Neutral Citation 2010 [IEHC] 531

THE HIGH COURT

[2010 No. 162 COS]

IN THE MATTER OF THE COMPANIES ACTS 1963 - 2009

AND

IN THE MATTER OF SECTION 205 OF THE COMPANIES ACT, 1963

AND

IN THE MATTER OF SKYTOURS TRAVEL LIMITED

BETWEEN

MARK EDMOND DOYLE

PETITIONER

AND

JOHN BERGIN

RESPONDENT

Judgment of Miss Justice Laffoy delivered on the 9th day of July, 2010.

1. The proceedings and the application

1.1 These proceedings were initiated by a petition claiming relief under s. 205 of the Companies Act 1963 (the Act of 1963), which was presented on 18th March, 2010. The primary relief claimed by the petitioner in the petition is a declaration that, by reason of certain actions of the respondent outlined in the petition, the affairs of Skytours Travel Limited (the company) are being conducted in a manner oppressive to the petitioner in his capacity as a member of the company. The petitioner seeks an order that either the respondent or the company be compelled to purchase his shares in the company at a value to be determined by the Court. The petition was grounded on an affidavit sworn by the petitioner on 12th March, 2010 (the grounding affidavit).

The procedural aspects of the matter have advanced since the petition was presented. For present purposes it is sufficient to say that points of claim were delivered on behalf of the petitioner on 17th May, 2010.

1.2 On this application, which was initiated by a notice of motion of 14th June, 2010, the respondent seeks the following orders:

> (1) an order that the matter be heard in camera;
>
> (2) an order "pursuant to the inherent jurisdiction" of the Court redacting all references to private information given by the petitioner to the respondent, the redactions being illustrated by use of a black marker on certain portions of the petition, the grounding affidavit and the points of claim.

In the alternative, the petitioner seeks an order staying "all proceedings" against the respondent until further order. However, that relief was not pursued at the hearing of the application.

1.3 The main thrust of the submissions made on behalf of the respondent at the hearing of the application on 2nd June, 2010 was that redaction and a hearing *in camera* are necessary to protect a communication from the respondent to the petitioner, who is a lawyer, which the respondent contends is covered by legal professional privilege.

1.4 Accordingly, as I see it, the two issues which fall to be considered on this application are:

> (a) whether the relevant communication in respect of which the respondent contends that he is entitled to legal professional privilege is a privileged communication; and
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> (b) whether the proceedings should be heard *in camera*.

1.5 The Court has had the benefit of comprehensive outline written submissions from both sides, to which I have had regard, although I do not propose to summarise them.

2. Factual background

2.1 The company was incorporated on 30th October, 1987. Since its incorporation it has carried on the business which it is authorised to carry on under its memorandum of association, that of a travel agency. It appears to have traded successfully.

2.2 The issued share capital of the company comprises 30,000 ordinary shares of €1.20 each, which are fully paid up. The respondent is the owner of 28,420 shares (on the assumption that there is a typographical error in paragraph 3 of the petition) and the petitioner is the owner of the remaining 1,580 shares. In other words, the petitioner owns slightly in excess of 5% of the issued shares and the respondent owns slightly less than 95%. It is clear on the evidence that the company is the respondent's trading vehicle.

2.3 The petitioner is a practising solicitor. In that capacity, he has acted for both the company and the respondent in the past. The

petitioner acquired his shareholding in the company in 1990. For present purposes I do not attach significance to the circumstances in which the petitioner acquired his shareholding.

2.4 The petitioner has been a director of the company since 1990. There are three directors of the company: the respondent; the petitioner; and a person who is an employee, but not a shareholder, of the company (the employee director).

2.5 What precipitated these proceedings was the receipt on 8th February, 2010 by the petitioner of an e-mail from the respondent which was accompanied by an e-mail of the same date with an attachment. The attachment was headed "Memo". It was dated 4th February, 2010. It was an internal memorandum from an employee of the accountancy firm which acts as auditors to the company (the company's auditors) to a partner of that firm. The accompanying e-mail was from the partner to the respondent. As a result of the receipt of the e-mail and the accompanying e-mail with the attachment, the petitioner became aware for the first time of the following facts:

> (a) In October 2008 the respondent had made a voluntary statement of disclosure to the Revenue Commissioners, which, insofar as is relevant for present purposes, was in the following terms:
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> > "Undisclosed Income
> >
> > During the period from March 1997 to May 2006 I operated two deposit accounts with First Active Building Society, one in the name of Skytours Travel Limited and the other held personally. The details of the transactions for the account in the name of Skytours Travel Limited were not previously included in the financial statements of the company. The source of lodgements to these accounts was rebates from travel companies and some cheques drawn on the current account of Skytours Travel Limited. The lodgements to these deposit accounts ceased in December 2003, and some subsequent rebate cheques received were cashed by me for personal use. I had personal use of these funds which were lodged in each of these accounts until I closed the accounts in May 2006."
>
> (b) In June 2009 the company finalised a settlement with the Revenue Commissioners in relation to the undisclosed income.
>
> (c) The aggregate of the undisclosed income which the respondent had appropriated to his own use and of the amount paid by the company to the Revenue Commissioners in settlement of the undisclosed income of the company was just short of €2.4m.

2.6 As is clear on its face, the purpose of the internal memorandum was to apprise the partner of the employee's view of possible indictable and other offences which arose from those facts and the reporting obligations of the company's auditors to the Director of Corporate Enforcement and to An Garda Siochana in relation thereto pursuant to various statutory provisions in the context of the audit by the company's auditors of the financial statements of the company for the year ended 31st October, 2009. In the internal memorandum, the employee indicated to the partner his view of the company's auditors' reporting obligations arising out of the facts outlined. On 8th February, 2010 the partner e-mailed the internal memorandum to the respondent with a message in the following terms:

> "I would suggest that you forward this to [the petitioner] and you set up a meeting with him to explore any options we might have."

Two minutes after receipt of that e-mail, the respondent e-mailed both the message from the partner and the attachment to the petitioner without any message.

2.7 According to the grounding affidavit, on 11th February, 2010 the respondent and the partner in the company's auditors met the petitioner to talk to him about, *inter alia*, "the signing off of the accounts" and the contents of the internal memorandum. The evidence of the petitioner is that he was adamant that both the respondent and the partner get independent advice, that it was a very serious matter from his perspective and that whatever advice they got had to include dealing with his position as a director and shareholder.

2.8 In the grounding affidavit the petitioner has averred that on 24th February, 2010 the respondent called a meeting for Friday, 26th February, 2010 "to have the accounts signed off, without first circulating the accounts". The petitioner attended the meeting with his solicitor. The respondent and the employee director were present, but the partner in the company's auditors was not. The petitioner has averred that the respondent informed him that "independent legal advice" had been obtained regarding the issues raised in the internal memorandum, that advice had been obtained "from a tax consultant", and that the accounts could be passed. However, despite his request, the petitioner was not shown any such advices and has never seen them. He refused to sign off on the accounts. The respondent and the employee director signed the accounts. The abridged accounts certified by the respondent and the employee director were filed in the Companies Registration Office (CRO) on 3rd March, 2010 with the annual return (Form B1).

2.9 In his supplemental affidavit sworn in support of this application, which was sworn on 30th June, 2010, the respondent clarified the position he had adopted in the following terms:

> "In so far as there is any misapprehension in relation to the matter I wish to clarify that the purpose of my application is to ensure that no privileged, private and confidential information given by me or on my instructions to the petitioner as solicitor for the company and as my personal solicitor is used in these proceedings or publicised in any way. I am advised that if there is any hearing in open court which deploys this information the company's right to privilege and my right to privilege and our constitutional rights will be compromised. I am advised that if the material which I seek to have protected is referred to in open court, even in the course of an application to protect that privilege, it will lose the confidential nature which is essential to its privileged character."

3. Privilege

3.1 The respondent's legal advisers have applied the black marker liberally to the grounding affidavit. In the grounding affidavit the petitioner has averred to certain matters which arose before 8th February, 2010 in relation to advice, including legal advice, given by the petitioner to the respondent in relation to the company. Contemporaneously with the presentation of the petition, the petitioner

brought the usual motion for directions regarding the mode of trial, exchange of pleadings and such like and that motion is still before this Court. It is clear from what has transpired on that motion that both sides recognise that these proceedings will have to be heard on oral evidence. If the petitioner were to attempt to adduce oral evidence on the lines of the evidence contained in the grounding affidavit in relation to the pre-8th February, 2010 matters averred to therein, it would be a matter for the trial Judge to deal with any issue of privilege raised on behalf of the respondent. Having regard to the redaction which the respondent seeks of portions of the petition itself and of the points of claim, in my view, the only issue which arises for determination on this application is whether the e-mail of 8th February, 2010 from the respondent to the plaintiff, and the e-mail of the same date from the partner in the company's auditors to the respondent and the attachment, that is to say, the internal memorandum, give rise to a legitimate claim for privilege in relation to those documents on the part of the respondent.

3.2 The rationale of legal professional privilege was explained by the Supreme Court in *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd*. [1990]1 I.R. 469. Finlay C.J. stated (at p. 477):

> "The existence of a privilege or exemption from disclosure for communications made between a person and his lawyer clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, in my view, only be granted by the courts in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.
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> It is necessary to bear these general considerations in mind in attempting to ascertain the underlying principle which appears to have led to the expansion of the privilege for communications with a lawyer from cases of actual or contemplated litigation to cases of communications seeking legal advice and/or legal assistance other than advice."

In relation to the last sentence in the first paragraph of that quotation, Fennelly J. observed in his judgment in *Fyffes Plc. v. D.C.C. Plc*. [2005]1 I.R. 59 (at p. 67):

> "The then Chief Justice did not, in my view, by those words mean to suggest that, in cases where reliance is placed on legal professional privilege in respect of documents the courts should balance the two considerations, as it were, on a case by case basis. He was referring to what the policy of the law should be. In my view, whether or not documents are privileged will be determined by the application of these principles to the facts of the case. Once it is found to exist, there is no judicial discretion to displace it. .....
>
> The law, therefore, attaches significant value and accords a high degree of protection to the principle of legal professional privilege. It can, of course, be lost if it is clear that it is being used as a cloak to cover fraud. It may also be overridden by express statutory provision.
>
> Waiver is another matter. Clearly a party to an action may waive privilege in express terms. A party may also be held to have waived it impliedly, as when a party does not claim privilege, but includes potentially privileged documents in the non-privileged schedule of an affidavit. Equally, a party waives the privilege attaching to documents passing between himself and his solicitor, when he elects to sue the latter."

3.3 In the *Smurfit Paribas Bank* case, Finlay C.J. went on (at p. 478) to consider the circumstances in which the expansion of legal professional privilege to legal advice and/or legal assistance is justified. In *Miley v. Flood* [2001] 2 I.R. 50, Kelly J. stated (at p. 69) that the decision in the *Smurfit Paribas Bank* case established the following propositions:-

> "(1) legal professional privilege can only be invoked in respect of legal advice and not in respect of legal assistance;
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> (2) where the claim of privilege is challenged, the onus is placed upon the person invoking that privilege to justify it;
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> (3) the correct formulation of that privilege which arises in Irish law, other than in contemplation [or] furtherance of legal proceedings is as follows "... where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client" (per Finlay C.J. at p. 478);
>
> (4) what is privileged is the communication. That communication only attracts privilege if it seeks or contains legal advice. The communication of any other information is not privileged in Irish law."

3.4 For a number of reasons, in my view, the e-mail of 8th February, 2010 from the respondent to the petitioner coupled with the e-mail of the same day from the partner in the company's auditors to the respondent with the attachment does not fulfil the requirements for the existence of privileged status of legal advice in the third proposition identified by Kelly J.

3.5 First, while the petitioner is a lawyer and while he had previously acted as the respondent's lawyer and the company's lawyer, I am not satisfied that the Court should regard the communication from the respondent as a communication to the petitioner acting as a lawyer. The context in which the internal memorandum was prepared was the audit of the company's financial statements for the year ended 31st October, 2009 and the author's concern as to the statutory obligations of the company's auditors in relation to reporting. Aside from any other statutory obligations, the petitioner, in his capacity as a director and, as such, an officer of the company, had statutory obligations in relation to approving the financial statements and filing the annual return and abridged accounts in the CRO. In that capacity, the petitioner was entitled to the information contained in the internal memorandum and, in my view, it is reasonable to infer that that is the capacity in which the communication was sent to him.

3.6 Secondly, while the partner in the company's auditors made it clear that he wished to set up a meeting with the petitioner in order to explore options, it would appear that the options in question were the options of the company's auditors in relation to their reporting obligations of matters in respect of which there were reasonable grounds for believing indictable offences may have been committed by the company or an officer or agent of the company, failure to comply with which could give rise to prosecution for an offence. Those obligations are statutory obligations imposed on the auditors. Presumably, if the auditors considered that they needed legal advice on that matter, they should have obtained their own independent legal advice. In my view, it must be inferred that what they were suggesting was that the respondent in conjunction with his co-director, the petitioner, should consider the matter in the light of the obligations imposed by law on them as officers of the company.

3.7 Thirdly, there is nothing on the face of the communication from the respondent to the petitioner to suggest that the respondent, in his own right, was seeking legal advice and communicating with the petitioner on the basis that the communication would be privileged and exempt from disclosure. Nor is there anything on the face of the communication to suggest that, even if the respondent on his own had authority to bind the company, the communication was a communication on behalf of the company which was seeking legal advice and was to be treated as being privileged or exempt from disclosure.

3.8 It would be absurd if one party to a dispute could unilaterally preclude the other party to the dispute, who happens to be a solicitor, from disclosing a communication in relation to a matter in circumstances where the solicitor party had refused to accept instructions to act or give advice in relation to the matter on the ground that a conflict of interest arose. It is well settled that legal professional privilege is the client's privilege, not the lawyer's privilege. However, the reality of the situation here is that, as regards the matter which was the subject of the internal memorandum, of which the petitioner only became aware when he received theel mail of 8th February, 2010, the petitioner never acted, or agreed to act, in the capacity as lawyer to the respondent or the company. On the contrary, the petitioner made it clear that, because of the conflict of interest involved, he could not so act. In the circumstances, the information which was communicated to the petitioner via the two e-mails of 8th February, 2010 and the attachment, cannot be privileged, in the sense of being exempt from disclosure in legal proceedings, as against the petitioner.

3.9 What the respondent is attempting to do in this case, by reliance on the principle of legal professional privilege, to adopt the terminology used by Fennelly J. in *Fyffes plc v. D.C. C. plc*. is to use it in s. 205 proceedings "as a cloak" to cover his acknowledged appropriation to his own use of the company's money and effectively nullify the petitioner's cause of action in respect of that action. To allow the respondent to achieve that objective would be to allow legal professional privilege, which Kelly J. in *Miley v. Flood* (at p. 65) characterised as "a fundamental condition on which the administration of justice as a whole rests", to have the effect of undermining the proper conduct of the administration of justice in the public interest.

3.10 In *Murphy v. Kirwan* [1993] 3 I.R. 501 the Supreme Court considered the scope of the "fraud" exception to the general rule that communications between a client and his legal adviser are privileged. Having reviewed the case law, Finlay C.J.. stated (at p. 511):

> "... the essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct or moral turpitude or of dishonest conduct, even though it may not be fraud."

That case concerned the issue of a claim for privilege in the context of an allegation of malicious prosecution of an action for specific performance. In this case, the allegation by the petitioner against the respondent which forms the basis of the petitioner's claim of oppression within the meaning of s. 205 of the Act of 1963, the acknowledged appropriation by the respondent of the assets of the company to his own use, must be an allegation of a type of moral turpitude or dishonest conduct which precludes the application of the general rule in relation to legal professional privilege. The interests of justice require that it be precluded here and that the petitioner be allowed pursue his statutory remedy under s. 205.

4. In camera

4.1 In *Doe v. Revenue Commissioners* [2008] 3. I.R. 328 Clarke J. summarised the propositions which can be abstracted from the established jurisprudence on Article 34.1 of the Constitution, which mandates that justice shall be administered in public, save in such special and limited cases as may be prescribed by law, as follows (at p.339):

> "3.16 Firstly, the obligation that justice, save in special and limited circumstances, be administered in public includes an obligation that all parts of the court process be available to the public. That means that the identity of the parties to proceedings, amongst other things, must, prima facie, be made public. ...
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> 3.17 Secondly, in the absence of an express statutory provision permitting either that all (or the appropriate part) of a relevant proceeding be heard otherwise than in public or prohibiting the publication of the identity of parties to the relevant proceedings, the only circumstances in which it has been established that a court may restrain a full publication of all that transpired during a court hearing (including the names of the parties) is where the restrictive court order concerned is necessary to prevent a real risk of an unfair trial, and where the damage which would result from not making the order concerned would not be capable of being remedied by appropriate directions to a jury or otherwise.
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> 3.18 Thirdly, it seems clear that parties are not entitled to call in aid the undoubted constitutional right to a good name or to privacy, as a countervailing factor to the constitutional imperative that justice be administered in public. It is only where there is no other means of achieving the undoubted entitlement of parties to a just determination of their proceedings, that it has been established that a court has a constitutional entitlement to interfere with the obligation that justice be fully administered in public, and even then the court is constrained to interfere as little as possible with that imperative."

Sub-section (7) of s. 205 of the Act of 1963 is an express statutory provision of the type referred to in the second proposition in that quotation. However, apart from that, in my view, the Court has no jurisdiction to hear these civil proceedings otherwise than in public. In particular, one could not conclude that there are not other means of achieving the entitlement of the parties to a just determination of the proceedings than to hear the proceedings *in camera*.

4.2 Sub-section (7) of s. 205 provides as follows:

> "If, in the opinion of the court, the hearing of proceedings under this section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company, the court may order that the hearing of the proceedings or any part thereof shall be *in camera*."

The construction of that provision came before the Supreme Court for consideration for the first time In re R. Limited [1989] I.R. 126 and was explained and applied by the Supreme Court in *Irish Press Plc v. Ingersoll Irish Publications* (No. 1) [1994]1 I.R. 176.

4.3 In the later case, Finlay C.J., having quoted from the majority judgments in earlier case, set out the propositions to be deduced therefrom "as principles applicable to an application under s. 205, sub-s. 7" as follows (at p. 194):

> "1 The court cannot even commence to exercise a discretion under s. 205, sub-s. 7 unless it is of opinion that the hearing of the proceedings or of some particular part of the proceedings would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company.

2. If it is of opinion that such a situation exists, the court may then enter upon an investigation as to whether it should exercise its discretion under s. 205, sub-s. 7 to hold the case in camera. In so doing, it will, however, be involved in considering a fundamental constitutional right vested in the public, namely, the administration of justice in public, and it cannot,therefore, make an order under s. 205, sub-s. 7 merely on the consent of all the parties concerned in the petition before it.

3. The additional matter which a court would have to be satisfied of in order to direct a hearing of the whole or part of the petition otherwise than in public would be that a public hearing of the whole or of that part of the proceedings would prevent justice being done.

4. In reaching a conclusion as to whether this test has been satisfied in any particular case, it would be appropriate for the court, having regard to the terms of the provisions of Article 34, s. 1 of the Constitution, to construes. 205, sub-s. 7 bearing in mind that the entitlement of the Oireachtas pursuant to Article 34, s. 1 to prescribe by law for the administration of justice otherwise than in public, is confined to special and limited cases.

5. It would appear to me to be probable that in most instances, at least, a successful application for a hearing in camera pursuant to s. 205, sub-s. 7 would be:-

(a) …

(b) where the party seeking an in camera hearing is the respondent, by establishing to the satisfaction of the court that, by reason of the making known to the public of information concerning the company involved in the course of the hearing of the petition, even if the petition were to be dismissed by the court and the respondent awarded costs against the unsuccessful petitioner, that by reason of the extent of the damage to the asset consisting of the respondent's shareholding in the company concerned, or if the company were the respondent by reason of the damage to its value, that the court would, merely by dismissing the petition with costs, be incapable, by reason only of the publication of the proceedings, of rendering a just remedy to the wrongfully sued respondent, or

(c) by proving that either the petitioner to further his claim or the respondent to defend himself against the claim of the petitioner, in reasonable prudent protection of the asset which he owned, consisting of his shareholding in the company, would be obliged to abstain from tendering evidence which would probably influence the resolution of the issues and the achieving of a just result by the court, by reason of the fact that the publication of it would do such damage, (irrespective of the result of the case and the remedy which he might obtain from the court) to the asset consisting of his shareholding so as to outweigh the advantage of succeeding in the petition."

4.4 Applying the foregoing principles to the facts of this case, to use a sporting metaphor, the respondent does not even get to first base. The information which the respondent seeks to suppress is that he has acknowledged that he appropriated monies belonging to the company to his own use and that, following on a Revenue audit, he made a voluntary disclosure to the Revenue that the company had not included those monies in the financial statements and had not returned the income for taxation purposes, and further that during its accounting year ended on 31st October, 2009 the company rectified the situation by discharging the unpaid tax together with interest and penalties. In my view, it is impossible to conclude that the publication of the disclosure of that information in proceedings heard in open court would be seriously prejudicial to the legitimate interests of the company. As the condition precedent to the Court embarking on a consideration of the exercise of the discretion conferred by subs. (7) of s. 205 has not been satisfied, the Court is barred from exercising that discretion.

4.5 Aside from the fact that the condition precedent has not been complied with, it is impossible to conclude that hearing these proceedings in public would prevent justice being done or perpetrate an injustice on the respondent, if he is successful in defending the petition.

5. Order

5.1 There will be an order dismissing the respondent's motion.