

THE HIGH COURT

1986 No. 946p

BETWEEN

PATRICK J. O'CONNELL

PLAINTIFF

AND

RADIO TELEFIS EIREANN (OTHERWISE KNOWN AS R.T.E.)

DEFENDANT

Judgment of Mr. Justice Blayney delivered the 2nd day of November 1988.

This is an appeal by the Plaintiff against two Orders for discovery made by the Master, on the application of the Defendant, under Order 31, Rule 29 of the Rules of the Superior Courts. The Orders were made on the 8th July 1988 and directed discovery to be made by the County Council of the County of Donegal and Set Developments Limited respectively. The Order affecting Set Developments Limited has been appealed by that Company as well as by the Plaintiff.

The Plaintiff's action is for damages for libel. He claims to have been libelled by one of the Today Tonight programmes on Telefis Eireann. The Plaintiff is the Assistant County Engineer in the County of Donegal and it is pleaded in the Statement of Claim that what was said in the course of the programme meant and was understood to mean, inter alia, that

the Plaintiff had:

- "(1) Misused and abused his position as Assistant County Engineer in Donegal County Council,
- (2) conspired with Councillor Sean McEniff and another or others to illegally irregularly or unjustifiably obtain planning permission for Set Developments Limited for the said Ballyshannon development,
- (3) submitted incorrect or inaccurate reports in relation to the sewerage proposals and plans for the said Ballyshannon development, and
- (4) that planning permission was obtained by Set Developments Limited in respect of the said Ballyshannon development by reason only of the involvement of the Plaintiff therewith."

It was submitted on behalf of the Plaintiff, and this seemed to be the main ground of the appeal, that the defence delivered amounted to a plea of justification; that the Defendant was trying to get discovery to enable it to furnish replies to Notices for Particulars delivered by the Plaintiff and Orders for discovery should not have been made as it was well settled that a Defendant was not entitled to get discovery for this purpose. In order to deal with this submission it is necessary to set out briefly the position in regard to the particulars of the defence sought by the Plaintiff.

On the 15th September 1987 the Plaintiff sought further and better particulars of the defence which had been delivered and an answer was furnished by the Defendant on the 16th December 1987. The Plaintiff was dissatisfied with some of the replies and sought more particulars on the 8th January 1988. The Defendant initially refused to answer these but did

so on the 8th June 1988 in obedience to an Order of the President of the High Court which had been affirmed by the Supreme Court on appeal. A final point raised by the Plaintiff on the 27th June 1988 was answered by the Defendant on the 30th June 1988. No further particulars have been sought by the Plaintiff.

The Defendant's motion for discovery against the County Council and Set Developments Limited was issued on the 29th October 1987 before the Defendant had replied to the Plaintiff's request for particulars of the 15th September 1987 but it was not adjudicated upon by the Master of the High Court until the 8th July 1988 at which date all the particulars sought by the Plaintiff had been furnished. It follows that the discovery sought at the time when the motion came before the Master of the High Court could not have been for the purpose of enabling the Defendant to reply to the Plaintiff's Notice for Particulars so there is no factual basis for the Plaintiff's submission and for that reason I must reject it.

I am not overlooking the fact that it was also submitted by the Plaintiff that some of the replies given by the Defendant were not adequate but I am not satisfied that this is the case and, furthermore, I have no doubt that if it were the case a request for further and better particulars would have been forthcoming from the Plaintiff and there has been no such request.

The manner in which Order 31, Rule 29 should be construed was laid down by Costello J. in his judgment in Holloway .v. Bellenos Publications Limited and others 1987

I.L.R.M. 790 at page 794:

"The original application and the application in its amended form are both, it seems to me, brought under

a misunderstanding of the purpose and scope of the new rule and the courts powers under it. The court has no power to make an order merely for the purposes of permitting a party to inspect the files of a non-party to see whether they contained any relevant document; it cannot be used (to employ a metaphor apposite to this action) for the purpose of issuing a licence to explore the files of a notice party in the hope of discovering a relevant document. The court must have evidence on which it can conclude

- (a) that relevant documents exist (that is, documents which are relevant to an issue likely to arise at the hearing of the action) and
- (b) that it is likely that the notice party has in his possession power or procurement relevant documents."

Adopting this statement of the law, I have to consider in regard to each of the Notice Parties if there is evidence on which I can conclude that relevant documents exist and that it is likely that the Notice Party has such documents in its possession, power or procurement.

The application for discovery against the County Council is grounded on the affidavit of Eugene Murphy, a partner in the firm of Solicitors acting for the Defendant, and the affidavit of Ciaran Fahy, a Civil Engineer. I am satisfied from these affidavits that there are relevant documents in existence, principally the documents in planning files relating to planning applications in respect of the site in Ballyshannon for which planning permission was obtained by

Set Developments Limited. One of the innuendoes pleaded by the Plaintiff is "that planning permission was obtained by Set Developments Limited in respect of the said Ballyshannon development by reason only of the involvement of the Plaintiff therewith". All the documents relating to the obtaining of the planning permission are clearly relevant to this.

On behalf of the County Council, Mr. Carson argued that it was necessary for the Defendant to show that the Plaintiff had an involvement in the grant of the planning permission and that in absence of such an averment the planning documents were not relevant. I do not agree. Since the libellous innuendo pleaded is that planning permission was obtained by reason only of the involvement of the Plaintiff, all the documents relating to the application and granting of the planning permission are in my opinion relevant. They are relevant to the issue of whether the Plaintiff had an involvement or not in the granting of the planning permission. I am of opinion accordingly that the Master was correct in making an Order for discovery against the County Council and I refuse to discharge his Order.

In the case of Set Developments Limited there is a single grounding affidavit also sworn by Eugene Murphy. Once again the question to be considered is whether I can conclude on the evidence contained in the affidavit that relevant documents exist and that it is likely that they are in the power, possession or procurement of Set Developments Limited. The answer to this question is in my opinion quite clear. Mr. Murphy does not in his affidavit refer to any documents let alone prove the existence of any. The only paragraph of his affidavit which might be said to be in any way relevant to this

issue is paragraph seven where he says :-

"Counsel has advised and I say and believe that matters which are of relevance to the proceedings are the matters set out in paragraph 1 (a) to (f) of the Notice of Motion."

The matters set out in paragraph (a) to (f) of the Notice of Motion are certain records, documents and contracts and other papers. But there is no averment that the records, documents, etc., are in existence. So the first requirement laid down by Costello J. is not satisfied and by reason of this I consider that the Defendant was not entitled to an Order for discovery against Set Developments Limited and accordingly I propose to discharge the Order for discovery obtained against that Company.

*John Haynes*

Doc. No. 2510SAK

