

APPROVED

[2021] IEHC 102

THE HIGH COURT

2018 No. 124 COS

IN THE MATTER OF INDEPENDENT NEWS AND MEDIA PLC

AND IN THE MATTER OF SECTION 748 OF THE COMPANIES ACT 2014

AND IN THE MATTER OF AN APPLICATION

BETWEEN

JENNIFER KILROY, HARRIET MANSERGH, JONATHAN NEILAN, MARK KENNY,
SAM SMYTH, ANDREW DONAGHER, AND SIMON MCALEESE

DONAL BUGGY, ANNEMARIE HEALY AND MANDY SCOTT

VINCENT CROWLEY

MOVING PARTIES

AND

THE DIRECTOR OF CORPORATE ENFORCEMENT
INDEPENDENT NEWS AND MEDIA PLC
LESLIE BUCKLEY

RESPONDENTS TO THE MOTIONS

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 February 2021

INTRODUCTION

1. This supplemental judgment addresses a number of matters arising out of a judgment delivered on 18 September 2020, *In the matter of Independent News and Media* [2020] IEHC 385 (“*the principal judgment*”). The principal judgment granted a number

NO REDACTION REQUIRED

of individuals leave to use material, which they had received in the context of the within proceedings, for the purposes of *other* proceedings. The material consists of affidavits and exhibits which had been filed as part of an application to appoint inspectors to Independent News and Media plc pursuant to the Companies Act 2014. I will refer to these affidavits and exhibits as “*the disputed material*”. The moving parties wish to use the disputed material for the purposes of proceedings which they intend to pursue against Independent News and Media plc and/or Mr. Leslie Buckley. These other proceedings allege that an exercise, which involved the detailed examination or “interrogation” of data held by the company, entailed a breach of the moving parties’ rights, including, in particular, their right to privacy. The proceedings will be referred to as the “*proceedings alleging breach of privacy*” where convenient. It should be recorded that Mr. Buckley disputes these allegations and intends to fully contest those proceedings.

2. The matters remaining to be determined by this court fall under two broad headings as follows. First, it is necessary to address the precise form of costs order to be made in respect of the applications the subject-matter of the principal judgment. Secondly, it is then necessary to consider a number of *additional* applications for leave to use the disputed material for other proceedings.

COSTS OF THE MOTIONS HEARD ON 28 JULY 2020

3. The principal judgment had been delivered in respect of three motions heard by me on 28 July 2020. The parties to these motions *appear* to be in broad agreement that the costs of the motions should be borne by Mr. Buckley as the unsuccessful party. (The position in respect of the costs of Mr. Vincent Crowley’s motion is less clear-cut, with his entitlement to costs being challenged in the written legal submissions). The parties are in disagreement, however, as to whether a stay should be imposed on those costs orders.

Mr. Buckley submits that the costs should not be executed until such time as the other proceedings, i.e. the proceedings alleging breach of privacy, in aid of which leave to use the disputed material had been sought, are heard and determined.

4. If and insofar as it remains in dispute, I propose to address, first, the question of the allocation of costs. The applications for leave to use the disputed material were made in the context of existing proceedings pursuant to the Companies Act 2014, whereby the Director of Corporate Enforcement had sought an order from the High Court appointing inspectors to investigate the affairs of Independent News and Media plc (“*the Company*”). As explained in the principal judgment, documentation in the form of affidavits and exhibits had been exchanged in the course of that application. The documentation had been furnished to interested parties, subject to a proviso that same was not to be used other than for the purposes of the proceedings without the leave of the court. The motions sought leave to use that material for the purposes of other proceedings.
5. The motions represented stand-alone applications, in the sense that the sole issue to be determined between the parties to those motions has now been finally decided by the High Court (subject, of course, to any appeal). There will be no further hearing before this court involving those parties. The applications should thus be characterised for costs purposes as resulting in final orders, rather than interlocutory orders.
6. On this analysis, the parties who sought leave to use the disputed material for other proceedings are *prima facie* entitled to an order for costs against Mr. Buckley. This is because those parties have, for the purposes of Part 11 of the Legal Services Regulation Act 2015, been “entirely successful” in their applications. Mr. Buckley is the unsuccessful party in that he had opposed the applications by way of written and oral submission.

7. It is correct, of course, to say that an application to court for leave to use the disputed material would still have been required even had Mr. Buckley not opposed same. This is because it was necessary, under the terms of the relevant court orders, to apply for leave of the High Court to rely on the disputed material for any purposes other than for the application to appoint the inspectors. Nevertheless, Mr. Buckley's stance in opposing the motions had the consequence of increasing costs significantly. The Director of Corporate Enforcement and the Company had not opposed the motions, and but for Mr. Buckley's opposition, the matter could have been dealt with shortly and, possibly, even on the basis of the papers alone. Instead, Mr. Buckley, as he was perfectly entitled to do, resisted the applications. This had the consequence, however, that the costs incurred by the other side in pursuing the applications were increased. I am satisfied, therefore, that Mr. Buckley should have to pay the costs.
8. For the sake of completeness, I should say that even if I am incorrect in my characterisation of the orders as final, as opposed to interlocutory, orders, the same result would nevertheless eventuate. This is because it is clear from Order 99 of the Rules of the Superior Courts (as amended in 2019) that the High Court, even on an interlocutory application, must seek to determine the incidence of costs save where it cannot do so in the interests of justice. This is consistent with the language of the Legal Services Regulation Act 2015 which provides that the High Court may make an order for costs at any stage of the proceedings. It seems to me, therefore, that even if characterised as interlocutory orders, this court would be obliged to attempt to address the question of costs. The position is clear-cut in that the other side was entirely successful in the application, notwithstanding Mr. Buckley's opposition.
9. The next issue to be determined is whether some form of stay on the enforcement of the costs orders should be put in place. Mr. Buckley submits that the execution of the costs

orders should await the hearing and determination of the *other* proceedings, i.e. the proceedings against Mr. Buckley himself, in aid of which the documentation had been sought.

10. With respect, I do not think that such a stay is necessary in the interests of justice. Whereas a court will often impose a stay on the execution of costs pending the determination of the proceedings *within which* the costs order has been made, it would be most unusual to stay an order pending the determination of *other* proceedings. The position in this regard has been stated as follows by the Court of Appeal in its judgment in *Permanent TSB v. Skoczylas* [2020] IECA 152 (at paragraph 44 of the judgment).

“The principles discussed in [*Godsil v. Ireland* [2015] IESC 103, [2015] 4 I.R. 535] apply to the execution of orders for costs and not merely to the making of such orders. To hold otherwise would be to fundamentally undermine the role of costs, and the function of costs orders, in the administration of justice. The making of costs orders would be an entirely hollow protection for successful litigants if such orders were not, in general, immediately enforceable. A successful party has a legitimate expectation that where costs are awarded in his favour that he may take all lawful steps to recover those costs from the unsuccessful party. Where it is sought to suspend that entitlement by the granting of a stay, the onus clearly rests on the party seeking such a stay to satisfy the court that it is in the interests of justice to do so. Such stays are, of course, frequently granted pending appeal. Such a stay has been ordered by this Court but the additional stay now sought by Mr Skoczylas is quite different in nature and scope.”

11. On the facts of *Skoczylas*, a stay had been sought on a costs order pending the determination of other proceedings to which the party in whose favour the costs order had been made was not involved. The primary reason advanced for seeking the stay was that were the costs order to be executed it would, or so it was said, inevitably result in the bankruptcy of the party against whom the order had been made. This, in turn, was said to have implications for the ability of a company, in which the party against whom the costs order had been made was the major shareholder, to pursue the other

proceedings. The Court of Appeal ultimately refused the application for a stay pending the determination of the other proceedings.

12. As appears from the passage cited above, the test to be applied is whether the imposition of a stay on a costs order is necessary in the interests of justice. For the reasons which follow, I am satisfied that a stay is not necessary in the present case.
13. First, there has been no suggestion that a requirement to discharge the costs orders would adversely affect Mr. Buckley's ability to finance his defence of the other proceedings. The measure of costs will be relatively modest, consisting of the costs of a motion heard before the High Court in less than half a day, together with the costs of written legal submissions. This is not a situation where, for example, the requirement to meet a costs order in a first set of proceedings would cause financial hardship for a party and inhibit their ability to prosecute or defend, as the case might be, a second set of related proceedings involving the same parties. In such a scenario, a court might well decide to stay the execution of a costs order to ensure that the party's right of access to the courts is safeguarded. This is especially so if there is a reasonable prospect that the party would succeed in the second set of proceedings. It would be unjust if, for example, a party who would otherwise have won the second set of proceedings were to be prevented from pursuing those proceedings in consequence of having to pay a costs order obtained in earlier, related proceedings.
14. Secondly, the connection between the issues arising on the motions heard on 28 July 2020, and the other proceedings, is remote. Even if Mr. Buckley were to be entirely successful in defending the proceedings taken against him alleging breach of privacy, this would not vindicate his opposition to the applications for leave to use the disputed material. Those applications were determined primarily by reference to the fact that the disputed material had already been the subject of a hearing in open court. The outcome

of the motions on 28 July 2020 did not turn on the merits of the breach of privacy proceedings. Put otherwise, even if Mr. Buckley is entirely successful in his defence of the proceedings alleging a breach of privacy, it remains the fact that he opposed the motions on 28 July 2020 on grounds which were ultimately found by this court to be unsustainable.

FURTHER APPLICATIONS FOR LEAVE TO USE DISPUTED MATERIAL

15. It is next necessary to consider two outstanding applications for leave to use the disputed material in other proceedings, as follows.
16. The first application is brought by Mr. Joe Webb. Mr. Webb explains his role in the Company as follows in his affidavit of 16 July 2020.
 - “3. I am the former Chief Executive of the Respondent’s Irish division having held a number of senior management positions over almost 20 years with Independent News and Media plc. These senior positions held across the period 2001 to 2010 were, inter alia, Group Advertisement Sales Director, Deputy Managing Director and Managing Director of Independent Newspapers Ireland Limited. I held the post of Chief Executive - Island of Ireland - between the years 2010 and 2013.”
17. Mr. Webb goes on to explain that he is one of the so-called “INM 19”. This is a reference to nineteen individuals whose name appear on a spreadsheet discovered by the Office of the Director of Corporate Enforcement as part of its own investigations, i.e. prior to the appointment of the two inspectors by the High Court. This spreadsheet has been exhibited as part of the affidavit of Mr. Ian Drennan sworn on 23 March 2018. The precise purpose of, and genesis of, this spreadsheet is a matter which is currently under investigation by the court-appointed inspectors.
18. Mr. Webb had been provided with the disputed material in April 2018, and had issued proceedings both as against the Company itself and as against Mr. Buckley. At the time

the application for leave to use the documents came to be made, the proceedings had only been served as against the Company not as against Mr. Buckley.

19. The application for leave to use the disputed material was not opposed by the Company nor by the Director of Corporate Enforcement. Mr. Webb has confirmed that he is not seeking a costs order as against either the Company or Mr. Buckley.
20. The position adopted by Mr. Buckley in response to Mr. Webb's application is that he formally opposes same, but has nothing to add in terms of his opposition to that which had been ventilated in respect of the earlier applications which resulted in the principal judgment.
21. Applying the principles set out in the principal judgment, I am satisfied that it is in the interests of justice that Mr. Webb also be given leave to use the disputed material for the purpose of his proceedings as against the Company and Mr. Buckley.
22. Mr. Webb has a legitimate interest in the proceedings leading up to the appointment of the inspectors, given his previous employment by the Company and the fact that he appears on the INM 19 spreadsheet.
23. The next application to be considered is that of Mr. Godson. The solicitor acting for Mr. Godson has sworn an affidavit grounding the motion. It is explained in the affidavit that Mr. Godson worked as a journalist from 1985 to 2002, latterly at *The Sunday Times* and that he then worked at Goldman Sachs, an investment bank, before starting a strategic communications firm, Powerscourt, in 2004. Mr. Godson's name also appears on the INM 19 spreadsheet.
24. The position taken by Mr. Buckley in response to Mr. Godson's application is similar to that in the case of Mr. Webb's application above. Mr. Buckley is formally opposing the application but does not seek to add to the submissions previously made.

25. Applying the principle set out in the principal judgment of September 2020, I am satisfied that Mr. Godson too is entitled to use the disputed material for the purpose of proceedings against Mr. Buckley and/or the Company.

CONCLUSION AND FORM OF ORDER

26. The precise terms of the orders to be made in respect of the three motions heard on 28 July 2020, and which are the subject of the principal judgment, have largely been agreed between the parties, save in respect of costs. For the reasons set out herein, the order will now provide that the moving parties in respect of each of the three motions are entitled to recover their costs as against Mr. Buckley. The costs are to include any reserved costs; the costs of the hearing on 28 July 2020; and the costs of written legal submissions, if any, filed. Such costs to be adjudicated by the Office of the Chief Legal Costs Adjudicator in default of agreement between the parties.
27. Mr. Webb and Mr. Godson are granted leave to use the disputed material (as more fully defined in the order) for the purpose of their proceedings as against the Company and/or Mr. Buckley. A costs order will be made in favour of Mr. Godson, in terms similar to those outlined in the preceding paragraph (save that the date of the hearing is 6 October 2020). No costs order is made in respect of Mr. Webb's motion in circumstances where he did not pursue an application for costs.
28. A stay will be placed on the costs orders pending any appeal to the Court of Appeal and/or an application for leave to appeal to the Supreme Court. For the avoidance of any doubt, the execution of the costs orders is not to be stayed pending the outcome of the other proceedings taken against Mr. Buckley and/or the Company.

Approved
Gareth S. Mans