

THE HIGH COURT

[2015 No. 445P]

BETWEEN

LIAM CRAWLEY

PLAINTIFF

– AND –

SUNDAY NEWSPAPERS LIMITED TRADING AS THE SUNDAY WORLD

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 18 June 2020

Introduction

1. In these proceedings the plaintiff seeks damages for defamation, negligence, breach of constitutional rights and breach of privacy. As pleaded in the Statement of Claim of 11 February 2015, the claim arises out of the publication of articles in the Sunday World newspaper on 13, 20 and 27 April 2014. It is alleged that certain words and conduct of the defendant meant, *inter alia*, that the plaintiff was a criminal, was a pimp and procurer of prostitutes, was guilty of criminal offences, lived off the earnings of prostitutes, was an illegal trafficker of women, associated with members of illegal organisations, was associated with the vice trade and was a danger to members of the community. It is also alleged that the defendant was guilty of negligence in that, *inter alia*, it failed to ensure that the information it proposed to publish was properly checked and verified and caused the plaintiff to be unjustly and wrongly accused of serious criminal offences.
2. By way of defence of 9 December 2016, the defendant denies the words either in their natural meaning or by way of innuendo bore the meanings alleged and without prejudice to that plea, pleads that the words are true or true in all material respects and that the plaintiff's reputation has not been injured and/or that they were statements of opinion honestly held, and the articles constituted fair and reasonable publication on a matter of public interest. The plea of negligence is denied.

Discovery

3. By way of letter of 25 October 2018, solicitors for the plaintiff sought voluntary discovery of two categories of documents –
 - (a) An order for discovery of the documents relating to the investigation of the plaintiff with regard to the articles published by the defendant concerning the plaintiff on 13, 20 and 27 April 2014;
 - (b) An order for discovery relating to the preparation of the articles the subject matter of the proceedings herein, those published on 13, 20 and 27 April 2014, to include interviews of any individuals, transcripts of interview, memoranda of interviews, particulars of relevant telephone numbers, photographs and letters.
4. It was said that because the defence of truth was pleaded, the plaintiff should be able to consider the information sought to investigate and challenge the erroneous information upon which the articles were based.

5. By letter of 28 January 2019, solicitors for the defendant refused to make discovery, first because the categories were over burdensome given the description of the documents sought and the lack of any temporal limitation and second, because the defence of truth would not involve a consideration of the investigation carried out by the defendant but rather consideration by the court as to whether any defamatory meanings were true, including in all material respects.
6. By motion of 25 November 2019, the plaintiff brought a motion seeking discovery of the two categories that had been identified in its letter. In the affidavit of Michele Murphy, solicitor for the plaintiff, sworn 28 May 2019, it was averred that the request was not excessively broad or burdensome where the categories concern articles published relating to one particular individual. Re the temporal limitation, it was said that same was not appropriate given that the plaintiff has no idea when the investigation was commenced by the defendant. Further, because the plaintiff has pleaded negligence, including a failure to ensure the information published was correct, the particulars of the investigation are an important consideration for the court in deciding whether there was proper checking and verification.
7. In the replying affidavit of Kieran Kelly, solicitor for the defendant, sworn 27 November 2019, it was averred that before the articles were published, the defendant carried out an investigation, which involved journalists talking to sources in confidence, and that those conversations are covered by journalistic privilege. He averred that it is in the public interest that people should be able to approach journalists to impart information in confidence on the basis that their identify remain confidential and that the orders sought by the plaintiff would imperil this function of the press and dissuade sources from speaking with the defendant (who has an established record of investigating and reporting serious criminal activity) and other newspapers. In the context of investigative journalism dealing with serious criminal conduct, it was necessary to protect the safety of confidential sources.
8. Separately, Mr. Kelly avers that negligence is not an element in the tort of defamation and therefore the care taken by a publisher in the carrying out of proper checking and verification is not relevant to the tort of defamation or the defence of truth. He noted also that the defence of qualified privilege has not been put in issue by a plea of express malice and that therefore negligence has no relevance to that defence.

Decision

9. Although two categories of discovery are sought, one in respect of the investigation of the plaintiff and the other in respect of the preparation of the articles, in truth there is a significant degree of overlap between them.
10. The defendant has essentially put up four reasons that discovery should not be made: that it is over broad, that there is no temporal limitation, that it is not relevant, even given the defence of truth, and that in any case journalistic privilege applies.

Journalistic privilege

11. I will deal with the last issue first. The Supreme Court considered the treatment of privilege in the context of discovery in some detail in *Keating v. RTE* [2013] IESC 22. Subsequently, in *Ryanair v. Channel 4 TV* [2017] IEHC 651, the specific issue of journalistic privilege was considered. In *Keating*, the Supreme Court reiterated that the assertion of a claim for privilege does not normally absolve a person of their discovery obligations: rather documents must be listed in the normal way and the nature of the privilege and of the document asserted to be privileged particularised to permit the court to evaluate the claim. The Supreme Court did accept that the court has an inherent jurisdiction to refuse the application on the basis that the privilege plea must inevitably succeed. However, it noted that this was an abridgement of the normal two step process, which distinguishes between discovery and inspection obligations. If there is any possibility that the privilege plea might not succeed, then to refuse discovery would be to conflate distinct steps in a two-tier process. Therefore, where a party is refusing to swear an affidavit on the grounds of privilege, including journalistic privilege, the first inquiry must be to determine whether success on the plea is unavoidable. It is only if so that an affidavit as to documents will not be required.
12. The *Ryanair* case concerned the second stage of the inquiry, i.e. where an affidavit of discovery had been sworn invoking, *inter alia*, journalistic privilege. It was therefore necessary for Meenan J. to carry out a balancing exercise, balancing the right of the defendant (Channel 4) to freedom of expression, in that case the protection of sources, and on the other hand, the right of Ryanair to vindicate its good name.
13. However, in this case, I am only concerned with the first step i.e. whether it is so inevitable that the defendant will be successful in its plea of journalistic privilege that I should not order discovery at all. The judgment in *Keating* makes it quite clear that in the majority of cases, an assertion of privilege should be determined following an identification of the document and the nature of privilege in the Schedule to the Affidavit of discovery in the normal way.
14. In this case, there are undoubtedly strong arguments that may be made in respect of the privilege; but there will also be respectable countervailing arguments made in respect of the personal rights of the plaintiff, including his good name. It is true that there is a very heavy burden on those who seeks disclosure of a journalistic source. Nonetheless, I cannot conclude at this stage that it is inevitable that the defendant will succeed in respect of a claim to privilege over each and every document that might be caught by the categories sought or a variation of same. Accordingly, the normal obligations of a party asserting privilege apply to the defendant in this case.
15. I should add that, as per the dicta of Meenan J. in *Ryanair*, where a party is asserting journalistic privilege to protect a source, there may be a particular difficulty when it comes to describing the document since identifying the sender and recipient of the document, or indeed the document itself, might identify the source. Therefore, a more general description of documentation over which journalistic privilege is being claimed is acceptable.

Relevance

16. Turning to the asserted lack of relevance of the discovery sought on the basis that negligence is not a permissible cause of action given the plea of defamation, this is a substantive legal issue that does not appear to have been substantively decided by the courts in a reasoned judgment. There has been no application to strike out this part of the case and the plea therefore remains in the case. Accordingly, I must proceed on the basis that negligence has been pleaded and therefore will require to be adjudicated upon by the court, even if it is ultimately excluded as a cause of action in these proceedings. Accordingly, any documents that either advance or undermine this plea are potentially relevant to the court's function. Nonetheless, the plaintiff is not entitled to launch an inquiry into the decision of the defendant to publish the impugned articles and to receive every internal communication in respect of the article simply by pleading negligence. The category of discovery identified below will permit the plaintiff (subject to any claim for privilege) to understand the material upon which the article was based and that is sufficient discovery in the context of a claim for negligence.
17. Next, lack of relevance is identified on the basis that the defence of truth does not require a court to interrogate the process carried out by a newspaper or journalist prior to publication. Adjudicating upon a defence of truth is not the same as analysing the pre-publication process. Nonetheless, in this case, in the context of the defence of truth, it will be necessary for the court to make decisions on the particulars set out at paragraph 10 of the defence. The defendant will likely proffer evidence supporting its plea that, for example, the plaintiff operated brothels, procured prostitutes, lived off the earnings of prostitutes, employed foreign nationals as prostitutes and associated with members of the IRA. The material sought by the plaintiff (if not ultimately found to be privileged) may be potentially relevant to those matters. I cannot therefore conclude that discovery of the type sought is wholly irrelevant to the issues in the case.

Onerous nature of discovery sought

18. Finally, it is alleged that the categories are over broad, onerous and not limited in time. There is no averment identifying the oppressive nature of the discovery that would result if an order was made in the terms sought, such as the amount of time that would be required or the number of documents that would have to be reviewed. Nonetheless, the categories are in my view over-broad and if granted in their present formulation, would be very difficult to comply with because of the vagueness of the wording of the categories. Equally, the categories sought are not limited in time and this omission imposes a potentially excessive burden on the defendant.

Terms of Discovery Order

19. Taking all these matters into account, I propose to grant discovery in the following terms:

An Order for discovery directing the Defendant to make discovery on oath of the documents relied upon and/or reviewed by the Defendant in writing the articles the subject matter of the proceedings, namely those published on 13, 20 and 27 April 2014, that are or were in the Defendant's possession, power or procurement, for the time period

from 1 September 2013 to 31 May 2014, including but not limited to notes or minutes of interviews.

20. If the defendant wishes to invoke privilege over any documents, including journalistic privilege, it should do so in the normal way in the Schedule to the Affidavit and if the description of the documents would tend to identify privileged matters, a more general description of documentation over which journalistic privilege is being claimed is acceptable.