



THE HIGH COURT
IN THE MATTER OF INDEPENDENT NEWS AND MEDIA PLC

[2018 No. 124 COS]

AND

IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

INDEPENDENT NEWS AND MEDIA PLC

RESPONDENT

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 30th day of July, 2019

Introduction

1. This is my judgment on the application of numerous persons and entities ("the Applicants") to be provided with copies of an interim report presented to the court by Inspectors appointed over the Respondent.

The Inspectors

2. On 4th September, 2018 I appointed Sean Gillane S.C. and Richard Fleck CBE as Inspectors ("the Inspectors") over the Respondent pursuant to the provisions of s.748 of the Companies Act 2014 ("the Act"). They were appointed to investigate and report on the affairs of the Respondent in accordance with terms of reference which were set out in the court order.

3. The Inspectors were directed to deliver an interim report to the court not later than 12th April, 2019. They delivered that report on the preceding day.

The terms of reference

4. The Inspectors were appointed to examine a number of different issues which are identified in some detail in my judgment of 4th September, 2018 [2018] IEHC 488. Four particular areas for investigation were identified. They were called:-

1. The Data Interrogation Issue
2. The Newstalk Acquisition/APN Transaction
3. The Independent Review Process
4. Alleged market abuse.

The majority of the parties seeking to be provided with a copy of the Inspectors' interim report are concerned with just one of those four issues namely the data interrogation question.

The Data Interrogation issue

5. This issue is described in my judgment of 4th September, 2018 so only a short summary of it is required for the purposes of this ruling.

6. In 2014 back-up tapes of computer data were removed from the Respondent's premises. They were taken out of the jurisdiction and that data was interrogated over a period of months. This operation was allegedly directed by Mr. Leslie Buckley the then chairman of the board of the Respondent. It was alleged that this exercise was carried out as part of a cost cutting measure in respect of legal fees payable to a firm of solicitors. Other members of the board of the Respondent were apparently not aware of the operation at that time. During the course of the interrogation, the data was accessible to and accessed by a range of individuals who are external to the company. They have business links with Mr. Buckley and with each other. They also appear to have links with Mr. Denis O'Brien the then largest shareholder in the company.

7. During the course of that interrogation, data appears to have been searched against the names of 19 individuals. They included Messrs. Vincent Crowley, Rory Godson and Maeve Sheehan. Grave concerns have been expressed about the lawfulness of this activity. That is particularly so in the case of journalists who believe their personal data and material which was accessed may well have contained information covered by journalistic privilege. Two of the persons against whom data was searched are members of the Inner Bar who acted for several years as counsel to *The Inquiry into Payments to Politicians and Related Matters* presided over by Mr. Justice Moriarty. That tribunal was involved in investigations into allegations related to the awarding of the second GSM licence to ESAT which is an entity controlled by Mr. Denis O'Brien. In a letter of 30th April, 2018 the Respondent's solicitors described the names of those searched against as persons who may be regarded as having acted adversely to Mr. O'Brien.

8. It is difficult to see what the interrogation of information concerning at least some of the 19 persons had to do with the cost reduction exercise that was allegedly being carried out. The lawfulness of this whole operation is very questionable.

The statutory provisions

9. Section 759 of the Act deals with the distribution of an Inspector's report. Subsection 1 is framed in mandatory terms and requires

the court to provide a copy of every such report to the Director of Corporate Enforcement ("the Director"). Subsection 2 reads as follows:-

"The court may: –

(a) forward a copy of an inspectors' report to the registered office of the company that is the subject of the report;

(b) provide a copy of an inspectors' report on request to any of the following:

(i) a member of the company or other body corporate that is the subject of the report;

(ii) a person whose conduct is referred to in the report;

(iii) the statutory auditors of the company or other body corporate;

(iv) if other than the Director, the person or persons who applied for the appointment of the inspectors;

(v) any other person (including an employee or creditor of the company or other body corporate) whose financial interests appear to the court to be affected by the matters dealt with in the report;

(vi) the Central Bank, if the report relates, wholly or partly, to the affairs of a credit institution."

10. Subsection 3 entitles the court to provide a copy of an inspectors' report to certain appropriate authorities. Subsection 4 provides that the court may cause an inspectors' report to be published in such form and manner as it thinks fit. Subsection 5 reads as follows:-

"The court may direct that a particular part of an inspectors' report be omitted from a copy that is forwarded or provided under subsection (2) or (3) or a report that is printed and published under subsection (4)."

11. In accordance with s. 759(1) of the Act I provided a copy of the Inspectors' interim report to the Director. He is the only person entitled as of right to a copy of such a report.

12. The Applicants ask the court to exercise its discretion in their favour so as to provide them with a copy of the report. Their application is opposed both by the Director and the Inspectors.

The Director's approach

13. In the course of apprising the court of the reasons for his opposition to the interim report being provided to the Applicants the Director makes a number of points.

14. First, he says that I ought to have regard to the views of the Inspectors themselves which is to the effect that the interim report should not be provided to the Applicants.

15. He points out that the report informs the court of the progress made to date by the Inspectors and gives an indication of how they propose to carry out their work in the future. It also deals with certain evidential matters which the Inspectors believe ought to be brought to the court's attention. He argues that nobody other than the court and the Director have a legitimate interest in having oversight of the work carried out by the Inspectors since it is to the court and it alone that they are accountable.

16. He also makes the point that the Inspectors expressly state that no conclusions have been arrived at by them. They are still in the process of taking evidence and of giving parties the opportunity to address matters that arise.

17. He is of the belief that if the interim report is not provided to any of the requesting parties then there is no risk to reputations from the dissemination of any evidential or other material. If the interim report were disclosed to any person there would be a risk of its contents percolating into the public sphere.

The Inspectors' approach

18. Mr. Gillane S.C., one of the two Inspectors, addressed the court. He pointed out a number of features of the report. First, its purpose was largely to bring the court up to date in respect of progress made, work done and procedures adopted. It also indicates the expected future progress.

19. He correctly said that there is a good deal of direct and indirect reference to evidential material contained in the report. He told me that a commitment of confidentiality had been given to all of the parties involved. Those parties regarded that as important. He believed that the commitment had been of assistance in obtaining the cooperation of persons who furnished information without the fear of material leaking into the public domain during the course of the investigation. He did not wish that confidential arrangement to be endangered. It is in respect of the references to evidence in the report that the Inspectors voiced their strongest objection to disclosure.

20. The Inspectors were of opinion that it was not necessary for the report to be disclosed to any of the applicants nor indeed that it should be published. In any event he pointed out, and in my view correctly, that if the report is to be disclosed it will be disappointing to many people because it is largely an indication of how far the Inspector's work has gone and the timeframe for future work and not much else.

The Applicants

21. The following is a list of the persons or bodies who seek a copy of the interim report:-

1) The Respondent. It is the subject of the report and therefore falls within the provisions of s.759(2)(a).

2) Mr. Leslie Buckley. He is the former Chairman of the Board of the Respondent and held that position until 1st March, 2018. He falls within the provisions of s.759(2)(b)(ii) being a person whose conduct is referred to in the report.

3) Four companies called:-

DMZ IT Ltd.;

Specialist Security Services Ltd.;

Reconnaissance Group Ltd.;

Resilient Defence Ltd.;

together with four individuals associated with those companies namely,

Derek Mizak,

John Henry,

Keith Duggan,

Shane Henry.

These have all been implicated in the data interrogation work that was carried out and fall within the provisions of s.759(2)(b)(ii) being persons whose conduct is referred to in the report.

4) Mr. Robert Pitt. He is the former Group Chief Executive of the Respondent and he falls within the ambit of the same statutory provision.

5) Mr. Vincent Crowley, former Chief Executive of the Respondent

Mr. Joe Webb, former Chief Executive of the Respondent's Irish division;

Mr. Rory Godson, a journalist;

Ms. Maeve Sheehan, a journalist.

All of these persons were among the 19 whose data was interrogated and thus are persons whose financial interests appear to the court to be affected by the matters under investigation and dealt with in the report. They thus fall within the provisions of s.759(2)(b)(v).

6) Mr. Alan Marshall, a former Director of the Respondent. It appears to me that he likewise falls within the provisions of s.759(2)(b)(v) even though not one of the persons whose data was apparently interrogated.

7) The Central Bank of Ireland. The Central Bank is given an express statutory entitlement to apply for disclosure to it of any report if such relates wholly or partly to the affairs of a credit institution. The Respondent is not a credit institution. The bank makes it clear that it only seeks to be provided with a copy of the report insofar as it might be relevant to its statutory obligations. The Bank also points out that it has a statutory entitlement to have material obtained under s.778-780, 783 or 787 disclosed to it as a competent authority as defined in s.792 of the Act.

22. All of the Applicants contend that as they fall within the statutory definition of persons who have an entitlement, subject to the discretion of the court, to be furnished with a copy of the interim report the discretion ought to be exercised in their favour. That is particularly so, it is said, in the case of the Respondent whose very affairs are the subject matter of the investigation.

The discretion

23. All of the Applicants agree that they have no absolute entitlement to a copy of the Inspectors' report. They have a statutory entitlement to apply to the court and thereafter it is a matter of the court's discretion as to whether they should be furnished with a copy of the report.

24. Two cases were cited in argument before me. Both relate to the inspection which was conducted into National Irish Bank Ltd. Both are decisions of my own. The first in time is *In Re National Irish Bank Ltd (No. 2)* [1999] 3 I.R. 190. The second is *In Re National Irish Bank Ltd. (No. 3)* [2004] 4 I.R. 186. Both cases were decided under the predecessor to the Act. Each decision is distinguishable from the present application.

25. *In Re National Irish Bank Ltd (No. 2)*, which was principally relied upon by the Respondent, did not deal at all with the question of disclosure of inspectors' reports. Rather it was an application which sought to limit the investigation of court appointed inspectors into the affairs of that bank coupled with an application for production of all the transcripts of evidence taken by the inspectors from the employees of the then applicants. It is clear that the application was predicated upon the contents of an interim report prepared by the inspectors. That had been circulated to the relevant parties but in circumstances where there was no opposition to such circulation by either the inspectors or the Director. The most that can be said of the decision that might be pertinent to this application is that an interim report was provided to the relevant parties pursuant to court order. But there was no opposition to such a course. Thus, it is of no assistance in the present case.

26. *In Re National Irish Bank Ltd (No. 3)* does at least deal with the question of entitlement of parties to a copy of an inspectors' report. However, the report in that case was the final report of the inspectors rather than an interim one. In addition, neither the Director nor the inspectors opposed furnishing the report. In fact, the inspectors favoured not merely provision of the report to the relevant parties but its publication in full. Thus, it is of little assistance on the question of the exercise of the discretion which I am called upon to consider in this case.

27. In exercising my discretion I have regard to the fact that the report in question is merely an interim one. No findings of any sort have been made. It is a progress report on the work that has been undertaken to date.

28. I also take into account the fact that the Director opposes the furnishing of the report to all of the Applicants as do the Inspectors. That opposition is not however determinative of the issue since it falls to the court to weigh that opposition in the

balance against the entitlements of the Applicants.

29. All of the Applicants are conferred with the statutory right to apply for a copy of the report. The Respondent clearly has an interest in how the work of the Inspectors is progressing and the estimate of how much longer the inspection is likely to take. Likewise, persons whose conduct is referred to in the report as well as those whose financial interests may be affected by matters dealt with in it have, in my view, a *prima facie* entitlement to be informed of progress to date and what lies ahead.

30. I readily accept that it is only the court and, to a very limited extent, the Director who have a legitimate interest in having oversight of the work carried out by the Inspectors. But I do not believe that the furnishing of a copy of the report to the Applicants would in any way interfere with that oversight.

31. The principal matter of concern to me in the exercise of my discretion is the opposition registered by the Inspectors. Whilst they are opposed to the provision of the report in its totality, in reality it is to those parts of the report which deal with evidential material that they direct their opposition. I would be loath to take any step which might risk being a hindrance to the Inspectors making progress in their work. I fully appreciate that they gave a commitment of confidentiality to all of the parties with whom they spoke. That was regarded as a matter of some importance by those parties. Furthermore, the Inspectors inform me that it has been particularly productive in assisting in their work. They have been able to obtain the cooperation of individuals without the fear of material leaking into the public domain. It would be quite inappropriate for the court to take any step which might cut across that commitment given by the Inspectors and thus result in them being hindered in their important task. The court should not take any step which might impede the progress of the inspection or jeopardise in any way the integrity and progress of the inspection. That said, however, I do not see any objection to those parts of the report which do not deal with evidential matters being disclosed.

32. It would, in my view, be an appropriate exercise of the court's discretion to direct the furnishing of the report to all of the Applicants given their respective interests but with appropriate redactions so as to fully take account of the Inspectors' concerns.

33. As is clear from subs.5 of s.759 the court is empowered to direct that a particular part of an Inspectors report be omitted from a copy that is forwarded or provided. I propose to exercise that power and therefore will direct that the Applicants be furnished with a copy of the first interim report of the Inspectors but with all sections dealing with evidential material redacted.

34. A good deal of the report deals with just such material either directly or indirectly. Thus, it must be redacted so as to ensure that the Inspectors' work may proceed as planned. Accordingly, I direct that the following paragraphs of the report and only those paragraphs be furnished to the Applicants. All other paragraphs will be redacted. The paragraphs to be provided are:-

(1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (38) (39) (40) (79) – all other paragraphs will be excluded.