

THE HIGH COURT

[2011 No. 5977 P]

BETWEEN

LOUIS WALSH

PLAINTIFF

AND

THE NEWS GROUP NEWSPAPERS LIMITED

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 10th day of August, 2012

1. In this motion, the plaintiff seeks discovery of documents from the defendants. The defendants, in opposing the entirety of the discovery sought, rely upon the journalistic privilege of non-disclosure of sources of information. Because the defendants' opposition was in respect of all of the discovery sought on this particular ground, the hearing of this motion was treated as also the hearing of the defendants' claim to privilege in respect of all of the documents sought to be discovered.

2. In the action, the plaintiff sues the defendants for damages, including aggravated and exemplary damages for defamation arising out of an article published in the 'Sun' newspaper on 23rd June 2011, and also the same material published by the defendants on their website, www.thesun.co.uk on the same date.

3. The article in question was headlined "*LOUIS PROBED OVER 'SEX ATTACK ON MAN IN LOO'*". The article in the newspaper and the information published on the website were to the effect that the plaintiff was being investigated by the police in respect of a claim by a 24-year old man that the plaintiff had indecently or sexually assaulted him in the toilet of a Dublin nightclub. In the article in the newspaper and in the information published on the website, there was included a denial by the plaintiff of these claims and an assertion that the plaintiff would fully cooperate with any police investigation.

4. Not long after these publications, it emerged that the allegations made in respect of the plaintiff were false and the person who made these allegations, a Mr. Leonard Watters, was prosecuted in respect of making these false allegations. The defendants unreservedly accept that the allegations against the plaintiff were false and that the plaintiff has been completely exonerated in this respect.

5. In the particulars supporting the plaintiffs claim for aggravated and/or exemplary damages, as set out in the plaintiffs statement of claim, the plaintiff alleges that on 15th June 2000, a journalist employed by the defendants, Joanne McElgunn, met Mr. Watters in the Newbridge Hotel, Navan, bought him dinner, offered him a sum of money on behalf of the 'Sun', if he agreed to make a complaint to An Garda Síochána about being assaulted by Mr. Watters in the toilet of a Dublin nightclub. Thereafter on the same day, it is alleged that Joanne McElgunn travelled with Mr. Watters to Pearse Street garda station so that he could make the agreed complaint against the plaintiff, which he did. Subsequently, on 20th June 2011, Mr. Watters provided a written statement of complaint to An Garda Síochána setting out the alleged sexual assault. Having made this written statement, the plaintiff alleges that Mr. Watters again met Joanne McElgunn and was encouraged or enticed by her to repeat the false statements to her for publication in the 'Sun'. The plaintiff further alleges that Joanne McElgunn paid Mr. Watters the sum of €700 and promised to make further payments after the story was printed. It is alleged by the plaintiff that on a later date, Mr. Watters was booked into a Dublin hotel in order to secure further false statements from him concerning the plaintiff and to ensure that he did not take his false story to rival publications. The plaintiff says that full and detailed particulars of further payments by the defendants to Mr. Watters could not be pleaded with certainty without discovery of documents and interrogatories.

6. The plaintiff also pleads that the defendants falsely misrepresented to the plaintiff that it had received information from An Garda Síochána pertaining to the complaint made by Mr. Watters, and specifically, that on 22nd June 2011, Gordon Smart of the defendants informed Sarah Lee, a representative of the plaintiff, that the defendant had received from An Garda Síochána information concerning the allegation made against the plaintiff, and on the same date, that Dominic Mohan, Editor of the 'Sun' newspaper, had informed Sarah Lee that the defendants had received "*guidance from the police throughout the story*". Further, that on 23rd June 2011, Gordon Smart had informed Sarah Lee that the information in the defendants' article had come from the police *via* the 'Sun's' crime correspondent. The plaintiff says that these representations were made by the defendants deliberately so as to misrepresent to the plaintiff that the source of the information was a member or members of An Garda Síochána, thereby suggesting that members of An Garda Síochána had breached s. 62 of the Garda Síochána Act 2005, and had thereby committed a criminal offence.

7. In their defence delivered on 24th January 2012, the defendants admit publication of the article in question in the newspaper and on the defendants' website. They deny that the article in its ordinary natural meaning, had the meaning contended for by the plaintiff or the innuendo suggested by the plaintiff, and they say that true meaning of the words used was that a person had made an allegation against the plaintiff, which was sufficiently serious to warrant an investigation by An Garda Síochána or, alternatively, that they were reasonable grounds to investigate the allegations that the alleged victim had made, under circumstances where the same were the subject matter of an investigation by An Garda Síochána. The defendants plead the article was a fair and reasonable publication on a matter of public interest for the purposes of s. 26 of the Defamation Act 2009, as interpreted in the light of the provisions of the European Convention of Human Rights Act 2003. The particulars in support of this plea are to the effect that given the seriousness of the nature of the complaint against the plaintiff, and the plaintiffs standing as a public figure, the subject matter of the article was one of public interest; that the defendants published the article in good faith in circumstances where a serious allegation of a criminal nature had been made against the plaintiff; that the allegation of assault was one which was alleged to have occurred in a place to which members of the public had access; that the Garda Síochána did investigate the complaint which subsequently transpired to be false, a fact which was wholly and unreservedly accepted by the defendants. They say that the defendants contacted the plaintiff prior to publication to inform him of the allegation and that the plaintiff was made fully aware of the nature of the allegation; that the plaintiff commented on the allegation through his personal representative and that the plaintiff's rejection of the allegation was prominently and repeatedly set out in the article. They say that the article itself was balanced in tone,

contained the plaintiff's denials and that the article made a clear distinction between suspicions, allegations, and facts and that the defendants investigated the assertions and allegations concerning the plaintiff to the best of their ability.

8. The defendants, further in the alternative, rely on the defence of qualified privilege and on the provisions of the Constitution, in particular, Articles 40.3 and 40.6.1 as interpreted in the light of the provisions of the European Convention on Human Rights Act 2003, and they also rely upon s. 17 and 18 of the Defamation Act 2009. The defendants contend that they are entitled to take advantage of the defence of consent pursuant to s. 25 of the Defamation Act 2009, and in this respect they say that prior to the publication of the article, the plaintiff was contacted by the defendants and told of the allegation being made against him, and in response, the plaintiff engaged the services of a PR agency who produced a statement on behalf of the plaintiff rejecting the allegations and emphasising the plaintiff's willingness to cooperate with any investigation carried out by An Garda Síochána, and the plaintiff insisted on his statement being included in full in the article, which was done. The defendants contend that in consenting to the publication of the plaintiff's rebuttal of the allegations against him, the plaintiff was necessarily consenting to the publication of the existence of these allegations.

9. The defendants deny all of the particulars set out by the plaintiff, grounding a claim for aggravated or exemplary damages and the defendants deny that claim.

10. The discovery sought, as set out in the plaintiff's notice of motion, is as follows:

"(a) An order compelling the defendant herein to make discovery on oath of all documents in its power, possession or procurement following within the following categories:

1. All documents in the power, possession or procurement of the defendants, its servants or agents, including but not limited to Joanne McElgunn, evidencing and/or referencing and/or identifying and/or referring to the investigation conducted by the defendant, its servants or agents into the assertions and allegations concerning the plaintiff made by Leonard Watters.

2. All documents in the power, possession or procurement of the defendants, its servants or agents, including but not limited to Joanne McElgunn, evidencing and/or referencing and/or identifying and/or referring to and/or suggesting any payments made or offer of payments made by or on behalf of the defendants or its servants or agents to Leonard Watters.

3. All documents in the power, possession or procurement of the defendants, its servants or agents, including but not limited to Joanne McElgunn, evidencing and/or referencing and/or identifying and/or referring to any expenses claimed by Joanne McElgunn from the defendants between 15th June 2011 and 15th December 2011 (inclusive).

4. All documents in the power, possession or procurement of the defendants, its servants or agents, including but not limited to Joanne McElgunn, evidencing and/or referencing and/or identifying and/or referring to the booking of a hotel room for Leonard Watters in Dublin on any date between 15th June 2011 and 23rd June 2011 (inclusive).

5. Bank statements in the power, possession or procurement of the defendants and/or Joanne McElgunn evidencing and/or referencing and/or identifying and/or referring and/or recording cash withdrawals of €200, or more, in Ireland between 15th June 2011 and 23rd June 2011 (inclusive) from bank accounts in the name of Joanne McElgunn or in the name of the defendants, or in the name of any company or person who is holding an account for the benefit or on behalf of the defendants.

6. (a) All test messages and/or emails and/or records of telephone calls between Joanne McElgunn and Leonard Watters between 14th June 2011 and 23rd June 2011 (inclusive);

(b) all text messages and/or emails and/or records of telephone calls between Joanne McElgunn and servants or agents of the defendants evidencing and/or identifying and/or referring to Leonard Watters (whether by name or otherwise) and/or Joanne McElgunn's interaction with Leonard Watters between 14th May 2011 and 23rd June 2011 (inclusive)

7. All documents in the power, possession or procurement of the defendants, its servants or agents evidencing and/or referencing and/or identifying and/or referring to any contact between the defendants, its servants or agents and any member of An Garda Síochána between 15th June 2011 and 23rd June 2011 (inclusive) in respect of the publication of the article about the plaintiff

8. All documents in the power, possession or procurement of Joanne McElgunn and/or Michael McEniffe, Editor of the Irish edition of the 'Sun', and/or Gordon Smart, journalist with the 'Sun' newspaper and/or Dominic Mohan, Editor of the 'Sun' newspaper, evidencing and/or referencing and/or identifying and/or referring to information available to them between 15th June 2011 and 23rd June 2011 (inclusive) concerning the preparation and/or investigation and/or publication by the defendants of the article about the plaintiff"

11. It is accepted by the defendants that all of the categories of documents sought, apart from Category 7 relating to contracts between the defendants and members of An Garda Síochána are relevant to the contested issues in the action. I am quite satisfied from the nature of the documents sought by the plaintiff that discovery of these documents could be of considerable advantage to the plaintiff in advancing his case, particularly for aggravated and/or exemplary damages and also in attacking the defendants' defence, both in respect of reasonable publication pursuant to s. 26 of the Defamation Act and the defence to the plaintiff's claim for aggravated and/or exemplary damages.

12. In an affidavit sworn on 11th May 2012, by Paul Clarkson, Deputy Editor of the 'Irish Sun', the following is averred at paras. 3,4 and 5:

"3. Before writing the article, the defendant carried out an investigation, which involved talking to several people in confidence about the said complaint as well as gathering other background information. Mr. Watters, who has since been named as the person who made the complaint against the plaintiff, also confirmed to the defendant that an incident happened. Mr. Watters was not named as a source in either the article or elsewhere. The details of all conversations in relation to the article were in confidence and understood to be protected by journalistic privilege, which the defendant is asserting and maintaining. It is in the public interest that people should be able to approach journalists and impart information in confidence, on the understanding that this information should remain confidential. The order sought by

the plaintiff would interfere and jeopardise this important function.

4. I say that the discovery sought in reality is seeking to pierce journalistic privilege. The documents that are covered by discovery sought include notes, phone records and financial records. The disclosure of these documents would in turn disclose details of the confidential discussions had in relation to the article, which in turn runs the risk that sources and the confidential information that was given to the defendant may be disclosed.

5. The discovery sought also encompasses documents that may tend to identify sources and confidential information in relation to other articles in ongoing investigations. In this regard, I say that it is of crucial importance that the defendant's sources remain confidential. I say that the defendant regularly reports crime stories, which naturally involve extremely sensitive information. In all cases, the protection of sources is vital, not only to the defendant's ability to do so, but also to protect the safety of those people who give the defendant information."

13. In a reply to a notice for particulars dated 24th April 2012, the following was said by the defendants at para. 2(ii):

"The plaintiff was the subject matter of a complaint by Mr. Watters to An Garda Síochána Mr. Watters also confirmed to the defendant that the alleged incident had occurred. It is now accepted that Mr. Watters was not being truthful in this regard."

14. The issues that therefore fall to be determined in this application are whether journalistic privilege applies to all of the categories of discovery sought and whether or not the documents sought in Category 7 are relevant to the issues in the action.

15. Journalistic privilege is now firmly established in our legal jurisprudence, largely resulting from Article 10 of the European Convention on Human Rights, which is in the following terms:

"1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

16. In the case of *Mahon v. Keena* [2010] 1 I.R. 336, relied upon heavily by Mr. Compton for the defendant, Fennelly J., having reviewed the judgments of the European Court of Human Rights on the subject of journalistic privilege, the learned judge quoted the following passage from the case of *Goodwin v. United Kingdom* [1996] 22 E.H.R.R. 123, to illustrate the ECHR approach to the question of journalistic privilege:

"Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest ..."

17. In his judgment, Fennelly J. says the following commencing at para. 71:

"71. The European Court of Human Rights has been at pains to emphasise that the right to freedom of expression is not unlimited. It usually states ... that the press must not 'overstep certain bounds'. The court has said that 'article 10 does not ... guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern'. For example, it may be necessary, depending on the circumstances, to balance an individual's right to private and family life guaranteed by article 8 of the Convention. Member states have a 'certain margin of appreciation in assessing whether' there is a need for a restriction.

72. Nonetheless, the court constantly emphasises the value of a free press as one of the essential foundations of a democratic society, that the press generates and promotes political debate, informs the public in time of elections, scrutinises the behaviour of governments and public officials and, for these reasons, that persons in public life must expect to be subjected to disclosure about their financial and other affairs, to criticism and to less favourable treatment than those in private life. Generally, therefore, restrictions on freedom of expression must be justified by an 'overriding requirement in the public interest'.

73. One of the public interests recognised by article 10.2 as potentially justifying a restriction on the exercise of freedom of expression is 'preventing the disclosure of information received in confidence'. It is cases concerning this precise issue that are the most relevant to the present appeal. Two cases deserve careful consideration."

18. Thereafter, the learned judge went on to consider the cases of *Fressoz and Roire v. France* [2001] 31 E.H.R.R. 28, and the aforementioned *Goodwin v. the United Kingdom*.

19. Mr. Compton relied upon this line of authority to submit that the privilege against disclosure applied not just to the identification of a particular source, but also to the content of the confidential information given. He submitted it was made clear in all of these cases before the European Court of Human Rights and the *Mahon v. Keena* decision, that the public interest which is protected is not the journalist or specifically the identity of the source, but rather, it is the function of journalism itself that is protected by the privilege, which necessarily means that the identity of the source must be protected and also, he submitted, the content of the information given. In this respect, he relied upon the following passage from the judgment of Fennelly J. in *Mahon v. Keena* at para. 98, p. 365:

"Counsel for the tribunal submitted, that the relationship of trust and confidence between the journalist and the source

which is the basis of the journalist's privilege was absent where the source was anonymous. There has been some discussion in the United States of theories of privilege: - is it there to protect the source or the journalist? I do not find any such notion in the European case law, which seems to proceed on a functional theory: is there a pressing social need for the imposition of the restriction?"

20. I would readily agree with Mr. Compton that the interest which is identified as protected by journalistic privilege is the proper functioning of journalism, namely, that there is a free flow of information from the public to journalists which is not inhibited or "chilled" by the prospect that the source will be disclosed. Implicit in all of this is that the risk to the proper functioning of journalism is disclosure or identification of the person supplying the information. Ordinarily, information supplied will end up published; thus, *per se*, it could not be said that the content of the information enjoyed privilege from disclosure. If, however, the content of the information which, necessarily, was not published, could lead to the identification of the source, then it would seem to me that it too must enjoy the privilege from disclosure, as otherwise, the overall purpose of the privilege would fail.

21. Whilst journalistic privilege is there to protect the proper functioning of journalism, the allegations made by the plaintiff in these proceedings relative to the claim for aggravated or exemplary damages, if true, could well merit the description of improper journalism. The purpose of the privilege is to ensure that the flow of information from the public to journalists is preserved. It could hardly be contended that the offering of financial inducements to members of the public to obtain information should benefit from the same privileged protection. However, in this effect (if any) the offering of financial inducements would have in the application of journalistic privilege to other sources. For the reasons set out hereunder, which lead me to conclude, apart from any consideration of financial inducement, that journalistic privilege does not apply to communications between Mr. Watters and the defendants' journalists, it is also unnecessary for me to consider the effect the alleged financial inducements to Mr. Watters might have on the application of journalistic privilege to the defendants' communications with him.

22. The position of Mr. Watters is pivotal to the outcome of this application. In the affidavit sworn by Paul Clarkson at para. 3 as quoted above, it is said that Mr. Watters confirmed to the defendants that an incident happened. Mr. Clarkson goes on to say that Mr. Watters was not named as a source in the article or elsewhere.

23. For the plaintiff, it was submitted by Mr. O'Callaghan S.C. that at all times, Mr. Watters has been identified and therefore no journalistic privilege can attach to communications between the defendants and him. In para. 3 of his affidavit, Mr. Clarkson seems to exclude Mr. Watters as a source in using the curious phrase *"was not named as a source in either the article or elsewhere"*.

24. If Mr. Watters is not a journalistic source and if his identity is well established, as it is, the only basis, in my opinion, upon which journalistic privilege in respect of communications between the defendants and Mr. Watters could rest would be if it were shown that a disclosure of the content of the communications between Mr. Watters and the defendant could lead to the disclosure of another source either in respect of the story the subject matter of these proceedings or other investigations conducted by the defendants' journalists. Thus, discovery should be made in respect of communications between the defendants and Mr. Watters unless the defendants can assert privilege on the basis that these communications will disclose another source. If necessary, the court can inspect these documents to exclude from discovery documents leading to the identification of other sources.

25. In general, documents relating to communications between the defendants' journalists and persons other than Mr. Watters should enjoy journalistic privilege unless the following circumstances exist, which pertain to the documents sought in Category 7 where the alleged source is said to be a member of An Garda Síochána. The defendants submit that these documents are not relevant to any of the matters in contest in the action. The plaintiff submits that this category of discovery is relevant because the existence or non-existence of documents in this category would be directly relevant to advancing the plaintiff's case, to the effect, that the plaintiff or his representative was misled by the defendants as to the manner in which their investigation of the incident took place, and hence could assist the plaintiff in overcoming the defendants' defence of fair and reasonable publication pursuant to s. 26 of the Defamation Act 2009. In addition it was submitted by Mr. O'Callaghan that such disclosures by members of An Garda Síochána would be a criminal offence, contrary to s. 62(2)(g)(ii) of the Garda Síochána Act 2005, and therefore documents relating to communications of this sort could not enjoy journalistic privilege.

26. The plaintiff makes the case that the story was, in effect, procured by financial inducements offered by the defendants through its crime correspondent to Mr. Watters, and that the defendants misrepresented to the plaintiff or his representative that they had obtained the story from An Garda Síochána. The defendants deny these allegations. In my view, discovery of documents relating to communications between the defendants and An Garda Síochána would be relevant to the resolution of these disputed issues. The resolution of these issues will be central to a determination on the plaintiff's claim for aggravated damages and also to the defendants' defence of fair and reasonable publication pursuant to s. 26 of the Defamation Act 2009. Insofar as this category of discovery is concerned, therefore, I am quite satisfied that the plaintiff has established that Category 7 of the discovery sought is relevant to the issues in dispute in the action.

27. Section 62 of the Garda Síochána Act 2005, provides for the confidentiality of certain information as follows:

"62.-(1) A person who is or was a member of the Garda Síochána or of its civilian staff or who is or was engaged under contract or other arrangement to work with or for the Garda Síochána shall not disclose, in or outside the State, any information obtained in the course of carrying out duties of that person's office, employment, contract or other arrangement if the person knows the disclosure of that information is likely to have a harmful effect.

(2) For the purpose of this section, the disclosure of information referred to in subsection (1) does not have a harmful effect unless it

- (a) facilitates the commission of an offence,*
- (b) prejudices the safekeeping of a person in legal custody,*
- (c) impedes the prevention, detection or investigation of an offence,*
- (d) impedes the apprehension or prosecution of a suspected offender,*
- (e) prejudices the security of any system of communication of the Garda Síochána,*
- (f) results in the identification of a person-*

(i) who is a witness in a criminal proceeding or who has given information in confidence to a member of the Garda Síochána, and

(ii) whose identity is not at the time of the disclosure a matter of public knowledge,

(g) results in the publication of information that-

(i) relates to a person who is a witness to or a victim of an offence, and

(ii) is of such a nature that its publication would be likely to discourage the person to whom the information relates or any other person from giving evidence or reporting an offence,

(3) For the purpose of this section, a person is presumed, unless the contrary is proved, to know that disclosure of information referred to in subsection

(1) is likely to have a harmful effect if a reasonable person would, in all the circumstances, be aware that its disclosure could have that effect.

(5) A person who contravenes subsection (1) is guilty of an offence and is liable-

(a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both. "

28. The disclosure by members of An Garda Síochána to the media of a complaint by a victim of a sexual assault where the alleged assailant was a person with a high public profile, would, in my opinion, be likely to have the effect contemplated by s. 62(2)(b)(i) and (ii) of the Garda Síochána Act 2005, namely, of discouraging the person to whom the information related or any other person from giving evidence or reporting an offence. As the activity impugned here is undoubtedly a criminal offence, journalistic privilege could not be availed of to shelter such activity. Article 10(2) of the European Convention on Human Rights expressly recites the "*prevention of disorder or crime*" as a basis upon which a measure, necessary in a democratic society, which interfered with the normal freedom of the media, would be justified. The overwhelming public interest in the detection and prosecution of crime, would, in these circumstances, outweigh the public interest in the proper functioning of journalism, and hence, journalistic privilege could not apply in these circumstances.

29. Communications between the defendants' journalists and persons other than Mr. Watters and members of An Garda Síochána concerning the publication the subject matter of these proceedings, would, in my opinion, be protected from disclosure by journalistic privilege.

30. This brings me to a consideration of the eight categories of discovery sought.

31. The plaintiff is entitled to discovery of the documents sought in Category 1 but excluding any documents which identify or could lead to the identification of a source other than Mr. Watters or members of An Garda Síochána.

32. The plaintiff is entitled to discovery of the documents sought at Category 2 without any alteration.

33. The plaintiff is entitled to discovery of the documents sought at Category 3 but limited to documents referable to expenses claimed in respect of Leonard Watters.

34. The plaintiff is entitled to the discovery sought at Category 4 without any alteration of same.

35. The plaintiff is entitled to the discovery sought in category 5 without any alteration of same.

36. The plaintiff is entitled to discovery of the documents sought at Category 6.

37. The plaintiff is entitled to discovery of the documents sought at Category 7 without any alteration of same.

38. The plaintiff is entitled to discovery of the documents sought in category 8, but excluding any documents which identify or could lead to the identification of a source other than Mr Watters or members of An Garda Síochána.

39. If the defendants apprehend that any of the documents now ordered to be discovered identify or could lead to the identification of sources other than Mr. Watters or members of An Garda Síochána, this Court can inspect any of these documents to ascertain whether or not journalistic privilege should apply in respect of them.