Neutral Citation: [2013] IEHC 648

THE HIGH COURT

[1997 No. 58 M]

IN THE MATTER OF SECTION 40(8) CIVIL LIABILITY AND COURTS ACT 2004, AND OTHER MATTERS

BETWEEN

J.D.

APPLICANT

AND

S.D.

RESPONDENT

AND

MA AND LM

APPLICANTS

JUDGMENT of Mr. Justice Henry Abbott delivered on the 6th day of December, 2013

1. The applicant and the respondent herein are divorced from one another, but are still engaged in matrimonial proceedings before this Court which are protected by the *in camera* rule. At various junctures, the applicant claims to be married to another person, (hereinafter referred to as wife No. 2).

2. The applicant has filed for bankruptcy under Chapter VII of the United States Bankruptcy Code before the United States Bankruptcy Court on 29th March, 2013. This finally had the effect of imposing an automatic stay on all proceedings (including proceedings outside the US) involving the applicant. The second named applicant is NAMA, established under the Act of 2009, the purposes of which, under s. 10 thereof, include the protection or enhancement of assets acquired by it in the interest of the state, so as to achieve so far as possible the optimum financial return for the state. The functions of NAMA to achieve its purposes are set out in s. 11 of the 2009. These include (among others) holding, managing and realising acquired bank assets including the collection of interest, principal and capital due and taking over of collateral where necessary, and taking all steps necessary or expedient to protect, enhance or realise the value of acquired bank assets. In accordance with s. 12 of the 2009 Act, NAMA has all powers necessary for or incidental to the achievement of its purposes and performance of its functions. Pursuant to s. 12(4) of the 2009 Act, NAMA may exercise any of its powers or carry out any of its functions within or anywhere outside the state, alone or in conjunction with others or by or through (among others) a NAMA group entity.

3. On 9th March, 2012, the High Court in Ireland made a summary judgment on consent in the sum of €185,299,627.78 in favour of NALM (a NAMA group entity) against the first named applicant. The first named applicant was adjudicated a bankrupt in Ireland by order dated 29th July, 2013, on foot of a bankruptcy petition issued by a non NAMA creditor. A notice to show cause against the validity of the adjudication was subsequently filed by the first named applicant and, at the date of hearing of this motion, the hearing of the notice to show cause had not been completed to judgment.

4. The filing by the first named applicant for bankruptcy under Chapter VII in the United States Court had the effect of imposing an automatic stay on all proceedings (including proceedings outside of the US) involving the first named applicant. In order to ensure that it complied with the requirements of US law, NAMA made an application to the US Bankruptcy Court to lift the stay for the purposes of continuing this motion. By order dated 18th September, 2013, the US Bankruptcy Court lifted the automatic stay to specifically permit NAMA/NALM to pursue the within motion.

5. By order dated 3rd October, 2013, the US Bankruptcy Court granted an order compelling the first named applicant to attend the continued creditors meeting (known as a s. 341 meeting) and, absent a contrary ruling from the US Bankruptcy Court on specifically identified and reserved objections to questions or requests for production, to fully complete all questions posed by the trustee and to turn over all documents requested by the trustee without limitation or qualification. The trustee's motion to hold the first named applicant in contempt for his failure to comply with the order compelling production has been deferred.

6. The trustee in the US bankruptcy has obtained an order of the US court permitting the second applicant to bring this motion to the Irish court, and as appears from the affidavit of Alan Stewart sworn on 15th October, 2013 on behalf of the second applicant, the American trustee has identified the central issue in the US bankruptcy as the extent to which the first named applicant made avoidable transfers to wife No. 2 and the extent to which wife No. 2 may be holding property that is owned actually or constructively by applicant No. 1. It was submitted on behalf of applicant No. 2 that the disclosure sought in this application is necessary for the following reasons:-

> A. To fill the gap in the information currently available to NAMA/NALM, the trustee and the official assignee in relation to applicant No. 2's financial affairs and, in particular, such transfers as may have been made by him to third parties.
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> B. In order to ensure that NAMA/NALM, the trustee and the official assignee have complete visibility in relation to the first named applicant's assets and liabilities and, as a result, are in a position to ascertain whether the first named applicant has sought to conceal any assets and to verify such information as already has been provided by the first named applicant in relation to his assets and liabilities.
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> C. Any orders made in the various family law proceedings with have a direct impact on assessing the extent of the pool of assets available for distribution ultimately amongst the first named applicant's creditors participating in the American bankruptcy.
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> D. The disclosure as sought is necessary in order to ensure that the trustee and official assignee are aware of any unencumbered assets which may become available following the determination of the family law proceedings in Ireland.

7. The American trustee has sworn an affidavit for the assistance of this Court, which confirms that he is supporting this application for discovery and disclosure, and sets out the obligations of a debtor to disclose information and documentation as a matter of US bankruptcy law. This duty referred to by the American trustee is the very same duty which the first named applicant has to the Irish High Court in the current family law proceedings. I consider that this is a very important conclusion for this Court in dealing with the present application.

8. The list of documents sought by the second applicant was expanded upon by amending the notice of motion to include:-

> (a) All pleadings, orders, affidavits, exhibits, transcripts, witness statements, forms, and documents, file and judgments in

the Supreme Court appeal heard 2nd July, 2013.

(b) Copies of all affidavits of discovery made in the proceedings to date, along with copies of all documents listed and the schedules to the affidavits of discovery or otherwise disclosed including but not limited to discovery/disclosure documentation provided pursuant to the disclosure orders made in the High Court in *L.E. v. U.F.* [2011] IEHC 229.

(c) A copy of the judgment of the Hon. Ms. Justice Irvine, referred to in a judgment of *U. v. U.* [2011] IEHC 228.

The Law

The In Camera Rule

9. The *in camera* rule directing secrecy of family law proceedings has many statutory sources, but in this application, the relevant statutory provision is that of the Family Law (Divorce) Act 1996, which provide that proceedings under that Act are to be heard "otherwise than in public". The purpose of the *in camera* rule is as follows:-

(1) To protect the privacy of the parties in circumstances where matters of a private and sensitive nature are disclosed in the evidence.

(2) To protect the welfare of minor children who are often affected by divorce proceedings.

(3) To protect the assets of the parties which might be adversely affected by the disclosure of the proceedings through the heading manoeuvring, bad faith or sheer panic of those who may have commercial relations with them (including creditors).

(4) To ensure that a confidential atmosphere is maintained which has the effect of improving disclosure of details of assets and income.

Irish family law courts have been very successful in maintaining and enforcing the in camera rule in all its respects, and it is valued greatly by family law litigants on all sides.

Exceptions to In Camera Rule

(a) The s. 40(8) of the Civil Liability and Courts Act 2004, provides as follows:-

(8) A court hearing proceedings under a relevant enactment shall, on its own motion or on the application of one of the parties to the proceedings, have discretion to order disclosure of documents, information or evidence connected with or arising in the course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings.

(b) Section 40 of the Family Law Act 1995, provides as follows:-

40.—Notice of any proceedings under this Act shall be given by the person bringing the proceedings to—

(a) the other spouse concerned or, as the case may be, the spouses concerned, and

(b) any other person specified by the court.

(c) Section 15(5) of the Family Law Act 1995, provides as follows:-

(5) Where a spouse has a beneficial interest in any property, or in the proceeds of the sale of any property, and a person (not being the other spouse) also has a beneficial interest in that property or those proceeds, then, in considering whether to make an order under this section or section 9 or 10 (1) (a) (ii) in relation to that property or those proceeds, the court shall give to that person an opportunity to make representations with respect to the making of the order and the contents thereof, and any representations made by such a person shall be deemed to be included among the matters to which the court is required to have regard under section 16 in any relevant proceedings under a provision referred to in that section after the making of those representations.

(d) Section 40 of the Family Law (Divorce) Act 1996, provides as follows:-

40.—Notice of any proceedings under this Act shall be given by the person bringing the proceedings to—

(a) the other spouse concerned or, as the case may be, the spouses concerned, and

(b) any other person specified by the court.

10. It was urged upon this Court by the first applicant and the respondent that the court should interpret subs (8) of s. 40 of the Act of 2004 by construing the words "on its own motion" strictly and literally. Against that proposition counsel for the second applicant urged that to adopt such an interpretive approach would lead to absurdity and that the provisions of the Interpretation Act 2005, s. 5 in relation to construing ambiguous or obscure provisions, should be considered in construing the meaning of the words "of its own motion". Section 5(1) provides as follows:-

"5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

I am of the view that in the context of the court acting "of its own motion" in the interests of third parties, an interpretation which suggests that such third parties would be precluded from applying to the court to enable it to act on its own motion, is an interpretation which is both obscure, ambiguous and also absurd, in that in many cases the legitimate rights of third parties might not be protected by the court.

11. The provisions of s. 40 of the Family Law Act 1995, and s. 40 of the Family Law (Divorce) Act 1996, as well as the provisions of s. 15(5) of the Family Law Act 1995, together with the general provisions of the Family Law Acts are drafted so as to respect the rights of third parties throughout, by enjoining the court to take into account the assets and the liabilities of the parties. The interests of other persons affected under the criteria are set out in ss. 16 and 20 of the 1995 and 1996 Acts respectively. Thus, as directed by the provisions of s. 5 of the Interpretation Act 2005, I consider that the plain intention of the Oireachtas, as ascertained from the Act as a whole, and the particular provision referred to in this paragraph was that the legitimate interests of third parties should not be adversely affected. The court to fully exercise its powers of disclosure of its own motion may have an application brought to it by third parties in the event of the spouses not taking the initiative in that regard. In practice, parties applying to the court under s. 40(8) should not apply as of right as in the instance of the spousal parties, but should apply first to the court to lift the *in camera* rule so as to be in a position to use the record number of the proceedings and to proceed to make the substantive application. This appears to be the practice for the last number of years in this Court.

Common Law

12. In *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399, it was held by Barr J. that there was a common law power to lift the *in camera* restrictions on such terms as a judge thought proper in the interests of justice:-

> "There is an established practice at common law recognised in England and in this jurisdiction (see judgment of Budd J. in *BSS v. JS & Ors*) that the court in proceedings held *in camera* has a discretion to permit others, on such terms as a judge thinks proper, to disseminate (and in appropriate cases to disseminate himself/herself) information derived from such proceedings which the judge believes that it is in the interest of justice to do, due and proper consideration having been given to the interests of the person or persons intended to be protected by the conduct of the proceedings *in camera*. In given circumstances a judge may find that a crucial public interest such as the prosecution of crime or the protection of vulnerable children, takes precedence over the interests of the protected person in non-disclosure of the information in question.
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> In considering a conflict between the public or the interests of a person seeking disclosure on the one hand and the interest of an individual in retaining the full benefit of the "*in camera*" rule on the other hand, the court is bound by the concept that the paramount consideration is to do justice."

It was noted by Barr J. that there was an imperative public interest in having the conduct of a specialist investigated by the Fitness to Practice Committee.

13. The submissions on behalf of the first applicant and the respondent relied particularly on two cases following in which the court did not allow the publication of *in camera* material. The first such case is *Tesco (Ireland) Ltd v. McGrath* (Unreported, High Court, 14th June, 1999) in which Morris J. (as he then was) held that:-

> "It is therefore clear that circumstances may arise in which the interests of justice or a crucial public interest may justify the publication of matters arising at an "*in camera*" hearing. Mr. Justice Barr instanced the prosecution of a witness in such proceedings for perjury. However, I am unable to identify anything in the present case which would indicate to me that it is in the interest of justice or that it is crucial in the public interest that the matrimonial proceedings in this case be made public."

The second such case is *R.M. v. D.M.* [2000] 3 I.R. 373, in which Murphy J. held that in camera restrictions could not be lifted in circumstances where he distinguished the public importance of the purpose for which the lifting of the *in camera* rule was required from that involved in the *Eastern Health Board v. Fitness to Practice Committee* case in that the applicant was seeking to adduce documents in evidence before a Barristers Tribunal which emanated from previous family law proceedings.

14. However, in both the *Tesco* and the *R.M. v. D.M.* cases the court recognised that there was indeed a common law power vested in the court to lift the *in camera* rule, notwithstanding the statutory provisions. In particular, the *Tesco* case did not involve a balancing of the public interests involved in determining whether the *in camera* rule be lifted, as that case was determined on the basis of a vendor and purchaser conveyancing requirement being met by the reply of the vendor's solicitor to a requisition on title in accordance with the conveyancing standards at the time. The following other cases were cited in argument:-

(1) *N.P. v. A.P. (Practice in Camera)* [1996] 1 I.R. 144

(2) *T.F. v. Ireland* [1995] 1 I.R. 321

(3) *N.P. v. A.P.* [1996] 1 I.R. 144

(4) *Eastern Health Board v. E.* [2000] 1 I.R. 451

Although some of these cases prevented publication, nothing in the judgments prevent me from concluding that the court has a power in common law, having balanced the interests served by the *in camera* rule with the public interest in having information available for the purpose of some important tribunal or the exercise of important statutory function.

15. It was argued on behalf of the first named applicant and first respondent that if such common law rule existed, it was abolished by the provisions of s. 40(8) of the Civil Liability and Courts Act 2004. I find that if such was the intention of s. 40(8), then I would

expect the Oireachtas to have included in the statutory provision an additional provision abolishing this important existing common law rule. No such additional provision is contained in the Act of 2004 and, in its absence, I find that the common law rule survived its enactment.

Inherent Jurisdiction

16. While the second applicant advanced in its submissions that as an alternative there was an inherent jurisdiction in the court, I find that such inherent jurisdiction (if it may be termed as such) is coterminous with the common law power described above. I take slight exception to the description "inherent jurisdiction" as I do not think it is appropriate, notwithstanding that it is frequently conflated with "implied jurisdiction". My understanding of inherent jurisdiction is that it is a jurisdiction associated with the High Court and the Supreme Court on appeal arising from the unlimited jurisdiction of these courts in the context of the Constitution which enables them to provide a framework for reliefs delivering constitutional rights which are not yet delivered by statutory provision. An implied jurisdiction or power is, on the other hand, a power vested in the court by reason of its power and duty to regulate its own affairs having regard to the requirements of justice. I am of the view that the power of the courts to lift the *in camera* rule referred to as a common law power is, in fact, an implied power arising in the normal administration of court business in the interest of justice, and, most importantly, in the context of family law proceedings, it is a power which may be exercised by a statutory court such as the Circuit Court or the District Court without any constitutional remit.

Balancing of Interests

17. On the basis that I find that the court may in certain circumstances lift *the in camera* rule, it is important that the lifting of the *in camera* rule is seldom absolute and the practice of the court usually is to attach the disciplines of the *in camera* rule to the recipients or recipients of the information and documentation which has been released by lifting the rule. There is, almost invariably, a further restriction on the lifting order insofar as non-essential private material should be redacted, and where the lifting of the *in camera* rule relates to information and documentation pertaining to just one of the parties, then the privacy and business of the other party should be preserved by even more rigorous redaction, with costs orders providing that the burden of such redaction does not fall on an innocent, or less blameworthy party.

Probity of Court

18. As was held in *X.Y. v. Y.X.* [2010] IEHC 440, the court when dealing with family law proceedings arising in bankruptcy, or realistically threatened with same in the future, must act "with probity" to protect against fraudulent behaviour and bad faith. An essential basis for such probity is that the family law court should ensure full and accurate disclosure by all parties in the family law proceedings and ensure, through case management and other steps, that there was a proper account of the assets and needs of the parties, as well as fair provision having regard to the competing requirements of the applicable bankruptcy code. There is, therefore, a very substantial common interest in law between this family court and the bankruptcy court in Ireland. Also, given the strong statutory nexis between NAMA and the US Bankruptcy Court, I consider the same relationship arises between this Court and the US Bankruptcy Court.

Public Interest

19. Insofar as public interest may have a statutory basis, it arises in abundance through the complex statutory framework of NAMA, which is charged with its duties in the interests of the taxpayers of Ireland. This strong public interest also arises through the nexis between NAMA and the US Bankruptcy Court through its act of participation in the US bankruptcy proceedings.

The Facts

20. I find as a fact that the first applicant has been guilty of several intentional or unintentional concealment of assets, either through simple denial in the examination process of s. 341 in the US bankruptcy, or by inappropriate invocation of the *in camera* rule in this and in another non-EU jurisdiction and by failing to properly define the status of wife No. 2 and her relationship to the various assets and transactions queired in the interrogation process. I am satsifeid that without full disclosure in accordance with the motion herein the position of the US court in establishing the assets and liabilities of the first applicant for the purposes of bankruptcy proceedings in the US, would be well nigh impossible. The forensic affect of committal proceedings against the first named applicant for contempt in the US bankruptcy proceedings would not necessarily have the desired result in ensuring that availability of proper information for the US bankruptcy proceedings.

Conclusions

21. Having regard to the fact that this application should be judged on the basis of a balancing of the interests of the first named applicant and the respondent and, indeed, wife No. 2 to the protection of the *in camera* rule, and the very substantial universal interest of the Irish taxpayer in recovering the assets provided by NAMA to rescue the banks following the 2008 crisis and the parallel public interest in ensuring that the Irish courts assure an active comity and cooperation with the US bankruptcy court by reason of the participation of a highly important organ of the Irish State in the form of NAMA and its entity with the US bankruptcy court, I find that the *in camera* rule should be lifted in terms of the notice of motion herein (as extended and amended), but subject to redaction to protect the private and sensitive non-commercial aspects of the case from being disclosed, and on the basis that the material is only used for investigative purposes within the US bankruptcy and not for public dissemination in the s. 341 process. The information should, therefore, not be disclosed by reason of this Court lifting the *in camera* rule unless the trustee and official assignee in the US bankruptcy proceeding are authorised by the US court to use the information and documentation within that constraint. In this regard, I have taken some comfort from the fact that counsel for NAMA indicated that this course would be taken by the trustee in the US bankruptcy proceedings.

22. As stated above, the disclosure of the documentation and the hearing of this motion has been an expensive process, and one for which the respondent should not be liable, and I accept the undertaking on behalf of NAMA to discharge the respondent's costs. These costs, I understand, should also be paid in relation to further continuing costs arising from the selection and approval and detail of the documents and information to be disclosed under the lifted rule. As I suggested during the hearing, similar costs in relation to selection and redaction of material should be paid by the second applicant to the first applicant (notwithstanding the court holding against the first applicant in the substantive application unless the second applicant convinces me otherwise). The rationale for such an approach is that while the first applicant cannot be commended for his approach towards this case, the pace of the proceedings could be greatly hindered and delayed if the first applicant finds that he is not indemnified in respect of all or, at least a reasonable proportion of his costs for continued involvement. I await submissions of counsel in relation to the form of order and further issues in relation to costs.