

THE HIGH COURT

[2003 No. 7197 P]

BETWEEN

INDEPENDENT NEWSPAPERS (IRELAND) LIMITED

PLAINTIFF

and
JOSEPH MURPHY JUNIOR

DEFENDANT

Judgment of Mr. Justice Clarke delivered on the 28th day of July, 2006

1. Introduction

1.1 On the 2nd May, 2006, the Master of the High Court ordered that the plaintiff ("Independent") make discovery of a category of documents described in the order of the Master in the following terms:-

"All articles prepared and/or published by journalists writing for the plaintiff prior to the 20th July, 2001, on the issue of the defendant's alleged attendance at Ray Burke's house in May/June 1989, together with memoranda or notes of any unpublished information irrespective of the reliability of its source contained in the instructions of the plaintiff to its lawyers prior to the 20th July, 2001."

1.2 The category which had been sought by the defendant ("Mr. Murphy") differed in some respects from the category directed to be discovered by the Master.

1.3 Independent has appealed against the order of the Master and this judgment is concerned with that appeal.

1.4 As in all cases of discovery an important starting point has to be a consideration of the issues which arise in the proceedings to which discovery is directed. As these proceedings are somewhat unusual in nature it is necessary to turn, firstly, to those proceedings and the issues which may or are likely to arise in them.

2. The Substantive Proceedings

2.1 On the 17th May, 1998, Independent published an article which referred to a Michael Bailey as being famous for being "the man in Ray Burke's house when a brown paper bag with IR£50,000 in cash was handed over to the former Minister by Joseph Murphy of J.M.S.E. as a campaign contribution".

2.2 On the 29th May, 1998, Mr. Murphy commenced proceedings in this court (record No. 1998/64/89P) in which he claimed damages for alleged defamation arising out of that article ("the defamation proceedings").

2.3 It would appear that the defamation proceedings were compromised on the 20th July, 2001, as a result of an agreement reached between the respective solicitors for both parties on terms that Independent would pay to Mr. Murphy a sum of IR£53,000 inclusive of costs and would publish an agreed apology.

2.4 It would also appear that the terms of that compromise were implemented, with the sum of money being paid and the apology appearing in the agreed form in the Sunday Independent on the 22nd July, 2001. Resulting from those two matters, the defamation proceedings were struck out by consent with no further order on the 16th October, 2001.

2.5 It is clear that Mr. Murphy's case, as made in the defamation proceedings, was to the effect that he was never present in Mr. Burke's house on the occasion in question and never paid any sum of money to Mr. Burke. It also needs to be added that that question, together with related issues, formed the central focus of the earlier considerations of the Flood Tribunal.

2.6 In these proceedings Independent maintains that the defamation proceedings were based upon a false representation by Mr. Murphy to the effect that he had not been present in Mr. Burke's house on the occasion in question and had not handed any sum of money to Mr. Burke. It is contended, therefore, that the proceedings were a malicious abuse of the process of the Court and were based upon fraudulent misrepresentation. In those circumstances, it is contended that Independent is entitled to have appropriate declarations or orders which would set aside or rescind the settlement agreement. Damages are also claimed. In his defence, Mr. Murphy claims that, as of the date of the settlement of the defamation proceedings, all evidence, whether oral or documentary, and all submissions, relating to the relevant events in Mr. Burke's house had been heard by the Flood Tribunal and were publicly available. Mr. Murphy also states that by the time the settlement had been reached, Independent had obtained discovery from Mr. Murphy in the defamation proceedings and had also obtained third party discovery from Mr. Dermot Ahern. In those circumstances, it is contended that, at the time the settlement was entered into on the 20th July, 2001, Independent had the benefit of legal advice and the benefit of all relevant evidence relating to the defamation proceedings. In those circumstances, Mr. Murphy contends that Independent is now estopped from pleading that the defamation proceedings were an abuse of process, malicious or otherwise unlawful.

2.7 As the proceedings are, undoubtedly, unusual, if not unique in this jurisdiction, it is necessary to consider the legal principles which may be applicable to such proceedings (for the purposes of identifying the matters of fact which may be relevant to the determination of those proceedings). I should emphasise that a final determination as to any such principles is a matter for the judge who will have carriage of the trial of the substantive action in this case. My purpose, at this stage, is simply to give sufficient consideration to the legal issues to enable a reasonable estimate to be made as to the factual issues which may be before the court. I now turn to those legal principles.

3. Malicious prosecution

3.1 It is clear that, in principle, a defendant may have a cause of action against a plaintiff, where that plaintiff maintains and prosecutes a claim without reasonable cause and for the wrongful purpose of exacting pressure on a defendant such that the defendant may suffer damage. In *Dorene Limited & Another v. Suedes (Ireland) Limited* [1981] 3 I.R. 312 Costello J. so held in determining that the defendant in those proceedings was entitled to damages arising from the fact that the plaintiff pursued a claim for specific performance with the view to exerting pressure on the defendant to obtain a lease of premises.

3.2 The precise parameters of such a cause of action remain to be clearly defined. The basis of the finding of Costello J. in *Dorene* stemmed from advice of counsel, given after the commencement of proceedings, but well before the proceedings came on for hearing,

to the effect that the plaintiffs in that case did not have a cause of action, because the necessary elements required to justify a decree of specific performance were not present. Despite that advice, the plaintiffs did not discontinue the action, but attempted to negotiate the lease concerned. It is clear, therefore, that the reason why the proceedings were regarded, on the facts of that case, to have been prosecuted (from the date of counsel's advice) maliciously and inappropriately was that the proceedings were unstateable for legal reasons (of which the plaintiff had been advised) rather than by virtue of any issue of fact.

3.3 It is, of course, in principle open to a party to allege that the reason why the court should conclude that proceedings were maliciously progressed was because of the assertion by the plaintiff of factual matters which the plaintiff knew not to be true. There seems no reason in principle why, in an inappropriate case, the pursuit of a claim in such circumstances, based on an assertions of facts which the plaintiff knew not to be true, would not equally amount to an abuse of process. However, additional difficulties arise where, unlike in *Dorene*, the proceedings have already been concluded whether by compromise or by determination by the court, without reference to the question of malicious prosecution.

3.4 In the latter case (and on the assumption that the plaintiff succeeds), there will be a binding determination by the court to the effect that the facts are as contended for by the plaintiff. Such a finding could only be gone behind in the limited circumstances identified in the jurisprudence such as a case where it can be shown that the plaintiff's success was procured by a fraud on the court (see for example *House of Spring Gardens Limited v. Waite*). In the absence of the defendant being in a position to have the original order set aside on such grounds, the Court could not entertain a second set of proceedings which was predicated upon the fact that the original finding of the court was incorrect.

3.5 Somewhat different considerations may well apply in respect of a case which was compromised rather than determined by the court. In those circumstances, there is no finding of a court, binding on the parties, which can only be set aside on very limited grounds.

3.6 The precise parameters of the circumstances in which a party, such as Independent, may be entitled to seek to go behind a settlement on such grounds, remain to be the subject of authoritative determination. However it seems to me to be at the very least arguable that it could be the case that a plaintiff, in a position such as Independent, can simply not re-run on the same evidence the action which it had compromised by means of asserting that the claim made by the plaintiff in that action was false to the knowledge of the plaintiff concerned and no move.

3.7 The issues which arise in litigation vary. However quite a number of cases turn largely on questions of fact where it is clear, in advance of the hearing, that the parties propose leading contradictory evidence as to key events. Where the parties compromise such an action, such settlement will be based on a view (presumably with the benefit of expert advice) as to the chances of each succeeding or failing in persuading the court that the facts are as they allege. If it were possible, in effect, to reopen such a case, notwithstanding such a settlement, by the defendant simply asserting that the plaintiff's factual contentions were, to the knowledge of the plaintiff, false, without more, then it would, in practical terms, be virtually impossible to compromise any such action. If, in such a case, the court were merely asked to hear the competing evidence which would have been presented to the court on the first action with a view to persuading the court that the plaintiff's evidence was not to be believed, then the court would, in effect, be being asked to allow the defendant to run the case which he had already settled. Without expressing any concluded view on this issue it seems to me that such a conclusion as to the state of the law would be improbable.

3.8 Leave is likely, to be an issue in this case as to whether the plea of estoppel raised by Mr. Murphy should succeed unless it can be shown that there is now available to Independent additional materials which would not result in the court being invited to re-run the case that has been compromised. The precise nature of the materials which would suffice, the circumstances surrounding whether such materials were or could have been available at the time of the compromise, and how they are available now, are matters which the court at trial will have to address. In the absence of authority, it would be both difficult and, indeed, inappropriate, to express any view as to the precise test or barrier which Independent may have to surmount. However, it seems to me that it can be safely concluded that there is at least a very real possibility that the question of the state of knowledge of Independent and its advisors, at the time when the settlement was entered into, may be relevant for the purposes of ascertaining whether any of the materials which are to be put before the court at the trial were or could have been available to Independent at the time of the compromise. It is not, therefore, that Independent's state of knowledge is relevant in itself. That state of knowledge may, however, be relevant to the question of the status of evidence now put to the court by reference to whether it was or could or should have been available to Independent at the time of the compromise. It should be said that whether any such materials may become relevant will depend on the detail of the case, both on the facts and the law, made by the parties at the trial.

3.9 Against that background, it is necessary to turn to the discovery issue.

4. The documents sought to be discovered

4.1 The category of discovery in issue in this case can, in my view, conveniently be broken into two parts. The first part concerns published material. While it is true to state that any such material might be available to Mr. Murphy through other sources, it does not seem to me to be inappropriate to direct Independent to make discovery of such documents. It is clearly much easier for Independent to compile a list of the relevant documentation.

4.2 Different considerations potentially arise in respect of the second part which involves unpublished internal documentation and would, necessarily, involve, as a matter of likelihood, either materials which were communicated to journalists in confidence or materials which were presented by Independent to its legal advisors for the purposes of obtaining advice. The former category would be confidential but not privileged. The latter category would, *prima facie*, be privileged and, even if not privileged, would undoubtedly be confidential.

4.3 I am satisfied that the court should only order discovery of confidential documents (particularly where the documents involve the confidence of a person or body who is not a party to the proceedings) in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made.

4.4 It is clear that confidential information (which is not privileged) must be revealed if not to reveal same would produce a risk of an unfair result of proceedings. The requirements of the interests of justice would, in those circumstances, undoubtedly outweigh any duty of confidence. There is ample authority for that proposition which now may be taken to be well settled. Where, therefore, it is clear that the materials sought will be relevant, then discovery must be made notwithstanding any confidentiality.

4.5 However, it seems to me that the balancing of the rights involved also requires the application of the doctrine of proportionality. To that extent, it seems to me to be appropriate to interfere with the right of confidence to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing. In the unusual circumstances of this case it is far from clear (for

the reasons analysed above) as to whether any of the disputed documentation will become necessary. As pointed out relevance will depend on the case which Independent makes, the facts and evidence led in support of that case and the legal submissions of the parties. The balance is, therefore, between a possible relevance and a high probability of a breach of confidence.

4.6 In those circumstances it seems to me that it would be disproportionate to order an immediate discovery of what are undoubtedly confidential documents in circumstances where those documents may (but only may) be relevant to the issues which will arise at the trial. The uncertainty as to the issues derives in significant part from the fact of there being a very limited jurisprudence in this area.

4.7 In those circumstances it seems to me that the proportionate order that should be made (in the absence of an undertaking to like effect given on behalf of Independent) should be to require Independent to refrain from destroying any of the documentation within the second part of the order of the Master pending trial; to make a list of such documentation; and to provide such a list to Independent's solicitors. Depending on the way in which the case is presented at hearing, there may be a necessity to test a contention that any evidence then put before the court on behalf of Independent was not and could not have been available to Independent at the time of the compromise. It *may* be necessary to test such a contention by reference to any specific category of documents which the trial judge might consider to be relevant to that question. Whether such an eventuality will arise depends on the course of the trial and, in particular, the way in which Independent chooses to make its case. It may never arise. In those circumstances it seems to me that it would be disproportionate to require the disclosure of the relevant information at this stage, when it may well not be relevant at all. However it would equally be unfair to Mr. Murphy to deprive him of the opportunity to have access to such documentation at the trial, if it becomes apparent that the documentation is necessary to the fair resolution of the issues which have arisen. Therefore any refusal to order the disclosure of such documentation at this stage should not be regarded as final. The trial judge (who will then be able to take a much clearer view as to the precise factual issues which have arisen) will be in a much better position to determine whether any such documents are, truly, necessary in relation to those issues in the way in which they have evolved.

4.8 I have adopted a similar approach in *Yap v. Temple Street Hospital*. In that case discovery was sought of confidential patient records in the context of a dispute between a consultant doctor and her hospital employer. As it was unlikely to be clear as to whether any individual records would be necessary to a fair determination of the issues between the parties until the actual trial, I adopted a similar approach to that which I propose adopting in this case. In an ex tempore ruling I made provision for securing the relevant documents to ensure that they would be available, if required, at the trial.

4.9 Finally, it seems to me that it is unnecessary, at this stage, to deal with questions of whether legal professional privilege might attach to those documents specified in the contested order which would amount to instructions to lawyers. Irrespective of whether privilege attaches, such documents would also clearly be highly confidential. In those circumstances it seems to me that the same principles and considerations apply to them as I have indicated apply in respect of confidential communications to Independent and its employees. For those reasons I would propose applying the same regime to those documents, as I have already indicated I would apply in respect of the earlier category.

5. Conclusions

5.1 In all the circumstances I would therefore propose allowing the appeal by deleting all words after "May/June 1989" in the order of the Master.

5.2 In lieu of the second portion of that order, I direct that the documents referred to in that portion should be subject to the regime which I have identified above.