



THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2023] IECA 109

Court of Appeal Record Number: 2020/262

Woulfe J

Collins J.

Binchy J.

BETWEEN

AX

Applicant/Appellant

AND

BX

Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 5th May 2023

1. On 5 October 2022 this Court (per Woulfe J) gave judgment dismissing Mr X's substantive appeal. A number of issues arose consequent on that judgment which were the subject of a further hearing before the Court. In his further judgment (with which I agree) Woulfe J addresses the issue of costs and also explains the Court's decision on the publication of a redacted version of the judgment of 5 October 2022.

2. This judgment addresses a further issue raised by each of the parties concerning the disclosure of an unredacted version of the judgment to certain third parties.
3. Some background must be given. Mr X has made a complaint to the Solicitor's Disciplinary Tribunal ("*the SDT*") alleging professional misconduct against the solicitors acting for Ms X (hereafter "*the Solicitors*"). The complaint arises from circumstances referred to in this Court's earlier judgment. In support of his complaint, Mr X provided the SDT with documents and/or information relating to these proceedings which – so it appears to be accepted - was covered by the *in camera* rule (or at least which would be covered by that rule were it not for the provisions of section 40 of the Civil Liability and Courts Act 2004). Mr X has also made complaints – the nature and scope of which is unclear – to a number of other bodies, including the Gardaí, the DPP, the Legal Services Regulatory Authority (LSRA) and the Judicial Council.
4. Mr X asks the Court for permission to provide an unredacted version of this Court's judgment of 5 October 2022 to the SDT and also to the LSRA. While Ms X opposes disclosure to the LSRA, she does not object to the proposed disclosure to the SDT. In fact, her Solicitors also wish to provide the judgment to the SDT. In addition, the Solicitors ask the Court to permit them to provide the judgment to their professional indemnity insurers, to whom (with the permission of the High Court) they have previously disclosed Mr X's complaints against them.
5. Mr X also asks the Court to permit him to provide a copy of the judgment of the High Court

in the substantive family law proceedings to the SDT.

6. The parties have brought to the Court's attention a decision of the High Court (Barrett J) given in these proceedings on 21 October 2022 ([2022] IEHC 584). The judgment relates to the complaints referred to above and the associated disclosure of *in camera* material by Mr X to the various bodies I have mentioned. On the application of Ms X, Barrett J held that such disclosure was impermissible except with prior leave of the High Court (which, it is accepted, Mr X had not sought or obtained). In so holding, Barrett J rejected Mr X's argument that leave of the court was not required by reason of section 40(6) and (7) of the Civil Liability and Courts Act 2004 ("*the 2004 Act*"). In his view, nothing in section 40 of the 2004 Act varied or removed "*the traditional rule as regards obtaining the prior leave (permission) of the courts when it comes to the disclosure to third parties of documents, information or evidence that are generated in or garnered or gleaned from in camera proceedings*" (para 15). Consequently, Barrett J made orders requiring Mr X to provide Ms X with a list of all of the persons to whom he had shown or furnished any *in camera* material, as well as a comprehensive list identifying the material disclosed to such persons. In addition, Barrett J made an order restraining Mr X from further dissemination of *in camera* materials.
7. The Court was told that the order made by Barrett J has not yet been perfected and it appears that further issues remain to be argued, including whether the High Court should now direct the return/retrieval of the material disclosed by Mr X (Ms X's position being that it should so direct) or whether it should instead make an order retrospectively authorising some or all of that disclosure (it appears that Mr X has brought, or intends to bring, an application

for such an order).

8. Mr X told the Court that he had not ruled out bringing an appeal from the order and judgment of Barrett J. That, he said, would depend on the further orders (if any) that may ultimately be made in the High Court. Before this Court Mr X did not challenge the judgment of Barrett J or maintain that section 40 of the 2004 Act permits the disclosure of its judgment to the SDT (or the LSRA) without this Court's permission. Rather, he expressly sought such permission from the Court.
9. In my view, on the premise that its permission is necessary, the Court should permit the disclosure of its judgment in unredacted form to the SDT. Ms X does not oppose disclosure to the SDT and, as already noted, her solicitors separately seek permission for such disclosure.
10. As for Mr X's request to be permitted to provide the High Court judgment to the SDT, I do not believe that it would be appropriate to give such permission at this stage, given that the wider question of what High Court material (if any) should be permitted to be disclosed to and/or retained by the SDT is still being considered by the High Court.
11. On the same assumed premise – that the permission of this Court is necessary for such disclosure – I do not consider that any basis for permitting disclosure to the LSRA has been established and in my view the Court should decline to give such permission. Since October 2019 the LSRA has assumed responsibility for dealing with complaints against solicitors pursuant to Part 6 of the Legal Services Regulation Act 2015. But the complaint made by

Mr X regarding Ms X's solicitors was, it seems clear, made to the SDT and is being dealt with by that body. On that basis, there appears to me to be no reason why the judgment should be sent to the LSRA.

12. However, it is important to emphasise that, in making such orders, the Court is not to be taken as explicitly or implicitly endorsing Barrett J's views as to the meaning and effect of section 40 of the 2004 Act.
13. In relevant part, section 40 provides as follows:

“(6) Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings, to

(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or

(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation

to, or adjudicating on, any matter as may be so prescribed.¹

(7) Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the giving of information or evidence given in such proceedings to

(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or

(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.

(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

¹ In 2005 the Minister for Justice made two statutory instruments prescribing certain bodies and matters for the purpose of section 40(6)(b) and 40(7)(b) (see the Civil Liability and Courts Act 2004 (Bodies Prescribed under Section 40) Order 2005 (SI 170/2005) and the Civil Liability and Courts Act 2004 (Matters Prescribed under Section 40) Order 2005 (SI 339/2005). The net effect of these orders was to extend the application of section 40(6) and (7) to specified (non-statutory) bodies exercising disciplinary functions over barristers in respect of complaints of misconduct against barristers and appeals against such complaints.

is required to protect the legitimate interests of a party or other person affected by the proceedings.

(9) A hearing, inquiry or investigation referred to in subsection (6) or (7) shall, in so far as it relates to a document referred to in subsection (6) or information or evidence referred to in subsection (7), be conducted otherwise than in public and no such document, information or evidence shall be published.”

14. Divorce proceedings are required to be heard otherwise than in public by virtue of section 38(5) of the Family Law (Divorce) Act 1996, which applies section 34 of the Judicial Separation and Family Law Reform Act 1989 to such proceedings. Section 34 (as applied by section 38(5) of the 1996 Act) is therefore “*an enactment that prohibits proceedings to which the enactment relates from being heard in public*”. The effect of section 40(6) of the 2004 Act appears to be that nothing in section 34 of the 1989 Act “*shall operate to prohibit the production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings*” to “*(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter or (b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.*” Section 40(7) operates in the same way as regards the giving of information or evidence given in such proceedings to such a body.

15. The SDT is clearly a body that performs functions under an enactment (the Solicitors Acts) that consist of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, namely complaints against solicitors. There are a number of other such bodies, including the LSRA (whose functions under Part 6 of the 2015 Act extend to “*legal practitioners*”, which includes barristers as well as solicitors) and the Judicial Council, which under Part 5 of the Judicial Council Act 2019 has the statutory function of investigating and adjudicating on complaints made against members of the judiciary.

16. To the extent that, in the period pre-dating the coming into operation of section 40 of the 2004 Act, section 34 of the 1989 Act (as applied to divorce proceedings by section 38(5) of the 1996 Act) prohibited the production of a document prepared for the purposes or in contemplation of divorce proceedings or given in evidence in such proceedings, whether absolutely or conditionally (i.e. subject to prior permission from the court) - section 40(6) appears, at least on its face, to disapply that prohibition in respect of the production of such a document to a body coming within section 40(6)(a) or (b). On its face, section 40(7) appears to do the same in relation to information/evidence.

17. In other words, what these subsections *seem* to be saying is that the *in camera* rule does not operate to prohibit production (disclosure) of documents/information/evidence to a body or person within (a) or (b). If that be so, the question arises as to what rule or principle of law might operate to prohibit or restrict such production or disclosure or

make it conditional upon prior court approval.

18. In this context, section 40(6) and section 40(7) appear to be self-executing and do not appear to be - and certainly are not expressed to be - conditional upon any prior court order or permission. In that regard, those sub-sections stand in marked contrast to section 40(8) of the 2004 Act. Section 40(8) gives a court that is hearing proceedings under a “*relevant enactment*” a “*discretion*” to order disclosure to third parties, if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings. The persons to whom, and the purposes for which, such disclosure may be directed under section 40(8) differ significantly from section 40(6) and section 40(7). There appears to be nothing in section 40(6) and section 40(7) to suggest that the production that they authorise is conditional on the making of an order under section 40(8). If that were the case, section 40(6) and section 40(7) would serve no useful purpose and would effectively be entirely otiose.

19. In his judgment, Barrett J raises the spectre of “*largely untrammelled*” disclosure of *in camera* material if section 40(6) and (7) were to be construed as permitting disclosure without the need for prior court permission. But that stated concern appears to significantly overstate the scope of the disclosure apparently permitted by those provisions. As will be evident from the discussion above, those provisions relate only to disclosure to specified bodies for specified purposes (and, in passing, I would observe that disclosure to a planning authority would not appear to come within the scope of the sub-sections). Furthermore, section 40(9) expressly prohibits a body to whom material is disclosed from publicly disclosing it (by requiring any hearing, inquiry or

investigation relating to such material to be heard *in camera* as well as by prohibiting the publication of such material). Accordingly, so far from those subsections providing for the “*largely untrammelled dissemination*” of *in camera* material, there are significant restrictions on the disclosure of such material under section 40(6) and (7) and significant restrictions on the subsequent use of such material.

20. In *SM v SL* [2022] IEHC 449, the High Court (Butler J) expressed the view that section 40 established “*two different pathways through which in camera material might become available and be used outside the parameters of the case in which it originated*” (at para 32). In his judgment, Barrett J expresses his disagreement with her analysis but does not otherwise engage with it. Butler J’s analysis of section 40 appears to be consistent with its language and structure. It is, of course, a fundamental rule of statutory interpretation that one should not look at sections and sub-sections of an enactment in isolation.
21. Barrett J notes at para 12 of his judgment that, as of the enactment of the 2004 Act, there was conflicting High Court authority (the decisions of that Court in *MP v AP* [1996] 1 IR 144, *Eastern Health Board v Fitness to Practice Committee* [1998] 3 IR 399 and *RM v DM* [2000] 3 IR 373) as to whether the court had the power to authorise the disclosure to third parties of material covered by the *in camera* rule or whether the rule against disclosure was absolute. That may well be the case but it is not immediately obvious what relevance that has when one comes to ascertaining the meaning and effect of section 40 of the 2004 Act. That exercise requires a basic engagement with the text enacted by the Oireachtas. There is limited evidence of any such engagement in the High Court’s judgment here.

22. However, as already explained, the issue of the construction and effect of section 40 is not before this Court. In making the observations I have, my concern is simply to emphasise that, in addressing the requests made on both sides for permission to disclose this Court's earlier judgment to third parties, the Court is not to be understood as endorsing Barrett J's analysis or conclusions.

23. One issue remains to be addressed, namely whether permission should be given to Ms X's solicitors to provide a copy of this Court's judgment of 5 October 2022 to her professional indemnity insurers. In my view, such disclosure is clearly "*required to protect the legitimate interests*" of the solicitors, who are undoubtedly persons "*affected by the proceedings*", given their role in the proceedings and the close connection between the proceedings and the complaint against them made to the SDT. That being so, I believe that the solicitors should be permitted to provide a copy of the judgment to their insurers, subject to the insurers' undertaking (to be provided in writing to the solicitors and to be copied to Mr X) that they will keep the judgment and the information in it confidential and will not publish or otherwise disclose it, or any information in it, to any third party, other than as may be necessary for the purpose of dealing with Mr X's complaint against the solicitors that is currently before the SDT.

Woulfe and Binchy JJ have indicated their agreement with this judgment and with the orders proposed.