Neutral Citation [2016] IEHC 719

THE HIGH COURT

[2015] No. 8265 P

BETWEEN

DENIS O'BRIEN

PLAINTIFF

AND

RED FLAG CONSULTING LIMITED, KARL BROPHY, SEAMUS CONBOY, GAVIN O'REILLY, BRÍD MURPHY AND KEVIN HINEY

DEFENDANTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 13th of December, 2016.

Introduction

1. This is the plaintiff's application for discovery in proceedings alleging conspiracy, defamation and "causing loss by unlawful means." The facts of the case relate to the production of a dossier containing original documents and republished press articles concerning the plaintiff and his business activities compiled by the defendants on behalf of an unnamed person or entity who is said to be a client of the first named defendant.

The Pleadings

2. The statement of claim was delivered on the 4th December, 2015. At para. 8 it is pleaded:-

> "On dates unknown to the plaintiff, but which he believes were between 9 October 2014 and 9 October 2015, the Defendants conspired and combined together and with at least one other person whose name is presently unknown to the Plaintiff but whom the Defendants describe as their 'client', wrongfully and with the sole or predominant intention of injuring and/or causing loss to the Plaintiff."

The plaintiff's claim for defamation is pleaded in the following terms at para. 12:-

> "Further or in the alternative and entirely without prejudice to the foregoing the Defendants and their unnamed client have published or caused to be published and disseminated of and concerning the Plaintiff the statements appearing in Schedule 2..."

It is then pleaded that the statements had the meaning and/or innuendo alleged by the plaintiff and that he has suffered reputational damage as a result. The tort of unlawful means conspiracy is pleaded at para. 16:-

> "The publication by the Defendants and their client of the statements particularised in Schedule 2 hereto, in addition to amounting to the independent tort of defamation, amounts also to wrongful actions on the part of the Defendants and their client with intent to injure the Plaintiff by unlawful means and thereby also amounts to the tort of conspiracy."

3. A defence was delivered on the 1st March, 2016. At para 3, the defendants deny the tort of conspiracy:-

> "It is denied that the Defendants or any of them conspired or combined, whether with themselves and/or together with one or more other persons (whether clients of the Defendants or otherwise) wrongfully or with the sole or predominant intention..."

The defendants admit producing the Dossier but do not admit publication; it is pleaded that the Dossier was not compiled, pursuant to or in furtherance of any conspiracy against the plaintiff and it is pleaded that, with the exception of a draft speech, the Dossier was produced in the ordinary course of the defendant's business and pursuant to its retainer by a client. It is denied that the Dossier was directed towards the plaintiff and his commercial and/or business interests. It is denied that the Dossier had the sole or predominant object of being damaging to the plaintiff or his commercial and/or business interests. The defendants raise the defence of qualified privilege under the Defamation Act 2009.

Categories of discovery sought

4. By letter dated 21st March, 2016, the plaintiff requested voluntary discovery of nine categories of documents. The categories sought are set out in the affidavit of Mr. Diarmuid O'Comhain, solicitor for the plaintiff, in the following terms:-

> "Category 1(A)
>
> All documents that evidence, record or relate to the retainer of the Defendants by a third party client in relation to the matters in issue in these proceedings including in particular, but without prejudice to the generality of the foregoing, all documents which:
>
> (i) identify the client;
>
> (ii) identify the instruction(s) given by the client to the Defendants;
>
> (iii) identify the terms of the retainer ultimately agreed upon between the client and the Defendants; and
>
> (iv) identify the date of the retainer and the duration of same.
>
> Category 1(B)
>
> All documents that evidence, record or relate to the drafting, authoring or editing of the following documents contained in the 'Dossier' including documents which relate to the objective or purpose of their preparation and which identify those

who contributed to the preparation thereof:

(i) 'Who is Denis O'Brien?';

(ii) 'Denis O'Brien IPO Experience'; and

(iii) 'The Moriarty Tribunal Explainer'.

Category 1(C)

All documents that evidence, record or relate to the compilation and/or editing of the other documents contained in the 'Dossier' other than those referred to at Category B above and the drafts of the Colm Keaveney speech, including documents which relate to the objective or purpose of their compilation and/or editing and which identify those who are responsible for same.

Category 1(D)

All documents that evidence, record or relate to the circumstances in which the Defendants, or any of them, were engaged in relation to the making of suggestions in relation to the draft speech of Colm Keaveney TD including in particular, but without prejudice to the generality of the foregoing, all document which:

(i) identify the date upon which the Defendants were so engaged;

(ii) identify the place the Defendants were so engaged;

(iii) identify the terms of the engagement;

(iv) identify what work the Defendants did on foot thereof;

(v) identify which of the Defendants made suggestions in relation to the draft speech;

(vi) identify the purpose or motivation of the Defendants in so assisting Deputy Keaveney; and

(vii) identify the circumstances in which the draft of the speech came to be part of the Dosser."

Categories 1 (A) – (D)

5. The defendants agreed to make voluntary discovery of documents in categories 1 (A) – (D) save for anything that reveals the identity of their client or anything that would tend to identify their client. The only issue between the parties in respect of the documents sought under categories A – D is the defendants' refusal to identify the client on whose instruction the Dossier was compiled.

6. Three arguments are advanced on behalf of the defendants in support of their refusal to identify the client. Firstly, it is submitted that this court has already refused to order disclosure of the client's identity in its judgment of the 21st December, 2015, on the basis that the plaintiff had failed to establish wrongdoing on the part of the client. Secondly, it is submitted that the identity of the client is not relevant to the pleadings in this case as the plaintiff's case is based on the nature of the material contained in the Dossier which is already available to the plaintiff and the defendant has admitted compiling the Dossier. Thirdly, it is submitted that the greater harm lies in revealing the client's identity which would entail a breach of the client's confidentiality and a risk of irreparable harm to the business of the defendants in circumstances where it is submitted that the plaintiff is not hindered in prosecuting his claim in the absence of the client's identity.

7. The defendants have argued that the plaintiff is not entitled to discovery which would reveal the identity of the defendants' client because of the decision of this court of the 21st December, 2015, which refused to order that the client be identified in the context of a *Norwich Pharmacal* application. I reject this as a basis for refusing discovery. The fact that disclosure has been refused on a *Norwich Pharmacal* application could not prevent a party from seeking discovery in the ordinary way and indeed a concession to this effect was made by the defendants during the course of the defendants' reply to the plaintiff's application for disclosure orders which resulted in the judgment of this court of the 21st of December, 2015. Disclosure of the defendants' client's name to enable the plaintiff to sue him or her has been refused. That application cannot be repeated in this discovery application but that is not to say the plaintiff is prohibited from seeking the name of the defendant's client on the basis that the information is relevant in these proceedings - as opposed to needed for intended proceedings.

Relevance

8. The defendants assert that the identity of the client is not relevant to the case pleaded by the plaintiff against the defendants. The plaintiff, in written submissions, says that the client's identity is relevant for the following reasons:-

a. Firstly, the plaintiff has pleaded that the defendants engaged in a conspiracy to injure him by unlawful means and by lawful means. In order to prove that a defendant has engaged in conspiracy by lawful means, it is necessary to demonstrate that the sole or predominant purpose of the conspiracy is to injure the plaintiff. The identity of the client and the information that can be ascertained and established by virtue of that identity are clearly relevant to the question of whether or not the Dossier was prepared/compiled with the sole or predominant purpose of injuring the plaintiff's interests or whether there was some alternative or additional purpose of its preparation/compilation. Integral to this analysis is an understanding of the motivations of the defendants' client, and, it is submitted, that the said client's identity is clearly relevant to establishing what those are.

b. Secondly, the plaintiff is seeking aggravated and exemplary damages from the defendants and the question of motivations (be they personal, commercial, political or otherwise) is also highly relevant to the question of the state of mind of the defendants and the intended outcome of the preparation, compilation and dissemination of the Dossier. Once again, the identity of the client is highly relevant to the question of establishing precisely what those motivations are and, consequently, the quantum of aggravated and exemplary damages to which the plaintiff is

entitled.

c. Thirdly, the identity of the client and the motivations on which that identity may shed light is relevant to the question of who the intended audience for the Dossier was, what the anticipated nature and size of that audience was, the nature and extent of secondary republication of the Dossier which was intended, foreseeable and actually anticipated by the defendants. This will be germane not merely to the nature of damage caused by the publication but also the aforementioned issues of intention and aggravation.

d. The relevance of the client's identity is heightened by the manner in which the above issues interact. For instance, the question of whether causing injury was the sole or predominant purpose of the preparation/compilation of the Dossier sheds light not merely on the issue of conspiracy by unlawful means but also the issue of aggravated and exemplary damages. Meanwhile the issue of the nature of the audience and scope of intended and foreseen publication is relevant to the issue of malice underlying the aggravated and exemplary damages plea, and that of the underlying purpose of the conspiracy.

e. In paragraphs 10 and 11 of the defence, the defendants plead that the draft speech of Colm Keaveney which the second and third named defendants admit to having amended and published, was amended and published outside of the rubric of the client retainer in the context of which the Dossier was prepared/compiled. This naturally throws up two issues; the first being why the draft speech was contained in the Dossier in the first place and, the second being the response of the defendants to the plaintiff's request for the documentation contained in Category D. That response included, inter alia, an agreement to make discovery of documentation relating to the draft speech with client details redacted. This proposed agreement is, it is submitted, hardly consistent with the said speech being amended and published outside the scope of the client retainer.

Analysis of Relevance

9. In relation to the tort of conspiracy, the plaintiff must establish the defendants' predominant motive in producing the Dossier. The defendants deny an intention to injure or cause loss to the plaintiff. There is no doubt that the motivation of the defendants in producing the Dossier is a major issue in the case. I have reproduced at paragraph 8 above the argument advanced by the plaintiff (in written submissions) in support of his claim that the identity of the defendants' client is relevant in these proceedings. Re-phrased, the plaintiff says that he may be able to discern the motive of the defendants' client if he is told the client's identity and he may then, with that information, be able to establish, by inference or by other means, the defendants' motivation. Thus, according to the plaintiff, revealing the identity of the defendants' client is relevant because it will in turn reveal the defendants' motivation in compiling/producing the Dossier - one of the central issues in this case.

10. Kelly J. (as he then was) in *Astrazeneca AB and Astrazeneca UK Ltd. (AZ UK Ltd.) v. Pinewood Laboratories Ltd.* [2011] IEHC set out "the principles which are applicable in the determination of disputes on discovery" as follows:-

> "Under O. 31, r. 12 of the Rules of the Superior Courts, an applicant for discovery has to demonstrate that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs.
>
> The onus of establishing relevance and necessity is on the moving party."

Kelly J. referred to case law which confirmed that the observations of Brett L.J. in the *Peruvian Guano Case* [1882] 11 Q.B.D. 55 "remain the guiding norm", those observations being :-

> "Every document relating to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which may – not which must – either directly or indirectly, enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary." (Per Brett LJ)

11. Many Irish decisions have reproduced and relied on the *Peruvian Guano* formula. The formula itself makes it clear that a party seeking disclosure does not have to establish that the information sought will in fact assist him/her and/or harm the opponent. But to what standard is the party seeking disclosure required to establish that the information sought *may* advance his case or damage the case of the adversary? What does the word 'may' mean in the Peruvian Guano formula? In *Framus v CRH* [2004] IESC 25, Murray J addressed the matter thus:-

"29. The parties also referred to the oft cited statement of Brett L.J. in *Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55 (see for example *Sterling-Winthrop Group Ltd. v. Farbenfabriken Bayer A.G.* [1967] I.R. 97) to the effect that 'every document [relating] to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary' should be discovered. As I pointed out in *Aquatechnologie Limited v. National Standards Authority of Ireland* (Unreported, Supreme Court, 10th July, 2000) 'there is nothing in that statement which is intended to qualify the principle, that documents sought on discovery must be relevant, directly or indirectly, to the matte in issue between the parties in the proceedings. (sic) Furthermore, an applicant for discovery must show it is reasonable for the court to suppose that the documents contain information which may enable the applicant to advance his own case or to damage the case of his adversary. An applicant is not entitled to discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition."

> 30 In addition, I think that certain principles to which the court must have regard in an application for discovery of documents were succinctly set out by McCracken J. in *Hannon v. Commissioners for Public Works* (Unreported, High Court, McCracken J., 4th April, 2001) in the following terms:-
>
> "(1) The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant.
>
> (2) Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents. It should be noted that O. 31, r. 12 of the Rules of the Superior Courts 1986 specifically relates to discovery of documents "relating to any matter in question therein."

(3) It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other party's documentation is not permitted under the Rules.

(4) The court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties." [emphasis added]

12. This court finds guidance in the principles set out in *Hannon v. Commissioners for Public Works (supra)* by McCracken J. (and then endorsed by Murray J. in the Supreme Court in *Framus* (supra)) on the question of how far a requesting party must go in establishing the relevance of the matter sought to be disclosed. Relevance must be established as a matter of probability. The clear approach declared by McCracken J. in *Hannon* has not only been endorsed in the Supreme Court but has been frequently cited in the High Court. (*See Boehringer Ingelheim PharmaGmbH v Norton (Waterford) Ltd* [2016] IECA 67 per Finlay Geoghegan J.; *O'Brien v Nolan* [2013] IEHC 160 per Birmingham J.; *Linfen Limited v. Rocca* [2009] IEHC 292 per MacMenamin J.; *O'Neill & Ors v An Taoiseach* [2009] IEHC 119 per Murphy J; Shortt v Dublin City Council [2003] 2 IR 69 per Ó Caoimh J.; and Marian Cave v Walter Beatty [2005] IEHC 466 per Murphy J.)

13. The dicta of McCracken J. in *Hannon (supra)* was applied recently by the Court of Appeal in *Lawless v. Aer Lingus* [2016] IECA 235 where Irvine J. dismissed the plaintiff's appeal against the decision of the High Court not to order discovery in a personal injuries action. Irvine J. held at para. 26:-

> "26. Of some further assistance concerning the approach of the court on an application for discovery is the decision of McCracken J. in *Hanna v. Commissioners of Public Works* [2001] IEHC 59 (sic) where he emphasised that 'relevance' must be determined in relation to the pleadings in the specific case and not by submissions as to alleged facts put forward in affidavits, unless such submissions relate back to the pleadings, or in the case of an application for further and better discovery, to previously discovered documents. He also stated that the court must decide as a matter of probability whether any particular document is relevant to the issue to be tried and that discovery cannot be ordered simply because there is a possibility that documents may be relevant." (emphasis added).

Applying these principles, Irvine J said at paragraph 31 of the judgment:-

> "…Not only has the plaintiff failed to convince me that these documents are probably relevant to that issue but she has also failed to convince me that they there is any possibility that they could be of relevance to the liability aspect of her claim. *(sic)* I fear that her application for discovery of these documents falls to be condemned as a fishing expedition." (emphasis added)

The underlined words indicate that the Court of Appeal was applying a probability test with respect to relevance.

14. The Irish authorities, it seems to me, have clarified the *Peruvian Guano* formula by including a probability standard as to the relevance which the party seeking disclosure must meet.

Application in this case

15. The defendants have agreed to make discovery of the instructions provided by the client and the terms of the retainer and many other documents as set out in categories A-D on the basis that they are relevant to the issue of the defendants' motivation. In other words, the defendants are not saying that documents which reveal or are likely to reveal the defendants' motivation are not discoverable.

16. The plaintiff must persuade me that knowing the defendants' client's identity as a matter of probability advances the plaintiff's plea that the defendants had a predominant motive to harm the plaintiff in compiling the Dossier.

17. Knowing the identity of the defendants' client might assist the plaintiff in establishing the client's motivation in requesting the defendants to compile the Dossier. It is possible that once the plaintiff knows the identity of the defendants' client, the plaintiff may be able to surmise that person's motivation or otherwise discern it. But what the plaintiff has to establish is that disclosure of this person's identity is relevant to the case he seeks to make against the existing defendants. The height of the plaintiff's relevance argument is that if he can identify the unnamed client he might be able to prove that that person's motivation was to harm the plaintiff and then he might be able to attribute or connect that person's motivation to the defendants.

18. As noted by McCracken J. in *Hannon (supra)*:-

> "…..a party may not seek discovery of a document in order to find out whether the document may be relevant."

Murray J. in *Framus (supra)*, was saying the same thing when he ruled out discovery where relevance was a matter of speculation.

The key to deciding the relevance issue in this case seems to me to be found in these quotations. The plaintiff does not know whether the identity of the defendants' client will assist in establishing that client's motivation in engaging the defendants to compile the Dossier, much less whether the defendants shared their client's motivation. Knowing the identity of the defendants' client may not assist the plaintiff in establishing the client's motivation. It is possible that the defendants' client is a stranger to the plaintiff and the plaintiff may be unable to surmise or establish that person's motivation from the fact of the person's identity alone. On the other hand, it is possible that once the defendants' client's identity is revealed, the plaintiff will be able to say that the motivation of that person is clear and that the person in question has a long history of animus, for example, towards the plaintiff but that alone would not establish the motivation of the defendants. Alternatively, the plaintiff may be able to discern the client's motivation from his or her or its identity alone but it may transpire that the motivation was benign or something other than a predominant motive to injure the plaintiff. In short, the identity of the defendants' client may be of great utility to the plaintiff or it may be wholly irrelevant. The extent to which the identity of the defendants' client is relevant to these proceedings will only become apparent once the identity is revealed. The principle enunciated by McCracken J. in *Hannon* (supra) that a person may not seek discovery to find out if the document is relevant is an obstacle in pathway of the plaintiff's quest to unmask the mystery client. No basis has been established as to why, if the motivation of the defendants' client is mischievous, that mischievous motivation is shared by the defendants. In other words, the disclosure sought might assist the plaintiff in establishing the motivation of the defendants' client but the plaintiff cannot say that as a matter of probability it will assist the plaintiff in establishing the motivation of the defendants in this action.

19. There are too many imponderables and unknown outcomes in the theory of relevance advanced by the plaintiff. The most the

plaintiff can say is that gaining the identity of defendants' client might assist with proving the motivation of the client, which in turn might assist in attributing that motivation to the defendants in compiling the Dossier. In my view, this falls short of what is required of the plaintiff in this case.

20. The plaintiff suggests in written submissions that the extent to which it is required to establish relevance is altered or reduced by the manner in which the defendants have met this application. The plaintiff says as follows:-

> "In the present case, the Defendants appear to be arguing not that the identity of the client is information whose relevance has not been established as a matter of probability but which is irrelevant as a matter of principle. It is thus submitted that once relevance in principle is established, the present case is not one in which the probability of relevance is an issue …".

I disagree with this statement. It mischaracterises the defendants' case. But even if it correctly states the defendants' case, in my view, the burden of establishing relevance rests on the plaintiff, and it must be discharged regardless of the attitude of the defendants to the issue. The court must be independently satisfied that the plaintiff had discharged the burden.

21. For the sake of completeness, I do not find that the points raised by the plaintiff in connection with the aggravated damages or in relation to the work done on a draft speech aid the application for discovery. In so far as this discovery is sought to establish motivation, it is agreed and will be given voluntarily but I have not been persuaded disclosing the identity of the defendants' client probably reveals the defendants' motivation. The defendants have said that work on the speech was not connected with the client instructions and thus his or her identity could not assist with establishing motivation for this activity.

Confidentiality
22. I reject the defendants' case that discovery ought to be refused on the basis of confidentiality between the defendants and their client. I accept the argument of the plaintiff that the principles of proportionality will aid a party who seeks discovery and in an appropriate case the justice of a case would overcome resistance based upon the need to protect a confidence. If the plaintiff had persuaded me that discovery was relevant and necessary, it would have been open to the plaintiff to then argue that the confidential relations between the unnamed client and the defendant ought not prevent an order for discovery being made. In an appropriate case, provided the justice of the case demanded it, the court might prefer the interest of the plaintiff in litigation to the interests of the party seeking to maintain a confidence. However, as I have decided that the plaintiff has not established that the identity of the client is relevant, I do not have to decide whether the defendant can withhold documents because of the confidence said to be owed to the unnamed client.

Categories 1(E) and (F)
23. The documents sought under categories E and F relate to publication of the Dossier. Discovery is resisted on the basis that the plaintiff is "fishing" for evidence to substantiate his bare allegation that publication has in fact taken place. The categories are set out as follows:-

"Category 1(E):

> All documents that evidence, record or relate to the identity of those to whom the Dossier or part thereof was sent and/or by whom it was received and/or by whom it was seen, the foregoing to include all documents that evidence, record and/or relate to attempts to send the Dossier or parts thereof to persons/entities and whether or not such attempts were successful.
>
> Category 1(F):
>
> All documents that evidence, record or relate to the response(s) by persons/entities to receipt or sight of the Dossier and the contents contained therein."

24. The plaintiff accepts that publication as pleaded in the statement of claim lacks specificity but cites the clandestine nature of the defendants' activities as the reason for this. The court must strike a balance between the defendants' claim that the plaintiff is "fishing" for evidence and the plaintiff's claim that due to the clandestine nature of the defendants' activities, he is unable to provide particulars of publication at present. This balancing exercise was described by Clarke J. in *Hartside Ltd v. Heineken Ireland Ltd* [2010] IEHC 3 as follows:-

> "The overall problem is one between balancing, on the one hand, the need to facilitate a party who may have a legitimate claim but who may require access to information available only to its opponent in order to fully plead and ultimately substantiate that claim on the one hand, and the need to prevent, on the other hand, a party, by making a mere allegation, from being able to have a wide range of access to its opponent's documentation, including what may well include highly confidential documentation. The balance struck in both Moorview, National Education Board and Ryanair, leads to the conclusion that a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation."

25. The defendants submit that publication is pleaded in the barest terms. Accordingly, it is submitted that the plaintiff fails to meet the threshold identified by Clarke J. in *Hartside* because he can demonstrate no basis for his claim that the Dossier has been published.

26. The difference between seeking discovery in support of a plea and seeking discovery to make or prove a plea is well established. In *Keating v. RTE* [2013] IESC 22, [2013] 2 ILRM 145 McKechnie J said:-

> "… It seems clear, at least in principle, that a sharp distinction exists between situations where a party, be he plaintiff or defendant, seeks discovery to support or advance his particular viewpoint and where such is sought for the purposes of making or formulating a claim which otherwise does not exist. In other words, discovery is an aid to further a viable action or defence, or an issue in either, but not a means in itself to establish one."

In a similar vein, Binchy J in *Ryanair v. Quigley* [2015] IEHC 776 remarked:-

> "… there is a difference between seeking discovery in support of an existing plea and seeking discovery for making a case pleaded where no particulars of the plea have been given …".

In this case the defendants served a notice for particulars on the 26th of January which sought the plaintiff's particulars in relation to publication, and the reply was as follows:-

> "By reason of the covert nature of the Defendant's activities and that of their client, the Plaintiff is unable to fully particularise the publication, distribution and/or dissemination of the Dossier by the Defendants until after the making of discovery and/or answers to interrogatories."

In my judgment on the plaintiff's application for a *Norwich Pharmacal* order (December 21st 2015), I indicated that:-

> "I had not been persuaded that there was enough evidence or any evidence in the case for me to be certain that publication has indeed happened."

27. The plaintiff has not provided any additional information in connection with this application for discovery which would persuade me to change my view in relation to this matter.

28. The plaintiff says publication of the Dossier may be inferred from the anonymous delivery of the memory stick to him and from the fact that he was asked certain questions by journalists in the months before the proceedings issued which suggests that they "received a briefing of some sort" (Plaintiff's replies to particulars 2 (e) 8th February 2016).

29. In so far as it is suggested that questions posed by journalists to the plaintiff indicate that the journalists have seen the Dossier and therefore it was published to them, the plaintiff has failed to substantiate this claim in any way. Examples of the questions asked, or the identity of the journalists asking the questions, or the occasions on which the questions were asked, or how the questions were asked etc. might have assisted, but the plaintiff has not given any details at all which would begin the process of allowing the court to say whether the actions of the journalists were connected with the Dossier and therefore infer evidence of publication of the Dossier to them.

30. The plaintiff says the lack of pleading in relation to publication should be excused because it results from the clandestine activities of the defendants. That may or may not be so but in my opinion the absence of pleading concerning the connection between the journalists' questions and the content of the Dossier cannot be blamed on the alleged clandestine nature of the defendants' activities. The plaintiff says that it was the activities of the journalists which aroused his suspicion that there was a conspiracy or a campaign against him, and it is therefore very surprising that no details at all are provided about his interaction with the journalists in question. This is information which the plaintiff presumably has at his fingertips, and it may well support the proposition that the journalists had seen the Dossier and therefore that it had been published to them. The omission of these potentially very relevant alleged facts from the pleadings, or from the correspondence and affidavits grounding this application is odd.

31. The plaintiff also says the circumstances in which he obtained the Dossier suggests publication. The plaintiff says that the delivery by the anonymous sender of the memory stick infers publication of the Dossier to that person. Thus, the circumstances in which the memory stick came to plaintiff are potentially very significant indeed. It is surprising therefore that the plaintiff has not been able to provide any information at all about how the memory stick came to him. The plaintiff has not even told the court why he has no information about the mysterious appearance of the memory stick. The plaintiff initially made two averments about the manner in which he received the memory stick:-

> "I received an envelope anonymously, which contained a memory stick, which itself contained a Dossier. I do not know who sent me this envelope" (para. 15, affidavit of Denis O'Brien, 12th October, 2015) and "the Listed items were sent anonymously in a letter containing a memory stick and addressed to me" (para. 18, affidavit of Denis O Brien, 13th October, 2015).

32. In response to complaint from the defendants as to the quality of this evidence, the plaintiff gave further evidence that the memory stick was in an envelope, marked for his attention, that a code was written inside the envelope which was needed to unlock the memory stick, and that he gave the memory stick to the solicitors he had retained to investigate the campaign which he suspected was being waged against him and that the envelope had been discarded. At paragraph 36 of his affidavit sworn on the 4th of December, 2015, Mr O'Brien says the defendants query "…the place, date and time at which the USB stick was received. I believe that the memory stick was received in an envelope at my offices at Grand Canal Street in Dublin sometime on 8 October 2015 as it was there when I arrived." At paragraph 5 of his affidavit of the 11th of December 2015, Mr O'Brien says that "… I can say that the envelope did not bear a post mark but I cannot say how it was delivered."

33. The defendants (in the context of the *Norwich Pharmacal* application) said these circumstances indicated lack of candour on the part of the plaintiff. They said that it was implausible that the envelope could appear somewhere in his offices and that no one could explain how it got there. They said that the plaintiff had offered no explanation why the plaintiff gave the memory stick to his legal advisers rather than computer/technology advisers, given that he could not have known its contents before he gave it to them. In the event, I ruled that there was insufficient evidence to conclude that there was a want of candour but I pointedly said that the full story had not been told in relation to the manner in which the memory stick appeared on Mr. O Brien's desk. Having re-read the transcript of the hearing in relation to the *Norwich Pharmacal* application, the suggestion (which appears in my judgment of 21st December, 2015) that the memory stick appeared on Mr. O Brien's desk seems to have come from the defendants' oral submissions. There appears to be no evidence the memory stick was ever on anyone's desk. Mr. O Brien merely says that the envelope was received at his offices in Grand Canal Street on October 8th. There is no evidence as to how Mr. O Brien personally took possession of the memory stick.)

34. In circumstances where the plaintiff relies on the memory stick and its anonymous delivery to the plaintiff as evidence of publication of the Dossier to the sender of the memory stick, and where the court has already ruled that there is a lack of evidence as to publication and that the full story has not been told about the delivery of the memory stick, the plaintiff has been aware or ought to have been aware that he should provide a full explanation of how the memory stick came to be in his possession or if he can't do that, he should explain why this is not possible. He cannot rely on the alleged clandestine nature of the defendants' activities to explain the absence of evidence about how the memory stick came to be in his possession. These facts are known to him.

35. The plaintiff has not adequately pleaded facts concerning publication. The plaintiff could have pleaded more facts about the memory stick. He has not done so and has not explained the absence of pleading. Similarly he has not pleaded facts about the suspicious questions from journalists and he has not explained the absence of pleading. The court will not order discovery of documents in relation to publication because of the absence of pleading in relation to this issue.

36. It is not surprising the plaintiff has not referred to any decision where a court ordered a defendant accused of defamation to

supply evidence of publication where the plaintiff had none. If the plaintiff in this case is entitled to discovery of evidence without which his case will fail, then so too is every plaintiff who believes he or she has a good case but lacks the evidence to prove it. If this were possible, litigants would flood the courts with unsubstantiated writs hoping that applications for discovery would produce the evidence they lack.

Category G
37. Category G is set out as follows:-

> "Category 1(G):
>
> All documents that evidence, record or relate to communications between the Defendants and their client, the foregoing not to be limited to communications in relation to the commissioning, compilation, authoring or editing of the Dossier or parts thereof."

The plaintiff submits that communication between the defendants and their clients are relevant to proving whether the intention to injure the plaintiff was the sole or predominant motivation behind the compilation of the Dossier and whether any prior enmity between the plaintiff and any of the defendants might have anything to do with the production of the Dossier. The defendants refuse to make discovery of communications which they say are not relevant to the compilation, authorship or alleged publication of the Dossier.

38. It seems to me that the plaintiff is entitled to discovery of communications between the defendants and their client. Such communications are likely to reveal the nature of the relationship between the defendants and their client, and this seems to me to be one of the issues between the parties. The communications sought are likely to assist with establishing why the Dossier was complied. The motivation of the defendants is a central issue in the case and thus disclosure is likely to assist the plaintiff with this issue. However, it seems to me that the discovery should be limited to communications which refer to the Dossier and/or to the plaintiff. This limitation is required because the client may have retained the defendants in relation to matters not connected with Mr O'Brien and such communications are unlikely to be relevant to this case.

39. I note that the defendants have agreed to make voluntary discovery of communications between the defendants and their client which reveal the instructions of the client and the terms of any retainer. (See categories 1(A)(ii) and (iii)) It is inconsistent of the defendants to agree to make discovery of these latter documents but to resist category G generally.

40. Needless to say, any discovery ordered in this category may be redacted to conceal the identity of the defendants' client or anything which might tend to reveal the client's identity.

Category H
41. Category H relates to the documents sought to be relied on by the defendants in advancing the defence of qualified privilege and honest opinion. Discovery is resisted on the basis that the plaintiff is seeking to force the defendants at an interlocutory stage to identify the documents on which they intend to rely on at trial. Category H is set out as follows:-

> "Category 1(H):
>
> All documents that the Defendants intend to rely upon in advancing the Defence of Qualified Privilege and Honest Opinion"

42. This category is refused on the basis that it is neither relevant nor necessary for the plaintiff to obtain documents which the defendant may use in connection with defence of the proceedings. The plaintiff is aware of the defence advanced by the defendants. The manner in which they prove elements of that defence is a matter for evidence at the trial of the action and not properly a matter for discovery.

Category I
43. Category I relates to the status of the second to sixth named defendants as officers and/or employees of Red Flag. Discovery is resisted on the basis that there is no dispute about the status of the defendants in the case.

44. Counsel for the plaintiff informed the court that this matter was not being advanced and thus no decision is needed in relation to this matter.

45. The Court refuses discovery in categories 1(A) – (D) which identifies the defendants' client. Discovery of Categories 1(E) and (F) is refused. Discovery as sought in Category 1(G) is ordered as follows: All documents that evidence, record or relate to communications between the Defendants and their client, in so far as the documents relate to the Dossier or the plaintiff, redacted to conceal the identity of the client whose instructions led to the production of the Dossier. Discovery of Categories 1 (H) and (i) is refused.