[2019] IEHC 854

THE HIGH COURT

[2019 No. 6893 P.]

BETWEEN

KEITH BLYTHE

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys given on the 18th day of September, 2019

1. Before the court is an application for an order seeking disclosure from the Garda Commissioner of information that identifies, or may assist in identifying, persons who have participated in the dissemination of allegedly defamatory material regarding the plaintiff.

2. The detail of the alleged defamation is of limited relevance for present purposes, and indeed there may be a general question as to whether it is just and fair for a plaintiff to have to publicly circulate and draw attention to details of a defamatory allegation in order to seek redress for that defamation. On the face of it, while open justice is of course crucial, it is not without its limits and the unrestricted reporting of all details of the alleged defamation in every case may raise an issue in particular circumstances as to the right to an effective remedy, without which all other rights are meaningless. The Supreme Court in *Sunday Newspapers Limited v. Gilchrist* [2017] IESC 18 [2017] 2 I.R. 284 left open room for orders under the court's general jurisdiction, going beyond the statutory jurisdiction, to restrict reporting if there was a clear and pressing basis for doing so. That is simply a general comment I make in the context of this particular case, where the actual content of the allegations is not of central relevance to the matter that I have to determine.

3. Very sensibly, the parties agreed that the trial of the motion for disclosure would be treated as the trial of the action because there was really nothing further left in the case beyond the reliefs sought in the motion, and I have now received very helpful submissions from Mr. Paul O'Higgins S.C. (with Mr. Conor O'Higgins B.L.) for the plaintiff and from Mr. Conor Power S.C. (with Mr. James Geoghegan B.L.) for the defendant.

4. The hearing began with a minor procedural skirmish in the sense that on 18th September, 2019 the plaintiff delivered two late affidavits. Mr. Power objected to those being admitted, but in fairness the objection was of a rather faint character and he couldn't point to any particular factual averment that he would have disputed had he had the affidavits earlier, so on that basis I allowed the affidavits, although on any view they don't appear to be really central to the key questions on this application.

The Court's jurisdiction

5. Strong reliance is placed by Mr. Power on the Supreme Court decision in *Megaleasing v. Barrett (No. 2)* [1993] 1 I.L.R.M. 497, but to some extent that decision has been over-interpreted by the defendant. The judgments delivered in the Supreme Court are very

fact-specific as appears from the judgment of Finlay C.J. at p. 504 which *inter alia* refers *"the breadth and scope of the inquiries which the plaintiffs seek*". Thus he was not satisfied that making an order for disclosure would be appropriate in terms of whether "*to apply [the jurisdiction to order disclosure] to the facts of this particular case".* McCarthy and O'Flaherty JJ. make other fact-specific points in their separate judgments.

6. The jurisdiction of the court to make an order for disclosure or discovery, whether against a party or a non-party, derives from two related but congruent and mutually consistent sources. Firstly, it is inherent in the judicial power that, at least as a general proposition, the court can require interested parties to assist the doing of justice; and secondly, the constitutional right of access to the courts and the related EU and ECHR right to an effective remedy, which is also perhaps a better way to phrase the unenumerated constitutional right, implies that the court must have the jurisdiction to make such orders as are necessary to vindicate the right to effective access to the court and to an effective remedy at the end of the day. In cases such as the present one, where a plaintiff is unable to sue because a holder of information about the proposed defendants in the defamation action is not prepared to part with that information, to refuse the order would deprive the plaintiff of that right to an effective remedy. Both of those factors, while mutually consistent, are relevant, and the fact that the scope of the judicial power is engaged by discovery and disclosure orders takes the matter beyond one of being a purely human rights issue.

7. Costello J., as he then was, in his judgment in *Megaleasing* (with which the Supreme Court differed) relied on English caselaw as it stood at the time, but that law has been undergoing continuous evolution and has been extended further, particularly by the judgment of the UK Supreme Court in *Rugby Football Union v. Consolidate Information Services Limited* [2012] 1 W.L.R. 3333. That evolution was noted by MacEochaidh J. in *O'Brien v. Red Flag* [2015] IEHC 867 (Unreported, High Court, 21st December, 2015).

8. The conclusion that inevitably follows both from the inherent nature of the scope of the judicial power and from the right of access to the court and to an effective remedy, whether taken separately or in conjunction, is that in principle and in general there is jurisdiction to direct discovery or disclosure that is in aid of, and will facilitate the institution of, an anticipated action by a third party against someone else: see also para. 14 of MacEochaidh in *O'Brien v. Red Flag*. Nonetheless the court would need to be satisfied of the appropriateness of such an order on the particular facts of the given case. In his judgment in *O'Brien v. Red Flag* [2017] IECA 258 (Unreported, Court of Appeal, 13th October, 2017), Ryan P. made the point that just because the jurisdiction exists doesn't mean it is appropriate to exercise it in any particular case.

9. In the context of *O'Brien,* it should be noted at the outset that the judgments in that case have to be read in the context that there was no evidence in any meaningful sense in favour of the plaintiff in those proceedings and consequently the judgments should not be over-interpreted as somehow setting an unnecessarily high bar to be crossed where an order of this nature is sought.

10. There may well be limits to orders against persons who are not parties to the alleged wrong the subject of the proceedings, including in particular in relation to a "*mere witness*", although the defendant here can't be regarded as a mere witness.

11. The court's jurisdiction to direct disclosure of discovery cannot be viewed as limited to requiring disclosure of just the identity of the wrongdoer. Having regard to the general considerations of the imperative of doing justice and the right of access to the court and to an effective remedy, it would be arbitrary to impose such a limitation as a matter of absolute principle. Nonetheless the distinction needs to be drawn between information needed to launch the action and information needed to prosecute or advance the action. All the plaintiff needs at the pre-action stage is the information necessary to launch the action. If there is a case for access to further documents which are in the possession of the Garda Commissioner but not in the possession of defendants against whom the plaintiff intends to proceed substantively, that can be dealt with by way of third-party discovery at a later stage. Admittedly, there is a certain duplication involved in that process, but that appears to be the current state of the law.

12. Anyway, the plaintiff in this case doesn't seek anything more than material related to the wrongdoers of the minimum nature to enable him to bring proceedings. He wants their names and addresses and details of the portions of the defamatory material in relation to which each of them was concerned in publishing. That is information that has to be pleaded if the plaintiff is to be in a position to institute his proceedings. It is limited to material he needs to institute the proceedings and is a workable order. It does leave a certain threshold to be overcome in the sense that a third party such as the Garda Commissioner doesn't have to disclose these details where there is nothing more than mere suspicion of wrongdoing, and I will now turn to the question of whether there is a requirement for clear and unambiguous evidence.

Alleged requirement for clear and unambiguous evidence of wrongdoing

13. The defendant objects that there is no clear and unambiguous evidence of wrongdoing and in particular denies that the allegations are defamatory. Starting with the latter complaint, it may be that an entirely reasonable, humane and liberal person should not think less of a plaintiff such as this one because of at least some of the allegations, but that is not the test. On the material before the court, the plaintiff has a strong prospect of coming within the point made by Walsh J. in *Quigley v. Creation Limited* [1971] I.R. 269, that even lawful conduct or being in a lawful situation or even being the victim of crime may be capable of being defamatory, particularly if it has the effect of "*creating an undesirable interest*" in the plaintiff.

14. A similar approach was taken in *Reynolds v. Malocco* [1998] IEHC 175 [1999] 2 I.R. 203 by Kelly J., as he then was. It is also open to the jury to consider any implied or inferred meaning: see in particular *Leech v. Independent Newspapers Ireland Limited* [2014] IESC 78 [2015] 2 I.R. 178 *per* McKechnie J. at para. 25. Innuendo was a factor in *Reynolds v. Malocco*, and as stressed by Mr. O'Higgins, a false suggestion that a person is conducting a secret life, even if not unlawful, is capable of being defamatory. The point made by Kelly J., as he then was, at p. 217 applies. It is incorrect to say that "*merely because an*

activity is no longer prohibited by the criminal law an allegation of engaging in such activity cannot be defamatory". That principle must also apply to other activity whether it was ever prohibited by the criminal law or not; mere legality does not prevent an allegation from being defamatory.

15. The affidavit put in by the defendant makes the suggestion that the material can't be said to identify the plaintiff. While that is a matter for the jury, on the material before the court, the plaintiff has made out a strong case as to why he would be identified.

16. As regards the alleged requirement for the evidence of wrongdoing to be clear and unambiguous, that is ultimately an arbitrary test and to some extent a Catch-22. The purpose of the order sought is to enable the plaintiff to have access to the court and the paramount consideration is the doing of justice, not the meeting of some arbitrary standard. It is true that MacEochaidh in *O'Brien* referred to establishing wrongdoing "*to a high degree of certainty*", but judgments are not statutes and must be read in context above all else, and the context of that case was an utter lack of evidence of behalf of the plaintiff. One cannot therefore read too much into that comment, which was no doubt influenced by the particular facts before the learned judge and the fundamental evidential deficit in that case. Certainty, or a high degree of certainty, is not required. What is required, in the words of Kelly J., as he then was, in *EMI Records Ireland Limited v. Eircom Limited* [2005] IEHC 233 [2005] 4 I.R. 148, is "prima facie *demonstration of wrongful activity"*. Ryan P. pointed out at para. 41(x) of *O'Brien* [2017] IECA 258 that the plaintiff should show, in the case that the requested party is mixed up in the wrongful conduct to a significant degree, while itself being innocent, that he or she has made out a strong case.

17. Insofar as the present case is concerned, a strong case has been shown that persons unknown have defamed the plaintiff. In the context of that strong case, where a third party such as the defendant here has relevant information that could identify those persons, being necessary information to enable the proposed defamation proceedings to be instituted, that is sufficient to warrant the making of an order for disclosure, subject to the other points made in this judgment.

Objection that only names and addresses can be sought

18. The objection that only names and address or identifying information can properly be sought under the *Norwich Pharmacal v. Customs and Excise Commissioners* [1974] AC 133 jurisdiction has in substance been dealt with by the proposed limitation on the phrasing of the order that I have referred to above.

Alleged countervailing consideration

19. The complaint is made on behalf of the defendant that "*the court should not interfere with lawful and proper policing practice and the application of lawful policing policy by the defendant*". Mr. Power's submission claims that to provide further information about an internal disciplinary investigation "*would prejudice the individual concerned and the operations of An Garda Síochána*". That is an unconvincing objection. If a member of An Garda Síochána commits an act which is both a civil wrong and a breach of discipline, he

or she is liable to be proceeded against in both ways. Such a person is not prejudiced in the legal sense in the disciplinary proceedings merely by being sued civilly. This objection has all the appearance of a puff of smoke dreamed up by lawyers on behalf of the defendant. Mr. Power also submits that "*the plaintiff has established no risk of harm to him, irreparable or otherwise, if this general order is refused*". But if the limitation period is going to expire imminently and the plaintiff is not given the necessary information to institute proceedings within that period, it is nonsensical to suggest that he is not prejudiced.

20. Mr. Power's written submissions claim at para. 43 that the prejudice to the Garda Commissioner will be irreparable because the identity of the Garda concerned will be disclosed and that such a genie cannot be put back in the bottle. That point is a *jus tertii* but even disregarding that, it is not a significant reason for refusing to make the order. As noted above, the mere disclosure of that individual's identity does not prejudice that person in a legal sense in the disciplinary inquiry.

21. Considering all relevant factors, both ones that are availing and countervailing from the plaintiff's point of view, there are strong availing considerations for making the order and only very weak countervailing ones.

Alleged failure to set out what steps the plaintiff has taken to obtain information otherwise than by way of the order sought

22. A party is not under an obligation to take all conceivable steps above and beyond the option of seeking disclosure from a respondent to an application, or indeed to set out all steps taken in endless detail. It is clear on the particular facts that the information in the possession of the defendant has the potential to materially assist the plaintiff's right of access to the court. It may be relevant in this context that the plaintiff spent quite some time writing letters to the defendant without much in the way of substantive reply.

23. It is also necessary to point out under this heading that no clear, simple and effective step has been identified on behalf of the defendant that could have been taken by the plaintiff to obviate the need for the motion. It is insufficient to simply dream up possible wild-goose chases that the plaintiff could have gone on, or other steps that perhaps might have yielded results, or perhaps might not have, and could perhaps have taken a very considerable time. Mr. O'Higgins is entirely correct to describe pursuing Facebook and so forth as being "*immensely complex*". By way of analogy, it took years in *Tansey v. Gill* [2012] IEHC 42 [2012] 1 I.R. 380 to track down all the potential defendants *via Norwich Pharmacal* orders. Mr. Power also seems to be making some point that the plaintiff didn't take all steps to find out who looked at his LinkedIn page. But so what? Even if he had done, it wouldn't have got him anywhere because looking at LinkedIn is not evidence of publishing defamatory material.

Objection that the platforms in question were not operated by the defendant

24. Mr. Power complains that "*the defendant was not in any way responsible for the messages".* That is not a valid objection. The court's jurisdiction is not limited to orders against persons who are responsible for the defamatory publication. The defendant was involved beyond the mere bystander role. He was the principal of the potential

defendants, even if not perhaps strictly speaking in law their employer. He was also the investigator of the publication for disciplinary purposes and has responsibility for discipline in relation to members of An Garda Síochána who commit acts that amount to a breach of discipline, which certainly has a significant evidential overlap with the behaviour complained of here.

25. The court's jurisdiction doesn't depend on a condition that the extent to which the respondent in the motion has got mixed up in the matter complained of being such as *"to facilitate their wrongdoing*", *per* Lord Reid in *Norwich Pharmacal* at para. 12. That is certainly included but it is not definitional of the court's jurisdiction. Logically, neither the judicial power nor the right to an effective remedy can be subject to such an arbitrary limitation.

Alleged speculative nature of the plaintiff's proposed action

26. Mr. Power complains that the plaintiff's proposed claim is "*entirely speculative*" and falls foul of the rule against "*fishing*" for a case. Discovery and disclosure applications are generally met, with all the tedious predictability of the utterly routine, by the cry that they are fishing expeditions. Sometimes that is justified, but the complaint is so much of a cliché that in certain circumstances it carries little, or here no, weight. This is not a fishing expedition, still less a "*textbook*" example of one, as alleged in Mr. Power's submission. The disclosure sought is strictly limited to the absolute minimum information required to enable the plaintiff to have access to the court.

Order

27. I might finally be forgiven for venturing the comment that unfortunately it is not clear to me why the defendant has opposed this application so vigorously or indeed at all. No real interests of An Garda Síochána are at stake, or at most only limited interests. The Commissioner could simply have agreed to disclosure of such minimal information as might be required for the plaintiff to have launched the action and indeed might have had a case for his costs if he had done so. It is very much in the interests of An Garda Síochána that there be accountability for wrongdoing of the type alleged by the plaintiff, and to that extent there should be a confluence of interests between the court's role of doing justice, the plaintiff's rights under the Constitution and the ECHR to an effective remedy, and the defendant's interest in the accountability of his members to the courts even on the civil side.

28. It appears to be strange situation that the defendant is trying to prevent the making of an order that would allow the court's civil jurisdiction to be invoked. While not questioning the defendant's strictly legal right to launch such an objection, it doesn't necessarily seem the most well-judged position to have adopted. In relation to the asserted confidentiality of this information, s. 62(4) of An Garda Síochána Act 2005 makes clear that disclosure of such information is lawful if it is either made to the court or authorised by the Garda Commissioner, so confidentiality in and of itself is not an absolute answer to the claim made.

29. Mr. Power, in the course of his excellent and helpful written and oral submissions, set out every possible matter that could have been advanced on behalf of the Commissioner, but nonetheless I was left with a certain doubt as to why the case particularly matters to his client. The defendant relied on legalistic points, such as whether the appropriate test was met and whether the Garda processes are confidential, but surely a better approach would have been to come to court asking: "how can we help the court do justice?". Eventually, Mr. Power came out with the suggestion that the bar for such applications had to be high in order to deter people from making these kind of applications without due cause, which at the level of abstract principle is a fair point, albeit an objection primarily related to administrative convenience. But the facts of the present case are relatively unusual and I don't think it is very likely that this application will open a huge floodgate, but even if it does, it is not clear that that would create any huge injustice overall.

30. In that regard, Mr. O'Higgins' written submission asked the compelling question at para. 36: *"it is not understood what marks these proceedings out from other potential proceedings in which similar information might be sought. Is it contended that the Gardaí would not disclose the identity of someone who had committed a serious assault on a member of the public prior to the expiry of a time limit to sue that person for damages; that it would refuse to disclose to a rape victim the identity of his or her assailant; that it would not disclose to a member of the public whose house had been burgled or whose car had been stolen or whose business had been defrauded the identity of the suspected wrongdoer?*". One only has to ask that question to recognise the appropriate answer; and in this case the answer will come in the form of an order requiring the defendant to disclose to the plaintiff the names and addresses of persons where the defendant considers that there was *prima facie* evidence that they were involved in publications of allegations against the plaintiff of the general nature described in the affidavit of the plaintiff of 3rd September, 2019 and in each case specifying the portions of the particular defamatory material in relation to which any such person was concerned in publishing. That information is to be provided by letter rather than affidavit, subject to hearing counsel. There is a certain urgency here in the sense that the limitation period for issuing the proceedings is about to expire, so I will have to hear the parties as to the deadline for compliance.

Postscript in relation to time for compliance

31. Having heard counsel further, the logic of the foregoing judgment is that, leaving aside the question of a stay, the information would have to be provided before the expiry of the limitation period. I cannot pre-judge any application to extend that period or assume that it would be extended, and on that logic, the information should be provided by 1pm on 19th September, 2019. That is on the basis that Mr. O'Higgins indicates that 20th September, 2018 was the earliest possible date for publication.

32. Mr. Power has now applied for a stay. In that regard there is no perfect order that I can make, and, if it is any consolation to the defendant, a situation such as this is not a totally comfortable one from the court's point of view. My inclination in this type of situation would normally be to grant some form of stay, but there is a strong countervailing

consideration here in the sense of the imminent expiry of the limitation period, and I can't assume either that it would be extended, or even more speculatively that any appeal or further appeal from my decision would be prosecuted to a final conclusion within such extended period.

33. The judgment of Clarke J. (as he then was) in *Okunade v. Minister for Justice and Others* [2012] IESC 49 [2012] 3 I.R. 15 directs the court to consider where the least risk of injustice lies in considering any stay. On the one hand, any potential appeal, if there is an appeal, could be said to be moot if the information is already disclosed. Having said that, mootness is not an absolute rule and there are many exceptions where appellate courts have considered appeals notwithstanding that the factual situation has removed the reality to the actual dispute. I indicated to the parties that I was willing to grant a declaration as well as a mandatory order, which would not be moot, but Mr. Power did not in the end ask me to do that, not having any instructions in that regard. Not taking up that offer does dilute the complaint of mootness, at least to some extent. That is from the defendant's side. On the other hand, the plaintiff, if there is a stay, loses the opportunity of instituting proceedings within the limitation period and therefore puts the substantive defamation case in jeopardy. Again, that is not an absolute problem because time can be extended, although even if it was extended he would then have to get the case through at least one, and possibly two, appellate levels within a fixed period of time.

34. We then go back to the question I raised earlier in the judgment as to the real interests of the parties, and in that regard Mr. Higgins has to be correct in saying that he has "*infinitely more to lose*". The plaintiff's interests here are compelling and clear whereas the defendant's interests, insofar as they could be said to have been identified, are generic, weak and marginal. Mr. O'Higgins also makes the point that the matter could have been brought to a head much earlier if the plaintiff's correspondence over an extended period time had been replied to substantively, but it wasn't. To that extent, the fact that we are now up against a deadline is now largely a matter of the defendant's making. Accordingly, the balance of justice is compellingly in favour of refusing a stay.

Postscript in relation to costs

35. Having heard the parties further as regards the costs of the proceedings, including the motion, those follow the event in favour of the plaintiff. As regards the costs of making the disclosure, the case for costs in making disclosure are stronger where the requested party doesn't object to the order, because there must be some incentive to parties to come to terms at an early stage. Also relevant is the defendant's delay in dealing with the matter, to which I have referred, and the limited nature of the order made, and consequently the relatively insignificant quantum of any costs of compliance which seems to be broadly accepted by Mr. Power. Therefore the appropriate order under that heading is no order as to the costs of making the disclosure.