

**THE HIGH COURT**

**[2014/48JR]**

**BETWEEN**

**MICHAEL LOWRY**

**APPLICANT**

**AND**

**MR. JUSTICE MICHAEL MORIARTY (THE SOLE MEMBER OF THE TRIBUNAL OF ENQUIRY INTO PAYMENTS TO MESSRS. CHARLES HAUGHEY AND MICHAEL LOWRY)**

**RESPONDENT**

**JUDGMENT of Ms. Justice Costello delivered the 17th day of December 2014**

1. The applicant seeks judicial review of a decision by the respondent dated 31st October, 2013, to grant to the applicant one third of the costs of representation before the respondent in respect of the Tribunal of Enquiry into payments to Messrs Charles Haughey and Michael Lowry ("The tribunal"). The tribunal was established in 1997 and published its final report in March, 2011.

2. In the Amended Statement of Grounds the applicant pleads that in appearing before the tribunal and in engaging adequate representation in relation to the tribunals of investigation the applicant incurred extremely significant costs in relation to his legal representation and the provision of ancillary financial advices and assistance in responding to the tribunal's investigations. At para. 24 it is pleaded:-

*"Those costs have not yet been fully ascertained but it is expected that they will run into many millions of euro having regard in particular to the length of the Tribunal, the considerable assistance afforded by the Applicant to the Tribunal, the complexity of the matters investigated, the centrality of the Applicant to those investigations and his corresponding necessity to be fully involved in all the aspects of the Tribunal's work concerning those Terms of Reference that identified him".*

The next three paragraphs deal with the likely extent of his legal costs. At para. 28 he continues:-

*"A further sense of the extent of the burden imposed upon the Applicant arising from the Tribunal's investigation of his affairs and his consequential representation costs can be gleaned from the documentation prepared by Mr. O'Connor, the applicant's accountant at the relevant time.*

*29) In support of claims for fees from the Applicant Mr Denis O'Connor has submitted summaries which he maintains correspond to work undertaken at the request of the Tribunal and/or in response to necessary representational work. These are located at tab 10. As there are legal proceedings in being in relation to Mr Denis O'Connor's claims for fees the Applicant reserves his position. Nonetheless, it can be readily seen that these summaries afford some understanding of the enormous extent of the positive cooperation undertaken by the Applicant in response to the Tribunal's many requests and the very considerable representation demands occasioned by the Tribunal's investigation.*

*30) Specifically, Mr O'Connor is at present suing the Applicant for non-payment of fees in relation to this role on behalf of the Applicant before the Tribunal and Judgment has been entered in the amount of €625,000 by a decision of the Master of the High Court in or about 08 November 2013 in proceedings entitled BBT Accountants v. Michael Lowry Record No. 2013/1777S. The balance of that firm's claim for fees being €1,090,000 has been remitted to plenary hearing. A copy of the Order of 08 November 2013 is located at tab 11.*

3. The applicant sought various categories of discovery from the respondent and issued a notice of motion seeking orders for discovery from the High Court dated 23rd October, 2014. The matter was heard before McDermott J. and decision on the motion is awaited. The respondent did not seek discovery from the applicant.

4. The respondent served a notice to produce dated 22nd October, 2014, in the following terms:-

*"TAKE NOTICE that the Respondent requires the Applicant to produce for inspection within seven days from the date hereof the following documents which are referred to in the Amended Statement of Grounds and Affidavits delivered on behalf of the Applicant and which the Applicant has hitherto refused to produce: a complete set of the pleadings and affidavits exchanged in the proceedings entitled BBT Accountants v. Michael Lowry (Record Number 2013/1777S)".*

5. The applicant objects that the notice to produce is fundamentally misconceived and declined to comply with the notice. Accordingly, the respondent issued a notice of motion dated 13th November, 2014, seeking an order pursuant to O.31, r.18 of the Rules of the Superior Courts or the inherent jurisdiction of the court directing the applicant to produce for inspection the documents he referred to in the notice to produce.

6. A notice to produce is served pursuant to O. 31, r.15. This provides:-

*"Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; and any party not complying with such notice shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice: in which case the court may allow the same to be put in evidence on such terms as to*

*costs and otherwise as the Court shall think fit."*

7. A precondition to the operation of rule 15 is that there be reference to a document in either pleadings, an affidavit or a list of documents. If there is such a reference, then the entitlement under rule 15 is to call for the production of the document so that it may be inspected and to permit copies to be taken of the document. The sanction for failure to comply with a notice to produce is that the party so refusing is precluded from putting the document into evidence unless he can satisfy the court as to the matters set out in rule 15 quoted above.

8. It is important to note that rule 17 entitles a party to whom such a notice is given to object to the production of any documents the subject of a notice to produce and he must state on what grounds he so objects. It is only if a party fails to give notice of a time for inspection or objects to giving inspection that an application is then made to court pursuant to rule 18. This provides as follows:-

*"18(1) If the party served with notice under rule 15... objects to give inspection... the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit or list of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party.*

*(2) An order shall not be made under this rule if and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."*

9. It is apparent from consideration of the Rules that the scope of a notice to produce is different to the scope of discovery. It is confined to documents referred to in the pleadings or affidavits or list of documents of a party to a cause or matter. The document must be referred to in the proceedings in which the notice to produce is served. The court will not make an order pursuant to rule 18 if the court is of the opinion that inspection of the document is not necessary either for disposing fairly of the cause or matter or for saving costs.

10. Ms. Eimear Collins swore an affidavit on 13th November, 2014, on behalf of the respondent grounding the application for the relief sought in the notice of motion. She made a bald averment to the effect that the documents the subject of the present application are necessary for disposing fairly of these proceedings and in order to save costs. There was no elaboration of this statement in that affidavit. In an affidavit sworn on behalf of the applicant on 18th November, 2014, his solicitor, Mr. Ray Noone noted that a copy of the summary summons had been furnished. At para. 4 he averred:-

*"It was also explained that none of the other documents requested by the Respondent had been referred to in the pleadings in the instant proceedings. Furthermore, it was pointed out that these documents were plainly immaterial to the Respondent's decision-making process as they were not considered by and were not before the Respondent when he made his decision on costs."*

11. The applicant swore an affidavit on 4th December, 2014, stating that he confirmed with his solicitor who was on record on his behalf in the proceedings *BBT Accountants v. Michael Lowry* that two affidavits were effectively opened before the Master of the High Court on 8th November, 2013: an affidavit of Denis O'Connor dated 27th September, 2013, and an affidavit of Michael Collins solicitor dated 8th November, 2013. He averred:-

*"Whilst subsequent to this hearing before the Master, affidavits were filed in the context of an appeal of this decision, there was no hearing on that appeal and the matter was adjourned to plenary hearing by consent. My solicitor has also confirmed my understanding that no other affidavits filed in those proceedings have been opened or effectively opened in court."*

12. It is thus clear that the respondent has been furnished with a copy of the order of the Master of 8th November, 2013, and of the summary summons. His application pursuant to O.31, r.18 before the court relates to the affidavits exchanged in those proceedings, two of which were effectively opened before the Master and six of which were never opened in court. The application is grounded expressly on O.31, r.18 and on the inherent jurisdiction of the court.

13. In relation to O.31, r.18, the central matter for decision is the meaning of the phrase "references made to any document". In *Dubai Bank Ltd. v. Galadari and Ors (No. 2)* [1990] 2 All E.R. 738 the Supreme Court of England & Wales considered the equivalent provision under the English rules. The court held:-

*"In our judgment, a mere opinion that on the balance of probabilities, a transaction referred to in a pleading or affidavit must have been effected by a document does not give the court jurisdiction to make an order under Ord 24, r 10, unless the pleading or affidavit makes direct allusion to the document or class of documents in question."*

14. Neither party has been able to open an Irish authority elaborating on the meaning of reference to a document in rule 15. In those circumstances, I am prepared to adopt the construction set out in *Dubai v. Galadari* as requiring a direct allusion being made to the document in the pleading or affidavit, or list of documents.

15. In my opinion the references in the Statement of Grounds cited above do not contain such a direct allusion to the affidavits. In each case the references in paras. 29 and 30 are to the existence of proceedings and to a decision of the Master of the High Court. The court is being asked to infer that there were affidavits referred to in the Statement of Grounds on the basis that it refers to proceedings. This is precisely what the court is not empowered to do on the authority of *Dubai v. Galadari*. Therefore in so far as the application is advanced pursuant to O.31, r.18, I refuse the application.

16. The application is also advanced upon the inherent jurisdiction of the courts. In this regard reliance is placed on two recent decisions of Hogan J., *Allied Irish Bank Plc v. Tracey (No. 2)* [2013] IEHC 242 and *Kelly v. Byrne* [2013] IEHC 450. At para. 11 of his judgment in *Kelly v. Byrne* Hogan J. summarised his decision in *AIB v. Tracey (No. 2)* as follows:-

*"All that Tracey (No. 2) decided was that, in principle, at any rate, the public are entitled to know the contents of material which was opened without restriction in open court."*

17. Earlier in that paragraph he took the opportunity to stress the principle applied only to documents which had already been freely opened in open court and in respect of which there were no reporting or other restrictions. It follows therefore that insofar as the

respondent relies on these authorities to seek inspection of the six affidavits which were not opened in open court in the *BBT Accountants v. Michael Lowry* proceedings that this application must fail.

18. In *AIB v. Tracey (No. 2)* Hogan J. pointed out that the application was one of some novelty. In *AIB v. Tracey (No. 2)* Mr. David Agar was not sued. In the course of defending the proceedings Mr. Tracey made serious allegations against Mr. Agar. Hogan J. noted:-

*"4. ...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 affidavit 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."*

19. Hogan J. stated that it would be clearly appropriate to grant Mr. Agar access to the affidavits which had been effectively fully opened to the court:-

*"14. In my view, it clearly would be so appropriate. Article 40.3.2 of the Constitution guarantees every 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..."*

*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."*

20. However, Hogan J. also concluded that permission was not in fact required. At para. 23 he stated:-

*"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."*

21. Insofar as the ratio of *AIB v. Tracey (No. 2)* is founded upon Article 40.3.2., a citizen's right to a good name, this clearly can have no relevance to the application before the court. There is no suggestion that any allegation was made in respect of the respondent in the affidavits which were effectively opened before the Master in November, 2013. It follows therefore that reliance must be placed entirely upon para. 23 of the judgment of Hogan J. In both *AIB v. Tracey (No. 2)* and *Kelly v. Byrne* an application was made in the proceedings in which the affidavits or, in the case of *Kelly v. Byrne*, a witness statement, were opened to the court. The application was on notice to the parties to the particular proceedings and the parties to the proceedings were afforded the opportunity to make such submissions as they thought fit. It seems to me that if the respondent seeks to rely upon the authority of *AIB v. Tracey (No. 2)* that he should make an application in the proceedings *BBT Accountant v. Michael Lowry* for copies of the two affidavits opened before the Master on 8th November, 2013. Mr. O'Connor ought to be afforded the opportunity to make such submissions, if any, as he sees fit to the respondent's sanction request that the court release the affidavits in those proceedings. It does not seem to me that the case confirms an inherent jurisdiction on this court to direct that the applicant produce for inspection affidavits which were filed and opened in separate proceedings to which he was a party as is sought in this case.

22. I wish to emphasise that I am not to be taken as indicating that an order sanctioning the release of the two affidavits can not or ought not to be made. Nor am I restricting the respondent from seeking access to the documents through any other legal channel that may lie open to him.