

THE HIGH COURT

[2010 No.7923 P.]

BETWEEN

NORA WALL

PLAINTIFF

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT delivered by Mr. Justice Michael White on the 20th day of March, 2014

1. The plaintiff issued a motion on 11th May, 2012, originally returnable for 16th July, 2012, seeking an order of discovery against the defendants in the following terms

(i) All documentation recording the reason or reasons, as yet undisclosed that the Director of Public Prosecutions directed that PP was not to be called as a witness for the prosecution in the trial of the plaintiff.

(ii) All documentation recording assessment of RW's credibility and/or reliability both prior and subsequent to the direction of the Director of Public Prosecutions that PP was not to be called as a witness for the prosecution in the trial of the plaintiff.

(iii) All documentation recording the systems put in place so as to ensure compliance with the directions of the Director of Public Prosecutions with regard to disclosure and/or the calling of witness, (including but not limited to) all documentation recording the circulation of the director's direction not to call PP as a witness for the prosecution.

2. By separate notice of motion issued on 21st January, 2013, returnable for 11th February, 2013, the plaintiff sought discovery against the Director of Public Prosecutions of documentation in similar terms to that set out in the previous motion.

3. The motion erroneously cited the Director of Public Prosecutions as a notice party but the motion is a non-party discovery motion.

4. The plaintiff issued a plenary summons in July 2010, against the defendant seeking damages for miscarriage of justice, pursuant to s. 9 of the Criminal Procedure Act 1993.

5. A statement of claim was delivered on 7th October, 2010. Included in that statement of claim was the following,

"(o) The servants and agents of the State involved in and responsible for the Plaintiff's prosecution knew or ought to have known that the complainant and the allegedly corroborating witness had lied in statements made to An Garda Síochána and had connived in the making of a false statement of corroboration.

6. At para. 20 of the statement of claim, it stated.

"The plaintiff is entitled to aggravated and/or punitive compensation on the following grounds:-

(a) There was a fundamental failure to properly investigate the complainant's allegations against the plaintiff.

(b) There was a fundamental failure to abide by the disclosure obligations of the Director of Public Prosecutions and of the gardaí

(c) On the basis of the information available to the Director of Public Prosecutions when considering whether to prosecute the Plaintiff, there was reason to believe that the complainant had connived with the allegedly corroborating witness in procuring false or unreliable corroboration.

7. In the affidavit of Seán Costello, Solicitor, of 21st January, 2013, grounding the motion for non-party discovery, he averred at para. 12 as follows:-

"I say and believe and am advised that the defendants, their servants and agents including the notice party, knew or ought to have known that the complainant and the allegedly corroborating witness had lied in statements made to An Garda Síochána and had connived in the making of a false statement of corroboration and the giving of false testimony against the plaintiff at trial."

8. Prior to the issue of the relevant motions, the solicitors for the plaintiff wrote to the Chief State Solicitor on 20th December, 2011, seeking voluntary discovery and setting out the reasons therefore.

9. On 7th November, 2012, the solicitors for the plaintiff wrote to the Chief Prosecution Solicitor's Office seeking voluntary discovery for the reasons set out in that letter.

10. The history of the criminal proceedings are summarised in the judgment of the Court of Criminal Appeal of 16th December, 2005, when the plaintiff applied for and was granted a certificate pursuant to s. 9 of the Criminal Procedure Act 1993.

11. In the course of submissions before this Court on the relevant motions, the parties were at variance on the grounds upon which the certificate was granted.

12. The Court of Criminal Appeal in its judgment at p. 6 stated:-

"Needless to remark, the fact that a corroborative witness is shown to be unreliable would not of itself amount to a miscarriage of justice. However the evidence went a great deal further in the present case to the point where it is now established that PP on 10th January 1997 made a statement to the Garda Síochána which was untrue and at the trial gave entirely fabricated evidence in circumstances which give rise to a compelling inference of collusion between her and the complainant resulting in the fabrication of evidence which in the judgment of this court would render it unsafe to leave any of the evidence of either girl to a jury."

13. The parameters of the certificate granted by the Court of Criminal Appeal are a matter for the trial judge, as is also the jurisdiction or discretion to award aggravated or punitive compensation pursuant to a certificate issued in accordance with s. 9 of the Criminal Procedure Act 1993.

14. It will also be a matter for the trial judge if the certificate includes a finding that RW and PP connived with each other to give false testimony, when RW is not a party to the proceedings and never made such an admission as distinct from PP.

Relevant Law on Discovery Applicable to these Proceedings.

15. Order 31, rule 12 of the Rules of the Superior Courts (No. 2) (Discovery) 1999, amended the original order of O. 31, r. 12. The amended rules at (1) (2) and (3) states:-

"(1) Any party may apply to the Court by way of notice of motion 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 or her possession or power, relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall:

(a) Verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs;

(b) Furnish the reasons why each category of documents is required to be discovered.

(2) On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance with the provisions of sub rule 4(1), or make such order on terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes or documents as may be thought fit.

(3) An order shall not be made under this rule if and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

16. In the judgment of the Supreme Court in *Ryanair Plc v. Aer Rianta c.p.t.* [2003] 4 I.R. 264. Fennelly J. in his judgment in respect of the amended rules stated at p. 275:-

"It is impossible to resist the conclusion, however, that the amendment to the rule has shifted the primary burden of proof. The applicant must, under the present rule, discharge the *prima facie* burden of proving that the discovery sought 'is necessary for disposing fairly of the cause or matter'. This is not a mere formalistic requirement: the affidavit must, in addition, 'furnish the reasons why each category of documents is required'. In context, there is no meaningful distinction between the words, 'necessary' and 'required.' The latter term is implicitly referable to the objective of the fair disposal of the cause or matter. The nature of this burden is considered further below.

Apart from this alteration of the *prima facie* burden of proof, it is clear that the amended rule made no serious or fundamental change in the law regarding discovery of documents. The definition by Brett L.J. in *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882) 11 Q.B.D. 55 at p. 63, remains the universally accepted test of what is the primary requirement for discovery, namely the relevance of the documents sought. "

17. Fennelly J. went on to state at p. 276:-

"In the great majority of cases, discovery disputes have revolved around the issue of relevancy. There are fewer cases concerning necessity. There are good reasons for this. If there are relevant documents in the possession of one party, it will normally be unfair if they are not available to the opposing party. Finlay C.J., in his judgment in *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd.* [1990] 1 I.R. 469 emphasised, at p. 477, 'the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice'. The overriding interest in the proper conduct of the administration of justice will be the guiding consideration, when evaluating the necessity for discovery.

The issue of 'necessity' for discovery has, consequently, usually been debated in cases where some other interest is involved, particularly the confidentiality of documents, especially where they involve the interests of third parties. To that extent, the arguments advanced on behalf of the defendant on this appeal, effectively that the plaintiff does not need the documents, because they have alternative means of establishing the relevant facts, has rarely arisen."

18. Order 31 Rule 29 makes provision for non party discovery and states:-

"29. Any person not a party to the cause or matter before the Court who appears to the Court to be likely to have or to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is or is likely to be in a position to give evidence relevant to any such issue may by leave of the Court upon the application of any party to the said cause or matter be directed by order of the Court to answer such interrogatories or to make discovery of such documents or to permit inspection of such documents. The provisions of this Order shall apply mutatis mutandis as if the said order of the Court had been directed to a party to the said cause or matter provided always that the party seeking such order shall indemnify such person in respect of all costs thereby reasonably incurred by such person and such costs borne by the said party shall be deemed to be costs of that party for the purposes of Order 99."

19. The jurisdiction conferred by rule 29 has been construed narrowly and the courts have generally been exacting in requiring a party seeking non-party discovery to demonstrate that such discovery is necessary and will not cause oppression or undue prejudice to the non-party. [*Delaney: Civil Procedure in the Superior Courts* Third Edition para 10.85]

20. The court shares the concerns of the non-party, that serious allegations have been made against the Office of the Director when it is not a party to the proceedings or a notice party, and also that serious allegations have been made against RW when she is not a party to the proceedings or a notice party.

21. To make the case set out in the statement of claim, against the defendants the documentation sought is relevant and is necessary for disposing fairly of the litigation, but may not be within their power and procurement. In its present form, the order sought against the defendants is deficient, but the court will make an order in an amended form, as submitted by the defendants and also taking into account the findings of the court on non party discovery.

22. It would not be appropriate to make the order for discovery in the non-party motion as it issued in a form which erroneously cites the non-party as a notice party and where the contents of which are not suitable for non-party discovery, as serious allegations of wrongdoing are alleged against the non party.

23. The court can indicate if the Director of Public Prosecutions was a defendant or notice party; the categories of discovery sought with some amendments are relevant and necessary to the plaintiff in her conduct of these proceedings.

24. The court will make the following order of discovery in favour of the plaintiff against the defendants, subject to any further submissions on the terms of the order.

(a) An order directing the defendants to make discovery of all documentation in their power or procurement or of their servants or agents recording the reason or reasons as yet undisclosed directing that PP was not to be called as a witness for the prosecution on the trial of the plaintiff.

(b) All documentation in their power or procurement or their servants or agents dealing with any assessment of the credibility and/or reliability of RW, both prior and subsequent to the direction of the Director of Public Prosecutions that PP was not to be called as a witness for the prosecution on the trial of the plaintiff. The relevant cut off date in respect of the documentation is 31st of July 1999.

(c) All documentation in their power or procurement or their servants and agents recording the systems in place at the time of the trial to ensure compliance with the directions of the Director of Public Prosecutions with regard to disclosure and/or the calling of witnesses, including but not limited to all documentation recording the circulation of the director's direction not to call PP as a witness for the prosecution. The relevant dates are from 1st April, 1997 to 31st July, 1999.

25. For the purposes of this application, the court does not regard the Director of Public Prosecutions as a servant or agent of the defendants.

26. The court refuses the reliefs sought in the motion for non-party discovery.