

## THE HIGH COURT

[2012 No. 5318P]

BETWEEN

DAVID NORRIS

PLAINTIFF

AND

RADIO TEILIFÍS ÉIREANN AND HELEN LUCY BURKE

DEFENDANTS

**JUDGMENT of Kearns P. delivered on the 28th day of February, 2014**

This is an application for discovery brought by the second named defendant in defamation proceedings brought by the plaintiff against both defendants arising from two "Liveline" interviews broadcast by the first named defendant on 30th May, 2011 and 21st October, 2011.

During the course of the first broadcast, which related to a recorded interview which took place between the plaintiff and the second named defendant over dinner in Chapter 1 restaurant in Dublin in January, 2002, the following exchanges occurred between the programme presenter, Mr. Joe Duffy and the second named defendant:-

HLB — When I challenged him he said yes, I want all of this set down. So I did. One of the things he wanted was a kind of free-range sexuality. "I believe very strongly in people being allowed to make any choices they like within very wide limits". He made it plain that the right of unfettered sexual activity guided by the principle of mutual consent – (this is Norris's perception of the way things should be) "with a bar only on intimidation, bullying or bribery. He did not appear to endorse any minimum age or endorse my protest that a child was not capable of informed consent. The law in this sphere should take into account consent rather than age and when I asked about incest he hesitated and conceded in the case of girls the case could be made for a ban, as a possible resulting pregnancy might be genetically undesirable. Earlier on he had said that in terms of classical paedophilia as practised by the Greeks, for example, where it is in older man introducing a younger man or boy to adult life, I think that there can be something to be said for it". Now, this is all against the law, you understand, the law as it stands here. He said too and I'm quoting again, "When I was younger it would most certainly have appealed to me in the sense that I would have greatly relished the prospect of an older attractive mature man taking me under his wing, lovingly introducing me to sexual realities and treating me with affection and teaching me about life. Yes, I think that would have been lovely. I would have enjoyed that". But all that is against the law.

JD — Did you read the article back to David Norris for example? Of course I did. I am very careful about these things. I read back the entire article. As it turned out one part of the article, which I think was too gross to be published, was removed by the editor but he had endorsed that. I read it out in completion and very slowly and he congratulated me on my accuracy. He went off to ... After I had done this interview with him he went off to oh a day or two later to Thailand for a holiday. This was before Magill had been published but when he came back he rang me the evening he came back and told me he had gone across the road and had bought Magill in the shop and congratulated me again on my complete accuracy.

But ....

HLB — Every word he told me how accurate it was and how pleased he was with it. Then on the Sunday, a couple of days later, the Sunday Independent took it up and they were kind of I believe horrified about it and Norris hurried into the studio and denied having said any of the things that I had written and I was asked what comment I had to make about that and I said that if it's a case that I have not reported him accurately then he has got a case for libel against him. I said I await with interest the service of the writ. ...

JD — Why not?

HLB — I think these are evil beliefs.

JD — When he was talking to you in Chapter One and it was in the context, the tape recorder was on obviously, did you say to him these are evil beliefs or did you draw him in?

HLB — I did. He could not have been unaware that I was horrified. I protested and he stood up for what he had said.

JD — David Norris was obviously aware that this was going to come up in the Election campaign.

HLB — I don't know if he was but this was in 2002.

JD — I know and now you have raised it because ... Anyway he won the poll last week. Anyway he sent in a statement. He is unavailable. Now he may be soon. He said he was in a meeting. Any way he said "I was the subject of a profile in Magill Magazine conducted by the restaurant critic and columnist Helen Lucy Burke for Magill Magazine in 2001. During the course of a comprehensive conversation, Miss Burke and I got into an academic discussion about classical Greece and sexual activity in a historical context; it was a hypothetical, intellectual conversation, which should not have been seen as a considered representation of my views on some of the issues discussed over dinner. The article did contain other valid comments from me on human rights and equality issues but the references to sexual activity were what were emphasised and subsequently picked up and taken out of context in other media outlets."

HLB — Incorrect.

JD — What's incorrect?

HLB — Here we are "The right of unfettered sexual activity guided by the principle of mutual consent – would be Norris's perception of the way things should be with a bar only on intimidation bullying or bribery" and again I repeat. "He did not appear to endorse any minimum age and when I asked about incest he hesitated and conceded that in the case of girls a case could be made for a ban. In other words within a family he endorsed sexual activity between the father, mother and their children.

I queried him about it on that occasion and he stood up firmly for it. Free-range sexuality was what he was for.

JD — ...

HLB — I dare say. But I'm perfectly happy that I reported him accurately and I reported the whole tenor of the conversation accurately.

JD — And David Norris goes on to say "The presentation of references to sexuality in the article attributed to me were misleading in that they do not convey the context in which they were made. People should judge me on my actions as a public servant, over the last 35 years and on the causes and campaigns, for which I have fought, and not on an academic conversation with a journalist over dinner.

HLB — Come now, come now. I have in fact said at the end that I was aware of many acts of kindness and bravery on his part, not least the championing of the rights of those variously disadvantaged and I questioned him about the good he had done in his life and he told me and I put that in as well. I am perfectly sure that I had given an accurate portrait and he told me several times how great it was to have somebody who reported him accurately.

JD — But now he's saying you took him out of context.

HLB — No I took him in context. That's what he's questioning.

JD — And that you were misleading?

HLB — No I wasn't misleading. It's quite a lengthy piece. I said at the start of it I found some of his views on sexual matters deeply troubling, notably on sex with minors.

JD — And has it anything to do with his homosexuality?

HLB — It has nothing to do with his homosexuality. I contributed to him when he was campaigning. I contributed to the campaign. I helped him along the years in these things, but sex with minors is a thing that I cannot endorse and I do not think it should be endorsed by anybody.

JD — And just give me the provenance of the article. It was published by Magill and taken up by the Independent the following Sunday.

JD — And then what frame did the Sunday Independent put on it?

HLB — The Sunday Independent seemed to be horrified and then David Norris hurried in and denied that he had said anything that had been quoted in the article.

JJ — Maybe it's my article in the Sunday Independent that Helen is referring to there but I would just point out, I've listened to all she has had to say. I think that there is even one comment that she made there which was grossly misrepresenting David Norris. She said and it was a loaded comment that he had just come back from a holiday in Thailand. Now I'm looking on my computer. I have the old article on my website. He categorically states that he had just come back from Thailand where he was looking at the position of HIV and the trafficking of women and children for sexual purposes and he was the leader of that group. It wasn't a holiday.

HLB — Well?

JJ — But there's a difference.

HLB — I don't see what the difference is. I simply said he went away. The point I was making was I read it out to him before he went away in quite a hurry so he may have not taken the whole of it in though I did repeat anything that he couldn't understand properly.

JJ — That's not the point I'm making but when he gave me the interview the following Sunday.

JD — The point you're making Joe is?

JJ — That to say that he came back from a holiday in Thailand and not give him the credit for leading a group where they were exploring something like the trafficking of children and HIV.

HLB — He didn't tell me anything about that. He did not tell me anything about the trafficking he was going to. He told me he was going to Thailand.

JD — But Joe was inferring that by the way you put that you were saying that you were going nudge nudge wink wink.

HLB — No, I was not nudge nudge wink wink.

JJ — Can we get to the centre of the thing, which is the suggestion that he was condoning sex with children?

HLB — Well, he did say that.

JD — You answer that Joe.

JJ — Sorry I'm challenging you now about what you are saying today and I'm challenging you about what I put in print a couple of weeks later. I was reacting to a headline in Ireland on Sunday, which said "Fury of Gay's paedophilia is ok and then below that it had "Senator backs sex with children". He had said in the article and you quoted it yourself Helen that in classic terms of classic paedophilia as practiced by the Greeks where an older man introduces a younger man to adult life. That's a broader issue. But he said that that was something to be said for that but that it did not appeal to him.

HLB — An older man introducing a younger man or boy to adult life.

JJ — Yeah adult life is a broader issue than just sex and also the following Sunday he categorically said to me that he was vehemently against sex with children, it was something he could never condoned it and he saw it as illegal. So for you to bring the issue up now when the man has categorically taken a stand against it and stated that you misrepresented him, I think is unfair.

HLB — Since he agreed thoroughly with what I said when I read out to him.

JJ — He didn't agree with you thoroughly when he has already put out a statement today saying.

HLB — He probably didn't realize the impact it would have. Maybe he thought he was going to be a great hero to make these remarks.

JJ — I think you're prejudiced.

HLB — No, I have never been prejudiced against gay people and I've helped them as much as I could.

JJ — Against David Norris and his position and you are misrepresenting the man. I'm not speaking for him. I just interviewed the man twice but I think he was misrepresented by you.

HLB — I say here – "he did not appear to endorse any minimum age or endorse my protest that a child was not capable of informed consent".

JJ — But you're saying Helen he did not seem to. That's your interpretation. I'm a journalist. I know what that is. That's a trick.

HLB — No it isn't.

JJ — I have a categoric comment from him where he says that he is against it.

HLB — And he says again "the law in this sphere should take into account consent rather than age".

JJ — Alright and then the following Sunday he said to me he was against anyone who was underage having sex. He didn't condone it and he said the penetration of a juvenile of either sex was wrong and harmful.

HLB — Yes he said that alright and I have that here in my article. But perhaps it would help you if you read my entire article.

JD — What are you saying Helen Lucy Burke that when David saw the reaction to the comments, he then?

HLB — He then backtracked.

JD — But he changed his mind so.

HLB — Well I think he backtracked when he saw that he wasn't being seen as a hero of sexual reform.

JD — But Joe you report that David Norris that it was the lowest point of his life.

HLB — I read out the entire article to him and he endorsed every single word and said that he said it was accurate.

JJ — I think that it is your misrepresentation of it and I think that if the man came on today he would categorically deny it.

HLB — I am not misrepresenting him. He is backtracking, that is all.

JJ — I have a right to say what I believe.

HLB — So do I. I wrote this article. He endorsed every word.

JD — And what do you believe? Joe if you're arguing if Helen Lucy Burke grossly misrepresented David what do you think was Helen Lucy Burke's agenda?

JJ — Well you asked her was she prejudiced. She says she wants an honest campaign. I believe she's a prejudiced woman. I don't know. Maybe she just has a blind spot in relation to the man's sexual politics. But I think she is prejudiced.

HLB — I'm prejudiced against anyone who endorses sex with young boys.

JJ — The man categorically stated that he doesn't. Why are you still saying that he does?

HLB — Well why did he say he did then?

JJ — Do you think he was lying the second time around just to placate you?

HLB — No. He endorsed every single word I read out and said that it was very accurate and that it was a pleasure to be accurately quoted.

JD — He also says that it was over dinner. So was there alcohol consumed?

HLB — There was one glass of wine consumed by each of us. I'm very careful about these things.

JJ — Well, I'll tell you what. Let's go to a market place. You bring your tape and I'll bring my tape where he says the opposite and we'll see what people believe.

JD — Well it won't solve the issue.

JD — David never denied that he said what he said, just that you took him out of context.

HLB — I didn't take him out of context.

JJ — Well, Joe, he denied it to me the following Sunday. He said the article misrepresented him.

HLB — Of course he did. He was going back tracking. He was being afraid.

JJ — That's your interpretation of it. He claimed you misrepresented him and he wanted to straighten out the truth.

JD — Hang on, and in fairness the statement we got in from David Norris and obviously they got it prepared. I don't know if Helen contacted anyone else. They knew this issue was going to come up.

HLB — No.

JD — Well, the statement they sent in to us does not say that Helen Lucy Burke was telling lies and does not deny that David Norris said what he said. What he does say is that it was an academic discussion about classical Greece and sexual activity in a historical context; it was a hypothetical, intellectual conversation, which should not have been seen as a considered representation of my views on some of the issues discussed over dinner. In other words what was said was said but it was in the context of dinner and relaxation and intellectual conversation. He does not say what you are now saying, that he completely denies saying what Helen Lucy Burke reported.

JJ — I'm saying he denied a particular quote. But Joe you're a journalist, I'm a journalist and Helen Lucy Burke is a journalist. How we put quotes in an article defines its context.

JD — Well on a radio show you say what you say and it's unedited.

Jimmy — I think this is a stunt by Helen Lucy Burke to get known as a journalist. David Norris is a very good man who for years was standing up for great causes. Helen Lucy Burke is completely out. If you go for a glass of wine and even five glasses of wine, you never have one. You drink more. More might have been said.

HLB — We had one glass of wine. I'm very careful about these things ....

Jimmy — How could you bring up old information of 9 years ago?

HLB — Because I have the magazine in front of me. Perhaps you didn't hear this bit. We were talking about minimum age for sexual activity and. "He did not appear to endorse any minimum age or endorse my protest that a child was not capable of informed consent. Now I quote him here

But But

"To take into account consent rather than age. When I asked about incest he hesitated and conceded that in the case of girls a case could be made for a ban as a possible resulting pregnancy might be genetically undesirable" in other words it was alright to do it with young boys by their parents.

JJ — Sorry Joe that's not a quote, that's an interpretation.

Jimmy — That is not a quote

JJ — It is not a quote

JJ — It is not a quote. It is not something David Norris has said. It is not a quote and should not be taken as a quote.

JD — But I presume Jimmy's point is that you have to judge David by his actions and its 9 years ago and what David Norris has done in the wider sphere both to do with gay rights and way beyond speaks for itself and that in Jimmy's view speaks volumes and positive volumes.

HLB — Well now, if David Norris comes up and says he has changed his mind about having incestuous relations, parents being allowed to have incestuous relations with their offspring, I would be interested to hear it.

HLB — I in fact contributed to his campaign. I contributed as much as I could at the time.

Jimmy — You're not contributing now. You're knocking him now at the minute.

HLB — I worked on the campaign altering the laws on homosexuality. I contributed to it and I worked for him.

Jimmy — This man is standing up for himself and for other people. Standing up for the gay rights people, women and men

that are afraid to go out on the streets at night because they are in fear of being attacked on the way out of a gay pub.

HLB — Well, there was something not included in this article. I think the editor thought it was a bit too gross to include it. But I'll include it if anybody wants me to.

Sheila — "still straining to gather his emotions, Norris apologises and says he hopes that all this didn't sound like boasting on his behalf. I assured him it doesn't. It sounds more like a man pleading for his political career. Well in fact I'm only back from a visit to Thailand where we were looking at the situation of HIV and the trafficking of women and children for sexual purposes. I was asked to be the leader of that group and that is why I was in Thailand and I was responsible and successful as that leader and then I come home to this. I can control it consciously but when I go to sleep ... I am wracked by nightmares in which I am unjustly accused of all kinds of terrible things I have never done and why it wounds me so much is because I have fought so hard for the rights of people who are damaged, underprivileged and abused and this is an attempt to put me in the camp of the abusers. I am against abuse. It horrifies me". That's what he has said.

HLB — David told me he was going off on a holiday to Thailand. That's why I said it.

JD — That can be checked.

HLB — He told me he was going on a holiday. That's all I can say.

Sheila — That's your word against his. I don't know you. She said earlier. He just said he

JD — That can be checked. It was an official trip according to David.

HLB — That could be very well so. But he gave me to understand he was going on a holiday and I simply mentioned it. I had no agenda there.

Sheila — I just read what it was. He went with the group and he was asked to be leader of that group.

HLB — That's fine then.

Sheila — Well take it back then. It wasn't a holiday.

HLB — I'm just saying what he said to me.

Sheila — Well I'm not sure. Maybe that's what you think he said. I don't know. I'm just reading this article that this man Joe Jackson did with him.

JJ — You read it very accurately too.

Michelle in Abbeyleix — He does not say Helen Lucy Burke was lying. He does not say that Helen Lucy Burke misreported him. What he does say is that it was a hypothetical intellectual conversation, which should not have been seen as a considered representation of my views. How do you respond to that particular view Helen Lucy Burke?

HLB — He knew perfectly well he was doing an interview with me so it couldn't very well be that

JD — Helen Lucy Burke you are adamant you have no agenda but on that occasion when you met David to do the interview you say you were taken aback by what he said. I asked you this earlier, did you show your displeasure or did you simply just?

HLB — Oh no I argued with him about it. I thought it was absolutely terrible, in particular.

JD — And did he say we're only arguing hypothetically here.

HLB — No he did not. He argued away with me. I could say something that would add more to it but it wasn't included in the original article because it was too gross.

Michael in Kildare — I'm sure Helen Lucy Burke didn't just get out of bed this morning and make all this up. She's a fine journalist and food critic and we've all kept an eye out for her over the years in the restaurant and were terrified when she arrived and very often ... I think she's doing the country a great justice by doing this. I think people are going around with their eyes closed now and have romantic views of people's sexuality. That man if he has those beliefs which she has recorded, he should be put in handcuffs and not represent his country as their President.

JD — I don't know what you said to the Producers during the break and what you allege David Norris said to you but at this time of day we're not allowed to publish it. Maybe some other publication but we're not allowed to publish what you say he said. But Helen have you ever discussed this publicly with David Norris? Has he ever decided to discuss it publicly with you?

HLG — No

JJ — Do you know Joe why he refused to discuss it publicly with Helen Lucy Burke?

HLB — He didn't refuse to discuss it publicly, he just didn't. I read him out the article. He endorsed every single word in it. He congratulated me on my accuracy and that was that.

JJ — So when he said in a Sunday paper 10 days later that you completely misrepresented what he said.

HLB — He would, wouldn't he.

JJ — You think he changed his mind because you think it was going to work against him? My argument is that is what he believed.

JD — Are you criticising gay people?

HLB — I'm criticizing paedophiliacs and I hope that that man I'm talking to does not endorse paedophiliacs. I don't endorse it. As far as homosexuality goes, I have a number of homosexual friends. Davis Norris was one of them. As I said I contributed to his campaign to change the law on homosexuality. I worked hard for it and I gave money for it.

JD — But I will go back to the statement that David issued today May 30, 2011, which does not challenge the veracity of what Helen Lucy Burke says.

JJ — But he challenged the veracity of the article 10 days later in my article Joe.

JD — I'm not forgetting that but what I'm talking about is a statement we have today saying it was a hypothetical intellectual conversation, which should not have been seen as a considered representation of my views". It doesn't challenge the veracity. It doesn't challenge Helen Lucy Burke to produce the tapes. It doesn't say she had an agenda.

JD — Isn't that a good point Helen Lucy Burke, that whatever David said then in whatever context he said it to you and the nature of your discussion, his actions speak otherwise and you should take that from him and not be resurrecting this now?

HLB — Probably you haven't read the complete article ...

JD — Helen you would have been aware of David Norris's rebuttal in various formulae of what was reported in your article. O.K? He rebutted it. It's 9 years later. He's never repeated it obviously.

HLB — He can rebut it until the cows come home but I read out every single word in it.

JD — But you're not prepared to say, on the one hand, and I don't think anyone has ever challenged you before, you seem to be a very diligent journalist, writing everything down and your sources and your notes and all this carry on but what he said, let's go this direction for two seconds, he said what he said. That was in a particular context. Now move on. He has denied that interpretation ever since. He denied that he and obviously doesn't hold those views. Why are you saying to us now that he is now not fit? Why are you saying "I do not feel that this man is a desirable candidate for the presidency?"

HLB — I do not think he's desirable. His views published in this article were never challenged, are very troubling indeed.

JD — It's a cassette. If you have the tape. I don't know if it will work. Technology will get it working.

HLB — But in any case he agreed with everything I said. O.K."

The statement of claim alleges that these words, taken in their ordinary and natural meaning, meant that the plaintiff:-

- (a) Held evil beliefs;
- (b) Was unfit to be President of Ireland or to hold public office;
- (c) Was unworthy to be President of Ireland or to hold public office because he held evil beliefs;
- (d) Should be put in handcuffs because of his beliefs;
- (e) Was in favour of incest and endorsed sexual activity between parents and their children;
- (f) Believed that parents should be allowed to have incestuous relations with their offspring;
- (g) Went to Thailand for a purpose connected with improper sexual activity;
- (h) Was in favour of underage sex;
- (i) Advocated breaking the law;
- (j) Had read and endorsed the second named defendant's article prior to its publication in January 2002, and had agreed with its content;
- (k) Never challenged the article published by the second named defendant in January 2002;
- (l) That the second named defendant accurately reported the plaintiff and accurately reported the tenor of her conversation with the plaintiff in the interview in Magill Magazine in January 2002."

On the 21st October, 2011, during the course of a further Liveline programme, an 8 minute recording of the conversation which had taken place in the restaurant was broadcast and published by the first named defendants following which the presenter of the programme, Mr. Joe Duffy asked Mr. Harry McGee, a well-known journalist for the Irish Times, to comment on the contents of the said recording in the context of the previously broadcast programme of Liveline on the 30th May, 2011. In the course of the interview of the 21st October, 2011, the following words were spoken of the plaintiff:-

"Harry McGee — "Well I think that Helen Lucy Burke is a very punctilious journalist and when she said that this is what David Norris said, I never had any doubts about that whatsoever. She had always been very meticulous in terms of what she has written and her research. And I think that every single word we heard in the interview we heard produced in one newspaper or the other."

Joe Duffy — " ... I think that the main reason is that she felt afterwards that people didn't believe her that she had a tape and she found it anyway and she feels that she was undermined and she wanted to let it be known very clearly that she had the tape and that was the tape and that was what she was working off."

It is alleged that these words meant that there was no doubt that the second named defendant's statements made regarding the plaintiff were true and accurate.

In her defence delivered on the 7th October, 2013, it is alleged as follows at paragraph 3 of the defence:-

"Insofar as the said words, in the context of the whole of the Liveline programmes broadcast on the 30th May, 2011 and the 21st October, 2011, in their natural and ordinary meaning, bore and were understood to bear the meaning set out at paragraph 5(e) to (f) and (h) to (k), and paragraph 8(a) to (b), and also meant that the second named defendant had produced a tape which was the tape from which she was working that largely vindicated what she had previously said, then they were true in substance and in fact.

Particulars of material facts are then pleaded as follows:-

3.1 That the plaintiff had said that he favoured people being allowed to make any choice of sexual activity that they liked within very wide limits, guided by the principle of mutual consent with a bar only on intimidation, bullying or bribery.

3.2 That the plaintiff appeared not to endorse any minimum age of consent for the purpose of sexual activity, and had said that the law in this area should take into account consent rather than age, thereby condoning sex with children.

3.3 That the plaintiff when asked for his views on incest had said that a case could be made for a ban on incest in the case of girls, because a possible resulting pregnancy might be genetically undesirable, thereby endorsing sexual activity between other members of a family.

3.4 That the plaintiff had said that there was something to be said for classical paedophilia as practised by the Greeks, when an older man would introduce a younger man or a boy to adult life.

3.5 That the plaintiff had said that, when he was younger, he would have relished and enjoyed the prospect of an older attractive mature man taking him under his wing, lovingly introducing him to sexual realities, treating him with affection and teaching him about life.

3.6 That the plaintiff had endorsed the second named defendant's article prior to its publication in January 2002 and had agreed with its content.

3.7 That the second named defendant was in possession of tape recordings of an interview with the plaintiff on which she based the article which was published in Magill magazine in January 2002.

3.8 That the second named defendant accurately reported the tenor of her conversation with the plaintiff in the article in Magill magazine published in January 2002."

The present application is one brought pursuant to O.31, r.12(4) of the Rules of the Superior Courts (as amended) directing the plaintiff to make discovery of the following categories of documents:-

(a) All documents in the possession, power or procurement of the plaintiff amounting to or relating to representations made by the plaintiff to Israeli authorities for and on behalf of the plaintiff's former partner, Ezra Itzhak Nawi;

(b) All documents in the possession, power or procurement of the plaintiff relating to the plaintiff's support for the poet, Cathal Ó Searcaigh, after Mr. Ó Searcaigh had been the subject of a television documentary detailing his relationship with Nepalese teenage boys.

The application is grounded upon the affidavit of Simon McAleese sworn on the 11th December, 2013. In this affidavit, Mr. McAleese deposes to the fact that he requested the plaintiff to voluntarily discover these documents but that the plaintiff has refused to do so. He contends that discovery of the documents referred to in the notice of motion is necessary for disposing fairly of the action and for saving costs.

In relation to representations made by the plaintiff to the Israeli authorities, Mr. McAleese deposes as follows:-

"The essence of the second named defendant's pleas of truth and honest opinion is that the plaintiff has held ambivalent views in relation to paedophilia, incest and underage sex.

In or around 1992, the plaintiff's partner, Ezra Itzhak Nawi was convicted of the statutory rape of a fifteen year old boy in Israel. In or around 1997, the plaintiff wrote to the Israeli courts on Seanad Éireann notepaper intervening on behalf of Mr. Nawi and urging that clemency be shown to him by the Israeli courts.

A considerable controversy surrounding the plaintiff's correspondence with the Israeli courts on behalf of Mr. Nawi arose during the course of the Presidential election campaign in 2011 when the plaintiff was a candidate for the Irish Presidency. Prior to that point, the existence of this correspondence had not been publicly known. In an effort to deflate this controversy, the plaintiff chose to publicly reveal some but not all of his correspondence with the Israeli Courts. The second named defendant maintains that the plaintiff's correspondence with the Israeli courts on behalf of Mr. Nawi will support her contention that the plaintiff at all relevant times has had an ambivalent attitude towards the question of underage sex between men and boys and sexual relations generally, in particular to the extent outlined by the plaintiff to the second named defendant when she interviewed the plaintiff for the purpose of the Magill magazine feature.

Discovery of this category of documents is clearly necessary for the purpose of allowing the second named defendant demonstrate that the plaintiff's claim is, for the aforementioned reasons, unsustainable. In other words, it is the second named defendant's contention that the plaintiff's correspondence (and all documentation relating to it) with the Israeli courts will support the pleas of truth and honest opinion which it has asserted in its defence. Such discovery is clearly necessary for the purpose of disposing of this action fairly. Furthermore, discovery of this category of documents should lead to a saving of costs."

Separately, in relation to any documentation in the possession or procurement of the plaintiff relating to his support for the poet, Cathal Ó Searcaigh, Mr. McAleese deposes as follows:-

"The essence of the second named defendant's pleas of truth and honest opinion is that the plaintiff at all material times has held ambivalent views in relation to paedophilia, incest and underage sex.

In particular, the plaintiff called for the RTE programme concerning Ó Searcaigh, entitled 'Fairytale of Katmandu' to be investigated by a cross-party Oireachtas Committee. Furthermore, the plaintiff demanded that the broadcast of that programme should be halted, alleging that Mr. Ó Searcaigh was being subject to 'trial by media'. The second named defendant seeks copies of correspondence sent by the plaintiff to newspapers, media and others in which he sought to protect Mr. Ó Searcaigh from exposure to criticism for what was widely regarded as 'sex tourism' by Mr. Ó Searcaigh involving Nepalese teenagers.

The second named defendant will argue that the plaintiff's actions demonstrate conduct on the part of the plaintiff in keeping with the comments made by him when he was interviewed for Magill magazine by the second named defendant in or around January 2002. The second named defendant pleads truth in respect of both the accuracy and tenor of the second named defendant's report of that interview and its entirely accurate representation of the plaintiff's attitude when interviewed towards underage sex and the other matters mentioned above. Discovery of this category of documents is clearly necessary for the purpose of allowing the second named defendant demonstrate that the plaintiff's claim is, for the aforementioned reasons, unsustainable. In other words, it is the second named defendant's contention that the aforementioned documents relating to the plaintiff's efforts on behalf of Mr. Ó Searcaigh will support the pleas of truth and honest opinion which she has asserted in her defence. Such discovery is clearly necessary for the purpose of disposing of this action fairly. Furthermore, discovery of this category of documents should lead to a saving of costs."

The basis for the plaintiff's refusal to comply with the request for discovery under both headings is set out in a letter from his solicitors, Messrs. O Riada, dated the 14th November, 2013, which states as follows:-

"We acknowledge receipt of your request for voluntary discovery dated the 7th October, 2013.

Category 1: The second named defendant seeks to obtain discovery on the basis that the class of documents identified will support two pleas; the plea of truth and the plea of opinion honestly held. It is stated in your request that the essence of these pleas is that the plaintiff has held ambivalent views in relation to paedophilia, incest and underage sex.

No such pleas have been justified in the defence; nor is any such plea the subject of the defence of opinion honestly held. The plaintiff is therefore under no obligation to discover the requested documents.

Category 2: This is refused on the same basis as Category 1 above."

In a supplemental affidavit sworn on the 6th January, 2014, Mr. McAleese deposes as follows:-

"5. I say that insofar as the plaintiff alleges in his solicitor's letter that the second named defendant has not pleaded that the plaintiff has held ambivalent views in relation to paedophilia, incest and underage sex, this is denied by the second named defendant.

6. In particular, I say that the second named defendant has pleaded at paragraph 3.1, 3.2, 3.3 and 3.4 of her defence that these issues are material facts upon which the second named defendant will base her plea of the truth of the meanings pleaded by the plaintiff.

7. For the avoidance of doubt, the second named defendant intends to rely on the fact that the plaintiff has also expressed such views in the past in relation to the law relating to underage sex and consent prior to his interview of the second named defendant.

8. In the circumstances, I say that the second named defendant has sufficient evidence to plead truth and that sufficient particulars of the plea of truth are before the court. I say that the second named defendant is entitled to discovery of documents which will support her case."

## DISCUSSION

Section 16 of the Defamation Act 2009 provides as follows:-

"(1) It shall be a defence (to be known and in this Act referred to as the "defence of truth") to a defamation action for the defendant to prove that the statement in respect of which the action was brought is true in all material respects.

(2) In a defamation action in respect of a statement containing 2 or more distinct allegations against the plaintiff, the defence of truth shall not fail by reason only of the truth of every allegation not being proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining allegations."

Obviously a defendant is not entitled to put forward the defence of truth unless he has some basis for so doing. Thus in *Associated Leisure v. Associated Newspapers* [1970] 2 Q.B. 450 at 456, Lord Denning M.R. said counsel has a duty in this regard: "Like a charge of fraud, you must not put a plea of justification on the record unless he has clear and sufficient evidence to support it." This view was endorsed by the Supreme Court in *Desmond v. MGN* [2009] 1 I.R. 737.

As pointed out in *Maher's Law of Defamation* (Thompson Press 2011) at 5-11:- " ... the defendant is not prevented from pleading the defence of truth, aware that he has only a limited basis for doing so but in the hope or expectation that at the time of the hearing he may have more evidence available to him". In *McDonalds v. Steele* [1995] 3 All ER 615 at 621 Neill L.J. said:-

"It is true that a pleader must not put a plea of justification (or indeed a plea of fraud) on the record lightly or without careful consideration of the evidence available or likely to become available. But, as counsel for the plaintiffs recognised in the course of the argument, there will be cases where, provided a plea of justification is properly particularised, a defendant will be entitled to seek support for his case from documents revealed in the course of discovery or from



answers to interrogatories.”

In *McDonagh v. Sunday Newspapers* [2005] 4 I.R. 528, the Supreme Court considered a discovery application in a case in which the defendant newspaper had in its defence simply stated that the words it had published about the plaintiff were “true in substance and in fact”, and then sought discovery of a range of documents from the plaintiff. Macken J. held that while there was no requirement for a defendant to particularise a plea of justification in the defence itself, a court considering an application for discovery would need to have before it “some sufficient particulars in support of the plea”. This could be done in the affidavit grounding the discovery application in which respect Macken J. stated:-

“I am not satisfied that a defendant must disclose his hand, by presenting actual evidence, in detail, in order to be entitled to discovery and more recent jurisprudence would not support such a constraint on a defendant. It is sufficient, in order to do justice between the parties and maintain the appropriate balances between a defendant’s entitlement to plead the truth in substance and in fact of the words used and the plaintiff’s right to have his good name adequately vindicated and knowledge of the case he has to meet when there is a plea of justification, that appropriate details of the plea, if material facts have not been pleaded, is available to the court in the affidavit grounding a discovery application.”

She then went on to conclude:-

“... in a libel action in which a defendant pleads justification *simpliciter*, there must be before the court, at least at the time discovery is sought, sufficient information, particulars or material facts, however phrased, upon which the court can conclude that the application for discovery is firstly, intended to advance the plea of justification and not merely make such a case for the defendant, secondly, to establish that the documents sought are relevant to the issues arising between the parties and thirdly, to establish that they are necessary for the purposes of disposing of the action.”

There is no doubt but that the existence of evidence upon which to base a plea of justification has been demonstrated in this case. Moreover, particulars of the facts relied upon in that regard are pleaded in some detail. That being so, counsel on behalf of the second named defendant submitted that this was a clear case where the discovery order sought should be granted, given that the documents in question might aid those pleas.

In opposing the application, counsel for the plaintiff submitted that in reality the “goal posts” had been moved so that the second named defendant was now in fact seeking to base the plea of justification – in part at least – on the plaintiff’s supposed “ambivalence” about men having sex with underage males. A plea of ambivalence fell well short of the case for which justification was sought to be made in the defence

## DECISION

While it is true, as contended by counsel for the plaintiff, that the second named defendant has not expressly pleaded in his defence that the plaintiff has held ambivalent views in relation to paedophilia, incest and underage sex, paragraph 3 of the defence is quite explicit in pleading justification for the meanings set out at paragraph 5(e) – (f) and (h) – (k), of the statement of claim.

For convenience, they may again be referred to as those paragraphs which allege:-

- (e) [That the plaintiff] was in favour of incest and endorsed sexual activity between parents and their children;
- (f) Believed that parents should be allowed to have incestuous relations with their offspring;
- (h) Was in favour of underage sex;
- (i) Advocated breaking the law;
- (j) Had read and endorsed the second named defendant’s article prior to its publication in 2002 and had agreed with its content;
- (k) Never challenged the article published by the second named defendant in January 2002.

In view of the evidence put forward in support of that plea, I am satisfied that it is sufficient and sufficiently particularised, to form the basis for this application for discovery, and that the subsequent reference in correspondence to some form of “ambivalence” on the part of the plaintiff, which would not of itself warrant discovery in view of the matters sought to be justified, is therefore a peripheral and non-relevant consideration in the context of this particular application.

The issue then becomes one of the relevance, scope and necessity for the discovery sought. In so far as the discovery sought is concerned, it is conceded on behalf of the plaintiff that the defence of truth can rely on facts which come into existence after the allegedly defamatory statement has been published, and no point was taken on that ground to the defendant’s request for discovery of documents in the possession of the plaintiff relating to his possible support for the poet, Cathal Ó Searcaigh was expressed in the aftermath of an RTE investigation which took place and which was broadcast many years after the interview between the plaintiff and the second named defendant in Dublin in 2002.

However, with regard to this category of discovery, I fail to see how it could be regarded as being “clearly necessary for the purpose of disposing of this action fairly”.

The plaintiff, on the defendant’s own case, did no more than call for the RTE programme to be investigated by a cross-party Oireachtas committee, claiming that Mr. Ó Searcaigh was being subject to “trial by media”. In so far as the second named defendant in this regard seeks copies of correspondence sent by the plaintiff to newspapers and media on this topic, the same must be assumed to be in the public domain already. It is difficult to identify any shortfall of information which would necessitate discovery, given that the plaintiff’s behaviour with regard to this particular matter can be fully explored in cross-examination.

With regard to the first category of documents, namely, the correspondence had between the plaintiff and the Israeli courts when the plaintiff sought clemency from the courts in Israel following the conviction of Ezra Nawi for an offence involving a fifteen year old boy in Israel, the plaintiff has already made public some of his correspondence with the Israeli courts.

The fact of this intervention has never been denied by the plaintiff, nor has the plaintiff ever taken issue with the fact that he intended to achieve the best possible outcome from those legal proceedings for his former partner, Ezra Nawi.

Given that this information is already available to the second named defendant, I fail to see how it can be contended that such discovery is "clearly necessary for the purpose of disposing of this action fairly". In my view it fails that part of the test.

Furthermore, the central plank relied upon in seeking this need of discovery is the second named defendant's contention that the plaintiff "at all relevant times has had an ambivalent attitude towards the question of underage sex between men and boys and sexual relations generally". That is not a particular relied upon in the defence.

Accordingly, I would disallow the request for discovery of this category also, on the grounds of non-relevance to the particulars of material fact relied upon by the second named defendant in her plea of justification.