Neutral Citation [2013] IEHC 150

THE HIGH COURT

[No. 2013/28/IA]

BETWEEN

PATRICK MC KILLEN

PLAINTIFF

-AND-

TIMES NEWSPAPERS LIMITED AND MARK TIGHE

DEFENDANTS

AND

[No. 2013/29/IA]

DENIS O'BRIEN

PLAINTIFF

-AND-

TIMES NEWSPAPERS LIMITED AND MARK TIGHE

DEFENDANTS

EX TEMPORE REDACTED JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 30th day of March 2013

This is an application for an interlocutory injunction arising out of the institution of proceedings against Times Newspapers Limited and Mark Tighe by two plaintiffs in respect of separate but related matters. The application in respect of both plaintiffs was heard together and arose from an intended publication by the *'Sunday Times'* of certain information which is said by the plaintiffs to be confidential. It is not seriously denied by the *'Sunday Times'* that the information is indeed confidential.

The issues which arise on this application are delicate and touch upon matters of great public importance. On the one hand, the Constitution guarantees freedom of expression to the *'Sunday Times'*, but perhaps more important than the *'Sunday Times'* own constitutional right to freedom of expression, is the public right in the free press. The public has an extraordinary interest in there being a free and untrammelled press entitled to comment on all matters that are genuinely of public interest as opposed to matters of mere public prurience or curiosity. It is not seriously denied by the respondent that the information that they intend to publish relates to confidential matters arising from the banking relationship of Mr. McKillen with the IBRC and information relating to his commercial relationship with Mr. O'Brien.

The contest in this case is between categories of competing rights. I have already identified the *'Sunday Times'* interest in its own constitutional rights and the public's right in the existence of a free and untrammelled press in a democratic society. The plaintiffs, of course, naturally have an interest in protecting their own confidential dealings and it is well established that the public also has an interest in the maintenance of confidential banking relations. The interest in such confidentiality extends not only to the parties who enjoy the confidence, but every citizen and resident in the State would like to see such relationships protected. To put it bluntly, no one would like to see their banking details on the front page of any newspaper and therefore there is a public interest in protecting and upholding those confidences.

The parties have opened a variety of cases which demonstrate how some of these competing interests have been played out and have been balanced by the courts. It is very clear to me that the law directs the High Court to be extraordinarily slow to place restraints on publication. If there is to be any presumption applied, it seems that there is a very strong presumption in allowing the press to publish and to permit any harm caused thereby to be reparable or compensated by an award of damages. That would appear to be the way the courts tend to approach these difficult questions. The courts are slow to restrain publication. On the other hand, the courts accept the need to protect the confidential relations between banks and their customers. The principal authority addressed to this Court on circumstances when the confidential relationships may be invaded is the decision of this Court and of the Supreme Court in *National Irish Bank v. Radio Telifis Eireann* [1998] 2 ILRM 196.

It is contended on behalf of the plaintiffs that the only circumstance in which confidential relations can be breached and details published is when it is intended to report upon or unearth an iniquity or misdeeds of some sort and that there is no other category recognisable by the courts which would permit an invasion of confidences.

While it is true to say that in the Supreme Court, that particular category was indeed identified by Mr. Justice Lynch speaking for the majority, there was, I think, a more detailed discussion of the principles involved in invading confidences and disclosing matters that are otherwise thought to be confidential in the decision of Shanley J. in the High Court. If I could quote briefly from the manner in which Shanley J. described the law, he said at page 475 of the judgment as follows:

> "It seems to me that disclosure of confidential information will almost always be justified in the public interest where it is a disclosure of information as to the commission or intended commission of serious crime because the commission of such crime is an attack upon the State and the citizens of the State and such disclosure will always be in the public interest. While the disclosure of serious crime will always be in the public interest there is also a range of other activities (which are not necessarily criminal) the disclosure of which may also justify a breach of confidence on the grounds that its disclosure is in the public interest. It would, I believe, be unwise to attempt to find the boundaries of the so-called exception of public interest and I refrain from doing so other than to observe (as Ungoed Thomas J. did in *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241 at p. 260) that:- "... misdeeds of a serious nature and importance to the country" will justify disclosure on the grounds that such disclosure is invariably in the public interest."

Therefore, it seems to me that the category of cases in respect of which confidential information can be disclosed is not limited to circumstances where there is an interest in publishing it for the purposes of unearthing a misdeed or an iniquity and that is not solely

what the law provides. That is not what the Supreme Court held, in my view, in *National Irish Bank v. Radio Telifis Eireann* [1998] 2 ILRM 196.

In that regard, useful guidance on the balancing of interests is also to be had from a decision of the Court of Appeal in *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526 and also referred to by Shanley J. in the *National Irish Bank* case. The case deals with circumstances in which disclosure of confidential information might be done in the public interest, and more particularly, the case deals with the manner in which the court should address the balancing of rights required at the interlocutory stage.

The Court of Appeal, in allowing the appeal, said that there was a conflict between two public interests, namely, the plaintiffs' right to protect their internal, confidential documents and their copyright in them and the public's entitlement to information which raised serious doubts about the reliability of an instrument which was providing the sole evidence on which members of the public had been or were being prosecuted; and that in actions for breach of confidence, the defence of disclosure in the public interest, where there was a just cause or excuse for breaking confidence, did not depend on any 'iniquity' on the part of the plaintiffs. Accordingly, defendants in interlocutory proceedings had to satisfy the court that there was a serious defence of public interest that might succeed at the trial and did not have to show that the plaintiffs were guilty of iniquitous conduct; that the information contained in the documents was so important to the public as to outweigh the plaintiffs' interests, and that accordingly, the court was entitled to overrule the judge's exercise of discretion. I place some particular stay by the decision of the Court of Appeal and the manner in which rights were balanced in that case.

Another important matter which has been put before the court is what test is to be applied at the interlocutory stage where there is an application to restrain publication. Whilst the standard test for the granting or the withholding of an interlocutory injunction is that which has been set out in the *Campus Oil* decision numerous times and repeated numerous times, (although recently slightly refined in the public law area by the Supreme Court in the decision in *Okunade v. Minister for Justice* [2012] IESC 49) there is, I think, the test which I say applies, as urged upon me by the '*Sunday Times*', set out by Irvine J. in *Murray v. Newsgroup Newspapers Ltd.* [2010] IEHC 248 in the following terms:

> "In cases where freedom of expression is sought to be restricted by an interlocutory order I am satisfied that the plaintiff is required, as Kelly J. said in *Foley v. Sunday Newspapers Ltd.* [2005] 1 I.R. 88, "to demonstrate, by proper evidence, a convincing case to bring about a curtailment of the freedom of expression of the press". In my view this is the same as saying that the plaintiff must demonstrate at an interlocutory application that he is likely to establish at the trial of the action that the publication complained of should not be allowed."

I think that is the proper test which applies to the determination of the application to restrain publication which is before the Court today.

On behalf of the plaintiffs, it is urged upon the Court that irreparable harm will be done to the plaintiffs and the harm said to happen and which I think is not gainsaid by the '*Sunday Times'* in this case, is that first and foremost the confidence which they have will be lost. I accept that the plaintiffs have established that that is the damage they will suffer.

It seems to me that the second category of loss which is sought to be advanced on behalf of the plaintiffs and to which both the plaintiffs refer in their affidavits is not sufficiently particularised to meet the standard or the burden described by Irvine J. in *Murray v. Newsgroup Newspapers Ltd.*

On behalf of the '*Sunday Times'*, what is said to me is that there is a public interest of a real and weighty nature in publishing information about the manner in which the bank in question deals with one of its most significant debtors. Such interest arises in circumstances where the bank has been bailed out by the public; the debts of the bank have been taken on the shoulders of the Irish people; the bank is run effectively at the direction of or by persons appointed by the Minister for Finance; and the whole of the operation is now, effectively, a public interest operation. In those circumstances, there is a particular public interest in knowing certain things about the relationship between the bank and its customers.

It is important to underscore here that the information intended to be published seems to fall into three categories:

1. Information of an opinion nature expressed by officials internally within the bank.

2. Information the '*Sunday Times'* intends to report that a further loan has been extended to Mr. McKillen.

3. Information relating to the commercial relationship between Mr. McKillen and Mr. O'Brien.

Balancing as best I can the competing interests in this case, bearing in mind the weighty importance that is attached to a free press, I have decided in this case to permit a limited amount of publication of the intended information. I say that the '*Sunday Times'* has established that it is a matter of very significant public interest as to how it is that certain parts of the bank conducts its business and the extent to which it might be granting further public monies to one of its largest debtors. Therefore, I have decided not to grant an injunction restraining publication of the fact that a further loan was granted to Mr. McKillen. However, I say that the plaintiff has persuaded me that the publication of information of an opinion nature communicated internally within the bank by officials is a step too far and that information should not, in my view, be published. The *'Sunday Times'* has not persuaded me that there is a public interest in that sort of opinion on behalf of the bank.

Neither am I persuaded that information relating to the commercial relationship between Mr. McKillen and Mr. O'Brien is a matter that has to be published. Those are matters which seem to me to just fall on the wrong side of the nature and extent of the sort of information that the public has a right and entitlement to know at this stage. Therefore, I grant an injunction restraining publication of information of an opinion nature communicated internally within the bank by officials as well as an injunction restraining the publication of information relating to the commercial relationship between Mr. McKillen and Mr. O'Brien.

I refuse to grant an injunction restraining publication of the fact that a further loan was extended to Mr. McKillen in the amount identified and for the purpose identified.