Neutral Citation Number: [2009] IEHC 119

THE HIGH COURT

2004 18528 P

BETWEEN/

MARTHA O'NEILL, ELIZABETH O'BRIEN AND FRANK MASSEY

PLAINTIFFS

AND

AN TAOISEACH, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgement of Mr. Justice Roderick Murphy, delivered the 18th day of March, 2009.

1. Introduction

This is an application by way of an appeal of the Order of the Master of the High Court, dated 7th May, 2008, whereby he made an order directing the Defendants within six weeks to make discovery on oath of documents which are or have been in the possession of the Defendants, namely the archive of a private statutory inquiry into the explosions collectively known as the Dublin-Monaghan bombings of 1974. Mr. Patrick MacEntee S.C., Q.C., was appointed in May 2005, as the sole member of the Commission of Inquiry (the MacEntee Commission). The final report was made in March, 2007.

In the substantive proceedings, the plaintiffs seek various declarations and orders to the effect that the State is under a duty to carry out an investigation and/or public inquiry in respect of the deaths of their relatives, Edward O'Neill, John O'Brien, Anne Marie O'Brien, Jacqueline O'Brien and Anna Massey respectively, who died in the Dublin-Monaghan bombings, on 17th May, 1974. The plaintiffs' claim is based upon Article 40.3 of the Constitution and Article 2 of the European Convention on Human Rights. The plaintiffs are seeking discovery of the MacEntee Commission archive. They argue that, at a minimum, the defendants are required to list on affidavit the documents in the archive and to specifically identify any claim of privilege being made in respect of each.

The defendants oppose discovery on the basis that the documents sought are not relevant to the substantive proceedings; that the documents sought are not necessary for disposing fairly of the matter or saving costs; and that the entirety of the archive is subject to public interest privilege. The heads of public interest privilege invoked by the defendants are national security, the protection of lives, the relationship between the State and external agencies and entities and statutory privilege. The defendants argue that the plaintiffs' case involves a discrete legal issue, namely whether the defendants have a duty to hold a public inquiry into the deaths of the plaintiffs' relatives under the Constitution and the European Convention on Human Rights. They submit that the documentation gathered under the MacEntee Commission's terms of reference bears no relation to this net legal issue.

2. The MacEntee Commission

The MacEntee Commission was established pursuant to the Commissions of Investigation Act 2004, (the 2004 Act). Its terms of reference were as follows:

> "To undertake a thorough investigation and make a report on the following specific matters considered by the Government to be of significant public concern:-
>
> (1) Why the Garda investigation into the Dublin and Monaghan bombings was wound down in 1974?
>
> (2) Why the Gardaí did not follow up on the following leads:
>
> (i) information that a white van, with an English registration plate, was parked outside the Department of Posts and Telegraphs in Portland Row and was later seen parked in the deep sea area of the B&I Ferry port in Dublin, and the subsequent contact made with a British Army officer on a ferry boat leaving that port;
>
> (ii) information relating to a man who stayed in the Four Courts Hotel between the 15 and 17 May 1974 and his contacts with the UVF;
>
> (iii) information concerning a British Army corporal allegedly sighted in Dublin at the time of the bombings;
>
> and
>
> (3) In relation to the missing documents:
> (i) the exact documentation (departmental, Garda intelligence and any other documentation of relevance) that is unaccounted for;
>
> (ii) the reasons explaining why the documentation went missing;

(iii) whether the missing documentation can now be located; and

(iv) whether the systems currently in place are adequate to prevent a re-occurrence of such documentation going missing."

In accordance with section 43(2) of the 2004 Act, the archive of the MacEntee Commission was deposited with the Department of the Taoiseach upon submission of the Commission's final report. The cover letter of the Commission's sole member, dated 12th March 2007, stated that:

> "The commission hereby gives notice that its archive includes material that continues to have duties of privilege, confidentiality and secrecy attaching to its contents. In particular instances the contents of this material give rise to risks to the lives of persons, to risks to the security of the State, and to risks of damaging the relationships between this State and external agencies and entities. In all instances this material was disclosed to the commission on the express assurance that it was to be used solely for the purposes of this statutory investigation in private and that none of this material would be disclosed to any person, agency or entity without the prior written consent of the donors of that material."

3. Principles governing discovery applications

The starting point in any application for discovery is Order 31 Rule 12(1) of the Rules of the Superior Courts, which provides:

> "Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order on such terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes of documents as may be thought fit."

Order 31 Rule 12(3) states:

> "An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."

The import of O.31 r. 12 was addressed by Keane C.J. in *Burke v. D.P.P.* [2001] I.R. 760, where he stated that the rule made blanket discovery a thing of the past. It is well established in the jurisprudence of the courts that a party is not "*entitled to discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition*" (*Acquatecnologie v. Minister for the Environment*, Unreported, Supreme Court, 10th July, 2000).

4. Relevance of the documents sought

The test of relevance was succinctly stated by Brett J. in *Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company* [1882] 11 Q.B.D. 55:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of those two consequences."

The threshold of relevance in this jurisdiction is one of probability not possibility, as stated by McCracken, J. in *Hannon v. The Commissioner of Public Works and Others* (Unreported, High Court, 4th April, 2001) in the following terms:

> "The Court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the Court to order discovery simply because there is a possibility that documents may be relevant."

In the present case, the defendant submits that the plaintiffs' interest in seeking discovery of the archive is to engage in their own private enquiry into the deaths of their relatives in 1974, rather than to advance their legal claims in the proceedings. The plaintiffs submit that the documents are relevant as the court will be obliged to consider the efficacy of any investigation carried out to date and whether there is any new material available which justifies the further investigation into the deaths in 1974 at this point in time.

5. Necessity of discovery

The criterion of necessity is a separate consideration to the criterion of relevance. Rule 12(1) of Order 31 gives discretion to the court to refuse discovery if satisfied that it is not necessary. In *Ryanair PLC v. Aer Rianta CP* (Unreported, Supreme Court, 2nd December, 2003), Fennelly J. stated:

> "The court…must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation."

In *Framus v. CRH* (Unreported, Supreme Court, 22nd April, 2004), Murray J. introduced a proportionality assessment to the criterion of necessity stating that:

> "It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse…the crucial question is whether discovery is necessary for disposing fairly of the cause or matter. I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in

addition to ensuring that no party is taken by surprise by the production of documents at a trial. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues."

6. Are the documents sought relevant and necessary in the present case?
Having regard to the arguments advanced by both parties, I am not satisfied for the following reasons, that discovery of the archive of the MacEntee Commission is either relevant and necessary in the context of the substantive proceedings.

The substantive proceedings are concerned with a question of law, namely whether the State is obliged by Article 40.3 of the Constitution and Article 2 of the European Convention on Human Rights to carry out a further investigation into the Dublin-Monaghan bombings.

The plaintiffs submit that it is necessary for the court to have access to the entirety of the MacEntee Commission archive to determine this question. However, having regard to the terms of reference of the Commission and the fact that the Commission has reported, it is neither relevant nor necessary to allow discovery of the entirety of the archive to enable the plaintiffs to advance their case. It would be disproportionate in the circumstances of the case to so order.

In this regard, I am guided by the remarks of Finlay C.J. in *K.A. v. Minister for Justice* [2003] 2 I.R. 93, at 100:

"It is however inherent in the nature of judicial review that the necessity for discovery will be more difficult to establish than in plenary proceedings. This follows from the fact that in judicial review what is at issue is the legality of the decision challenged. In many instances the facts are not in dispute. Discovery will normally, but not exclusively, be confined to factual issues in dispute. It can be envisaged that an applicant for judicial review may raise a factual issue and, whilst not disputed, consider that there are documents in the possession of the respondent which would assist in the proof of relevant related facts at the hearing and that a court would take the view that discovery of such documents is necessary for disposing fairly of the application for judicial review. The limitation on discovery in such circumstances is that it must not be considered to be a fishing exercise. It is difficult to state in a general way the precise dividing line but it is clear that it is not sufficient for an applicant simply to make an assertion not based upon any substantiated fact and then seek discovery in the hope that there will exist documents which support the assertion."

It is noteworthy that the plaintiffs in this case have not sought to focus their claim for discovery in any way by relating a narrow category of documents sought to the precise legal issues in the substantive proceedings; rather they have simply sought the entirety of the MacEntee Commission archive.

7. Privilege claimed by the defendants
7.1 In any event, even if discovery of the archive were relevant and necessary in the present case, the court must consider the defendants' further submission that the entirety of the MacEntee Commission archive is subject to public interest privilege. The information provided to the Commission was, it is submitted, subject to conditions of absolute confidentiality. Disclosure of the said material to third parties could present risk to the lives of persons, to the security of the State and damage the relationship between the State and external agencies or entities.

In addition, the defendants claim that the documents are subject to statutory privilege pursuant to the Commissions of Investigation Act 2004.

7.2 Principles of public interest privilege
Murphy v. Dublin Corporation [1972] I.R. 215 and *Ambiorix v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277 established that it is for the courts to determine which public interest shall prevail in the event of a conflict between the public interest in the administration of justice and the public interest involved in the confidentiality or exemption from disclosure of documents pertaining to the executive powers of the State.

In *Ambiorix*, Finlay J. summarised the principles laid down in *Murphy* 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 the 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.

Finlay C.J. held that these principles lead to certain practical conclusions which are applicable to a claim of executive privilege made in the context of civil proceedings:

"(a) The executive cannot prevent the judicial power from examining documents which are relevant to an issue in a civil trial for the purpose of deciding whether they must be produced.

(b) There is no obligation on the judicial power to examine any particular document before deciding that it is exempt from production, and it can and will in many instances uphold a claim of privilege in respect of a document merely on the basis of a description of its nature and contents which it accepts.

(c) There cannot, accordingly, be a generally applicable class or category of documents exempted from production by reason of the

rank in the public service of the person creating them, or of the position of the individual or body intended to use them."

7.3. Statutory privilege

The Defendants submit that the provisions of the Commissions of Investigation Act 2004 re-enforce the position that the documents gathered by the MacEntee Commission are confidential and should not be disclosed to third parties. Several provisions of the 2004 Act are relevant in this regard. Section 11 establishes a general principle that evidence before the Commission is to be given in private. Section 11(1) provides:

> "A commission shall conduct its investigation in private unless –
>
> (a) a witness requests that all or part of his or her evidence be heard in public and the commission grants the request, or
>
> (b) the commission is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence of a witness in public.

Section 11(3) reinforces the position that the commission's investigation is to be conducted in private, stating that, subject to certain exceptions there should be no disclosure of any document produced to the Commission:

> "A person (including a member of the commission) shall not disclose or publish any evidence given or the contents of any document produced by a witness while giving evidence in private, except –
>
> (a) as directed by a court,
>
> (b) to the extent necessary for the purposes of section 12,
>
> (c) to the extent otherwise necessary in the interests of fair procedures and then only with the written consent of the chairperson or, if the commission consists of only one member, the sole member, or
>
> (d) to a tribunal in accordance with section 45.

Subsection (5) provides that a person who contravenes subsection (3) is guilty of an offence.

Section 12 imposes a duty on a commission to disclose the substance of evidence to other witnesses and to give them a chance to comment. It is not relevant to the present application.

Section 45 provides that evidence received by a commission may, in certain circumstances be made available to any member of a tribunal as defined under the Tribunals of Inquiry (Evidence) Act 1921 to 2004. This provision does not arise in the present circumstances.

Section 39 of the Act restricts the application of the Data Protection Act, 1988 to "personal data" in the custody of the Commission or the Taoiseach, as the specified Minister, after it is deposited with him under s. 43(2) of the Act.

Section 40 of the Act restricts the application of the Freedom of Information Acts, 1997 to 2003, to "*a record relating to an investigation by the Commission*" held by the Commission or the Taoiseach, as the specified Minister, after it is deposited with him under s. 43(2) of the Act.

Section 41 of the Act applies the provisions of the National Archives Act, 1986, to those records of the Commission that come within the definition of "*departmental records*" pursuant to s. 2(2) of the National Archives Act, 1986.

Section 43(2) of the Act provides:

> "Before the dissolution of a commission, the chairperson or, if the commission consists of only one member, the sole member shall deposit with the specified Minister all evidence received by and all documents created by or for the commission."

There are several authorities in this jurisdiction which have examined the ambit of statutory privilege. In *Cully v. Northern Bank Finance* [1984] I.L.R.M. 683, O'Hanlon J. set aside a subpoena where the witness, an officer of the Central Bank, would, if compelled to give evidence, have been in breach of an oath of secrecy which he was required to take under section 31 of the Central Bank Act, 1942. The court held:

> "[O]ne of the effects of the provisions of section 31 of the Central Bank Act, 1942, is to give rise to a very unusual form of statutory privilege in favour of information and documents coming into the possession or control of officers of the Central Bank. I am of the opinion that they are entitled to rely on that privilege in resisting any attempt to compel disclosure of the protected material unless and until the validity of Section 31 is successfully challenged."

In *O'Brien v. Ireland* [1995] 1 I.R. 568, the applicant sought discovery of documents in the defendant's possession relating to the death of her husband, who died while serving as a member of the Defence Forces in Lebanon. Two inquiries were carried out under the auspices of the United Nations and the Irish Defence Forces. It was held by O'Hanlon J. that as a result of Defence Force regulations, the Irish Defence Forces inquiry documents were exempt from production on the basis of statutory privilege. Having cited the principles set out by the Supreme Court in *Ambiorix v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277, the court considered:

> "These statements of the law are expressed in absolute terms, as leaving it to the ultimate decision of the courts in all cases to decide what documentary evidence must be produced (if production is sought by appropriate means) and what documentary evidence may be exempted from production, and to decide where necessary between conflicting claims based on the public interest between compelling production of documents and exempting them from production.
>
> I do not consider, however, that either decision was intended to convey that the power of the legislature to intervene and confer the privilege of exemption from production on specified categories of documentary or other evidence was curtailed or restricted in any way, save insofar as any legislation enacted must not conflict with the overriding provisions of the Constitution."

Applying the principles set out in *Ambiorix*, the court held that there was no obligation on the judicial power to examine any particular

document before deciding that it is exempt from production and the claim of privilege may be upheld in respect of a document merely on the basis of a description of its nature and contents which the judicial power accepts. The conclusions of O'Hanlon J. were endorsed by the Supreme Court in Skeffington v. Rooney [1997] 1 I.R. 22.

In *M.B. v. Commission to Inquire into Child Abuse and Residential Institutions Redress Board* [2007] IEHC 1, O'Neill J. considered the statutory provisions on non-disclosure of statements made to the Confidential Committee of the Commission to inquire into Child Abuse. These statutory provisions mirror those at issue in the present case. The applicant in the case was the wife of a man who had died since the date of his application to the Residential Institutions Redress Board for compensation. The only record of the alleged abuse suffered by him was his statement to the Confidential Committee. O'Neill J. refused to grant discovery of the record sought, relying on s. 27 of the Commission to Inquire into Child Abuse Act, 2000, which provided for the confidentiality of the information provided to the Confidential Committee of the Commission. The section further provided that it was a criminal offence to contravene the section. O'Neill J. described the situation as "analogous" to that arising in the *Cully* and *O'Brien* cases, referred to above, and stated:

> "In my opinion the statutory prohibition on disclosure contained in s. 27(1) could not be expressed in clearer terms and the absolute nature of the prohibition could not be more forcefully legislated, than has been done, by the making of a contravention of subs. (1) a criminal offence. If disclosure was refused in the foregoing two cases on the basis of a statutory prohibition on disclosure, a fortiori in this case, it must also be."

In the present case, the provisions of the Commissions of Investigation Act 2004, cited above, confer a similar statutory privilege on the documents which comprise the archive of the MacEntee Commission. I am satisfied that this statutory privilege should prevail in the absence of any successful constitutional challenge to these provisions. Furthermore, I do not deem it necessary for the court to conduct an examination of these documents in order to uphold the claim of statutory privilege. The claim may be upheld on the basis of a description of the nature and contents of the documents, namely that they comprise the archive of the MacEntee Commission and having regard to that Commission's terms of reference.

I can not accede to the plaintiffs' submission that the defendants should be required, at the very least, to list on affidavit the documents in the archive and to specifically identify any claim of privilege being made in respect of each. To do so would, it appears to me, constitute a dilution of the confidentiality promised by the Commission to those who provided the information, a confidentiality which was essential to the discharge of the functions of the private statutory inquiry. The statutory privilege, accordingly, prevents discovery of the archive of the MacEntee Commission.

8. Conclusion

I am satisfied that the plaintiffs have failed to establish that discovery of the archive of the MacEntee Commission is either relevant or necessary in the context of the substantive proceedings. I am further satisfied that the archive is subject to statutory privilege which prohibits its disclosure to the plaintiffs. Accordingly the court can not direct that the defendants disclose or publish any evidence given or the contents of any documents produced by a witness. Moreover, neither paragraphs (b), (c) or (d) of subs. 3 of s. 11 of the 2004 Act applies. In light of my conclusions, I would allow the defendants' appeal against the order of the Master of the High Court.