Neutral Citation Number: [2009] IEHC 229

THE HIGH COURT

2007 2858 P

BETWEEN

QUINN INSURANCE LIMITED, QUINN GROUP LIMITED, SEAN QUINN AND KEVIN LUNNEY

PLAINTIFFS

AND

TRIBUNE NEWSPAPERS PLC. NOIRIN HEGARTY,

CONOR MCMORROW AND MICHAEL CLIFFORD

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered on the 13th day of May, 2009

The plaintiffs herein commenced proceedings claiming damages for libel and the tort of intentional infliction of economic damage, arising out of the publication of a series of articles published and written by the defendants in the *'Sunday Tribune'* newspaper in its editions of 1st and 8th April, 2007.

The first and second named plaintiffs are limited liability companies, the first of which carries on business as an insurance company, and the second of which is the parent company of a series of companies including the first named plaintiff, with interests in a wide range of businesses in this jurisdiction and the United Kingdom and Europe. The third named plaintiff is a businessman and the Chairman of the first and second named plaintiff companies. The fourth named plaintiff is a senior executive with the second named plaintiff and was previously a senior executive with the first named plaintiff.

The headings of the articles complained of in the *'Sunday Tribune'* of 1st April, 2007, gives a flavour of the matters complained of in these proceedings:

> "Revealed: how gardaí and solicitors helped Ireland's richest man make millions."

Beneath that headline was a sub-heading which stated:

> "Confidential internal memo outlines how: A panel of senior Gardai relay detailed background information to Quinn Direct; Garda panel offer plaintiff solicitors a bonus to recommend early settlements in cases against firm."

The articles were accompanied by a photograph of the third named plaintiff. In the course of the articles, significant reliance was placed by the defendants on a document purporting to be an internal memorandum written by the fourth named plaintiff in October 2001. The authenticity of this document is a matter of serious dispute between the parties in this action.

In the course of the statement of claim, portions of the articles complained of are referred to specifically and I propose to refer to them here also as they seem to me to contain the thrust of the allegations made against the plaintiffs in the articles, and which are complained of in these proceedings. The main article complained of commenced as follows:

> "Quinn Direct, the motor insurance company set up by Ireland's richest man, Sean Quinn, offered claimants' solicitors a sweetener to settle quickly in an innovative cost-cutting measure.
>
> The company also recruited serving gardaí to investigate claims and settle them as quickly as possible on the company's behalf, according to a confidential company memo.
>
> Members of this garda panel approached plaintiffs' solicitors, offering them a bonus on their fees to recommend reduced settlements to their clients in cases against Quinn Direct."

An editorial in the same edition of the *'Sunday Tribune'* contained the following passages:

> "There are many deeply worrying aspects to the relationship between the gardaí and the insurance giants, Quinn Direct and [another] revealed in the '*Sunday Tribune*' today.
>
> It is a bedrock of policing that the gardaí remain independent of vested interests, be they their political masters, business interests such as insurance company . . . or even just their good friends. On the other side, the political, business and legal institutions of this State who work closely with the gardaí have a moral, ethical and, in some regards, legal responsibility to respect the Force's independence and to do nothing to undermine it.
>
> Yet, in 2001, Quinn Direct, the multibillion euro insurance business built up by Cavan man, Sean Quinn, now officially Ireland's wealthiest individual, crossed that line.
>
> Six years ago, when the fledgling company was battling both our ruinous 'compo culture' and the established

insurance multinationals which dominated the market here, Quinn Direct put into operation a business plan that involved a scandalous subversion of garda independence and infringement of data protection legislation."

The editorial continued by referring to the first named defendant's denial of the allegations by stating:

"Quinn Direct has denied these charges, but this denial contradicts the company's own internal documentation which we have published today."

All of the articles complained of are set out in appendices to the statement of claim herein.

The defence filed on behalf of the defendants herein contains, *inter alia*, the following pleas at paras. 5-7 inclusive:

"5. Further or in the alternative and without prejudice to the foregoing, the defendants plead that if and insofar as the words published on 1st and 8th April, 2007 bore and were understood to bear the meanings complained of, then the same are true in substance and in fact:

Particulars

(a) The memorandum is authentic, and the defendants are entitled as against the plaintiffs to assume the accuracy of its contents.

(b) The first named plaintiff made use of the services of retired members of An Garda Siochána to investigate and handle claims, but on occasion, made use of the services of serving members.

(c) The first named plaintiff obtained from State servants, but, in particular, from serving members of An Garda Siochána, access to confidential information in the possession of various State agencies including, in particular, the Department of Social Welfare and An Garda Siochána, thereby acting both unethically and in breach of the laws relating to privacy and data protection.

(d) The first named plaintiffs, through its claims managers, made use of the services of serving members of An Garda Siochána to obtain introductions to accident victims or their relatives, and access to vehicles and accident sites.

(e) The first named plaintiff, through its claims managers, engaged in other unlawful and unethical practices.

(f) The first named plaintiff issued a statement denying that it had engaged in unlawful and unethical practices, although it knew that this was untrue.

6. Further, or in the alternative and without prejudice to the foregoing, the defendants will, so far as it may be necessary to do so, rely on the provisions of section [22] of the Defamation Act 1961.

7. Further, or in the alternative and without prejudice to the foregoing, the words complained of in both the edition of the 1st April and the edition of 8th April, 2007, were published on an occasion or occasions of qualified privilege.

Particulars

The subject matter of the articles were matters of public interest, namely, (a) the relationship between the insurance industry in general and the first named plaintiff, in particular, on the one hand, and An Garda Siochána and (sic) the other hand, and (b) the practices in which the first named plaintiff allegedly engaged in the pursuit of its business.

The defendants acted responsibly in the research and publication of these articles. The subject matter of the articles was one of public interest. The information on which the articles were based was received from an apparently reliable source. Comment was sought from the plaintiffs, and the articles contain the gist of the plaintiffs' side of the story. The articles were written in a responsible tone.

In addition to the foregoing, the defendants plead that the material published on 8th April, 2007, was largely by way of reportage of current events of public interest, including the public interest in the fact of a Garda investigation, and was both fair and neutral in tone."

Following the delivery of the defence dated 23rd July, 2007, the plaintiffs raised particulars thereon by notice for particulars dated 2nd August, 2007. Replies were furnished dated 14th December, 2007. The plaintiffs were dissatisfied with the replies received and raised further particulars on 19th March, 2008. Replies dated 10th July, 2008, were subsequently furnished. The plaintiffs were again dissatisfied with the replies furnished and consequently issued the motion which ultimately came before me for hearing in which the following reliefs were sought:

"A. An order pursuant to Order 19, rule 28 or rule 27 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court striking out paragraphs 5, 6 and 7 of the defendants' defence.

B. In the alternative, an order pursuant to Order 19, Rule 7 of the Rules of the Superior Courts, compelling the defendants to furnish replies to the plaintiffs' notice for further particulars dated 19th March, 2008."

The motion was grounded upon an affidavit of Declan Black, a partner in the firm of Mason Hayes & Curran, the solicitors for the plaintiffs herein. As he set out in the grounding affidavit, the subsequent notice for particulars does not raise new enquiries of the defendants. It repeats the particulars raised in the original notice for particulars which the plaintiffs

consider to be unanswered. During the course of the hearing, I was furnished with a document which was a composite of both notices for particulars and the replies furnished by the defendants. During the course of the hearing, it was indicated that the plaintiffs no longer pressed the defendants for a reply to question 2 of the notice for particulars which related to paragraph 6 of the defence. It was also indicated that the plaintiffs sought a response to question 3(a) which related to the "public interest" referred to in paragraph 7 of the defence which contained the plea of qualified privilege as set out above, but it was further indicated that the remainder of the particulars sought under the various headings in question 3, were not now being pursued. Finally, it was indicated that the plaintiffs no longer sought a further response to question four.

Accordingly, the issues before the court were confined to (a) the particulars contained in question 1 of the notice for particulars of which there are some 26 sub-headings which relate to the plea of justification and, (b) the identification of the public interest relied on in respect of the plea of qualified privilege.

It is clear from the above that the articles complained of make serious allegations against the plaintiffs over the alleged use of serving members of the Gardaí for the purposes of the business of the plaintiffs and, in particular, the first named plaintiff, in a way that involved "a scandalous subversion of garda independence" and the use of the Garda resources. It is clear that the defendants place considerable reliance on the internal memorandum of October 2001, the authenticity of which is in serious dispute. The defendants have, as I have indicated above, pleaded, *inter alia*, justification as set out above. It is in that context that the issue in relation to particulars now arises.

The complaint of the plaintiffs in respect of the particulars raised and the replies furnished thereto, is that the defendants have made a generalised plea of justification and therefore, in those circumstances, it is contended that the plaintiffs are entitled to have further and better particulars of the plea of justification. The plaintiffs contend that the response "this is a matter for evidence" is not a sufficient reply. It is instructive to note that of the 26 sub-headings in question 1, the response, "this is a matter for evidence" was given in respect of 15 of the particulars raised on both notices for particulars. In the second notice for particulars, the same response was given on five occasions where further particulars were raised, even though there was a full reply furnished originally. (See replies 1(I), 1(M), 1(W), 1(X) and 1(Y)). It has to be borne in mind that the plaintiffs are of the view that the responses to the particulars in the first notice for particulars were inadequate and, consequently, were repeated in the second notice for particulars.

The plaintiffs say that they are entitled to know the case being made against them, namely, what are the unlawful and unethical practices referred to in paragraph 5 of the defence, and to this end, have sought the particulars at issue herein. The specific matters sought by way of particulars include the names of the serving members of the Gardaí referred to in paragraph 5 of the defence; the occasions upon which the services alleged were provided by members of An Garda Siochána, the names of other "State servants"; the instances of the plaintiffs having obtained confidential information; the identity of claims managers of the first named plaintiff involved; the accident victims involved; the accident sites involved; the vehicles involved and the dates of the matters referred to. By way of summary, the plaintiffs contend that they are entitled to know when, with whom and in what circumstances the first named plaintiff, through its claims managers, engaged in the "unlawful and unethical practices" alleged herein.

In the course of the arguments before me, reference was made to O. 19, r. 3 of the Rules of the Superior Courts, which provides as follows:

> "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; but where pleadings have been settled by counsel, they shall be signed by him; and if not so settled, they shall be signed by the solicitor, or by the party, if he sues or defends in person."

The purpose of pleadings, generally, is probably best set out in a passage from the judgment in the case of *Mahon v. Celbridge Spinning Company Ltd*. [1967] I.R. 1, a decision of the Supreme Court in which Fitzgerald J. at p. 3 thereof stated:

> "The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence of the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words, a party should know in advance, in broad outline, the case he will have to meet at the trial."

There is no doubt whatsoever that a party is entitled to know the nature of the case being made against them. However, the role of particulars is not to require a party to furnish detailed particulars of specific aspects of the case. It is sufficient that the issues between the parties should be adequately defined and that the parties should know in broad outline what is going to be said at the trial of the action. In this regard, reference was made to the case of *McGee v. O'Reilly* [1996] 2 I.R. 229, in which *Mahon v. Celbridge Spinning Company Ltd*. [1967] I.R. 1, was followed. The case of *ASI Sugar Ltd. v. Greencore Group plc.,* High Court (Finnegan P.) 11th February, 2003, is also of note, where it was stated by Finnegan P.:

> "The function of pleadings is to define with clarity and precision the issues of fact and law between the parties. Where issues are so defined, each party will have given fair and proper notice to his opponent of the case he has to meet and each party will be enabled to prepare his own case for trial. Discovery can be directed to the issues and the delay and expense thereby incurred, minimised: this is particularly important in a case such as the present where discovery, even with the issues so defined, will be expensive. Further, this will enable the court to be aware of the issues before it and the trial judge will thereby be better enabled to control the hearing and confine the same within the limits of the pleadings. See *McGee v. O'Reilly* [1996] 2 I.R. 229."

The issue in that case arose in the context of a competition case and was whether the plaintiff had adequately replied to a notice for further and better particulars.

Finally, I want to refer briefly to a passage from the case of *McGee v. O'Reilly* [1996] 2 I.R. 229. That was a case in which the plaintiff was claiming damages for medical negligence arising out of treatment afforded to him by the defendants. The statement of claim averred that the first named defendant had called to the plaintiff's home, but had not examined him and had simply advised his parents to continue with existing medication. The defence averred that he had examined the plaintiff and advised that he be brought to hospital. The plaintiff sought detailed particulars of the examination and advice. The defendant refused to answer and a motion to compel replies was brought and refused. In the Supreme Court, the appeal was dismissed and, having followed the judgment in *Mahon v. Celbridge Spinning Company Ltd*. referred to above, Keane C.J. commented as follows at page 234 of the judgment:

> "Thus, so far as this part of the case is concerned, the issues are defined between the parties which will be confined at the trial to the matters relevant to those issues. There is no ground on which it could be suggested that the trial of this action could conclude with the plaintiff having been taken at a disadvantage by the introduction of matters which could not fairly be ascertained from the defence. At the very least, the plaintiff knows in broad outline what is going to be said at the trial in relation to the visit on 22nd October, 1987.
>
> In our system of civil litigation, the case is ultimately decided having regard to the oral evidence adduced at the trial. The machinery of pleadings and particulars, while of critical importance in ensuring that the parties know the case that is being advanced against them, and that matters extraneous to the issues as thus defined will not be introduced at the trial, is not a substitute for the oral evidence of witnesses and their cross-examination before the trial judge."

I think the nature and purpose of particulars is clear from the authorities referred to above and there was no issue between the parties as to the principles of law in relation to the purpose for which particulars may be sought and the circumstances in which orders for particulars may be made.

It is the plaintiffs' contention that the particulars sought herein are required so as to allow them to know which of the first named plaintiff's employees are alleged to have acted corruptly, when, and in what circumstances. They say that in order to prepare fairly for the trial, they need to have details. It is not sufficient for them to rely on general allegations of corruption, but they are required to know what witnesses would be necessary to rebut the plea of justification. In that regard, it is their contention that the particulars in respect of the plea of justification are not sufficient to allow the plaintiff to deal with the matters raised in the plea of justification. They contend that not to provide the particulars sought herein would amount to a trial by ambush.

By way of response, the defendants contend that they have given a broad outline of the case being made in respect of the plea of justification, and that there is no obligation to go beyond that. It is contended that although the defendants had not been expressly asked to name the witnesses that would be called in support of the plea of justification, that was the effect of what had been asked in the notices for particulars. Mr. Kennedy, on behalf of the defendants, referred to the decision in the case of *Cooney v. Browne* [1985] I.R. 185, in which an issue arose as to particulars in relation to a rolled up plea. Henchy J., in the course of the judgment in that case, stated at p. 191 of his judgment:

> "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."

Mr. Kennedy accepted that that was the statement of principle applicable to the facts of this particular case, but that the requirement identified in that case was not as onerous as suggested on behalf of the plaintiffs herein.

There was some discussion in the course of the arguments before me as to the practice prevailing in this jurisdiction as contrasted with that of the United Kingdom in relation to the plea of justification. The most obvious difference between the jurisdictions is that under the Rules applicable in the jurisdiction of England and Wales, it is necessary that a defendant, in pleading justification, must furnish full and detailed particulars of the facts and matters upon which the plea is based. Mr. McDowell S.C. referred to a discussion on this divergence of practice in Cox on *'Defamation Law'* at pp. 149-150, together with the analysis set out therein of the decision in the case of *McDonagh v. Sunday Newspapers t/a The Sunday World* [2005] 4 I.R. 528. Mr. Dowell argued that what is sought herein is not the names of witnesses. This is a case where serious allegations have been made against his clients, but he contends that what has been provided is a "rough" outline of the allegations against the plaintiffs and that it is not sufficient to provide a "rough" outline of the allegations. He contends that the information provided thus far falls far short of the level of particularity required. It is not fair for the plaintiffs to be put in the position of learning for the first time, in the course of the trial, the specific incidents of wrongdoing alleged against them.

I think it is clear from the outline of the arguments I have set out, that the issue I have to consider is whether the defendants have, in fact, provided a broad outline of the case being made in justification against the plaintiffs, or are the plaintiffs attempting, by means of the notices for particulars, to force the defendants to disclose the names of the witnesses who will be giving evidence on their behalf at the trial of the action.

In that context, it seems to me that it would be of assistance to consider some of the other authorities to which I was referred in the course of the arguments. The first of those to which, I think, it would be useful to refer, is the decision in the case of *Doyle v. Independent Newspapers (Ireland) Ltd.* [2001] 4 I.R. 594. In that case, a newspaper article had referred to the plaintiff, a former coach of the Irish rugby team, as having been "ostracised by the decision making core of the team". It was held by the Supreme Court that the High Court judge was wrong, in principle, in requiring a party to furnish in advance to the other party the names of the witnesses he was going to call in relation a specific plea in his defence or in a statement of claim. The particulars sought in that case asked which senior players had lost confidence in the plaintiff and the manner in which the plaintiff was ostracised by the senior players. In the course of his judgment, Keane C.J. at p. 597, said as follows:

> "In the present case, as matters stand, the plaintiff will be informed of the manner in which it is alleged that he was

ostracised or shunned by senior players in the team because that has been so ordered by the High Court and not appealed from, and it must be assumed that the defendants will comply, as they must, with that order. Given that this is a relatively specific allegation that is made in the article, confined to what must, on any view, be a relatively small number of people, I would have thought that the pleading could not be described as so general or imprecise that the plaintiff in this case could not know what case he will have to meet in the trial. The defendants have undertaken the burden of establishing and, of course, the onus of proof will be on them, that the plaintiff was, in truth, shunned or ostracised by senior members of the Irish rugby squad, the decision making core of the Irish rugby squad during the course of his tenure of the position of rugby coach, indeed, confined to two particular seasons stretching, one supposes, over three years. That is what they will have to establish and not merely that, they will have to establish the specific incidents which are being relied upon in support of that statement in the article, because that is what they have been directed to furnish. When those particulars are furnished, as they must be, I would find it difficult to see how it could be said that the pleading was now so general or imprecise, that the plaintiff did not know what case he has to meet at the trial. What will be lacking, of course, undoubtedly, are the actual names of the players concerned.

The cases in which a court will actually order a defendant to say what witnesses he is going to produce at the trial are extremely rare and unusual, and even allowing for the somewhat unusual features of the law of defamation, it does not appear to me that this is a case where a party must be ordered to say precisely what witnesses he is going to call. It should be observed that these would not necessarily be players, members of the squad. If the defendants are, they say they are, going to prove the manner in which the coach was being ostracised by his players, that could be somebody at a restaurant, somebody at a hotel, somebody who happened to be in the same room as him who was not a player himself or herself, but who thought he saw some conduct which would amount to ostracism or shunning of the manager, clearly related to a poor performance by him as the coach.

That is what the evidence may be; obviously, the court does not know and the plaintiff does not know, at this stage, what specific witnesses are going to be produced, but then, that is the nature of adversarial litigation and there is certainly no general principle requiring one party to furnish in advance to the other the names of the witnesses he is going to call in relation to a specific plea in his defence, or in a statement of claim, as the case may be."

Mr. McDowell, in the context of this case, has accepted that he is not entitled to a list of witnesses, but he says that the claims managers and solicitors involved in the alleged practices complained of should be identified.

Reference was also made to the decision of the Supreme Court in the case of Johnston v. Church of Scientology & Ors., (Unreported, 7th November, 2001) in which an issue arose as to an allegation that the defendants had pressurised the plaintiff into paying money to the defendants. Particulars were raised in relation to the form that pressure was alleged to have taken, and in the course of the judgment, Keane C.J. stated at p. 3 of the judgment as follows:

"How the plaintiff responds to that is, of course, a matter for her, but it seems to me reasonable that the plaintiff should be asked to indicate what form that pressure is alleged to have taken, because it is, clearly, at the heart of the plaintiff's case. That, I emphasise, does not necessarily mean that the plaintiff is obliged to give particulars down to the day, the minute or whatever, that a particular phone call was made to her or a particular letter written to her. If you come to paragraph 9 of the statement of claim, you see the precise allegation of pressure being particularised where it says, in particular, representatives of the defendant would telephone the plaintiff regularly at work and at home and have accused her of being selfish and of thinking only of herself. There, the defendants, in my view, know the case that is being made against them in relation to that, and it does not really bring matters particularly further to say that this happened on 1st November, 1990, or on 3rd February, 1991. It is an allegation, of course, of conduct pursued over a particular period of time in the form of telephone calls to her work or to her home.

In the earlier part of the statement of claim where that same phrase is used, exerting great pressure or bringing pressure to bear upon the plaintiff, it is not particularised in that fashion and, in my view, the defendants are entitled to have particulars given as to what is the nature of the pressure in those circumstances alleged to have been brought against the plaintiff. In other respects, I am satisfied that the defendants, in the particulars they have sought, are really seeking matters which really only relate to evidence which will have to be given by the plaintiff at the trial, if she is to make out, in evidence, the pleas she has brought against the defendants."

Mr. Dowell also relied on a decision in a case of *Hickinbotham v. Leach* [1842] 10 MW 362, at p. 511, where Parke B. stated:

"It is a perfectly well established rule in cases of libel or slander, that where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of misconduct imputed to the plaintiff . . . in some of those cases, the statement in the plea was not so specific as it is here, but still this is not specific enough: the plea should have stated the description of the goods, or at least the names of the pawnbrokers with whom they were pledged. As it is, the statement is so general that the plaintiff cannot know with what he is intended to be charged. The defendant is bound to give him information of some specific acts with which he intends to charge him. This plea does not do that, and is therefore bad. With respect to the cases which have been referred to, of actions for not accounting for monies, the reason for the exception in those cases is, that there, the charge is for not accounting for an aggregate sum received; and it held to be sufficient, in order to avoid multiplicity of pleading, to assign a general breach, that the defendant received differs sums of money, which he did not pay over. None of those decisions have any application to cases of libel or slander. The plea is therefore bad, and the judgment must be for the plaintiff."

In reliance on that authority, Mr. Dowell contends that the defendants must set out in summary form the basis of the plea in justification. It is not sufficient to make a generalised plea alleging corruption or unlawful or unethical conduct. There must be some degree of particularity in order to enable the plaintiffs to deal with the plea.

I was referred to the decision in *Cooney v. Browne* [1985] I.R. 185, by Mr. Kennedy, on behalf of the defendants. The case concerned a "rolled up plea", but the purpose of particulars was considered in that case, and a passage from the judgment of Henchy J. at p. 191 of the judgment is of some assistance, where he stated:

> "The matter, therefore, falls to be decided on principle. The determining considerations seem to be these. Where particulars are sought for the purpose of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason: see Order 19, rule 6(3). Where the particulars are sought for the purpose of the hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing. 'The object of particulars is to enable the parties asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise': *Spedding v. Fitzpatrick* [1888] 38 Ch. Div. 410 at p. 413, thus, were the pleading in question 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."

Mr. Kennedy contended that the principle to be derived from that judgment is that the plaintiffs are entitled to such particulars as will inform them of the range of evidence which they will have to deal with at the trial. However, he contends that the effect of what he has been asked to do by reason of the form of particulars in this case is to supply the names of witnesses, something which is not permitted as it clear from the decision in the case of *Doyle v. Independent Newspapers (Ireland) Ltd*.

I was also referred to the decision in *McDonagh v. Sunday Newspapers* [2005] 4 I.R. 528. That decision was analysed at length in *'Defamation Law'* by Neville Cox, referred to above. It was a libel action which concerned an article in which the plaintiff was described as criminal engaged in drug dealing and money lending. The defence pleaded justification. The application before the High Court concerned the issue of discovery. Although justification was pleaded, no particulars of justification had been set out in the defence or in the affidavit grounding the application for discovery. Mr. McDowell, on behalf of the plaintiffs, acknowledged that that decision made it clear that although O. 19, r. 3 of the Rules of the Superior Courts required a defendant to plead in summary form the material facts upon which a plea was based, the degree of particularisation was not as extensive as provided for in the law of England and Wales.

Macken J. noted in that case, at p. 541:

> "On the question whether the defendant is obliged to particularise a plea of justification in the defence itself, this is not a requirement under the rules of procedure in this jurisdiction, if what is being considered are details or particulars of the type usually sought pursuant to a request for the same, and if one is speaking of a specific rule requiring particulars in the sense in which this word is used in the Rules of the Superior Courts, or in the case law. It is undoubtedly the case that it would be helpful if such appeal were, in fact, particularised in a defence, but, as a matter of law, I do not accept that this is required . . . however, that does not resolve the matter, either in relation to the pleadings or in relation to the question of the entitlement to discovery where the defence, as here, consists of an admission of the meanings attributable to the words spoken and a simple plea of justification . . . while it is undoubtedly true that particulars, such as are required in the United Kingdom, and such as may have been required under the old law in Ireland, are not now required in this jurisdiction to be included in a defence in a libel action, nevertheless, material facts to support the plea of justification are required . . .
>
> I am satisfied that counsel would not put a plea of justification other than in accordance with their obligations in that regard. However, here, the plea of justification is in the most general terms, being pleaded simpliciter, and in respect of all of the meanings contended for by the plaintiff. In that regard, the law, well prior to the change in statutory or procedural practices in the United Kingdom, made it clear that such a plea of justification, simpliciter, is a mere repetition of a libel, and that in order to secure discovery, such a plea must, in any event, be particularised."

Mr. Kennedy contrasts the facts of that case with the present case and points out that unlike the *McDonagh* case, the defendants herein have pleaded the material facts relied on in support of the plea of justification.

Macken J. went on to say in the course of her judgment at p. 550:

> "In the earlier case law, what appears to have been required before discovery was granted was actual evidence of the justification plea. 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 the 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, if material facts have not been pleaded is available to the court in the affidavit grounding a discovery application.
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> Provided, therefore, that a defendant in such a case can "particularise" his plea of justification, which, in the present case, concerns several separate and unrelated types of crime and the comments thereon by means of such material facts or in the form of details or particulars averred to on affidavit, it is not necessary that actual evidence be disclosed to the court."

Thus, by way of contrast with that case, Mr. Kennedy again asserts that the defendants have pleaded the material facts in paragraph 5 of the defence in relation to the plea of justification.

Reference was also made in the course of Mr. Kennedy's submissions to the decision in the case of *Cooper Flynn v. RTE* [2000] 3 I.R. 344. The plaintiff, in that case, had sued RTE and a journalist for libel in respect of a series of broadcasts

which allege that she, the plaintiff, had induced the third named defendant and others to participate in a scheme aimed at evading tax. The first and second named defendants had obtained non-party discovery relating to the scheme, but with the names of the participants in the scheme excised. They now sought the disclosure of the names of those involved. Inspection of the discovered documents had taken place, but the documents were made available for inspection in a redacted form with the names and addresses of the customers involved expunged. The application before the court sought disclosure of the documentation in an unredacted form. Although the application in that case arose in the context of the discovery process, some of the issues that arose in that case are of relevance to the matters at issue in the present case.

In the course of his judgment in that case Kelly J. made a number of observations which have some relevance to the issues arising in the case before me. It is important to bear in mind, having regard to the facts of that case, that the motion to obtain disclosure of the names and addresses of the customers concerned was brought against a non-party to the proceedings, namely, National Irish Bank, the plaintiff's former employer, and this raised the important issue of a bank's duty of confidentiality to its customers. The first point noted by Kelly J. in the course of his judgment at p. 347, was that although the defence was the subject of a notice for particulars, "no application has ever been made to the court with a view to requiring the first and second defendants to identify persons, other than the third defendant to whom such representations were allegedly made by the plaintiff".

As I have already mentioned, the issue in that case arose in the context of inspection following the making of discovery. Order 31, rule 18(2) of the Rules of the Superior Courts, deals with applications for orders for inspection and provides:

> "An order shall not be made under this rule if, and so far as the court shall be of opinion that it is not necessary, either for disposing fairly of the cause or matter or for saving costs."

Much of the consideration in that case, therefore, turned on the question as to whether the inspection in the form sought, that is, with disclosure of the names and addresses, was "necessary for disposing fairly of the cause or matter".

A number of comments made by Kelly J. in the course of his judgment in *Cooper Flynn v. RTE*, are of assistance. At p. 355, he commented:

> ". . . I have come to the conclusion that an inspection of these customers' files in an unredacted form which will disclose their identity to the representatives of the first and second defendants, will confer a litigious advantage upon them. It will make known to them the names of persons who, on the basis of the testimony put before me, may well be able to give evidence in their favour upon their plea of justification. To deny them this entitlement would not be conducive to the fair disposition of this action. It must be borne in mind that the plaintiff has full knowledge of both the identity and the commercial affairs of her clients, whereas the first and second defendants have only a very limited knowledge of the identity of such persons."

He continued at p. 355:

> "In the present case, there is a plea of justification in respect of which particulars, apparently satisfactory to the plaintiff (no application seeking better particulars having been brought before the court) have been provided. There is no suggestion that counsel, in signing the plea of justification, behaved other than in accordance with their obligations in this regard, but that does not mean that the first and second defendants are not entitled to seek support for their case from documents revealed in the course of discovery."

In this regard, the views of Neil L.J. in *McDonald's Corporation v. Steel* [1995] 3 All E.R. 615 at p. 621 are relevant:

> 'It is true that a pleader must not put a plea of justification (or, indeed, a plea of fraud) on the record, likely, 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 my view, this is one such case."

Finally, Kelly J. commented:

> "The making of an order of the type of which I propose in this case, does not appear to me to be unfair or oppressive insofar as the plaintiff's rights are concerned. There is, in my view, no substance to the contention that this disclosure will give rise to what her counsel described as an 'ambush'. The present position is that she knows the identities of these customers and their dealings with her employer. The defendants have very little information pertaining to the identity of these clients. As the defendants have pleaded justification, they will have to prove it. The likelihood is that they will have to give evidence first in the trial, and all of the witnesses whom they call will be open to cross-examination by the plaintiff. None of the bank's customers whose identities are divulged to the defendants and who are called in support of the plea of justification will come as any surprise to the plaintiff. In that regard, she is in a happier position than many plaintiffs who may have to contend with surprise testimony which may be called against them from witnesses of whom they have never heard. I therefore do not see that the disclosure of this information imperils the plaintiff's entitlement to a fair trial. The converse would, however, be the case - a failure to allow inspection of the type sought would imperil the defendant's entitlement. To put it another way, a refusal of this order would be to the litigious disadvantage of the first and second defendants, and to the considerable advantage of the plaintiff in a manner that would be unfair."

There are some areas of distinction between the facts of the present case and the facts of *Cooper Flynn v. RTE*. As I have mentioned already, the first and second named defendants in that case had pleaded justification and were the parties looking for the names and addresses of potential witnesses with a view to interviewing them. In that case, the

potential witnesses were the former clients of the plaintiff and would have been known to her. Kelly J. therefore rejected the contention that she would have faced trial by "ambush". However, as Kelly J. noted, the refusal of the order would have put the first and second named defendants in that case at a considerable disadvantage.

Having referred at length to the authorities opened to me in the course of argument, it seems that certain principles can be derived from those authorities. It goes without saying that a party is entitled to know the case being made against them. If necessary, particulars may be ordered to clarify the issues or to prevent the party from being taken by surprise at the trial of the action. However, a party is only entitled to know the broad outline of the case that he/she will have to meet. A party is not entitled to know the evidence that will be given against them in advance of the hearing. Further, it is not usual to order the names and addresses of witnesses to be furnished in advance of the hearing of an action.

The absence of particulars in relation to a plea of justification may result in an order to furnish such particulars, although the level of specificity is not as great in this jurisdiction as is required in the jurisdiction of England and Wales. The Rules in England and Wales do require a party pleading justification to set out the particulars of justification in their defence. The Rules of the Superior Courts do not impose a similar requirement on the party pleading justification in this jurisdiction, although it has been noted in a number of decisions that a party pleading justification should not do so lightly or without consideration of the evidence available to support such a plea.

Finally, the names and addresses of potential witnesses may be ordered in circumstances where not to do so would be to the litigious disadvantage to the party pleading justification and to the considerable advantage of a plaintiff in a manner that would be unfair. The overriding principle in deciding whether to order replies to particulars which would have the effect of disclosing the names and addresses of potential witnesses, should be the need to ensure a fair trial for both parties to the litigation.

It is now necessary to consider those principles in the light of the facts of this case. The allegations complained of by the plaintiffs centre around the conduct of the insurance business of the first named plaintiff. The articles complained of, as noted previously, allege, *inter alia*, that the first named plaintiff offered solicitors sweeteners to settle claimants' cases quickly; recruited serving Gardaí to investigate claims and claimants; the first named plaintiff adopted a strategy whereby serving members of the Gardaí were instructed to approach the plaintiffs' solicitors to offer them a bonus to recommend a reduced settlement to their clients. It is in that context that the plaintiffs contend that they could be the subject of ambush at trial as they do not know the names of the claims managers who are alleged to have conducted the affairs of the first named plaintiff in the manner alleged; they do not know the names of the serving Gardaí alleged to have been employed by them, and they do not know the names of the claimants who are dealt with in the manner alleged. Thus, they seek the particulars at issue herein.

Given the plea of justification in this case, there is a strong possibility that the defendants will be required to give evidence first. I have no doubt that the memorandum previously referred to will be at the heart of the case being made by the defendants in justification. The plaintiffs have put in issue the genuineness of that document. The defendants rely on it as part of their plea of justification. They do so in circumstances where they maintain that the memorandum was written by the fourth named Plaintiff and purported to set out the strategy of the first named Plaintiff in reducing costs by settling claims as quickly as possible. If that document is found not to be genuine, it is difficult to see how the defendants' plea of justification will be sustained, given the reliance placed on it by the defendants. The plaintiffs herein have been furnished with particulars of the plea of justification made herein as set out by the defendants in their defence. I am satisfied that they have been given a broad outline of the material facts relied on by the defendants. That is no more nor less than they are entitled to having regard to the principles outlined above. Reading through the articles complained of herein and the quotations from the memorandum, it is clear that the allegations in relation to the use of serving members of the Gardaí and the allegations in relation to unlawful and unethical practices are derived from the contents of the memorandum. I have little doubt that the defendants would find it extremely difficult to identify the names and addresses of the serving members of the Gardaí alleged to have been employed by the first named plaintiff. I am also of the view that it would be difficult for the defendants to identify particular claims managers of the first named plaintiff involved in such activities. Equally, I think it would be very difficult for the defendants to ascertain the means of claimants who may have been affected by such alleged practices. To do so, the defendants would have to have full access to the first named plaintiff's files and records. On the other hand, it seems to me that it would be a relatively straightforward matter for the first named plaintiff to establish if it had, in fact, employed serving members of the Gardaí for the purposes outlined. It should also be relatively straightforward for the first named plaintiff to ascertain from its own enquiries within its own business whether or not it made use of information improperly obtained on its behalf. I find it very difficult to understand how the plaintiffs could be at a disadvantage compared to the defendants herein by reason of the absence of the names and addresses of the witnesses sought in the particulars herein.

I am certainly not of the view that without the particulars sought herein, the plaintiffs will be subject to trial by ambush. The plaintiffs and, in particular, the first named plaintiff, must be aware of the manner in which it conducted its business. It knows the identity of its claims managers and I have no doubt it is in a position to establish whether or not it employed serving members of the Gardaí to investigate claims and claimants. They have been furnished with a broad outline of the case being made against them. As far as I can see, the only parties who will be at a significant litigious disadvantage in this case would be the defendants if required to furnish the particulars sought herein as they could not reasonably be expected to provide the particulars without access to the first named plaintiff's files and records. In the circumstances, I am not disposed to order the particulars sought herein in question 1 of the notice for particulars. I am satisfied that the absence of the particulars at issue herein could not give rise to an unfair trial. Finally, I should note that the particulars sought at paragraph 1A are no longer required.

The only other outstanding issue relates to question 3A. Question 3A relates to the plea of qualified privilege and the specific question is in the following terms:

> "Please furnish full and detailed particulars of the 'public interest' referred to in the articles published by the defendant.
>
> Answer: The public interest is already referred to and particularised in the particulars to paragraph 7 of the defence."

As far as this response is concerned, I am satisfied that the defendants have identified with sufficient particularity the nature of the public interest they rely on. Accordingly, I do not think it is necessary to furnish any further reply to that question. In the circumstances, I am satisfied that I should not make an order for the reliefs sought herein.