THE COURT OF APPEAL

Neutral Citation No.: [2021] IECA 172
Record No.: 2020/177

Donnelly J.
Noonan J.
Binchy J.

BETWEEN/

DENIS O'BRIEN

PLAINTIFF/APPELLANT/
RESPONDENT TO CROSS APPEAL

-AND-

RED FLAG CONSULTING LIMITED, KARL BROPHY, SEAMUS CONBOY, GAVIN O'REILLY, BRID MURPHY, KEVIN HINEY AND DECLAN GANLEY

DEFENDANTS/RESPONDENTS/CROSS APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered on the 11th day of June, 2021

Introduction

1. This appeal by the plaintiff and cross-appeal by the first to sixth defendants (together the "Red Flag defendants") relates to an order for discovery made by the High Court on 7 July 2020. The plaintiff's underlying application was for discovery by the Red Flag defendants of certain categories of documentation relating to the plaintiff's claim against the Red Flag defendants and the seventh defendant for conspiracy, defamation and the causing of loss by unlawful means.

2. I will structure this judgment by addressing the issues in the following sequence;

   a) the nature of the case and the pleadings generally,

   b) the categories of discovery sought,

   c) the High Court judgment,

   d) the appeal and

   e) the cross appeal.

The nature of the case and the pleadings

3. The plaintiff issued these proceedings against the Red Flag defendants on 13 October 2015. His claim was initially pleaded in a statement of claim delivered on 4 December 2015. Following the joinder of the seventh defendant (not a party to this appeal or cross appeal) by order of the High Court, the plaintiff delivered an amended statement of claim on 23

March 2018. The discovery application which is the subject matter of this appeal arises from the amendments made in that statement of claim.

4. The plaintiff's claim against the Red Flag defendants may be very briefly summarised. The plaintiff claims that the first named defendant, Red Flag Consulting Limited (hereinafter "Red Flag"), together with its directors and employees, the second to sixth defendants, conspired with the seventh defendant, wrongfully and with the sole or predominant intention of injuring and/or causing loss to the plaintiff. In his original claim, the plaintiff alleged that the conspiracy was between the Red Flag defendants and their client, whose identity was then unknown. It was only at the time of the amendment to the statement of claim that the plaintiff claimed that the client was the seventh defendant. The seventh defendant has filed a defence, denying, *inter alia*, that he is that client.

5. The plaintiff claims that, in furtherance of the alleged conspiracy, all the defendants commissioned, compiled, authored and published a dossier of documents contained in schedule 1 to the statement of claim ("the dossier"). He further claims that the defendants suggested amendments to a draft speech to be delivered in Dáil Éireann by (now former) TD Colm Keaveney (hereinafter "Deputy Keaveney"). The plaintiff claims that the defendants have published the statements contained in schedule 2 to the statement of claim, which are said to be defamatory of the plaintiff. Those statements comprise extracts from the dossier.

6. In his amended statement of claim at para.16A, the plaintiff also claims that the defendants encouraged and facilitated Mr Neil Ryan, a former assistant secretary at the Department of Finance, to disclose confidential information concerning the plaintiff. The plaintiff pleads that such disclosure was a breach of the Official Secrets Act 1963 and a criminal offence, and that the alleged actions of the defendants amounted to soliciting, aiding, abetting, counselling or procuring the commissioning of a criminal offence or a breach of confidence. As these actions are said to be criminal wrongs it is alleged that the defendants conspired to injure the plaintiff by unlawful means.

7. The plaintiff claims at para. 16B, that, pursuant to and in furtherance of that conspiracy, the defendants engaged in a campaign of briefing politicians and journalists with material adverse to his interests, with the express purpose of having those politicians and journalists promote and publish that material with the predominant intention of injuring the plaintiff or causing him loss.

8. The Red Flag defendants delivered an amended defence on 27 June 2018. They admit that Red Flag compiled the dossier (which comprises mostly material in the public domain) and produced some of the documents contained therein. They plead that the dossier was compiled and, where applicable produced, in the ordinary course of Red Flag's business and pursuant to its retainer by a client. The alleged conspiracy is denied and the plaintiff is put on strict proof of the alleged publication of the dossier and the statements.

9. The Red Flag defendants plead that the appellant has not adequately particularised his allegations concerning the alleged disclosure of material by Mr Ryan. They further plead

that they are strangers to the plaintiff's assertion that Mr Ryan possessed information concerning the plaintiff or companies with which he is associated. They deny that they sought to encourage or facilitate the disclosure of such information by Mr Ryan, and they deny that they are guilty of soliciting, aiding, abetting, counselling or procuring the commissioning of a criminal offence or a breach of confidence. The Red Flag defendants also deny that they engaged in the alleged campaign of briefing politicians and journalists.

The categories of discovery sought

10. The plaintiff sought discovery of the following four categories of documents:

Category A

11. All documents relating to and/or evidencing the first to sixth named defendants bearing hostility and/or ill feeling towards the appellant (including communications between him, his servants or agents and the defendants).

Category B

12. All documents relating to and/or evidencing the defendants (including their servants or agents) seeking to encourage and/or facilitate the disclosure by Mr Neil Ryan (and/or his servants or agents) of information (including information relating to the appellant's confidential private banking affairs with IBRC) relating to the appellant and/or companies with which the appellant is associated including documents relating to and/or evidencing the consequences and/or results of any communications between the defendants and Mr Neil Ryan.

Category C

13. All documents relating to and/or evidencing the defendants briefing politicians, their parliamentary assistants, servants and/or agents and/or journalists with material adverse to the interests of the appellant, including documents relating to and/or evidencing the purpose and/or motive of such briefings.

Category D

14. All documents that evidence, record or relate to the defendants' awareness and/or knowledge of the confidential banking affairs of the appellant and/or companies associated with him.

The High Court Judgment

15. The High Court granted discovery of categories A, B and D. The motion judge, in an *ex tempore* judgment, stated her reason for refusing discovery of category C as follows:

> "*It seems to me that [Category C] is overbroad in the extreme and has nothing to do with a temporal limit. The Defendants will of course be briefing politicians, assistants and journalists in or about their day-to-day business and they may well have material adverse to the interests of the Plaintiff. But that of itself does not suggest that because they may be speaking to parliamentarians and their servants or agents and/or journalists and their servants or agents with such material that that that (sic) would amount to a conspiracy. And in these circumstances I do not believe that it is appropriate to make an order under paragraph C in favour of the Plaintiff.*"

16. The motion judge, in limiting the period for discovery to two years (1 January 2014 to 31 December 2015) initially addressed the period when dealing with the discovery sought under category A prior to extending the period to all categories. She stated:

> "*It does appear to me that hostility or ill will can vary from time to time between any two parties. And I'm not satisfied that the particulars arising in the replies to particulars of June 2018, in fact, sufficiently bring a period of relevant hostility back to 2012 because certainly the parties may well have and presumably did have a hostile relationship in or about 2012 as between Mr Brophy and Mr O'Brien. And similarly when there was a change of personnel involved in INM then hostility would presumably arise as between Mr O'Brien and Mr O'Reilly. Life takes a course of its own and hostilities of the past may not be of the present.*
>
> *The period identified by the Plaintiff in the pleadings and which notwithstanding that, by the time the application for an amendment was made, the Plaintiff was well aware of the nature of the exchange of e-mails which was the groundwork for the amendments. There was no alteration of the time specified in paragraph 8 of the statement of claim*.
>
> *Having said that, I must bear in mind, it does say on dates unknown but which he believes were between two certain dates. I believe therefore that, taking this case on the basis that it is a case-by-case basis, one would look at discovery in the context of the period between the 1st January 2014 to 31st December 2015. And I don't think that any injustice on the basis of what has been referred to the court would arise by looking at that temporal period in relation to the discovery. And it seems to me that that's in relation to all categories.*"

The Appeal (refusal to grant discovery in relation to category C)

17. The plaintiff frames his appeal by reference to the principles in *Lawless v. Aer Lingus* [2016] IECA 235, which suggests that an appellate court should accord a significant margin of discretion to the High Court in considering interlocutory appeals. He accepts that he must demonstrate, on this interlocutory application, a clear error in principle in the judgment or an injustice that would result from the decision. He submits that there are two clear errors in principle and that furthermore it would be an injustice if the plaintiff was refused this category of documents.

18. The plaintiff pointed to the use of the word "overbroad" by the trial judge. He submits that this can only be a reference to the nature of the Red Flag defendants' business rather than to the wording of the category. He submits that in that situation it is a reference to proportionality. Relying on the principles set out in *Tobin v. Minister for Defence* [2019] IESC 57 he submits that where something is relevant it is *prima facie* discoverable and the party resisting discovery must demonstrate disproportionality. The Red Flag defendants did not swear any affidavit in response to the motion and there is no evidence of oppression.

19. The plaintiff also submits that there was a second legal error. The motion judge refused to make the documents discoverable on the basis that simply speaking to politicians or

journalists in relation to such material would not amount to a conspiracy. The plaintiff submits that the discoverability does not depend upon it amounting to the case made by the requesting party. He submits that it is sufficient to put him on a line of enquiry.

20. The Red Flag defendants in opposing the appeal stand over the finding of the motion judge that the wording of the category was overbroad. This is an argument that the wording should be sufficiently precise as to constitute a category for discovery. It does not relate to a question of proportionality. The Red Flag defendants submit that was the meaning of the motion judge's use of the word "overbroad".

21. The Red Flag defendants also oppose the motion on further grounds. In their submission this is a "fishing" exercise where the plaintiff has not detailed the particulars even when requested. Furthermore, they submit that it is an attempt to circumvent earlier decisions where discovery was refused.

22. In opposing the appeal, the Red Flag defendants point out that there have been a number of previous applications by the plaintiff seeking discovery and/or disclosure from them. The plaintiff has been unsuccessful in his application for both Anton *Piller (Anton Piller K.G. v Manufacturing Processes Ltd* [1976]) and *Norwich Pharmacal (Norwich Pharmacal Co. v. Commissioners of Customs and Exercise* [1974] A.C. 133) type relief in October 2015. He was also unsuccessful in his application for discovery in December 2016. The refusal of that latter application was upheld by the Court of Appeal in October 2017 and leave to appeal was refused by the Supreme Court. It is a fact that the plaintiff and the Red Flag defendants agreed in April 2016 to exchange certain discovery in respect of the issues arising from the pleadings as they stood at that time.

Overbroad

23. On one reading of the *ex tempore* judgment there is a certain ambiguity in the use of the word "overbroad". It might mean that it is imprecise and perhaps beyond the pleadings and therefore is not relevant or it can mean that it is oppressive and disproportionate. The Red Flag defendants in the letter opposing voluntary discovery argued that it would be disproportionate to make such discovery. Their counsel in opposing the application in the High Court, referred to the fact that category C referred to a very generalised plea in the statement of claim that had been made to the effect that the Red Flag defendants briefed politicians generally and specifically against the plaintiff. He submitted that this was the very nature of Red Flag's business and that it was talking to politicians all the time. He also made the case that this was an attempt to re-open the earlier decisions and that there were no particulars.

24. I am satisfied therefore that, in stating as a reason for refusal that the category was "overbroad", the motion judge was relying on the Red Flag defendants' submission that this was a disproportionate imposition on them in light of the fact that their business was briefing politicians. That was the basis on which the case had been made by them. In those circumstances, there was clearly an error in principle, as it was not contested before us that the principles in *Tobin* did not apply; the evidential burden on the party resisting discovery on grounds of disproportionality had not been met by Red Flag. That is not the

end of the appeal however, as it is necessary to consider the other points argued by the Red Flag defendants as to why this appeal should be dismissed.

A fishing expedition?

25. In advance of their claim that this was a fishing expedition by the plaintiff as well as in support of their contention that this category was imprecise, the Red Flag defendants pointed to the lack of relevance of the material sought. In large measure the arguments about this amounting to "fishing" are bound up with arguments that the category is overbroad.

Relevance

26. The Red Flag defendants submit that the wording of the category is imprecise and that this violates the wording of O. 31, r. 12 of the Rules of the Superior Courts, 1986 (as amended) ("the RSC") which requires precision. This requirement was also set out in *Ryanair PLC v. Aer Rianta CPT* [2003] 4 IR 264 in which McCracken J. said that the wording of the category must be sufficient to ensure that the party making discovery can identify the relevant documents. They rely upon the decision in *Framus Limited v. CRH PLC* [2004] 2 IR 20 where discovery was refused as the category was couched in extraordinarily broad terms and that there would have been a large degree of speculation.

27. The parties before us were in general agreement as to the principles in discovery. It is not necessary to set out the well-known case law establishing that discovery must be both relevant and necessary. A document is relevant if it may reasonably form the basis of a line of enquiry which may lead to the discovery of information that will advance the case of the seeker and/or weaken that of the party against whom it is sought. It is sufficient that a document *may* contain such information. It is not necessary to prove that it *will*. Relevance is determined on the basis of the pleadings and not the evidence. A plea must be taken at its high watermark and it is generally not the role of the court to embark on an enquiry as to the strength of the case or the probability of proving a pleaded fact. However, it is not open to a party to submit a bare and unparticularised plea in the hope of using discovery to obtain evidence in support of a claim that is not particularised. In particular, a document cannot be sought for the purposes of demonstrating the existence of a claim where there is no other evidence to suggest that one exists. Discovery may be permitted for the purposes of evidencing a sparsely particularised claim where the impugned activity is alleged to have been committed in a surreptitious and clandestine fashion.

28. The relevant paragraph in the amended statement of claim is para. 16B which pleads as follows:

> "Pursuant and in furtherance of the aforementioned conspiracy the Defendants engaged in a campaign of briefing politicians and journalists with material adverse to the interests of the Plaintiff and with the express purpose of having those politicians and journalists promote and publish the material with the predominant intention of injuring and/or causing loss to the Plaintiff."

29. The plaintiff has pointed to the particulars set out in schedule 5 to demonstrate that this is not a bare assertion but has been evidenced by the very detailed series of text and email

communications between the second defendant (a director of Red Flag) and Deputy Keaveney, in which the second defendant volunteered to the Deputy material which the plaintiff submits is plainly adverse to the interests of the plaintiff. The second defendant also suggested parliamentary questions that the Deputy might ask and made reference to two named journalists and possibly others who may have had information concerning the plaintiff's dealings. The schedule also revealed email correspondence to Deputy Keaveney from the third defendant in which a draft speech was sent to him.

30. The Red Flag defendants point to the fact that prior to the amended pleadings the plaintiff had claimed that he had interactions with journalists in which he said there had been a pattern of increased questioning of him by journalists and business associates over a period of some 12 months prior to the discovery of the dossier. The plaintiff was criticised in earlier judgments for not particularising those interactions (in his pleadings or replies to particulars) when seeking discovery of publication of the dossier.

31. The Red Flag defendants pointed to the notice for particulars filed after the amendment to the statement of claim in which the plaintiff was asked to give details of the politicians and journalists allegedly briefed, to identify the material briefed and the facts relied upon to support the claim of an intention on the part of the defendants to injure or cause loss to the plaintiff. In his reply, the plaintiff referred to Deputy Keaveney, his parliamentary assistant and the two journalists named in the communications. The plaintiff also mentioned however, that one of the emails indicated that other politicians were being briefed. The plaintiff also replied in response to the question of material adverse to him, that this was a matter of evidence but expanded on that answer on a without prejudice basis. He said he did not yet have further particulars but referred to the text messages referred to above. In answer to the question as to what material was published, the plaintiff said it was a matter of evidence but said it was expressly pleaded that the defendants published the material at schedule 5. When asked about material which supported the allegation that the briefings were done with the predominant intention to injure him, the plaintiff replied that it was a matter of evidence and/or legal submission. Without prejudice to that and subject to his right to deliver further particulars, the plaintiff said that the intention could be readily inferred from the matter pleaded in the statement of claim and in the schedule in particular.

32. In the submission of the Red Flag defendants, the plaintiff has failed to provide any meaningful particulars of the broad allegations. They submit that schedule 5 is limited in scope and does not substantiate the broad assertions made in para.16B. They also rely upon the history of the unsuccessful applications for access to the dossier referred to in greater detail above, saying that there is a pattern of the plaintiff seeking unsubstantiated discovery in this case.

33. In my view, the documents are clearly relevant. The category goes to the heart of the claim that the plaintiff makes. It is not for this Court to decide the strength of that claim. The point that is claimed is that the briefing of politicians and journalists with information adverse to the plaintiff, with the intention of harming him, was a conspiracy. The category

of discovery sought, mirrors closely the plea that has been made in the amended statement of claim. I am satisfied that the documents claimed may reasonably form the basis of a line of enquiry which may lead to the discovery of information that will advance the plaintiff's case and/or weaken that of the Red Flag defendants. It is sufficient that those documents *may* contain such information. Therefore, the category sought has obvious relevance to the issue bearing in mind the pleadings.

34. I am also satisfied that, by the references in schedule 5 to the communications between the Red Flag defendants and Deputy Keaveney, there is particularisation of the claim. The plea is not a generic plea such as that made in the original statement of claim. It is given an evidential basis by those particulars. I do not accept that they only particularise a limited conspiracy between the named persons. There is sufficient reference in those texts to suggest that other parties may have been briefed. If there was any doubt as to the sufficiency of the particularisation, this is put to rest by the fact that this conspiracy is, by its nature, a clandestine affair the extent of which is not known to the plaintiff. I am satisfied that the dicta in *National Educational Welfare Board v. Neil Ryan, I.T. Upgrade Limited and Peter O'Grady* [2008] 2 IR 816 is relevant to this situation. That case involved a claim of fraud but at one point in his judgment, Clarke J. referred to "*cases of fraud or other clandestine activity*". I am satisfied that this claim, being one of conspiracy, is an allegation of clandestine activity.

35. In *National Educational Welfare Board v. Neil Ryan and Ors.*, the plaintiff did not reply to particulars in circumstances where he was alleging that the first defendant received a bribe from the second defendant to overcharge the plaintiff for goods and service. The court ordered the second defendant to file a defence notwithstanding the lack of particulars. Clarke J. said (at para. 10) that if a plaintiff making an allegation of fraud was required to particularise prior to defence in a manner which narrowed the case;

> "*…there is every chance that, in a genuine case of fraud, the perpetrator will escape having to make discovery in respect of aspects of the fraud because the plaintiff will not have been sufficiently aware of the details of those aspects of the fraud to plead them in an appropriate manner…*".

Clarke J. was fully alive to the problem of allowing parties make a mere invocation of fraud to engage in a widespread trawl; that is not permissible.

36. As Clarke J. indicated there is a balance to be struck between those competing factors. There should be no indulgence of a claim set out by way of a bare assertion but there must also be a recognition that full details cannot be given. In the present case, the details set out in schedule 5 take the claim alleged in the amended statement of claim beyond the situation of bare assertion. Those details give sufficient particularisation of the plaintiff's claim of conspiracy to provide the Red Flag defendants with a "*reasonable picture*", (borrowing the wording of Clarke J. in *National Education Welfare Board*) of the conspiracy alleged. I am satisfied therefore that there is both relevance and particularisation of the plea of conspiracy.

Subjective nature

37. Under this heading, the Red Flag defendants also submit that the discovery was overbroad in the sense that it was entirely subjective and would be impossible (a) for the Red Flag defendants to know what was to be included and (b) would be impossible to police. In so far as category A referred to material *hostile* to the plaintiff but which was not appealed by the Red Flag defendants, counsel submitted that this, the subjective nature of the issue was to be considered as one ground amongst the totality of the grounds. In other words, it might not on its own be a sufficient ground justifying the refusal to grant discovery, but it was sufficient having regard to the other legal and factual issues relied upon.

38. The plaintiff does not take issue with the fact that the category may be subjective but submits that all issues of discovery would require good faith. I agree with that observation. Discovery always requires an element of good faith by a party. There is an element of self-policing about discovery. There is also the possibility of sanction against a deponent or a party who does not comply with that requirement to act in good faith. Moreover, there is an element of objectivity that can be injected into this category. In the present case for example, if the Red Flag defendants decided not to discover material of the same or similar nature to the texts apparently exchanged between the second defendant and Deputy Keaveney, it would be very difficult for them to maintain in the first place that they subjectively thought these were not within the category sought, given what has transpired to date including this judgment. To use again the phrase of Clarke J., the details in schedule 5 give a "*reasonable picture*" as to what is alleged to be material adverse to the plaintiff. As with any case, if discoverable material was held back but came to light in another fashion, the Red Flag defendants might risk adverse consequences in the context of the litigation.

39. I am therefore satisfied that, even if the Red Flag defendants are correct that "overbroad" must be assessed by reference to the wording of the category, the category must still be discoverable. It would be an error in principle to disallow it because of its subjective nature given the facts and circumstances here; this is particularly significant where category A also required the same type of subjective evaluation but has not been appealed by the Red Flag defendants.

Attempt to circumvent earlier decisions

40. This was a ground that was relied upon heavily in the court below by the Red Flag defendants in their opposition to the application. It was not addressed by the motion judge in her judgment.

41. The Red Flag defendants refer to an earlier application for discovery in these proceedings heard by Mac Eochaidh J. at first instance and on appeal in this Court by Ryan P., Peart and Hogan JJ., where the plaintiff sought and was refused discovery of documents evidencing the publication of the dossier.

42. The Red Flag defendants refer to the judgment of Mac Eochaidh J. at para. 29 wherein he says:

"*In so far as it is suggested that questions posed by journalists to the plaintiff indicate that the journalists have seen the Dossier and therefore it was published to them, the plaintiff has failed to substantiate this claim in any way. Examples of the questions asked, or the identity of the journalists asking the questions, or the occasions on which the questions were asked, or how the questions were asked etc. might have assisted, but the plaintiff has not given any details at all which would begin the process of allowing the court to say whether the actions of the journalists were connected with the Dossier and therefore infer evidence of publication of the Dossier to them.*"

43. With respect to the absence of a pleading referring to the issue of how the plaintiff came to be in possession of the memory stick containing the dossier, Mac Eochaidh J. said at para. 35:

"*He has not done so and has not explained the absence of pleading. Similarly he has not pleaded facts about the suspicious questions from journalists and he has not explained the absence of pleading. The court will not order discovery of documents in relation to publication because of the absence of pleading in relation to this issue.*"

44. The Court of Appeal at para. 50 said with reference to the issue of publication:

"*The plaintiff accepted that publication as pleaded in the statement of claim lacked specificity, but maintained that the clandestine nature of the defendants' activities was the reason for that. He cited a catalogue of facts, which it was his contention gave rise to the implication of publication sufficient to meet the standard required in law.*"

45. Ryan P. concluded in relation to that category at paragraph 67:

"*For these reasons, I am of the view that the trial judge was amply justified in arriving at the conclusion that the plaintiff had not adequately pleaded facts concerning publication so as to justify their request for discovery. The plaintiff did not pass the limited threshold of specifying a legitimate basis for publication of the material.*"

46. The Red Flag defendants submit that those deficiencies have not been cured by any amendment to the statement of claim made subsequently by the plaintiff. They claim the purpose and/or effect of an order in the terms of category C would be to circumvent the prior refusal to grant the plaintiff discovery of documents evidencing publication of the dossier.

47. I am satisfied that this is not a ground upon which this Court should uphold the refusal of the motion judge to grant discovery. The previous discovery application related to the tort of defamation. As counsel for the plaintiff has stated, the present claim is based upon a different tort, that of conspiracy involving the exhortation of people to cause harm, loss and damage. This application for discovery has been made subsequent to an amendment to the pleadings to make that specific claim. The evidence upon which the plaintiffs relies

is entirely different to the dossier which was at issue earlier. This is new evidence obtained, the plaintiff says, from Deputy Keaveney.

48. Therefore, I do not consider that this application for discovery can be correctly considered as an attempt to circumvent the previous refusal to grant discovery of the dossier. In so far as there was a failure to particularise the contacts with journalists as pleaded by the plaintiff at paragraph 17, I do not consider that to be the same matter at issue here. These are particulars based upon schedule 5 which provide an evidential context for the plea made at paragraph 16B. This is a separate plea of conspiracy to injure the plaintiff by unlawful means and I am therefore satisfied that the discovery application has not been previously decided.

Conclusion on Category C

49. In the circumstances, I am satisfied that there were two clear errors in principle in the motion judge's refusal to grant discovery of category C. The claim was made on the basis of the particulars set out at paragraph 16B (which referred back to 16A), which was a claim of conspiracy. That claim was not a bare assertion but had been supported by the relevant contacts between certain Red Flag defendants and Deputy Keaveney. The category relates to documents which are relevant. The Red Flag defendants have not given evidence (or even pointed in more than a general way to evidence) supporting a contention that it would be oppressive upon them to make discovery. There was no basis for holding that this was an overbroad category in that sense. I am satisfied also that the wording was sufficiently precise and sufficiently particularised, especially considering the fact that the claim is inherently a claim relating to clandestine activity. I am also satisfied that the other grounds upon which the Red Flag defendants opposed the appeal must also be rejected. The subjective nature of the assessment as to what to discover does not amount in all of these circumstances to an otherwise overbroad category. There was no element of "fishing" in the circumstances of the particulars demonstrated. Finally, this was not an attempt to circumvent earlier rulings but was instead a category of discovery relevant to the issues pleaded.

The Cross -Appeal: Temporal limitation on discovery

50. In the course of the hearing in the High Court, the issue of a temporal limitation on the order was raised by the motion judge. Counsel for the Red Flag defendants drew attention to the fact that the alleged conspiracy pleaded by the plaintiff in the amended statement of claim is said to have occurred in a one-year period, namely between 9 October 2014 and 9 October 2015. The relevant plea is at paragraph 8 of the amended statement of claim:

> "On dates unknown to the plaintiff, but which he believes were between 9 October 2014 and 9 October 2015, the defendants conspired and combined together, wrongfully and with the sole or predominant intention of injuring and/or causing loss to the plaintiff."

51. The plaintiff argued in the High Court that a temporal limitation of one year would be "*unduly narrow*". Various periods in respect of each of the categories were indicated by

him. The plaintiff also submitted that the dates were not fixed within the statement of claim but were said to be unknown but limited by the plaintiff's belief.

52. The Red Flag defendants submit that the selection of the dates 1 January 2014 and 31 December 2015 for the temporal limitation applicable to the categories of discovery ordered was entirely arbitrary. It is submitted that it was not consistent with the period of the alleged conspiracy expressly pleaded by the plaintiff at paragraph 8 of the amended statement of claim. Further, it appears to overlook the fact that the proceedings were issued on 13 October 2015 and that any documents generated after that date are likely to be privileged.

53. The Red Flag defendants also point to the replies to particulars as set out above in demonstrating that, although the plaintiff maintained the plea that he did not fully know the dates of wrongs complained of, the plaintiff had committed to a particular time frame. The plaintiff had done so by his knowledge as referenced in the statement of claim, to increased calls from journalists. Despite that knowledge, the plaintiff had chosen not to give particulars of these contacts in terms of who and when. It was submitted that the plaintiff had therefore in fact opted to restrict the time limit to the dates between 9 October 2014 and 9 October 2015.

54. Reference was made to the arbitrary nature of category A where the plaintiff had pleaded that the hostility went back to 2012. Category B related to the contacts with Mr Neil Ryan and this could only have occurred in a small space of time. In category D it was submitted that there was no justification for going beyond the alleged dates of the conspiracy.

55. Both parties agree there was limited authority concerning the application of temporal limitations. The plaintiff conceded that the dates fixed upon by the motion judge could be viewed as "*rough and ready*" but submitted that this was usually the case when considering discovery. The Red Flag defendants submitted however, that the implication of a temporal limitation is an aspect of the relevance requirement; if the time period covered by a category of discovery is too wide then the discovery may not be entirely relevant to the case as pleaded. And relevance, of course, is to be determined by reference to the pleadings, to the case as pleaded by the party seeking discovery.

56. The Red Flag defendants also submitted that it would be an injustice to them to have to incur the additional time and cost of making discovery when it is clearly not justified by the plaintiff's pleaded case.

57. The Red Flag defendants relied upon the decision of Twomey J. in *Nolan v. Dildar Limited* [2019] IEHC 166 in which he said that the normal cut-off date at the end of the period for a category of discovery is the date when proceedings are issued, because any documents generated after that date will usually be privileged. In that case however, Twomey J. actually gave discovery for a period beyond that date.

58. The issue of the temporal time limit has also to be viewed within the context of the requirement to establish a clear error of principle in the judgment or an injustice. In the

present case, the plea as regards the conspiracy was not a plea in respect of an absolute period, the period was identified as relating to dates *unknown* but believed to be between certain dates. The temporal period chosen was therefore not outside the expansive terms of the pleadings.

59. As regards extending the period beyond the date of the proceedings, I do not consider there to be an absolute rule in that regard. On the contrary, the *Nolan v. Dildar Limited* decision itself gave discovery for a longer period and in certain personal injuries litigation, discovery of attendances at doctors for treatment in the aftermath of proceedings issuing may be highly relevant to issues concerning the extent of the injuries. Where matters are privileged, that claim can of course be made in the affidavit. The motion judge here used her discretion, in the context of a plea regarding a conspiracy the temporal width of which could not by its nature be entirely clear to the plaintiff, to fix a two year period. While it could be said that the selection of these dates is arbitrary, the same criticism necessarily applies to any date other than the dates specifically pleaded by the plaintiff, which are explicitly non-exhaustive, and some reasonable margin of discretion should be accorded to the trial judge in this regard as *Lawless v. Aer Lingus* shows. There is therefore no obvious error in principle in that regard.

60. In relation to the plea that the temporal limitation ordered by the motion judge gives rise to an injustice, I do not consider that this is the type of injustice that is meant by saying an appellate court will interfere where there is injustice. I have held that the claim has been pleaded. Some of the grounds submitted by the Red Flag defendants make the point that the contacts can only be alleged for a limited time e.g. the contact with Mr Neil Ryan. If that is so there can be little or no extra time or expense incurred on discovery. In relation to the other matters, we have had no evidence that there would be any particular time or expense incurred in making this discovery. The "extra length" is not particularly onerous and there are no grounds for holding that this time period amounts to an injustice.

61. Both parties were in agreement that if the appeal in category C was successful the same time limit ultimately fixed after the cross-appeal was determined should apply to that. In those circumstances, the two year period also applies to category C.

Conclusion

62. I have concluded at paragraph 49 above that the documents sought at category C are discoverable. Clear errors in principle have been established on the part of the motion judge hearing the case.

63. I am satisfied that there is no basis for interfering with the temporal limit imposed by the motion judge on the discovery. No clear error in principle has been established and it is not unjust to impose that particular temporal limit on discovery.

64. For the reasons set out in this judgment, I would,

    a) allow the appeal in the respect of the application for discovery of category C,

    b) dismiss the cross appeal in relation to the temporal limit on discovery,

c) order that the same temporal limitation be applied to category C.

65. As the plaintiff's appeal was wholly successful the plaintiff appears entitled to the costs of the appeal. I would propose to so order unless the Red Flag defendants, within 14 days from the delivery of this judgment, indicate by email or otherwise in writing to the Office of the Court of Appeal that they wish to contend for some other order as to costs. If they do so indicate, this court will decide the matter on a short oral hearing, but the Red Flag defendants should be aware that in the event that their contentions are unsuccessful they may be ordered to pay in addition the costs of that costs hearing.

66. Similarly, as the Red Flag defendants' appeal was wholly unsuccessful, the plaintiff appears entitled to the costs of the cross-appeal. I would propose to so order unless the Red Flag defendants, within 14 days from the delivery of this judgment, indicate by email or otherwise in writing to the Office of the Court of Appeal that they wish to contend for some other order as to costs. If they do so indicate, this court will decide the matter on a short oral hearing, but the Red Flag defendants should be aware that in the event that their contentions are unsuccessful they may be ordered to pay in addition the costs of that costs hearing.

As this judgment is delivered electronically, Noonan and Binchy JJ. have indicated their agreement with it and to the orders proposed.