



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 258

[2017 No. 27]

[2017 No. 24]

**The President
Peart J.
Hogan J.**

BETWEEN

DENIS O'BRIEN

PLAINTIFF

AND

RED FLAG CONSULTING LIMITED AND OTHERS

DEFENDANTS

JUDGMENT of the President delivered on 13th October 2017

Introduction

1. In this case, the plaintiff claims that the defendant company and the personal defendants, together with an instructing client who is unknown, were engaged in a conspiracy to damage him in a variety of ways, including defamation. His claim is pleaded in conspiracy, causing loss by unlawful means and defamation. He claims compensatory as well as aggravated and exemplary damages. The issue at hand is the plaintiff's appeal against the judgment of Mac Eochaidh J. and the order in consequence dated 12th January 2017 on his motion for discovery.

2. In October 2014, the plaintiff, Mr. Denis O'Brien, came into possession of a USB memory stick in circumstances with which the court is not concerned so far as this discovery appeal is concerned. The device held a dossier relating to Mr. O'Brien consisting of memoranda, drafts of a speech by a TD and media articles. He claims that the materials are of a most negative and disparaging nature. The collection was compiled by the defendants who also produced some of the documents. They are a public relations consultancy company and carried out the work collected in the dossier, through its employees and officers, on the instructions of a client. Mr. O'Brien claims that the dossier is the result of a conspiracy by the defendants and their client to cause him harm by unlawful means and is also defamatory. On consideration of the material in the dossier, he instituted his proceedings on the grounds and seeking the reliefs above stated. Further and better particulars were sought and furnished between the parties and the defendants filed their defence. They admitted collecting and compiling the information in the dossier and authorship of original material therein, but denied each and every legal wrong alleged. As well as containing a general traverse, the defendants pleaded qualified privilege and honest opinion, which are defences under the Defamation Act 2009.

3. Mr. O'Brien, in a notice for particulars, sought the name of the defendants' client but that was refused. He brought a motion to have the identity revealed to him pursuant to the jurisdiction that was applied in Norwich Pharmacal and that matter came before Mac Eochaidh J. in the High Court. The judge refused the application on the ground that the plaintiff had not made out a sufficient case as required under that jurisprudence. That application has some relevance to the present proceedings, firstly, because Mac Eochaidh J. referred in his judgment on this application for discovery to his previous order and judgment, and, secondly, because Mr. O'Brien's counsel relies on what he claims are concessions made by counsel for the defendants in the course of the argument on the quasi-Norwich Pharmacal application.

4. Mr. O'Brien then applied for discovery of documents. On 12th January 2017, the High Court ordered discovery of five categories out of nine that were sought and relating to matters including the retainer of the defendants, the drafting of certain documents in the dossier, the compilation of other documents, the circumstances in which suggestions were made in respect of a draft speech by a TD and communications between the defendants and their client. This order was, however, qualified by the refusal of the court to order identification of the client, a restriction that was embodied in the discovery by the addition to each category ordered of the words "subject to redaction of the identity of the said client and of any information which might enable the client to be identified".

5. In his judgment, Mac Eochaidh J. held that the identity of the defendants' client was not relevant to the present proceedings. Having set out the relevant law – as to which there is no dispute or complaint – the High Court judge revealed his rationale as follows. In summary, he held that a party may not seek discovery of a document to find out whether the document may be relevant. The plaintiff does not know whether the identity of the defendants' client will assist in establishing that client's motivation in engaging the defendants to compile the dossier, much less whether the defendants shared their client's motivation. The most the plaintiff can say is that gaining the identity of defendants' client might assist with proving the motivation of the client, which in turn might assist in attributing that motivation to the defendants in compiling the Dossier. That fell short of what was required of the plaintiff in this case. The burden of establishing relevance rested on the plaintiff and it had to be discharged regardless of the attitude of the defendants to the issue. The court must be independently satisfied that the plaintiff had discharged the burden. At paragraphs 19 and 20 of the judgment, MacEochaidh J. held:

"19. There are too many imponderables and unknown outcomes in the theory of relevance advanced by the plaintiff. The most the plaintiff can say is that gaining the identity of defendants' client might assist with proving the motivation of the client, which in turn might assist in attributing that motivation to the defendants in compiling the Dossier. In my view, this falls short of what is required of the plaintiff in this case.

"20. The plaintiff suggests in written submissions that the extent to which it is required to establish relevance is altered or reduced by the manner in which the defendants have met this application. The plaintiff says as follows:-

'In the present case, the defendants appear to be arguing not that the identity of the client is information whose relevance has not been established as a matter of probability but which is irrelevant as a matter of principle. It is thus submitted that once relevance in principle is established, the present case is not one in which the probability of relevance is an issue ...'

"I disagree with this statement. It mischaracterises the defendants' case. But even if it correctly states the defendants' case, in my view, the burden of establishing relevance rests on the plaintiff, and it must be discharged regardless of the attitude of the defendants to the issue. The court must be independently satisfied that the plaintiff had discharged the burden."

6. The judge rejected an argument made by the defendants that discovery should be refused on the basis of their confidentiality with their client. He held that as a matter of proportionality, it would have been open to the plaintiff to argue that discovery was relevant and necessary such that it would justify overbalancing the right of the defendants. The issue, however, did not arise in view of the judge's decision on relevance.

7. In relation to the claim for evidence of publication, other categories which were refused by the trial judge. Mac Eochaidh J. emphasised the difference between seeking discovery in support of a plea and seeking discovery to make a plea, citing *Keating v. RTE* [2013] IESC, [2013] 2 I.L.R.M. 145. At para. 26 of Mac Eochaidh J's judgment, the judge recalled that in his *Norwich Pharmacal* judgment he "had not been persuaded that there was enough evidence or any evidence in the case for me to be certain that publication has indeed happened". At para. 27, the judge went on to say:

"The plaintiff has not provided any additional information in connection with this application for discovery which would persuade me to change my view in relation to this matter."

The court also addressed other categories of discovery which will be considered in due course.

8. The issues for the court on the appeal are directed to four areas of dispute or categories of discovery of documents:

- (a) Documents which tend to identify the client;
- (b) Documents which provide evidence of the publication of the Dossier or any constituent elements thereof;
- (c) Documents which provide evidence of communications between the Defendants and the Client; and
- (d) Documents which tend to support the Defendants' pleas of honest opinion and qualified privilege.

The defendants appeal against the order for discovery of documents relating to communications between them and their client.

Categories 1(A) to (D): Identity of the Client

9. The controversy about the identity of the defendants' client comes under the heading of Categories 1(A) to (D) of the plaintiff's request. They may be broadly summarised for my purpose because the defendants agreed to make the discovery sought, except for documents that would identify or tend to identify their client. That is therefore the only question that arises under these parts of the discovery materials.

10. Category 1(A) –(D) sought a compendium of documents relating to:

- (i) the retainer of the defendants by the client including documents which identify the client, the instructions and relevant dates;
- (ii) the production of the Dossier, its purpose and the contributors of particular items in it;
- (iii) the compilation of the other elements of the Dossier; and
- (iv) the circumstances in which the defendants were engaged in relation to the draft speech of Mr. Colm Keaveney TD, including how it came to be part of the Dossier.

11. The first point that is put forward on the appellant's behalf is that the trial judge applied an incorrect test of relevance. The written submissions cite the decision of McCracken J. in *Hannon v. Commissioners of Public Works* (Unreported, High Court, 4th April 2001) which was subsequently endorsed by the Supreme Court in which he said that the court must decide as a matter of probability whether any particular document is relevant to the issues to be tried. While the trial judge in this case cited this authority and others, quite correctly, as it is submitted, certain passages of his judgment are identified in which it is contended that he misunderstood and misapplied the appropriate test. For example, in para. 16, the judge said:

"The plaintiff must persuade me that knowing the defendants' client's identity as a matter of probability advances the plaintiff's plea that the defendants had a predominant motive to harm the plaintiff in compiling the Dossier."

The submissions propose that this is a mistake, that the Peruvian Guano test merely requires that the applicant establish that the document contains information which may either directly or indirectly enable that party to advance his own case or to damage the case of his adversary.

12. In another passage from his judgment, the trial judge declared that it is possible that the client of the defendants is a stranger to the plaintiff so that he will be unable to infer the person's motivation from his or her identity alone. On the other hand, the contrary may be the case – that the plaintiff will be able to say that the motivation of the person is clear, and, for example, that he had a long history of hostility towards the plaintiff. The judge added that in this latter situation "that alone would not establish the motivation of the defendants". The plaintiff takes issue with the word 'establish' because that is not necessary, as he contends. In another passage, the judge acknowledged that disclosure might assist the plaintiff in establishing the motivation of the client, but that the plaintiff could not say as a matter of probability that it would assist him in establishing the motivation of the defendants.

13. In another important passage at para. 19 of the judgment, the judge said as follows:

"The most the plaintiff can say is that gaining the identity of defendants' client might assist with proving the motivation of the client, which in turn might assist in attributing that motivation to the defendants in compiling the Dossier. In my view, this falls short of what is required of the plaintiff in this case."

The submissions argue that this does not fall short of what is required, but "classically is sufficient to meet the test".

Again, in another passage, the judge said that he had not been persuaded that disclosing the identity of the client probably reveals the defendants' motivation.

14. All of these statements by the judge are said to be incorrect applications of the standard tests for discovery on the basis of relevance. It is submitted that documents that identify the person who instructed the defendants and who is a co-conspirator with them, as he alleges, "are manifestly relevant". Insofar as those documents might assist in proving the motivation of the client and in attributing that motivation to the defendants, the documents are relevant, not only to establishing conspiracy, but also the claims for aggravated and exemplary damages.

15. Mr. Cush SC for the plaintiff encapsulated the dispute on relevance when he argued that it is in issue in the case whether the defendants had a predominant motive to injure the plaintiff and asked: "does it potentially advance my case if I establish that the *client* had a motive to injure me and that was known to the defendants?" He submitted that the identity of the client was, of course, relevant to the case against the defendants. It was sufficient relevance for discovery on his argument that knowing the client's identity might enable the plaintiff to attribute his or her motivation to the defendants.

16. The defendants, in response to these submissions, argue that the identity of the client is not relevant to the claim pleaded against the defendants. Secondly, the High Court had previously refused disclosure in the *Norwich Pharmacal* application on the ground that the plaintiff had failed to establish evidence of wrongdoing by the client and the plaintiff had not advanced his case beyond the original unsuccessful basis. Thirdly, revealing the client's identity would entail a breach of the client's confidentiality and risk irreparable harm to the business of the defendant company, in which circumstances the plaintiff was required to establish that the discovery was necessary and that such necessity outweighed the prejudice and he had failed in that regard. The defendants' submissions point out that the High Court refused the discovery sought as to the client's identity on the basis solely of relevance. They seek in the alternative to rely on the other grounds that they raised.

17. The defendants submit that the judge's analysis of the test of relevance and his application of it in this case was correct. They submit that the plaintiff failed to prove as a matter of probability that the identity of the client might be relevant to the defendants' motivation. They argue that the plaintiff's submissions miss the point that was being made by the High Court judge, namely, to highlight the distinction between the motivation of the client, to which the discovery might be relevant and the motivation of the defendants, to which it had not been shown "that the discovery sought might be relevant, as a matter of probability".

The Law Applicable

Discovery

18. Order 31, r. 12 of the Rules of the Superior Courts (as inserted by S.I. 93 of 2009) provides that any party may apply to the court for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession, power or procurement relating to matter in question therein. The notice must specify the precise categories of documents in respect of which discovery is sought. Under r. 12(5), an order shall not be made if the court is of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs. Rule 12(19) provides that if the requested party objects to discovery, the court may postpone the application until another matter on which the entitlement to discovery depends is decided first or for any other reason it is desirable.

19. The legal principles applying to discovery are not in dispute. They have been settled for 135 years since Lord Justice Brett's expansive definition in *Peruvian Guano* (1882) 11 Q.B.D. 55 at 63/6 to which I will refer later. This appeal has its dispute over the application of the long-established criteria, although my view is that the specificity of the information that is in question makes it possible to ascertain with unusual precision the essential nature of the dispute arising in the appeal.

20. The overriding principle is that discovery is a procedural device designed to promote fairness in litigation by making relevant documents equally available to the parties to the action. The party who receives the affidavit of discovery impliedly undertakes not to use the documents or the information in them for any purpose not connected with the proper conduct of the proceedings in which they are discovered: *Ambiorix Ltd. v. Minister for the Environment No. 1* [1992] 1 I.R. 277.

21. Among the authorities cited in submissions and argument and included in the book of relevant cases are *Hannon*, *Framus*, *Hartside*, etc. Specific rules derived from them are as follows:

1. The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties. [*Stafford v. Revenue Commissioners*]
2. Relevance is determined by reference to the pleadings. Order 31, r. 12 specifies discovery of documents relating to any matter in question in the case. [*Hannon*, para.2]
3. There is nothing in the *Peruvian Guano* test which is intended to qualify the principles that documents sought on discovery must be relevant, directly or indirectly, to the matter in issue between the parties in the proceedings.
4. An applicant for discovery must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information. [*Peruvian Guano*, page 65]
5. An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments. [*Framus Ltd v. CRH plc* [2004] 2 IR 20, page 34-35]
6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. [*Hartside Ltd v. Heineken Ireland Ltd*, para.5.9.]
7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases

that their discovery is necessary for the fair disposal of those issues, the question whether discovery is necessary for "disposing fairly of the cause or matter" cannot be ignored. [*Cooper Flynn v. Radio Telefís Éireann* [2000] 3 IR 344]

8. The court should consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. [*Ryanair plc v. Aer Rianta cpt* [2003] 4 IR 264,

9. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial. [*Framus*, page 38]

10. In certain circumstances, a too-wide ranging order for discovery may be an obstacle to the fair disposal of proceedings. [*Independent Newspapers (Ireland) Ltd v. Murphy* [2006] 3 IR 566, page 572]

11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties. [Hannon, para.4]

12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly. [*McCabe v. Ireland* [1999] 4 IR 151, page 156]

Defamation Act 2009

22. Some provisions of the Act should be noted in connection with the arguments as to the issue of the defendants' motivation. Truth is a defence: section 16. The defence of qualified privilege is defeated by proof of malice on the part of the defendant in relation to the publication of the statement: section 19(1). The same section provides at sub-section (3):

"Where a defamation action is brought against more than one defendant, the failure of the defence of qualified privilege in relation to one of the defendants by virtue of the application of *subsection (1)* shall not cause the failure of the defence in relation to another of the defendants unless that other defendant was vicariously liable for such acts or omissions of the first-mentioned defendant as gave rise to the cause of action concerned."

Section 20 provides for the defence of honest opinion:

"(1) It shall be a defence (to be known, and in this section referred to, as the 'defence of honest opinion') to a defamation action for the defendant to prove that, in the case of a statement consisting of an opinion, the opinion was honestly held."

Subsection (4) provides:

"Where a defamatory statement consisting of an opinion is published jointly by a person ('first-mentioned person') and another person ('joint publisher'), the first-mentioned person shall not fail in pleading the defence of honest opinion in a subsequent defamation action brought in respect of that statement by reason only of that opinion not being honestly held by the joint publisher, unless the first-mentioned person was at the time of publication vicariously liable for the acts or omissions, from which the cause of action in respect of that statement accrued, of the joint publisher."

Section 32 deals in turn with aggravated and punitive damages in defamation:

"(1) Where, in a defamation action—(a) the court finds the defendant liable to pay damages to the plaintiff in respect of a defamatory statement, and (b) the defendant conducted his or her defence in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement, the court may, in addition to any general, special or punitive damages payable by the defendant to the plaintiff, order the defendant to pay to the plaintiff damages (in this section referred to as 'aggravated damages') of such amount as it considers appropriate to compensate the plaintiff for the aggravation of the said injury.

(2) Where, in a defamation action, the court finds the defendant liable to pay damages to the plaintiff in respect of a defamatory statement and it is proved that the defendant—(a) intended to publish the defamatory statement concerned to a person other than the plaintiff, (b) knew that the defamatory statement would be understood by the said person to refer to the plaintiff, and (c) knew that the statement was untrue or in publishing it was reckless as to whether it was true or untrue, the court may, in addition to any general, special or aggravated damages payable by the defendant to the plaintiff, order the defendant to pay to the plaintiff damages (in this section referred to as 'punitive damages') of such amount as it considers appropriate."

Discussion of Relevance Issue

23. There is no dispute that the classic definition of relevance by Brett LJ is the legal rule to be applied. In *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, Brett LJ sought to make a comprehensive statement:

"It seems to me that every document which relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences." [At page 63]

24. Mr. O'Brien's written submissions make a simple assertion on the critical issue of relevance:

"10. In the present case, documents which identify the person who instructed the defendants and to the plaintiff alleges

is a co-conspirator with the defendants are manifestly relevant. Insofar as those documents might assist in improving the motivation of the client and in attributing that motivation to the defendants (to use the learned High Court Judge's own phraseology) the documents are relevant not only to establishing the tort of conspiracy but also to the claims for aggravated and exemplary damages."

In his submissions to this Court, Mr. Cush SC drew attention to a passage in para. 19 of the judgment of Mac Eochaidh J. as follows:

"The most the plaintiff can say is that gaining the identity of defendants' client might assist with proving the motivation of the client, which in turn might assist in attributing that motivation to the defendants in compiling the Dossier."

Counsel observed that the basis of claim to relevance as stated in this manner was not deficient but rather represented the classic statement of the test that the plaintiff had to satisfy. The judge was in error as a matter of law in saying it was not enough. Counsel argues that it is an issue in the case whether the defendants had a predominant motive to injure, and it potentially advances the plaintiff's case if he can establish that the client had a motive to injure him and that was known to the defendants.

25. It is clear from the authorities, going back to *Peruvian Guano*, that discovery is specific to the action that is before the court in the terms that are pleaded. It is limited to those parties in the particular dispute and to the purpose of the litigation and the issues defined by the pleadings. There is, admittedly, a broad definition of relevance to ensure that all the necessary materials to assist the court in its function of deciding between the parties are before the court.

26. In regard to conspiracy and causing loss by unlawful means, the plaintiff has confirmed in his reply to particulars at Item 4 that the unlawful means in question consist of the defamation that he alleges. In other words, there is not any additional element of conspiracy or causing loss over and above the claim of defamation. At Item 4 of the notice for particulars, the following appears:

"Insofar as the plaintiff is relying on the tort of conspiracy to injure by unlawful means, please confirm whether the sole unlawful means relied upon is the alleged publication of the statements appearing in Schedule 2 of the Statement of Claim. If the plaintiff is relying on unlawful means other than or in addition to the alleged publication of the statements appearing in Schedule 2 of the Statement of Claim, please provide full and detailed particulars of same."

The plaintiff replied:

"Confirmed. The plaintiff, however, reserves the right to furnish additional particulars in the event that he becomes aware of other unlawful means employed by the defendants."

27. It is unnecessary in this case to debate the requirements of discovery. The law is not in dispute; it is the application of the principles and precepts that is in issue. Neither is it necessary to speculate. We do not have to explore the potential relevance of unknown documents or other material. We know precisely the information that is sought, we know that it exists and is easily accessible. No question of proportionality arises. The simple question is whether the identity of the Red Flag client is relevant within the meaning of *Peruvian Guano*. That is, will it enable Mr. O'Brien to advance his own case or to damage the defendants' case? I have used one modal verb in my question but that needs to be explained because another version is: may/might the information assist him or damage them? My view is that we are not in a zone of uncertainty where possibilities have to be examined but in a place where the specific legal issue can be addressed with clarity. So, will knowing the name of the Red Flag client enable Mr. O'Brien to advance his own case or damage the defendants? The questions for the court in applying the *Peruvian Guano* relevance test are:

(i) Is the client's name evidence on any issue in the action?

(ii) Would knowing the client's name enable the plaintiff

(a) to advance his own case? or

(b) to damage the defendants' case?

28. The unusual point about this application is that we know the information that is being sought. Not that the court knows the name of the client, but that it is clear what the nature of the information is. That knowledge in my judgment requires some recasting of the *Peruvian Guano* test. We do not have to ask whether it is reasonable to suppose that the document contains information – we know just what the information is. Therefore, the first question is whether the client's name is evidence on any issue in the case. It cannot refer to publication or to meaning. The suggestion is that it is relevant to damages but obviously not to ordinary compensatory damages because however innocent the publication the plaintiff is entitled in case of proof of defamation to appropriate compensation. As to aggravated or punitive damages, the identity of the client can only be relevant if he or she is to be presumed to have a malign motivation and that can lawfully be ascribed to the defendants. What basis is there for doing that?

29. We must, of course, confine our attention to this present case against these defendants. The suggestion is that the name of the client will give rise to an inference of hostility against Mr. O'Brien that thereby affects these defendants. This is a fundamental point. The trial judge held that the identity of the client might enable his/her motivation to be established. It may be that general hostility at some level might be presumed from the identity of the client but I do not see how the name itself could give rise to a deduction as to an intention to collect and publish untrue material or to conspire to do so. It is not sufficient to show a basis for disliking the plaintiff or being hostile to him in general. However that may be, we have to ask how such conclusion could be transferred to these defendants. I do not think it could, as a matter of law and logic. It is worth recalling that s. 19(3) of the Defamation Act 2009, which says that the malice of Defendant A does not affect Defendant B unless Defendant B is vicariously liable for Defendant A. That is not the situation here; indeed it is the reverse of the situation.

30. The trial judge was right to draw the distinction between matters that might be relevant in a claim against the client and those that are relevant to the claim against these defendants. It is only the latter with which we are concerned. It does not follow that because Mr. O'Brien harbours suspicions, even if it could be shown that they were well-founded, in respect of the client that the defendants in this action are similarly motivated. The two are not logically connected in the manner the plaintiff contends.

31. I think the matter goes somewhat further and there could be another problem. The trial judge will have to be careful in this case to confine the evidence and arguments to the issues between the parties. It is easy to see how bandying about the name of a client who was not before the court could be damaging in a variety of ways to persons and also to the interests of justice. Assuming the client was named but was not a party to the action, which is clearly one possibility – because any joinder would depend on court order and there are arguments going each way as to whether such an order might be made – focusing on his/her motivation could be

damaging to that person in circumstances where no issue concerned his/her liability in the instant proceedings. If the client were to be made a party, it would be important that the different bases of potential liability were kept separate. The question would still arise as to how the client's motivation affected these defendants in carrying out their instructions. Experience suggests that the temptation to reach for extraneous material in support of the case is not easy for counsel to resist or for the court to police. This makes it all the more important to be vigilant about relevance to the matters at hand. My point is that there is a danger that the trial could segue into questions quite removed from these defendants' liability.

32. In view of his decision on relevance, the trial judge did not proceed to consider whether the identity of the client was necessary for the fair disposition of the case. I do not think it necessary to discuss this question because of my concurrence with the views of the High Court. This is clearly an important criterion to be satisfied in accordance with the Rules, but I would find it difficult to refuse discovery in the circumstances of this application if I had reached a different conclusion on relevance. My view is that this is in accordance with the approach adopted in *Framus*.

33. My view is that the plaintiff has done no more than to assert relevance, insisting that it is obvious but has not been able to demonstrate any legal or logical justification for his proposition.

Client Identity: Discovery to Identify a Concurrent Wrongdoer

34. Under this head, the plaintiff seeks to invoke the jurisdiction identified in *Norwich Pharmacal v. HM Commissioner for Customs & Excise* [1974] A.C. 133 where Lord Reid said:

"So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against with the wrong than that he was a spectator or has some document relating to it in his possession." [At page 175]

35. This has been applied in a number of subsequent cases and not been questioned as to its correctness as it is submitted. The plaintiff complains of the refusal by the High Court judge of the claim based on *Norwich Pharmacal* in which the judge referred to his previous decision and said that the application could not be repeated on this occasion. The submission is that the test to be applied under the alternative *Norwich Pharmacal* rubric identified by Lord Reid is quite different from the principal category of application under that authority. The defendants argue that the judge correctly identified the appropriate jurisdiction when he gave judgment in the previous *Norwich Pharmacal* application. On that occasion, he said:

"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."

36. In the circumstances, the defendants argue that the plaintiff had previously made an interlocutory application for disclosure of the identity of the client. On his own case, that was not a *Norwich Pharmacal* application, but one invoking some other interlocutory jurisdiction for disclosure. Since there was not clear evidence of wrongdoing, the case had not been made out by the plaintiff who had not appealed the decision. The defendants submit that this is an attempt by the plaintiff to re-visit a claim previously made and rejected by the court. However, the judge in this case did not accept the defendants' argument that the earlier decision precluded the plaintiff from seeking discovery as sought. The judge held that the plaintiff was precluded from seeking the client's identity in order to sue the client, but that he could nevertheless seek discovery on the basis that the information was relevant in these proceedings as opposed to any intended proceedings. The defendants argue to the contrary that the application ought to have been refused because he had failed to advance the position in respect of evidence of wrongdoing since discovery was first refused.

Discussion: Concurrent Wrongdoer Jurisdiction

37. This argument must also be rejected, for a number of reasons. First, on the approach adopted by the High Court, I think the conclusion the judge reached was correct. There was no new basis advanced by the plaintiff to produce a different result from the previous unsuccessful application. Secondly, there was actually no case made out by facts put before the court that entitled the plaintiff to the order sought. Thirdly, and more fundamentally, the analysis of *Norwich Pharmacal* on which this part of the plaintiff's argument depends is not a correct reading of the decision and the speeches as a whole, including that of Lord Reid. The case does not give rise to two separate heads of entitlement to disclosure of the name of an alleged or presumed wrongdoer. Fourthly, it seems to me to be a case of *res judicata*. It also seems that there are policy considerations that are relevant. It is not in dispute between the parties that there is jurisdiction as identified by Lord Reid in *Norwich Pharmacal*. But is there evidence that the client and the defendants are concurrent wrongdoers? Concurrent wrongdoers are liable to the plaintiff for the same damage. In this case, the allegation is that there was a conspiracy to damage the plaintiff by unlawful means, namely, defamation.

38. It seems to me that the points made by the High Court judge as to the speculation about the identity of the client and the inferences that may be drawn merely from his or her identity apply as much to this point as to the basic issue of relevance. I do not think it is sufficient to say that the name of the client might give rise to an inference of hostility to Mr. O'Brien. That may be the case, although there is actually no evidence one way or the other. It is possible that one could surmise that a person who instructed the defendants to prepare the dossier may be supposed on a reasonable basis not to be favourable to Mr. O'Brien. But even allowing that, how can one go any further to infer some either transferred hostility from him or her to them, or some shared motivation of hostility such that it makes the client a concurrent wrongdoer? I do not think that jump can be made. It seems to me to be pure speculation. I think that this is what the trial judge meant when he drew attention to the difference between the original application and to the requirement that the discovery be shown to be relevant for the purpose of this action against these defendants. I should also say that it seems to me that the defendants have gone a long way towards establishing that the judge was indeed referring to the specific kind of jurisdiction that Lord Reid had in mind when he was describing the alternative *Norwich Pharmacal* jurisdiction. Therefore, there is some real substance to the submission by the defendants that the previous decision was binding and that this application, insofar as it relies on or endeavours to rely on Lord Reid's identification of an appropriate circumstance for discovery, represents in fact a return to previously trodden territory.

39. In the leading case, *Norwich Pharmal*, the House of Lords, in 1974, held that the court had an equitable jurisdiction in addition to the provisions of the Rules of the Superior Courts to order discovery or disclosure by an innocent involved party of the name of a wrongdoer against whom the plaintiff wished to proceed. In the *Norwich Pharmacal* case the Revenue authorities had, because of their customs functions, been involved in the presumptively fraudulent importation and distribution of a drug of which the applicant company was the patent owner. This involvement came about because of the system of import certification that applied. The actual importer had no right to bring in the drugs or to distribute them but the entitled party was unable to ascertain the name of the importer or importers. The Revenue refused to reveal the details and the manufacturer applied to the court and during the proceedings dropped any claim alleging wrongdoing against the Revenue but simply seeking discovery of the identity of the importer. The House of Lords held in favour of the company. It declared the principle that an innocent party that became mixed up in the tortious acts of a wrongdoer was in a different position from a mere witness to wrongdoing and owed a duty to the plaintiff to reveal

the information in its possession.

40. Lord Reid, in the course of his speech, commented that if the requested party was itself a wrongdoer, it was incumbent on it to make known to the plaintiff the identity of a concurrent wrongdoer. The principle established in this case has been applied in a number of subsequent proceedings. The particular question that the House addressed was: what was the level of involvement by the requested party to remove it from the position of being merely a witness? It was accepted as being clearly established that if the latter was the situation the equitable right did not exist to require provision of the information. On being satisfied of the sufficient level of involvement in the affair the subject of the proceedings, the House of Lords held that the obligation existed. That is not the principle on which the appellant Mr. O'Brien relies in this case. His argument instead is based on the point about a concurrent wrongdoer that Lord Reid mentioned in his speech. The question therefore arises as to the criteria that have to be satisfied for a party to obtain discovery in that second situation.

41. In my judgment, this leading case and the others relied on in submissions and argument and contained in the book of authorities give rise to the following conclusions about this jurisdiction:

(i) *Norwich Pharmacal* is authority for the point that the courts have an equitable jurisdiction to order a party or person to reveal the identity of an alleged wrongdoer.

(ii) This jurisdiction is separate from the discovery process under the Rules of the Superior Courts or the equivalent Civil Procedure Rules in England and Wales.

(iii) There is one jurisdiction not two; the mistaken submission made by the plaintiff is based on the concept that there are two separate and distinct processes envisaged by *Norwich Pharmacal* whereby the name of a wrongdoer may be ascertained by a plaintiff or an intended plaintiff.

(iv) The argument in *Norwich Pharmacal* was about the position of a party such as the Revenue in that case against whom or which the plaintiff did not have a cause of action: was there a jurisdiction in those circumstances to require the innocent third party to reveal information. The House of Lords held that the Revenue was mixed up in the fraudulent affair of the wrongful importation of the intended plaintiff's pharmaceutical products by bodies or persons known to the Revenue but not to the company that owned the patent. Because of the customs arrangements for the importation of the drugs the Revenue was involved in the sense of giving permission for them to be imported. This meant that the Revenue was involved sufficiently albeit innocently and inadvertently in the fraudulent activity of which the plaintiff was complaining.

(v) The issue in the House of Lords was whether the Revenue in that case were subject to the jurisdiction whereby they could be compelled to reveal the information to the intended plaintiff. It was not in dispute that there was a distinction to be drawn between a person or body who is merely a witness to some wrongful or allegedly wrongful event or transaction on one hand and, on the other, a person or body who is liable to and being sued by the plaintiff and who is in possession of information that the plaintiff needs about other wrongdoers who are similarly liable. Concurrent wrongdoers are in this latter category.

(vi) The debate therefore centred on whether the Revenue were in the category of a mere witness or closely related so that the order could not be made. Or were they closer to the position of concurrent wrongdoers, notwithstanding that they were not wrongdoers at all as was conceded by the applicant? As mentioned above, the House of Lords held that the jurisdiction did exist in circumstances where the Revenue were mixed up sufficiently in the matters in suit.

(vii) The rule excluding a mere witness from liability to disclose is long established and accepted by the highest authority as being grounded in public policy. It may be considered necessary to prevent endless and uncontrollable demands by prospective litigants made to persons or bodies that the complainants think may have knowledge that will assist the prosecution of the claims. An impossible situation would exist if a party were to be permitted to interrogate by court application any person or body whom the applicant believed or suspected to have information relevant to an intended claim. The courts would be at risk of being inundated with applications by persons with grievances that they wanted to bolster or establish by gaining access to the relevant records. Persons alleged to be witnesses and bodies and institutions said to have information might be put to trouble and expense dealing with requests. The courts are obviously keen to maintain this important even essential restriction.

(viii) This is the background to the debate in the House of Lords in *Norwich Pharmacal*. Their Lordships held that the applicant company was entitled and that the position of the Revenue could be satisfactorily distinguished from the position of a mere witness. This was in line with the authorities and the principles that could be derived from them, although the House acknowledged that there were some difficulties and inconsistencies. They seem to me to have arisen from the particular facts and circumstances under consideration in the different cases. That is often the case which arises from the process of inductive reasoning whereby precepts are derived from different decisions.

(ix) The plaintiff's argument in this case is that there are two separate jurisdictions that were acknowledged in *Norwich Pharmacal*. The first one was applied in that case and it was the basis of application by the plaintiff in the prior application to the High Court which was refused. No appeal was taken from the decision so that stands and the principle of *res judicata* applies in respect of anything specifically decided or essential to the decision. But, the plaintiff says, there is a separate jurisdiction acknowledged in *Norwich Pharmacal* which entitles him to apply to the court in another application for the same relief. To spell this out more clearly, it seems that the applicant's argument on this motion is as follows.

a. This basis of application is separate from the discovery motion and so relevance to the issues in the case between the plaintiff and these defendants is not decisive and perhaps not even a consideration.

b. *Norwich Pharmacal* contains two separate and self-contained jurisdictions whereby the identity of a wrongdoer may be ascertained by a plaintiff or an intending plaintiff, one being the case where an innocent party in respect of any tortious liability is mixed up in the matter under claim by the plaintiff or intended to be the subject of proceedings: that was the actual circumstance in *Norwich Pharmacal* where the Revenue were innocent of wrongdoing but mixed up in the nefarious activity being carried on by another party. In those circumstances, the House of Lords ordered revelation of the identity of the importer that was known to the Revenue but not to the plaintiff. The second heading is what Lord Reid mentioned at page 175 of the report, being the situation where a

plaintiff seeks the name of a concurrent wrongdoer from a defendant whom he is suing, which Lord Reid mentioned as an existing avenue that was available to a plaintiff.

c. This plaintiff applied pursuant to the *Norwich Pharmacal* jurisdiction for an order against the defendants to reveal the name of their client. That was on the authority of the *Norwich Pharmacal* decision itself, not on the alternative or second basis mentioned by Lord Reid. The case as made was not strictly on the same basis because here the defendants were actually being sued and they were not innocent parties who somehow got mixed up in the affair. Therefore their position was not the same as the Revenue in *Norwich Pharmacal*. So the case should strictly speaking as made by the plaintiff in the prior application to the High Court be considered as somehow analogous to *Norwich Pharmacal* proper or no.1. The High Court rejected the application, considering that the material advanced by the plaintiff was entirely insufficient to justify making the order. The plaintiff did not appeal against that decision.

d. In this application for discovery, the plaintiff advanced the argument based on the supposedly second jurisdiction identified in *Norwich Pharmacal* and the judge entertained the application but rejected it. The defendants had argued that the matter was already decided in the previous motion but the judge did not hold with that objection. However, he again rejected the disclosure request on the basis that no new information had been put forward so the position had not been advanced in any way since the previous application and he therefore decided against the plaintiff. The plaintiff appeals from that decision, claiming that the judge was in error because the appropriate test for this second case jurisdiction is different and lesser than the stringent requirement for a *Norwich Pharmacal* application against a party innocently involved. The defendants maintain that the judge ought to have rejected the application on the basis of *res judicata*.

e. To complicate the situation, counsel for the plaintiff acknowledges that he made his case in the *Norwich Pharmacal* application in the High Court not only on the basis of the decision of the House in the specific circumstances, namely, the *ratio decidendi* of the case before their Lordships (*Norwich Pharmacal* proper or no.1) but also on the obiter comments made by Lord Reid, case no.2. It is clear therefore that this suggested second basis was also before the High Court although the judgment did not actually address this particular point. This is how the plaintiff is able to argue that it is open to him nevertheless to make this case in the instant application.

(x) In my judgment, the appellant plaintiff is not correct as a matter of law in proposing two separate *Norwich Pharmacal* jurisdictions, one for an innocent party and one for an actual defendant. There is only one, which has been exercised in cases (a) in which the requested party is a defendant or alleged wrongdoer where the applicant achieves a relatively high standard of proof on a provisional basis, that is, a strong case and (b) where the party in possession of the information is involved in the wrongful conduct in significant degree but is itself innocent of liability to the applicant seeking the disclosure, again provided the applicant makes out a strong prima facie case. The standards of evidence or proof are not different; it would make no sense to hold otherwise. The comments of Lord Reid cited by counsel for the plaintiff in this case are in no way contradictory of that. Indeed, it would not make any sense to think that they were.

42. It follows, in my view, that the trial judge was correct to reject this ground of the application. He ought indeed to have held that the matter was *res judicata* by reason of the previous decision of the court. But on the footing that the judge employed in considering the matter, it was also correct to rule out relief because the factual ground had advanced no further. I would incidentally comment that the rule now much cited in our courts that was stated in *Henderson v Henderson* [1843] 1 Hare 100 would surely militate against the reiteration of the claim under *Norwich Pharmacal* even if it had not actually been argued on the previous hearing. There is, of course, no authority or logic to justify the application of separate factual criteria for this jurisdiction, even if it were to be held that the law made provision for different grounds as the plaintiff submits.

43. In addition to these considerations, it is clear that the plaintiff has not established any grounding of fact for the renewed application, even if it were to be held that there is a second and distinct jurisdiction, as the plaintiff contends. An applicant has to satisfy a threshold test in order to succeed in a *Norwich Pharmacal* application. It is obviously not sufficient simply to allege that the defendant in the case is a concurrent wrongdoer with another whose identity is sought. The High Court held that the plaintiff had not made out a sufficient or indeed any case for the relief he sought in the original process.

44. It is not the case that a party can avail himself of an entitlement to obtain information that he could not get otherwise by the simple stratagem of alleging concurrent wrongdoing in his pleadings or particulars or argument. I think that this is what has happened in this case; Mr. O'Brien has gone no further than to make the allegations which if they were founded in fact at a sufficient level could justify the court in making the order he seeks if it was satisfied that it was in the interest of justice to do so. I should say that this last point is not to be overlooked: the fact that the jurisdiction exists for the court to make an order does not mean that it will do so; the court must be satisfied that the application is in all the circumstances a deserving one. However, I do not think that it is necessary to consider the merits of the application under this heading because Mr. O'Brien has failed to establish the necessary factual basis to enable the court to exercise its discretion. This applies even on the assumption which I am satisfied is not correct as to an alternative mode of invoking *Norwich Pharmacal*.

45. Mr. O'Brien must rely on conspiracy in seeking to attribute concurrent wrongdoer status to the client. He obviously cannot do so in regard to defamation at this stage. The case is that the defendants and the client conspired to damage Mr. O'Brien by the unlawful means of defamation. This means that they agreed between themselves that they would publish untrue material to damage him. It is not that they agreed to publish material which subsequently turned out to be defamatory. For the conspiracy to exist, the agreement had to be to do something unlawful, which is just what is pleaded. It could still subsist if the agreement were that they would publish damaging material regardless of whether it was true or untrue, which would still amount to wrongdoing if it turned out that the material was untrue. In those circumstances, it would also give rise to an entitlement to punitive damages. But it is unnecessary to engage in any detailed discussion of the specific requirements of conspiracy or of intention or recklessness because there is not any evidence on which the court could conclude for the purpose of a *Norwich Pharmacal* jurisdiction that the plaintiff had reached the base camp of fact that would enable him to invoke this procedure.

Client Identity: Submission of the Defendant's Counsel in the *Norwich Pharmacal* Application

46. This argument was that counsel for the defendants made submissions in the course of the *Norwich Pharmacal* application in reference to discovery of documents which amounted to something of a concession in this motion. Counsel said at the *Norwich Pharmacal* hearing that the information sought was more appropriate to a discovery hearing than it was to the procedure in question at that point. In oral argument, counsel for Mr. O'Brien pointed out references in the transcript of the hearing but counsel for the defendants was able to cite other passages in which the matter was not conceded. Indeed, there really was no question of

concession or admission in the argument on behalf of the defendants. Counsel was drawing a distinction between the two kinds of application and actually expressed a reservation about the position on discovery while still making the point of the distinction between the two procedures.

47. I do not think that an argument made by counsel in one application could, in general, be considered to be a concession binding on the client in another proceeding. An argument is different from a concession. Even if it were the case that counsel had appeared to concede that the situation that he was resisting would be different in another case, or on another occasion in the same case, I would be slow to hold the client to an apparent concession in those circumstances. Obviously, counsel is in a position to make a concession on behalf of his client but that very privilege and responsibility must be confined to its proper zone of application. That is in the particular court procedure to which the concession is relevant.

48. I am satisfied as a matter of fact that counsel did not actually commit his clients to an agreement that they would give discovery of the name of the unidentified person if such an application were to be made under a different legal rubric. Mr. Collins SC for the defendants was able to demonstrate the fallacy of the ground by a consideration of the transcripts of the proceedings.

Categories 1(E) and (F) – Publication

49. In these categories of discovery, the plaintiff sought documents relating to publication of the dossier as follows:

“Category 1(E):

All documents that evidence, record or relate to the identity of those to whom the Dossier or part thereof was sent and/by whom it was received and/or by whom it was seen, the foregoing to include all documents that evidence, record and/or relate to attempts to send the Dossier or parts thereof to persons/entities and whether or not such attempts were successful.

Category 1(F);

All documents that evidence, record or relate to the response(s) by persons/entities to receipt or sight of the Dossier and the contents contained therein.”

50. The plaintiff accepted that publication as pleaded in the statement of claim lacked specificity, but maintained that the clandestine nature of the defendants’ activities was the reason for that. He cited a catalogue of facts, which it was his contention gave rise to the implication of publication sufficient to meet the standard required in law. The parties were agreed as to the legal rules as expressed in the cases and that the trial judge had correctly identified them. They established that it was legitimate to seek discovery in support of a case *i.e.* to advance a case, but not in order to make a case which otherwise did not exist. The issue arose, therefore, as to whether the plaintiff’s request was in support of an existing plea or was it put forward in order to make one. Had the plaintiff disclosed information on which the plea of publication was based? In other words, had the plaintiff shown some sufficient evidence of publication to meet the admittedly low threshold separating a genuine case perhaps lacking in evidence from one that was speculative and unsupported by facts?

51. In *Hartside Ltd. v. Heineken Ireland Ltd.* [2010] IEHC 3, Clarke J. held as follows:

“The overall problem is one between balancing, on the one hand, the need to facilitate a party who may have a legitimate claim but who may require access to information available only to its opponent in order to fully plead and ultimately substantiate that claim on the one hand, and the need to prevent, on the other hand, a party, by making a mere allegation, from being able to have a wide range of access to its opponent’s documentation, including what may well include highly confidential documentation. The balance struck in both *Moorview*, *National Education Board* and *Ryanair*, leads to the conclusion that a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent’s relevant documentation.” [At page 13]

The difference above mentioned between seeking discovery to support a case and discovery to make a case appears from the following two cases. In *Keating v. RTE* [2013] IESC 22, McKechnie J. said:

“... it seems clear, at least in principle, that a sharp distinction exists between situations where a party, be he plaintiff or defendant, seeks discovery to support or advance his particular viewpoint and where such is sought for the purposes of making or formulating a claim which otherwise does not exist. In other words, discovery is an aid to further a viable action or defence, or an issue in either, but not a means in itself to establish one.” [at para.62]

52. In *Ryanair v. Quigley* [2015] IEHC 776, Binchy J. said:

“... there is a difference between seeking discovery in support of an existing plea and seeking discovery for making a case pleaded where no particulars of the plea have been given. .” [At para.13]

53. The plaintiff had replied to the defendants’ request for particulars in respect of publication as follows:

“By reason of the covert nature of the Defendants’ activities and that of their client, the Plaintiff is unable to fully particularise the publication, distribution and/or dissemination of the Dossier by the Defendants until after the making of discovery and/or answers to interrogatories.”

The judge cited all these matters as prelude to his discussion of the issues and his ultimate conclusion. That appears at para. 35 of the judgment and is as follows:

“35. The plaintiff has not adequately pleaded facts concerning publication. The plaintiff could have pleaded more facts about the memory stick. He has not done so and has not explained the absence of pleading. Similarly he has not pleaded facts about the suspicious questions from journalists and he has not explained the absence of pleading. The court will not order discovery of documents in relation to publication because of the absence of pleading in relation to this issue.”

54. The judge discussed in some detail two features that were relied on by the plaintiff in order to demonstrate publication. The plaintiff did in fact put other matters before the High Court which, it is suggested, should have been expressly mentioned by the judge in his discussion and in arriving at his conclusion. The plaintiff’s submissions cited nine such facts or circumstances which they maintain are sufficient to bring him over the threshold of proof required.

55. The judge referred specifically to two such matters. The first was the fact, as suggested by the plaintiff, that publication was to be inferred from certain questions he was asked by journalists in the months before the proceedings issues which suggested that they had "received a briefing of some sort" which is how the plaintiff put it in replies to particulars of 8th February 2016. The judge held that Mr. O'Brien had failed to substantiate this claim in any way by giving details of the questions or the names of the journalists or the occasions or the manner in which the questions were asked. He had not given any information which would enable the court to draw the necessary inference that he wanted, nor did it he supply any sufficient information as to enable the court to analyse the issue at all.

56. On the second point as to the manner in which Mr. O'Brien came into possession of the memory stick in which the Dossier was contained, the trial judge was deeply unimpressed by the lack of specificity as to the circumstances of receipt and subsequent events. There were many unanswered questions, as the judge noted, and while he had ruled in the *Norwich Pharmacal* application that there was not sufficient evidence to lead to the conclusion that there was a want of candour on the part of the plaintiff which would have a determinative effect, he was obviously still very concerned that the full story had not been provided to the court. In respect of both the journalist questions, therefore, and the receipt of the memory stick, the judge felt, and so held, that Mr. O'Brien was in possession of a great deal more information about these matters than he had provided to the court and that would have enabled the court to engage in scrutiny and evaluation of the facts and circumstances. In the event, the judge concluded as he did.

57. The judge also referred back to his judgment on the plaintiff's *Norwich Pharmacal* application which he gave on 21st December 2015 in which he said:

"I had not been persuaded that there was enough evidence or any evidence in the case for me to be certain that publication has indeed happened."

He then went on to say that the plaintiff had not provided any additional information in connection with the instant application that would persuade him to change his mind in relation to the matter. On that point, the plaintiff argues that the judge applied the wrong test, because in the application for discovery, a quite different criterion had to be satisfied as to evidence by comparison with the high standard applicable to a *Norwich Pharmacal* application.

58. The matters relied upon by the plaintiff that evidence or imply publication are as follows. First, it is said that the defendants are engaged in public relations and communication and they seek to be opinion forming. That is not evidence of publication of the dossier, but it is probably meant more as a general background point against which the other suggested evidences are to be considered. Secondly, it is said that the dossier was compiled on the instructions of a client and was "clearly intended for an audience, its contents are not for 'in-house' consumption". The defendants argue that at its height, that, if correct, it is no more than evidence of an intention to publish, but not of publication. That is correct. The material contained in the dossier does not indicate publication. In circumstances where the collection of material could be part of a continuing process or could be done for a variety of reasons or could suggest an intention to publish at some time in the future, that is not sufficient, in my view. Neither could it be said that the material in the dossier was all to be published at one time or published in parts or any other circumstance.

59. Point (c) is that the metadata of some of the documents reveal that they had been worked on from at least May 2015 and this point has to be seen in conjunction with point (d). There, it is alleged that the plaintiff experienced questioning by journalists in a 5-month period prior to October 2015 when he acquired the memory stick, which he experienced by journalists which was consistent with their having received a briefing of some sort. This is the matter on which the trial judge made critical observations based on the absence of any detail supplied by the plaintiff as to the particular questions or circumstances, and the trial judge cited the response of the plaintiff in the particulars. In my view, the judge was clearly correct in this conclusion that he reached, even before making any allowance for the particular position of the trial judge in making an evaluation of that kind.

60. Point (e) is a reference to a draft speech prepared for Deputy Colm Keavney for delivery in the Dáil. The defendants suggested various amendments to the draft but the Deputy did not accept any of their amendments. That is not evidence of publication, but rather of non-publication. The plaintiff submits that this action by the defendants indicated an intention of publication under privilege of the Dáil, but that is a different thing.

61. Point (f) is that the defendants used drop box, which, as the defendants point out, is no more than evidence that the dossier was stored on the Cloud platform.

62. Point (g) is that the plaintiff has repeatedly, in various court applications, sworn to his belief that the defendants have published, distributed and/or disseminated the dossier and they have never taken the opportunity to deny publication. However, the defendants have made clear in their defence and in their submissions that they do not admit publication and put the plaintiff to proof thereof and they will rely, if possible, on any failure of proof in that regard. This point is not evidence of publication. Additionally, the plaintiff submits that there must have been publication of the dossier to the anonymous person who delivered it to the plaintiff's offices. But that does not follow either. There is no basis for suggesting that the courier of the memory stick had actually accessed the material on it. It is possible that he knew what was on it; it is possible that he looked at the material, but the matter goes no further than that.

63. Finally, the plaintiff suggests that some of the language of one at least of the memoranda suggests that it was designed for an audience in the United States. The defendants argue that that is speculative, which is essentially correct. Moreover, it is no evidence of actual publication.

64. It is the case that the test that the High Court applied in the *Norwich Pharmacal* application was different from the one applicable to the discovery motion. It was not necessary in this case for the trial judge to be persuaded that there was enough evidence to be certain that publication had happened. Clearly, that was not the appropriate test in this motion. If the trial judge had applied that test or standard, it would have been incorrect. However, I do not think that the judge intended to say that or to apply that incorrect test. The point that he was making, as it seems to me, is that on the previous occasion when he gave judgment in the *Norwich Pharmacal* application refusing the order sought by the plaintiff, he had made this statement about the absence of evidence. The judge went on to consider in some detail the suggested evidence or implication from the questions by journalists and the allegedly clandestine activities of the defendants, and he then addressed in considerable detail the point as to the circumstances in which Mr. O'Brien came into possession of the memory stick. The judge emphasised that the matters that had come up in the *Norwich Pharmacal* application in respect of the receipt by Mr. O'Brien of the memory stick gave rise to an obvious need for him to put further information and a lot more information before the court as to the precise circumstances. He was also satisfied that Mr. O'Brien was in possession of that information, but had not furnished it to the court. Accordingly, it seems to me that the judge laid out as a prefatory remark before embarking on the discussions above mentioned his finding in the *Norwich Pharmacal* application.

65. The whole discussion by the trial judge of the issue of publication and the legal requirements in the cases that are authorities on the questions and it is clear that he was fully apprised of the appropriate legal criteria to be applied. It seems to me, therefore, that the suggestion that the judge, by his reference to the *Norwich Pharmacal* decision, applied an inappropriate test is quite erroneous.

66. As to the submission that the trial judge failed to apply the threshold test as described by Clarke J. in *Hartside v. Heineken Ireland Ltd.*, I do not think that this bears examination. The judge actually laid out the test in the quoted passage above from the judgment of Clarke J. He also cited the additional quotes that I have cited. Then the judge referred to the facts as above mentioned. In respect of those facts that he did not specifically mention, they do not amount to any evidence or sufficient material from which any inference of publication could be derived. The judge was not obliged to mention every piece of evidence that he considered and it seems to me that in the context of a careful, reasoned judgment delivered by the judge, it would be quite wrong to assume that he had overlooked this material or had chosen to ignore it. As I have indicated, I do not think it amounts to any evidence of publication.

67. For these reasons, I am of the view that the trial judge was amply justified in arriving at the conclusion that the plaintiff had not adequately pleaded facts concerning publication so as to justify the request for discovery. The plaintiff did not pass the limited threshold of specifying a legitimate basis for publication of the material.

Category G

68. The request in respect of communications with the defendants' client is as follows:

"Category 1G:

All documents that evidence, record or relate to communications between the defendants and their client, the foregoing not to be limited to communications in relation to the commissioning, compilation, authoring or editing of the Dossier or parts thereof."

The judge ordered discovery as follows:

"All documents that evidence, record or relate to communications between the defendants and their client, insofar as the documents relate to the dossier or the plaintiff, redacted to conceal the identity of the client whose instructions led to the production of the dossier."

The judge explained his reasoning, saying that the motivation of the defendants is a central issue in the case and thus disclosure is likely to assist the plaintiff on that issue, but the discovery should be limited to communications that refer to the dossier and/or to the plaintiff. The client may have retained the defendants in relation to matters not connected with Mr. O'Brien and such communications were unlikely to be relevant to this case.

69. It is clear that the plaintiff was seeking access to all communications between the defendants and their client. The plaintiff's submissions were based on a misunderstanding as to the terms of the order, being concerned that the description made by the trial judge was too narrow, but that appears to have been cleared up now. The order made by Mac Eochaidh J. under this category was for documents that relate to the dossier or the plaintiff, redacted as described.

70. That is not the end of this matter because the defendants have themselves appealed against this order. They argue that given the breadth of the other categories that were ordered by the judge, namely, Categories A to D, they necessarily encompass all relevant communications with the client concerning the dossier. They argue against inclusion of any documents that are communications unrelated to the dossier. They point out that the only acts the plaintiff alleges that have occurred in pursuance of the conspiracy he alleges are those in connection with the dossier. It seems to me that the order as made by the judge and as recorded at para. 45 of the judgment is confined to communications between the defendants and their client which relate to the dossier or the plaintiff redacted to conceal the identity of the client. Thus, the High Court rejected the request made by the plaintiff for documents that were not limited to communications in relation to the dossier. In my judgment, this category of discovery as ordered by the trial judge may well overlap with other area and may, in that sense, be unnecessary, but I do not think that there can be any reasonable or legal objection to the discovery as ordered under this head. Confidentiality is preserved in respect of matters not relating to the dossier or the plaintiff and the identity of the client is not to be revealed.

71. In the result, I think that there is actually very little in contention under this category when the discovery, as ordered by the trial judge, is correctly understood.

Category H

72. This is as follows as sought by the plaintiff:

"Category 1(H):

All documents that the defendants intend to rely upon in advancing the defence of qualified privilege and honest opinion."

The judge ruled as follows:

"This category is refused on the basis that it is neither relevant nor necessary for the plaintiff to obtain documents which the defendants may use in connection with defence of the proceedings. The plaintiff is aware of the defence advanced by the defendants. The manner in which they prove elements of that defence is a matter for evidence at the trial at the action and not properly a matter for discovery."

73. The plaintiff submits that documents in the possession of the defendants that are relevant to the pleas of qualified privilege and honest opinion are discoverable. It is submitted that the request is narrow, being confined to documents that the defendants intend to rely upon in advancing the defence of qualified privilege and honest opinion. The defendants submit that the judge was correct and that the defendants should not be required at an interlocutory stage of proceedings to identify the documents on which they intend to rely at trial.

74. It seems to me that this request gives rise to difficulty. There is merit in the defendants' objection that it requires them at an interlocutory stage to identify the documents that they will rely on at trial. Discovery is a continuing obligation and it may be suggested that they are being required to identify the documents on which they at present intend to rely, with the proviso that if they propose to use further documents at a later stage, then it would be incumbent on them to furnish those extra documents also. The problem is that this is practically a demand of an excessively broad nature as follows: please make discovery of every document

you have relating to qualified privilege. In the first place, it may not be easy to identify just what documents are relevant to that plea. These pleas relate to states of mind and that is really the kernel of the difficulty in relation to discovery. It is not that the documents constitute evidence, but rather that they are sought in respect of a state of mind or states of mind of the defendants and each or any of them. Just how are they going to be able to put their fingers on particular documents and say that they are or are not relevant on the question of honest opinion or qualified privilege?

75. It is true that qualified privilege and honest opinion are issues in the case as defined by the pleadings. But what is the nature of those issues? They are not factual questions. They are rather issues of law and fact that will arise out of evidence about the state or states of mind of the defendants. With some hesitation, therefore, I think that this category is not allowable and I would endorse the decision of the High Court, but for different reasons. The fact that the plaintiff has not pointed to any legal authority on this point makes me more comfortable in the position that I adopt.

76. I would, accordingly, dismiss the appeal in respect of this category also.

Second Ground based on Alleged Concurrent Wrongdoing

77. The plaintiff's case was that the client and the defendants are concurrent wrongdoers because the former commissioned the defamatory material and the latter put it together. They were conspiring together to damage him. Counsel accepted that on the conspiracy question there had to be a bad motive.

78. The second leg of Mr. Cush SC's argument for revelation of the name of the defendants' client is based on a passage from the judgment of Lord Reid in *Norwich Pharmacal* and he cites specifically p. 175 of the judgment at para. (d):

"I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him."

Mr. Cush SC says that Lord Reid's speech is to the effect that a plaintiff can get a *Norwich Pharmacal* order against concurrent wrongdoers and that jurisdiction is not in dispute. He says that this jurisdiction has been applied in *Loose v. Williamson* [1978] 1 W.L.R. 639. In that case, the allegation was of one in which the plaintiffs sued the defendants who were the owners of three boats alleged to be engaged in illegal fishing and they sought disclosure of the identity of the other boat owner and the people in the boat – they were all concurrent wrongdoers and the order was made by reference to the judgment of Lord Reid. That strikes me as being an authority that needs to be examined in some detail because the proposition in it is questionable, at least as far as the summary given by Mr. Cush goes.

79. This part of the argument is separate from the *Peruvian Guano* discovery heading. Mr. Cush is saying that there is a distinct jurisdiction arising from the comments of Lord Reid in *Norwich Pharmacal* that entitles him to get disclosure from the defendants of the name of their client. On this question and I am referring back to *Norwich Pharmacal* at 175, para. (d), the question arises is how is it alleged that the unnamed client has incurred liability to Mr. O'Brien? What has the client done to give rise to this liability? Yes, Mr. O'Brien has pleaded that the defendants defamed him – I appreciate there is also the plea of conspiracy, but this point applies even more powerfully to the plea of conspiracy and the question of conspiracy does not seriously arise, in my view, because the plaintiff has confirmed that the case is actually one of defamation and the conspiracy, is allegedly a conspiracy of which the unlawful part is defamation, a claim that awaits being borne out by the judgment of the court in due course. However, keeping to the question of defamation, how is it alleged by Mr. O'Brien that the client has defamed him? Are the defendants his servants or agents? He has not established that and I do not think he has even asserted or alleged it in the documents or submissions. He is allegedly a co-conspirator, but the conspiracy depends entirely on defamation, as is confirmed by reply to particulars number 4. Is it alleged that the client published the material? I do not think so. The defendants published the material so it is possible to say that the defendants conspired to defame the plaintiff, but in order to do that you have to establish a basis for defamation for which the client is a concurrent wrongdoer.

Therefore, I am at a loss to understand, through all the thickets of confusion that seem to me to apply to this case, just how precisely the unnamed client is to be indicted for conspiracy or defamation.

80. Mr. Cush submits that the client will be a concurring wrongdoer and that he has incurred some liability. Mr. Cush also accepts that he put up this case in the quasi-Norwich Pharmacal application to Mac Eochaidh J. in the High Court in the previous application. Counsel said that this issue was not the subject of *res judicata* or issue estoppel because the test the court applied on that application was different and the issue was not precisely the same. In this respect, counsel criticises the decision of Mac Eochaidh J. in this case when he said that the *Norwich Pharmacal* application could not be renewed.

81. It seemed to me, when managing the list for an early hearing of this matter, that the plaintiff wished to ascertain the identity of the defendants' client so that he could sue that person for defamation. The urgency of the matter was that the time limit provided by the Defamation Act 2009 was one year, which could be extended for a further year, but there was no provision for any greater extension. The time would run out in October of this year, on at least one view of the proceeding. That is a reference back to the dates of publication alleged in these pleadings which are between October 2014 and October 2015. Taking the later of those dates, obviously October is the deadline. However, I am extremely doubtful as to whether that use of the discovery in this action would be permitted by law. In this regard, see 17-01 to 17-17 of Abrahamson & Others on '*Disclosure and Discovery*' 2nd Ed. 2013. As the authors observe at para. 17-17, an exception to the general restriction on use of documents is a *Norwich Pharmacal* order in which the discovery is the sole relief in the proceedings and is sought for the purpose of identifying wrongdoers in order to proceed against them. The interesting feature in this case is that the plaintiff, Mr. O'Brien, brought a *Norwich Pharmacal* application and was unsuccessful in it, a fact which the trial judge, Mac Eochaidh J, considered relevant and referred to in his judgment. That is a ground of criticism levelled by the appellant here, but it seems to me that it represents a barrier of some kind to the present application insofar as it is intended to use it for further proceedings.

82. All of this makes me more concerned than I was at the time of trial in failing to see the connection that counsel for Mr. O'Brien claims is obvious but which he did not elucidate in any way that made sense to me.

Discussion

Propositions/Principles

83. The defendants' client in this case was free to collect and/or publish material critical of the plaintiff. He was also entitled to engage others to do that very thing, but subject to doing so lawfully, either by himself or by his servants or agents. Red Flag, as a consultancy, does not have to ensure that its clients' motives are pure, legitimate and not simply hostile or "malicious". If material

hostile to a person is published and he or she sues, truth is a defence. Even if the person is actuated by the bitterest and most unjustified and unfair malice, actual hostility or other mean intentions, it is a full defence to an action for defamation to prove that the statements are true. There is no equivalent at common law of the sin of detraction.

84. As with others, *e.g.*, a journalist or editor, a public relations consultant or company such as Red Flag does not have to validate the motive of an informant, but a publisher is liable if the information is defamatory and untrue. That is the case even if the motives of all the people involved are entirely pure. There is a question of motive. A plaintiff is entitled to recover damages for the injury his, her or its reputation by the publication of defamatory material no matter how innocent all of the parties may have been. A simple accident can result in a mistake by somebody and a statement is published which gives a plaintiff who is identified or identifiable a full cause of action irrespective of the purity of the motive of the defendant in question.

85. The nature of the case as pleaded here may give rise to greater or lesser vigilance by the court in scrutinising the discovery application and its claims of relevance. It strikes me that it is not sufficient simply to plead defamation and conspiracy and to refer to exemplary damages and aggravated damages, which are a possibility, in order to justify the demand for identification of the client. I think that the circumstances of this case should make the court chary of the intentions and purposes behind the claims to relevance.

What does all this Mean?

86. Malice is presumed in the case of a defamatory statement. The standard form of pleading is that the defendant "falsely and maliciously published of and concerning the plaintiff". There is no need for the plaintiff to prove express malice on the part of the defendant and it is questionable whether any such evidence would actually be admissible except as follows from below. If the defendant establishes that the occasion is one of qualified privilege or *Reynolds* privilege, that is a defence and the onus shifts to the plaintiff to establish malice. If the plaintiff does that, the defence evaporates. Malice in those circumstances consists of having an improper motive for publishing the defamatory material. One obvious improper motive or circumstance is where the defendant does not have a belief in the truth of the material or is reckless as to whether it is true or false or actually knows that it is untrue. But it is also an improper motive if the person abuses the privilege that would otherwise be available by reason of the occasion to pursue some personal vendetta or hostility and that applies even if the publisher firmly believes that the material is true.

87. Malice is also relevant to circumstances of aggravated or exemplary damages claims. Since aggravated damages require that the plaintiff establish that he or she suffered some particular extra discomfort or embarrassment or suffering by reason of the publication and the circumstances, the onus is on the plaintiff to establish those particular features, and it seems to be accepted that knowledge by the plaintiff that the defendant was actuated by spite or ill-will and published the defamatory material in that spirit could be sufficient to increase the suffering produced by the defamation. Therefore, malice can be relevant to aggravated damages. In respect of exemplary damages, it is the conduct of the defendant that is in issue and this, as I understand, requires some extreme behaviour on the part of the defendant. It seems from what I have been quoting above, that in the case of defamation, a plaintiff would have to show that the defendant was not only actuated by improper motive, such as spite or ill-will, but actually knew that the defamation he or she was publishing was untrue and that he published it with the express intention of harming the plaintiff.

Summary/Conclusions

88. This is really a case of defamation although conspiracy is pleaded as is causing loss by unlawful means. The plaintiff can only seek discovery of the identity of the defendants' client or any other matter for the purpose of this action against these defendants. This is the rule in *Peruvian Guano* and is clearly established in our law and is buttressed by the necessary implications as recognised by the courts of an order of discovery. It is difficult to see how the plaintiff can succeed in an alternative form of relief in getting the same thing that he is looking for by way of discovery application, but under another heading of a quasi-*Norwich Pharmacal* jurisdiction. I think that the trial judge was correct in rejecting this claim having regard to the previous application under *Norwich Pharmacal* for the disclosure of the identity of the defendants' client, which I think was a legitimate application and the judge heard and considered it and then ruled against it. I do not think that the plaintiff has established the necessary basis, even as he has set out the passage from Lord Reid on which he relies.

89. For a variety of reasons, the issue of malice arises in defamation, first, in qualified privilege and, second, in regard to aggravated and exemplary damages. It is not necessary for the plaintiff to plead the facts on which he relies for a claim of exemplary damages, but that requirement exists in English jurisprudence because of the Civil Procedure Rules. It does not appear to be the case here, but a defendant or defendants could find themselves in real difficulties if it were not.

90. The fundamental point, however, is that Red Flag's client was entitled to have the dossier prepared, even if this was done for the basest of motives. That in itself is not sufficient to establish a conspiracy on the part of that client or to demonstrate that Red Flag was itself a co-conspirator with the client. If the Dossier was actually published by Red Flag and it has defamed the plaintiff, then Mr. O'Brien has his remedy under the Defamation Act 2009. But for all the reasons I have given, the plaintiff is not entitled to ascertain the identity of that client by means of seeking discovery from Red Flag.