THE HIGH COURT

[2021] IEHC 495

[2014 No. 9351 P]

BETWEEN

LYNDA MEEGAN

PLAINTIFF

AND

TIMES NEWSPAPERS LIMITED TRADING AS THE SUNDAY TIMES

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 2nd day of July, 2021.

The proceedings

1. In these proceedings, the plaintiff claims damages for alleged defamation on foot of an article that was published by the defendant in the Sunday Times on 14 September 2014. The article was published under the headline: -

> "Convicted bomb-maker was recipient of garda intelligence."

The complained of article further stated that: -

> "A SENIOR figure in the Continuity IRA (CIRA) has been identified by Special Branch as the person who received sensitive intelligence from a former garda about operations against dissident republicans.
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>
> The female officer is said to have sent texts to Fee alerting him to the identities of dissidents arrested by gardai. The texts were intercepted by Crime and Security, the garda agency responsible for spying on dissidents.
>
> The officer, who cannot be named, resigned after being confronted. …"

2. A Statement of Claim pleads that the former member of An Garda Síochána to whom the article referred is the plaintiff.

Application for third party discovery

3. A motion for third party discovery was brought against the Commissioner of An Garda Síochána, seeking discovery of a report prepared for the Minister for Justice, dated 1 October 2014, in relation to the provision of confidential information by a serving member of An Garda Síochána to dissident republicans.

4. On 25 March 2019, the High Court (Barr J.) made an Order, on consent, that the Commissioner of An Garda Síochána make discovery of: -

> "The report prepared for the Minister for Justice dated the 1st October 2014 in relation to the provision of confidential information by a serving member of An Garda Síochána to dissident republicans."

5. Subsequently, an affidavit of discovery was sworn by John Finucane, a Garda Inspector who was duly authorised to make the affidavit on behalf of the Commissioner.

6. The said report was set out in the second part of the first schedule of the affidavit of discovery as the Garda Commissioner objected to produce the said document. The grounds for such objection were set out as follows in the said affidavit: -

> "4. The grounds on which I object to produce these last mentioned documents are that such are covered by Public Interest privilege, in the interest of preserving An Garda Síochána's ability to effectively investigate crime and Garda tradecraft, and in the interests of protecting informants."

7. The application before the Court concerns the scope of the public interest privilege being asserted. The said report was made available to the Court so that it could be considered and any necessary redactions could be made.

Principles to be applied

8. Both the defendant and the Commissioner accepted that the law on public interest privilege was as is set out in Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (3rd ed., Round Hall, 2019), as follows: -

> "Unlike other forms of privilege, public interest privilege is not absolute and in determining whether a document should be disclosed, the courts will balance the public interest relied upon by the State as a justification for refusing to disclose the document against the public interest that is served by the disclosure of relevant documents. This balancing exercise is not carried out in cases of private privilege where the court will not inquire into the potential relevance of the material itself once the criteria for establishing the privilege are met."

9. This principle has been referred to in a number of authorities. Keane J. (as he then was) stated in *Skeffington v. Rooney* [1997] 1 I.R. 22: -

> "… In such cases, as has been frequently pointed out, the courts must balance the public interest in the production of documents which are relevant to the issues to be determined in the particular case against some other public interest which is invoked to justify their being withheld. …"

A balancing exercise was carried out in *Gormley v. Ireland* [1993] 2 I.R. 75. In this case, the plaintiff had been suspended following his internment under the Offences Against the State Act, 1939. He issued proceedings seeking a declaration that he was entitled to be paid his salary without any deduction arising from his suspension. An order for discovery was made against the defendant, who claimed executive privilege in respect of certain documents. Murphy J. stated: -

> "Notwithstanding the claim made by Mr. Grant in his affidavit and the undoubted involvement of the Offences Against the State Act, 1939, I would not go so far as to say that all the documents in respect of which executive privilege is claimed would involve national security. On the other hand they are unquestionably confidential, sensitive documents recording for the greater part submissions and advices by senior civil servants to Ministers and indeed to the Government. It is in the public

> interest that communications of this nature should be made on the basis that they would not be disclosed in legal proceedings unless the court is satisfied that the public interest in this regard is outweighed by the conflicting interest of the litigant to have access to such documents as may be necessary to enable him to prosecute fairly and properly his action in the courts set up under the Constitution. …"

It should be said that this equally applies to a person defending an action.

10. In the course of the application, the Commissioner sought to argue that the said report was neither relevant nor necessary for the defendant in its defence under s. 26 of the Defamation Act, 2009. I do not accept that it is open to the Commissioner to make such a submission in circumstances where he has consented to making discovery of the said report and, thus, has accepted that the report is both relevant and necessary. In any event, I have doubts as to whether it is open to a third party, who is not a party in the proceedings, to make submissions as to what is or is not relevant and necessary for a defendant's defence. As was stated by Haughton J. in *Ryanair Ltd v. Besancon* [2021] IECA 110: -

> "60. … If parties to proceedings routinely agreed to discover documentation with the intention of extensive or material redaction and later contesting relevance at the point where inspection/production is sought, this would indeed undermine the system of agreed/voluntary discovery."

Application of principles

11. In carrying out the balancing test, I wish to identify what factors are in balance. On the one side, there is the right of the defendant to defend these defamation proceedings and to vindicate its reputation and good name. On the other side, as stated in the affidavit of Inspector John Finucane, there is the public interest of An Garda Síochána being able to effectively investigate and prevent crime, which may require the receipt of information and intelligence from informants whose identities are required to be protected. The required balance can be achieved by certain redactions, which I will make in the report.

12. In making the redactions, I will proceed on the basis that it must be generally accepted and known to the general public that An Garda Síochána receive information from informants, but that it is essential that any information that could potentially lead to the identities of any such informants be redacted.

Conclusion

13. I will direct that An Garda Síochána make available for inspection a copy of the said report, as redacted by the Court.

14. As this judgment is being delivered electronically, the parties have fourteen days within which to make short submissions on the issue of costs. I will return the said report, as redacted, to the Commissioner of An Garda Síochána for transmission to the defendant.