THE HIGH COURT

[2022] IEHC 584

Record No. [See Appendix][1]

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN:

X

APPLICANT

– AND –

Y

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 21st October, 2022.

SUMMARY

This judgment concludes that there is nothing in s.40(6)/(7) of the Civil Liability and Courts Act 2004 that varies or removes 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 generated in or garnered or gleaned from in camera *proceedings.*

1. Every day people attend child and family law courts, asking judges to deal with a variety of private matters. In all of these cases parties must be honest and open with the court. That is

[1] For the reasons stated later above the Record Number is not being made public and should not be made public without the express leave (permission) of the court.

the only way that the best and fairest solution can be reached in accordance with law. To facilitate such honesty and openness parties coming to court enjoy the assurance that so far as is humanly possible their private lives will not become public fodder. That is why such cases are heard *in camera*, *i.e.* in private. Even when written judgment is given, it is anonymised in a still-further bid to ensure that the private does not become public.

2. What, however, if a suspected crime is committed in the course of child or family law proceedings and a party to those proceedings later wishes to report her suspicions to An Garda Síochána or some other relevant state entity? Here, Mr X, is convinced that the solicitors on the opposing side of his divorce proceedings engaged in a deceit in the course of those proceedings which resulted in him having to pay heightened costs. That is a serious matter, if true. I emphasise, however, that I do not know if it is true. I am neither required to make, nor have I made, any findings as to the truth of Mr X's allegations. His allegations (and to this time they are but allegations) are vehemently denied by those against whom they have been levelled.

3. As I said at the hearings, I do not see that I need to get into the details of Mr X's allegations. In fact I see good reason why I should not do so when it is the fact of the allegations and certain related disclosures (of documents, information, or evidence generated in or garnered or gleaned from *in camera* proceedings) having been made to third parties, rather than the substance of same that is relevant for the purposes of this judgment. That said, I am grateful to both sides for having brought me through the background to the allegations, if only so I could be satisfied that this is not some theoretical case but a genuine one in which real issues are at stake.

4. As mentioned at the hearings, I believe that all I need record for the purposes of this judgment is the following:

> Mr X is convinced that he was the victim of deceit in the course of his divorce proceedings. Following on those proceedings he enquired of a solicitor whether he had grounds to make a criminal complaint. In the course of making that enquiry, Mr X disclosed certain materials from the divorce proceedings to the solicitor, without getting prior leave (permission) of the court. The solicitor approached by Mr X is said to have advised Mr X that he had grounds for making a criminal complaint, indeed that Mr X was obliged to make such a complaint under the Criminal Justice Act 2011. Armed with this advice Mr X made a complaint to An

Garda Síochána. Mr X submitted (he has not sworn an affidavit to this effect) that following on this complaint, he and his solicitor met with the Gardaí, who, it is claimed, requested (they were certainly given) sight of certain information from Mr X's divorce proceedings, again without the leave (permission) of the courts. Related complaints concerning the alleged deceit appear also to have been made to the DPP, the Solicitors Disciplinary Tribunal, the Legal Services Regulatory Authority, and the Judicial Council. (Complaint has also been made by Mr X to the Legal Costs Adjudicator. However, I understood counsel for Ms Y effectively to concede that dealings with the Legal Costs Adjudicator would have been done pursuant to court order in default of agreement between the parties as to the costs presenting, placing that process outside the ambit of the present dispute. If I am wrong as to what counsel intended to contend in this regard, he should feel free to correct me).

5. In effect, as the parties can see, I take Mr X's case at its height. I also assume for the purposes of this judgment that he has acted at all times in good faith.

6. Ms Y is aggrieved that material disclosed in the course of *in camera* court proceedings has made its way to third parties without prior leave (permission) being sought of the courts. Mr X contends that Ms Y's concerns and the within application are baseless. In making this contention he points to s.40 of the Courts and Civil Liability Act 2004 as giving him what he in effect contends is a largely untrammelled right to disseminate documents, information or evidence that are generated in or garnered or gleaned from *in camera* proceedings without need for any prior leave (permission) from the court. So, who is right? Has a legal wrong been done to Ms Y by virtue of Mr X disseminating to third parties materials from *in camera* court proceedings without obtaining the prior leave (permission) of the courts? Or is Mr X right in his contention that, thanks to s.40 of the Act of 2004, he has done Ms Y no legal wrong in proceeding as he has?

7. Section 40 of the Act of 2004 provides, amongst other matters, as follows:[2]

> "*(1) In this section 'court' includes the Master of the High Court….*

[2] I have relied on the administrative consolidation of the Act of 2004 (updated to 24th April 2021), as set out at *https://revisedacts.lawreform.ie/eli/2004/act/31/revised/en/html#SEC40* (accessed: 15th October, 2022).

(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.

(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[3] 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 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."

[3] The term "*relevant enactment*" is defined in s.2 and includes an array of child and family law-related enactments.

8. It is important to note when approaching s.40 that it was not born into a world unscathed by any history of child or family law proceedings. In fact, in the years prior to the enactment of s.40 there was conflicting High Court authority on whether courts had power to allow disclosure of information for the purposes of initiating complaints before professional bodies – see, *e.g.*, *M.P.* v. *A.P.* [1996] 1 I.R. 144, *R.M.* v. *D.M.* [2000] 3 I.R. 373, and *Eastern Health Board* v. *Fitness to Practise Committee* [1998] 3 I.R. 399. Notably, while those cases diverged as to the exact extent of the common law power of the courts in this regard, none suggests that there is an effectively untrammelled power on the part of anyone involved in family law proceedings to disseminate freely, without prior leave (permission) of the courts, documents, information or evidence that are generated in or garnered or gleaned from *in camera* proceedings. (And for the avoidance of doubt there is no such power).

9. When viewed in this historical context, s.40 seems to me to represent a sensible and comprehensible attempt by the Oireachtas to bring helpful clarity to what is permissible in terms of ordering the disclosure to third parties of documents, information or evidence that are generated in or garnered or gleaned from *in camera* proceedings. Indeed, it would appear when one reads the entirety of s.40 that the Oireachtas almost had something of a 'to-do list' to get through in terms of addressing issues arising concerning "*Proceedings heard otherwise than in public*" (as the heading to s.40 reads). In other words, it is a mistake to approach s.40 as if each sub-section links to the other. Rather, if I might use a helpful metaphor deployed by counsel for Ms Y, there is in each subsection of s.40 a separate island of exception that sits within an archipelago of exceptions created by the various subsections, each in the same area of the law but each also separate from the other (save where, as with ss.(9), it makes express provision regarding another subsection).[4]

10. To read s.40 as giving a largely untrammelled right to disseminate documents, information or evidence that are generated in or garnered or gleaned from *in camera* proceedings without need for any prior leave (permission) from the court would require one to accept that the Oireachtas intended (and for the avoidance of doubt I do not accept that the Oireachtas intended) that:

[4] To the extent that the High Court in *S.M.* v. *S.L.* [2022] IEHC 449 undertakes (what appears to be an *obiter*) linked analysis of the un-linked subsections of s.40, I respectfully do not agree with that linked analysis for all of the reasons stated above.

(i) *parties coming to* in camera *proceedings should be exposed to the risk that there could be largely untrammelled dissemination of information generated in or garnered or gleaned from* in camera *proceedings without prior court permission*. That would have so severe a 'chilling effect' on how the family courts have for long operated that it would effectively require one to believe that the Oireachtas intended to destroy (or do the most drastic damage to) the private nature of the family courts system when it enacted s.40. One need merely state that proposition to see that it just cannot be the end-result that the Oireachtas intended.

(ii) any *person who became involved in* in camera *proceedings (so any of the parties, any of the court officials, any of the witnesses, even the judge) would be free at her election, without need to seek permission of anyone, and as the sole arbiter of what is appropriate, to disseminate information generated in or garnered or gleaned from* in camera *proceedings*. Could it really be that the Oireachtas intended that, for example, if a potential breach of the planning law system was encountered by a valuer who gave evidence in family law proceedings, that valuer should be free to take some or all the papers she had come across in *in camera* proceedings and (in her absolute discretion) hand them over to an official at the relevant planning authority without any need for prior court involvement? One need merely state that proposition to see that it just cannot be the end-result that the Oireachtas intended. That would be a recipe for chaos and also for the pernicious release of possibly highly private documentation.

(iii) the courts should no longer enjoy any supervisory jurisdiction as regards the use of documents, information or evidence that are connected with or arise in the course of in camera proceedings. Again, this just cannot be true. It would mean that the malevolent (and I do not include Mr X among their number) would be free to make any number of groundless complaints to any number of bodies following on child or family law proceedings solely with the intention of embarrassing or humiliating another party, yet the courts would be powerless to interfere. One need merely state that proposition to see it cannot be the end-result that the Oireachtas intended.

11. Mr X suggested, by way of justification for his reading of s.40, that the Oireachtas must have taken comfort, when enacting that provision, in the fact that (a) if anyone disclosed documents, information or evidence generated in or garnered or gleaned from *in camera* proceedings to third parties who have an official role (such as the parties complained to here),

(b) those third parties would treat such information securely. I respectfully do not see, for the reasons stated at points (i)-(iii) in the preceding paragraph, that s.40 has the meaning contended for by Mr X. As Mr X's contention as to the Oireachtas taking comfort in the just-described manner relates to his contended-for reading of s.40 it too must fail.

12. Mr X suggested that for me to arrive at the conclusions that I have reached would be for me to engage in law-making. I fully accept that a judge cannot bring her sense of what she might like the Oireachtas to have legislated and (through the guise of interpretation) seek to bring that supposedly desirable end into being. But that is not what I have done. I have placed the Act of 2004 in its legal-historical context and discerned the meaning of what the Oireachtas must have intended when one has regard to that legal-historical context. I am satisfied that the interpretative approach which I have adopted honours what the Oireachtas did and intended to do when it enacted s.40.

13. Mr X has pointed to the fact that this is the first *known* case in which objection has been taken to a failure to seek leave in the manner for which Ms Y contends. However that does not mean that there have been no such cases previously. In truth, there are a number of possible reasons why one would not necessarily have heard of such cases: (i) it seems unlikely that there are many child or family law cases in which a crime is alleged to have occurred in the course of the proceedings (certainly this is the first case where I have known such an allegation to arise), (ii) any application for leave (permission) would itself have been covered by the *in camera* rule, (iii) if there was application for leave (permission), there would likely be no reason to hear about it (as the parties would have proceeded in accordance with law), (iv) an application for leave (permission) would normally be an incidental matter that, after the judge heard both sides, would yield a quick decision, rather than a formal written judgment, (v) even if a written judgment issued in such a case it might not be released publicly by the judge who authored it (though most such judgments are released), and (vi) even if such a judgment was released publicly it might not be reported and so might not become widely known. But even if Mr X is right and this *is* the first known case in which objection has been taken to a failure to seek leave (permission) in the manner for which Ms Y contends (and I rather doubt it is, but even if it is), so be it: she is right in her view of the law as to what is permissible and required.

14. Mr X contends that, if I find as I have found, that could make a judge the arbiter of what evidence might be released in the context of a criminal complaint. It might, but I see no inherent

problem with that: a child or family law judge might perfectly legitimately decide, for example, that in the context of a fraud complaint she would not allow the release of *in camera* information concerning an individual's sexual history. (For the avoidance of doubt I do not know what information has been released to third parties in the present case. I just give the example as an imagined example). As to the notion that making a judge the arbiter of what evidence might be released in the context of a criminal complaint could leave a judge judging what evidence might be released in a case concerning herself, I am not aware of any instance in which this has even been alleged to have occurred, never mind found to have occurred. If such a judge declined to recuse herself in a later application for the release of documentation concerning her alleged crime, I have no doubt that matters would swiftly be set straight on appeal. But, with respect, I find this whole construct a little fanciful: we are fortunate to live in a jurisdiction where judges do not typically engage in criminality.

15. This is such an important judgment that I wish to make precisely clear what I have decided. In this regard, the reader should ignore any ambiguities or looseness of language or nuances that she may perceive to arise elsewhere in this judgment (whether above or hereafter). What I have decided is this: **there is nothing in s.40(6)/(7) of the Act of 2004 that varies or removes 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.** To the extent (if at all) that anything I state or have stated in this judgment might in any way be construed as departing from the conclusion that I have just set out in Bold text, any such departure is unintended and the point in Bold text prevails.

16. Ms Y has come to the court seeking, amongst other matters:

(i) an order directing Mr X to furnish to Ms Y within 14 days of the making of the court's order a comprehensive list of all persons, corporations, tribunals or regulatory authorities (excluding professional advisors directly retained by Mr X in relation to the relevant judicial separation, divorce, and review of taxation proceedings) to whom materials (including but not limited to documents, pleadings, correspondence, submissions, judgments and transcripts/notes of evidence) have been shown or furnished by the Applicant,

his servants, or agents arising from or connected to certain identified proceedings;

(ii) an order directing Mr X to furnish to Ms Y within 14 days of the making of the court's order a comprehensive list of all materials (including but not limited to documents, pleadings, correspondence, submissions, judgments and transcripts/notes of evidence) which have been shown or furnished by the Applicant, his servants or agents to such persons, corporations, tribunals, or regulatory authorities as may be identified in consequence of the order referred to at (i) being complied with, including but not limited to certain stated persons;

(iii) an order restraining Mr X from further dissemination of *in camera* materials.

17. I do not accept that either of reliefs (i) or (ii) involve some sort of unwarranted 'fishing expedition' on Ms Y's part as was suggested. Ms Y is understandably concerned to know what has been circulated and to whom. For the reasons stated in this judgment, I will make orders (i), (ii) and (iii), save that 14 days in the case of order (ii) seems very short; I will discuss with the parties, before the order to issue is finalised, whether a longer timeframe is preferable.

18. There is a concern in this case that (a) a previous judgment delivered some years ago by another judge concerning the parties to these proceedings may inadvertently have provided sufficient information to enable the parties to this application to be identified were someone inquisitive enough to 'join the dots' as regards such information as was disclosed in that judgment,[5] and (b) if the Record Number was stated on the face of this judgment, the inquisitive might be able to work backwards to that earlier judgment and discern who the parties to the present application are. For that reason the Record Number is not stated on the front page of this judgment. Instead it is stated in the Appendix which I hereby order is not to be made public. Indeed this removal of the Record Number to an unpublished Appendix may be a practice that might perhaps usefully be commenced in all published child and family law judgments.

[5] For the sake of good form, I note in passing that I make no criticism of my colleague. It is really very challenging to write a child or family law judgment that states enough to make sense to the parties and to any appeal court that might be prayed in aid without delving into personal matters that (as is often the case in family proceedings) are aired but not really relevant, and also without giving too much away to the intrusive reader. One possible solution that may require to be considered is whether in all future written judgments the applicable facts should be stated briefly in the main text of a child/family law judgment, with any more thorough consideration of the evidence being consigned to an Appendix that does not get publicly released without the leave of the court.

TO MR X/MS Y:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Mr X, Ms Y

I have just written a detailed judgment about the application brought by Ms Y. The judgment contains a lot of legal language which can be hard (even boring) to read. In a bid to make my judgments easier to understand by those who receive them I often now attach a note in 'plain English' briefly summarising what I have decided. I thought it might assist for me to add such a note in this case.

In a bid to ensure that people do not know who you are, I refer to you in my judgment and in this note as Mr X and Ms Y. This may seem a bit artificial. However, I think it is for the best.

This note is a part of my judgment. However, it does not replace the text in the rest of my judgment. It is written to help you understand what I have decided. Any lawyers that you have engaged or may engage will explain the rest of my judgment in more detail.

As you know, the key focus of this application was the correct interpretation of s.40 of the Civil Liability and Courts Act 2004. I have concluded that there is nothing in s.40(6)/(7) that varies or removes 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.*

I wish you both the very best.

Yours sincerely

Max Barrett (Judge)

Date: 21st October, 2022.