

THE HIGH COURT

Between:-

THOMAS BYRNE

Plaintiff

- and -

SUNDAY NEWSPAPERS LIMITED t/a THE SUNDAY WORLD

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 2nd December, 2015.

Part 1: Background.

1. Mr Byrne is a onetime solicitor who is presently serving a prison sentence for financial fraud. In August 2011, before he was tried and sentenced, Mr Byrne was the subject of an article in *The Sunday World* newspaper that linked him with 'gangland-style' 'criminality' of the 'Love/Hate' variety. Mr Byrne claims that this article was defamatory and, in October 2011, he commenced these defamation proceedings in a bid to protect whatever remains of his good name. He contends that any post-imprisonment attempts at self-rehabilitation will be made more difficult if he is linked to 'gangland' crime, a link he strenuously denies. He also contends that he may be in physical danger, post-imprisonment, if he is thought by one set of 'gangland' figures to be connected to another.

Part 2: Discovery Sought and Ordered.

2. In October 2013, as part of the defamation proceedings, *The Sunday World* sought voluntary discovery from Mr Byrne, i.e. that he would elect to provide certain documentation to them. Mr Byrne declined to do so. A contested application for discovery of the documentation ensued and, in May 2014, Mr Byrne was ordered by the High Court to produce various categories of documents to *The Sunday World* within 12 weeks. Unfortunately, sometime between October 2013 and May 2014, all manner of discoverable documents were inadvertently destroyed by Mr Byrne's solicitor. So, despite a notably comprehensive order of discovery, the details of which are considered later below, the discovery process has thus far yielded a grand total of five documents, all of which could likely have been assembled by *The Sunday World* itself without much a-do.

3. Mr Byrne has averred that certain of the documentation which he has been required to produce (hereafter the 'Category 1 Documentation') has long been outside his possession, power or control. For reasons identified hereafter the court must admit to some scepticism about the adequacy and credibility of this averment. More convincing, and accepted by the court as true, a solicitor who did *pro bono* work for Mr Byrne, following the latter's 'downfall', has sworn an affidavit indicating that certain documentation (hereafter the 'Category 2 Documentation') was innocently destroyed by him (the solicitor) around or after the time that the letter seeking voluntary discovery issued from *The Sunday World*. Innocently though this was done, the court returns later below to the consequences that may yet flow from this destruction of otherwise discoverable documentation.

Part 3: Application brought by The Sunday World.

4. Pursuant to a notice of motion of 11th May last, *The Sunday World* comes now to court seeking, *inter alia*, the following reliefs: (1) an order pursuant to O.31, r.21 of the Rules of the Superior Courts 1986 (as amended) dismissing Mr Byrne's claim for want of prosecution, arising from his failure to comply with the order for discovery of May 2014; and (2) further, or alternatively, an order requiring Mr Byrne to make further and better discovery and/or to further and fully comply with the order for discovery made by the court in May 2014.

Part 4: Some Relevant Case-Law.

5. In approaching an application brought under O.31, r.21, the court is mindful of the cautionary observations of (i) Hamilton C.J. in *Mercantile Credit Co. of Ireland v. Heelan* [1998] 1 I.R. 81, 85, that:

"The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order of discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.

It should only be where there is wilful default or negligence on the part of a defendant and then only upon application to the court for an order to that effect",

And (ii) Barrington J. in *Murphy v. J. Donohoe Ltd* [1996] 1 I.R. 123, 142, that:

"Order 31, rule 21 exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court".

6. Bearing these observations in mind, the court is satisfied for now to give Mr Byrne the benefit of the doubt as regards lack of culpability and lack of wilful default in respect of discovery of the Category 1 Documentation. When it comes to the Category 2 Documentation, the court touches upon some potential concerns in this regard later below.

Part 5: The Required Documentation.

7. The High Court, in its order of May 2014, ordered discovery of the documentation indicated in italics below. This Court makes certain remarks after each block of italicised text.

8. "a) *All documents which record and/or evidence and/or refer to the process and sequence of events resulting in the Plaintiff being struck off the Roll of Solicitors including but not limited to any communications from the Plaintiff his servants or agents to the Law Society of Ireland and any communications from the Law Society of Ireland to the Plaintiff his servants or agents from 2006 to the present whether in the course of any investigation by the Solicitors Disciplinary Tribunal an application by the Law Society to the High Court or otherwise".*

9. This is Category 1 Documentation. Mr Byrne has indicated on affidavit that since 22nd October, 2007, he has not had any documentation in his "possession, power or control" relating to his former practice as a solicitor.

10. Notably, the order for discovery made by the High Court in May 2014, echoing the wording of O.31, r.12, requires discovery by Mr Byrne of such documents as "are or have been in his possession power or procurement", not to such documentation as is in his "possession, power or control". The reference to "procurement" was added to O.31, r.12 in 2009. There is little if anything by way of recent authority as to the meaning of "procurement" when used in this context. However, the court is mindful of the long-ago views expressed by Finlay P. in *Northern Bank Finance Corporation v. Charlton* (Unreported, High Court, 26th May 1977), and later followed

by Barron J. in *Yates v. Ciba Geigy Agro Ltd* (Unreported, High Court, 29th April 1986), that documents not being in the power of a party may still be within his procurement. Those precedents were not cited at the hearing of the within application. However, even if one were to disregard them, and there is no reason why one should, there is no cause to consider that the word "procurement", when used either in O.31, r.12 or in the order of May 2014, should not bear its ordinary English meaning. A Google search of the word "procurement" indicates it to mean "the action of obtaining or procuring something". A Google search of the verb 'to obtain' yields the meaning "get, acquire or secure (something)"; and of the verb 'to procure' yields the meaning "obtain (something) especially with care or effort" and, in law, as having the meaning "persuade or cause (someone) to do something". Thus the notion of "procurement" is rather more far-reaching than the word "control" which does not feature in the operative part of the court order of May 2014, or indeed in O.31, r.12, and which, as a term, is suggestive of documentation over which one has 'custodianship' or 'sway', a rather more constrained category of documents than those of which Mr Byrne has been ordered to make discovery.

11. It was indicated at the hearing of the within application that such documents as are referred to in the above category of documentation are likely in the possession of the Law Society or the Gardaí. The court will order that Mr Byrne liaise with the Law Society and the Gardaí and secure the release, by end-February 2016, to *The Sunday World* of such documentation that (i) either or both of those bodies is satisfied to release, and (ii) is covered by the High Court order for discovery of May 2014, which documentation appears to the court to be documentation that is peculiarly within Mr Byrne's capacity to 'procure'. After all, he alone appears to have some entitlement to it; *The Sunday World* has none. The court will also order that Mr Byrne swear a supplemental affidavit of discovery which refers to such documents as "are or have been in his possession power or procurement".

12. The court notes too that the scope of documentation to which Mr Byrne refers in his Affidavit of Discovery is narrower in ambit than that which is the subject of the Court order. He appears to focus on the "including but not limited to" segment but does not properly address the segment requiring discovery of "All documents which record and/or evidence and/or refer to the process and sequence of events resulting in the Plaintiff being struck off the Roll of Solicitors". The court struggles to believe that the entirety of such a swathe of documentation – which includes documentation referring "to the process and sequence of events", a potentially very wide category of documentation indeed – is no longer in any way in Mr Byrne's possession, power or procurement. The court would encourage Mr Byrne to re-address his mind to this aspect of matters and will order that he make averment in this regard in a supplementary affidavit of discovery.

13. "b) All documents generated in the course of the High Court proceedings bearing the title and record number *John Kelly v Thomas Byrne trading under the style and title of Thomas Byrne and Company Solicitors 2008 546 P* which proceedings are the subject of a final judgment of this Honourable Court bearing the neutral citation number [2011] IEHC 174".

14. "c) *The Book of Evidence served upon the Plaintiff in the criminal proceedings brought against the Plaintiff by the People at the suit of the Director of Public Prosecutions and any statements made by the Plaintiff to An Garda Síochána since 2006*".

15. Both of the above categories of documents concern Category 2 Documentation. Mr Byrne avers that the relevant documentation was last in the possession of his former solicitor. His former solicitor has averred, and again the court accepts his averment as true, that he (the solicitor) has innocently destroyed this documentation.

16. "d) All documents evidencing the relationship between the Plaintiff and Mr [A] including but not limited to any property deals or transactions involving the Plaintiff and [A]

e) All documents which record and/or evidence and/or refer to the relationship between the Plaintiff and Mr [B] and any interactions or dealings between the Plaintiff and [B]

f) All documents which record and/or evidence and/or refer to the relationship between the Plaintiff and (i) [C] and (ii) [D] including but not limited to documentation evidencing and/or referring to and/or relating to any interaction or dealings whatsoever between the Plaintiff and Mr [C] and the Plaintiff and Mr [D]".

17. Mr Byrne has averred that Mr C was never a client of his. As to Mr A and Mr B, Mr Byrne claims that the relevant documentation was last in his possession or that of his solicitor in 2011. However, it seems to the court that some of this documentation must be in the possession of the Law Society, to the extent that it has retained seized documentation from Mr Byrne's former practice. As mentioned above, the court will order that Mr Byrne liaise with the Law Society and secure the release by end-February 2016 to *The Sunday World* of such documentation that (i) the Law Society is satisfied to release, and (ii) is covered by the High Court order for discovery of May 2014, which documentation again appears to the court to be documentation that is peculiarly within Mr Byrne's capacity to 'procure'.

18. "g) All documents which record and/or evidence and/or refer to any employment activities engaged in by the Plaintiff subsequent to his being struck off the Roll of Solicitors".

19. Mr Byrne's former solicitor has suggested that Mr Byrne, being a prisoner, is presently unable to initiate searches or enquiries or to order papers relating to his employment in the restaurant outside of which the photograph accompanying the impugned newspaper article was taken. This is a matter to which Mr Byrne ought to have averred in his own affidavit and concerns a general point to which the court returns later below. For now, the court would merely note that it struggles to believe that the entirety of the above-mentioned category of documentation, a potentially very wide category of documentation indeed, is no longer in Mr Byrne's possession, power or procurement. The court would encourage Mr Byrne to re-address his mind to this aspect of matters and will order that he make further averment in this regard in a supplementary affidavit of discovery.

Part 6: Fairness of Procedures and Freedom of the Press.

20. A concern might be contended to present as to whether it will be possible for *The Sunday World* to enjoy fairness of procedures in these defamation proceedings, thanks to the innocent destruction by Mr Byrne's onetime solicitor of an abundance of otherwise discoverable documentation. Journalists presumably sometimes come into possession of information which, having regard to the quality of their sources and their own professional experience, they are genuinely satisfied is true and are also satisfied to publish. Journalists clearly need to be careful in this regard, so as not wrongly to intrude on someone's right to privacy and, even more basically, so as not to make a mistake. However, as a society, we place a premium on freedom of expression, so much so that we allow potentially defamatory articles to be published and provide the possibility for subsequent relief to anyone who has been defamed. It does not seem to this Court that there is anything legally wrong in journalists publishing something which they genuinely believe to be true, having regard to their sources and experience, and factoring into their calculations on whether or not to publish a sense that, if a particular publication results in later defamation litigation, they will additionally be vindicated by what comes out in a discovery process, albeit that this is a consequence, not the purpose, of discovery. Here, much of what was discoverable, and has been ordered to be discovered, was destroyed, albeit innocently, by an agent of the party claiming defamation, after defamation

proceedings commenced and *after* voluntary discovery was requested. The former of these moments in time was possibly, and the latter was certainly one from which Mr Byrne might reasonably have been expected to secure the preservation of documentation that he apprehended or – following receipt of the letter seeking voluntary discovery – knew that *The Sunday World* would be seeking to discover and could be seeking to rely upon at any later defamation trial. Having regard to the actions of Mr Byrne’s solicitor (however innocent) and the inaction of Mr Byrne, a concern might be contended to arise as to whether an incurable unfairness of procedures arises for *The Sunday World*. For this reason, should either or both of the parties so wish, the court will set aside time in March 2016 to consider (a) how matters stand as regards discovery, following on the orders that it has indicated above that it will make, and (b) any arguments that either or both of the parties may seek to make (if they so seek) as to whether or not fairness of procedures continues to be attainable for *The Sunday World* in the within proceedings.

Part 7: Mr Byrne’s Current Imprisonment.

21. As mentioned above, there is suggestion in the affidavit of Mr Byrne’s former solicitor that, given Mr Byrne’s current status as a prisoner, he will face difficulty in acquiring and/or procuring discoverable documentation at this time. Much of this difficulty would not present at all if, after commencing these proceedings and after receiving the letter seeking voluntary discovery, Mr Byrne had taken care to ensure that documentation relevant to these proceedings was not destroyed. In addition, the court has indicated some scepticism above as to whether the entirety of certain wide-ranging categories of documentation are truly outside Mr Byrne’s possession, control and, most significantly, procurement. Moreover, Mr Byrne was represented by Senior Counsel, Junior Counsel and a solicitor at the within application and so appears not to be proceeding alone in this matter. Indeed, if his defamation suit is likely to succeed, he seems unlikely to want for assistance. But regardless of all that, Mr Byrne’s misfortunate current position as a prisoner cannot have as a necessary consequence that *The Sunday World* should be denied its full rights as a defendant in the within proceedings; those rights include that the order for discovery of May 2014 be complied with fully and properly.

Part 8: Non-Party Discovery.

22. Notwithstanding the foregoing, and notwithstanding the orders that the court has indicated that it will be satisfied to make, there was mention at the within application that *The Sunday World* may yet seek discovery from certain non-parties to the within proceedings. It is clear from case-law that a rigorous test of necessity applies when it comes to non-party discovery, with the courts only being satisfied to make such an order if the relevant documentation cannot be obtained by other means. In the within proceedings it seems that alternative means are available at this time. But times change. If either of the parties to this application should consider, between the date of this judgment and end-February that he/it needs to seek non-party discovery so as to progress matters more efficiently, this Court is satisfied to hear any such application at short notice.

Part 9: Conclusion.

23. As indicated above, and for the reasons stated above, the court will make the following orders at this time:

24. With regard to the documentation referred to:

(1) at para. a) of the order for discovery of May 2014:

- the court shall order that Mr Byrne liaise with the Law Society and the Gardaí and secure the release, by end-February 2016, to *The Sunday World* of such documentation that (i) either or both of those bodies is satisfied to release, and (ii) is covered by the High Court order for discovery of May 2014, which documentation appears to the court to be documentation that is peculiarly within Mr Byrne’s capacity to ‘procure’;

- the court notes that the scope of documentation to which Mr Byrne refers in his affidavit of discovery is narrower in ambit than that which is the subject of the Court order. The court shall **order** that any supplementary affidavit of discovery should focus, as appropriate, on all documents which record and/or evidence and/or refer to the process and sequence of events resulting in Mr Byrne being struck off the Roll of Solicitors;

(2) at paras. d), e), and f) of the order for discovery of May 2014, the court shall **order** that Mr Byrne liaise with the Law Society and secure the release by end-February 2016 to *The Sunday World* of such documentation that (i) the Law Society is satisfied to release, and (ii) is covered by the High Court order for discovery of May 2014;

(3) at para. g) of the order for discovery of May 2014, the court shall **order** that any supplementary affidavit of discovery refers to such documentation as is in Mr Byrne’s possession, power or procurement.

25. The court further **orders** that any supplemental order of discovery sworn by Mr Byrne is to make reference to all such documents as are or have been in his ‘possession, power or procurement’.

26. Finally, the court notes that, notwithstanding authorities such as *Mercantile Credit and Murphy*, it is not required to extend endless indulgence to Mr Byrne when it comes to his making discovery. In this judgment, the court has afforded Mr Byrne additional time to comply with his discovery obligations and sought also to indicate clearly what he needs to do. The court would respectfully suggest that Mr Byrne now seek to make optimal use of the additional time that the court has afforded him in this regard.