

THE HIGH COURT

[2016 No. 2573 P.]

BETWEEN

GERALD KEAN

PLAINTIFF

AND

INDEPENDENT STAR LTD

DEFENDANT

Ex-tempore Judgment of Mr Justice Barr delivered on the 19th day of April, 2018.

Background.

1. For the purposes of this application, it is only necessary to set out the background to this case in brief detail. The plaintiff is a practising solicitor. By a Plenary Summons issued on 22nd March, 2016, he issued proceedings against the defendant, which is the owner and publisher of a newspaper known as "The Irish Daily Star". The plaintiff is suing for damages, including aggravated and/or exemplary damages, for defamation in respect of an article which was written by a journalist employed by the defendant, which referred to the plaintiff and was published in the defendant's newspaper published on 11th March, 2016.
2. It is not necessary to go into the content of the article in depth. Suffice it to say that it is alleged by the plaintiff that the article meant and was understood to mean that his offices had been searched by the police because they felt that he had had some dealings with a well-known criminal drug gang.
3. A full defence has been filed on behalf of the defendant. It denies that the article contains the defamatory meanings alleged by the plaintiff. The defence goes on to plead that the material complained of was fair and reasonable publication on a matter of public importance. The defence further pleads that the defendant will rely upon the defence of truth pursuant to s.16 of the Defamation Act 2009.
4. This application arises out of an order for discovery which was made by this Court on 20th February, 2017. Under the terms of that order, the defendant was directed to make discovery, *inter alia*, of the following:-

"All documents in the power possession or procurement of the defendant its servants or agents and in particular in the power possession or procurement of Michael O'Toole evidencing and/or referencing and/or identifying and/or referring to information available to them between 7th March, 2016 and 11th March, 2016 (inclusive) concerning the preparation and/or investigation and/or publication by the defendant of the article about the plaintiff."

5. In purported compliance with that Order, Mr Des Gibson, managing editor at the Irish Daily Star newspaper, swore and Affidavit of Discovery on 13th April, 2017. In the second part of the first schedule, he set out documents under category 3 as being "Emails Michael O'Toole to the Star News Desk – 10th March, 2016." In his affidavit, Mr Gibson stated that he objected to produce the documents and electronically stored information set out in the second part of the first schedule on the basis that the said documents were subject to journalistic privilege.
6. By letter dated 21st April, 2017, the plaintiff's solicitors requested that the defendant should provide additional details in relation to the documents listed in the affidavit of discovery over which privilege had been claimed. In response to that request Mr. Eoin Brannigan swore a further affidavit on behalf of the defendant on 13th October 2017. In that affidavit, he indicated that the documents over which privilege was being claimed, consisted of two emails from the author of the article, Mr. Michael O'Toole, to the news desk at the defendant's newspaper, sent at 18.20 hours and 20.11 hours on 10th March, 2016.
7. By further order of this Court dated 6th November, 2017, the defendant was ordered within three weeks to set out the basis on which it was claimed that the documents referred to in the second part of the first schedule of the affidavit of discovery were subject to journalistic privilege. It does not appear that any further affidavit was filed on behalf of the defendant in response to that order.

The Present Application

8. By notice of motion dated 1st February, 2018, the defendant sought an order striking out the defence of the defendant for failure to comply with the order of the High Court made on 6th November, 2017. The plaintiff further sought an order that the court should inspect the documents over which privilege had been claimed and rule upon the issue as to whether those documents were properly covered by the principle of journalistic privilege.
9. In response to that motion, Mr. Brannigan swore a further affidavit on 9th March, 2018, in which he stated that it was the defendant's position that the emails in question were covered by "journalistic privilege", because a source for the article in question may, in their opinion, have been identifiable by a reading of these emails, either in isolation or in conjunction with other extraneous knowledge or information. He went on to state that such identification would be possible, either by a reading of the emails themselves individually, or by comparison between them for omissions and/or additions. It was on this basis that the privilege against production of the documents was claimed.
10. When the matter came before this Court, an agreement was reached between the parties that Mr. O'Toole would swear an affidavit deposing to the fact that the source of his information, was not a serving or former member of An Garda Síochána, or a civilian who is or had been working with or for the police. In compliance with that agreement, Mr. O'Toole swore an affidavit on 13th April, 2018, in which he stated as follows at paragraph 4 thereof:-

"In accordance with the terms of agreement reached between the parties on 12th March, 2018, I confirm that the source of this article was not a member of An Garda Síochána or of its civilian staff or who is or was engaged under contract or other arrangement to work with or for An Garda Síochána."

11. In that affidavit, he stated as follows in relation to the claim of journalistic privilege which had been made in respect of the two emails:-

"I say that the plaintiff's claim is in respect of an article published on 11th March, 2016 and was written by me, crime correspondent of the Irish Daily Star newspaper. As was previously averred to in Mr Brannigan's second affidavit, I say and believe that it is necessary to protect the source/sources for this article. I say that as a journalist it is vital that the sources of information have the fullest and utmost confidence that their identities will not be revealed, either directly or indirectly by means of deduction, elimination or by "jigsaw" identification. In my experience even certain references and comments may yield clues to a source. I say that the production and reading of the emails from your deponent to the news desk of the Irish Daily Star newspaper of Thursday, 10th March, 2016 timed at 6.20 p.m. and a second email at 8.11 p.m., would cause a real risk of the identification of a confidential source, were they to be released."

12. It was further agreed between the parties that the Court would be furnished with the two emails in question and having read them, would come to a decision as to whether journalistic privilege had been correctly claimed over them.

13. I have read the two emails sent by Mr O'Toole to the news desk at 18.20 hours and 20.11 hours on 10th March, 2016. While it has not been specifically averred to in any of the affidavits to date, I do not think that I am breaching the integrity of the privilege by saying that the two emails were in fact earlier drafts of the article which was ultimately published by the defendant newspaper on 11th March, 2016.

14. There were certain matters in the first draft of the article, which were deleted in the later draft submitted at 20.11 hours. There were further deletions made from the second draft before the final version was ultimately published on the following day. Thus, it would appear that the author of the article, Mr O'Toole, perhaps having consulted with his editor, or with his source or sources, came to the conclusion that it was necessary to make certain deletions from the draft article, so as to protect the identity of his source/sources. I think that the Court has to give considerable weight to the fact that the journalist himself came to the conclusion that it was necessary to make these deletions so as to protect the identity of his source/sources.

15. In looking at the particular portions that were deleted and which did not appear in the final version of the article, the Court must be cognisant of the fact that, while the court may not be able to identify the source or sources of the information from the deleted portions, there is a possibility that other people, who may have more in-depth knowledge or information, may be in a position to identify the source or sources from the information that was deleted. I presume that this was what Mr. O'Toole was referring to when he spoke of "jigsaw identification".

16. Having looked at the deleted portions with some care, I am satisfied that there would be a significant risk that the source or sources of Mr. O'Toole's information, may be identified if these deleted portions of the draft article were made public by way of discovery between the parties. Accordingly, I rule that the two emails in question are covered by journalistic privilege and need not be produced for inspection by the defendant.