2005 IEHC 183

THE HIGH COURT

2000 No. 486P

BETWEEN

MARTIN McDONAGH

APPLICANT

AND
SUNDAY NEWSPAPERS LIMITED
TRADING AS SUNDAY WORLD

RESPONDENT

Judgment of Mrs. Justice Macken delivered on the 10th day of May 2005

1. This is an appeal by the plaintiff from an order of the Master dated 14th March, 2004 by which he ordered the plaintiff to make discovery of a range of documents. The appeal is resisted by the defendant.

The Facts

2. The defendants are well known publishers of a weekly newspaper known as the Sunday World which is widely distributed throughout the entire of the State. In an edition of 5th September, 1999 there was published in that newspaper a headline story which occupied most of the front page as well as pages 2 and 3. It is fair to say that the story was hard hitting and the portion of the story which was on the front page was accompanied by a large photograph, in part obliterated. It described the person depicted as "The Shark", as an emerging drug baron, involved in a number of unsavoury matters, including violence, money lending, being a loan shark, having amassed a series of convictions for larceny, burglary, malicious damage and receiving stolen goods and having served time for criminal offences, together with detailed comment thereon. Part of the story also concentrated on a recent find of a substantial quantity of drugs in the West of Ireland, in which it was alleged the person depicted had been involved.

3. The plaintiff issued proceedings shortly after the publication of the story, and pleaded at paras. 7 and 8 of his statement of claim, inter alia, that the article, including the photograph, was intended to and did identify him, that the words used were intended to be understood and were understood as referring to him, and in particular that they meant and were intended to mean, or that in their ordinary and natural meaning inferred, and were intended to infer, directly or by innuendo that the plaintiff:

(a) is a criminal

(b) is a drug dealer

(c) is a thug

(d) has a history of being a violent money lender

(e) engages in large scale drug dealing

(f) is a notorious criminal

(g) is a cheat

(h) is a tax evader

(i) is a drugs baron

(j) is a loan shark

(k) is a person of a ruthless disposition prone to serious violence

(l) is a person who is a wholly disreputable, dishonest and untrustworthy person with whom no fit person should associate

(m) derives his living from drug dealing

(n) has knowingly derived significant earnings from drug dealing for the purpose of financing the high lifestyle

(o) is now one of Ireland's top drug dealers;

(p) is a violent, ruthless, disreputable person who is a parasite on the community.

4. There were requests for particulars issued by the defendant and responded to or ordered to be responded to, and motions for judgment in default of defence which I do not need to consider further.

5. The Defence was delivered on 2nd April, 2002. Paragraphs 4, 5 and 6 read as follows:

"4. Save that [it] is admitted that the words complained of refer to and were understood to refer to the plaintiff,….

5. Paragraphs 7 and 8 of the statement of claim are admitted.

6. The words complained of are true in substance and in fact."

6. In essence, therefore, in so far as the issues before me are concerned, the defendant admits, *inter alia*, that the article was published, that the article referred to and was understood to refer to the plaintiff, and that the article had the meanings contended for by the plaintiff in paras. 7 and 8 of the statement of claim, which are those I have synopsised above. The defendant having pleaded, however, that the words complained of were true in substance and in fact, also pleaded that the words complained of were published on an occasion of qualified privilege or were the result of the exercise by the defendant of its rights under article 40 of the Constitution.

7. With the delivery of the defence, the defendants also delivered a letter, dated the same day, requesting discovery of certain documents. This letter was divided into two parts. Firstly, it sought pursuant to order 31, rule 15 of the Rules of the Superior Court, certain documents, including revenue returns, a copy of the plaintiff's VAT number, a copy of the leasehold interest in a pub in Sligo, the "books of the plaintiff", the books of account of the plaintiff, social welfare receipts of the plaintiff, material nominating the plaintiff an enemy of society, and public comments about the plaintiff. These latter documents do not form part of this appeal, but rather certain of them were the subject of a consent order on the same original motion.

8. Secondly, the defendant sought voluntary discovery of a wide range of categories of documents. These are the subject of this appeal. The documents were not furnished, and a notice of motion to compel the plaintiff to discover them issued on 22nd July, 2002.

9. As to these documents, they consist of the following categories, together with the reasons for seeking them, which reasons had been included in the letter of demand seeking them, and were also set forth in substantially the same format in an affidavit grounding the notice of motion, sworn by Mr. Colm McGinty on behalf of the defendant on the 22nd July, 2002. I need to set these out, as their content and the reasons put forward for seeking them form the nub of the arguments in this appeal. They read as follows:

(i) The plaintiff's Tax Number and his accounts for his business for the last five years;

> *Reasons*: I say that the plaintiff's tax number and his accounts for his alleged business activities are a matter in relation to which the plaintiff has put his character in issue. I say that at all times, the plaintiff alleges that he is a lawful businessman engaged in lawful activities. I say and believe that this is not the case, and that this issue has been put in issue in the defence of the defendant herein. I say that these matters will avoid delay and save costs, in that they go to the heart of the issue as to whether or not the plaintiff was engaged in business, and as to whether those activities were in fact, lawful.

(ii) All benefits, receipts, emolument receipts, money receipts, documents and materials relating to State benefits received by and on behalf of the plaintiff and the members of his family within the last five years;

> *Reasons*: "…I believe the plaintiff has been in receipt of substantial benefits over the last number of years, during which he alleges he has been engaged in lawful business activities, which to go the heart of the issue as to how he has come to be in receipt of large sums of money. I say that these alleged large benefit receipts go to the heart of the issues as to the amount of money received by the plaintiff over the last number of years. I say that it is necessary for the purpose of saving costs and avoiding delay, that they go to the heart of the matter as to whether the plaintiff has lived on the basis of lawfully earned income, or income from activities outside the law."
>
> > "…The matters sought therein go to the heart of the issue as to whether or not the Plaintiff has obtained income and has been involved in criminal activities which is the gist of the alleged libel. I say that those records will define the issues between the parties, save costs and avoid delay…"

(iii) All conviction records, charge sheets, probation records, remand records, and other documentation relating to any dealings which the plaintiff might have had with An Garda Siochana, the Metropolitan Police in London, the Police in the United Kingdom or in any other jurisdiction;

> *Reasons*: "… I say that once again, those matters to the hear of the issue as to whether or not the plaintiff is a well known criminal engaged in criminal activities, including drug dealing, which is the gist of the alleged libel."

(iv) All records, notes, interview notes and other documents relating to any interview of the plaintiff by An Garda Siochana, the Metropolitan Police and/or the United Kingdom Police and/or the Police in any other jurisdiction relating to any and every criminal matter in respect of which the plaintiff was interviewed;

> *Reasons*: " … I say that those documents, which relate to dealings with money, go to the heart of the issue as to whether or not the plaintiff is a moneylender and a loan shark, which is one of the particular of the alleged libel. I say that the plaintiff has put on record in the course of interviews, that he has made loans to members of the public. I say that there is no source for the alleged monies which the plaintiff has been lending to third parties. I say that any of the matters requested are necessary for the purposes of saving costs and avoiding delay, for they define the issues between the parties and go to the heart of the alleged libel."

(v) All interviews and/or memoranda and/or records of interviews between the plaintiff and any members of the Press;

> *Reasons*: "I say that the Plaintiff has commented on his activities and made admissions as to his activities in respect of which the libellous action has been taken, to members of the Press. I say that this goes to the heart of the issue and is necessary for the purposes of avoiding delay and saving costs. The range is slightly different and wider than the letter.

(vi) All reference notes, memoranda, letters or correspondence and documents generated between the plaintiff and the Criminal Assets Bureau within the last five years;

> *Reasons*: "I say and believe that the Plaintiff has come to the attention of the Criminal Assets Bureau during the period of the last five years, in respect of his alleged business activities. I say that the sole function of the said Bureau is to seek those engaged in criminal activity to disgorge the fruits of their unlawful activities. I say that any documents generated therein are necessary for the purposes of saving costs and avoiding delay, for they go to the crucial issue as to the origin of the funds upon which the plaintiff has financed his lifestyle within the last five years, and as to whether or not the plaintiff has engaged in criminal activity or money-laundering activities relating to drug dealing."

(vii) All notes, correspondence, records, memoranda or other documentary material relating to any warnings, threats and/or comments made by or on behalf of third parties to the plaintiff in connection with his alleged criminal and/or drug activity.

Reasons: "I say that the matters sought therein go to the heart of the allegations as to whether or not the plaintiff has been involved in criminal activity and/or has been a loan-shark and/or has been a drug dealer, for they record in written form evidence of the alleged activities. Such matters will save costs and avoid delay, for they define the issues clearly between the parties in the context of the proceedings.

(viii) All press cuttings, documents, notes from publications or memoranda from publications relating to the plaintiff which have been published in the last seven years;

Reasons: "I say that any and all press cuttings concerning the plaintiff go to the heart of the issue as to the damage suffered by the plaintiff in connection with the alleged defamatory publication in this case. Such matters will save costs, avoid delay and make clear the issues between the par-ties."

(ix) All bank records, notes, memoranda, bank account statements, customer letters and correspondence between the plaintiff and any financial institution in this State, the United Kingdom and the European Union, in relation to bank accounts in the plaintiff's own name and those bank accounts held in another name to which he is beneficially entitled, including those held by or to the order of or to the benefit of the plaintiff in the name of Sinead McGarry.

Reasons: "I say that all and every bank dealing of the plaintiff with financial institutions within the European Union will make clear that the plaintiff dealt with sums of money in excess of his Welfare receipts, which it is alleged arose from his other alleged business activities. I say that in particular, one Sinead McGarry, who has been engaged in close relations with the plaintiff, has held money by and on behalf of the plaintiff herein. I say and believe that the said monies are the product and the fruits of unlawful activity…."

(x) All records, passports, birth certificates, electricity bills, rent books, utility records, telephone bills, marriage certificates, baptismal certificates utilised by the plaintiff or by any other person by and on his behalf to obtain Housing Benefit, Rent Allowance and Unmarried Mothers Allowance, Child Benefit, unemployment assistance, disability allowance from the Social Welfare Department of the Government of the United Kingdom of England and Wales;

Reasons: "I say that it is part of the defendant's case that the plaintiff is a fraudster, and has perpetrated fraud upon the Government of the United Kingdom in relation to the obtaining of Housing Benefit. I say that evidence will be adduced at trial which makes clear the foundation and basis for the said allegation. I say that several persons have been engaged with the plaintiff in the said activity. I say that all and any of those matters sought at the said paragraph go to the heart of the alleged libel between the parties, for they show unlawful behaviour on the part of the plaintiff. I say that they are necessary for the purposes of saving costs and avoiding delay, for they define clearly the basis for the alleged or any libel concerning the plaintiff."

(xi) All contracts for sale, option agreements, trust agreements, escrow dealings, conveyances an disposals relating to any property, solely, jointly or beneficially held by the plaintiff in this jurisdiction or in the United Kingdom within the last twelve years;

Reason: "I say that the plaintiff has dealt with the fruits of his proceeds from his drug-related activities by purchasing assets within the jurisdiction of this Court, and within the jurisdiction of the United Kingdom. I say that the plaintiff has sought to invest and dispose of his proceeds by purchasing and dealing in property, including a public house in Sligo. I say that production of the matters sought herein and all assets of the plaintiff herein are necessary for the purpose of saving costs and avoiding delay and simplifying the issues between the parties."

(xii) Details of all share certificates, bonds, securities, warranties, annuities, investment fund units held by the plaintiff or to his order in this jurisdiction or in the United Kingdom or the European Union.

Reasons: "I say that the plaintiff has, with funds realised from his drug-dealing, sought to purchase securities and other forms of moveable property as shown in this action over the past number of years. I say that discovery of all of the said materials are necessary for the purposes of saving costs and avoiding delay between the parties, for they provide evidence material and germane to the gist of the libel in the instant proceedings."

10. The issues between the parties on this appeal relate directly to the extent of the discovery sought and the law relating to the entitlement to discovery in a case such as this, namely, a libel action in which the defence of justification is pleaded, and to the question of the relevance of the documents sought.

11. The Master, having heard argument on the matter, (and having made his order on consent mentioned above), adjourned the motion as to the remaining categories until 13th February, 2003 when the order the subject of this appeal was made.

12. Although the plaintiff's appeal includes an application for an enlargement of the time within which to lodge notice of appeal, the parties agreed that the appeal could be dealt with on the merits.

Legal submissions:

13. Before me, Mr. Cooney, S.C., for the plaintiff objected to the granting of the Order. Referring to the defence as "terse", he drew the Court's attention to the fact that in the defence the defendant admitted the article referred to the plaintiff, did not put in issue his identify, and admitted the meaning of the words as being those contended for by the plaintiff, but claimed by a plea of justification, that the words are true. In the circumstances, he submitted that the defendant is clearly pleading that everything published by it of the plaintiff and of which the plaintiff complains, is true, and the only real issue before the Court at the hearing of the action will be the truth of those statements. In such circumstances, he argued that the defendant, having furnished no information as to the basis upon which they should be entitled to have such discovery, had embarked in reality on a fishing expedition, which was not permitted in law. He submitted that the Court should not grant discovery in the absence of any indication in the affidavit of Mr. McGinty of the facts and matters upon which the defendant will actually rely to support its plea of justification, pointing, in that regard, to para. 5 of the affidavit which reads:

"I ask this Honourable Court to have regard to the terms of the said letter seeking discovery in this action. In particular, I ask this Honourable Court to have regard to the reasons set out therein in relation to the individual heads in respect of which discovery is sought."

14. Mr. Cooney submitted that this is not a sufficient ground upon which to mount an application for such discovery, even when read with the reasons furnished in respect of each category of documents sought. He pointed, for example, to para. 11 of Mr. McGinty's affidavit seeking documents concerning dealings with money, basing this on alleged interviews, without either identifying the interviews, or the persons with whom those interviews were held, or even the dates or approximate dates when they are said to have occurred. And at paragraph 12 of the affidavit, where the reasons are given, the defendant claims, without any particularity and without identifying anyone involved, that the plaintiff "made admissions as to his activities" to members of the Press, but again without any date or time frame for these alleged admissions, or their nature, even in the most general terms.

15. Further, he contended that the application does not fall within the Rules of the Superior Courts, as amended in 1999, in respect of discovery, and in particular does not comply with the requirement that the defendant, in seeking discovery, must (a) verify that the discovery is necessary for the disposal of the action, and (b) give reasons why each category of documents is required. On this aspect of the case, Mr. Cooney relied on the decision of Kelly, J. in *Cooper Flynn v RTE* (2000) 3 I.R., 252, as well as on the judgment of Fennelly, J. in the decision of the Supreme Court in *Ryanair v Air Rianta* (2003) I.R. 19. 535.

16. Next he argued that this was a case in which discovery ought to have been delayed or refused until the defendant had particularised its defence, since, although no particulars of the plea of justification had been included in the defence, neither had the defendant furnished any appropriate particulars of that plea in the affidavit of Mr. McGinty. In that regard, he invoked the principles enunciated in Gately on Libel and Slander, 10th ed., and in particular what that author says a defendant must do when it pleads justification.

17. Further, in that regard, he submitted that since in this case the Defence is one of justification, with no issue as to identification of the plaintiff or as to the meanings of the words used in the article, it would be open to the trial judge hearing the case, to oblige the defence, once the plaintiff had given certain formal evidence, to go first on its plea of justification. In these circumstances, before the defendant should be entitled to any discovery - and even leaving aside the breadth and onerous nature of the discovery sought in the present case - it must indicate to the Court the basic evidence which it intended to present in support of its justification plea, citing in that regard, the principle of libel law which requires that a defendant may not plead a defence of justification without having the necessary basis for so doing, and submitting that the defendant ought, for that reason also, present to the Court some appropriate indication of the basis for the justification plea before it could be permitted to have discovery. Here, for example, the Plaintiff had no criminal convictions, but the article claims that he has amassed several such convictions and had served time for them. He relied on the case of *Cooney v. Brown* [1985] IR 185, a decision of the Supreme Court, and cited from the judgment of Henchy, J. the principal judgment in the case, in support of his contention that an indication of the basis for the justification plea must be made available.

18. Finally, on the actual categories of documents sought in the matter, Mr. Cooney argued that the order would be oppressive, in that the scope of the documents sought was not clear and so the order could not readily be complied with, and even if complied with, would be subject to an enormous amount of very onerous work and cost. He submitted that the application was too wide, being couched in terms of seeking every document imaginable.

19. For the defendant, Mr. McCullough, S.C. argued a diametrically opposite view as to the entitlement of his client to have discovery. He submitted that once the plaintiff had commenced proceedings claiming that an article published by the defendant had the meanings which the plaintiff ascribed to it, and the defendant admitted the truth in substance and in fact of the content of the article complained of, and pleaded justification, the question to be considered was whether the documents sought are ones which are relevant to the pleas and issues between the parties and if that be so, then the only question which arises is whether the discovery sought is too wide in nature, or the order would be too oppressive.

20. He argued that the defendant is entitled to have from the plaintiff all documents which are relevant, that is to say all those which would or might help establish the truth of the statements complained of. It is, he said, by reference to that entitlement that the application for discovery should be considered. He too invoked the decision in the case of *Ryanair v. Air Rianta*, supra, as a central authority on the matter of relevance, which, he said, reaffirmed the long established test of relevance enunciated in *Compagnie Financiere du Pacifique v Peruvian Gua*no (1882) 11 Q.B.D. 55.

21. Further, he contended that on any analysis of the categories of documents sought, having regard to the law, they all come within the test of relevance, or litigious disadvantage or necessity, as those phrases have been interpreted. The traditional test applies to the categories sought here, namely, that the defendant is entitled to have discovery of any documents which either assist its case or undermine the plaintiff's case. Nothing more is needed to assess whether discovery is to be permitted. Pointing to the requirements of the Rules of the Superior Courts, which oblige a party seeking discovery to set out either an individual document or categories of documents sought, he said his clients had fully complied with the Rules. He argued that the principles enunciated in the case of *Ryanair v. Air Rianta*, supra, were particularly apposite to the present case. Here, he said, the various crimes alleged were those set out in the statement of claim. His client could not specify the precise documents, because of the nature of the claims made.

22. He rejected Mr. Cooney's submission that particulars of a justification plea must be provided, and submitted that, under Irish law, there is no such obligation and never was any obligation to particularise such a plea in a defence. Citing also Gately, 10th Edition, he argued that this obligation arises in the United Kingdom only on the basis of the procedural rules existing there.

23. He submitted that if a plaintiff wants particulars of a plea of justification, he must seek them in the usual way, and that had not been done. He accepted that if a defendant pleads generally, a plaintiff may seek particulars, although he did not concede that in the present case, particulars would be granted in response to such a request. As to the argument that the discovery is oppressive, Mr. McCullough submitted that the fact that the discovery is wide is not to be taken to mean it is, automatically, oppressive, and that in the present case, having regard to the pleadings, it is necessarily wide.

24. In reply, Mr. Cooney argued that the defendant was not seeking to advance its case, but rather to make its case, and that the law does not permit. It is for this very reason that the defendant is obliged, when it seeks discovery, to have already in existence grounds upon which it can properly plead justification. He argued that Mr. McGinty did not depose to a single word by which he could say he had evidence to substantiate or justify the serious charges included in the article, which include allegations of specific criminal activity and convictions, and which is a fundamental precondition to an entitlement to discovery in a case such as the present one. Many of the matters mentioned in support of discovery are not even matters which are referred to in the article itself. In support of this aspect of his reply, Mr. Cooney relied on the decision in *McDonnell v. Sunday Business Post Ltd* (2000) I.R. 19.

25. And finally, on the defendant's argument that the plaintiff had not yet sought particulars, this did not mean that the plaintiff was not entitled to them. The request for discovery, out of which this motion arises, was delivered on the same day as the defence itself, and the plaintiff can still seek particulars of the defendant's plea of justification.

Conclusions
26. Having regard to the extensive submissions made on the law by both parties, it will not be necessary for me to cite all of the relevant jurisprudence invoked. In general, there is little between the parties as to the relevant jurisprudence, although as to the application of that jurisprudence to the contentious issues in the case, they are in total disagreement. The issues between them can be divided into the following:

> (a) Whether the defendant must particularise a plea of justification in a libel action before discovery can be granted in its favour;
>
> (b) Whether the particular categories of documents now sought are relevant to the issues in the case as it currently stands;
>
> (c) Whether the breadth of discovery sought is within the permitted range or in the alternative, is oppressive;

27. I think it fair to say that there is little or nothing between the parties on the principles applicable to the test of relevance. In so far as the distinction and the nuances, if any, between the question of relevance, litigious disadvantage and necessity are concerned, as these words are used in the jurisprudence, the real question remains at all times, as is clear from the judgment of Fennelly, J., in *Ryanair v. Air Rianta*, supra, one of relevance. I agree with Mr. McCullough'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 enquiry in relation to the same, is fully applicable in the present case.

28. Nor do I think that Mr. Cooney has in any way disagreed with Mr. McCullough's approach to those principles applicable to the question of relevance. In these circumstances, I do not consider it necessary to cite or analyse the various cases opened to me on this general aspect of relevance in the context of discovery.

29. Both parties also appear to me to be ad idem as to the principle that a defendant may not plead justification in his defence to a libel action, unless he has, at the time the defence is filed, sufficient evidence to support his plea. Nor are the parties in disagreement with the principle that, once the defendant does have evidence to support his plea of justification, he is then entitled to discovery of all documents which may aid those pleas, in the sense set forth above. I do not, therefore, propose to revisit the jurisprudence cited on these matters either, save where it is necessary to do so in support of any conclusions I reach.

30. A much greater legal difficulty arises under the first of the above questions, and in respect of which the parties are completely at odds, namely, whether a defendant must particularise a plea of justification in a libel action, prior to discovery being granted. This may arise at least at two different stages, which, for the purposes of this appeal are somewhat interlinked, namely at the defence stage or in the course of a motion for discovery.

31. 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 a plea were, in fact, particularised in a defence, but as a matter of law, I do not accept that this is required, and on that aspect of the matter, I do not think the extracts from the more recent editions of *Gately* are of assistance, since they deal with the statutory or procedural position obtaining in the United Kingdom. Mr. McCullough is correct in arguing that there is no such obligation in this jurisdiction, either pursuant to statute or to any Rules of Procedure.

32. However, that does not really 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. All defendants, under Order 19 Rule 3 of the Rules of the Superior Courts are obliged to plead, in summary form, in any defence delivered, the material facts upon which he basis his pleading. So, 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.

33. This case does not really concern the question as to whether a defendant is obliged formally to particularise his defence of justification in the defence itself, in the sense set out above. Even if, as I find, a defendant is not obliged to include particulars, but only material facts, in his defence, the real issue to be resolved is whether or not for the purposes of granting discovery, the Court should have before it, in a libel action where the defendant pleads justification, but no material facts, some sufficient particulars in support of the plea. This arises in circumstances where the Court, as here, is required to consider whether the discovery is sought to advance the case of one party and/or to undermine the case of the other, rather than merely make a case for a defendant who pleads justification, and where the court is asked to resolve the question as to whether the documents sought are necessary for the proper disposal of the issues between the parties, in accordance with the jurisprudence in that regard.

34. The problem can only, if readily, be resolved by the furnishing of appropriate required material facts or volunteered particulars in the Defence itself, by the furnishing of replies to any request for particular which may be sought by a plaintiff, or in the affidavit grounding the motion for discovery, which in the present case includes identical material to that sent in a prior letter. Here there are no material facts pleaded, no particulars volunteered in the Defence, no request for particulars has been raised, and the Plaintiff alleges that what is put forward on behalf of the Defendant seeking discovery does not allow of an order to be made.

35. While in the present case there are no material facts pleaded to support the plea of justification in what is, indeed, a short and pithy Defence, Mr. Cooney for the plaintiff indicated that in his view particulars ought to have been sought, he would advise that they still should be sought, even now, and he argued that the absence of a request for particulars of justification should not be determinative of the issue of discovery. On the other hand Mr. McCullough argued that in the absence of a request for particulars, a plaintiff is, in effect, taken to have accepted the sufficiency of the case as pleaded. While not formally invoking a principle of estoppel, his argument was very close to saying that the plaintiff cannot, in law, raise the absence of particulars being sought, in the course of this appeal, as a ground for resisting discovery. The main case he relied on in support of this argument is *Cooper Flynn v. Radio Telefis Eireann*, supra, in which Kelly, J. stated that the plaintiff in that case was to be taken as having accepted that the defence was sufficiently clear, no particulars of the plea of justification having been raised.

36. I do not think that the general principle of law contended for by Mr. McCullough, namely that where no particulars have been sought, a plaintiff must always be taken as accepting the sufficiency of the pleadings, can be gleaned from the judgment of Kelly, J.

in that case. A decision as to whether any particular pleading is sufficiently particularised must depend on the pleadings in each case and their context. Nevertheless, it might well be said that, as a starting point, a party who does not seek particulars of a plea, provided that the defendant has pleaded material facts, even in summary form in accordance with the Rules, may be considered *prima facie* to have accepted that the plea is sufficiently particularised, but this must depend on each case.

37. In the present case, Mr. Cooney reminded the Court also that as well as the plea not being particularised, discovery was sought by the defendant by letter on the same day the defence was delivered. That of course is perfectly permissible, and it may also be tactically appropriate. But a plaintiff faced with such a request then has to choose whether he should immediately seek particulars of the plea and be faced with a claim that he is delaying the issue of discovery, or that the particulars are sought as a means of seeking improperly to limit discovery. It is not, therefore, necessarily the case that a plaintiff who does not seek particulars is always to be taken to have abandoned or waived that right, and in the present case Mr. McCullough accepts that the Plaintiff can still seek particulars, even if not prepared to concede that the Plaintiff will be successful in that regard.

38. As to Mr. McCullough's reliance on the case of *Hewson v. Cleeve* (1903) I.R. 536, again I do not think that case is a clear authority for the general proposition that a person not seeking particulars must always accept the case as pleaded. The argument in that case took place in the context of an application for a retrial where a trial judge refused to rule out evidence he had permitted to be adduced during the course of a libel action in which both fair comment and justification had been pleaded by the defendant.

39. While it is true that some of the judgments suggest that, while the plea of fair comment had been particularised, and the justification plea not, and no particulars of the latter plea had been raised, in those circumstances the appellants had waived their entitlement to particulars. Nevertheless there were strong countervailing reasons in the case for the findings actually made, namely no new trial, most notably the fact that, without any objection on the part of the appellants at the time, and without the appellants claiming, at the time or since, that they were taken by surprise, not only was the contested evidence heard, but the plaintiffs, in the course of cross-examination in the original trial, admitted all the material facts which had been adduced by the witnesses whose evidence they now sought to have disregarded. Therefore according to some at least of the judgments, these were based, not on the fact that there had been no request for particulars, but there would be no point in permitting a retrial. Leaving aside the fact that the case did not concern the question of discovery in the absence of particular having been furnished, it could not, in this Court's view, be understood from that case that there is no requirement for a defendant to give particulars of a plea of justification, at least at some stage, where, as here, discovery is being sought.

40. In the circumstances, I find that the plaintiff should not be precluded from raising the insufficiency of the defence or the absence of particulars of the plea of justification in the course of the present motion, because a request for particulars has not yet been raised by him, although it would of course have been preferable had it been.

41. Moreover, it is the Court itself which must be satisfied at the end of the day that the documents sought on discovery are, in the case of a libel action in which justification is pleaded, sought for the purposes of advancing an existing plea, and are actually relevant to the issues in the proceedings, whether or not a plaintiff has raised particulars. This is especially so where the range of discovered documents is, on its face, extremely wide. This will apply particularly in the case of a defence of justification, for the law makes it very clear, as Kelly J. stated in *Cooper Flynn v. Radio Telefis Eireann*, supra, citing Lord Denning M.R. in *Assoc. Leisure v. Assoc. Newspapers* [1970] Q.B. 450 at 456:

> "Like a charge of fraud, [counsel] must not put a plea of justification on the record unless he has clear and sufficient evidence to support it".

42. 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. This approach is clearly seen in such cases as *Wootton v. Sievier* [1912] 3 K.B. 499, a decision of the Court of Appeal in England concerning an allegation that the plaintiff had been guilty of gross dishonesty in the training and running of horses, conspiring with others to defraud bookmakers and owners of racehorses and the public generally, and in which the Court held that:

> "Where a defendant raises an imputation of misconduct against the plaintiff, the plaintiff ought to be enabled to go to trial with knowledge of the acts which it is alleged he has committed and upon which the defendant intends to rely as justifying the imputation."

43. The same approach is found in another, also quite old case, *Arnold and Anor v. Bottomley and Others* (1908) 2 K.B. 151, again a case of libel and a plea of justification, the Court of Appeal in England stated, as regard discovery in such circumstances:

> "A defendant to an action for libel who pleads a justification must state in his defence or in his particulars of justification the specific facts or instances upon which he relies in order to prove his plea, and he can obtain inspection of the plaintiff's books or documents only in respect of such specific facts or instances."

44. Of course these are older cases in respect of which the procedural rules of the type then applicable no longer apply, and certainly not in this jurisdiction, but in this jurisdiction there is still a requirement pursuant to the Rules of the Superior Courts for the pleading of material facts. Of those material facts the other party may then seek *further and better particulars*. The necessity to plead material facts is particularly important in the case of those parts of the article complained of which allege criminal offences or an involvement in illegal activities.

45. But although they are older case, the matter has been considered, although in a slightly different context, in the more recent judgment of the Supreme Court, *Browne v Browne and others* (1985) I.R. 185, there in the case of a rolled up plea and the entitlement to have particulars of such plea, and in which Henchy J. stating that the case law did not appear to be well settled and therefore the issue had to be decided on principle, and citing from yet another early case, *Spedding v Fitzpatrick* (1888) 38 C.D. 410, stated:

> "The object of particulars is to enable the party 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."

46. He then continued:

> "In this case, the factual elements in the article complained of are so numerous and so unspecific that it would be unfair to expect the plaintiff to come to court and present his case properly without knowing in advance the true range of the factual case that will be presented in support of the rolled-up plea. It would of course be unfair to require the defendants to make a detailed disclosure of their evidence in advance, but all they are being asked to do is to identify the matters in the article which they claim to be matters of fact and to state the facts which they intend to prove at the trial for the purpose of supporting those factual statements in the article. Such disclosure is in my view not unfair and indeed is highly desirable, if not necessary, in the interests of a fair trial."

47. In that case, as here, there was a simple plea of justification. Now of course it is true that, here the defendant does not plead fair comment, and so the necessary division between justification and fair comment was an issue in that case. However, with a plea of justification, a defendant must prove not only the truth of each of the facts published, but also the truth of the comment on such facts. I consider the above extract to be of guidance also in assessing whether, in the case of a defence which includes a simple plea of justification the documents sought are for the purposes of advancing a case rather than merely making a case of justification, for the defendant is being asked only to state the facts upon which they intend to prove the factual for the purposes of supporting the factual matters at the trial.

48. Allied with the above issue is the second matter between the parties, namely relevance of the documents. Without any particulars, or any sufficient material facts, or sufficient information as to the matters of fact upon which the defendant will adduce evidence in due course, in an affidavit grounding a motion for discovery, it is not easy to see where the line of relevance or litigious disadvantage or necessity should lie on the discovery application before me.

49. Even if I were wrong in my view that material facts of a sufficiently clear nature to support discovery must be included in a defence which pleads justification in a libel action, it is still difficult to find, in the reasons furnished in Mr. McGinty's affidavit, a basis for deciding that the discovery is in fact being sought to support an existing plea of justification rather than for the purposes of making a case for justification, or that the discovery is necessary, in the sense in which that is interpreted in the jurisprudence, for the proper disposal of the action.

50. It will be seen from the reasons set out in respect of each of the categories of documents sought, that Mr.McGinty invokes a general basis of "necessity" which can be described in the following words or words to similar effect:

> "I say that these matters will avoid delay and save costs, in that they go to the heart of the issue as to whether or not the plaintiff was engaged in business and as to whether those activities were in fact, lawful"

or alternatively:

> "I say that any of the matters requested are necessary for the purposes of saving costs and avoiding delay, for they define the issues between the parties and go to the heart to the alleged libel."

51. I am not satisfied that such general statements are appropriate. The reason for the change in the rules on discovery and disclosure was so as to avoid unnecessarily extensive discovery. The Rules require, expressly or implicitly that, when seeking discovery, certain elements grounding such discovery must be present. It is clear from the jurisprudence in that regard that the applicant seeking discovery should link the request for discovery or the extent of the discovery sought with the particular pleas, and indicate in what regard it is necessary to have such discovery. An analysis of the reasons given in the Supreme Court in the case of *Ryanair v. Air Rianta*, supra, and the consideration of the same in the judgment of McCracken, J., makes it clear that the 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 documents is sought. This also avoids the likelihood that the discovery motion itself becomes in reality a detailed exchange of argument on affidavit as to the entitlement or not to discovery, something to be avoided.

52. Further, an averment, for example, that discovery will "avoid delay and save costs" tells the Court little unless there is some factual matter upon which the Court can be reasonably satisfied that this is the case. A simple statement to that effect does not add to a plea of justification of the simple type found in the present case, unless the description of the category of documents actually used is such as to make it obvious that it will, in fact, avoid delay and save costs. I take the same view in relation to the statement "they define the issues between the parties" without further comment.

53. I take a few fairly simple categories among the several sought. At para. 15 of Mr. McGinty's affidavit, which refers to category (viii) of the notice of motion seeking "all press cuttings, documents, notes from publications or memoranda from publications relating to the plaintiff, which have been published in the last seven years", Mr. McGinty says (these) "go to the heart of the issue as to the damage suffered by the plaintiff in connection with the alleged defamatory publication in this case. Such matters will save costs, avoid delay and make clear the issues between the parties in the instant action."

54. If I commence with the question of saving delay, it is unclear to me from this description how any collection of press cuttings in the possession or procurement of the plaintiff, in the context of a case such as the present, would avoid delay. Even if the Court were to assume that the plaintiff had press cuttings, it is very doubtful that he might have all cuttings. If he does not have all such cuttings, does he have them within his procurement because they concern him, it being reasonable to assume that at least in certain cases, assuming they exist but are not in his hands, he might be entitled to secure copies from those who own or have possession them. And if he does not already have them, but is entitled to get them, how can he know what he should be seeking, or from whom? It is not clear to me this exercise would avoid delay.

55. Even if he had such documents, their relevance is not clear, without some further explanation for they would not ordinarily prove themselves, or their content. They would at best suggest that other persons may have been writing about the plaintiff. If that were the position, then it is likely, even without having to hear argument on the matter, that with modern technology it is in fact the defendant who would be in the best position to secure such documents, assuming they were available, from press cutting agencies or from other newspapers or magazines, to which they have ready access.

56. Further, on relevance, the defendant says these documents are relevant to the question of damages, without any further comment. While it might be possible to speculate on this, it is nowhere clear to me from the affidavit of Mr. McGinty, how the mere existence of press cuttings concerning the defendant, would be necessarily relevant to the question of damages, without further elaboration.

57. I take a second sample of what is sought, which throws up a somewhat similar difficulty. That is the request at number (iv) of the notice of motion, namely: "all records, notes, interview notes and other documents relating to any interview of the plaintiff by An

Garda Siochana, the Metropolitan Police and/or the United Kingdom Police and/or the Police in any other jurisdiction relating to any and every criminal matter in respect of which the plaintiff was interviewed";

58. This is a request for discovery of documents without any limitation in time, and without geographical limitation, because although initially apparently limited to Ireland and the United Kingdom, it then includes "any other jurisdiction". In his affidavit Mr. McGinty explains the reason for the request as: "… I say that those documents, which relate to dealings with money, go to the heart of the issue as to whether or not the plaintiff is a moneylender and a loan shark, which is one of the particulars of the alleged libel. I say that the plaintiff has put on record in the course of interviews, that he has made loans to members of the public. I say that there is no source for the alleged monies which the plaintiff has been lending to third parties. I say that any of the matters requested are necessary for the purposes of savings costs and avoiding delay, for they define the issues between the parties and go to the heart of the alleged libel."

59. This is a good example of the difficulty which the Court has with a defence which is either not particularised, or which contains no material facts of the justification plea, or where there are no details presented in support of the motion for discovery. Even though the defendant says these documents "go to the heart of the issues", the only "issues" referred to in Mr. McGinty's affidavit are money lending (of itself not necessarily an illegal activity), although the Plaintiff pleads the article says he is a violent moneylender, and the activity of loan sharking. Moreover, the defendant does not seek to limit the discovery to police interviews concerning such matters of violence and of being a loan shark.

60. Being on its face without any form of limitation in respect of all and any possible interview with police in any jurisdiction, it covers every possible activity which might be considered "criminal", since the plea of the Plaintiff is that the article means, *inter alia*, that he is a criminal and a notorious criminal. On its face it would cover even certain road traffic offences. The documents sought also cover offences committed for example as far away as Australia. It also, on its face, covers offences in which the Plaintiff may not have been in any way implicated, but rather a third party. And even if one limited the discovery to matters pleaded by the plaintiff as constituting the meanings of the published material, it would be very difficult indeed to know what exactly the plaintiff is obliged to discover, what among the possible interviews, if they exist, might be relevant for the defendant, and it is certainly the case that such a wide request would be both onerous and very costly.

61. As to the relevance of these documents and their necessity properly to dispose of the action, it is also unclear from the pithy reason given by Mr. McGinty, on what basis copies of interviews with police of the type sought are relevant to any plea. It has not been explained how a mere interview with police could undermine the plaintiff's plea as to the truth of the meanings attributed to the words used in the impugned article, nor assist the Defendant's plea as to the truth of the allegations that the Plaintiff is, for example, a notorious criminal. I assume that if such notes of interviews existed, then it might lead the defendant on a course of enquiry, although nowhere is it suggested that this is what is intended by seeking such discovery.

62. Somewhat similar comments arise in relation to (iii). According to Mr. Cooney, the Plaintiff has no criminal convictions. In the present case, the article states that the Plaintiff has convictions for four different types of criminal offence. If a material fact were pleaded in the Defence in that regard, or any indication were found in Mr. McGinty's affidavit that the defendant would present proof or evidence of the conviction records of the Plaintiff, this category could well be supported as indicative of the fact that the Plaintiff is, after all, a criminal – even a notorious criminal. But, as Henchy, J. stated in the case of *Cooney v Browne*, supra, citing Denning. L.J. in Cunningham-Howie's case and speaking about facts supporting the plea of justification: "the Defendant must know what they are, because he intends to prove them at the trial and it is no hardship for him to give particulars of them". However, what Mr. McGinty says is that these documents are sought to support a plea that the Plaintiff is in fact a well known criminal, involved, inter alia, in drug dealing, without any indication that evidence concerning even the convictions specifically alleged against the Plaintiff in the article, and which do not include convictions for drug offences, will be presented at the hearing.

63. Another, final, example in this context, is indicative of the fact that the breadth of the discovery is also such as to make it very difficult for the plaintiff to comply with the order sought, and equally difficult for the Court to assess the relevance of the categories of documents is the following.

> (v) All interviews and/or memoranda and/or records of interviews between the Plaintiff and any members of the Press;
>
> *Reasons:* "I say that the Plaintiff has commented on his activities and made admissions as to his activities in respect of which the libellous action has been taken, to members of the Press. I say that this goes to the heart of the issue and is necessary for the purposes of avoiding delay and saving costs".

64. This is again a category of documents which is very wide, and covers everything which could be considered to be an interview with the press, at any time, and anywhere, and in any jurisdiction. I do readily not see how the plaintiff could really know how he should comply with this request. If he had some such documentation, what precisely should be included? What is covered by "activities" in the explanatory sentence from the affidavit? What is covered by the so-called "admissions" and what do they admit to?

65. I have not dealt with each single category of documents sought, and I mention the above categories only as examples of the difficulty which has arisen in relation to assessing the relevance of the discovery sought, as well as it scope.

66. The court recognises, of course, that it is essential that newspapers or other media should not be unduly restrained in the reporting of matters which are of public importance or concern, including matters concerning crime or persons suspected of crime, even if such reporting is of a robust nature. I do not speak here of reporting in respect of criminal matters the subject of an extant hearings, which is the subject of special rules.

67. 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 fact of the words used and the plaintiff's right to have his good name adequately vindicated, and knowledge of the case he has to meet when there is a plea of justification, that appropriate details of the plea, if material facts have not been pleaded is available to the court in the affidavit grounding a discovery application.

68. 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. In the present case, it would not have been necessary for Mr. McGinty to swear an affidavit in which he identifies the name of a person who will give evidence that

the plaintiff is, for example, a "loan shark", as Mr. Cooney contended was required, but only that adequate information of the type referred to above is made available to the Court at the latest at the time discovery is sought.

69. Without these, not only is it impossible to establish that the discovery is sought to advance the defendant's plea of justification, a very important issue in a case such as this, rather than to make a case on that plea, it is also not clear how the question of the relevance and necessity of the discovery sought can be assessed, even if in respect of these, in the ordinary case, one frequently equates with the other.

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

71. In the circumstances, this motion in its present format, is either premature, in that it was filed before any material facts were pleaded or presented to the court in support of the motion, or particulars were sought or granted. Further or in the alternative, the motion is not well founded in that the defence, not complying with the Rules of the Superior Courts as to the requirement to plead in summary form the material facts upon which the defendant will rely in support of its plea of justification, does not permit the Court to assess whether the discovery is sought to advance an existing plea of justification. The motion is also not in at this time in compliance with the Rules in that proper reasons for the discovery sought, in particular as to the relevance of the documents, and as to their being necessary for the proper disposal of the action, are not sufficiently disclosed.

72. In the foregoing circumstances, the plaintiff has established that the Master should not, at this point in time, have acceded to the application made on behalf of the defendant for discovery, and I set aside the order made. I do so without prejudice to the defendant's right to seek an order for discovery at a future date.