

## THE HIGH COURT

[2008 No. 546 P]

BETWEEN

JOHN KELLY

PLAINTIFF

AND

THOMAS BYRNE

DEFENDANT

**JUDGMENT of Mr. Justice Hogan delivered on 7th day of October, 2013**

1. Where a party to litigation makes a statement in the course of civil proceedings which is subsequently opened in open court, is the Director of Public Prosecutions entitled to have access to that statement for the purpose of possibly deploying that statement in a subsequent criminal prosecution against that self-same litigant? This, in essence, is the issue presented by the present application on the part of the Director of Public Prosecutions.

2. The defendant in the civil proceedings, Thomas Byrne, is presently charged with over 50 counts in respect of a variety of offences under the Criminal Justice (Theft and Fraud Offences) Act 2001. Mr. Byrne is a former solicitor, but it is alleged that in the course of his practice as a solicitor he defrauded a variety of banks and credit institutions by means of property transactions involving clients and loans from a number of financial institutions. This criminal trial is scheduled to begin, tomorrow, 8th October, 2013, and it will, I have been informed, last approximately ten weeks. Given the imminence of the trial, it is especially important to describe the nature of the present application with some circumspection lest there be any suggestion that the trial might inadvertently be contaminated by adverse pre-trial publicity.

3. The document which is sought is a statement made by Mr. Byrne in the course of civil proceedings brought by Mr. Kelly as plaintiff against Mr. Byrne as defendant. Those proceedings were heard and determined by Clarke J. in the Commercial Court in a judgment delivered on 13th April, 2011: see *Kelly v. Byrne* [2011] IEHC 174. There is no doubt but that this statement was opened – or, at least, effectively opened – in open court. It would appear from the affidavit of Ms. Irvine, a solicitor in the Office of the Director of Public Prosecutions, that the transcript of these civil proceedings is replete with references to this statement. Mr. Byrne was, moreover, cross-examined on this statement in the course of those proceedings.

4. The Director already stands possessed of a copy of this transcript and it may be surmised that the prosecution will endeavour to lay the transcript before the jury. The plaintiff in the present proceedings, Mr. Kelly, has indicated that he will abide the order of the court. This is also the approach which is taken by the Court Service, albeit that they are not formally a party to the proceedings. The application is, however, steadfastly opposed by Mr. Byrne for reasons which I will presently consider.

5. Counsel for the Director, Mr. Farrell S.C., admitted that the present application – which was moved before me on Wednesday 2nd October, 2013 – was a belated one. He nevertheless candidly admitted that the reason for the delay was that it only occurred to the prosecution team following a review of proofs that it would be prudent to have access to the statement in the event that the transcript of the civil proceedings before Clarke J. were to be put before the jury. While the delay was perhaps unfortunate, it has not been suggested that this delay was prejudicial since, it may naturally be assumed that the accused has, in any event, access to his own statement. I will not, therefore, find against the Director on the ground of delay.

**The opposition of Mr. Byrne to the production of the statement**

6. Counsel for Mr. Byrne, Mr. Colgan S.C., objected to the making of the order on several grounds. But these chiefly related to arguments based on the supposed *inadmissibility* of the statement before the court of trial. It was contended, for example, that the statement was inadmissible on the ground that it had been procured involuntarily since – or so the argument ran – the statement made been prepared under compulsion since under Commercial Court procedures, an advance statement was required of all witnesses.

7. It must, however, be recalled that I have no role at all in pronouncing on the admissibility of any such statement before the criminal proceedings which is about to commence in the Circuit Court. It is perfectly clear from established case-law that the admissibility of such a statement is committed in the first instance exclusively to the decision of the court of trial: see, e.g., the comments of Fennelly J. in *Blanchfield v. Harnett* [2002] IESC 41, [2002] 3 I.R. 207. Nothing in this judgment should be seen as in any way expressing any view on this question which will be entirely a matter for the presiding judge at the criminal trial in the Circuit Court.

**The nature of the application**

8. The Director of Public Prosecutions rather sought to ground her application for the production of the statement on the authority of my own decision in *Allied Irish Banks plc v. Tracey (No.2)* [2013] IEHC 242. In that case the plaintiff bank sought summary judgment for some €18m. against Mr. Tracey. One of the defences to the Bank's application was that the Bank had knowingly allowed Mr. Tracey's (former) business partner, Mr. Agar, to misappropriate monies which had been advanced by the Bank by way of loan to companies jointly owned by the two men. As he was not a party to the proceedings, this defence was ventilated in Mr. Agar's absence and the relevant portions of the affidavit making this allegation were opened (or, at the very least, effectively opened) in open court.

9. At the conclusion of the hearing Mr. Agar's legal representative applied to me for a copy of the relevant affidavit containing these allegations. While the Bank took a neutral stance on the application, it was opposed by Mr. Tracey. I then directed that the application be made for release of the affidavit be made by motion on notice to Mr. Tracey.

10. In the course of my judgment I noted that the critical feature of the affidavit now sought to be produced was that it had been effectively opened in open court in the manner required by Article 34.1 of the Constitution. Once that occurred "any cloak of

confidentiality or protection from non-disclosure vanished at that point". I then continued thus:

"The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse.

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."

11. I might take the opportunity to stress that this principle applies *only* to documents which have *already* been freely opened *in open court* and in respect of which there are no reporting or other restrictions. It does *not* apply to the generality of other types of court files and documents. But where the document has been opened without restriction in open court, it then effectively forms part of the public record relating to the administration of justice which Article 34.1 enjoins must (subject to exceptions) be in public. 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.

12. In that respect both *Tracey (No.2)* and the present case are very different from the situation disclosed in *Breslin v. McKenna* [2008] IESC 43, [2009] 1 I.R. 298. In that case the plaintiffs contended that the defendants had planned a major explosion in Omagh, Co. Tyrone in August 1998 which had caused a major loss of life and injury to innocent by-standers and they had commenced civil proceedings before the Northern Irish courts claiming damages in respect of those appalling injuries. To that end they also sought access in this jurisdiction to books of evidence supplied by the prosecution to the accused pursuant to statute for the purposes of a criminal prosecution before the Special Criminal Court in this State. Here it must be stressed that the plaintiffs in that case had never contended that this material had actually been opened in open court and the decision in *Breslin* does not proceed on this basis. The Supreme Court nonetheless sanctioned the use of the material for the purposes of the Northern Irish proceedings.

13. Mr. Colgan was at pains to submit that the Director had no *locus standi* to interfere in civil proceedings of this kind by seeking documents which the parties had produced for their own purposes in that litigation. It is perhaps unnecessary for the purposes of this application to decide whether a party seeking such access has to establish that he or she has a good reason to seek such documentation. It is sufficient to say that, just as was the case in *Tracey (No.2)*, the Director can plainly point to such good reason. She is the person authorised by law to prosecute crimes and offences of this nature "in the name of the People" in the manner envisaged by Article 30.3 of the Constitution. It is not denied that the document in question is plainly relevant to the full presentation of certain material which the prosecution may wish to lead as evidence in the course of the prosecution of Mr. Byrne in respect of these offences. While again abjuring any views on the admissibility of any such evidence – which, to repeat, will be entirely a matter for the trial judge – it would nonetheless be only appropriate that the Director should be permitted to have access to such material.

### Conclusions

14. In these circumstances and for all the reasons which I have ventured to set out, I would accordingly direct the Courts Service to provide the Director of Public Prosecutions with a copy of the statement made by Mr. Byrne in the course of these proceedings, assuming always that a copy has been so retained by them for the purposes of the court file.