Neutral Citation Number: [2012] IEHC 376

THE HIGH COURT

[2012 No. 4 FTE]

IN THE MATTER OF THE FOREIGN TRIBUNALS EVIDENCE ACT 1856, AND

IN THE MATTER OF CIVIL PROCEEDINGS NOW PENDING BEFORE THE COLORADO DISTRICT COURT OF THE CITY AND COUNTY OF DENVER CASE NO. 2008 CV 10169 (CONSOLIDATED WITH NO. 09 CV 8277)

BETWEEN/

JEAN CORNEC

PLAINTIFF

AND

SUSAN MORRICE

DEFENDANT/COUNTER CLAIMANT

AND

JEAN CORNEC, MARIE LAWLOR, JOHN VINCENT FENNELLY AND SHEILA McCAFFREY

ADDITIONAL COUNTER

CLAIMANT/THIRD PARTY PLAINTIFF

AND

MARIE LAWLOR

ADDITIONAL COUNTER

CLAIMANT/THIRD PARTY DEFENDANT

AND

SUSAN MORRICE AND JOSHUA STEWART

ADDITIONAL COUNTER

CLAIMANT/THIRD PARTY DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 18th day of September, 2012

1. It might seem surprising that litigation presently pending in the District Court of Denver, Colorado ("the Colorado litigation") concerning a disputed share purchase contract of the shares of an oil company registered in St. Kitts and Nevis and which is currently operating in Belize should give rise to an application in this jurisdiction for evidence to be taken on commission of an investigative journalist and a former theologian who specialises in the investigation of cults. This, nevertheless, is the background to the present application under s. 1 of the Foreign Tribunals Evidence Act 1856 ("the Act of 1856").

2. While this application raises many difficult questions of evidence, procedure, conflict of laws and the scope of journalistic privilege, it is necessary first to set out the background to this application.

The background to the Colorado litigation

3. So far as can be gleaned from the Colorado pleadings, it seems that Ms. Morrice, a British national, is a petroleum geologist who, along with Mike Usher, a Belizean seismic surveyor, had long believed that Belize had (then undiscovered) oil reserves. To that end they set up a series of companies which are now controlled by International Natural Energy LLC ("INE"). A subsidiary of INE, Belize Natural Energy Ltd. ("BNE") was granted a prospecting licence by the Belizean Government in January, 2003 and, to the surprise of industry observers, BNE discovered significant quantities of oil in June, 2005. Oil was then extracted and BNE commenced production and sale in January, 2006. In the words of Mr. Justice Bannister of the East Caribbean Supreme Court (Nevis Circuit) in *SM Life Ventures v. Morrice*, in a judgment delivered on July 16th, 2012, BNE has since "been astonishingly successful". The decision in *SM Life Ventures* provides an invaluable guide to the background to the subsequent dissension within INE, since it concerns an oppression petition brought in the Nevis courts by the dissident shareholders in the company.

4. One of the other dissident shareholders is the present plaintiff in the Colorado proceedings, Jean Cornec. Mr. Cornec is a mining engineer who had previously worked in Belize identifying its strategraphy. Mr. Cornec and Ms. Morrice were among the five original promoters of the company and were among a handful of Class A shareholders. It would be tedious and unnecessary to chart the dissension which afflicted the company, but many of these difficulties appear to date back to 2002 when Ms. Morrice was introduced to Mr. Tony Quinn by another Class A shareholder, Ms. Shelia McCaffrey.

5. Although Mr. Quinn is not a party to the litigation (and, hence, not represented before me), it is fair to say that his career has engendered some controversy. While it would be inappropriate to dwell on these matters in circumstances where he was not represented before me, the evidence before me nonetheless suggests that he professes what many might regard as rather unorthodox religious views. His supporters appear to subscribe passionately to these views and often participate in what are

described as "Educo" seminars run by Mr. Quinn and his close associates. In this regard and to anticipate somewhat, it may be observed that Ms. Tallant, an investigative reporter with the *Sunday World* newspaper has penned several articles in that newspaper in which she brands Mr. Quinn as a sham who exploits the religious sensibilities of the vulnerable for financial gain, often using hypnosis and other techniques subverting the will and reason. Mr. Cornec (and others) maintain that Ms. Morrice herself has come under what they see as the baneful influence of Mr. Quinn and that she herself has effectively gifted large amounts of stock to him, while also permitting him to use the assets of the company in a wholly unorthodox fashion. Thus, for example, Bannister J. found that some US$1.8m of INE money had been spent in the last few years on security and surveillance personnel, thus allowing Mr. Quinn to hire what the judge described as virtually his own "private army".

6. Bannister J. also rejected the suggestion that Mr. Quinn was an *original* Class A shareholder or that he had been validly appointed to the board. It nonetheless seems clear that several members of the Board at least endeavoured to transfer some US$15m. worth of stock to Mr. Quinn in 2007. Bannister J. held that a 2007 operating agreement was invalid, since it trenched on the ownership rights of Class A shareholders and, furthermore, had stipulated that Class B shares were freely transferable only to other members who had completed one of Mr. Quinn's Educo training courses. This is a classic example of oppression of minority shareholders, since it is impossible to see what legitimate reason there might be for such an eccentric – and there is, I fear, no other word for it – requirement.

7. Bannister J. also found that the company had operated what was described as a loan release programme, whereby INE lent the members funds to be set-off against future profits. This arrangement – unorthodox in itself – was found by the judge to have been operated in a highly partial and selective manner and was "designed to punish INE members of which or of whom Ms. Morrice or Mr. Quinn disapproved".

8. This forms the general background to the Colorado litigation. In essence, the dissension in the company was damaging to the members. The minority objected strongly to Mr. Quinn's involvement and considered that his presence as an *eminence grise* within the company dissuaded outside investment and damaged the share price. From their perspective, they felt that they had no option but to get out of a company which, while very successful, was nonetheless being operated by Ms. Morrice and Mr. Quinn in a partial and autocratic fashion. So far as Ms. Morrice was concerned, the minority – represented by Mr. Cornec - were dissatisfied and determined to cause trouble and there was little alternative but to buy them out.

9. This ultimately led to the agreement reached in August, 2008 whereby Ms. Morrice agreed to purchase Mr. Cornec's shares in INE for a sum just under US$17.6m. This was financed by an immediate cash payment of $2m and a promissory note for just under $15.6. The loan notes were payable in 12 instalments. Ms. Morrice made two principal payments, but has made no further payments since October, 2008. To date, therefore, Mr. Cornec has received a sum in excess of $4.7m.

10. At the heart of Mr. Cornec's claim, therefore, is a claim for breach of contract for a liquidated amount just under $13m., together with other related claims. For present purposes, however, what is most critical are the terms of Ms. Morrice's counter-claim. In essence her case is that Mr. Cornec immediately violated the terms of the share purchase agreement in a material respect, thus entitling her to repudiate the agreement.

11. Critically, the agreement provided for a non-disparagement clause. Clause 5.4 of the Share Purchase Agreement accordingly provided that Mr. Cornec agreed that:-

> "He will not in any way, costs to be made or otherwise disclose any disparaging comment, statement of communication about purchaser [Ms. Morrice] or any director or member of INE or their respective affiliates (a "Negative Remark") either verbally or in writing to any person, entity or authority."

The Share Purchase Agreement went on to provide that breach of the Clause is deemed to be a material misrepresentation and Clause 6.1.2 in particular provides that:-

> "Purchaser may offset any amounts due from Seller to Purchaser under this Section 6 against payments due under the Note."

Central to Ms. Morrice's counterclaim, therefore, is the contention that, the non-disparagement clause notwithstanding, Mr. Cornec arranged or organised for critical comments to be made in the media and elsewhere aimed at herself, Tony Quinn and INE. Specifically, Ms. Morrice contends that Mr. Cornec's attorney, Ms. Katrina Skinner, travelled to Ireland at his behest in November, 2008 and there met a number of individuals who were broadly antipathetic to Mr. Quinn and, by extension, to Ms. Morrice. Particulars were given in the pleadings as to the nature of these contacts from November, 2008 onwards. For present purposes it suffices to say that it is contended Ms. Skinner met with Mr. Garde and Ms. Tallant and that as a result of these contacts critical articles were published by Mr. Garde on the one hand and Ms. Tallant from the *Sunday World*, on the other.

12. This may be a convenient point to say something about Mr. Garde and Ms. Tallant. Mr. Garde is a director of a charity known as "Dialogue Ireland". He has a particular interest in new religious movements, especially those where there is reason to suspect that undue psychological pressures or influence have been used over adherents.

13. Ms. Tallant is an investigative reporter with the *Sunday World*. As already indicated, she has written extensively about Mr. Quinn in that newspaper. Two articles in particular were the subject of some debate in the hearing before me. The first of these is from the 1st March, 2009, which contains a lengthy interview with a disaffected former follower of Mr. Quinn, Marie Lalor. Ms. Lalor contends that she was effectively indoctrinated into believing that Mr. Quinn was the reincarnation of Jesus Christ and that one of his closest followers was the reincarnation of Moses. She further contended that Mr. Quinn described memories of a previous life on the (mythical) island of Atlantis.

14. The second article was published on 6th September, 2009, and is perhaps more directly relevant to the present application. It is headed "Exclusive: 'Messiah' Appointed to Company Board by Gullible Disciples – Guru Tony Strikes Oil",. Underneath the legend ran "Cult Leader "Muscles" in on Followers' Fortune". The article then went on to say:-

> "Mucky Messiah Tony Quinn has struck oil and is on the verge of becoming a billionaire after muscling his way into the top of a company pumping thousands of barrels of black gold a week. Quinn is hoping he can join the ranks of the Texas barons after a team of his devoted followers appointed him as director of their company. But the controversial mind guru is now at the centre of a massive boardroom bust-up after his bizarre appointment and the influence he appears to have over his fellow directors. Quinn, who some followers believe is Jesus Christ, is facing allegations that he has muscled in on the company which was set up seven years ago by two avid followers of his

> Educo cult and that he is now creaming the profits for himself. Furious shareholders are also looking for answers about a golden handshake of $20m in free shares he was gifted when he was voted onto the board and whether or not he is now using profits to send to company associates on his own $60,000 a pop seminars. The fight over the oil company "International Natural Energy" (INE) has been brewing since 2007 when Quinn was appointed as director – two years after it struck oil in the impoverished Central American country of Belize. Incredibly, immediately after his appointment he announced on a Dublin stage that only "Eduocists" or his followers could become shareholders."

The article continues in similar vein, along with quotations from unidentified shareholders questioning the circumstances in which Mr. Quinn came to be appointed as a director of the company. It then went on to give details of the Colorado litigation saying that:-

> "When in 2005 the then 82 shareholders were informed that the company had struck high grade oil on its first ever drill, Quinn decided to take a second look at the company. At the time Sheila McCaffrey credited Quinn's mind technology for the oil find, but since then the battle for control of the control of the company has turned nasty. McCaffrey is no longer a working director and Cornec is currently suing INE for more than $10m. he says he is owed. After agreeing to sell his cut to Morrice, INE are countersuing Cornec saying that a campaign of negative remarks directed at Quinn and Morrice has damaged the value of the company and its attempts to raise finance by selling the shares."

15. This brings us to the heart of the present application. Essentially, Ms. Morrice contends that Mr. Cornec did not honour his side of the bargain and that he repeatedly violated the non-disparagement claim, not least by arranging for Ms. Skinner to come to Ireland in order to meet Mr. Garde and Ms. Tallant and, indeed, others who were hostile to her, Mr. Quinn and INE. To this end, therefore, Ms. Morrice contends that Mr. Garde and Ms. Tallant are relevant witnesses who ought to be deposed and that this Court should accordingly give effect to the letters rogatory issued by Judge Bronfin of the District Court of Denver on 31st May, 2012.

The nature of the application under the Foreign Tribunals Evidence Act 1856

16. The first issue which arises was already the subject of a ruling by me in the course of the proceedings, namely, the status of the original *ex parte* order. The present application comes before me formally as a motion on the part of Mr. Garde and Ms. Tallant to set aside an order made by me *ex parte* pursuant to s. 1 of the Act of 1856. The application is made *ex parte* precisely because that is the procedure contemplated by the Act of 1856 and Ord. 39, rr. 39-44 RSC. While I duly made the orders ought sought, I duly made it clear at the time that the order simply had a provisional status and that the moving party (Ms. Morrice) would carry the burden of making the application afresh in the event that the addressees of the order (Mr. Garde and Ms. Tallant) sought to have it set aside.

17. The Act of 1856 is, of course, a pre-Constitution statute which must, where necessary be read in a fashion which would make it conformable to the modern understanding of the requirements of fair procedures as prescribed by Article 40.3. It is absolutely clear that the courts cannot constitutionally make an order *ex parte* finally affecting the rights of the parties. An abundance of contemporary authority attests to this point: see, *e.g.*, the judgment of Keane C.J. in *DK v. Crowley* [2002] 2 I.R. 744, that of Finlay Geoghegan J. in *Chambers v. Keneflick* [2005] IEHC 402, [2007] 3 I.R. 526 and my own judgments in *Doyle v. Gibney* [2011] IEHC 10 and *Re Custom House Capital Ltd. (No.1)* [2011] IEHC 399.

18. It was for this reasons that I indicated that the *ex parte* procedure did not and could not finally affect the rights of Mr. Garde and Ms. Tallant and the fact that an initial order was made in favour of Ms. Morrice created no presumption in her favour.

19. The power to grant international assistance via the letters rogatory is, of course, a discretionary one. Naturally, in the interests of the international judicial comity, this Court will endeavour to give assistance where at all possible to requests of courts from foreign states and, as Denham J. put it in *Novell Inc. v. MCB Enterprises* [2001] 1 I.R. 608, it should "be slow to refuse such an order." Nevertheless, before any such order could properly be granted, it would be necessary to establish that (i) the evidence proposed to be taken is relevant to the foreign proceedings; (ii) the application is not oppressive; (iii) the grant of the request would not override any established privilege or protection available to the prospective witness and (iv) the evidence so taken on commission is itself admissible under the law of the requesting state. The applicant for such judicial assistance must satisfy all four of these conditions. I propose now to consider each of these conditions.

Is the evidence requested relevant to the foreign proceedings?

20. In my view, the evidence sought is, subject to one major qualification, clearly relevant to the Colorado proceedings. While the ultimate meaning and effect of the non-disparagement clause will be a matter for the Denver courts, on any view, it prevents Mr. Cornec and his agents supplying information which is critical of INE and its members to a journalist such as Ms. Tallant or a person in the position of Mr. Garde. There seems little doubt on the evidence but that, for example, Mr. Cornec's attorney and agent, Ms. Skinner, travelled to Ireland for this purpose and that there were subsequent contacts (direct and indirect) between Mr. Cornec, Ms Skinner and others with Ms. Tallant and Mr. Garde. Thus, for example, e-mail correspondence which was exhibited in the proceedings is strongly suggestive of the fact that assistance was given to Ms. Tallant to enable her to write the story regarding the INE litigation and Ms. Morrice and Mr. Quinn which was published in September, 2009.

21. All of this suggests that Ms. Tallant and Mr. Garde are highly relevant witnesses to the Denver litigation so far as the counter-claim on the non-disparagement clause is concerned. Counsel for Mr. Garde, Mr. O'Tuathaill SC, argued that as Mr. Garde had only written about Mr. Quinn, the former's evidence should not be regarded as relevant. This was because – or so Mr. O'Tuathaill SC argued - Bannister J. had found in his judgment in *SM Life Ventures* that the appointment of Mr. Quinn as a director was invalid, as was – it would appear – the allocation of Class A shares to him. Given that so far as Irish conflict of law rules are concerned, all matters concerning the validity of the appointment of officers and the transfer of shares fall to be determined by the court of the place where the company is domiciled, I am bound by these findings of Bannister J. in the East Caribbean Supreme Court. Nevertheless, it also seems clear from that judgment that Mr. Quinn remains a Class B shareholder – indeed, Bannister J. said as much - and, hence, a member of INE. While Mr. O'Tuathaill SC argued that it was not clear when Mr. Quinn acquired these shares, it seems evident that the transfer to Mr. Quinn pre-dated the 2008 agreement and is therefore *prima facie* covered by the non-disparagement clause.

22. While Mr. Garde and Ms. Tallant are relevant witnesses it must be observed that some of the questions contained in the letters rogatory were directed to *inquiries about information supplied by Mr. Garde and Ms. Tallant respectively to Ms. Skinner*.

23. However, the supply of information by either Mr. Garde or Ms. Tallant is not material to any possible breach of the non-disparagement clause and I would propose, in any event, to disallow these questions as irrelevant.

Oppression

24. Both Mr. O'Moore SC (for Ms. Tallant) and Mr. O'Tuathail SC (for Mr. Garde) argued that the making of these orders for judicial

assistance would be oppressive of their clients. As Denham J. made clear in *Novell,* the court may decline to grant international judicial assistance on grounds of oppression. What, then, might constitute the oppression in question?

25. The oppression was said to take a variety of forms. So far as Ms. Tallant was concerned, Mr. O'Moore S.C. pointed to two defamation proceedings which Mr. Quinn had issued against the *Sunday World* arising (one must infer) from articles she had written. The first of the proceedings had been issued and served in 2009, but had been otherwise allowed to lie fallow. The second set of proceedings has apparently been issued in 2011, but has yet to be served.

26. Even if one assumes that these proceedings are still live – although I am inclined to agree with, counsel for Ms. Morrice, Mr. O'Callaghan S.C. who submitted that they should properly be regarded as dormant – I cannot see that their existence would *in itself* make the present application oppressive. I pass over for present purposes the fact that the proceedings are in the name of Mr. Quinn alone, given the closeness of the business relationship between himself and Ms. Morrice. The question, rather, is whether the very existence of the defamation proceedings would make it unfair for Ms. Tallant to be required to give evidence in aid of the Colorado proceedings.

27. I cannot conclude that it would. After all, the issues are fundamentally different ones, even if there is some overlap in the *dramatis personae* and the factual background. Here the simple question is whether Ms. Skinner (or others persons acting in concert with Mr. Cornec) met with Ms. Tallant with a view to imparting information critical of INE, Ms. Morrice or Mr. Quinn. The issues in the defamation proceedings are much more complex and would (so far as March, 2009 article was concerned) presumably traverse issues such as whether Mr. Quinn claims to be the reincarnation of Jesus or to have recollections of a past life on Atlantis. Any defamation proceedings concerning the September 2009 article would relate to many of the issues dealt with by Bannister J. in *SM Life Ventures* and thus would encompass the disputes involving the shareholders in INE.

28. This is fundamentally different, therefore, than the facts presented in *Novell,* a case where allegations of fraud were simultaneously being pursued against the respondents in proceedings both in Ireland and in Utah, with Denham J. concluding ([2001] 1 I.R. 608, 625) that it would:-

> "In all the circumstances be oppressive to permit the applicant to examine the respondents in advance of the hearing of the fraud action against them in Ireland."

29. As I have already indicated, I consider that the present case is fundamentally different, given the limited nature of the evidence sought to be tendered. Nor can it realistically be said that the present application represents some contrivance on the part of Ms. Morrice to secure this evidence as an indirect means of assisting Mr. Quinn in his defamation proceedings. While I agree that the application would have to be regarded as oppressive if that were her main motive in moving this application, I am nevertheless convinced that the present application is *bona fide* and is designed to secure the evidence of witnesses who can give relevant evidence in aid of the Colorado proceedings.

30. This general point was also made on the part of Mr. Garde, since it was said that there was such antipathy between himself and Mr. Quinn and his supporters (including Ms. Morrice) as would make the application oppressive. It is true that this antipathy is mutual and it is scarcely concealed. Yet this does not *in itself* make the application oppressive, if (as here) there are independent reasons (namely, the materiality and relevance of the evidence of the prospective witnesses) to justify the making of the application.

31. Mr. O'Tuathaill SC also emphasised that his client was an expert on religious cults and that it was oppressive to coerce an expert to give testimony where he did not freely consent to this procedure. It is true that in a leading English authority on the point, *Seyfang v. G.D.Searle & Co.* [1973] Q.B. 148, 152 Cooke J. agreed that the courts "will not as a general rule require an expert to give expert evidence against his wishes in a case where he has no connection with the facts or the history of the matter in issue". That statement must, however, be understood in its proper context.

32. In that case the applicant was suing the manufacturers of contraceptive pills in the United States for negligence, claiming that she having developed thrombo-phlebitis as a result with horrific personal consequences. To that end the US courts had issued letters rogatory directed at securing the testimony of three medical experts, all of whom were based in the UK and who had done research for the UK Medical Research Council on the possible link between the administration of the contraceptive pill and thrombo-phelibitis.

33. While Cooke J. accepted that s.1 of the Act of 1856 applied to expert testimony, he concluded that it would be oppressive to require an expert to give testimony which might amount to a breach of confidence and "where the preparation of the evidence required of him would require considerable time and study" and in this regard the judge distinguished between witnesses as to fact and expert witnesses. While I respectfully agree with this analysis, it must nonetheless be recalled that Mr. Garde's testimony is not here required qua expert. Rather his testimony is sought as a witness as to fact, whether Ms. Skinner (and others) spoke with him and briefed him on the involvement of Mr. Quinn in the affairs of INE. For these reasons, the principles articulated with regard to expert testimony articulated by Cooke J. in *Seyfang* do not apply to the present case.

34. For these reasons, therefore, I would reject the argument based on oppression.

Should Ms. Tallant be obliged to reveal her sources?

35. I now turn to the question of whether, as a matter of Irish law, a court could or would oblige a journalist to disclose her sources in the circumstances of the present case. Ms. Tallant objects in principle to being compelled to give evidence since it would (or might) disclose her sources. She further contends that the giving of evidence in this fashion under compulsion would inhibit her in her vital task of collecting and assembling material for future publication in her role as a journalist.

36. Before considering this argument, I should record that the parties were agreed that the three relevant Irish authorities on point were *Re Kevin O'Kelly* (1974) 108 I.L.T.R. 97, *Mahon v. Keena* [2009] IESC 64, [2010] 1 I.R. 336 and *Walsh v. Newsgroup Newspapers Ltd.* [2012] IEHC 353. I first propose to examine these three decisions and then to proceed to apply the principles contained therein to the facts of the present case.

37. The decision of the Court of Criminal Appeal in *Re Kevin O'Kelly* is one which has, I think, has not been fully understood in the intervening years. The background to this case was as follows. The late Mr. O'Kelly was a well-known RTE broadcaster of the highest personal integrity. He had then recently interviewed Sean MacStiofáin, the then *soi disant* "Chief of Staff" of an illegal organisation. This interview was then broadcast on RTE – as both interviewer and interviewee had intended – and, indeed, the main purpose of the interview was to allow Mr. MacStiofáin in his capacity as "Chief of Staff" to convey the views of the illegal organisation in question to the public at large.

38. At Mr. MacStiofáin's subsequent trial for membership of that organisation, Mr. O'Kelly was asked to confirm Mr. MacStiofáin's identity as the voice on the recorded tape. Mr. O'Kelly refused, citing journalistic privilege. The Special Criminal Court adjudged him to be in contempt of court and the Court of Criminal Appeal later heard an appeal against *sentence only* and, as Walsh J. stressed in his judgment, Mr. O'Kelly did not in fact even appeal his conviction.

39. Against that background the comments of Walsh J. regarding the scope of journalistic privilege with regard to their sources must be adjudged to be strictly *obiter.* But Walsh J. was surely correct in saying that, subject to an exception I will consider in a moment, no journalistic privilege could have attended Mr. O'Kelly's evidence precisely because the *open identification* of Mr. MacStiofáin as "Chief of Staff" was itself an intrinsic part of the entire broadcast. As Walsh J. put it ((1974) 108 I.L.T.R. 97, 101):-

> "In fact, the whole value of the publication of the interview from Mr. O'Kelly's point of view depended upon the fact that the persons to whom the interview would be published would be made aware that the person interviewed was Mr. Sean MacStiofáin."

40. Indeed, it may be observed in passing that a lawyer could not assert legal professional privilege were he or she to be placed in a somewhat analogous situation. Thus, in *Cullen v. Wicklow County Manager* [2010] IESC 49, [2011] 1 I.R. 152 the Supreme Court held that a solicitor on record for a party to litigation cannot assert legal professional privilege over the identity of her client, since to do so would be inconsistent with the very act of taking proceedings.

41. In these circumstances, a journalist could only possibly assert privilege where the identity of the person in the broadcast was itself confidential and withheld from the listeners or viewers, such as might occur where, for example, the interview was with the victim of a sexual assault. It is against that general background that the decision in *O'Kelly* must be understood and given these particular facts, the entire argument based on journalistic privilege was entirely misplaced to begin with.

42. While I have thus far loosely spoken of a journalistic privilege, there is, in fact, *in strictness*, no such thing. The protection is rather the high value which the law places on the dissemination of information and public debate. Journalists are central to that entire process, a point expressly recognised by Article 40.6.1.i of the Constitution itself when it recognises "the rightful liberty of expression" on the part of the press, albeit counter-balanced by the stipulation that this rightful liberty shall not be used to undermine "public order or morality or the authority of the State." Perhaps these constitutional fundamentals have been overlooked at times, in part possibly because the syntax and drafting of this particular clause is (uncharacteristically) awkward given that the critical proviso is somewhat obscured by being placed within a subordinate clause. The Irish language version is actually much clearer than its English language counterpart, since the privileged status of the organs of public opinion is more elegantly described, not least given that it is set out in a stand alone sentence at the end of the relevant second paragraph.

43. Irrespective, however, of the languages used, the constitutional right in question would be meaningless if the law could not (or would not) protect the *general right* of journalists to protect their sources. This would be especially true of the particular example of that rightful liberty afforded by Article 40.6.1.i which is expressly enumerated therein – criticism of Government policy ("tuairimí léirmheasa ar bheartas an Rialtas") – if no such protection were available.

44. But this right is not absolute or inviolable. In that respect, this protection differs in one key respect from legal professional privilege which, once applicable, cannot be overridden by a court by reference to some general balancing test based on the public interest. This, in essence, is what Walsh J. said in *O'Kelly* when he commented that:

> "There may be occasions when different aspects of the public interest may require a resolution of a conflict of interests which may be involved in the disclosure or non-disclosure of evidence but if there be such a conflict, then the sole power of resolving it rests with the courts."

45. Similar views were expressed by Fennelly J. in *Mahon v. Keena* ([2010] 1 I.R. 336, 363):-

> "While the present case does not concern information about the commission of a serious criminal offences, it cannot be doubted such a case could arise. Who would decide whether the journalist's source had to be protected? There can be only one answer. In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law."

46. Yet the public interest in ensuring that journalists can protect their sources remains very high, since journalism is central to the free flow of information which is essential in a free society. This is all underscored and tacitly complemented by the entire constitutional edifice, such as the democratic nature of the State (Article 5); the accountability of the executive branch to the Dáil (Article 28.4.1) and the provisions in relation to elections and referenda. I may venture here to repeat my comments in *Doherty v. Referendum Commission* [2012] IEHC 211 to the effect that the referendum process presupposes that the citizenry "will engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of discourse". If journalism and the media did not enjoy at least a general protection in respect of their sources, that robust political debate – *a sine qua non* in any democratic society - would be still born. Only the naïve would suggest otherwise.

47. In passing, it might be observed that while Article 10ECHR does not *in terms* privilege the media in the same way as Article 40.6 does, yet the importance of press freedom has been a cornerstone of the jurisprudence of the European Court of Human Rights since at least the judgment in *Sunday Times Ltd. v. United Kingdom* (1979) E.H.R.R. 1 and confirmed in ringing terms in *Goodwin v. United Kingdom* (1996) 22 EHRR 123, 143. The protection of journalistic sources is, subject to appropriate exceptions, accordingly, regarded as a core value protected by Article 10ECHR.

48. This is perhaps a convenient place to consider the decision of the Supreme Court in *Mahon v. Keena*, where the general extent of the Article 10ECHR right post-*Goodwin* on the part of journalists to protect their sources was expounded. All parties were agreed that in the light of the Supreme Court's subsequent decision in *McD. v. L.* [2009] IESC 81, it must be acknowledged that Article 10ECHR is not, as such, directly effective in Irish law, but rather has effect only under the conditions actually specified in the European Convention of Human Rights Act 2003 ("the Act of 2003"). Additionally, as a consequence of the Supreme Court's decision in *Carmody v. Minister for Justice and Equality* [2009] IESC 71, [2010] 1 I.L.R.M. 157 this Court is first required to examine the question presented for resolution under the terms of the Constitution. As Murray C.J. noted in *Carmody*, is only that in the event that the Constitution cannot avail the litigant who pleads that his or her constitutional rights have been infringed that the Court can then turn to a consideration of the position under the Act of 2003.

49. While this is the sequence which is prescribed in such cases by *Carmody,* in truth it hardly matters in this case, since the overlap between the two documents with regard to the role of the media is virtually a complete one, even if allowance is made for the fact that, unlike Article 40.6.1, the text of Article 10 ECHR does not actually seek to confer on the media a special or privileged position in terms of public debate or in criticism of government policy. In both cases, the approach is the same: has the case for the restriction on or overriding journalistic privilege - I am here returning to the convenient, if slightly inaccurate, shorthand - been convincingly established?

50. In *Mahon* the issue was whether the two *Irish Times* journalists in question could claim privilege from non-disclosure in respect of a document which originally emanated from the Mahon Tribunal raising questions about the finances of the then Taoiseach and suggested that he had received certain payments in an irregular manner. This document had been sent to them anonymously and on an unsolicited basis, but it formed the basis of a leading story in *The Irish Times* on 21st September 2006. The publication of that story certainly engaged the principle of criticism of Government policy and it is difficult to think of anything more central to a consideration of the public interest in publication.

51. The journalists in question had, however, destroyed the document lest its production might assist in identifying the source. This was the single factor which this Court considered had weighed heavily against the journalists when they sought to invoke journalistic privilege to resist the making of orders compelling them to assist the Tribunal in identifying the provenance of the document in question. The Supreme Court disagreed, holding that the case for disclosure had not been "convincingly established" (to use the language of *Goodwin)*. As Fennelly J. put it, where the source was anonymous, the benefit from any disclosure a journalist might be compelled to make is speculative at best.

52. This brings me to a consideration of the last of the three cases, *Walsh v. News Group Newspapers Ltd.* [2012] IEHC 353. The plaintiff in that case is very prominent in popular music circles and he has achieved a near iconic status as a judge of emerging musical talent in a highly acclaimed television series. He sued for defamation following the publication of an article which (falsely) asserted that he had sexually assaulted a young man in a Dublin nightclub. It was not disputed but that the allegations were made by a Mr. Watters and that they were entirely false.

53. More disturbingly, it then appeared that a journalist attached to the defendant newspaper had offered financial inducements to Mr. Watters if he agreed to make a complaint to Gardaí. When the plaintiff sought discovery of all contacts between the journalist and Mr. Watters, the newspaper confirmed that Mr. Watters was not a source. O'Neill J. accepted that newspaper sources generally enjoyed protection in the light of the decision in *Mahon v. Keena*. He went on to observe:-

> "If Mr. Watters is not a journalistic source and if his identity is well established, as it is, the only basis, in my opinion, upon which journalistic privilege in respect of communications between the defendants and Mr. Watters could rest would be if it were shown that a disclosure of the content of the communications between Mr. Watters and the defendant could lead to the disclosure of another source either in respect of the story the subject matter of these proceedings or other investigations conducted by the defendants' journalists. Thus, discovery should be made in respect of communications between the defendants and Mr. Watters unless the defendants can assert privilege on the basis that these communications will disclose another source. If necessary, the court can inspect these documents to exclude from discovery documents leading to the identification of other sources."

Should the Court order disclosure where the sources have been identified or least are identifiable?

54. This brings us directly to the critical question: should the Court order Ms. Tallant to give evidence in circumstances where it is more or less accepted who the identity of her sources are, or, at the very least, that their identity can be discerned from the material exhibited in both the Colorado proceedings and in the present application. Ms. Tallant has, in fact, sworn an affidavit in the Colorado proceedings in June 2010 in which she admitted that Ms. Lalor was her source in respect of the first article. So far as the second article is concerned, Ms. Tallant stated:-

> "The first article I wrote about Mr. Quinn's involvement in International Natural Energy ("INE") was September 6, 2009. My source for this story was a group of Irish investors in INE who were upset about Mr. Quinn's involvement in INE. Jean Cornec was not a source for this story."

55. While Mr. Cornec may not have been a source for this story, there is considerable evidence which suggests that Ms. Tallant has met with other persons who are associated with Mr. Cornec in connection with the publication of material pertaining to INE. Such persons would seem to include Mr. Cornec's wife, Ms. Frothingham, Ms. Skinner, Ms. Lalor and Ms. Lalor's son, Mr. Fennelly. Thus, for example, among the correspondence discovered in the Colorado proceedings (and exhibited for the purposes of the present application), is an email from Ms. Lalor to Ms. Skinner on 31st August, 2009, where she states:-

> "…Nicola [Tallant] coming down tomorrow so maybe we should call you as you need to brief her before she does that article."

56. Mr. Cornec, Ms. MacCaffrey and Ms. Frothingham are all listed as recipients of this email. On the 5th September 2009 Ms. Skinner replied to Ms. Lalor (which email was also copied to Mr. Cornec) to the effect that she should wait "until the oil story comes out" and that "this weekend's story is going to be crazy…just crazy". This is plainly a reference to the article which Ms. Tallant subsequently authored on 9th September, 2009, dealing with the affairs of INE, Ms. Morrice and Mr. Quinn and of which Ms. Skinner obviously had advance knowledge. All of this strongly suggests that Ms. Tallant was briefed by Ms. Lalor and Ms. Skinner in advance of the September, 2009 article dealing with the affairs of INE and that Mr. Cornec was fully aware of these developments.

57. Against that background Mr. O'Callaghan SC argued forcefully that the jurisprudence from *Goodwin* onwards merely concerned the identification of sources and that once the sources had been so identified, the privilege simply lapsed. I would, however, incline to approach the matter in a different way and, following the analysis found in the judgment of Fennelly J. in *Mahon*, I would prefer to weigh the competing interests of the parties before arriving at a conclusion.

58. In the first place, Ms. Tallant has a strong interest in publishing material concerning Mr. Quinn and the affairs of INE. If, as she maintains, Mr. Quinn holds unorthodox religious views and is effectively the leader of a religious cult which has used psychological techniques as a means of controlling gullible adherents, then – to use the language of Article 40.6.1 – the media are clearly entitled to educate public opinion in this regard. This is perhaps especially true if Mr. Quinn were to have access to enormous funds via what appears to be the largesse of some of the founding members of INE.

59. Second, while Ms. Tallant's evidence would be plainly relevant to the Colorado proceedings, it should be remarked that such

evidence is essentially confirmatory of evidence already available to Ms. Morrice through the US depositions and discovery process. In other words, Ms. Morrice already knows that Ms. Skinner and Ms. Lalor spoke with Ms. Tallant shortly in advance of the September, 2009 article. It would be unrealistic to suggest that these discussions did not concern the affairs of Ms. Morrice and Mr. Quinn, thus potentially triggering the application of the non-disparagement clause. Given that this avenue is already open to Ms. Morrice – and she has already successfully availed of it – this weakens the case for disclosure on the part of Ms. Tallant as her evidence – while undoubtedly helpful and confirmatory of other evidence – cannot be said to be *essential.*

60. Third, it may be recalled that the Colorado proceedings merely involve commercial proceedings, albeit for very significant sums of money. This is not to take from the intrinsic importance of these proceedings, but the public interest in disclosure is not as compelling as would have been the case, for example, where the potential innocence of a third party was at stake in criminal proceedings (cf. here by analogy the comments in this regard of Hardiman J. in *Howlin v. Morris* [2005] IESC 85, [2006] 2 I.R. 324).

61. Fourth, it cannot be said that there is any *ex ante* distinction between the protection of the *source* on the one hand and the *contents* of what the source disclosed on the other. In some cases – perhaps a majority – the source will wish to have their identity protected. In other instances, the source will wish to have the contents of what they actually said protected, even if they been identified as a source for the article. In both cases, the public interest in protecting the journalist from compelled disclosure is very high, since the exploration of the contents of any discussions with the source also has the ability significantly to hamper the exercise of freedom by the journalist in question.

62. Moreover, unlike the situation in *Walsh,* the letters rogatory are directed to communications between the journalist and her sources. By contrast, in *Walsh* the complainant who had made the false allegation had been publicly identified and was not a source. Furthermore, Mr. Walsh's interest in vindicating his good name in the wake of a malicious allegation was exceptionally high.

63. Weighing all these factors, I am not persuaded that the case for compelling Ms. Tallant to give evidence has been, in the words of the European Court in *Goodwin,* "convincingly established." Given that the questions posed in the letters rogatory inevitably probe the identity of her sources and the information conveyed to her by those sources as part of a core journalistic activity in respect of which she could properly decline to answer if those questions were posed to her in that form and in those circumstances in an Irish court, I would accordingly decline to give effect to the letters rogatory so far as Ms. Tallant is concerned.

64. Here it may be noted that s. 5 of the Act of 1856 preserves the privileges and protections otherwise available to the witness in purely domestic proceedings. Given the circumstances of the present case, as Ms. Tallant could invoke the protections afforded by Article 40.6.1 (and, for that matter, were it necessary to do so, Article 10 ECHR) to resist questioning directed to identifying the contents of information supplied to her as a precursor to writing the articles in question, it follows equally that she cannot be compelled to do so by the enforcement of the letters rogatory.

Whether the court should order Mr. Garde to give evidence

65. I now turn to the position of Mr. Garde. While Mr. Garde is not a journalist in the strict sense of the term, it is clear from that his activities involve the chronicling of the activities of religious cults. Part of the problem here is that the traditional distinction between journalists and laypeople has broken down in recent decades, not least with the rise of social media. It is probably not necessary here to discuss questions such as whether the casual participant on an internet discussion site could invoke *Goodwin*-style privileges, although the issue may not be altogether far removed from the facts of this case.

66. Yet Mr. Garde's activities fall squarely within the "education of public opinion" envisaged by Article 40.6.1. A person who blogs on an internet site can just as readily constitute an "organ of public opinion" as those which were more familiar in 1937 and which are mentioned (but only as examples) in Article 40.6.1, namely, the radio, the press and the cinema. Since Mr. Garde's activities fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected. It does not require much imagination to accept that critical information in relation to the actions of those bodies would dry up if Mr. Garde could be compelled to reveal this information, whether in the course of litigation or otherwise. It is obvious from the very text of Article 40.6.1 that the right to educate (and influence) public opinion is at the very heart of the rightful liberty of expression. That rightful liberty would be compromised – perhaps even completely jeopardised – if disclosure of sources and discussions with sources could readily be compelled through litigation.

67. It follows, therefore, that Mr. Garde has a similar interest to that of Ms. Tallant in ensuring that his sources are likewise protected. Of course, just as with Ms. Tallant, he is plainly a relevant witness to the Colorado litigation. Ms. Skinner (and others associated with Mr. Cornec) also seems to have either met with or corresponded with him. But his evidence would also be substantially confirmatory of material already in possession of Ms. Morrice. There are, moreover, no strong competing arguments to the contrary which would weigh against the public interest in ensuring that Mr. Garde is free from disclosing his sources or the contents of these discussions.

68. Applying, in essence, therefore, the same balancing test as already applied in the case of Ms. Tallant, I would hold that Mr. Garde is entitled to assert an immunity from disclosure in the present case.

The position of journalists under Colorado law

69. In view of the conclusions I have just reached, it would not seem to me to be necessary or desirable that I should express a view on the question of foreign law presented before me, namely, the construction of Colorado's press freedom statute and whether Ms. Tallant and Mr. Garde would have been able to avail of it in order to assert a journalistic privilege conferred by statute.

Conclusions

70. In conclusion, therefore, I respectfully decline to give effect to the letters rogatory for the reasons stated in this judgment.

Approved: Hogan J.