

## 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

**EX TEMPORE JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 21st day of December, 2015.**

1. This is an application on behalf of the plaintiff who seeks an order requiring the defendants or the appropriate defendant to reveal the name of one of their clients.
2. The plaintiff says that he has become aware over a period of about a year of a campaign against him and against his business interests. He says that one of the manifestations of that campaign was the grouping together of certain questions posed by journalists, which aroused his suspicions. He does not give any examples of these questions and he does not, for example, exhibit any questions that were e-mailed by any journalists. He simply makes the assertion as to the fact that this happened. He says that because of these suspicions he instigated an investigation to discover who might be behind the campaign by instructing a solicitor, though it was not clear to me why a solicitor would be instructed to investigate such matters. Needless to say there is nothing wrong with engaging a solicitor to commence an investigation of some sort.
3. In addition an (apparently) Irish accountant based in Kiev in the Ukraine was engaged in connection with the investigation. No explanation was provided as to why a Kiev based accountant with expertise in corporate matters was engaged to investigate why journalists had asked certain sorts of questions and who might be behind a campaign to harm the plaintiff.
4. During the course of this investigation, and possibly or probably before any result at all had been achieved, a memory stick contained in an envelope was anonymously delivered to the plaintiff. According to the affidavit evidence, the memory stick appears to have been produced no later than 1st October, 2015, and the plaintiff was in a position by 8th October to give it to his solicitors, who gave it to technical experts who examined it apparently on 9th October, and who were on that date able to identify who had authored or allegedly authored material on that memory stick, which the plaintiff says is defamatory of him and evidence of a conspiracy against him.
5. Approximately four days later the plaintiff's lawyers made an ex parte application to the President of the High Court, for an Anton Piller order, (see *Anton Piller K.G. v. Manufacturing Processes Ltd* [1976] Ch 55). Such order, if granted, requires co-operation from a person suspected of wrongdoing. It permits, and these are the words used by the plaintiff, "a civil search party" to enter premises to search and seize information and documents and to protect items of possible evidential value to ensure that suspected wrongdoing can be prosecuted. The courts are empowered in exceptional circumstances to come to the aid of a litigant in this manner.
6. A litigant may persuade a court that it is necessary to move in exceptional and extraordinary ways to protect evidence and even in some circumstances to grant "super injunctions" directing that the existence of the proceedings not be revealed. Such orders have been made in the United Kingdom and there are academics who argue that such orders may be made in this jurisdiction.
7. The plaintiff had enough information on the day he made the ex parte application to the President of the High Court to ground an application that the named defendants be required to identify other unnamed wrongdoers. Throughout his affidavit grounding the ex parte application, on a number of occasions, he indicates that he wants the Court to order that the existing defendants be required to identify others.
8. Critically, he also asked for non-disclosure orders, such that anybody against whom an order might be made would not be permitted to tell anybody that such order had been made. Obviously the purpose of this non-disclosure order was to ensure that there would not be any destruction of evidence. The plaintiff had made applications which, in appropriate circumstances, are entirely proper, and a court may come to the aid of a person who needs that level of special protection, where untoward and secret activity is underway seeking to damage a person. A court will, in an appropriate case, make such extraordinary orders.
9. The President did not make all the orders sought but instead decided to balance the interests of the plaintiff and the defendant by making evidence preservation orders and non-disclosure orders. The matter came back before this Court a couple of days later and in an attempt to further balance the interests of all the parties, and considering that the defendants would need to have access to their documents and their hardware and software, orders directing forensic imaging of the defendants' computers were made.
10. Matters were then adjourned in circumstances where the Court anticipated that there would be an application by the plaintiff for inspection of the forensic images so that it might be possible for the plaintiff to identify the first named defendant's client who the plaintiff believes is behind the campaign to harm him.
11. In the course of these applications counsel for the defendant conceded that the material found on the memory stick (referred to as 'the dossier') which had been produced in evidence to back up the application for the Anton Piller orders was indeed the work product of the defendants, in particulars the first named defendant. Ultimately the plaintiff decided that it did not immediately need to inspect the digital images but moved the Court for an order requiring the defendants to disclose the identity of the unnamed client.
12. The application came before this Court and there was a considerable legal debate as to the jurisdiction of the Court to make such disclosure orders. The Court was concerned at first to see whether the orders sought were discovery orders or whether they might be some other type of orders. Much of the case law was considered by the Court and read carefully and the seed case in all of this is a

case called *Norwich Pharmacal Co. v. Commissioners of Customs and Excise* [1974] A.C. 133. In that case a patent owning plaintiff had sought to complain that the U.K. customs had unlawfully assisted people breaching its patent by allowing patented or licensed product to come into the U.K.. In the course of making those complaints, the plaintiff added an application for a court order requiring the customs agency to reveal the identity of the people who had imported the product, whose names were known to the customs officials. So while the case started out as an application against identified wrongdoers, and an application that the identified wrongdoers disclose the names of other people, so that they would then be joined as concurrent wrongdoers, by the time it came to the House of Lords, as counsel for the plaintiff in that case I think conceded, it was then an action for pure discovery. Following that case it became accepted that at common law it was possible to seek, in plenary proceedings, orders for discovery only or disclosure only against an innocently involved defendant, who would have the name of the real wrongdoer. Matters have developed since then, and it seems to me that the state of the common law at the moment has been fully set out in a decision of the U.K. Supreme Court in *Rugby Football Union v. Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation)* [2012] 1 W.L.R. 3333 which describes the various circumstances which govern the making of Norwich Pharmacal type orders.

13. It is also clear from an examination of Irish jurisprudence that whereas historically such orders were made against an innocently involved defendant, it is clear that disclosure orders can be made against actual wrongdoers and whether one calls those Norwich Pharmacal orders or disclosure orders or discovery orders, such orders, are available to the High Court and have been made in the past. They have been made by Gilligan J. in *Ryanair v Unister* [2011] I.E.H.C. 167 where he ordered that the names of certain third party service providers be identified. Like orders were also made by Peart J., which he referred to as a "*Norwich Pharmacal order*" in *McKeogh v. John Doe & others* [2012] I.E.H.C. 95 where unnamed wrongdoers were required to be named. In fact, in that case, the unknown unnamed wrongdoers appeared in the title of the proceedings, but using of course fictitious names.

14. So I have no doubt but that in an appropriate case the Court has jurisdiction to order defendants to name and identify alleged concurrent wrongdoers in respect of whom they have certain information, especially their names and addresses.

15. Part of the argument in the case was as to whether or not orders of the sort that the plaintiff has sought are available at interlocutory stage. By virtue of the decision of Gilligan J. in *Ryanair* and Peart J. in *McKeogh*, and the statements of Clarke J. in the Supreme Court in the *Ryanair v. Unister* [2013] I.E.S.C. 14, it seems to me that orders of the sort sought by the plaintiff are indeed available at interlocutory stage. I note that Peart J. made the orders requiring information about the unnamed persons be delivered to the plaintiff at the ex parte stage.

16. Having found as I do that the jurisdiction to make the order sought by the plaintiff exists I now turn to look at the points of conflict in this case.

17. In the first place the defendants have said that the plaintiff is not entitled to the order sought because there has been a want of candour, and there are three broad complaints made here:-

- 1) The nature and circumstances in which Mr. O'Brien became suspicious of a campaign against him.
- 2) The nature of the investigation he conducted or had conducted, and
- 3) The circumstances surrounding the appearance of the memory stick in his offices and related matters.

18. I have been persuaded that I cannot decide whether there has been a want of candour by the plaintiff in this case. There is not enough evidence for me to come to a decision on this. The Court believes that though the full story has not been told in relation to the accountant in Kiev, the circumstances in which the memory stick appeared on Mr. O'Brien's desk, who carried out the first part of the investigation and various other matters, it seems to me that there may well be perfectly good explanations for all of these matters. Therefore, I cannot refuse the application before me based upon an unproven complaint of want of candour.

19. The second argument advanced by the defendants in favour of not making the order is that they say that they owe a duty of confidentiality to their client and that the Court should respect that. It is a simple proposition and the matter is answered by the plaintiff who says that the duty of confidentiality is one which must, in appropriate circumstances, give way to the public interest in prosecuting, whether in civil litigation or otherwise, wrongdoers. That of course is a correct statement of the law and Kelly J. (as he then was) has so confirmed in *E.M.I. Records (Ireland) Ltd & others v. Éircom Ltd & others* [2005] I.E.H.C. 233.

20. The plaintiff argues that when the Court comes to balance the right of the defendants to protect the confidentiality of their client, and the confidentiality of other information which they hold, that matter is to be balanced against the degree to which wrongdoing has been established by the plaintiff in the case.

21. This is a matter which bears some careful consideration. Having reviewed the Irish and English authorities, it seems to me, and in particular with respect to the Irish authorities, one feature stands out, and that is that in all of them, whether that be the *Norwich Pharmacal* case itself (supra), the *Ryanair v Unister* case (supra), *Megaleasing U.K. Ltd v. Barrett* [1993] I.L.R.M. 497, *McKeogh v. John Doe* (supra) or *E.M.I.* (supra), wrongdoing by unidentified persons, to a very high degree of probability, had been made out by the plaintiffs.

22. Now in pure actions for disclosure, which would be instituted by plenary summons, a plaintiff seeking disclosure orders can litigate whether or not an unnamed person can be shown to have done something wrong to the appropriate level of proof in that plenary action. That is much more difficult to achieve where the application is made at an interlocutory stage. It seems to me that the law does require that a plaintiff establishes to a high degree of certainty that an unknown person has engaged in unlawful activity before disclosure orders will be made. In this case the unlawful activity related to two particular torts, the tort of defamation and the tort of conspiracy.

23. To what extent has the plaintiff established wrongdoing by the anonymous tortfeasor? In the first instance with respect to defamation, the plaintiff says that, for example, one of the matters he says is defamatory is the suggestion that he engages in philanthropic activity in Haiti to disguise other activities he might be accused of or to make him look good and that he has no genuine interest in such activities. He points out that such an allegation was made in the past and he succeeded in a jury action in establishing that this was indeed defamatory. Counsel for the plaintiff, Mr. Cush (S.C.), has argued strenuously that that should establish to a point of the necessary certainty that is required in cases like these that wrongdoing has indeed occurred.

24. My view of the matter is that where a plaintiff seeks to establish wrongdoing to the degree necessary on an application such as this, they must do so in respect of each element of the tort. I have not been persuaded that there is enough evidence or any evidence in the case for me to be certain that publication has indeed happened, for without publication there can be no defamation.

Therefore, on that basis I am not satisfied that with respect to the first of the torts alleged that the wrongdoing has been made out to the degree necessary to justify the making of the orders sought.

25. With respect to the second matter, the tort of conspiracy, it seems to me that the plaintiff must establish either of the two forms of conspiracy to injure:-

1. By lawful means, and
2. By unlawful means.

The unlawful means tort is that of defamation, and as I have already found, that has not been made out to the degree necessary, that does not require any further consideration in respect of asking or answering the question as to whether the plaintiff has made out that a wrongdoing of conspiracy using unlawful means has occurred.

26. With respect to the tort of conspiracy using lawful means, it seems to me that there are two critical elements of this tort which have not been made out by the plaintiff. The first is that there is no evidence that injury has actually occurred. There can be no tort of conspiracy to harm unless there is proof of the harm. The one thing Mr. O'Brien has not been able to do is to prove that any of this dossier on the memory stick has actually harmed him, though there is a suggestion that it may somehow be related to the fact that an enterprise, a proposed I.P.O. in New York, may have been negatively effected by information contained in some of this dossier, but it is nothing more than a suggestion.

27. The second reason why I find that that tort (i.e. lawful means conspiracy, a strange and perhaps anomalous tort in the 21st Century because it damns people who do together that which would be lawful if they did it apart) is not made out is that it requires proof of the motivation of the alleged tortfeasor. In order for the plaintiff to establish the tort to the standard necessary in the current application there would have to be sufficient evidence of what the motivation of the unnamed person is. The unnamed person could have a dominant motive to advance his or her or its own interests, thereby causing collateral damage to the plaintiff, and that would not be tortious. No adequate evidence of motivation was available to the Court and thus the Court cannot conclude to level of certainty required that the tort has been committed by the unnamed person.

28. Ultimately the contest in this case was between the desire of the defendants not to breach their duty of confidentiality to their client and the desire of the plaintiff to secure information about the identity of that client.

29. The plaintiff knows full well the value of the duty of confidentiality. He has himself litigated his own interest in confidentiality, in a matter which was heard by me in 2013 (*O'Brien v. Times Newspapers Limited & anor.* [2013] I.E.H.C. 150), and where this Court set out the importance of confidentiality and if it is to be removed at an interlocutory stage what has to be balanced.

30. If this Court were to require the defendants to now disclose the name of the client, the very matter that Mr. O'Brien complained of in 2013 when he was seeking non disclosure of certain banking information in the Sunday Newspapers (he argued that irreversible harm would be done by the disclosure) which is precisely what the defendants say in this case. Once this matter is disclosed the confidentiality in the matter is gone forever. It seems that in order for that to happen at the interlocutory stage there really would have to be a very strong case indeed about the alleged wrongdoing, to the point of almost certainty, before a court could so order, knowing that if the court is wrong, irreversible harm would be done to the interests of the defendant and to the interests of the unnamed client in the case.

31. The final matter I wish to address is that the plaintiff has sought to persuade me that the information should be disclosed now by order of the Court, because, if this is not done, evidence will be destroyed. Though the plaintiff has moved quickly in making the application, it is a matter that weighs quite heavily with the Court that his very first application to the President was for an order that this information be disclosed. It seems not to have been pursued with the President and was only pursued in this Court latterly.

32. It seems to me that had the plaintiff's primary interest been to ensure that the name of this client be disclosed in a secret way to the plaintiff, to ensure that the client could not destroy evidence, that could indeed have been pursued and had it been done early, the interests sought to be protected could have been achieved. It is unclear that the President actually refused it but either no decision was made on that by the President or it was actually refused.

33. If it was refused and the plaintiff's real interest was in ensuring that information be disclosed, that should have been appealed. If it was not actually decided by the President, then it might have been pursued with me much earlier than it actually was, and there should have been an insistence by the plaintiff that the non disclosure part of the President's order be kept in place, (non disclosure of the making of certain court orders) such that the plaintiff could truly go after the evidence, which he says he needs in order to ensure that not only might the unnamed client be named but that an order might be sought ex parte, and with non disclosure protection, that computers or documents not be destroyed.

34. That simply did not happen in this case. It seems to me that if the best reason the plaintiff can advance for seeking an order at this stage is that evidence might be destroyed and the firm view of the plaintiff is that the malicious intent of the people he says conspired against him and defamed him is so great that he has no trust in them whatsoever, it seems to me that if he is right about that, this evidence has been destroyed a long time ago and no good will come from making the order now but that is the least of the reasons why I refuse the orders sought by the plaintiff.