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Ref: STE7446

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 20-03-09

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

STEPHEN NOLAN

Plaintiff

and

MGN LIMITED

Defendant

STEPHENS J

Introduction.

[1] MGN Limited, the publishers of 'The People' and the defendant in this libel action, brings two applications for interlocutory relief.

- (a) By summons dated 23 December 2008 the defendant seeks an order, pursuant to Order 24 rule 7 of the Rules of the Supreme Court (Northern Ireland) 1980, requiring the plaintiff to make an affidavit stating whether he has or has had in his possession, custody or power any document in relation to information provided to him or his solicitors on or after 8 October 2006 by the Northern Ireland Council for Ethnic Minorities.
- (b) By a second summons dated 29 January 2009 the defendant seeks an order, pursuant to Order 18 rule 12(3) of the Rules of the Supreme Court (Northern Ireland) 1980, compelling the plaintiff to provide proper and adequate replies to the defendant's Notice for Particulars dated 23 December 2008.

Both interlocutory applications are before me for determination. Mr O'Reilly appears on behalf of the defendant. Mr Ringland QC and Mr Bonar appear on behalf of the plaintiff.

The issues in this action

[2] The plaintiff, Stephen Nolan, a Radio Ulster and BBC Radio TV Live presenter, brings these proceedings in relation to an article entitled 'Nolan in fee shocker' which was published in the edition of The People dated Sunday 8 October 2006. For the purposes of these applications it is convenient to break the article into two distinct parts. In the first part it is factually asserted by the defendant that the Northern Ireland Council for Ethnic Minorities invited the plaintiff to appear at an anti-racism meeting and that the plaintiff agreed to do so provided he was paid a fee of £1,500. That the plaintiff prides himself in helping those in need and earns a salary in excess of £100,000. In the second part the newspaper published the reaction and comments of "insiders" at the Northern Ireland Council for Ethnic Minorities to the plaintiff's request that he should be paid any fee or a fee of £1,500. There is an implication, accepted by Mr O'Reilly, that those comments were from responsible and experienced insiders and therefore worthy of repetition. Some of the extracts from the article in respect of that second part are as follows:

- (a) "But NICEM insiders said that they were shocked he had even thought to ask money from them".
- (b) "One told us: 'we're not a charity but an umbrella group depending on handouts from Government and other bodies'."
- (c) "We thought Stephen Nolan, who was always the first to shout down racists, would have been perfect to host an event, but we never considered for one minute he would want paid. It is just not how we operate. Maybe we were being naïve but to ask for £1,500 is a bit cheeky - and greedy - to say the least".

[3] The plaintiff's Statement of Claim served on 6 February 2007 alleges that the article meant and was understood to mean that "the plaintiff was greedy" and that "the plaintiff was a hypocrite". The words "greedy - to say the least" being expressly used in the article. The word "hypocrite" is not expressly used but is a meaning which is open to a jury. It could be taken that the article means that the plaintiff pretends to support anti-racist activity but in reality is eager to gain money and wealth. In short that he pretends to be better than he is. Those meanings are defamatory of the plaintiff.

[4] The defendant in its defence served on 28 September 2007 relies on the defence of fair comment in relation to the second part of the article. In considering that defence it is relevant to note that the comments published by the defendant were the comments of "insiders" (in the plural and collectively)

at the Northern Ireland Council for Ethnic Minorities. They were not comments attributed to the journalist, Sinead King, who wrote the article.

[5] In the plaintiff's reply, served on 13 March 2008, I discern that the plaintiff alleges that no responsible or experienced insider at the Northern Ireland Council for Ethnic Minorities made any of the comments contained in the second part of the article. That the attribution of those comments by the defendant to insiders at the Northern Ireland Council for Ethnic Minorities was a fabrication. That the defendant had falsely put the comments into someone else's mouth. I say that I discern this to be so because from the wording of the Reply there is a degree of ambiguity about whether the pleaded fabrication extends to the factual allegations in the first part of the article or whether it is confined to the comments in the second part of the article. I consider that this ambiguity should be addressed by compelling the plaintiff to make further and better replies to some of the paragraphs in the defendant's Notice for Further and Better Particulars.

[6] Subsequent to the plaintiff's reply served on 13 March 2008 which contained an allegation that the comments were falsely attributed to insiders or responsible insiders at the Northern Ireland Council for Ethnic Minorities, the defendant served an amended list of documents on 27 November 2008 claiming that it had, but no longer has, in its possession, custody or power a note of a telephone call between Stephen Maguire, Editor of the Irish edition of The Sunday People, relating to a telephone call from a confidential source. From that amended list of documents it can be inferred that the defendant maintains that the comments made were not fabricated and were made to it prior to the publication of the article. Mr O'Reilly confirmed that this was so at the hearing of these applications. It is however still unclear whether the defendant is maintaining that there was more than one insider who made the comments.

The application for an order for discovery of specific documents.

[7] The plaintiff's allegation that no or no responsible person at the Northern Ireland Council for Ethnic Minorities made the comments is based upon investigations carried out by the plaintiff's solicitors with that charity subsequent to the publication of the article. The plaintiff's solicitor has waived privilege in relation to the contents of a letter addressed to him dated 9 November 2006 from Gabrielle Duffy of the Northern Ireland Council for Ethnic Minorities. That letter is in the following terms:

"Dear Mr Tweed,

I am writing on behalf of the Northern Ireland Council for Ethnic Minorities regarding the article

in The People on 8th October 2006 claiming that the Northern Ireland Council for Ethnic Minorities were 'stunned' and 'shocked' by the fact that Mr Nolan agreed to host an event for NICEM for a fee of £1,500.

I can confirm that a member of NICEM staff from the Asylum Seeker & Refugee team approached Mr Nolan (among others) by e-mail in order to find a host for an event to be organised by NICEM during Refugee Week 2006.

The event was not an 'anti-racism meeting' as suggested in The People article. The event was a question and answer session on the topic of Asylum Seekers & Refugees integration, as part of the week long programme of events organised by NICEM during Refugee Week 2006.

NICEM received a positive response from Mr Nolan for hosting the event which indicated that he would charge a fee. NICEM is a voluntary sector organisation established in 1994 and is well aware of the fact that individuals with an established profile working in the media and other fields regularly charge fees for appearances and the hosting of events, and the organisation was neither 'stunned' or 'shocked' by this fact.

Our only restriction on paying such fees are the budgets for particular events, and in this case it fell outside of our budget. The NICEM staff member did not send any further correspondence to Mr Nolan. The issue was not raised at all within the organisation.

Two members of staff from NICEM, the Executive Director and a staff member, who organised the event, were approached by the reporter from The People. Neither member of staff made any comment on the story. They both felt that there was no story since Mr Nolan was exercising a common practice.

In the article in The People by Sinead King, all quotations from NICEM sources she refers to as

`officials' and `insiders' have been fabricated and there are factual mistakes about the organisation, which in fact is a charity and is described in a `quotation' in the article as not a charity. NICEM made absolutely no comment on the story and we were shocked to see such comments ascribed to us in the article. ...

We are very disappointed by such a low standard of journalist skill and integrity exhibited by the article in The People ...

If you require any information from NICEM regarding this matter please do not hesitate to contact us.

Yours sincerely

Gabrielle Doherty"

[8] It is the other documents, in addition to this letter, which were generated by the plaintiff's solicitor's investigations with the Northern Ireland Council for Ethnic Minorities in respect of which the plaintiff seeks discovery of particular documents. The plaintiff's skeleton argument, for the purposes of this application, identifies that in addition to the letter which I have set out, there are telephone attendance notes for which privilege is claimed. I was informed during submissions that there are two telephone attendance notes made by the plaintiff's solicitor in respect of telephone calls to Jean Walsh and Patrick Yu of the Northern Ireland Council for Ethnic Minorities. It is recognised by Mr O'Reilly on behalf of the defendant that those two documents are subject to legal professional privilege. He asserts that the privilege has been waived but cites no authority for that proposition asserting that it is self-evident. The waiver upon which he relies is that these two documents, though not expressly, have by necessary implication, been referred to in the plaintiff's Reply and accordingly any privilege attaching to them has been waived. The plaintiff's Reply states:-

“(a) Although the journalist refers to NICEM insiders in the article investigations carried out on behalf of the plaintiff confirm that the NICEM employees contacted by the journalists were Jean Walsh and Patrick Yu. Each has confirmed that apart from confirming the figure involved they did not supply the journalist with any information relating to the allegations made in the said article.

The journalist had no, or no reliable alternative source of information in that regard.

(b) The journalist nevertheless proceeded to allege that NICEM insiders had provided information critical of the plaintiff including that he was greedy. Those allegations were fabricated.”

It is apparent that the investigations were conducted by the plaintiff’s solicitor. Solicitors take attendance notes and therefore by implication the attendance notes in relation to the investigations are referred to in the plaintiff’s Reply. Mr O’Reilly asserts that this leads to a waiver of privilege. I referred to the provisions of Order 24, rule 11 of the Rules of the Supreme Court (Northern Ireland) 1980 and its equivalent in the Supreme Court Practice 1999, Order 24, rule 10. Those rules deal with inspection of documents referred to in pleadings and affidavits. The notes to the Supreme Court Practice 1999 referred to two authorities in which documents were referred to in a pleading but privilege could still be claimed for them. Mr O’Reilly did not wish to make any submissions in relation to why privilege was not waived in circumstances where documents are expressly referred to in a pleading but is waived in this case.

[9] The authorities referred to in the Supreme Court Practice 1999 are *Roberts v Oppenheim* [1900] 1 Ch. D. 724 and *Milbank v Milbank* [1900] 1 Ch. 376. The commentary on those cases in the Supreme Court Practice is that the party against whom an order is sought to produce a document referred to in a pleading will be excused from doing so if he is privileged from producing the document. Since the hearing of this application I have considered those authorities and it is apparent that the then English equivalent to our Order 24, rule 11 was in a somewhat different form. However they are authority for the comment contained in the Supreme Court Practice. I have also considered a number of other authorities such as *Infields Limited v Rosen & Son* [1938] 3 All ER 591, *Lyell v Kennedy* (1884) 27 Ch. D. 1, *Tate & Lyle International Limited v Government Trading Court* (1984) 87 LS Gaz 3341 and *Derby & Co Limited v Weldon* (No 10) [1991] 2 All ER 908. I have not heard submissions in relation to any of these cases and as to why they should not be followed or should be distinguished. In those circumstances I do not propose to depart from them.

[10] I consider that a considerable portion of that part of paragraphs (a) and (b) of the plaintiff’s Reply which I have set out in paragraph [8] is unnecessary narrative. The requirement is to plead facts not evidence. There is no requirement to plead the process by which the facts have been discovered, namely here the investigation by the plaintiff’s solicitor. In a situation where the pleading of an investigation is unnecessary, the documents which record that investigation are acknowledged to be and are clearly privileged and in which I have been referred to no authority in support of the proposition that

privilege has been waived, I do not consider it appropriate to make an order for specific discovery of the two documents. It may be that the plaintiff's list of documents should make specific reference to the two documents and specifically claim privilege for them but my attention was not drawn to the plaintiff's list of documents during the course of the hearing. In those circumstances I will hear further submissions on that point.

The application for further replies to the defendant's Notice for Particulars.

[11] As can be seen from paragraph (b) contained in the plaintiff's Reply which I have set out in paragraph [8] it is asserted that "the journalist nevertheless proceeded to allege that NICEM insiders had provided information critical of the plaintiff including that he was greedy. Those allegations were fabricated." The pleading does not attempt to identify the allegations which were critical of the plaintiff and which it is stated were fabricated except to say that the allegation that the plaintiff was greedy is amongst the allegations which were fabricated. As a general proposition I consider that the issues between the parties are tolerably clear. I have set out those issues earlier in this judgment. However the function of a pleading is to bring exact definition to the issues rather than leaving any ambiguity.

[12] Paragraph 3(a) of the plaintiff's Notice for Further and Better Particulars requests the plaintiff to identify precisely the "allegations" which the plaintiff claims were fabricated. The reply is "The allegations which are the subject matter of this action". I do not consider this to be an adequate reply. I discern that the plaintiff takes no issue with the facts set out in what I have termed the first part of the article accepting that they are correct, but alleges that all the comments attributed to insiders at the Northern Ireland Council for Ethnic Minorities were fabricated. This should not be left as a matter of discernment but should be expressly pleaded. The plaintiff has stated that "allegations" were fabricated. He should set out exactly which allegations were fabricated. I order further and better replies to paragraph 3(a) of the defendant's Notice for Further and Better Particulars dated 23 December 2008.

[13] Paragraph 3(b) seeks particulars of the alleged fabrication by the defendant. I consider it apparent from paragraph (a) of the plaintiff's Reply set out at paragraph [8] that either it was fabricated in that there were no insiders who made any comment or alternatively that the implicit suggestion that the insiders who made the comments were reliable was fabricated. I do not order any reply to paragraph 3(b).

[14] Paragraph 3(c) of the defendant's Notice for Further and Better Particulars seeks "particulars of all "information critical of the plaintiff" which the plaintiff claims was alleged by the defendant to have been provided by NICEM insiders". I consider that paragraph 3(c) will be

sufficiently answered if the plaintiff provides further and better particulars in response to paragraph 3(a).

[15] Paragraph 4(b) seeks particulars of the “allegations which the journalist did not believe were true”. The reply to this paragraph was “not entitled”. I anticipate that the reply will be the same as the further and better reply to paragraph 3(a) but again this should not be a matter of conjecture. I order further and better replies to paragraph 4(b). I anticipate that the answer to paragraph 4(a) which asks the plaintiff to “provide precise details of the basis for alleging that at no time did the journalist have any or any sufficient grounds for honestly believing that “those allegations” were true”, will refer only to the comments in the second part of the article and that those comments were fabricated in the way that I have indicated. Again this should not be a matter of conjecture. I order further and better replies to paragraph 4(a).

[16] I have dealt with paragraphs 3 and 4 first before paragraph 1 which seeks “particulars of all the words complained of in which it is alleged that the journalist had no honest belief”. I consider that the further and better replies to paragraphs 3(a), 4(a) and 4(b) will bring sufficient definition to the pleadings. I do not order any further reply to paragraph 1 or for the same reason to paragraph 2(e).

[17] Paragraphs 2(a)-(d) seek particulars in relation to the plaintiff’s solicitors investigations. Those investigations are privileged. The reference to the investigations in the pleadings was unnecessary. I do not order any further replies to those paragraphs.

[18] Paragraph 2(f) is as follows:-

“Provide particulars of the basis upon which it is alleged that the journalist had no alternative source of information to Jean Walsh and Patrick Yu.”

I discern that the plaintiff’s case is based on the letter from Ms Doherty and the telephone discussions with Jean Walsh and Patrick Yu. The plaintiff asserting that having excluded those three individuals in the Northern Ireland Council for Ethnic Minorities there is no alternative or reliable alternative source of information. In short that Ms Doherty, Jean Walsh and Patrick Yu are the only reliable sources of information. If that be so then it should be stated. It should not be left as a matter of discernment. I order further and better replies to paragraph 2(f).

[19] Paragraph 2(g) requests the plaintiff to provide particulars of “the basis upon which it is alleged that the journalist had no reliable alternative source

of information to Jean Walsh and Patrick Yu and provide particulars of the lack of reliability of the defendant's source of information." In so far as the defendant requests the plaintiff to provide particulars of the lack of reliability of the defendant's source of information it is relevant to note that the plaintiff does not know the defendant's alleged source or sources. The defendant has refused to reveal the identity of the source or sources. The plaintiff cannot in those circumstances specify how the defendant's source is said to be unreliable except by exclusion and this will be apparent from the further reply to paragraph 2(f). I also consider that the first part of paragraph 2(g) will be answered if the plaintiff replies adequately to paragraph 2(f). I do not make any order in respect of paragraph 2(g).

[20] In conclusion I order the plaintiff to provide further and better replies to paragraphs 2(f), 3(a), 4(a) and 4(b) of defendant's Notice for Further and Better Particulars.

Procedure

[21] These applications were brought on foot of two separate summonses which were issued upon different dates. I consider that it would have been appropriate to amend the first summons to seek the relief claimed in the second rather than increasing costs by issuing a second summons.

Case management

[22] It became apparent during the course of the hearing that there are a number of issues which would benefit from directions in preparation for trial. Mr O'Reilly, for the defendant, accepted that part of the function of case management is to identify and clarify the issues between the parties.

[23] The plaintiff asserts that the attribution of the comments to an insider at the Northern Ireland Council for Ethnic Minorities was a fabrication. A question will arise as to what difference it would make to the defence of fair comment if indeed that be so. The underlying facts upon which the comments are based are set out in what I have described as the first part of the article. I discern that those facts are not in dispute. It is on those facts that the comment is being made. If in reality the comment was being made by the journalist, rather than by insiders at the Northern Ireland Council for Ethnic Minorities, then should the defence of fair comment still be available where, as here in so far as I discern the position, the underlying facts upon which the comment is based are not in dispute? I direct the plaintiff to lodge and exchange a skeleton argument in relation to this issue 2 weeks prior to the trial together with copies of any relevant authorities. The defendant to lodge and exchange a skeleton argument in reply 1 week prior to trial with copies of any relevant authorities.

[24] The defendant has not revealed the identity of the insider. If the insider is not to be called at trial then issues will arise in respect of hearsay evidence and the impact of the Civil Evidence (NI) Order 1997. I direct the defendant to lodge and exchange a skeleton argument in relation to this issue 2 weeks prior to the trial together with copies of any relevant authorities. The plaintiff to lodge and exchange a skeleton argument in reply 1 week prior to trial with copies of any relevant authorities.

[25] If the identity of the insider is not to be disclosed then questions will arise under Section 10 of the Contempt of Court Act 1981 and Article 10 of the European Convention on Human Rights in relation to the protection of journalistic sources. I direct the defendant to lodge and exchange a skeleton argument in relation to this issue 2 weeks prior to the trial together with copies of any relevant authorities. The plaintiff to lodge and exchange a skeleton argument in reply 1 week prior to trial with copies of any relevant authorities.

[26] I also direct that the parties shall lodge skeleton arguments with authorities with reference to any other legal matters likely to arise in this action 1 week prior to the trial of this action.

[27] I will fix a trial date. The parties shall take steps to confirm the availability of their witnesses within 7 days. In the event that the witnesses are unavailable then the court office is to be notified with a request for a review hearing within 14 days to fix an alternative trial date.

Costs

[28] I will hear counsel in relation to the question of costs including the costs unnecessarily incurred in that a second summons was issued instead of applying to amend the first summons.