

THE HIGH COURT

[2009 No. 11433 P.]

BETWEEN

GARECH BROWNE

PLAINTIFF

AND

ASSOCIATED NEWSPAPERS (IRELAND) LIMITED

DEFENDANT

JUDGMENT of Mr Justice Ryan delivered the 8th February 2013

This is an application for discovery in defamation proceedings. The defendant's newspapers, the Irish Mail on Sunday and the Irish Daily Mail, published three articles in April and June 2009 which are the subject of the action.

The essence of the plaintiff's claim is that the articles were published by the defendant in its two newspapers in the course of a campaign that portrayed the plaintiff as being petty-minded and disloyal and ungenerous in his behaviour towards a friend. It is alleged to have done this by treating as trivial a substantial theft of property from the plaintiff's home and portraying him as somebody who reported a friend to the gardai in relation to the alleged theft of a teapot and two teaspoons. The plaintiff's solicitors wrote to the defendant providing what is alleged to be a correct version of events and in particular demonstrating the large scale of the theft as well as other relevant information. That happened following the publication of the first article, but the defendant nevertheless went ahead and published the second and third articles. These are the features of the case that the plaintiff relies on as demonstrating malice.

The defendants deny the meanings ascribed to the publications by the plaintiff. They plead justification. They plead fair comment. They rely on s. 23 of the Defamation Act. They also deny that the words in their ordinary and natural meanings are capable of being defamatory of the plaintiff.

The plaintiff's reply joins issue and pleads express malice.

The discovery sought refers to two categories. The first is any background documents in the possession or procurement of the defendant relating to the preparation of the three articles that are complained of. The second category is in respect of documents relating to the hearing at Bray District Court involving the charges against Count McDonnell.

The requirement under 0.31 r.12 is for the party to make an affidavit detailing documents that are or were in his possession or power relating to any matter in question in the case. An order may not be made if the Court is of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

The question to be decided is whether it is necessary for the fair disposal of the proceedings to order discovery in respect of either or both of these categories. In the circumstances of the issues as they appear from the pleadings and having regard to the submissions made by counsel, I am satisfied that it is appropriate and just to order discovery of category No. 1, and to refuse discovery of category No.2 of the documents as specified in the notice seeking discovery. I do so for the following reasons.

The pleadings do, of course, refer to the publications as having been made "falsely and maliciously" and the reply that is filed pleads express malice. Since the statement of claim in every defamation action alleges that the publication was effected falsely and maliciously, I do not think that in itself makes a significant difference. As to the plea of express malice contained in the reply, it seems clear that the intention is to seek to defeat the plea of fair comment contained in the defence. But it is not a bald plea without any suggested basis in fact: the plaintiff expressly makes the case that the newspapers were running a campaign against him in the circumstances mentioned above. The plaintiff's argument is that that amounts to malice and it is sufficient for me to notice that it is such an allegation and it is possible that a plaintiff in such circumstances could if appropriate findings were made establish that case.

Mr Oliver Butler, Barrister, for the plaintiff submitted that this was a straight forward application for discovery that did not involve any legal complexity. The ordinary principles apply and the issues raised in the pleadings amply justify the making of the order.

Mr Tom Murphy, Barrister, for the defendant argued that the documents sought are not relevant to any issues that arise in the action. They do not relate to the alleged instances of malice and are not capable of doing so. Neither category touches on the matters outlined in the plaintiff's allegations of malice.

Specifically in relation to the second category, the defendant submits that the journalist's notes in respect of the criminal proceedings have no bearing on any alleged campaign on the part of the newspapers or any communication by the plaintiff's solicitors to the defendant in respect of the seriousness of the alleged theft from his home. The defendant was restricted in reporting the matters in the District Court to the evidence given there and would not have been permitted to give a report of a larger theft than was actually revealed in the court proceedings. The defendant goes on to submit that "the plaintiff does not deny that the charges, as outlined by the defendant, were brought against Randall McDonnell and that a *nolle prosequi* was subsequently entered".

I think that these submissions made by the defendant in respect of the references to events in the District Court are correct. I do not think that any factual issue arises in the proceedings in relation to the events in the District Court and I am of the view that the journalist's notes of the District Court proceedings are not relevant to any alleged campaign of the kind relied on by the plaintiff. In those circumstances, discovery of such notes is not required for the fair disposal of the proceedings.

The position is however different in regard to the other category. In circumstances where the plaintiff has relied on an alleged campaign by the defendant and has specified the nature of the campaign and the facts on which he will rely in order to seek to

establish it, it seems to me that the plaintiff has demonstrated a sufficient basis of relevance to support his application for discovery.

In its submissions, the defendant argues that preparatory materials cannot support the allegation of a campaign by the newspapers against the plaintiff; only published material is capable of doing that. The jury in the trial of the action will only be concerned whether the published was defamatory and the defendant does not seek to stand over material that was not published.

No authority is cited for this last submission. It seems to me to be a sweeping generalisation that is too broad to represent the law. However, I do not need to make a decision on that point at this stage or for the purpose of this application. If it appears on the basis of the pleadings as they stand that the documents are necessary, in the sense of discovery jurisprudence, for the fair disposal of the proceedings, it is proper that there should be an order.

Obviously, any resistance on the ground of privilege or other such basis is not affected by the obligation to disclose the material. It is equally the case that discovery does not abrogate any objection to admissibility that may be made at the trial. If the defendant is in a position to object to the use of any such materials then that will no doubt be raised at the trial.

In relation to the law I think Mr Butler is correct in submitting that there is not any significant issue of law or principle involved in this application. The defendant has not pleaded a Reynolds-type defence and neither is discovery resisted on the basis that any legitimate protection of sources will be compromised.

In the circumstances therefore, I propose to make an order for discovery in respect of category 1, but not in respect of category 2.