

BETWEEN

SEAN LYNCH, RONAN LYNCH AND THE SWAN BAR LIMITED T/A THE SWAN BAR

PLAINTIFFS

AND
THE IRISH TIMES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 22nd day of October, 2018.

The application

1. This is the defendant's application for an order for discovery pursuant to the provisions of O. 31 of the Rules of the Superior Courts. The defendant seeks an order requiring the plaintiffs to make discovery of notes, correspondence, memoranda, records and accounts evidencing a turnover and/or business of the third named plaintiff, for a period of three years prior to September, 2016, when a publication alleged to be defamatory took place, and for a further period thereafter up to the date of the motion. The application is resisted by the plaintiffs.

Underlying proceedings

2. This is an action for defamation in which the plaintiffs and each of them seek damages against the defendant together with further and other ancillary reliefs including an order pursuant to s. 30 of the Defamation Act 2009 (*"the Act of 2009"*) in respect of an article which appeared in the defendant's nationally circulating newspaper on 7th September, 2016. In the statement of claim it is pleaded that in the commercial property section of that paper, an article appeared under the heading *"Former Swan Bar at Aungier Street corner for €700,000"*. It is pleaded that the effect of the article and the accompanying photograph was to convey the impression to the reader that the business was run down and closed down, and that this was the reason for the sale. It is also pleaded that the words and the photograph were meant and understood to mean that the Swan Bar premises were shabby and/or dilapidated, had broken or boarded up windows, and that alcohol could not be legally sold or consumed on those premises as the appropriate intoxicating liquor licence was no longer attached and therefore the plaintiffs were trading illegally in serving alcohol to customers.

3. The first and second named plaintiffs own the Swan Bar and the third named plaintiff holds the intoxicating liquor licence for the premises. It also conducts and operates the business thereon. The first and second named plaintiffs own the share capital and are the directors of the third named plaintiff company.

4. The article, as outlined in the pleadings, states as follows:-

"FORMER SWAN BAR AT AUNGIER STREET CORNER FOR €700,000

Dublin City Council is to seek a buyer for the rundown former Swan bar at Aungier Street and Digges Lane Upper in Dublin 2.

Lisney is seeking offers in excess of €700,000 for the prominently located building which extends to 350 sq m (3,767 sq ft) and is need of major refurbishment.

Ross Shorten of Lisney, who is handling the sale, said the council wanted to see the high profile building brought back to life 'with a vibrant proposal which will contribute positively to the streetscape and public realm of the Camden District.'

The council is to offer developers the opportunity to purchase and refurbish the block under licence subject to planning permission. The Swan's seven-day licence is no longer attached to the premises."

It is pleaded that alongside and above the words, the defendant published a photograph of a shabby, dilapidated premises which was not owned by the plaintiffs.

5. The plaintiffs plead that the words and the photograph *"have injured the personal and business reputations of the Plaintiffs (and each of them) in the eyes of reasonable members of society"*. No special damages are claimed.

6. In its defence of 31st October, 2017, while the defendant admits the publication of the article, it pleads that a mistake was made. It is denied that the words were published falsely and maliciously or that the words and photograph have injured the personal and/or business reputations of the plaintiffs. Further, in addition to denying that reasonable members of society could in any way associate or identify the plaintiffs with the words or the photograph published, it is positively pleaded that the Swan Bar continued to trade and operate, *"a matter known again to reasonable members of society acquainted with the Plaintiffs, and further evidence of the mistake made by the Defendant"*.

7. Notice of trial was served on 10th April, 2018.

8. By letter of 9th May, 2018, the defendant sought discovery of the documents which are the subject matter of this application. The notice of motion issued on 14th June, 2018 and is grounded on the affidavit of Mr. Harry Fehily, a partner in the firm of Holmes O'Malley Sexton Solicitors who represent the interests of the defendant in these proceedings.

9. The reason outlined in the letter of 9th May, 2018 for discovery is that such documentation is relevant and necessary in circumstances where the company seeks damages as a consequence of the article, and:-

"Hence, to ascertain what, if any, financial damage was suffered by the Third named Plaintiff, sight of the said financial records is required and whereby same will lead to a saving of time, cost and witness testimony at the hearing of the action."

At the time of the swearing of the affidavit by Mr. Fehily on 12th June, 2018, the letter had not been responded to.

Submissions

10. When the matter came before the Court, the Court invited the parties to submit written observations on the relevant legal

principles.

11. In the submissions, reference is made to a reply of 19th July, 2018, in which the plaintiffs asserted that they were seeking general damages for damage to reputation and that no claim was being made in respect of special damages. Therefore, it is stated that the category of discovery sought is neither relevant nor necessary for the determination of the issues.

12. Mr. Walker B.L. who represents the interests of the defendant, relies on the provisions of the Act of 2009. Section 12 provides:-

"The provisions of this Act apply to a body corporate as they apply to a natural person, and a body corporate may bring a defamation action under this Act in respect of a statement concerning it that it claims is defamatory whether or not it has incurred or is likely to incur financial loss as a result of the publication of that statement."

13. Counsel also relies on a number of authorities, including the decision of Macken J. in *McDonagh v. Sunday Newspapers Ltd* [2005] 4 I.R. 528, where she stated at p. 540:-

"...the real question remains at all times, as is clear from the judgment of Fennelly J. in Ryanair p.l.c. v. Air Rianta c.p.t [2003] 4 I.R. 264, one of relevance. I agree with counsel for the defendant's submission that an analysis of the jurisprudence makes clear that the long established principle that discovery is permitted and will be granted, in respect of such documents as will or may advance the plea or the case of one party and/or which will or may undermine the plea or the case of the other party, or which may lead to further inquiry in relation to the same, is fully applicable in the present case."

Further, Macken J. stated that it was clear from the jurisprudence concerning the Rules of the Superior Courts relating to discovery, that an applicant seeking discovery should link the request for discovery, or the extent of the discovery sought, with the particular pleas in the case and must also indicate in what regard discovery is necessary. Those reasons must be sufficiently closely related to the complaints and to the pleas in the action as to make it obvious why a particular category of document is sought.

14. Mr. Walker B.L. argues that discovery is both relevant and necessary in this case because the plaintiff is making a claim that its business reputation has been injured. He relies on an extract from Cox & McCullough, *Defamation Law and Practice*, (Clarus Press, 2014) at para 14-109 as follows:-

"As in any case, the question most likely to arise is that of what precisely has been put in issue in the pleadings. A plaintiff claiming damages for loss of business, even without claiming special damages, may have to make discovery of business records."

It is stated that the authors cite Dawson v. Irish Brokers Association [1997] IEHC 217 as authority for this proposition.

15. Counsel also submits on behalf of the defendant that the documents sought are those which, in any event, the third named defendant is obliged to keep, namely the annual accounts. The making of an order for discovery in the terms sought, therefore, can neither be oppressive nor disproportionate. It is also accepted that the course of action of the third named plaintiff is maintainable without the need to prove special damage.

16. Ms. Byrne B.L., who represents the interests of the plaintiffs, emphasises the stated reason for the defendant seeking discovery from the third named plaintiff, being "to ascertain" what, if any, financial damage was suffered. Prior to the request for discovery, no particulars were raised in relation to the losses being claimed. Further, no claim for financial loss has been pleaded and it is confirmed in the submissions by and on behalf of the plaintiffs that no such claim has been made by the third named plaintiff. It has also been confirmed that the plaintiffs seek general damages only for the defamation.

17. Ms. Byrne B.L. makes the following submissions:-

(i) As a general principle, it is to be presumed that damage to the good name and reputation of a plaintiff flows from the publication of a defamatory statement.

(ii) In making an award of general damages in a defamation action, the Act of 2009 requires that regard shall be had to all of the circumstances of the case including:-

- the nature and gravity of the allegation;
- the means of publication;
- the extent to which the defamatory statement was circulated;
- the offering or making of an apology or correction;
- the making of an offer of amends under s. 22;
- the importance to the plaintiff of his or her reputation in the eyes of particular recipients;
- the extent to which the plaintiff caused or contributed to or acquiesced in the publication; and
- the evidence given concerning the reputation of the plaintiff.

It is also pointed out that under s. 31(7) of the Act of 2009, the court may make an award of damages, referred to in that section as special damages. Section 31(7) provides as follows:-

"(7) The court in a defamation action may make an award of damages (in this section referred to as 'special damages') to the plaintiff in respect of financial loss suffered by him or her as a result of the injury to his or her reputation caused by the publication of the defamatory statement in respect of which the action was brought."

18. It is argued that that because financial loss is not being claimed, it is neither relevant nor necessary for the defendant to seek

the documents in question. It is clear from the statement of claim that the plaintiffs are claiming general damages only.

19. Ms. Byrne B.L. also submits that *Dawson* is not of assistance for a number of reasons. First, the case predated the coming into effect of the discovery rules in 1999 which prohibited the making of a general order for discovery. Second, the request for discovery in that case was made in circumstances where the plaintiff had specifically claimed a loss of income and diminution of turnover due to the loss of clients, and in answer to the judge in that case, the plaintiff, a lay litigant, claimed that resumption of the family business was no longer feasible. Third, it is argued that *dicta* of Holroyd Pearce L.J. in *Lewis v. Daily Telegraph Ltd* [1963] 1 Q.B. 340, is apposite. He stated at p. 376:-

"...even though the plaintiff pleads no special damage, he may rely on a general loss of business if the words in their very nature intended or reasonably likely to produce a general loss of business ... That is a reasonable way of dealing with some general loss from a libel which can reasonably be inferred and cannot be proved. Nevertheless, if large sums are to be attributed to loss of business from a libel, it is plainly desirable that they should be pleaded, particularised, and so far as possible supported by evidence."

Thus, Ms. Byrne B.L. submits that *Dawson* distinguishes between circumstances where a claim for general damages is made from presumed financial loss and those where a substantial or quantifiable financial loss has been suffered. This, she submits, explains why the authors Cox and McCullough employ the word "may" in the paragraph referred to above. It is clear, however, from counsel's submission that the plaintiffs may seek to adduce evidence of impact on the business reputation of the third named plaintiff, for example, by maintaining that the turnover may have been bigger, or that there were certain customers who would not visit the premises because what they had seen in the defendant's newspaper.

20. Reliance is also placed on *Calvet v. Tomkies* [1963] 1 W.L.R. 1397, where the English Court of Appeal drew a distinction between potential loss of earnings and a loss. An actress alleged she had been defamed in an article. The Court of Appeal refused an application for a discovery of her financial records. The court considered it significant that there was no plea of special damage and the claim was simply an ordinary plea of general damage. In delivering judgment, Lord Denning M.R. noted that the Defamation Act 1952 provided at s. 3:-

"It shall not be necessary to allege or prove special damage if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him."

It was therein pleaded that the article was calculated to cause pecuniary damage to the plaintiff in that the publication would prevent her obtaining employment as a film actress. It was agreed by the parties that such was not an allegation of special damage, rather an allegation of general damage comparable to an allegation of general damage without any plea of special damage.

21. Lord Denning M.R. stated that the argument entirely depended on what was relevant on the pleadings, and if special damages had been claimed in the form of actual earnings, such would have been an allegation of which particulars would have been required to be given and correspondingly discovery would also be required to be given in due course. The court noted that it was open to a plaintiff, if he so wished, to allege special damage. On an analysis of the pleadings, there was no allegation of special damages, nor was there any allegation of specific loss of earnings or of income or "indeed of any general loss of business such as to call for particulars or discovery". Lord Denning M.R. concluded that the judge was correct in not ordering the plaintiff to produce various accounts.

22. Lord Denning M.R. also observed that the plaintiff had taken what he described as advantage of "this new Act" so as to avoid pleading or proving special damage, observing that s. 3 of the Act gave the benefit to a plaintiff in dictating that it was not necessary to plead or prove special damage if the words were calculated to cause pecuniary damage. Thus, he stated:-

"Having taken advantage of the Act in that way, it seems to me that she is saddled also with the consequences of it. She must be confined to the allegation that the words are calculated to cause pecuniary damage. She can ask the jury to say that the words are calculated to cause pecuniary damage but she cannot introduce by a side-wind evidence of special damage without pleading it. She cannot, for instance, give evidence of actual loss or ask the jury to give her damages for the engagements she has lost."

23. It appeared to Russell L.J. that under both libel and injurious falsehood heads of claim, the fact that the plaintiff was a film actress was relevant, both to the quantum of damages as well as to the cause of action:-

"This relevance exists because of a potential loss of earnings. But if evidence of actual loss of earnings or decline in business, even without any figures mentioned, is to be put forward in a case such as this, as at present advised, I for my part am inclined to think that it should be pleaded with consequential discovery. Beyond that rather general observation, I agree that it would be quite wrong to attempt to define what questions may or may not be asked or answered at the further trial."

Later, during an exchange with counsel, he stated "I did not make myself clear. I was drawing a distinction between a potential loss of earnings and an actual loss."

Decision

24. It appears to me that the reason why Moriarty J. ordered discovery in *Dawson v. Irish Brokers Association* is stated in his judgment as follows:-

"I am satisfied that each of the three motions brought should be acceded to. However the components of damages may be designated, the Plaintiffs clearly seek a potentially immensely high award and propose to stress to the jury the number of clients lost by them and the comparative downturn in income and turnover experienced by them in consequence of the libel. It would, in my opinion, be unfair and unsatisfactory to expect the Defendants to meet this claim without having some realistic intimation of the scope and scale of the claim it must meet."

25. On the pleadings in this case as they stand, no claim for loss of earnings or business downturn has been specifically pleaded in a quantified or quantifiable amount, unlike in *Dawson*, where the plaintiffs sought to introduce evidence of the number of clients lost and the comparative downturn in income. Therefore, it is not surprising that an order for discovery was made.

26. It is also clear that a company can be defamed and suffer damage to its general reputation. In *Crofter Properties Ltd. v. Genport Ltd.* (No. 2) [2005] 4 I.R. 28, Denham J. observed at p. 33:-

"As to the lack of evidence of actual damage suffered, this is not fatal to the claim for general damages. The trial judge identified negative effects, as quoted above. I am satisfied that the trial judge was entitled to infer, for example, a negative impact on the trade of the company from the facts so found, and an injury to the reputation of the company."

The quote to which she was referring was that of McCracken J. in the High Court where he stated (*Crofter Properties Ltd. v. Genport Ltd.* [2002] 4 I.R. 73, at p. 95):-

"It must be remembered that the defendant is a company, and a company of itself is not capable of having feelings which can be injured by false allegations. However, a company does have a reputation, and that reputation can be injured, and I believe I am certainly entitled to infer in the circumstances of this case that there probably was some injury to the reputation of the company, and some loss of efficiency of its staff by reason of these allegations."

27. On an application for discovery under O. 31, r. 12, the court must be satisfied that the documents are relevant to an issue in the case and that discovery is necessary to dispose of those issues or the cause of action (or for the saving of costs). As Morris J. stated in *McKenna v. Best Travel Ltd.* [1995] 1 I.R. 577 at p. 580:-

"...it is only documents which would support or defeat an issue that arises in the existing action which are required to be discovered or should be made the subject matter of an order for discovery. Unless the documents in question enable the plaintiff to advance her case or damage the defendants' case, these documents are not discoverable."

28. It seems to me on the basis of the pleadings as they stand, and on the law relating to discovery in defamation actions as heretofore developed, that the defendant is not entitled to discovery of documents on an issue of loss which is neither pleaded nor particularised.

29. In this case the allegations of the plaintiffs are in the barest form. The most general allegation of injury to business reputation of the company has been made. No particulars have been raised but it seems that the defendant is concerned that it will be at a litigious disadvantage at hearing should such bare allegation of loss or reputation be substantiated in a real and particular way. It is also clear from Ms. Byrne B.L.'s submission, as referred to at para. 19 above, that the plaintiff may seek to adduce evidence of impact on the business reputation of the third named plaintiff.

30. Whether and to what extent particulars might be raised or ordered by the court on such a matter is not for consideration on this application.

31. Further, Mr. Walker B.L. has made it clear that he is only seeking such documents as the third named defendant is obliged to keep. To what extent such documents might be available on a search of the Companies Registration Office is also not clear. If these documents are readily available on such a search, then the necessity for discovery may not arise. As this was not canvassed in court or at the hearing of the motion, I make no determination thereon.

32. Under O. 31, r. 12(2)(a):-

"On the hearing of such application the Court may:

(a) either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter..."

33. Given the barest of allegations made by the plaintiffs to which the defendant has not, before the bringing of this motion, sought any particulars, and in the light of the submissions by the parties, in the exercise of the Court's discretion under O. 31, r. 12(2)(a), and in the interests of justice, I propose to adjourn this motion to allow for the taking of such further steps as the parties might wish to clarify the extent of the claim being made; and thereafter to re-enter this motion if necessary.