Neutral Citation No. [2010] NIFam 12

Ref: **WEI7886**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **18.06.2010**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

05/024269
05/033567

BETWEEN:

H

Petitioner;

-and-

W

Respondent.

WEIR J

Background

[1] The present application has its origins in divorce proceedings between the parties which included an application by W for ancillary relief. In the course of the ancillary relief proceedings, which were conducted in chambers in accordance with the general rule contained in Rule 2.69 of the Family Proceedings Rules (NI) SR&O 1996 No 322 ("the Rules"), H was required to make disclosure of, inter alia, certain accounting records maintained by him as part of his accounts as a practising solicitor.

[2] Gillen J. gave an anonymised judgment in the matter on 16 November 2006 which is to be found at [2006] NI Fam 15 and which brought the ancillary relief proceedings to an end. However, the solicitor who had acted for W in those proceedings ("the Solicitor") was anxious about certain features of the

accounts which had been compulsorily disclosed by H and, in particular, as to whether on their face those accounts had been maintained in compliance with the requirements of the Solicitors Accounts Regulations 1998. He has deposed in the present application that he was concerned that he was professionally and/or legally obliged to report the information he had learned either to the Law Society and/or some other agency. He therefore got in touch with Ms Bryson, Deputy Secretary of the Law Society of Northern Ireland ("the Society") and informed her in outline and in anonymised form of the nature of the concern which he held. As a result a meeting was held with Ms Bryson although I have seen no minute or other record of it. Following the meeting the Solicitor, having obtained the permission of W to do so, wrote to Ms Bryson on 16 January 2007 in the following (redacted) terms:

> "I refer to the writer's meeting with Ms Bryson when we discussed the issues which arose in matrimonial litigation involving [W and H]. We enclose copy documents which detail the information which has come to light and which Ms Bryson confirmed should be reported to the Society."

[3] Unfortunately neither Ms Bryson nor the Solicitor nor, not unnaturally, W seem to have adverted to any possible legal implications of the fact that this information had been obtained by the Solicitor in the course of family proceedings conducted in chambers. Rather, Ms Bryson and the Solicitor appear to have proceeded on the assumption that as the Society had an interest in knowing about these matters the Solicitor was obliged to furnish it with the materials because of the provisions of Regulation 25 of the Solicitors Practice Regulations 1987 which provide as follows:

> "A solicitor shall bring to the notice of the Society (having where necessary first obtained his client's consent) any conduct on the part of another solicitor which appears to him to be a breach of these regulations".

[4] Having thus come into possession of the materials the Society naturally examined them and then raised certain queries with H to which the replies provided were not regarded by the Society as satisfactory. The matter was therefore referred to the Professional Ethics and Guidance Committee of the Society on 13 April 2007 and after further desultory correspondence with H that committee resolved on 26 July 2007 to refer his conduct to the Disciplinary Tribunal, which reference was approved by the Council of the Society at a meeting on 5 September 2007. The application to the Disciplinary Tribunal dated 23 April 2008 was grounded upon the materials that had been supplied to the Society by the Solicitor. The Tribunal held an inquiry on 6 and 20 November 2009 and before it H took the point that there was an implied

undertaking on the part of the Solicitor that information obtained in the course of the ancillary relief proceedings could not be used without the leave of the court for any other purpose than that of the proceedings in and for which it had been provided. The Society took a contrary view that the authorities established its entitlement to make use of the material and that the allegation of misconduct in the maintenance of the account of which the Society had obtained particulars in the materials obtained by it from the Solicitor meant that "the Tribunal is of the view that it cannot properly disregard a material allegation by the Society of misconduct by a solicitor and dismiss the matter in these circumstances." (Ruling dated 20 November 2009 at paragraph 4). In arriving at this decision the Tribunal gave as part of its reasoning at paragraph 3 *ibid* that "Even if the Society did not seek permission to use the "protected material" (which it is agreed it did and still has not) it was open to [H], at any point from mid 2008 when he received the complaint, to go to the High Court to seek a declaration or injunction from the Judge, Mr Justice Gillen, to restrain the use of the "protected material". He chose not to do so, so far, but can still do so, at any time before the full hearing." Thus the Tribunal plainly took the view that it could retain and make use of the material unless and until restrained by order of the court obtained at the instance of H.

[5] Being dissatisfied with the decision of the Tribunal to proceed to a full hearing of the complaint, H brought judicial review proceedings against the Tribunal in which leave was granted by Treacy J on 10 March 2010 in a ruling reported at [2010] NIQB 34. The basis of the application was the same as that which H had advanced at the preliminary issue stage before the Tribunal, namely that the courts have long recognised that any party on whom a list of documents is served or to whom documents are produced on discovery or pursuant to an order of the court impliedly undertakes to the court that he will not use them or any information derived from them for a collateral or ulterior purpose without the leave of the court or consent of the party providing such discovery.

[6] Treacy J. in giving leave, said at [12] –

> "I am satisfied that there is an arguable case that [the Tribunal] is bound by the implied undertaking and to use the documents as intended may constitute a violation thereof".

And, at para [13] he observed –

> "Whether the proposed use of the documents by the Tribunal was of greater advantage to the public than the public's interest in the need to protect the confidentiality of discovered documents is a matter which can be examined at the substantive hearing".

[7] The Solicitor and W have been made notice parties to the judicial review proceedings. On reading the papers it has clearly dawned upon the solicitor and no doubt been in turn conveyed by him to his client W that the imprimatur of Ms Bryson may not in fact have been sufficient in law to justify the disclosure of the documents, or certain of them, to the Society in breach of a possible obligation to the court for whose purposes they were provided. The Solicitor will further have become aware on considering the judicial review papers that the petitioner had been making a point in the course of his correspondence with the Society that the Solicitor and W were motivated in disclosing the materials not by any concern about a professional obligation to the Society but rather by what H described as "their continuing campaign against me." Therefore, being uncertain as to whether the disclosure of the materials by the Solicitor with the authority of W and the encouragement of Ms Bryson was or was not lawful, they decided to bring an application to this court seeking to discharge them from any implied undertaking to the court and to H.

The nature of the relief sought

[8] These proceedings commenced by way of an application dated 18 May 2010 for an order pursuant to Order 24 Rule 17 discharging [the Solicitor] and [W] from their implied undertaking to this Court and to the Petitioner not to use any documents discovered during the course of these proceedings for a purpose other than the conduct of those proceedings, in relation to a report made by [the solicitor] with the consent of the respondent, to the Law Society of Northern Ireland on 7 January 2007.

[9] At the initial hearing I expressed doubt as to whether Order 24 Rule 17 is apt to found the present application. That rule is in the following terms –

> "Any undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document *after it has been read to or by the Court, or referred to, in open court,* unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs." *(emphasis supplied)*

As noticed at para. [1] above, by virtue of the provisions of Rule 2.69(2) of the Rules, the hearing or consideration of an application for ancillary relief or any question arising thereon shall, unless the judge otherwise directs, take place in chambers. No contrary direction was given by Gillen J. Furthermore, by Rule 7.12(2) of the Rules –

> ". . . no document filed or lodged in the court office other than a decree, civil partnership order or other order made in open court, shall be open to inspection by any person without the leave of the Master, *and no copy of any such document, or of an extract from any such document, shall be taken by, or issued to, any person without such leave."(emphasis supplied)*

[10] It therefore seemed to me that the circumstances pertaining to these materials are not those of an implied undertaking but rather, in the absence of leave, of an express prohibition. Moreover, the proceedings having been conducted in chambers before Gillen J, Order 24 Rule 17 seemed to me to be inapplicable. The applicants thereupon enlarged the basis of their application with the consent of H to enable the power to grant leave for the release of documents provided by Rule 7.12(2) to be considered by me and the hearing thereafter proceeded on that basis.

The legal principles

[11] The exercise of the discretionary power to authorise the release or retention of documents provided under compulsion in family proceedings held in chambers is helpfully discussed in two decisions of Wilson J in S v. S (Inland Revenue Tax Evasion) [1997] 2 FLR 774 and R v. R (Disclosure to Revenue) [1998] 1 FLR 922 and in a most extensive judgment of Charles J in A v. A; B v. B [2000] 1 FLR 701, which extends to 57 pages. It is from those judgments and the very many authorities referred to therein that I have distilled the following principles relevant to the present application:

(1) The court has a discretion whether or not to grant leave under Rule 7.12(2) of the Rules.

(2) That discretion may be exercised on an application made prospectively or retrospectively.

[3] The principles guiding the exercise of the discretion under Rule 7.12 (2) are in general the same as those that govern an application for release from an implied undertaking.

(4) There is an important public interest that requires that disclosures of means or assets and the documents vouching them made by parties under compulsion of the court or of the rules in matrimonial proceedings are to be treated as confidential. Information obtained pursuant to statutory (or other) obligations should only be

used or disclosed either for the purposes which underlie such duties or, exceptionally, in the overall public interest.

(5) It follows that the court can authorise the release of the material subject to restriction if it concludes that to do so would be in the overall public interest. There is therefore a weighing exercise to be performed.

Consideration

[13] In this case the applicants seek retrospective permission to disclose the information to the Law Society based upon a concern that, having provided it without adverting to their obligation to first obtain authority to do so, they might be subject to sanction flowing from their unauthorised action having constituted a contempt of court.

[14] I accept that the Solicitor provided the material to the Law Society in the belief, encouraged by Ms Bryson, that he was not only entitled but obliged to do so by reason of Regulation 25 of the Solicitors Practice Regulations. Similarly, W gave her consent to the Solicitor providing the information to the Law Society having been requested to do so by him. Neither adverted to nor had attention drawn to the obligation to obtain the prior consent of the court. In those circumstances it seems to me that no court would regard the actions of the Solicitor or of W as other than constituting the most inadvertent breach of their obligation and it seems to me inconceivable that in the circumstances any sanction would be visited upon either of them other than, perhaps, a mild reproof to the Solicitor for failing to be conscious of his obligation to seek the court's leave. Moreover, at the hearing of this application counsel for H indicated that his client had no interest in pursuing or encouraging others to pursue any possible allegation of contempt of court against either the Solicitor or W.

[15] In those circumstances it does not seem to me that the strong public interest in encouraging candour and maintaining the confidentiality of materials obtained under compulsion for the purposes of proceedings conducted in chambers can begin to be outweighed as being in the overall public interest by a theoretical but entirely unreal fear that the Solicitor and W may be subjected to some court sanction unless they are granted retrospective consent to disclose the materials that they have already made available to the Society. I therefore decline to grant the leave sought.

[16] As Treacy J. will be dealing with the on-going judicial review application brought by H against the Tribunal and as neither that Tribunal nor the Society has made an application for leave to retain the materials which were provided to them through the present applicants I expressly refrain from expressing any view as to whether they are on any basis entitled to do so.