THE HIGH COURT

[2023] IEHC 319

[Record No. 2021/104COS]

IN THE MATTER OF

BROCK DELAPPE LIMITED

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 212 OF THE COMPANIES ACT 2014

BETWEEN

KEVIN DELAPPE

APPLICANT

AND

DAVID BROCK, DECLAN COSGRAVE AND BROCK DELAPPE LIMITED

RESPONDENTS

RULING of Mr Justice Mark Sanfey delivered on the 13th day of June 2023.

1. On 18 April 2023, I delivered a judgment in relation to an application by the respondents primarily seeking orders preventing the use or dissemination of certain documents which had come into the possession of the applicant on the basis that the documents were improperly obtained by the applicant and in any event were privileged. The applicant argued that the documents were not privileged, and that even if the court were satisfied that they were, the "iniquitous" conduct of the

respondents as revealed by the documents justified the setting aside of that privilege. The judgement of the court should be read in conjunction with this ruling.

2. In a lengthy judgment, I concluded that all but one of the documents in question were indeed privileged, and that the matters revealed by the documents did not warrant that privilege being set aside. The issues necessitated a detailed examination of the documents and the affidavits of the parties; it was necessary to dwell on the content of the documents in the judgment in order to form and express the findings and conclusions of the court in relation to what were complex and indeed convoluted issues.

3. At the conclusion of my judgment, I invited submissions in relation to the orders to be made on foot of my findings. There were two issues on which I required particular assistance: the issue of costs, and the question of publication of the judgment, given that the terms of the documents in respect of which privilege was claimed were set out in the judgment. Both sides duly furnished submissions, which I have considered for the purpose of this ruling.

Costs

4. There was no substantial dispute between the parties as to the principles governing the award of costs in interlocutory applications; those principles are well settled, and do not require to be summarised or explored here. The respondents argued that they had been successful in establishing that eight of the nine documents at issue were privileged, and that an appropriate undertaking had been given by the applicant not to access the first named respondent's email account, so that the respondent did not require any further orders in this regard. It was submitted that these circumstances constituted an "event" which costs should follow. The trial judge would not be in a

better position to determine the issue of costs; it is clearly possible for this Court to determine the costs of the interlocutory application.

5. The applicant submitted that the rejection of the claim of privilege in respect of one of the documents meant that the outcome of the application was a "score draw", and that there was "no obvious event" in either side's favour. Both sides had emerged from the application with a "tangible litigation advantage". It was also suggested that, in all the circumstances it was "reasonable for the [applicant] to raise, pursue or contest one or more issues in the proceedings" [s.169(1)(b) Legal Services Regulation Act 2015].

6. Although there were nine documents, four of these were particularly significant – documents KD9, KD10, KD11 and KD13 [see para. 149 *et seq*] – and most of the debate centred around these documents. The applicant succeeded in persuading the court that document KD10 was not privileged, as it comprised a letter of advice which, although directed to the interests of the first and second named respondents, was given by the solicitors for the respondents to the company at a time prior to the receipt of instructions by that firm to act on behalf of the first and second named respondents. As there was no dispute at the time of the letter between the applicant and the company, the respondents could not assert privilege against the applicant, who as a director of the company was entitled to access legal advice given to the company by a solicitor advising it. The issue of privilege surrounding document KD10, the contents of which make it clear that the letter is a significant one in the context of the litigation, was a significant controversy which took up a good deal of time. My analysis and conclusions in relation to the issue are set out at paras. 152 to 162 of the judgment.

7. With this sole exception, the respondents were entirely successful in asserting privilege over the documents. They were also successful in resisting the submission that privilege should be set aside because of the "iniquity" revealed by the documents. There can be no doubt that the application by the respondents was justified.

8. It seems to me that the overall "event" which costs must follow is the preponderance of the success of the respondents in the application. I do think however that the applicant's success in relation to document KD10 was significant. The issue was intensely fought by the parties, and required a consideration of principles – particularly the principle in *Re Hydrosan Limited* [1991] BCLC 418 – which were particularly applicable to this document. In the end, I accepted the submissions of the applicant as summarised at paras. 111 to 117 of the judgment on this issue.

9. While it is certainly not the case that an "event" must involve success on every issue to warrant an award of full costs, I consider that the applicant did obtain a significant litigation advantage, in the overall context of the litigation, in persuading this Court that document KD10 did not attract privilege as against the applicant, and that it was reasonable for the applicant to contest the issue, which may be considered an "event" for the purpose of costs. As Murray J confirmed in his summary of the principles regarding costs in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183 "…the court, in the exercise of its discretion may also make an order that where a party is 'partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d))" [para. 19].

10. In *Sony Music Entertainment (Ireland) Limited v UPC Communications Ireland Limited* [2017] IECA 96, Finlay Geoghegan J set out the approach to be followed in the case of partial success in a complex matter:

> "I would respectfully say that where a trial judge reaches a decision that the party losing the case succeeded on a number of issues which contributed to the overall complexity, length and cost of the proceedings and proposes only making a partial order in favour of the winning party that he should indicate his decision as to the percentage which the issues won by the losing party contributed to the overall cost of the proceedings and then expressly make the net order. This permits the parties and an appellate court to know and assess more clearly in the trial judge's decision. I followed this approach in the High Court in *McAleenan v. AIG (Europe) Limited* [2010] IEHC 279, [2013] 2 I.R. 202 where I determined, as a matter of probability, that the issues on which the losing plaintiff had succeeded, contributed to 40% of the overall costs of the proceedings. I decided and stated that it then followed that the plaintiff was entitled in substance to recover 40% of her costs against the defendant; the defendant was only entitled to recover 60% of its costs against the plaintiff (i.e. no part of the costs of the issues on which it lost) and that the net order should be an order for costs in favour of the defendant for 20% of the overall costs" [para. 23].

11. Accordingly, I take the view, on a rough estimate, that the issues on which the respondents succeeded accounted for 85% of the costs of the application, and the issue on which the applicant succeeded accounted for 15%. The net order in favour of the respondents against the applicant will be an order for 70% of the costs of the application, to be adjudicated in default of agreement. I consider however that the circumstances of the matter warrant a stay on the costs order pending the determination of the litigation, and I will so order.

Publication of the judgment

12. I asked for submissions in relation to the issue of publication of the judgment, as a concern was raised that publication of the judgment would defeat the purpose of the application if the judge hearing the trial became aware of the contents of documents which have now been found to be privileged.

13. The applicant did not address the matter in his submissions. The respondents acknowledged the requirement in Article 34 of the Constitution that justice shall be administered in public, and that this requirement applies to the present proceedings. They contended that the decision of the Supreme Court in *Gilchrist v Sunday Newspapers* [2017] 2 IR 284 was authority for the proposition that "…the Court possesses an inherent jurisdiction to adopt measures or impose certain restrictions on the public nature of the proceedings, where such a course is deemed to be justified having regard to the legitimate interests of parties involved. It is accepted that this jurisdiction which [sic] is to be exercised sparingly" [para. 3.3 written submissions].

14. The applicant submitted that a delay on publication of the judgment until after the determination of the proceedings "would preserve the effectiveness of the remedies sought and granted to the respondents and this would not impact materially upon the overarching requirement that justice must be administered in public…" [para. 3.6]. The respondents submitted that, in the alternative, certain measures could be taken to ensure that the parties would be precluded from referring to the judgment in any legal submissions to be made in the case, and steps taken to ensure that the judge assigned to hear the case "had not read or considered the judgment delivered herein" [para. 3.7].

15. O'Donnell J in *Gilchrist* stated that "…any departure from the rule of hearing in public is an exception which must be strictly justified…" [para. 44]. In that case, the court was requested by the Garda Commissioner to permit defamation proceedings

to be held in private, given the danger of persons being identified in respect of a witness protection scheme. O'Donnell J stated that "…it is in my view necessary to consider the matter incrementally, and to ask whether any lesser steps would meet any legitimate interests involved…" [para. 44].

16. The constitutional imperative that justice must be administered in public in Article 34.1 "…save in such special and limited cases as may be prescribed by law…" is a principle which must be observed, and "incremental" or "lesser steps" may only be justified where legitimate interests necessitate such measures, and then only to that extent.

17. It does not appear to me that a delay on publication of the judgment until determination of the proceedings is compatible with the constitutional principle, or desirable in the public interest. A situation cannot be permitted where litigants could persuade a court to postpone publication of a judgment on a case conducted in open court, simply because the parties see it as being in their interests to do so. A court is a public forum; save in certain limited circumstances which do not apply here, the public is entitled to know what is going on in its courts and is entitled to access to the judgment of the court which, apart from anything else, may contribute to the ongoing development and understanding of the law applicable to the dispute.

18. In the present case, it seems to me eminently possible to fashion orders which will reduce the possibility of any prejudice to the privilege which the respondents have now established in respect of most of the documentation in dispute. Even if it is not possible to guarantee that the judge assigned to preside over the trial will not learn something of the documentation to which privilege attaches, judges frequently find themselves in a position where they receive information or read documentation which should not have been available to them. While this is not ideal, a judge will always be

astute to ensure that only relevant and admissible documentation informs her deliberations, and that documentation which should have remained unseen by the court will not affect the court's consideration of the issues.

The orders

19. The parties have in fact proffered an agreed order which they consider addresses their needs, except in relation to the issue of costs, on which they disagree. The draft orders are as follows:

> "…IT IS ORDERED that the Applicant his servants or agents from using [sic], disseminating or otherwise relying upon the documentation and/or extracts exhibited at KD6, KD7, KD8. [sic] KD9, KD11, KD12, KD13 and KD14 in the applicant's affidavit sworn on 8 July 2021.
>
> AND IT IS ORDERED that the Applicant's affidavit sworn on 8 July 2021 be struck out in its entirety and its contents and exhibits expunged permanently from the record and the Court file held in respect of these proceedings.
>
> And the Court doth direct that the Applicant shall be at liberty to swear and file a new affidavit in reply to the affidavit of David Brock sworn on 21 June 2021 in the substantive proceedings."

20. I do not have any difficulty with the first paragraph of this suggested order. I consider that it is wide enough to cover any quotation from or reference to the documents mentioned, whether in written submissions or otherwise. The applicant should take particular care to ensure that the contents of the documents do not inadvertently "creep into" the evidence or submissions which will be before the court in any further application or the trial itself.

21. I do not consider the order in the second paragraph appropriate. The affidavit of 8 July 2021 gave rise to the application regarding privilege and the judgment of this

Court. To have it "expunged permanently from the record and the court file" is neither necessary nor appropriate. The affidavit should be preserved on the court file as the document which gave rise to the respondents' application. I accept however that it should not henceforth be relied upon by either party in the proceedings, nor should it be presented to the court as part of the papers relating to the case. The respondents may rest assured that judges, in a case such as this, do not generally consult the court file in advance of an application or hearing, but rely on the papers agreed by the parties as the appropriate documents and which are forwarded to the court in advance of an application or trial. It is highly unlikely that a judge would become aware of the affidavit or its contents from a perusal of the court file.

22. I accept that the order in the third paragraph is appropriate; if the offending affidavit is not to form part of the proceedings, it would appear that the applicant should have the opportunity to replace it with an affidavit responding to the first named respondent's affidavit of 21 June 2021.

23. The orders, then, which I propose to make are – in addition to the proposed order regarding costs at para.11 above – as follows:

> (1) An order preventing the applicant his servants or agents from using, disseminating or otherwise relying upon the documentation and/or extracts exhibited at KD6, KD7, KD8, KD9, KD11, KD12, KD13 and KD14 in the applicant's affidavit sworn on 8 July 2021.
>
> (2) An order that the applicant's affidavit of 8 July 2021 is not to form part of the pleadings or papers in the proceedings, and is not to be presented to the court as such in any further application or trial;

(3) The applicant shall have liberty to swear and file a new affidavit in reply to the affidavit of the first named respondent sworn on 21 June 2021 in the substantive proceedings.

24. I accept the contention on behalf of the respondents that it would be inappropriate that I would be assigned to hear and determine the trial of the matter, although the respondents do not appear to have a difficulty with my presiding over "certain interlocutory applications". I also would consider it appropriate if the parties or either of them were to explain the situation to any judge presiding over the listing of the matter for trial, with a view to ensuring, in as far as possible, that the judge assigned to hear the case does not read or consider my judgment on the respondents' application. The respondents also suggested an order providing that "the parties will be precluded from referring to the judgment in any legal submissions to be made in the case…". I consider that this eventuality is covered by the first paragraph in the order which I propose above.