as originally served. The exhibits are unchanged save for exhibit "BOR 1" which is now a letter from Giles J. Kennedy & Company, Solicitors, of the 15th March 2017. It is submitted that the para. of this letter which states: "G J K & Co. and Counsel must know what material terms in the settlement agreement affect BOR's case without BOR infringing the *in camera* rule". It is submitted on behalf of the applicant therefore that the letter has exhibit "BOR 2" is also of significance and in particular the third and fifth paras. thereof.

8. Counsel on behalf of the moving party in this notice of motion (the respondent in the divorce proceedings) points out that the test which should be applied should be that the moving party be entitled to have his solicitors consider the non personal parts of the agreement so that full and proper advice can be obtained by her client and that the advice would be limited and that it could otherwise prejudice him.

9. By open letter dated 23rd May 2017 addressed to Gore & Grimes Solicitors, acting on behalf of D.O.R, and it is noted that this matter concerns the family law matter from Hanlon & Co. who represent the respondent to the action and moving party B.O.R. in relation to this notice of motion, gives notice that in relation to the said motion before this court on 24th May 2017 pursuant to "such further or other relief as this honourable court shall seem proper" as provided for therein, they state an intention to rely on the common law if necessary, in addition to s. 40 (8) (of the Civil Liability and Courts Act 2004 and to please note that "such further or other relief" should include the common law).

Submissions on behalf of moving party

10. Essentially what is sought is an order allowing the moving party to discuss para. 6, 7 and 8 of the settlement agreement with the separate solicitors he has instructed in the equity and banking suits. It is argued that such an order would not impact the family, child or the family matter (except insofar as this would enable him to inform his solicitors that his wife maybe entitled to bring a claim against him in the event that damages are awarded).

11. The moving party argues that any potential liability to the applicant wife is a valid issue upon which he requires legal advice, in relation to para. 6 of the terms of settlement.

12. In relation to para. 7, this sets out the moving party's entitlement to sole occupation of the property pending the determination of the equity and banking suits. While acknowledging that this does not necessarily advance his case, the moving party asserts that this is information which he should be able to discuss with his solicitors. The moving party further argues that the existence of a confidentiality clause (as per para. 8) is something that he should be entitled to discuss with his solicitors.

13. Counsel on behalf of the moving party makes a distinction between confidentiality and the *in camera* rule. He argues that insofar as the settlement is "confidential to him" he is entitled to discuss the agreement with his solicitors and obtain advice. He argues that to do so would not be in breach of the confidentiality agreement. Therefore the *in camera* rule constitutes the only barrier to his discussing paras. 6, 7 and 8 with his solicitors. In *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399, Barr J. laid down specific principles to inform consideration of whether to lift the *in camera* rule. He held that statutory requirements that proceedings are held *in camera* do not imply "an absolute embargo" on the disclosure of evidence produced in the course of *in camera* proceedings.

Accordingly, the court in proceedings held *in camera* may allow for the dissemination of information "where the judge believes it is the interest of justice to do so". In this regard Barr J. cited the decision of Budd J. in *P.S.S. v. Independent Newspapers (Ireland) Limited* (Unreported, High Court, Budd J., 22nd May 1995).

14. A judge may determine that "a crucial public interest … takes precedence over the interest of the protected person in non-disclosure of the information in question". In such circumstances "the paramount consideration is to do justice" (in this regard Barr J. cited in *re R. Limited* [1989] I.R. 126). In summary, Counsel argued that consideration must be given to the interest of the parties who were intended to be protected by the *in camera* rule. Secondly the court must consider the purpose to which the *in camera* documentation will be put and whether any restrictions/protections need to be put in place if the *in camera* rule is to be lifted. Counsel noted that the "predominant feature is that the interest of justice must be protected".

15. The statutory position under s. 40 (8) of the Civil Liability and Courts Act 2004 affords the court "discretion to order disclosure of documents, information or evidence connected with or arising in the course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party or person affected by the proceedings". The moving party argues that the order sought is necessary for him, as an essential part of access to justice, to avail of proper and comprehensive legal advice. It is argued that in the absence of such order, his legitimate interest in obtaining legal advice will be undermined.

16. Reference is made to *J.D. v. S.D.* [2014] IEHC 648 where Abbott J. clarified that the common law position runs in parallel with s. 40 (8) of the Civil Liability Act. The official assignee in that case brought an application under s. 40 (8) to have orders made concerning the United States of America Courts and a NAMA official also sought sight of certain documents in that application.. Accordingly, the court considered the extent to which third parties are entitled to access documentation. Having set out the purpose of the *in camera* rule as covering rights of privacy issues concerning minors, assets, and the necessity for a confidential atmosphere to facilitate resolution of such disputes, Abbott J. found that a legitimate interest occurred and that there was clearly a necessity to release certain documents. While Abbott J. granted the request and said that there was an entitlement to access certain documents where there were legitimate interests, he also relied upon the common law case law.

17. Reference was made extensively to the decision of Budd J. in *P.S.S. v. Independent Newspapers (Ireland) Limited* (Unreported, High Court, Budd J., 22nd May 1995) stressing the court's discretion to disseminate information on such terms as the court sees fit and when it is in the interest of justice to do so. This was cited as an example of the very limited lifting of the *in camera* rule where certain arrangements could be put in place. It was stressed that the public interest does not arise in the instant case that there is no such clash in so far as the matter before this court concerns property and the entitlement to make a claim.

18. Further reference was made to *M.P. v. A.P.* [1996] 1 IR 144 which concerned an application by Mr. P. to advance a complaint he had made to the Psychological Society of Ireland. Difficulty arose in relation to s. 34 of the Judicial Separation and Law Reform Act, 1989 which provides that proceedings under that Act "shall be heard otherwise than in public." Laffoy J. at p. 154 determined that in making the aforementioned complaint, the defendant had divulged to the public confidential matters arising out of proceedings taken under that Act and, accordingly, contravened that section. Laffoy J. went on to state that "the court has an inherent jurisdiction to take whatever steps are necessary on its own motion to ensure that s. 34 of the Act of 1989 is complied with." It is noted, however, that Barr J. in *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399 distinguished the circumstances of *M.P. v A.P.*

in so far as that case related to an unauthorised disclosure of information emanating from proceedings protected by the *in camera* rule. Indeed, the principles formulated by Barr J. in *Eastern Health Board* were described by McGuinness J. in *Eastern Health Board v. E (No. 2)* [1999] IEHC 251 as "both impressive and convincing." Furthermore, in *Miggin [a minor]v. HSE & Anor* [2010] IEHC 169, Hanna J. expressly adopted the rationale of Barr J. in *Eastern Health Board*, holding that the discovery of a transcript of proceedings was warranted in the interests of justice. Hanna J. noted that the "court can exercise its inherent jurisdiction to police such discovery." In relation to the constitutional background to the in camera rule, reference was made to *D.X. v. Judge Buttimer* [2012] IEHC 175 where Hogan J. characterised Article 34.1 as a reflection of "the Constitution's preference for the open administration of justice." Noting that "derogations from that rule must truly be confined to "special and limited cases prescribed by law" in the relatively narrow sense of that term", the court interpreted 34 of the Judicial Separation and Law Reform Act, 1989 as "reflecting a desire by the Oireachtas to protect other constitutional values in the context of family law proceedings such as the right to privacy (Article 40.3.1), the authority of the family (Article 41) and the protection of the constitutional rights of children (Article 42.5)."

Submissions made on behalf of the respondent to the notice of motion (applicant in the main action)

19. While contending that there is no dispute between the parties as to the law, the applicant argues that the respondent and moving party does not come within the relevant legal principles. It is stressed that the respondent insisted himself on the insertion of a confidentiality clause and that para. 7 of the terms of settlement signed between the parties and ruled by this court refers to trustees where the applicant covenanted that she had procured from the trustees of the D.O.R. discretionary trust, the agreement that they and she would not take any action to interfere with the respondents, his servants or agents, in respect of his sole occupation of the premises at issue pending the determination of the two sets of proceedings referred to para. 6 of the said agreement. It is pointed out that the trustees who are parties not bound by the terms of the agreement as between the parties in the divorce proceedings were told of the particular terms. It is argued and stressed that the applicant herein and respondent to this motion is no longer a party to proceedings under record no. 2016/1045 1P. It is further submitted that no reasonable, appropriate or relevant grounds have been set out by the respondent and moving party such as would justify the granting to the respondent of the reliefs sought herein. It is argued that no "without prejudice" designation can arise in relation to para. 8 of the terms of settlement which, it is argued, was inserted at the express request and insistence of the respondent in circumstances in which settlement has been achieved and therefore the circumstances of the settlement negotiations pertaining to the said term may be disclosed. It is noted that the privilege attaching to "without prejudice" correspondence, the limitations thereof and the rationale behind the privilege were discussed in *Brown v. Rice & Ors.* [2007] EWHC 625 (Ch). Here Isaacs Q.C. outlined that: "a trio of cases , namely *Rush and Tompkins Ltd v. Greater London Council* [1989] AC 1280, *Cutts v. Head* [1984] Ch 290 and *Unilever Plc v. the Proctor and Gamble Co.* [2000] 1 WLR 2436, establishes that there are two justifications for the "without prejudice" rule. The first is the underlying public policy that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that what transpires in the course of the settlement negotiations may be used against them in the litigation. The second lies in the express or implied agreement of the parties themselves that what transpires in their negotiations should not be admissible in evidence in the litigation if a settlement does not result." Reference was made to *Muller v. Linsley & Mortimore* [1996] PNLR 74 where, after considering *Cutts v. Head and Rush and Tompkins*, Hoffmann L.J. expressed the view at 79-80 that the without prejudice rule to which he also refers as a "privilege": "operates as an exception to the general rule under admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted. Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which asserts or admits but simply in the fact that it was made. Thus when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute … Indeed, I think that the only case in which the rule has been held to preclude the use of without prejudice communications, otherwise than as admissions, is in the rule that an offer may not be used on the question of costs; a rule which … has been held to rest purely upon convention and not upon public policy …"

20. With specific reference to *Unilever Plc v. The Proctor and Gamble Company* [2000] 1 WLR 2436 Isaacs Q.C. went on to consider situations where the "without prejudice" rule does not prevent the admission into evidence of what one or both of the parties to litigation said or wrote. He noted that "two are of particular relevance in the present case. The first is when the issue is whether without prejudice communications have resulted in a concluded settlement agreement. This is for the understandable reason that without considering the communications in question, it would be impossible to decide whether there was concluded settlement agreement or not. The authority referred to here is *Tomlin v. Standard Telephones and Cables Limited* [1969] 1 WLR 1378, 1382G per Danckwerts L.J. and 1386A *per* Sir Gordon Willmer. The second is where, even if there is no concluded settlement, a clear statement made by one party to the negotiations and on which the other party is intended to and does, in fact, act may give rise to an estoppel, see *Hodgkinson and Corby v. Wards Mobility Services* [1997] FSR 178, 191 per Neuberger J. On Hoffman L.J's analysis in *Muller*, the public policy aspect of the without prejudice rule does not bite on either situation since the communications were not adduced in order to evidence and admission made by a party to a without prejudice communication, but to ascertain whether there was or must be taken to be a concluded settlement".

21. Great emphasis is placed by the applicant counsel in responding to the notice of motion to the fact that the term in question was inserted at the instigation and insistence of the respondent and that the letters of 31st January 2017, and of the 15th March 2017, are extremely concerning. It is argued that the moving party sought to include the provisions in the terms of settlement with a view to bringing an application which would substantially interfere with and further delay the conclusion of this three module litigation and the case management directions previously clearly determined by this honourable court and confirmed by the Court of Appeal in circumstances in which the respondent unsuccessfully appealed the order of this honourable court of November 2016.

22. The applicant defending this motion sets out that in order to obtain relief in applying s. 40 (8) of the Civil Liability and Court Act 2004 the moving party must demonstrate that (a) there are legitimate interests of the moving party affected and (b) disclosure is required to protect such interests. It is submitted on that basis that there is no evidence before this court in the present case of any such legitimate interest, nor is there any evidence that disclosure is necessary to protect same. This court is asked to consider pages 488 to 489 of the judgment of Abbott J. [2014] 3 I.R. 483 where he sets out the rationale behind the *in camera* rule. It is argued that the court then proceeded to set out the basis upon which the *in camera* rule might be lifted based on a balancing of interest test. The court in applying this test determined that it required regard to be had to the public interests "insofar as public interest may have a statutory basis, it arises in abundance through the complex statutory framework of NAMA, which is charged with its duties in the interests of the tax payers of Ireland. This strong public interest also arises through the nexus between NAMA and the United States Bankruptcy Court through its act of participation in the United States bankruptcy proceedings." It was determined that in applying the test in that case that the applicant had been "guilty of several intentional or unintentional concealments of assets, either through simple denial in the examination process of s. 341 of the United States Bankruptcy, or by inappropriate invocation of the in camera rule in this and in another non-European Union jurisdiction and by failing to properly define the status of wife no. 2 and her

relationship to the various assets and transactions queried in the interrogation process." It is argued in the instant case that there is no public interest which requires such lifting of the *in camera* rule and that this application constitutes an attempt to further delay the ultimate conclusion of the remaining modular hearings determined by this court in the context of case management. The only ground advanced by the respondent and moving party for lifting the *in camera* rule herein is to enable him to obtain legal advice. He is fully legally represented in the family law proceedings and there is absolutely no curtailment upon or impediment to him seeking legal advice in respect of the terms of his family settlement from the lawyers he instructed to represent him in those proceedings.

23. While Abbott J. in *J.D. v. S.D.* supported the continuation of parallel statutory and common law jurisdictions in relation to the *in camera* rule, it is argued in this case, however, that such common law jurisdiction is not invoked in the notice of motion herein which is very specific in its terms. It is further submitted that it is most difficult to rationalise why the legislature would have made specific statutory provision for the circumstances in which the *in camera* rule should be lifted to allow disclosure if the pre-existing common law jurisdiction in this regard was to continue. The common law jurisdiction was derived from the implied or inherent jurisdiction of the courts (the former having a somewhat wider jurisdiction application) and in this regard Abbott J. took the view that "the power of the courts to lift the in camera rule referred to as a common law power is, in fact, an implied power arising in the normal administration of court business in the interest of justice".

24. Reference is made to the dictum of Clarke J. in *Lopes v. The Minister for Justice, Equality and Law Reform* [2014] IESC 21 where he set out that "an inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law for to do so would set procedural law at nought." It is stressed that many of the cases concerning the common law scope of discretion involved what Abbott J. referred to in *J.D. v. S.D.* as an "imperative public interest". Barr J. referred to such imperative public interest and gave examples such as the prosecution of crime or the protection of vulnerable children in *Eastern Heath Board v. Fitness to Practice Committee* [1998] 3 I.R. 399 at p. 249 where he discussed the applicable test for the common law power to lift the *in camera* restrictions already referred to herein.

25. Maurice J. refused to exercise the discretion in the context of private law in *Tesco (Ireland) Ltd v. McGrath* (Unreported, High Court, 14th June 1999) which was a case involving a vendor and purchaser summons between two private parties, one of whom had been a party to the *in camera* proceedings. Maurice J. concluded "it is therefore clear that circumstances may arise in which the interests of justice or a crucial public interest may justify the publication of matters arising at an *in camera* hearing. Barr J. instances the prosecution of a witness in such proceedings for perjury. However, I am unable to identify anything in the present case which would indicate to me that it is in the interests of justice or that it is crucial in the public interest that the matrimonial proceedings in this case be made public".

26. Reference was made to *R.M v. D.M.* (practice: in camera) [2000] 3 I.R. 373 where Murphy J. held that the *in camera* restrictions could not be lifted in circumstances where he distinguished the public importance of the purpose for which the lifting of the *in camera* rule was required from that involved in the *Eastern Health Board* case and he refused to permit same in circumstances in which the applicant was seeking to adduce documents in evidence before a professional Tribunal which emanated from previous family law proceedings.

Conclusion

27. This court has carefully listened to the arguments and considered the authorities and written and oral submissions made. The court notes that there is no dispute between the parties as to the relevant legal principles except in so far as the respondent argues that an order to lift the *in camera* rule is not dependent on the existence of a crucial public interest. Ultimately, however, it does not appear to this court to be in the interest of justice nor does any crucial public interest arise nor has it been shown to arise in this case, which would lead the court to grant the relief sought. In exercising a balancing of the interest test this court refuses the reliefs sought herein. The paramountcy test of doing justice as determined by Barr J. in *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399 simply must be applied to this case, with particular reference to the ratio that while a judge may determine that "a crucial public interest… takes precedence over the interest of the protected person in non-disclosure of the information in question", in such circumstances "the paramount consideration is to do justice."

28. This court considers it to be a significant factor that the respondent to this notice of motion (the applicant in the divorce proceedings) is not a party to the equity proceedings. This position has been confirmed by the Court of Appeal on appeal from this court.

29. The court is particularly conscious of the fact that the confidentiality clause in question was included in the settlement agreement at the behest of the respondent in the divorce proceedings. Thus, while it is argued that the lifting of the in camera rule is necessary so that the respondent may obtain legal advice, it is noted that the respondent already has the benefit of legal advice and that it was his own decision to instruct a separate legal team in relation to the equity proceedings. Indeed, counsel for the applicant has noted that the recognition of such a confidentiality clause as a legitimate basis for lifting the *in camera* rule would effectively render the rule redundant in so far as any additional legal advisers would require access to information emanating from *in camera* proceedings.

30. For the reasons set out above, this court refuses the reliefs sought in the notice of motion herein.