Neutral Citation Number: [2009] IEHC 259

THE HIGH COURT

2004 19853 P

MONICA LEECH

PLAINTIFF

AND

INDEPENDENT NEWSPAPERS (IRELAND) LIMITED

DEFENDANT

AND

DEPARTMENT OF AN TAOISEACH

NON-PARTY

JUDGMENT of O'Neill J. delivered the 28th day of May, 2009

1. **Background**

1.1 The plaintiff is a director and shareholder of Monica Leech Communications Limited. That company and the plaintiff on her own account were the recipients of public relations consultancy contracts from the Office of Public Works and the Department of the Environment, Heritage and Local Government. The plaintiff seeks damages for libel, including aggravated and/or exemplary damages against the defendant in relation to some twenty articles and material published in one of its newspapers, which addressed the manner in which these contracts were awarded and the costs involved. In its defence the defendant pleads, *inter alia*, justification, qualified privilege and fair comment, to the effect that the award of the contracts was influenced by the plaintiff's connections with the then Minister for the Environment, Heritage and Local Government, Mr. Martin Cullen; that the award of the contracts did not comply with best standards and that the rates of payment were excessive.

1.2 The former Taoiseach, Mr. Bertie Ahern, on the 21st December, 2004, appointed the former chairman of the Revenue Commissioners, Mr. Dermot Quigley to conduct an inquiry into the awarding of the contracts to the plaintiff and her company and to report his findings to the Dáil. This arose from public concern about issues raised by the media relating to the circumstances surrounding the award of these contracts and the amounts paid to the plaintiff and her company under the contracts. The terms of reference of the inquiry were as follows:-

> *- "To establish the circumstances in which arrangements were entered into for the engagement of Ms. Monica Leech and/or Monica Leech Communications to provide services to the Office of Public Works and the Department of the Environment, Heritage and Local Government since July, 1997.*
>
> *- To examine the procedures adopted by reference to the norms and practice in respect both of public procurement and the division of the functions and responsibilities between Ministers and civil servant Departmental heads.*
>
> *- To ascertain whether the services contracted for differed in any material respect from those provided.*
>
> *- To make a report of findings and conclusions in relation to these matters and, arising from them, to make recommendations, if appropriate, in relation to any changes in practice which may be desirable."*

Assurances of confidentiality were given to those who participated in the inquiry. The Quigley Report was presented to the Dáil in January, 2005.

1.3 A notice of trial in these proceedings was served on the 7th April, 2006. *Inter partes* discovery has concluded. Third party discovery has been made to date by the Office of Public Works and the Department of the Environment.

2. **The discovery sought**

2.1 These proceedings arise by way of a notice of motion for third party discovery in which the defendants seek discovery by the Department of An Taoiseach ("the Department") of a variety of documents generated by or in the course of the Quigley Inquiry, and in response the Department claims public interest privilege over the contested documents. An order is sought by the defendant pursuant to O.31, r. 29 of the Rules of the Superior Court that the Department make discovery on oath of the following:-

> *(a) All documentation submitted by the plaintiff to Mr. Dermot Quigley as part of his inquiry in relation to matters arising out of the award of contracts to the plaintiff and her company.*
>
> *(b) All documents held by the Department in relation to Mr. Quigley's inquiry and report including notes of interviews conducted by Mr. Quigley and any other material gathered by Mr. Quigley during the course of investigating the matters which are dealt with in his report.*

2.2 The documentation at issue includes correspondence between Mr. Quigley and departmental officials, notes and memoranda in respect of the workings of the inquiry and notes of interviews conducted by Mr. Quigley and observations of interviewees on the draft version of the report.

3. **The defendant's submissions**

3.1 Mr. Ferriter B.L., for the defendant, submitted that his client's ability to defend itself in the action would be restricted by reason of the non-availability of the contested documentation. The defendant required access, in his submission, to the said documentation for the purpose of ascertaining the facts surrounding the award of contracts to the plaintiff and the work carried out by her so as to enable it to fully cross-examine the plaintiff at trial and to call witnesses, if necessary, in relation to these facts. He submitted that his client could be seriously prejudiced if the material was not disclosed in circumstances where its defence of justification had a public interest basis. In essence, he submitted that the public interest in the proper administration of justice was at stake and this interest would be damaged if the defendant was deprived of relevant material which would assist the defendant in making out its defence.

3.2 He also argued that confidentiality cannot act as a bar to discovery or a basis for the invocation of public interest privilege. In this regard he relied on the case of *Skeffington v. Rooney* [1997] 1 I.R. 22. He noted that there is no statute prohibiting the disclosure of the material at issue and also contended that there was no compelling reason for non-disclosure. He contended that it would be improper for the plaintiff, in bringing a libel action, to benefit from public interest privilege.

4. **The submissions of the Department of An Taoiseach**

4.1 The Department claims public interest privilege, as defined by the Supreme Court in *Ambiorix Limited v. Minister for the Environment* [1992] 1 I.R. 277, over the contested documentation, in that, such documentation came into existence in the context of a confidential State-sponsored inquiry. Mr. Hickey B.L., for the Department, argued that confidentiality was crucial to the efficacy of the inquiry so as to ensure that interviewees, who in many cases gave evidence pertaining to the Minster in charge of their own Department, could give honest information safe in the knowledge that their co-operation could not be used negatively against them and so as to enable the truth to be revealed to the inquiry.

4.2 Paragraph 8 of the affidavit of discovery of Anthony Cummins, Assistant Principal in the Department of An Taoiseach, sworn on the 29th April, 2009, sets forth the basis of the Department's objection to providing the documentation sought:-

"8. I object to producing documents …, as they consist of correspondence between the Quigley Inquiry and government officials and handwritten notes used in the compilation of the Inquiry report. I say and believe that there is a duty of confidentiality to those interviewed and that the revelation of their identities and evidence given to the Inquiry should not be revealed. I say that such documents should not be disclosed as this would adversely affect the Government's capacity to hold such an Inquiry in the future and affect the candid communication between public officials which is essential to the proper operation of an Inquiry of this type. Indeed the parties interviewed were not aware or warned that anything they said could be used for the purposes of private litigation."

4.3 Mr. Hickey acknowledged that there was a public interest in disclosing all evidence relevant to a trial but it was submitted that the public interest in ensuring the efficacy of *ad hoc* inquiries of the kind conducted by Mr Quigley, would be damaged to the point that it would not be possible to use this model of inquiry, if the confidentiality assured to those who co-operated with the inquiry was not to be upheld thereafter.

5. **Issue**

5.1 The key question in these proceedings is whether the material which was specifically generated in the Quigley inquiry should be discovered? This will involve a balancing exercise between competing public interests. On the one hand there is the established public interest in the discovering of relevant documents so that litigants can have access to all relevant material, thus enabling the Court to ascertain the truth. On the other hand, there is the public interest in establishing, where appropriate, *ad hoc* public inquiries which guarantee confidentiality to those who participate in them, without invoking the machinery and powers contained in the Public Inquiry Acts.

6. **Decision**

6.1 It is for this Court to strike the correct balance between the public interest in the maintenance and viability of *ad hoc* inquiries and the defendant's interest in having access to relevant documents so as to enable it to properly defend itself. This was recognised by Finlay C.J. in *Ambiorix Limited v. Minister for the Environment* [1992] 1 I.R. 277 at p. 283:-

> *"It appears to me appropriate that I should re-state by way of summary, but not by way of expansion or qualification, what appear to me to be the clear principles laid down by this Court in the judgment of Walsh J. in Murphy v. Corporation of Dublin [1972] I.R. 215 and which, in my view, are a correct statement of the law on this topic. They can be summarised as follows.*
>
> *1. Under the Constitution the administration of justice is committed solely to the judiciary by the exercise of their powers in the courts set up under the Constitution.*
>
> *2. Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the State.*
>
> *3. Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.*
>
> *4. The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.*
>
> *5. It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision."*

6.2 It is clear that the obligation of confidentiality to the individuals who participated in the inquiry cannot, of itself,

outweigh the public interest in full disclosure being made. However, as stated by Lord Hailsham of St. Marlebone in *D v. N.S.P.C.C.* [1987] A.C. 171 at p.230, quoted by Geoghegan J. in *Goodman International v. Hamilton (No. 3)* [1993] 3 I.R. 320 at p. 327, "*There are however cases when confidentiality is itself a public interest...*" In this case it is argued that confidentiality underpinned the other public interest in the effectiveness and viability of *ad hoc* tribunals. For reasons of practicality such tribunals are a useful if not essential tool in public administration in circumstances where it is necessary to conduct a public inquiry into a matter of public concern, but where for reasons of time constraint or otherwise in the interest of justice or proper expedition, it may not be appropriate to establish a public inquiry under the Public Inquiry Acts. In order for *ad hoc* tribunals to work, I am satisfied that invariably confidentiality will be essential. If it were the case that material given to such a public inquiry was capable of being disclosed later, it would, in my opinion, deter persons with relevant evidence from co-operating with the inquiry and as the inquiry would not have legal powers to compel attendance of witnesses or the production to it of documents, clearly the inquiry would fail as an effective method to establish the truth. This would result in a serious damage to the public interest in the use of this model of inquiry as an important if not essential tool of public administration.

6.3 Against this is the argument of the defendant that where a plaintiff has taken an action for defamation, that it would be unfair for the plaintiff to enjoy the protection of the public interest in respect of the documentation generated by the *ad hoc* tribunal. This argument, however, ignores the fact that the public interest in the maintenance, effectiveness and viability of the particular form of public inquiry is precisely that, a public interest which could not be defeated merely because a person such as the plaintiff derived a collateral benefit from it. In any event, in my view the plaintiff is not to be seen as in a different capacity from other potential participants in the inquiry. For the inquiry to achieve its objective, the co-operation of the plaintiff was as necessary as the co-operation of others such as the relevant civil servants. In addition, like the civil servants, the plaintiff had an obvious interest in non-disclosure in advance of her proceedings against the defendant, although her interest in this regard was of a different kind to the interest of the civil servants.

6.4 I am satisfied that the viability of this form of public inquiry would almost certainly be defeated if there was a risk of disclosure, where confidentiality had been sought from and granted by the person conducting the inquiry. In contrast, the public interest in the administration of justice would not be defeated by the denial of the contested documents, in circumstances where the defendant and indeed the plaintiff have available to them considerable resources of evidence, including *inter alia*, the completed Quigley Report.

6.5 It is to be observed that the material sought in these proceedings did not exist prior to the establishment of the inquiry. It was, in fact, generated by the inquiry itself. As such, the defendant is not being deprived of something that was there to begin with, at the time the newspaper reports were written. In reality, the defendant is being denied what may be described as a windfall resulting from the holding of the inquiry, a factor which adds some slight additional weight in the balance against granting the discovery sought.

7. **Conclusion**

7.1 In conclusion, I must refuse this application, for the central reason that in the balancing exercise undertaken above, I am satisfied that the balance lies in favour of the public interest in preserving the viability and effectiveness of this form of public inquiry.