



THE COURT OF APPEAL

Finlay Geoghegan J.  
Peart J.  
Hogan J.

Neutral Citation Number: [2016] IECA 327

2015 No. 562

BETWEEN/

LYNDA MEEGAN

PLAINTIFF /

RESPONDENT

- AND -

TIMES NEWSPAPERS LTD.

DEFENDANT/

APPELLANT

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 9th day of November 2016**

1. Where a defendant in a defamation action pleads in general terms the defence of fair and reasonable publication pursuant to s. 26 of the Defamation Act 2009 ("the 2009 Act"), is a plaintiff entitled in principle as a consequence of this plea to discovery of the journalist's notes and other background material relevant to the publication in the article, subject only to questions of journalistic privilege and legal professional privilege? In his judgment of the High Court delivered on 6th November 2015, Barr J. answered that question in the affirmative: see *Meegan v. Times Newspapers Ltd.* [2015] IEHC 696. The defendant newspaper contends that this decision was incorrect and it now appeals to this court.

2. The present proceedings arise following the publication which appeared in the defendant's newspaper, "*The Sunday Times*", on 14th September 2014. The publication was in the following terms:

"A senior figure in the Continuity IRA (CIRA) has been identified by Special Branch as the person who received sensitive information from a former Garda about operations against dissident republications.

Joe Fee, a convicted bomb maker who lives in Monaghan is the focus of an investigation into the disclosure of information likely to be of use to terrorists.

The female officer is said to have sent texts to Fee and alerted him to the identities of dissidents arrested by Gardaí. The texts were intercepted by Crime and Security, the Garda agency responsible for spying on dissidents.

The officer, who cannot be named, resigned after being confronted. She is the subject of a continuing criminal investigation."

3. The plaintiff states that she is the former member of An Garda Síochána referred to in the article. She has pleaded that these allegations are false and defamatory of her. It is not disputed by the defendant that the plaintiff is indeed the person referred to in the article although it contends that she has not been identified in the piece in question.

4. In its defence, the defendant has pleaded, inter alia, that the plaintiff was not identifiable from the content of the article. The defendant has also pleaded – albeit in the most general terms – the defence of fair and reasonable publication on a matter of public interest pursuant to s. 26 of the 2009 Act. Thus, para. 11 of the defence provides that if the words were indeed defamatory of the plaintiff, then:

"....the same constituted fair and reasonable publication on a matter of public interest. In this regard, the defendant will rely upon the provisions of section 26 of the Defamation Act 2009."

5. The plaintiff sought discovery of certain categories of documents from the defendant and the request was in the following terms:

**"Category 1**

***The notebooks used by the reporter and or reporters/researchers involved in researching and writing the article identified at paragraph 3 of the defence and published under the header "Convicted bomb maker was recipient of Garda intelligence" which appeared on September 14th 2014 in the defendant's newspaper and as identified in paragraph 6 and 7 of the statement of claim. To include all drafts of the said article and sources, notes, memorandum, essays, aide-memoire, or any other material used and or prepared by the defendants its servants or agents in respect of the said article as published by the defendant on September 14th 2014.***

**Reasons**

This category of discovery is required in light of the pleas contained in the defence delivered on June 8th 2015 to the effect that the plaintiff is not identifiable from the words contained in the said article of which she complains such claims contained at paragraphs 4 and 5 of the defence. In circumstances where the defendant claims the plaintiff is not

"identifiable" from the words complained of and does not deny that the plaintiff is in fact the person identified in the article the reporters and / or researchers notebooks are likely to confirm or otherwise whether the said article referred to the plaintiff.

## **Category 2**

***Copies of the defendants' news list, news conference schedules and minutes thereof containing reference to the publication of the article described in the within proceedings maintained by the author an/or authors, news editor and/or editor, chief sub-editor and/or sub-editors and/or other servant of agent of the defendant for the Irish edition of the Sunday Times for the publication of the Sunday Times of September 14th 2014.***

### **Reasons**

The said news schedules, news lists and editorial materials maintained by the defendant's servants or agents will contain reference to the intention and decision of the defendant to publish the defamatory article concerning the plaintiff. Given that the defendant claims that the plaintiff is not identifiable from the words complained of in the said article and has not denied the fact that the words complained of relate to the plaintiff and has put the plaintiff on full proof of her claim the said documentation will tend to provide proof of the issues surrounding the identification of the plaintiff as the subject of the article wherein she is accused of criminal offences while a member of An Garda Síochána.

## **Category 3**

***Copies of all references and advices made and sought and received by the author and or authors of the article with respect to the decision not to publish the plaintiff's name.***

### **Reasons**

The materials sought under this category of discovery are relevant to the defendants claim that the plaintiff is not identifiable from the words published in that it would appear from the defence that an active decision was made by defendant to attempt to conceal the identify of the plaintiff in the knowledge that the accusations made against her in the impugned article were defamatory of her and in spite of such knowledge the defendant wilfully, recklessly and maliciously proceeded to publish the defamatory words of and concerning the plaintiff. The said materials are further relevant to the defendant's requirement of full proof of all pleas and allegations and assertions made by the plaintiff in her statement of claim. The said category is particularly relevant to the plaintiff's claim for aggravated damages for irresponsible publication concerning the plaintiff in her professional reputation."

6. The reasons originally advanced for the discovery of the categories of documents sought was on the basis that such material would tend to show why the defendant decided not to identify the plaintiff in the article or to publish her name. Barr J. refused to order discovery on this ground, saying in essence that this was irrelevant, as it was a well-established principle of the law of defamation that intention on the part of the person who made the impugned statement is irrelevant to the question as to whether the plaintiff was identified in the defamatory statement. No appeal has been taken by the plaintiff against this aspect of the High Court judgment.

### **The judgment of the High Court on the s. 26 point**

7. The plaintiff, however, succeeded in obtaining an order for discovery on an alternative ground, namely, that having regard to the fact that the defendant had pleaded the defence of fair and reasonable publication on a matter of public interest, pursuant to s. 26 of the 2009 Act, she was entitled to the discovery sought as relevant and necessary to this defence.

8. Section 26 of the 2009 Act is in the following terms:-

"26(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,

(b) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and

(c) in all of the circumstances of the case, it was fair and reasonable to publish the statement.

(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) the extent to which the statement concerned refers to the performance by the person of his or her public functions;

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

(c) the context and content (including the language used) of the statement;

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

(e) the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication;

(f) in the case of a statement published in a periodical by a person who, at the time of publication, was a member

of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council;

(g) in the case of a statement published in a periodical by a person who, at the time of publication, was not a member of the Press Council, the extent to which the publisher of the periodical adhered to standards equivalent to the standards specified in paragraph (f);

(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) if the plaintiff's version of events was not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person; and

(j) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.

(3) The failure or refusal of a plaintiff to respond to attempts by or on behalf of the defendant, to elicit the plaintiff's version of events, shall not:

(a) constitute or imply consent to the publication of the statement, or

(b) entitle the court to draw any inference therefrom.

(4) In this section:

□ "court" means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury;

□ "defamation action" does not include an application for a declaratory order."

9. Barr J. took the view that in making the plea under s. 26 of the 2009 Act the defendant had, so to speak, opened itself to an application for discovery of documents:

"31. . . There is some support for this proposition in Cox and McCullough, *Defamation, Law and Practice* (Dublin, 2014), where the following opinion is stated at para. 14-109:

"Where there is a plea under s. 26 of fair and reasonable publication on a matter of public interest, there may be a requirement to discover journalist's notes and other material relating to the issue of whether or not it was fair and reasonable to publish the statement concerned."

However, there is no authority cited for this statement.

. . .

33. I am satisfied that the plaintiff is correct in her assertion that by raising the defence of fair and reasonable publication on a matter of public interest, the defendant has put in issue the question as to whether the defendant's servants or agents acted fairly and reasonably in publishing the article. By making such a plea, the defendant has opened itself to an application for discovery of documents. The plaintiff will only be able to adequately deal with the assertions made by the defendant in this regard if she is given discovery of the journalist's notes and other background material relevant to the publication of the article. In particular, she will need discovery of documents in order to deal with the issues raised in s. 26(1)(b) and (c). She will also need discovery of documents to deal with the matters raised by s. 26(2)(a), (b), (d) and (j). Accordingly, I direct that the defendant is to make discovery in the terms of the notice of motion. ....

34. I should state that in directing that the defendant make discovery of documents, I am expressing no view on the issue as to whether any or all of the documents may be covered by either journalistic privilege or legal professional privilege. These are matters that can be raised in the usual way in the affidavit of discovery. The court will adjudicate on those issues, if and when they are raised by the defendant in its affidavit of discovery."

### **The nature of the s. 26 defence**

10. Section 26 of the 2009 Act is a novel provision which, as we were informed at the hearing of the appeal, has yet to be successfully invoked in any reported defamation case. The section is clearly designed to provide a defence for publishers who show that they acted *bona fide* and that the publication was fair and reasonable having regard, in particular, to the matters set out in s. 26(2) of the 2009 Act. Section 26 may be regarded as an endeavour by the Oireachtas to move away in some respects from the strict liability nature of the common law tort of libel and to introduce – in, admittedly, some specific and limited respects – a negligence based standard in actions for defamation under the 2009 Act. This is reflected, in particular, in s. 26(2)(i) which requires the court to have regard to the endeavours made by the publisher to verify the contents of the article in assessing the defence of fair and reasonable publication.

### **Discovery in cases where the s. 26 defence is pleaded: relevance and necessity**

11. In the present case the plaintiff did not advance any reasons for the discovery sought arising from the s. 26 plea in any of the pre-motion correspondence. When the issue was first raised in the course of the hearing the plaintiff's solicitor was permitted to file a supplemental affidavit setting out the grounds on which discovery of the existing categories of documents sought was said to be both necessary and relevant by reference to the s. 26 defence. The only reason given was:

"I say and believe that, while the statement of claim in the within proceedings does not contain a plea referring expressly to s. 26 of the Defamation Act 2009, the said section being pleaded in defence to the plaintiff's claim, the categories of documentation sought to be discovered on the within notice of motion are relevant to the within proceedings in light of

the aforementioned plea by the defendant to the effect that it intends to rely on the said s. 26."

12. So far as discovery is concerned, of course, the material sought must be both relevant and necessary: see, e.g., *P.J. Carroll and Co. Ltd. v. Minister for Health and Children* [2006] IESC 36, [2006] 3 I.R. 431. There may well be cases where the type of discovery ordered here – such as, for example, journalists' notes and other background material – might possibly be relevant in assessing whether a s. 26 defence has been properly made out. Such a plaintiff would, however, have to satisfy the court that the documents sought are both relevant and necessary to the particular defence being pursued. As matters stand, however, I consider that the plaintiff has not yet established that such discovery is necessary, in part because the defendant's pleading in relation to the s. 26 defence is so general, but perhaps especially because the plaintiff has not sought the appropriate particulars which, when appropriately replied to, would articulate the precise basis for this defence.

13. Specifically, the grounds on which the defendant asserts that it was fair and reasonable to publish the article in question for the purposes of s. 26 are presently unclear. Viewed purely hypothetically, one could envisage an entire range of circumstances in which a newspaper might seek to set up a s. 26 defence. These might include, for example, a plea that there "were exceptional circumstances that necessitated the publication of the statement on the date of publication" (s. 26(2)(e)) or that the newspaper had sought (but failed) to obtain a response from the plaintiff prior to publication (s. 26(2)(i)) or that the newspaper had sought "to verify the assertions and allegations concerning the plaintiff in the statement" (s. 26(2)(j)).

14. It is, therefore, the very broad and potentially all-encompassing nature of the s. 26 defence and an absence of identification of facts intended to be relied upon the defendant in pursuing such a defence which means that it would be inappropriate to order discovery at this juncture. In my view, this is a case where the plaintiff should, have sought further particulars of the nature of the s. 26 defence envisaged by the newspaper before bringing an application for discovery. As Henchy J. observed in *Cooney v. Browne* [1985] I.R. 185, 191 in the context of an application for particulars in a defamation action:

"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."

15. Without prejudging in any way any application for particulars, it would have to be said that the present s. 26 defence is so general and imprecise that the plaintiff cannot at present know the nature of the actual s. 26 defence she will have to meet at trial, nor the facts which may be relevant in the context of any such defence.

16. Unless, therefore, the general and the unspecific nature of the s. 26 defence as presently pleaded is cut down by further pleading or particulars and the facts to be relied upon ascertained, then any discovery ordered by the court in the present case would be in the nature of the old orders for general discovery of any documentation which might possibly be relevant. This former practice has been disapproved of by the Supreme Court (see *Brooks Thomas Ltd. v. Impac Ltd.* [1999] 1 I.L.R.M. 171) and it is, in any event, out of line with modern thinking on discovery which suggests that discovery requests should be specific and focussed, so that the courts "should be willing to confine categories of documents to what is genuinely necessary for the fairness of the litigation": see *Ryanair Ltd. v. Aer Rianta cpt.* [2003] IESC 62, [2003] 4 I.R. 264, 277, *per* Fennelly J.

17. It is, accordingly, on this point that I respectfully part company with the reasoning of Barr J. in the High Court.

### Conclusions

18. One may sum up this general state of affairs by saying that it is at present premature to assess whether the discovery sought is genuinely necessary for the proper conduct of this litigation, at least until the scope and extent of the s. 26 defence is clarified and particulars of the facts proposed to be relied upon by the defendant in support of that defence are duly ascertained, whether by further pleading or by particulars. It follows, therefore, that the defendant's appeal must accordingly be allowed.

19. It will be a matter for the plaintiff to decide whether and, if so, to what extent, she wishes to raise further particulars arising from the s. 26 defence. For the avoidance of any possible doubt, however, I would wish to make it clear that in the event that the scope and extent of the s. 26 defence is clarified following delivery of particulars, it will then be open to the plaintiff to seek discovery afresh. In that event, the plaintiff should then furnish in pre-motion correspondence the appropriate reasons based on that s. 26 defence as so clarified as why the discovery which might then be sought would be both relevant and necessary.