THE HIGH COURT

[2024] IEHC 406

Record No. 2019/5651P

Between:

JOHN MATTHEW BERRY

Plaintiff/Applicant

AND

THE COMMISSIONER OF AN GARDA SIOCHANA

First Named Defendant/Respondent

AND

NOEL SHANNON

Second Named Defendant

EX TEMPORE JUDGMENT delivered by Ms. Justice Nuala Jackson on the 2nd May 2024:

1. The Plaintiff issued a plenary summons on the 16th July 2019 seeking damages for defamation, breach of the constitutional right to privacy, breach of statutory duty, including under the Data Protection Acts 1988 – 2018 and GDPR and under section 62 of An Garda Siochana Act 2005. At that time, the sole Defendant was the Commissioner of An Garda Siochana. On the same date, a Norwich Pharmacal motion was issued resulting in an order of this Court (Reynolds J.) on the 23rd October 2019 directing the Defendant to disclose the name of the now Second Named Defendant. Such disclosure occurred on the 28th November 2019 resulting in the service of an Amended Plenary Summons, joining the Second Named Defendant to the proceedings.

2. The most unusual circumstances of this case are set out in the Statement of Claim. There is, in essence, no dispute between the parties to the motions before me (which involved only the Plaintiff and the First Named Defendant) as to the generality of the background facts. The Second Named Defendant, a civilian having no association with the First Named Defendant, was engaged to carry out works of maintenance or repair at Kilmainham Garda Station, involving him having access to non-public areas of the station and places where investigative work was being progressed. It appears that the Second Named Defendant took photographs of and within the restricted access area, in particular, that he took photographs of a noticeboard or noticeboards in such areas which noticeboard(s), perfectly understandably, contained information relating to the ongoing work of the First Named Defendant. This is yet another example of the absence of smartphone etiquette all too common in today's society. It would appear that photographic images resulting from this appeared on the internet and some such photographs included the image of the Plaintiff and related comments. The Plaintiff asserts that these images defamed him and breached his rights and he has, in consequence, instituted the within proceedings. It is also to be noted that the First Named Defendant investigated the incident concerned and such investigations resulted in the successful prosecution of the Second Named Defendant.

3. It is amply clear that there is a considerable disparity in the information available to the Plaintiff and the First Named Defendant concerning the background facts and, more particularly, concerning the proving of such background facts. The Plaintiff has (a) copies of the images which were posted on the internet (presumably he also has details of the sites upon which these images were posted and the account names of the persons who posted them which, it would appear, were not the Second Named Defendant) and (b) newspaper reports of the prosecution of the Second Named Defendant. He can, it seems to me, have no further documentation concerning the incident. He does, however, as Mr. O'Higgins SC has pointed out to me, bear the burden of proving his case as asserted and, in this regard, I would refer, in particular, to paragraphs 12 and 13 of the Submissions of the Plaintiff. The Defendant, on the other hand, brought the Second Named Defendant onto his premises or, at least, must be aware of the arrangements for so doing; he has full access and information concerning the noticeboards involved and what was posted thereon and, most importantly, the First Named Defendant has within his power, possession or procurement the entirety of the

information which derived from the investigation and successful prosecution of the Second Named Defendant in relation to the events concerned.

4. The matter comes before me in the context of two motions brought by the Plaintiff; one seeking particulars and one seeking discovery. These motions do not involve a huge trawl or fishing expedition but appear to me to be focused, limited and pertinent. I have been furnished with a chronology and, in submission, there were various allegations of delay made by each party against the other. I am of the view that the procedural history of this case is not greatly relevant to what I have to decide. However, I am of the view that the pleadings and, in particular, the amendments between the first Amended Defence and the second Amended Defence of the First Named Defendant are of relevance. I will refer to this below.

5. The matters at issue fall into four broad headings:
   a. Information concerning the initial incident namely the locus of the display of the information allegedly concerning the Plaintiff, the arrangements whereby the Second Named Defendant had access to such locus and the displayed information, and the publication of the information displayed and subsequently photographed;
   b. The pleadings relating to the character of the Plaintiff;
   c. The defences raised in respect of truth and/or qualified privilege and/or honest opinion;
   d. Matters concerning the alleged data breach.

6. The position of the Plaintiff concerning a. above is straightforward. He does not have and has never had access to such information which he requires in order to prove the initial publication (by the First Named Defendant to the Second Named Defendant) and fundamental background facts. In this regard, I would make reference to paragraph 6 of the Statement of Claim. Additionally, the Statement of Claim asserts negligence and a failure to supervise (although these are not referenced in the Plenary Summons). In relation to subsequent publication by the Second Named Defendant, clearly the primary source of such information would be the Second Named Defendant who has not

participated in the proceedings at all. The Plaintiff asserts that the First Named Defendant has such information in the context of the prosecution which ensued.

7. The First Named Defendant says that the Plaintiff has sufficient evidence being the image taken from the internet which, although I have not seen it, presumably shows documents/images/commentary attached to a noticeboard at a location and a date undisclosed. In relation to subsequent publication, the First Named Defendant appeared to primarily take exception to the word "all" in Category 3. Obviously, the First Named Defendant can only discover what is within his power, possession or procurement (which, of course, includes the information derived from the prosecution of the Second Named Defendant). The discoverability by the First Named Defendant of documentation derived from investigations and prosecutions is amply discussed in the recent judgments of Allen and Collins JJ. in the Court of Appeal decision of **A v. B and The Commissioner of An Garda Siochana (Non-Party)** [2024] IECA 95. No assertion of public interest privilege was made by the First Named Defendant in this application.

8. In relation to b. above, the Plaintiff pleads at paragraph 5 of the Statement of Claim *"The Plaintiff is not involved in crime. He has no previous convictions."* It is my understanding that a Defence was served by the Defendant on the 18th January 2021. An Amended Defence was served on the 22nd February 2022. A Second Amended Defence was served on the 19th July 2023. I was not provided with copies of the first two such Defences but it is my understanding from submissions (oral and written) that the Defence and the Amended Defence stated at paragraph 8 *"[i]t is admitted that the Plaintiff has no previous convictions, but otherwise the content of Paragraph 5 of the Statement of Claim is denied. The Plaintiff received the benefit of the Youth Diversion Programme on two occasions."* In the Second Amended Defence, the second sentence was excised. Therefore, paragraph 8, in response to paragraph 5 of the Statement of Claim, now reads *"[i]t is admitted that the Plaintiff has no previous convictions, but otherwise the content of Paragraph 5 of the Statement of claim is denied."* It is manifestly clear that the First Named Defendant accepts (and has done so at all material times) that the Plaintiff has no criminal convictions. Therefore, it is also manifestly

clear that what he disputes is that the Plaintiff is not involved in crime. In the Defence and in the Amended Defence this very vague plea was clarified to some extent with reference to participation in the Youth Diversion Programme. However, it would now appear that the Plaintiff has not had involvement with such Programme, the previous pleading being based on a misidentification and confusion with some other person. The Defendant asserts that the seeking of further particulars in this regard is a matter of evidence.

9. In relation to c. above, the position is not hugely distinct from b.. The Plaintiff submits that if the specialist defamation defences of truth, substantial truth, qualified privilege or honest opinion are being relied upon, there must be some degree of factual particularisation of them in the pleadings of the First Named Defendant. In this regard, I refer to paragraph 14 of the Submissions of the Plaintiff.

10. In relation to d. above, the Plaintiff claims a breach of his data protection rights. The Defendant denies this at paragraph 21 of the Second Amended Defence.

DISCOVERY

11. The basic purpose of discovery is stated by Finley CJ in **AIB plc v. Ernst & Whinney [1993] 1 IR 375** as follows:

> *"[T]he basic purpose and reason for the procedure of discovery ... is to ensure as far as possible that the full facts concerning any matter in dispute before the court are capable of being presented to the court by the parties concerned, so that justice on full information, rather than on a limited or partial revelation of the facts arising in a particular action, may be done."*

12. The fundamental principle of relevance and necessity is well established (Abrahamson and Others, "Discovery and Disclosure" Para. 6.01). I fully accept the principle, as stated by the Plaintiff at paragraph 18 of his submissions, that what is necessary and relevant will be significantly influenced by the pleadings and what is at issue as between

the parties. This is clearly demonstrated in **Tobin v. Minister for Defence [2019] IESC 57**, Clarke CJ at paragraph 57.

13. Having regard to the pleadings in this matter:
    (a) Paragraphs 4, 6, 8, 9 and 12 and following (Particulars) of the Statement of Claim (relevant to Categories I – III of discovery request) are denied by the First Named Defendant save that it is admitted "there was a bulletin board situate in Kilmainham Garda Station which was erected for the purpose of facilitating the work of the first named Defendant". Indeed, the Plaintiff is put on full proof of the matters alleged in the paragraphs referenced.
    (b) Category IV relates to the Defences raised in the Second Amended Defence at Paragraph 18;
    (c) Category V relates to Paragraph 11 of the Statement of Claim which is denied and the Plaintiff is put on full proof of the matters therein.

14. In these circumstances, it is my view that the discovery sought is relevant. The First Named Defendant contends that it objects to discovery of Category I as the Plaintiff accepts he already has access to photographs of the bulletin boards in question. I do not accept that this results in the discovery being sought not being relevant and necessary. Downloaded images from internet postings cannot be equated with the requested discovery which, in my view, is directly relevant to the matters at issue herein. I have imposed a time period, however, covering the relevant period only. The acknowledged *dictum* of Hogan J. in **IBB Internet Services Ltd v Motorola Ltd** [2015] IECA 282 (at Paragraph 10 of the Submissions of the First Named Defendant) seems particularly apt.

15. In relation to Category II, the First Named Defendant asserts that there is no clear linkage between what is sought and the supervision issue and that, in any event, supervision has no bearing on liability. It is my view that the documents sought are relevant and necessary to the issue of supervision in that they clearly relate to the actions of the Second Named Defendant on the day in question and the events which transpired.

These are relevant and necessary to matters pleaded by the Plaintiff and denied by the First Named Defendant. The kernel of the Plaintiff's case is that the Second Named Defendant was put in a position whereby he was able to observe the notice boards and their contents and take the photographs complained of which were thus and subsequently published. This was the very essence of the criminal prosecution successfully pursued by the First Named Defendant.

16. In relation to Category III, relevance cannot be doubted. I believe that the inclusion of the word "all" is inappropriate but, given that there was a successful prosecution, I am of the view that there are documents within this category in the power, possession or procurement of the First Named Respondent which ought to properly be discovered. The First Named Respondent is not being asked to discovered any documents other than those which are within his power, possession or procurement.

17. The objection to Category IV seems to relate to
    (a) the use of the words "might use" at paragraph 20 of the grounding Affidavit of Ciara Burke. These words were not used in the discovery request which, in my view, were not vague. The First Named Defendant pleads a number of defences in Paragraph 18 of the Second Amended Defence (although part of the Defence from the outset). The discovery request relates directly to the plea.
    (b) I have considered the dictum of Ryan P. in **O'Brien v. Red Flag Consulting Ltd. [2017] IECA 258** where he stated:

> *"72. This is as follows as sought by the plaintiff: "Category 1(H): Al documents that the defendants intend to rely upon in advancing the defence of qualified privilege and honest opinion." The judge ruled as follows: "This category is refused on the basis that it is neither relevant nor necessary for the plaintiff to obtain documents which the defendants may use in connection with defence of the proceedings. The plaintiff is aware of the defence advanced by the defendants. The manner in which they prove elements of that defence is a matter for evidence at the trial at the action and not properly a matter for discovery."*
>
> *73. The plaintiff submits that documents in the possession of the defendants that are relevant to the pleas of qualified privilege and honest opinion are*

discoverable. It is submitted that the request is narrow, being confined to documents that the defendants intend to rely upon in advancing the defence of qualified privilege and honest opinion. The defendants submit that the judge was correct and that the defendants should not be required at an interlocutory stage of proceedings to identify the documents on which they intend to rely at trial.

74. It seems to me that this request gives rise to difficulty. There is merit in the defendants' objection that it requires them at an interlocutory stage to identify the documents that they will rely on at trial. Discovery is a continuing obligation and it may be suggested that they are being required to identify the documents on which they at present intend to rely, with the proviso that if they propose to use further documents at a later stage, then it would be incumbent on them to furnish those extra documents also. The problem is that this is practically a demand of an excessively broad nature as follows: please make discovery of every document you have relating to qualified privilege. In the first place, it may not be easy to identify just what documents are relevant to that plea. These pleas relate to states of mind and that is real the kernel of the difficulty in relation to discovery. It is not that the documents constitute evidence, but rather that they are sought in respect of a state of mind or states of mind of the defendants and each or any of them. Just how are they going to be able to put their fingers on particular documents and say that they are or are not relevant on the question of honest opinion or qualified privilege?

75. It is true that qualified privilege and honest opinion are issues in the case as defined by the pleadings. But what is the nature of those issues? They are not factual questions. They are rather issues of law and fact that will arise out of evidence about the state or states of mind of the defendants. With some hesitation, therefore, I think that this category is not allowable and I would endorse the decision of the High Court, but for different reasons. The fact that the plaintiff has not pointed to any legal authority on this point makes me more comfortable in the position that I adopt.

76. I would, accordingly, dismiss the appeal in respect of this category also."

18. While I believe that there are significant distinctions between the within proceedings and those being considered by the Court of Appeal, it is unarguable that qualified privilege and honest opinion are not issues solely of fact but are issues of law and fact, substantially involving states of mind. However, Paragraph 18 of the Second Amended Defence not only includes such defences but also the defence of truth or substantial truth. This is clearly a matter of fact and I consider discovery in relation thereto and in relation to any factual matters pertaining to the issues of privilege and honest opinion to be relevant and necessary.

19. In relation to Category V, the primary objection of the First Named Defendant seems to be to use of the phrase "relating to" as being impermissibly broad. I do not consider that these words may be taken in isolation from the words which follow them. The breath of the words complained of must be considered in the light of the specificity of the matters to which the requested documents are to relate. The words following are extremely wide in the present instance but, in my view, this relates to the absence of specificity of connection with the events at issue rather than the use of the words "relating to".

CONCLUSION

DISCOVERY

20. I propose making the following Orders in relation to Discovery:
    - Category 1: Documents evidencing the presence, and the content, of the relevant bulletin boards at Kilmainham Garda Station between 1.1.2019 to the 1.5.2019.

    - Category 2: (as sought) Records relating to the presence of the second named defendant at Kilmainham Garda station in possession of a mobile phone and records relating to any measures taken to deny him access to the content of the bulletin board, including statements taken for the purpose of prosecuting the second name defendant and copies of charge sheets including such as he pleaded guilty to.

- Category 3: Documents evidencing acts of publication by the second named defendant and acts of republication by those to whom he published.

- Category 4: Documentation in support of the First Named Defendant's plea at paragraph 18 of the Second Amended Defence in so far as it asserts that the matters were true or substantially true and in so far as evidences factual matters pertaining to the issues of qualified privilege and honest opinion.

- Category 5: Documentation relating to the First Named Defendant's denial of a failure to comply with notification requirement in respect of a data breach or breaches arising from incidents concerning the Plaintiff.

PARTICULARS

21. The First Named Defendant did not address the issue of particulars in written submissions filed. Orally, it was argued that the submissions required too much detail.

22. This is a situation in which particulars are not being sought in order to plead but for the purposes of hearing. In **Cooney v. Browne [1985] IR 185**, Henchy J. stated that, in such circumstances, *"they [particulars] should not be ordered unless they are necessary or desirable for the purpose of a fair hearing"*. He continued:

> *"[W]here the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at 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."*

23. I am of the view that this is such a situation. As Dunne J. stated in **Quinn Insurance Ltd v. Tribune Newspapers plc [2009] IEHC 229**, the Plaintiff is entitled to know *"in*

broad outline what is going to be said at the trial of the action". In **Quinn Insurance Ltd v. Pricewaterhouse Coopers [2019] IESC 13**, O'Donnell J. (as he then was) stated:

> *"vi. The party is entitled to know the range of evidence (rather than any particular item of evidence) with which he or she will have to deal with at the trial: …".*

24. I have slightly amended the particulars sought such that, in my view, they now accord with the balance referenced by Hogan J. in **Burke v. Associated Newspapers (Ireland) Ltd [2010] IEHC 447**.

25. I propose making the following Orders in relation to Particulars:

1. As drafted excluding "(including date and location)".
2. As drafted excluding "(including date and location)".

26. I am of the view that the costs of these motions should be reserved but I will hear from the parties in relation to my proposed changes in the orders to be made from those sought and in relation to the issue of costs if they wish to make submissions in this regard.