

# THE HIGH COURT

[2021] IEHC 625

[2016 No. 8887P.]

**BETWEEN**

**WILLIAM J. P. EGAN**

**PLAINTIFF**

**AND**

**MICHAEL FENLON, BARRY SULLIVAN, GERARD BURNS, RAY DEVINE,  
SHANE O’CONNOR, JOHN FLANNERY, SEAMUS HERATY, PADRAIC BREEN,  
MARGARET NEILE, TOM O’DONNELL, SEAMUS O’BRIEN, PAT DONLON,  
PAUL DORAN, DAN CURLEY, PADDY FLYNN, JOE O’LOUGHLIN, DES  
FURLONG, JOHN DIVER, CARMEL MAGEE, PETER CRINNION, TOM O’SHEA,  
LEONARD RASMUSSEN AND JOE SYNNOTT**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Allen delivered on the 5<sup>th</sup> day of October, 2021**

## *Introduction*

1. This is an action for damages for defamation in which the defendants seek an order pursuant to O. 19, r. 7 of the Rules of the Superior Courts requiring the plaintiff to reply to a request for particulars dated 9<sup>th</sup> August, 2017, and an order pursuant to O. 31 directing the plaintiff to make discovery of three categories of documents said to be relevant and necessary for the fair disposal of the action and for saving costs.

*The action*

2. The plaintiff is a solicitor who for many years acted as the solicitor for an unincorporated association called the National Association of Regional Game Councils (“NARGC”). In 2015 the plaintiff decided that that he would cease to act for the NARGC and gave notice with effect from 17<sup>th</sup> October, 2015. A dispute as to the plaintiff’s entitlement, or at least the extent of his entitlement, to fees went to mediation and on 31<sup>st</sup> March, 2016 was settled upon terms reduced to writing which included a provision in respect of the plaintiff which read “6. *Cessation of any professional involvement with the NARGC.*” The core dispute between the parties is whether the plaintiff was bound by this clause not to act against the association.

3. Following the termination of his retainer with the NARGC, the plaintiff accepted instructions to act for a number of NARGC members against whom the association and four of its officers had brought High Court proceedings; and to act for a former employee of the association who had an employment dispute with the association.

4. By this action, commenced by plenary summons issued on 6<sup>th</sup> October, 2016, the plaintiff claims to have been defamed by a letter dated 21<sup>st</sup> July, 2016 to the Law Society by which the first defendant, the then chairman of the association, is said to have complained that the plaintiff had a clear conflict of interest; that it was unethical for him to have accepted instructions to act against the NARGC; and that the plaintiff was in breach of the terms of the settlement agreement.

5. The plaintiff further claims to have been defamed at a meeting of the governing body of the NARGC held on 6<sup>th</sup> August, 2016; at a meeting of the Executive Committee of the association held on 10<sup>th</sup> August, 2016; and at a further meeting of the governing body of the

association, at each of which the first defendant is said to have said that the plaintiff had breached the settlement agreement and that a complaint had been made to the Law Society.

6. The statements said to have been made to the governing body and the executive committee are said to have been spoken maliciously of and concerning the plaintiff in his professional capacity and to have meant and to have been understood to mean:-

- (a) That the plaintiff had breached a confidential settlement agreement and had thereby acted unethically;
- (b) That the plaintiff was in breach of his professional obligations as a solicitor and would be answerable or accountable for that breach to his professional body, the Law Society of Ireland;
- (c) That the plaintiff's actions had rendered him liable to sanction by the professional body of which he was a member;
- (d) That the failure of an application for an injunction by the NARGC in the proceedings in which the plaintiff had acted for the defendants was attributable to his unethical conduct;
- (e) That the plaintiff was not a man of his word; and
- (f) That the plaintiff was not to be trusted.

7. The plaintiff further claims to have been defamed in the annual report of the NARGC for 2016, which was circulated in late September, 2016. That report is said to have included a proposed resolution, resolution 6:-

*“That because of the agreement reached at mediation with William Egan of William Egan & Associates and his failure to honour that agreement, the following shall apply:*

- *No Associate Member, Regional Game Council, or any Sub Committee of the NARGC shall engage the legal services of William Egan & Associates Solicitors in any dealings with the NARGC.*
- *If they do they shall immediately be referred by the National Executive to the Disciplinary Committee and if the complaint is upheld those who are the subject of the complaint shall cease to be members of the NARGC and their membership of the Compensation Fund shall not be renewed.*
- *All NARGC indemnity shall be null and void from the date William Egan & Associates Solicitors were engaged.”*

**8.** Resolution 6 is said to have been published or caused to have been published by the first defendant to the executive committee with the intent that it would be included in the annual report and circulated to the NARGC’s constituent regional game councils and their members: which the plaintiff claims it was. The potential readership of the annual report is said to have been about 25,000 members of 950 gun clubs, which included the majority of the plaintiff’s clients or prospective clients for firearms licensing and other work.

**9.** Resolution 6 is said to have been published of and concerning the plaintiff’s firm and of and concerning the plaintiff in his professional capacity and to have meant and to have been understood to mean:-

- (a) That the plaintiff had failed to honour a mediation agreement;
- (b) That the plaintiff was dishonourable and devoid of professional integrity;
- (c) That the plaintiff was a person who flouted his professional obligations;
- (d) That the plaintiff was unscrupulous;
- (e) That anyone associated with the NARGC who ought (*sic.*) on no account engage the legal services of the plaintiff’s firm in any dealings with the NARGC;

- (f) That anyone associated with the NARGC who did retain the legal services of the plaintiff's firm in any dealings with the NARGC should be the subject of disciplinary sanction, and specifically would be excluded from membership and deprived of the benefits of the NARGC compensation fund;
- (g) That no right thinking and well informed person would retain the plaintiff or the plaintiff's firm to act on their behalf or provide other professional services;
- (h) That the plaintiff and his firm were not to be trusted;
- (i) That the plaintiff was actuated professionally by greed;
- (j) That it was inadvisable to retain the plaintiff or the plaintiff's firm;
- (k) That right thinking and well advised people ought to shun the plaintiff;
- (l) That the plaintiff was not fit to be a solicitor;
- (m) That the plaintiff was prepared to breach a solemn professional obligation;
- (n) That the plaintiff was not fit to be in practice as a solicitor;
- (o) That the plaintiff ought to be subject to disciplinary sanction;
- (p) That any reputation gained by the plaintiff in the past for the NARGC and associate members of the NARGC was a sham;
- (q) That any associate member of the NARGC who had in the past retained the plaintiff and his firm should not do so again;
- (r) That anyone who had in the past retained the plaintiff or his firm or who might do so in future was acting imprudently, was rewarding unethical conduct and did so at their own risk.

**10.** Resolution 6 is said to have been published with malice. Specifically, it is pleaded that the first defendant was actuated by actual malice against the plaintiff and specifically proposed to injure the plaintiff in his professional capacity and to injure the plaintiff's practice.

**11.** By reason of the matters aforesaid the plaintiff claims to have suffered grave injury to his professional standing and good name and to have suffered loss and damage.

**12.** The pleas at paras. 49, 50 and 51 of the statement of claim are of some significance for present purposes. They are:-

*“49. The plaintiff is unable to establish the full extent of the republication or the repetition of the defamatory allegations made against him. Given the scandalous nature of the allegations made against the plaintiff in his professional capacity, the defendants were or ought to have been aware that the content of the allegations would be repeated widely, and are liable for such repetition or republication.*

*50. It is a matter of continuing difficulty and anxiety for the plaintiff that he does not know the full extent of the persons to whom the defamatory allegations against him have been published, republished or repeated.*

*51. The plaintiff further asserts that the first named defendant, Michael Fenlon, has on diverse occasions not at present in the knowledge of the plaintiff, uttered or published words to the same effect as the words contained in resolution 6 of the annual report, namely that the plaintiff has breached a mediation agreement, or otherwise acted unethically, was of unethical character and was not a person of good standing, nor a person whom any right thinking person should, particularly a person associated with the NARGC, should retain as a solicitor. The plaintiff seeks to hold the defendants liable for such utterances.”*

**13.** The defence, which was delivered on 2<sup>nd</sup> August, 2017, is, as I have previously observed, robust. The defendants not only deny malice on their part but assert that the plaintiff has exhibited malice, has engaged in conduct aimed at undermining his previous client – the NARGC – and was responsible for a schism in the association. The defendants plead that the plaintiff, by acting professionally for the former employee of the NARGC and

for the defendants in the action brought by the NARGC, was in breach of the settlement agreement of 31<sup>st</sup> March, 2016.

**14.** The defence admits the correspondence with the Law Society and the three meetings of the governing body and executive committee. There is no express admission of the words spoken at the meetings, but the defendants plead qualified privilege, honest opinion, innocent publication, and fair and reasonable publication on a matter of public interest. It is denied that the words used at the meetings were defamatory of the plaintiff or that they bore the meanings alleged or any of them.

**15.** As to resolution 6, the defence pleads qualified privilege, denies that the words are defamatory, and asserts that to the extent that the words bore the meanings alleged by the plaintiff they are true. In support of their reliance on ss. 16 and 20 of the Defamation Act, 2009 (truth and honest opinion) the defendants assert that the plaintiff has breached the settlement agreement, has acted unethically, has breached his professional obligations, was by his unethical conduct responsible for the refusal of the EGM injunction, and was not a man of his word. For good measure, the defendants plead that they “*have concerns*” that the plaintiff’s claim is “*generated*” by the plaintiff’s malice, spite or ill will towards Mr. Fenlon personally.

**16.** The defence calls (twice) for proof of the plaintiff’s good standing as a solicitor and his compliance with the statutory duties and obligations under the Solicitors Acts and for proof that the defendants have alleged such misconduct as would bring his reputation into opprobrium or ridicule or otherwise would diminish him in the eyes of right thinking persons.

**17.** The defence was followed promptly, on 9<sup>th</sup> August, 2017, by a 23 paragraph notice for particulars of the claim and a request for voluntary discovery by the plaintiff of three categories of documents.

**18.** Despite a reminder letter of 20<sup>th</sup> February, 2018, neither request was answered and the motions now before the court were issued on 15<sup>th</sup> February, 2019 with a return date on 25<sup>th</sup> February, 2019.

*The motion for particulars*

**19.** The motion for particulars was grounded on a short generic affidavit of the defendants' solicitor who deposed that "*the statement of claim contained a number of assertions that required a further and better statement of the nature of the plaintiff's claim*"; that "*replies to the said notice for particulars are required to clarify matters asserted by the plaintiff in his statement of claim and for the defendants to know what assertions and/or claims are being made by the plaintiff herein*"; and that "*without such replies being provided by the plaintiff there is a risk that the defendants will be taken by surprise at the hearing of the substantive action herein.*"

**20.** Following an adjournment first until 8<sup>th</sup> April, 2019 and from then until 13<sup>th</sup> May, 2019, the defendant delivered a form of replies to particulars dated 12<sup>th</sup> May, 2019 – the substance of which was that the particulars sought were not proper matters for particulars – and a replying affidavit sworn on the following day to the effect that none of the particulars sought were proper matters for particulars. The motion then became caught up in the vortex created by a letter which had been written by the plaintiff's solicitors on 10<sup>th</sup> May, 2019, from which it eventually emerged on 4<sup>th</sup> February, 2021. See *Egan v. Fenlon & Ors.* [2021] IEHC 75.

**21.** The motion for discovery bumped along more or less in tandem: the defendant eventually, on 10<sup>th</sup> May, 2019, making an offer of discovery of three modified categories of the discovery sought by the defendants' solicitors' letter of 9<sup>th</sup> August, 2017; at the same time

contending that the issues had been narrowed by the plaintiff's purported reformulation of his claim; and eventually contending that none of the documents sought by the defendants in their motion issued on 15<sup>th</sup> February, 2019 were relevant or necessary to the defence of the proceedings.

**22.** When, pushing four years after the notice for particulars had been sent and upwards of two years after the motion was issued, the motion for particulars came on for hearing, many of the questions were abandoned.

**23.** Many of the particulars were compound loaded questions premised on the proposition that the plaintiff was not entitled to act against the association, which on the hearing of the motion, Mr. Declan Doyle S.C. acknowledged did not seek particulars of the claim. Seven of the questions – which sought particulars of any complaints or claims or findings ever made against the plaintiff over the entire course of his career – were eventually said to be more properly the subject of the request for discovery and were not pressed. One of the questions sought to establish the provenance of the text message by which the plaintiff had come to know of resolution 6: which was plainly not a matter for particulars. And so on.

**24.** In the end, only four of the twenty three questions were pressed.

**25.** The defendants claim to be entitled to particulars of para. 19 of the statement of claim, viz., the actual malice against the plaintiff pleaded against the first defendant; para. 20, particulars of the alleged damage to the plaintiff's good name and professional standing; para. 21, the loss and damage allegedly sustained by the plaintiff, and para. 22, particulars of the "*diverse occasions*" on which the first defendant is alleged to have repeated or uttered words to the same effect as resolution 6.

**26.** Mr. Callanan S.C. observed, correctly, that the overlap of the particulars and discovery meant that many of the particulars had fallen away. He went on to suggest that Mr. Doyle had been unable really to stand over any of the particulars. As to para. 22, he

suggested that the plaintiff might at some unspecified time in future seek discovery against the defendants and some unidentified non-parties with a view to identifying the “*diverse occasions*” on which the words complained of might have been repeated.

27. In *Goss v. Ryanair* [2016] IECA 328 Peart J. recalled that:-

*“10. The classic test regarding [the] object of particulars remains that as articulated by Henchy J. in Cooney v. Browne [1984] I.R. 185, 191:*

*“Where particulars are sought for the purposes of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason: see Ord. 19, r. 6(3). Where the particulars are sought for the purpose of a hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing. ... Thus, where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial.”*

*11. It follows, therefore, that particulars will be ordered in the interests of fair procedures and to ensure that a litigant will not be surprised by the nature of the case which he has to meet. The case-law shows that this is essentially the governing principle in all cases where the issue of whether the particulars should be ordered has been considered.*

*12. In Mahon v. Celbridge Spinning Co. Ltd. [1967] I.R. 1 Fitzgerald J. stated that the object of pleadings (of which particulars form part) was to ensure that a party ‘should know in advance, in broad outline, the case he will have to meet at the trial.’ This basic principle – namely, that particulars must convey ‘in broad outline’ the*

*nature of the case which the litigant must meet at trial – as distinct from the nature of the evidence which the other party may lead in support of that case – has also been consistently endorsed in the subsequent case-law. It must be admitted, however, that this principle is sometimes easier to state than it is to apply.”*

**28.** The particulars sought in this case are for the purpose of the hearing.

**29.** In the form of replies to particulars delivered on 12<sup>th</sup> May, 2019, the answer to para. 19 was that the first defendant had made a malicious and false complaint for which there was no basis and that the plaintiff would rely on the records relating to the first defendant’s unsuccessful complaint and appeal. In my view, this is sufficient. The plaintiff does not assert that there was any particular animus against him or, for example, that the first defendant was pursuing a vendetta against him. Rather the case made is that the alleged malice is evident from the alleged absence of merit in the complaint itself.

**30.** In the replies to particulars of 12<sup>th</sup> May, 2019 the answer to para. 20 was that the plaintiff would call witnesses at the trial who would give evidence that their perception of the plaintiff had been diminished and that the plaintiff had later been ostracised from certain recreational events. The answer to para. 21 was that the plaintiff was not seeking damages.

**31.** The position previously taken on the defendants’ request for particulars of loss and damage has been superseded by the judgment given on 4<sup>th</sup> February, 2021 that the plaintiff is not entitled to prosecute the action otherwise than as an action for damages, and the plaintiff’s later confirmation of his intention to do so. The substance of the case pleaded is that the publications complained of, in particular the circulation of resolution 6, were calculated to damage the plaintiff’s practice, specifically the business he had in the past and expected in the future from members of the NARGC in respect of firearms licensing and otherwise. What is not clear from the statement of claim is whether the plaintiff makes the case that he did in fact suffer a loss of business, or, if he did, the nature of the business he

claims to have lost or to what extent. The plaintiff has pleaded that he has suffered loss and damage but has not given any particulars of special damage. It seems to me that if the defendants might have kept their powder dry and objected at the trial to any claim for special damage they are equally entitled to insist upon knowing in advance the case they must meet at trial. If the answer to the question is that the plaintiff is not claiming that his business was damaged, they are entitled to know that. It seems to me that the defendants' request for particulars of the alleged grave injury to the plaintiff's standing and reputation is tied in to the nature of the loss and damage claimed. Absent a claim for loss of business the reply already given might very well have been sufficient, but the particulars sought at para. 20 will set out the basis for any claim for lost income.

**32.** As to para. 22, I have to say that it struck me rather as an invitation to the plaintiff – extended within the year following the events complained of – to add causes of action to which, if any such were now to be added, the defendants would likely object that they are statute barred. However, the basic principle is that the defendants are entitled to know in broad outline the case which they have to meet, and they cannot prepare to meet an action for defamation without knowing when and probably where it is said that the first defendant is alleged to have said what he is alleged to have said.

*The motion for discovery*

**33.** By their motion for discovery the defendants seek discovery by the plaintiff of three categories of documents, namely:-

*“1. All documentation in the power, possession or procurement of the plaintiff of any investigation of any professional body, and the results of such investigation, into the plaintiff's practice as a solicitor both personally and/or practising under the*

*style and title of William Egan & Associates and/or practising under the style and title of Egan Cosgrave & Associates and/or trading as Egan Cosgrave and Muldowney Solicitors.*

*2. All documentation in the power, possession or procurement of the plaintiff in respect of any complaint made or proceedings threatened or proceedings instituted against him in respect of any allegation regarding his practice as a solicitor. For the avoidance of doubt this includes all and any complaints to his professional body, and all or any warning letters in respect of litigation against him, and all or any litigation and includes all notifications by the plaintiff to his insurers in respect of any such complaints or threatened claims and/or claims together with all pleadings and proceedings in respect thereof. This includes any claim against him as a solicitor practising under the style of William Egan & Associates and/or practising under the style of Egan Cosgrave & Associates and/or trading as Egan Cosgrave and Muldowney Solicitors.*

*3. All documentation in the power, possession or procurement of the plaintiff in respect of all or any complaints made by an (sic.) third party regarding the plaintiff in his capacity as a solicitor either as William J P Egan and/or as William Egan and/or as William Egan & Associates and/or practising under the style of Egan Cosgrave & Associates and/or trading as Egan Cosgrave and Muldowney Solicitors, whether such complaints were substantiated or not by the professional body of which he is a member namely the Law Society of Ireland together with the details of such complaint.”*

**34.** The motion for discovery was grounded on a short fairly generic affidavit of the defendants’ solicitor who set out the text of his letter seeking voluntary discovery and averred that discovery would narrow the issues, save court time and cost, ensure a speedier resolution

of the plaintiff's claim and a level playing field. The defendants' declared objective was to obtain "*all relevant and pertinent information and material central and kernel to the matters in suit.*" The defendants, it was said, would be placed at an evidential disadvantage if not facilitated with access to the documents sought and would be prejudiced in the defence of the claim not least because the documentation is necessary to address the veracity of the plaintiff's claim in its entirety.

**35.** The letter seeking voluntary discovery offered an omnibus reason for the three categories of documents, which were said to be intertwined. In a nutshell, the defendants' case is that the discovery is necessary in order to determine precisely what the good name and reputation of the plaintiff was and is. The plaintiff, it is said, ought to be able to provide copies of the documents, to which the defendants, it is said, do not have access and the alternative to discovery by the plaintiff would be costly and "*timely*" third party discovery.

**36.** The request for voluntary discovery was ignored until, after the motion was issued and served and twice adjourned, the plaintiff's solicitors made an offer of voluntary by letter dated 10<sup>th</sup> May, 2019. By that letter the plaintiff offered to make discovery of his practising certificates for the years 2016 to 2019 and a certificate of standing as provided for by the Solicitors Acts 1954 to 2008 (Sixth Schedule) Regulations, 2010 (S.I. No. 604). Such a certificate of standing (which is different to a certificate of good standing), as defined by the regulations, is a certificate in writing issued by the Law Society of Ireland which includes a confirmation that as at the date of the certificate a search of the Society's records in relation to discipline discloses no orders or findings of misconduct or reprimands to the discredit of the named solicitor except for one or more specified matters referred to in the certificate.

**37.** In addition, subject to client confidentiality, the plaintiff offered to make voluntary discovery of:-

- A. *...any/all orders made in respect of him, arising out of any investigation by any professional body into the plaintiff's practice as a solicitor, both personally and/or practising under the style of William Egan & Associates and/or practising under the style of Egan Cosgrave & Associates and/or practising under the style of Egan Cosgrave & Associates and/or trading as Egan Cosgrave & Muldowney Solicitors.*
- B. *... all orders/determinations made against him in respect of any/all allegations which touch upon the plaintiff personally in his practice as a solicitor including any/all claims made against the plaintiff as a solicitor, either in respect of undertakings and/or in his capacity as a solicitor practising under the style of William Egan & Associates and/or practising under the style of Egan Cosgrave & Associates and/or practising under the style of Egan Cosgrave & Associates and/or trading as Egan Cosgrave & Muldowney Solicitors.*
- C. *... any/all complaints made by any third party made against him in respect of any/all allegations which touch on the plaintiff personally in his practice as a solicitor, either in respect of undertakings and/or in his capacity as a solicitor practising under the style of William Egan & Associates and/or practising under the style of Egan Cosgrave & Associates and/or practising under the style of Egan Cosgrave & Associates and/or trading as Egan Cosgrave & Muldowney Solicitors.*

**38.** The plaintiff's offer of voluntary discovery was repeated in an affidavit sworn by his solicitor, Ms. Cassandra Egan-Langley, on his behalf on 13<sup>th</sup> May, 2019 and it was only after the conclusion of Mr. Callanan's submission that Ms. Miranda Egan-Langley pointed to what was said to have been a typographical error in para. C, which, it was said, should have been

confined to orders and determinations made on complaints. I believe that I can be confident that wherever responsibility lies for the inconsistency between para. C and paras. A and B, it is not with the typist. That said, if the defendants had understood the offer as an offer of all documents in relation to any and all complaints, rather than findings, it is difficult to see how that would not have been acceptable to them.

**39.** As to the defendants' request for discovery beyond such discovery as the plaintiff was prepared to make, the plaintiff's position is that it does not arise on the pleadings; that the documents are irrelevant; and that the request for discovery is an aggravation of the defamation. In her affidavit sworn on 13<sup>th</sup> May, 2019, the plaintiff's solicitor also sought to argue that since the claim for damages had been withdrawn, there could be no issue as to the level of damages that might be awarded.

**40.** Mr. Doyle pressed for an order for discovery in the terms sought. The plaintiff, he said, claimed damages for damage to his professional reputation and the documents sought were centrally relevant to that. In reply to a question by the court as to whether it was contemplated that the plaintiff might be put on trial before a High Court jury on complaints spanning a period of 35 years on which he had been exonerated by the Law Society, counsel referred to s. 31(6) of the Defamation Act, 2009 which allows a defendant in a defamation action, with the leave of the court, for the purpose of mitigating damages, to lead evidence of any matter that would have a bearing on the reputation of the plaintiff, provided it relates to matters connected with the defamatory statement.

**41.** Mr. Callanan resisted the motion on the basis that the documents sought were neither relevant nor necessary; that the categories could not be linked to any issue raised by the pleadings; that the order sought was oppressive in scope and was in the nature of a punishment; and that the introduction of such documents at trial would cause the trial to be interminable and would be confusing to the jury. There was, it was said, no issue taken on

the pleadings as to the plaintiff's reputation. The only plea, it was said, was that proof was awaited of his good reputation.

42. In *Word Perfect Translation Services Ltd. v. Minister for Public Expenditure and Reform* [2020] IESC 56 Clarke C.J. recalled that:-

*“The most recent general statement of the law of discovery can be found in the decision of this Court in *Tobin v. Minister for Defence* [2019] IESC 57. As pointed out in *Tobin*, the initial onus rests on a requesting party to satisfy the court as to the fact that documents sought are relevant to issues arising in the proceedings. If relevance is established, then the second requirement of necessity will also, on a prima facie basis, be shown to exist. However, it is open to the requested party to seek to persuade the court, whether by argument or by evidence, that there is some countervailing factor which should lead the court to decline disclosure.”*

43. In the same case the Chief Justice set out the summary of the relevant principles at para. 29 of the judgment of Ryan P. in *BAM PPP PGGM Infrastructure Cooperatie UA v. National Treasury Management Agency and Minister for Education and Skills* [2015] IECA 246:-

*“1. The primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.*

*2. Relevance is determined by reference to the pleadings. O. 31, r. 12 specifies discovery of documents relating to any matter in question in the case.*

*3. There is nothing in the Peruvian Guano test which is intended to qualify the principle that documents sought on discovery must be relevant, directly or indirectly, to the matter in issue between the parties on the proceedings.*

4. *An application for discovery must show it is reasonable for the court to suppose that the documents contain relevant information.*
5. *An applicant is not entitled to discovery based on speculation.*
6. *In certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse.*
7. *As Fennelly J. pointed out in Ryanair plc v. Aer Rianta cpt [2003] 4 I.R. 264, the crucial question is whether discovery is necessary for ‘disposing fairly of the cause or matter.’*
8. *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.*
9. *Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties.”*

**44.** The first question, then, is whether it has been established that the documents sought are likely to exist. In his letter of 10<sup>th</sup> May, 2019, in which he attempted to abandon his claim for damages, the plaintiff reminded the defendants that he and his former partner had had negative findings made against them “historically” in respect of “accounting issues” the determination of which was, it was said, the subject of publication at the time and of consideration at the annual general meeting of the NARGC which immediately followed the publication of the determination. That was a finding on an investigation which was upheld and would clearly be captured by the discovery which the plaintiff has agreed to make.

**45.** The documents remaining in issue are those in relation to complaints or claims upon which no finding or determination was made against the plaintiff. The request for voluntary

discovery supposes that the plaintiff ought to be in a position to provide copies of the documents sought without positively asserting that there are any such documents. The plaintiff does not contest the existence of such documents and, indeed, by counsel, seeks to argue that an order for discovery would be oppressive. But there is simply no evidence as to the extent of what may be involved. The sporadic exchanges in this long running case have been consistently bitter but not always obviously focussed. While I am bound to say that I am by no means convinced that the defendants have a clear idea of what they are looking for or that the plaintiff has given any real consideration of the burden of complying with the request, I am prepared to contemplate that it is likely that a solicitor who has been in practice for 35 years probably had some dissatisfied clients.

**46.** Having regard to the offer of discovery which has been made by the plaintiff I do not need to consider the relevance of complaints or claims which were decided against the plaintiff in relation to matters wholly unrelated to the allegations which are the subject of these proceedings, but the plaintiff's professional standing and reputation are plainly relevant at least to the issue of damages. What the motion boils down to is whether professional claims or complaints against the plaintiff which were not upheld go to his standing and reputation. In my view they do not. The question is not whether evidence of such claims or complaints might be admissible or confusing to a jury but whether the mere making of a complaint against a professional person goes to his or her reputation. If the defendants object is to rummage about in the undergrowth of the plaintiff's practice in the hope of identifying dissatisfied clients, and then from among such as might be identified to revive claims or complaints long ago resolved in the plaintiff's favour, that would be fishing.

**47.** I am satisfied to make an order for discovery in the terms offered by the plaintiff in his letter of 10<sup>th</sup> May, 2019 – corrected to limit category C to orders and determinations but not to go any further.

**48.** On the defendants' motion for particulars there will be an order requiring the plaintiff to reply to paras. 20, 21 and 22 of the defendants' solicitors' notice for particulars dated 9<sup>th</sup> August, 2017.

**49.** On the defendants' motion for discovery there will be an order directing the plaintiff to make discovery of:-

1. Any and all orders made in respect of the plaintiff, arising out of any investigation by any professional body into the plaintiff's practice as a solicitor, both personally and/or practising under the style of William Egan & Associates and/or practising under the style of Egan Cosgrave & Associates and/or practising under the style of Egan Cosgrave & Associates and/or trading as Egan Cosgrave & Muldowney Solicitors.
2. All orders and determinations made against the plaintiff in respect of any and all allegations which touch upon the plaintiff personally in his practice as a solicitor including any and all claims made against the plaintiff as a solicitor, either in respect of undertakings and/or in his capacity as a solicitor practising under the style of William Egan & Associates and/or practising under the style of Egan Cosgrave & Associates and/or practising under the style of Egan Cosgrave & Associates and/or trading as Egan Cosgrave & Muldowney Solicitors.
3. All orders and determinations made against the plaintiff made arising from any complaints made by any third party made against him in respect of any and all allegations which touch on the plaintiff personally in his practice as a solicitor, either in respect of undertakings and/or in his capacity as a solicitor practising under the style of William Egan & Associates and/or practising under the style of Egan Cosgrave & Associates and/or practising under the

style of Egan Cosgrave & Associates and/or trading as Egan Cosgrave & Muldowney Solicitors.

**50.** Provisionally it seems to me that there was no clear winner on the motion for particulars and that the costs of that motion should be costs in the cause.

**51.** As to the motion for discovery, it seems to me that the plaintiff's agreement following the issue of the motion to make the discovery he agreed to make justified the issuing of the motion but that the defendants thereafter pressed the motion unsuccessfully. Taking into account also the significant correction much later of what discovery the plaintiff was in fact prepared to make, it seems to me that the costs of that motion, also, should be costs in the cause.

**52.** I will list the motions for mention for final orders and costs on Tuesday 12<sup>th</sup> October, 2021.