

THE SUPREME COURT

Finlay C.J.

Hamilton P.

Walsh J.

Griffin J.

Hederman J.

1988 No. 8775P

In re R Ltd

[1989] IR 126, [1989] ILRM 757

The appeal was heard before the Supreme Court on 13 December 1988, and judgments were handed down on 02 May 1989.

Finlay C.J.

1. This is an appeal against orders made in the High Court pursuant to s. 205, sub-s. 7 of the Companies Act, 1963. These orders directed (a) that these proceedings under s. 205 of the Act and every part thereof be held *in camera*; and (b) that none of the affidavits or exhibits referred to or facts therein recited, including the petitions and pleadings, be disclosed to anyone who is not a party to the proceedings.

2. The first of these orders was dated the 16th September, 1988, and was made *ex parte* by Johnson J., and the second was dated the 4th October, 1988, and was made upon notice of motion brought by the applicant to rescind the *ex parte* order made by Johnson J. The second order was made by Costello J. and in it he refused the application to rescind the order previously made, and in effect affirmed that order and added to it as matters not to be disclosed the contents of the petitions and pleadings.

3. Sub-section 7 of s. 205 of the Act of 1963 reads as follows:-

(7) If, in the opinion of the court, the hearing of proceedings under this section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company, the court may order that the hearing of the proceedings or any part thereof shall be *in camera*.

4. The nature of the proceedings provided for in s. 205 and the variety of reliefs which may be obtained in such proceedings is contained in sub-ss. 1 to 4 of s. 205 of the Act of 1963 which sub-sections read as follows:-

(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are

being exercised in a manner oppressive to him or any of the members (including himself), or in disregard of his or their interests as members, may apply to the court for an order under this section.

- (2) In a case falling within subsection (3) of section 170, the Minister may apply for an order under this section.
- (3) If, on any application under subsection (1) or subsection (2) the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised as aforesaid, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.
- (4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company, and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly.

5. Neither of the parties to this appeal sought to challenge the validity of s. 205, sub-s. 7 of the Act, having regard to the provisions of the Constitution. The Court, therefore, must proceed on the well-established presumption of the validity of all Acts of the Oireachtas until that presumption is displaced.

6. The sub-section must be considered as providing for a special and limited case within the meaning of Article 34, s. 1 of the Constitution and as being a prescription by law for exemption from the general requirement that justice should be administered in public.

Submissions on behalf of the applicant

7. The applicant makes four main submissions and they are:

- (1) He asserts that the granting of an order under sub-s. 7 upon an *ex parte* application is not ever within the jurisdiction of the High Court and should not have been done in this case.
- (2) He asserts that on the facts of this case and on the proper construction of the sub-section no order for a hearing *in camera* should have been made.
- (3) In the alternative, he contends that if an order under the sub-section were on the facts of this case permissible it should have applied only to the hearing of part of the proceedings.

- (4) He contends that so much of the order as purports to prohibit the disclosure of the affidavits and other documents and facts recited therein to anyone who is not a party to the proceedings is outside the powers of the High Court conferred on it by this sub-section.

The sub-section

8. The considerations in general which arise on the construction of this sub-section do not appear to have been examined by any court prior to the hearing of this application, and it is, in my view, necessary to examine them before seeking to apply the terms of the sub-section to the facts of the instant case. I am satisfied that the following principles apply to the construction of this sub-section.

- (1) The meaning of the expression "the hearing of the proceedings or any part thereof shall be *in camera*" is that such hearing shall be otherwise than in public.
- (2) Having regard to the fact that this sub-section is constitutionally permissible only as an express legislative exception to the provisions for the administration of justice in public, it must be strictly construed in the sense that it must be availed of only when and to the extent that it is necessary in the interests of justice to protect the legitimate interests of a company involved in a s. 205 petition.
- (3) Section 205 in general provides a form of procedure and remedies which are peculiarly the creatures of statute. A member of a company seeking relief under that section does not appear to me to have any special personal interest or right under the Constitution requiring the hearing of the proceedings to be in public which is independent of the mandatory provisions of the Constitution already referred to.
- (4) The sub-section can only be invoked if the legitimate interests of a company are involved and it could never be availed of to conceal from publication wrongful activities on the part of a company, its directors, its officers, or servants.
- (5) The sub-section cannot be invoked to protect the good name of any individual, whether a member of the company concerned or not, unless that protection is necessary to avoid a consequential serious prejudice to the legitimate interests of the company.
- (6) In a case where the power of the court under the sub-section can be properly invoked, the hearing *in camera* should be confined to such part only of the proceedings as is necessary for the protection of the legitimate interests of the company. To this principle there is, in my view, an inherent qualification, namely, that an order for the hearing of part only of the proceedings under s. 205 *in camera* should not be made where it would result in an unsatisfactory and unjust trial of the issues arising under the application brought pursuant to the section.
- (7) If any party or witness in the proceedings under s. 205 has information which might be seriously prejudicial to the legitimate interests of the company, if

published, an order under sub-s. 7 cannot *per se* prohibit him from publishing such information merely on the basis that it may be revealed during the hearing. Since, however, an order duly made under sub-s. 7 of s. 205 is one the breach or disregard of which would be contempt of court, the court should ensure that it is not circumvented, and for that purpose may, and probably should, in an appropriate case express the order for a hearing to be "*in camera*" so as to make it unambiguous. Thus the publication of pleadings and affidavits drafted and sworn for the purpose of the application would be prohibited in just the same way as would the publication of a report of the oral testimony given at the hearing.

- (8) These considerations concerning the effect of an *in camera* order duly made under sub-s. 7 of s. 205 apply, of course, *mutatis mutandis* to the making of an *in camera* order under the sub-section in respect of the hearing of part of the proceedings.
- (9) The making of an order pursuant to s. 205, sub-s. 7 does not impinge on or restrict the power of the court to make orders such as orders restraining defamation or protecting confidentiality. Neither can it be used to aid in any way other powers of prohibition, no matter how desirable the objective of such powers might appear to be.
- (10) Whilst in other contexts the phrase contained in the sub-section, namely, "the hearing of proceedings" might well appropriately be confined to the giving of oral evidence or the reading of affidavits in court, it seems to me that the stated purpose of the sub-section which is to attempt to protect the legitimate interests of a company from serious prejudice arising from the disclosure of certain information, makes it necessary to construe that phrase, namely, "the hearing of the proceedings" in a wider sense. It should, in my view, be construed as including in an appropriate case the originating documents and further pleadings, affidavits, and documents exhibited, as well as oral testimony.

9. In a case where it was considered necessary, the order could extend to the delivering of the judgment on the petition, although in this instance, in my view, it would be necessary to announce in public the decision of the court, at least, in terms which avoided the serious prejudice concerned, and subsequently to give a detailed, reasoned judgment *in camera*. The question as to whether or not it would be necessary for the judgment of the court on the final conclusion of the application under s. 205 to be delivered *in camera* in the manner which I have indicated should be a separate decision to be made by a judge at the conclusion of the case.

10. Where a judgment contains decisions on questions of law or principles applicable to the interpretation of s. 205, it is desirable that even though the decision only may have been announced in public, the detailed judgment is delivered *in camera*, that an edited version of the judgment, avoiding the revealing of seriously prejudicing information, should be circulated for the benefit of the legal profession and of the public.

The facts of this case

11. The petition in this case is brought by a person who was up to very recently the chief executive of the company concerned and who is a substantial shareholder in it. His complaint with regard to oppression and impropriety is that the company is being run by the majority of its directors in a manner which is not only likely to lead to a damaging of its interests in the short and long term, but which is actually intended to serve not the interests of the company but rather conflicting business interests of the founder of the company who is neither a director nor a member of it. The detailed allegations coming within this broad ambit are contained in an extremely lengthy affidavit filed by the petitioner in support of an already very detailed petition. That is an affidavit which in addition to facts contains a number of opinions and comments. The allegations contained in the petition and affidavits supporting it have not yet been in any detail dealt with on behalf of the company, but it has been indicated on its behalf that it will be disputing these allegations. The company has so far confined the filing of affidavits to the issue of the form of the order under s. 205, sub-section 7.

12. In the affidavit supporting the application for this order nine separate headings of information or documents contained in the petition and supporting affidavit are identified, which in the view of another director of the company would be seriously prejudicial to the legitimate interests of the company if published. In a replying affidavit and in the submissions made on his behalf to this Court the applicant does not seriously contest that at least three of these items would, if published, be prejudicial to the legitimate interests of the company in a serious way. These are a five-year business plan or programme for the company; details of the accounts of the company; and in regard to one particular transaction identified in the affidavit details of that transaction and its commercial terms. In addition, having regard to the relief claimed in the petition, it is possible that at some stage a question of the valuation of the shares of the company could fall to be determined in the application under s. 205 and, if it did, then probably the whole of the hearing concerning that issue would, if published, be seriously prejudicial to the legitimate interests of the company.

13. To a very large extent the issue which arises, therefore, on this appeal as it has been argued before this Court, is not whether there should be some order under s. 205, sub-s. 7 but rather as to whether there should be an order under that sub-section which covers the entire of the proceedings and, secondly, as to whether upon making such an order either in regard to the entire or to part of the proceedings it is open to and appropriate for the Court to prohibit in some specified way the publication of material other than the actual evidence given or opened in court hearings.

Application of the principles to the facts of this case

14. Applying the principles which I have set out above to the facts which have been shortly summarised, I have reached the following conclusions:-

- (1) The making of some order under s. 205, sub-s. 7 in regard to this petition was, in my view, necessary and proper.
- (2) On the evidence which is not contradicted, the applicant had communicated the terms of the petition, before it was even served on the company, to a

public servant who had no direct connection with the case. Correspondence entered into on behalf of the applicant prior to the institution of this petition is open to the construction of constituting a clear threat of publication of the contents of the petition unless claims made by him in respect of his dismissal as chief executive were satisfactorily dealt with. In those circumstances, I am satisfied that the making of an original or preliminary order *ex parte* to hold the hearing of the proceedings in camera was justified, though it is a relief which ordinarily speaking might well be inappropriate on an *ex parte* application. Any conceivable disadvantage which could arise from the making of such an order *ex parte* is avoided by the procedure which was adopted in this case of giving an extremely early hearing to an application to set aside or remove that order. I would, therefore, reject the contention that the fact that the original order in camera was made *ex parte* vitiates the validity of the orders eventually made.

- (3) I accept the finding of the learned trial judge that it is probable that the issues in this case will have to be determined on the petition under s. 205 by oral evidence. Having regard to the breadth and scope of the complaints being made by the applicant in the petition and affidavits so far filed and to the manner in which they are expressed, I would accept the conclusion reached by the learned trial judge in the High Court that it would be quite impractical to segregate part of the hearing so as to hold it in public and that it would vitiate any real chance of achieving a just result in the petition. I arrive at this conclusion with considerable reluctance, bearing in mind the desirability of confining and restricting as far as possible the holding of any part of proceedings in camera in the courts. I am, however, satisfied that in the interests of justice the order for the entire of the proceedings to be held *in camera* should be affirmed.
- (4) I do not consider that the Court has, under this sub-section, jurisdiction to prohibit the publication by an individual of any fact merely on the basis that that fact is likely to be proved at the hearing of the petition under section 205. At the same time it seems to me appropriate on the facts of this particular case expressly to prohibit the publication of facts or documents identifying them as being the contents of affidavits or exhibits referred to in affidavits or of the oral testimony had or to be had in these proceedings.

15. I would, therefore, disallow the appeal, except to the extent of varying the second part of the order made in the High Court in the manner which I have indicated.

Hamilton P.

16. I agree with the judgment of the Chief Justice.

Walsh J.

17. The facts of this case relevant to the issue before this Court have been so fully set out by the Chief Justice in his judgment that it is unnecessary for me to repeat any of them.

18. The issue before this Court touches a fundamental principle of the administration of justice in a democratic state, namely the administration of justice in public. Article 34 of the Constitution provides that justice shall be administered in courts established by law and shall be administered in public save in such special and limited cases as may be prescribed by law. The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have had any business in the courts. Justice is administered in public on behalf of all the inhabitants of the State.

19. Prior to the enactment of the Constitution the question of whether or not particular matters should be heard in public was a matter for the discretion of the judges subject of course always to particular statutory provisions which dealt with the subject. However it was always quite clear that the judges had no discretion to prevent the public from attending hearings unless they were satisfied that either total privacy for the whole or part of any case was absolutely necessary to enable justice to be done. The primary object of the courts is to see that justice is done and it was only when the presence of the public or public knowledge of the proceedings would defeat that object that the judges had any discretion to hear cases other than in public. It had to be shown that a public hearing was likely to lead to a denial of justice before the discretion could be exercised to hear a case or part of a case other than in public.

20. This fundamental principle in the administration of justice was made part of the fundamental law of the State by Article 34 of the Constitution in 1937. More than a decade later the same fundamental principle was incorporated in certain international instruments dealing with human rights. Article 10 of the Universal Declaration of Human Rights, 1948, and article 26 of the American Declaration of the Rights and Duties of Man, also of 1948, had each required public hearings for the administration of justice. They were followed by several international conventions incorporating the same principle, among which are article 6, para. 1 of the European Convention of Human Rights, 1950, and article 14, para. 1 of the International Covenant on Civil and Political Rights, 1966. It is also to be noted that one of the rights guaranteed by the Sixth Amendment to the Constitution of the United States is the right to a public trial in criminal matters.

21. The Courts (Supplemental Provisions) Act, 1961, by s. 45, sub-s. 1 permits the administration of justice otherwise than in public in applications of an urgent nature for relief by way of *habeas corpus*, bail, prohibition or injunction, matrimonial causes and matters, lunacy and minor matters and proceedings involving the disclosure of a secret manufacturing process. The section went on to say that the cases so prescribed should be in addition to any other cases prescribed by any Act of the Oireachtas. These specified exceptions were in fact matters in respect of which the judges had a discretion prior to the enactment of the Constitution. This discretion would appear to have survived Article 64 of the Constitution of Saorstát Éireann, which required the administration of justice “in the public Courts ...”, but did not provide for exceptions to be permitted by statute. The Constitution of 1937 removed any judicial discretion to have proceedings heard other than in public save where expressly conferred by statute. Indeed many matters which come

under the heading "lunacy and minor matters" probably do not constitute the administration of justice but simply the administration of the estates and affairs of the wards of court.

22. It is already well established in our constitutional jurisprudence that a phrase such as "save in such special and limited cases as may be prescribed by law" which appears in Article 34, s. 1 of the Constitution is to be construed as a law enacted, or re-enacted, or applied by a law enacted by the Oireachtas subsequent to the coming into force of the Constitution. In this case it is unnecessary for me to offer any view on the interpretation to be given to sub-s. 3 of s. 45 of the Courts (Supplemental Provisions) Act, 1961. Sub-section 2 of s. 45 refers to "any other cases prescribed in any Act of the Oireachtas" which of course must necessarily mean any Act of the Oireachtas established by the Constitution. There have been many such provisions including the one in question in this case.

23. What is to be noted in s. 45 of the Act of 1961 is that the cases set out in sub-s. 1 do not impose any requirement for hearing otherwise than in a public court but leave it to the discretion of the judge in question, but naturally the discretion must be conditioned by the necessary qualification that the doing of justice remains the paramount consideration. Some of the legislative provisions enacted after the coming into force of the Constitution purported to require mandatory privacy, and in others it remains a discretionary matter. These statutory provisions also display a varied and unexplained choice of words to describe hearings other than in public, such words as "*in camera*", "in private" and "in chambers." Examples of the discretionary power of the court are to be found in the Married Women's Status Act, 1957, (s. 12, sub-s. 4), the Marriages Act, 1972 (s. 1, sub-s. 3), and the Companies Act, 1963 (s. 205, sub-s. 7) and the provisions of s. 14, sub-s. 2 of the Family Law (Protection of Spouses and Children) Act, 1981. This latter provision which relates to proceedings in the Circuit Court, and in the High Court on appeal from the Circuit Court, stands in odd contrast to the provisions of sub-s. 1 of s. 14 which appears to be mandatory. There are several statutory provisions requiring hearings other than in public which are phrased in mandatory terms but it is not necessary for the purpose of this case to consider the interpretation which should be given to any such mandatory provision. If the *dictum* of the former Supreme Court of Justice in *In re Redbreast Preserving Co. Ltd.* (1956) 91 I.L.T.R. 12 at p. 23 means that the constitutional requirement that justice is to be administered in public is satisfied by the public pronouncement of a decision based on evidence taken other than in public, then where that is not expressly authorised by a post-Constitution statute it is clearly incorrect and ought not to be followed. All evidence in proceedings before a court must be taken in public save where otherwise expressly permitted in accordance with the terms of Article 34 of the Constitution.

24. The statutory provision which arises for consideration in this case, namely s. 205, sub-s. 7 of the Companies Act, 1963, confers a discretionary power upon the High Court. But the discretion cannot be exercised unless the court is of opinion that the hearing of proceedings under the section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company. That is a condition precedent to the exercise of a discretion but in my view it is not the only condition regulating the exercise of the discretion.

25. I fully agree with the opinion expressed by the Chief Justice that proceedings include pleadings, affidavits exhibits as well as oral testimony and indeed the judgment in the case. I also agree with his opinion that the section cannot be invoked simply to conceal from the public evidence of wrongful activities on the part of the company or any member of the company or employee of the company or anybody dealing with the company or the good name of any such persons or anybody else. In *Beamish & Crawford Ltd. v. Crowley* [1969] I.R. 142 this Court refused to accept as a factor in deciding the venue of a trial considerations of the adverse publicity which would affect the sale of the plaintiff's goods in the area of the particular venue for the trial. The Court held that apart from the exceptions permitted by law, publicity was inseparable from the administration of justice.

26. It is difficult to know what was the justification for the provisions of sub-s. 7 of s. 205 of the Act of 1963 when one bears in mind that in proceedings in any other form of action against the company, whether by a shareholder or anyone else, no information however damaging or embarrassing to the company may be withheld from publication unless it involved the disclosure of a secret process. The fact that s. 205 provided a special form of relief for minority shareholders alleging oppression does not on the face of it appear to be a reason for giving the procedure provided for in sub-s. 7 a character different from any other proceedings. However, be that as it may, it has been so enacted by the Oireachtas. But in my view that does not obviate the overriding consideration of doing justice. In seeking to avail of the protection apparently offered by the sub-section the party seeking it must be able to satisfy the court that not only would the disclosure of information be seriously prejudicial to the legitimate interests of the company, but it must also be shown that a public hearing of the whole or of that part of the proceedings which it is sought to have heard other than in a public court would fall short of the doing of justice.

27. In the hearing before this Court it appeared to be agreed between the parties that publication of information relating to the five-year business plan and programme of the company and the details of its accounts, and the details of one particular transaction and the commercial terms of that transaction "would be seriously prejudicial to the legitimate interests of the company." As that is the condition precedent for any decision on the part of the trial judge to hear the proceedings other than in a public court, the next question which must arise before the discretion can be exercised is as to whether publication of these matters would fall short of the doing of justice.

28. The first observation to be made is that unless the details of these matters are actually relevant to the issues to be tried they should not be admitted in evidence at all. Assuming they are relevant and admissible, one must bear in mind that the nature of the proceedings is that it is the affairs of a juristic person created by the Companies Acts which are under review. That puts the case in a quite different category from the private affairs of a human person. It is difficult to see why the disclosure of evidence of this type must necessarily be deemed to be a failure to do justice in the case of a juristic person where it would not be such in the case of a human person or of any unincorporated body of persons. The respondents as well as the applicant are entitled to a fair and public hearing by the courts set up under the Constitution. Is the fact of the statutory condition precedent, namely, a serious prejudice to the legitimate interests of the company, to be regarded as necessarily being equivalent to those exceptional circumstances where public knowledge of

the proceedings is likely to lead to an injustice or to defeat the object of the courts in doing justice? I do not think so, even though it might be thought that this appeal proceeded on the basis that it does. While in one sense the quarrels between a shareholder or shareholders in a limited company and the company itself might be regarded in the nature of a family squabble, it is in no way comparable to family disputes in the true sense. A limited company is the creature of the law and by its very nature and by the provisions of the law under which it is created it is open to public scrutiny.

29. I do not say that there can never be circumstances where the public hearing of cases such as this would prevent justice being done. However, I am of opinion that in the present case no circumstances, so far at least, have been shown which would justify this Court at arriving at such a conclusion. I would therefore allow this appeal.

30. If I were of opinion that the three matters mentioned and agreed as being the ones the disclosure of which would be injurious to the legitimate interests of the company were also shown in the circumstances of the case to be such that their disclosure would prevent justice being done, it would be my opinion that this fact would not justify the whole of the proceedings being held other than in public, unless it could be shown that not to do so would make the trial so unsatisfactory and difficult as to fall short of the proper administration of justice in that it would not be a fair hearing, when I would support the view that the entire trial should be held other than in a public court. However in the present case the evidence in so far as has been disclosed to this Court, is such that the most one could say is that if part only of the proceedings are heard other than in public it would make the trial inconvenient and possibly even troublesome. That is a very long way from saying that such inconvenience or trouble would cause such trial to amount to a failure to do justice.

31. I am also of opinion that in either event a judgment should be pronounced in public. If part or the whole of the proceedings were to be heard other than in public I am of opinion that so much of the judgment as does not disclose the particular information which had been withheld from publication should be pronounced in public.

Griffin J.

32. I agree with the judgment delivered by Walsh J. and would accordingly also allow this appeal. I would like however to add a few comments. As Walsh J. has stated in his judgment, in this case no circumstances have, to date, been shown which would justify the Court in arriving at a conclusion that a public hearing would prevent justice being done. It may very well be, however, that in respect of one or more of the three items to which the Chief Justice and Walsh J. have referred in their judgments (i.e. the five-year business plan or programme for the company, details of the accounts of the company, and details of and the commercial terms of one specific transaction into which the company had entered), the company may, at the trial, be able to establish that there are in fact further circumstances which would justify the trial judge in concluding that the disclosure of such item or items would be likely to prevent justice being done in the case. In such event, the trial judge would be justified in hearing the evidence in respect of such item or items otherwise than in public.

33. In his judgment on the hearing of the motion before him, the learned trial judge concluded that it would be impractical in this case so to separate part of the hearing as to hold it in public whilst excluding the public from hearing the balance of the evidence. I have re-read all the evidence and all the exhibits and documents in the case, and I cannot agree with that conclusion. In my view, there should be no more difficulty in this case than in any other case in isolating that part of the evidence which applies only to such one or more of the three items already referred to, and to hear the balance of the evidence in public. This might indeed be less convenient, but as Walsh J. has pointed out that is a very long way from saying that it would cause the trial to amount to a failure to do justice in the case.

Hederman J.

34. I agree with the judgment of Walsh J.