

THE HIGH COURT

[2017 No. 4816 P]

BETWEEN

GERRY ADAMS

PLAINTIFF

AND

BRITISH BROADCASTING CORPORATION

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 1st day of July, 2020

Introduction

1. There were two motions before the Court, both brought by the plaintiff seeking discovery and to compel replies to a notice for particulars. These motions arise in defamation proceedings. I will deal with each motion separately but, before doing so, I will consider the pleadings and identify the issues involved.

Defamation proceedings

2. On or about September, 2016, the defendant broadcast an episode of the "Spotlight" television programme, entitled "Spy in the IRA". On 21 September 2016, the defendant published an article on its website under the headline: "Gerry Adams 'sanctioned Denis Donaldson killing'". The plaintiff claims that both the programme and the article were defamatory of him in that the words contained therein meant, and were understood to mean, in their natural and ordinary meaning and/or by way of innuendo, that the plaintiff sanctioned and approved the murder of Denis Donaldson.
3. The Statement of Claim delivered sets out extracts from both the programme and the article. The plaintiff seeks damages (including aggravated and/or exemplary damages) for defamation.
4. The defendant delivered its Defence on 15 June 2018. It is necessary to consider the Defence in order to identify the issues that arise. The defendant expressly makes no admission as to the extent and publication of the words complained of in the programme and the article. It is also denied that there was any publication of the programme through its webpage or on the iPlayer in Ireland.
5. The defendant pleads that the programme and article "were published in good faith and in the course of, or for the purpose of, the discussion of subjects of public interest, which was for the public's benefit. In particular, the issue stated and discussed in the programme and article were issues of vital importance and interest to the people of Ireland". The defendant maintains that publication of the statements "constituted responsible journalism and was the result of a careful investigation by the defendant into the matters so broadcast and published". Thus, the defendant relies on the defence of fair and reasonable publication under s. 26 of the Defamation Act, 2009 (the Act of 2009) and/or the benefit of the defence of qualified privilege pursuant to s. 18 of the said Act. The defendant also claims that the programme was made in accordance with its editorial guidelines.

6. The defendant denies that the plaintiff has suffered any damage to his reputation and states at para. 22 in its Defence that it will give evidence, with the leave of the Court, in a number of matters which it claims have a bearing upon the reputation of the plaintiff. These matters are stated as follows: -

“(a) The plaintiff was for many years on the IRA Army Council.

(b) The plaintiff was for many years a leading member of the IRA.

(c) During the plaintiff’s period of leadership and/or membership, the IRA engaged in a campaign of horrific murder and violence, particularly in Northern Ireland and the United Kingdom, and engaged in thousands of acts of murder.

(d) The plaintiff continued to play a very important and senior role in the IRA up to and including the time of the Denis Donaldson murder.

(e) The plaintiff has continuously lied about his membership of the IRA.

(f) The plaintiff has a history of not condemning the killing of informers by the IRA and many years previously had said that anyone living in West Belfast knows that the consequences for informing is death.”

7. Arising from the Defence, the following can be stated: -

(i) Publication of the programme and article is in issue; and

(ii) The defendant will be relying upon the defences provided for in ss. 18 and 26 of the Act of 2009.

No reply has been delivered to the Defence.

Application for discovery

8. Arising from the Defence, the plaintiff has sought some seven categories of discovery, three of which have been agreed. Before examining the various categories, I will set out the legal principles that are applicable to an application such as this.

9. The issue of discovery has been most recently considered in the judgment of the Supreme Court in *Tobin v. The Minister for Defence, Ireland and the Attorney General* [2019] IESC 57. This comprehensive judgment sets out with clarity the principles that are applicable to an application such as this. I will be referring extensively to the judgment of Clarke C.J.

10. To make an order for discovery, the court has to be satisfied that the documents sought are both relevant and necessary. As Clarke C.J. stated: -

“6.2 The established definition of the test of relevance is to be found in the principles outlined in the judgment of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano* (1882) 11 Q.B.D. 55 (*Peruvian Guano*). With regard to necessity, in *Ryanair plc. v. Aer Rianta c.p.t.* [2003] IESC 62, [2003] 4 I.R. 264

(*Ryanair*), Fennelly J. held that, in order to establish that discovery of particular categories of documents is 'necessary for disposing fairly of the cause or matter', the applicant does not have to prove that they are in any sense 'absolutely necessary'. He went on, at p. 277, to hold that the court should:-

'...consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof which are open to the applicant.'

11. As for the importance of discovery, in *Tobin*, Clarke C.J. stated: -

"7.5 I emphasise all of these points precisely because it is important not to lose sight of the valuable contribution which discovery can make. It improves the chances of the court being able to get at the truth in cases where facts are contested. In that way, it makes a significant contribution to the administration of justice."

12. As for "*relevance*", Clarke C.J. stated: -

"7.25 I should also make one final point of general application. Relevance is, as has been pointed out, determined by reference to the pleadings. Importantly, therefore, the scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to plead their case. A plaintiff can hardly be heard to complain that they are required to make overbroad discovery if the reason for the scope of the discovery sought is because of a 'kitchen sink' approach to pleading the case. Likewise, defendants have to accept that, if they deny all elements of the plaintiff's case or place the plaintiff on proof about even relatively uncontroversial elements of the plaintiff's claim, then, inevitably, the scope of the issues which will arise for trial will be expanded and the potential for documents being relevant to issues which remain alive will be greatly increased."

13. As for "*necessity*", Clarke C.J. stated: -

"7.13 Considering all of that recent case law, it seems to me that, at the level of the broadest generality, certain fundamental principles can be discerned. First, the key criteria remain those of relevance and of necessity. However, it also seems clear that there has been much greater scrutiny of the issue of 'necessity' in more recent times. The traditional position very much accepted that if documents were relevant, their discovery would almost inevitably be necessary. However, much of the recent case law has indicated a need to move away from that position. Where there are other equally effectual means of establishing the truth and thus providing for a fair trial then discovery may not be 'necessary'. This will certainly be so where it can be shown that the cost of making discovery would be significant and would greatly

outweigh the costs of pursuing some alternative procedural mechanism to establish the same facts. Similar considerations apply when the likely true relevance of documentation may not become clear until the trial but where the immediate disclosure of the documentation concerned would necessarily involve disclosing highly confidential information. Furthermore, the development of a proportionality test can itself be seen as a further refinement of the concept of 'necessity'.

7.14 It is, of course, the case that 'necessity' means that the disclosure of the documents concerned may be necessary for the fair and just resolution of the proceedings and potentially for saving costs. The costly alternative to discovery might, of course, be that a large number of persons would be served with subpoenas requiring them to bring documents with them to the trial, but that would lead to greatly prolonged hearings while documents were being introduced into evidence, as it were, 'on the blind'. On the other hand, requiring a party to produce, at great expense, a very large number of documents, which are only likely to be of tangential relevance to the trial, is most unlikely to save costs and equally unlikely to lead to a fairer resolution of the proceedings. In that sense, the discovery of the documents in question cannot be said to be necessary."

14. Following the hearing of this matter before the Court, Collins J. (sitting as a judge of the High Court) gave judgment in *Dermot Desmond v. The Irish Times Limited* [2020] IEHC 95, in the course of which he considered an application for discovery where a defendant is relying on the defence provided for in s. 26 of the Act of 2009. The parties were invited to and did make submissions on this judgment. Section 26 provides: -

"(1) It shall be a defence (to be known, and in this section referred to, as the 'defence of fair and reasonable publication') to a defamation action for the defendant to prove that—

(a) the statement in respect of which the action was brought was published—

(i) in good faith, and

(ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,

...

(2) For the purposes of this section, the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters as the court considers relevant including any or all of the following:

(a) ...

(b) the seriousness of any allegations made in the statement;

(c) ...

(d) the extent to which the statement drew a distinction between suspicions, allegations and facts;

(e) ...

- (f) ...
- (g) ...
- (h) the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned;
- (i) ...
- (j) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement."

15. In the course of his judgment, Collins J. stated: -

"49. Again, I remind myself that this is a discovery application. It is neither necessary nor would it be appropriate for the Court to reach any definitive view as to the precise nature and scope of the fair and reasonable publication defence. On the other hand, it is necessary to form some view at least as to the general contours of that defence, given that the parties' respective positions on the disputed categories of discovery in turn reflect different views on the scope and effect of section 26.

50. In the first place, it is clear that an essential element of the new defence is that the defendant must prove that *'in all of the circumstances of the case, it was fair and reasonable to publish the statement'*: section 26(1)(c). While section 26(2) structures how the court (which in relation to a defamation action in the High Court means the jury, if the court is sitting with a jury) should determine whether it was fair and reasonable to publish, it is important to note that section 26(2) does not limit the matters that the court is to take into account. To the contrary, section 26(2) very clearly provides that the court *'shall... take into account such matters as the court considers relevant'*. I would add that it is not open to a defendant, by its pleading, to circumscribe what it is required to establish by section 26. *In all cases, what must be shown by a defendant is that 'in all of the circumstances of the case, it was fair and reasonable to publish the statement'* (emphasis added)

51. The matters to be taken into account *include* the matters specified at section 26(2)(a) to (j). These cover a wide variety of matters, some directed to the substantive content of the statement/publication at issue ((a), (b), (c) (at least in part), (d) and (h)) but others appear to be directed to the circumstances in which the statement is published ((c) (insofar as it refers to the context of the statement) (e), (i)) and/or the background to publication ((f), (g) and (j)). Some of these matters are more open-ended than others. Thus, for instance (f) and (g) *prima facie* involve a potentially broad inquiry as to the extent to which the publication of the statement complained of adhered to the Press Council's standards, which cover matters such as fair procedures and honesty, respect for rights such as the right to one's good name and privacy."

and: -

"53. I do not think it can plausibly be said that editorial decisions - in terms of deciding whether to publish or not and decisions as to when and what to publish - are *a priori* excluded from the assessment of whether it was fair and reasonable to publish a particular statement..."

Categories of discovery sought

16. Some seven categories of discovery were sought. There was agreement on three of these categories, and on the remaining four there was engagement between the parties: -

Category 1

17. The plaintiff sought the following: -

"All documents evidencing and/or recording the circulation and extent of publication of both the programme and the article."

The defendant proposed the following: -

"The defendant will provide such information as the defendant holds identifying the number of views of either the documentary or the accompanying article from within the jurisdiction of Ireland."

18. It is clear from the Defence that publication is in issue. The proposed wording from the defendant may well cover the issue involved but I accept the possibility that "*identifying the number of views*" may not fully capture "*the circulation and extent of publication*". Therefore, on this category, I will direct discovery of: -

"All documents evidencing and/or recording the circulation and extent of publication of both the programme and the article within the jurisdiction of Ireland."

Category 2

19. The plaintiff seeks discovery of: -

"The defendant's editorial guidelines together with all documents evidencing and/or recording all editorial decisions bearing upon the entitlement of the defendant to invoke the defence of fair and reasonable publication in respect of the programme and the article."

The defendant has proposed the following: -

"All documents evidencing and/or recording all editorial decisions (including relevant editorial guidelines) bearing upon the defendant's decision to publish the contents of the programme and article. Subject to a temporal limitation being all documents created up until 21 September 2016."

20. What is in issue here are the defendant's editorial guidelines. The defendant has pleaded that the programme and article in question are in accordance with its editorial guidelines.

Referring to the passage from the judgment of Collins J. referred to above, a defence under s. 26 of the Act of 2009 encompasses editorial decisions.

21. This category, as sought by the plaintiff, refers to "*the entitlement of the defendant to invoke the defence of fair and reasonable publication...*". In adopting this wording, the plaintiff was relying upon the decision of the Court of Appeal given on a discovery application in *Ryanair Limited v. Channel 4 Television Corporation and anor* (Court of Appeal, 29 July 2015). Clearly, the wording of a category of documents sought to be discovered must depend on the particular facts arising from the case in question. This is clear from the judgment of Hogan J. in *Ryanair*. However, in this case, I have a concern as to the wisdom of incorporating into a category of documents for discovery a person's legal entitlement and, more particularly, the extent of that entitlement to raise a particular defence. It is very likely that the parties will disagree as to the extent of such entitlement, which will, in turn, raise the issue as to whether discovery has been complied with. In my view, the description of the category of documents to be discovered should be clear and not subject to whether or to what extent the party making discovery is entitled to a particular defence. With this in mind, I will follow the wording proposed by the defendant for this particular category.

Categories 3, 4 and 5

22. Categories 4 and 5 have been agreed in the following terms: -

"4. All documents created up until 21 September 2016 comprising source material (including but not limited to all audio and video tape/recordings, dialogue, archive footage/resources, scripts and draft scripts) for the programme and, in particular, the claim that the IRA was responsible for the murder of Denis Donaldson and the allegation that the plaintiff sanctioned that murder."

and: -

"5. All documents created up until 21 September 2016 evidencing and/or recording the attempts made, and the means used, by the defendant, its servants or agents to verify the assertions and allegations concerning the plaintiff in the programme and article."

23. As for category 3, the plaintiff seeks the following: -

"All documents evidencing and/or recording all research, investigation, analysis, enquiries, interviews, meetings and/or communications of any kind carried out or made by or on behalf of the defendant, its servants or agents into the subject matter and content of the programme and article and in particular the claim that the IRA was responsible for the murder of Denis Donaldson and the allegation that the plaintiff sanctioned the murder."

The defendant has proposed the following: -

"All documents evidencing and/or recording all research, investigation, analysis, inquiries, interviews, meetings and/or communications of any kind carried out or made by or on behalf of the defendant, its servants or agents for the publication of the programme and the article. Subject to a temporal limitation on all documents created up until 21 September 2016."

It can be seen the difference between what is being sought and what is being offered is the underlined portion set out above. It seems clear to me that this is, in fact, covered by categories 4 and 5, which have been agreed. I will, therefore, direct that documents be discovered for category 3 in accordance with the proposed wording of the defendant.

Category 6

24. Category 6 has been agreed as follows: -

"All documentation created up until 21 September 2016 in relation to the efforts made by the defendant, its servants or agents, to obtain and convey the plaintiff's position in the programme."

Category 7

25. The plaintiff seeks: -

"All documents evidencing the plaintiff's alleged involvement with the IRA and his alleged responsibility for IRA atrocities."

The defendant proposes the following wording: -

"All documents evidencing the plaintiff's alleged involvement with the IRA and his alleged responsibility for IRA atrocities on which the defendant intends to rely."

26. In my view, the category proposed by the plaintiff is too broadly worded and goes beyond that which is relevant and necessary for this action. In his replying affidavit, Mr. Stephen Harris, a Solicitor in the legal department of the defendant, states that the defendant has been covering events in Northern Ireland for a period in excess of 50 years. The plaintiff has been a high profile public figure for much of that period and, thus, it is likely that the defendant would hold vast amounts of material relating to the plaintiff "*as a result of its news gathering and news reporting over the almost half century involved...*". Directing discovery of this category as sought by the plaintiff would be unduly burdensome. The wording proposed by the defendant, in my view, meets the situation, in that discovery will be made of the documentation evidencing the plaintiff's alleged involvement with the IRA and his alleged responsibility for IRA atrocities on which the defendant intends to rely (emphasis added). If the plaintiff were to contend that the defendant had other documentation which evidenced the plaintiff's non-involvement with the IRA and alleged responsibility for atrocities, but effectively ignored it, then such would be covered under category 2, which deals with editorial decisions. I will, therefore, direct discovery of this category in the terms proposed by the defendant.

Notice for particulars

27. In its Defence, the defendant pleads: -

"22. Further and in the alternative and without prejudice to the foregoing, the defendant will give evidence with the leave of the court on the following matters that have a bearing upon the reputation of the plaintiff:

- (a) The plaintiff was for many years on the IRA Army Council;
- (b) The plaintiff was for many years a leading member of the IRA;
- (c) During the plaintiff's period of leadership and/or membership, the IRA engaged in a campaign of horrific murder and violence, particularly in Northern Ireland and the United Kingdom, and engaged in thousands of acts of murder;
- (d) The plaintiff continued to play a very important and senior role in the IRA up to and including the time of the Denis Donaldson murder;
- (e) The plaintiff has continuously lied about his membership of the IRA;
- (f) The plaintiff has a history of not condemning the killing of informers by the IRA and many years previously had said that anyone living in West Belfast knows that the consequence for informing is death."

The reference to "*with the leave of the court*" is to s. 31(6) of the Act of 2009.

28. In a notice for particulars, the Solicitors for the plaintiff have sought further and better particulars of "*all material facts (and not the evidence thereof)*" in support of the allegations contained in paragraph 22(a), (b), (d) and (e). The defendant has refused to supply particulars on the basis that the particulars already pleaded are sufficient and that what is being sought is evidence.

Applicable legal principles

29. The principles which a court should apply on an application such as this have been considered by Hogan J. in *Ryanair Limited v. John Goss* [2016] IECA 328. Hogan J. reviewed earlier authorities: -

"10. The classic test regarding object of particulars remains that as articulated by Henchy J. in *Cooney v. Browne* [1984] I.R. 185, 191:

'Where particulars are sought for the purposes of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason: see Ord. 19, r. 6(3). Where the particulars are sought for the purpose of a hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing... Thus, where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial.'

11. It follows, therefore, that particulars will be ordered in the interests of fair procedures and to ensure that a litigant will not be surprised by the nature of the case which he has to meet. The case-law shows that this is essentially the governing principle in all cases where the issue of whether the particulars should be ordered has been considered."

Hogan J. further states: -

- "14. ... As Keane J. noted, the plaintiff already knew from the defence 'in broad outline' what was going to be said at the trial by the defendant regarding the house call. Keane J. further added ([1996] 2 I.R. 229 at 234):

'In our system of civil litigation, the case is ultimately decided having regard to the oral evidence adduced at the trial. The machinery of pleadings and particulars, while of critical importance in ensuring that the parties know the case that is being advanced against them and that matters extraneous to the issues as thus defined will not be introduced at the trial, is not a substitute for the oral evidence of witnesses and their cross-examination before the judge.'

30. The defendant has set out, in stark terms, a number of matters which it says have "a bearing upon the reputation of the plaintiff". It is clearly stated by the defendant that the plaintiff was for many years a leading member of the IRA, on the IRA Army Council, that he played an important role in the IRA up to and including the time of the Denis Donaldson murder and continuously lied about his membership of the IRA. There is nothing ambiguous about these statements, so I cannot see how it could be said that the plaintiff is not fully aware of the case that is being made against him.
31. In the notice for particulars, the plaintiff, probably mindful that the request would be met with the answer that the particulars being sought "*were a matter of evidence*", couched the request as being "*all material facts (and not the evidence thereof)*". I have to say that I see little distinction between "*material facts*" and "*the evidence thereof*". Evidence generally consists of putting material facts before the court.
32. By reason of the foregoing, I am satisfied that the plaintiff has not established a basis for me to direct the defendant to answer said notice for particulars.

Conclusion

33. I will direct that the defendant make discovery of the various categories of documents as set out in this judgment. For the ease of the parties, in the schedule attached, I have set out the various categories of documents to be discovered. I will hear the parties as to the time to be allowed for such discovery and the deponent of the affidavit.
34. For the reasons stated, I refuse the plaintiff's motion to compel replies to particulars.

Schedule

Category 1

"All documents evidencing and/or recording the circulation and extent of publication of both the programme and the article within the jurisdiction of Ireland."

Category 2

"All documents evidencing and/or recording all editorial decisions (including relevant editorial guidelines) bearing upon the defendant's decision to publish the contents of the programme and article created up until 21 September 2016."

Category 3

"All documents evidencing and/or recording all research investigation, analysis, inquiries, interviews, meetings and/or communications of any kind carried out or made by or on behalf of the defendant, its servants or agents for the publications of the programme and the article created up until 21 September 2016."

Category 4

"All documents created up until 21 September 2016 comprising source material (including but not limited to all audio and video tape/recordings, dialogue, archive footage/resources, scripts and draft scripts) for the programme and, in particular, the claim that the IRA was responsible for the murder of Denis Donaldson and the allegation that the plaintiff sanctioned the murder."

Category 5

"All documents created up until 21 September 2016 evidencing and/or recording attempts made, and the means used, by the defendant, its servants or agents to verify the assertions and allegations concerning the plaintiff in the programme and article."

Category 6

"All documentation created up until 21 September 2016 in relation to the efforts made by the defendant, its servants or agents to obtain and convey the plaintiff's position in the programme."

Category 7

"All documents evidencing the plaintiff's alleged involvement with the IRA and his alleged responsibility for IRA atrocities on which the defendant intends to rely."