Neutral Citation Number: [2010] IEHC 447

THE HIGH COURT

2003 6170 P

BETWEEN

JOSEPH BURKE

APPLICANTS

AND

ASSOCIATED NEWSPAPERS (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 10th day of December, 2010

1. In October 2002, the *Ireland on Sunday* newspaper published an article concerning an inquiry which was then to be conducted by the Flood Tribunal into allegations of political corruption and the zoning for planning purposes of certain lands at Quarryvale in West Dublin. The plaintiff, Mr. Burke, is a building contractor and is a former Dublin City councillor. Mr. Burke was prominently named in the article where he was described as a close friend of the then Taoiseach (Mr. B. Ahern T.D.). The article continued by claiming:

> "Burke is being investigated by Mr. Justice Feargas Flood over his role in discussions he had on behalf of the Taoiseach with property developer, Tom Gilmartin, who is expected to be the star witness as the public hearings."

2. Mr. Burke commenced defamation proceedings in May, 2003 and a statement of claim was delivered in July, 2003. Following a number of motions for judgment in default of defence, a defence was finally delivered almost two years later in May, 2005. The defence denied that the words carried the defamatory imputations which the statement of claim had alleged, but instead maintained that if they did so bear that meaning, "then the same were true in substance and in fact in those meanings."

3. Given the somewhat laconic nature of the plea in justification contained in the defence, it is not surprising that Mr. Burke's solicitors responded by letter in firm terms in August, 2005 demanding that the defendant newspaper now give particulars of the plea of justification.

4. This request was responded to by the newspaper's solicitors in February, 2006. It is probably unnecessary to set out the response in full: suffice it to say that the particulars of justification contended among other things that Mr. Gilmartin had contacted Mr. Ahern in relation to a particular development; that Mr. Ahern had said that Mr. Burke would be in contact with him in relation to this; that Mr. Burke in his capacity as Vice Chairman of the Planning and Development Committee of Dublin Corporation had "seen to it" that a deal would be done with Mr. Gilmartin and that Mr. Burke had subsequently called to see Mr. Gilmartin to advise him of these developments.

5. The final particular given was in the following terms:

> "In the following year, the plaintiff called to Mr. Gilmartin's office and Mr. Gilmartin complained about further difficulties with Quarryvale. The plaintiff said that Mr. Ahern was on Mr. Gilmartin's side and had managed to get the land deal through. The plaintiff asked Mr. Gilmartin if he would be prepared to pay £500,000 to Mr. Ahern to sort everything out. Mr. Gilmartin said that he would consider it and the plaintiff asked Mr. Gilmartin if he would meet Mr. Ahern. The plaintiff drove Mr. Gilmartin to a number of places where he hoped to meet Mr. Ahern, but did not find Mr. Ahern."

6. For reasons which remain unexplained, the next step in the proceedings came more than three years later on 2nd June, 2009, when Mr. Burke's solicitors sought further and better particulars. What in effect was sought here was further details concerning the meetings which the defendant contends that the plaintiff had with Mr. Gilmartin. A flavour of the request may be gauged by para. 4(b) of the notice for particulars which asks the defendant to furnish:

> "full and detailed particulars of the plea that the plaintiff drove Mr. Gilmartin to a number of places where he hoped to meet Mr. Ahern, including the location and name of each place to which it is alleged that the parties drove, and the identity of any person(s) that they met in the course of alleged drive."

7. The defendants responded by letter dated 12th June, 2009, saying that the requests were matters of evidence and not appropriate matters for particulars. The plaintiff then duly issued a motion seeking an order pursuant to O. 19, r. 7 compelling a response to these particulars. Order 19, r. 7(3) provides that the court should not order particulars for the purposes of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason. While this application does not, strictly speaking, come within that particular sub-rule - given that the pleadings are closed - one may nonetheless apply these principles by analogy to the present request which comes within O. 19, r. 7(1).

8. The law and practice in relation to the delivery of particulars was authoritatively determined by the Supreme Court in *Cooney v. Browne* [1985] I.R. 185. This was also a defamation case in respect of a newspaper article published by the defendants where it was alleged that there was a connection between the plaintiff (who was then Minister for Defence, but who had also formerly been the Minister for Justice) and a number of matters which were said to be public scandals. The defence was a classic rolled-up plea and the issue for the Court was whether the plaintiff was entitled to particulars as to what matters in the article were matters of fact.

9. As Henchy J. explained in that case, the entire object of particulars is to secure a fair hearing so as to ensure that the litigants will know the case that they have to meet. The requirements of O. 19, r. 7 may thus be seen as a specific application in the context of litigation of the constitutional guarantee of fair procedures and the general premise of Article 34.1 of the Constitution that the

administration of justice will be fair and even handed.

10. Henchy J. ([1985] I.R. 185 at 191) then articulated the general test to be applied in cases of this kind, namely, that:

> "…where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular item of evidence) which he will have to deal with at the trial."

11. Henchy J. went on to conclude ([1985] I.R. 185 at 192):

> "It would, of course, be unfair to require the defendants to make a detailed disclosure of their evidence in advance, but all they are 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 purposes 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."

12. Indeed, FitzGerald J. had earlier spoken to similar effect in *Mahon v. Celbridge Spinning Co. Ltd.* [1967] I.R. 1 when he stated that the object of pleadings (of which particulars form part) was to ensure that a party "should know in advance, in broad outline, the case he will have to meet at the trial." This principle - namely, that particulars must convey the "in broad outline" the nature of the case which the litigant must meet, as distinct from the nature of the evidence which the other party may lead in support of that case - has been consistently endorsed in the subsequent case-law.

13. Thus, for example, in *McGee v. O'Reilly* [1996] 2 I.R. 229 the plaintiff sued a medical practitioner for professional negligence in respect of the treatment of a young child. In his defence the medical practitioner had contended that he had examined the child following a house call and recommended that the child be brought immediately to hospital. Arising from this the plaintiff sought further and better particulars of the examination which the medical practitioner claimed to have undertaken, including the details of the observations and symptoms and the diagnosis made, and, in particular, the terms in which he had allegedly advised the parents to take the child to hospital.

14. The Supreme Court refused to order the particulars sought. As Keane J. noted, the plaintiff already knew from the defence "in broad outline" what was going to be said at the trial by the defendant regarding the house call. Keane J. further added ([1996] 2 I.R. 229 at 234):

> "In our system of civil litigation, the case is ultimately decided having regard to the oral evidence adduced at the trial. The machinery of pleadings and particulars, while of critical evidence in ensuring that the parties know the case that is being advanced against them and that matters extraneous to the issues as thus defined will not be introduced at the trial, is not a substitute for the oral evidence of witnesses and their cross-examination before the judge."

15. This is further illustrated by *Doyle v. Independent Newspapers (Ireland) Ltd.* [2001] 4 I.R. 594. Here the plaintiff, who was a former coach of the Irish rugby team, sued for defamation in respect of a newspaper article which alleged that he had "become ostracised by the decision-making core among the players." In response to a plea of justification, the plaintiff raised particulars in respect of the manner in which it was contended that he had been ostracised by senior players of that team and the High Court ultimately directed the defendant to furnish these details.

16. The plaintiff had, however, also sought the actual names of the members of the team who were said to have ostracised him. Although this Court (Quirke J.) directed that these names be furnished, an appeal against this specific aspect of the order was allowed by the Supreme Court. Keane C.J. concluded that it could not be said that the pleading of justification was so "general or imprecise" that the plaintiff did not know the nature of the case he had to meet at the trial. While the plaintiff did not know the actual names of the players concerned, Keane C.J. further noted ([2001] 4 I.R. 594 at 598) that the cases "in which a court will actually order a defendant to say what witnesses he is going to produce at the trial are extremely rare and unusual."

17. In general, therefore, while a litigant is entitled to know from the pleadings the nature of the case he has to meet, he is not entitled to learn in advance the *evidence* which his opponent will lead in support of that contention. The distinction between what is a matter for pleadings on the one hand and what is a matter for evidence on the other is often a fine one and it is also one which is sometimes difficult to apply consistently in practice. Nevertheless, it seems clear that a plaintiff (or a defendant, as the case may be) is not entitled to further particulars once the essence of the case which he has to meet is clear from the pleadings.

18. In the light of this case-law, we may now consider afresh the present motion for further and better particulars. If, for example, we take the request for further details of the places to which Mr. Burke allegedly drove Mr. Gilmartin in their quest for Mr. Ahern, can it realistically be said that the provision of these details materially affects the nature of the case to be advanced by the defendant and which the plaintiff must meet? I do not think so.

19. The gist of the defence is, after all, that Mr. Burke met Mr. Gilmartin on a number of occasions with regard to the Quarryvale project and that on the last occasion he sought to solicit a corrupt payment from him. If Mr. Burke did in fact thereafter drive Mr. Gilmartin to various places in an effort to find Mr. Ahern, all that this would tend to show is that the parties were anxious to speak with Mr. Ahern, but it would not materially affect the nature of the defence. Likewise, the request to identify potential witnesses who may or may not have been present at any of these meetings would seem to be a matter for evidence rather than pleading.

20. The same holds true of the request for dates and venues. So far as this case is concerned, the precise dates or venues would seem to be immaterial to the defence which the defendants are advancing. Of course, if it were to be established at the trial that a witness was in error in relation to his evidence regarding a date or venue this would go to his credibility (in the legal sense of that term), but the fact that the plaintiff does not know in advance exactly what the defendant's witnesses will say on these particular points does not mean that without this information the plaintiff does not know "in broad outline" the case which the defendant will make at the trial.

21. These examples thus stand in contrast to the central allegation that Mr. Burke sought a corrupt payment, since it is inconceivable that a defendant could seek to rely on a justification defence in a case of this kind without having furnished details of this specific plea to the plaintiff, either by way of defence or by way of particulars.

22. For the reasons just stated, it follows, therefore that - adapting the words of FitzGerald J. in *Mahon* - the plaintiff already knows

"in broad outline" the case which he will have to meet. For this reason, I do not consider that it is "necessary or desirable" - if one may be permitted to use the language of O. 19, r. 17(3) in the context of a request which strictly falls under O. 19, r. 17(1) - to direct that the defendant reply to the request for further and particular particulars of 2nd June, 2009.

23. In arriving at this conclusion, I have not overlooked the forceful submissions made on behalf of the plaintiff to the effect that I must have regard to the fact that the law of defamation is designed to protect the constitutional right of good name in Article 40.3.2 and, accordingly, must be understood against that constitutional framework. That is undoubtedly so, but that right must also be weighed in the balance against the right of free speech in Article 40.6.1 (cf. by analogy here the judgment of Kearns P. in *Hickey v. Sunday Newspapers Ltd* [2010] IEHC 249), not least given that the present case engages (or, at least, potentially engages) the right of the media to hold the Government (and, by extension, prominent political personages) to account in the manner expressly contemplated by Article 40.6.1.i. Any debate, however, as to whether the law of defamation must be re-fashioned in the light of these constitutional provisions is really for another day, since at its heart the present motion is not concerned with the substantive protection of the right to good name in Article 40.3.2, but rather with issues associated with procedural fairness in the conduct of litigation.

24. Nor do I think that *Murphy v. Flood* [2010] IESC 21 is of any direct relevance to this question. That case concerned the failure of the Flood Tribunal to supply the applicant in that case with material in the possession of the Tribunal which would (or might) have been relevant in the cross-examination of a leading witness. Leaving aside the fact that the case concerned the powers of an investigative body which has been granted extensive powers by law and which, in any event, was operating in the context of an inquisitorial rather than an adversarial system, the principles enunciated by the Supreme Court seem more directly relevant, for example, to issues of disclosure in discovery rather than to the question of particulars as such.

25. In these circumstances, I must refuse the plaintiff's application for further and better particulars. It follows that it is thus unnecessary for me to consider the additional argument advanced by the defendant, namely, that I should decline to exercise a discretion to order a reply to the request for further and better particulars on the ground that the plaintiff has been guilty of inordinate delay in prosecuting this action. I quite agree that it is most unsatisfactory that the plaintiff should have allowed an unexplained period of almost three years to pass without further action on his part, but it is likewise difficult to understand why it took the defendants almost two years to file a defence.

26. This is all the more unsatisfactory given that these proceedings may well have implications for the good name of third parties who are not before the court. It is perhaps sufficient at this juncture to say that, without passing any judgment on the delays to date, given the passage of time since the original article was published - now some eight years - it now behoves both parties to proceed with dispatch in order to have these proceedings speedily brought to trial.