[2020] IEHC 95

THE HIGH COURT

Record No 2016/6187P

BETWEEN

DERMOT DESMOND

PLAINTIFF

AND

THE IRISH TIMES LIMITED

DEFENDANT

JUDGMENT of Mr Justice Maurice Collins delivered on 17 February 2020

Introduction

1. On 3 April 2016 (a Sunday) a number of newspapers and media outlets globally - all associated with the Washington-based International Consortium of Investigative Journalists ("*ICIJ*") - began to publish/broadcast stories based on the so-called *"Panama Papers*", described by the *Irish Times* at the time as a "*vast collection of leaked documents from the Panamanian legal firm Mossack Fonseca*."

2. The *Irish Times* and/or some of its journalists are members of the ICIJ and the paper had been given access to the Panama Papers and been involved, along with many others, in the exercise of reviewing those papers in advance of 3 April 2016. It appears that the *Irish Times'* first coverage relating to the Panama Papers appeared online on 3 April 2016, and this was followed by a prominent story carried in the print edition of 4 April 2016 under the headline "*Global leak reveals secret offshore activities of world leaders and stars*". A separate story in the same edition disclosed that the Panama Papers revealed the involvement of an Irish registered company in the international arms trade. Persons accessing the *Irish Times* website could see a video which gave further background and were provided with a link to a special website set up by the ICIJ which, according to Mr Desmond, carried a banner headline *"THE PANAMA PAPERS Politicians, Criminals and the Rogue Industry that Hides their Cash."*

3. On 7 April 2016 the Irish Times published a further article based on the Panama Papers under the headline "*Mossack Fonsecca's Irish clients came from all walks of life*." Mr Desmond is referred to in this article and it also included a photograph of him. After noting that Mr Desmond and another well-known business person referred to in the article were"*active in international investments and are not tax-resident in this jurisdiction, and it is not surprising that they might show up in the files of a major law firm that provides global services*", the article went on to refer to a Panamanian company, Ard International Inc According to the article, Ard International had issued bearer shares in June 2005. Bearer shares – so the article explained – were company shares that belong to whoever has them and were being done away with in most jurisdictions because of concerns over transparency. The article went on to state that, at the same time as deciding to issue those bearer shares, the company's directors (employees of Mossack Fonseca) had granted a general power of attorney over its affairs to Mr Desmond. The article noted that the files included a note from Mr Desmond from November 2005 asking the directors to grant power of attorney to two Swiss lawyers, resigning as attorney and asking the directors to destroy the documents associated with his appointment and resignation.

Finally (as regards Mr Desmond) the article noted that it was not known what business – if any – had ever been conducted by Ard International and stated that a "*spokesperson for Desmond said he did not want to comment."*

4. On the following day, 8 April 2016, a Ms Suzanne McNulty (described in the papers as Mr Desmond's General Counsel) wrote to the *Irish Times* on Mr Desmond's behalf asserting that the article breached his rights to privacy and confidentiality and was not justified by any public interest and also that the publication had caused damage to Mr Desmond's reputation. A specific complaint was made about the reference to Mr Desmond's spokesperson having said that he did not wish to comment. Ms McNulty indicated that she was the spokesperson concerned and complained that the statement in the article was not accurate. A comment had, she said, been provided to Mr (Colm) Keena of the *Irish Times* on 29 March 2016, that comment being in the following terms: "*Please note that it is not our policy to comment on enquiries about Mr Desmond's personal affairs, which are private and conducted properly in compliance with the law*." Ms McNulty complained that these words had been twisted to imply that Mr Desmond had something to hide. The letter concluded by asking for the publication of an "*unequivocal apology*" to Mr Desmond.

5. The Editor of the *Irish Times*, Mr. Kevin O' Sullivan, responded denying that the article breached any of Mr Desmond's rights and emphasising the public interest relating to the international financial services system. According to Mr O' Sullivan, while identifying the shortcomings of that system, especially the secrecy it facilitates, the Irish Times had *"made clear at all times that it is legal and can be used for legitimate business purposes*" and the article had made clear that the use of the services of Mossack Fonseca was "*perfectly legal".*

6. There followed further correspondence between solicitors for the parties in which their respective positions were further rehearsed. That correspondence did not lead to any resolution and Mr Desmond commenced these proceedings by Plenary Summons issued on 11 July 2016.

The Proceedings

7. In his Statement of Claim Mr Desmond pleads that the firm had informed clients on 3 April 2016 that "*this unprecedented breach of lawyer-client confidence had occurred as a consequence of a 'hack' of the law firm's email server*." He also pleads that the *Irish Times* was aware that any material that it published concerning him was confidential between the firm and its clients, that such material had been stolen or otherwise unlawfully obtained and procured illegally in circumstances where it was self-evidently the property of either or both the firm and its clients. In its Defence, the *Irish Times* denies that it was aware that the material complained of by Mr Desmond was obtained unlawfully and does not admit that the material was in fact so obtained. It denies any involvement in any unlawful removal of information and documents from the firm's offices, denies that the information was confidential and pleads that the published information was originally supplied to the German newspaper *Süddeutsche Zeitung* which shared it with other news outlets, including the *Irish Times*, through the ICIJ. As will be seen, this issue as to whether the *Irish Times* was aware how the material relating to Mr Desmond had been

obtained, and in particular whether it was aware that (as Mr Desmond asserts) it was unlawfully obtained from Mossack Fonseca, is reflected in the terms of one of the categories of discovery sought by Mr Desmond.

8. The Statement of Claim sets out in its entirety that part of the 7 April 2016 article that concerned Mr Desmond and pleads that, in the context of the *Irish Times'* earlier coverage and the material referenced by it, the article was defamatory of Mr Desmond, with various meanings being pleaded including that Mr Desmond was involved in suspicious financial transactions designed to hide some type of serious wrongdoing, that he was involved in rogue transactions intended to hide money or assets, that there was something improper or sinister about his financial affairs that Mr Desmond was anxious to conceal, that right-thinking members of society ought to regard Mr Desmond with suspicion and disdain as a result of how he conducted his financial affairs and other meanings to broadly similar effect.

9. The Statement of Claims also pleads that the *Irish Times* article infringed his right to privacy in his business and financial affairs and breached a duty of confidence alleged to be owed by it to Mr Desmond. No public interest justified the publication in circumstances where (it is said) the Irish Times had asserted that the actions of those using the services of Mossack Fonseca were "*perfectly legal*". It is pleaded that the "*gratuitous nature of the publication*" and the way on which Mr Desmond's name and photograph had been so prominently published aggravated the hurt, upset and damage caused to him and damages (including aggravated and/or punitive damages) are sought for defamation, breach of privacy and breach of confidence, as well as an injunction compelling the removal of the material complained of and certain declaratory relief.

10. In its Defence (delivered on 20 February 2017), the *Irish Times* admits publication but denies that the article was defamatory of Mr Desmond and denies the pleaded meanings. Without prejudice to that denial, paragraph 8 of the Defence pleads that the article was published on an occasion of qualified privilege under the Constitution, at common law and/or under statute, including section 18 of the Defamation Act 2009 ("*the 2009 Act")* and/or pursuant to the ECHR. The Defence next pleads section 26 of the 2009 Act. Given the importance of this defence to the disputed issues of discovery, it may be useful to set out this plea in full:

> *"9 Further, and/or in the alternative the Defendant pleads that the article complained of was published pursuant to the provisions of s.26 of the Defamation Act 2009. The article was published in good faith and in the course of and for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit, namely the growth of offshore tax and regulatory havens. The Defendant pleads that in all the circumstances of the case, the manner and extent of publication did not exceed that which was reasonably sufficient and it was fair and reasonable to publish the statement. The article constituted fair and reasonable journalism on a matter of public interest, which public interest is particularised at paragraph (12) below."* (all emphasis supplied).

11. Paragraph 12 of the Defence sets out detailed particulars of the public interest in the publication of the material, in the context of a plea that even if the *Irish Times* owed a duty of confidence to Mr Desmond (which it denies), his interest was outweighed by the public interest in publication. Most of those particulars reference the offshore financial system generally but it is pleaded that Mr Desmond is a public figure with a high public profile "*in part through having given evidence to two tribunals of inquiry about payments to politicians*." Separately, the Defence denies any breach of privacy, pleading that the publication of material from the Panama Papers concerning Mr Desmond related to corporate/commercial activity on the public interest basis particularised previously and that the publication was proportionate.

12. Mr Desmond sought particulars of certain pleas in the Defence, including the pleas of qualified privilege, section 26 and the denial that the *Irish Times* was unaware of the fact that the Panama Papers had been obtained unlawfully. Replies were provided in May 2018 and it may be necessary to refer further to certain aspects of those Replies in due course. At this stage it may be noted that in the course of the hearing it was accepted by Mr Quinn Senior Counsel (for Mr Desmond) that the *Irish Times* had adequately pleaded its section 26 defence.

13. No Reply has been delivered by Mr Desmond. Mr Quinn in his submissions referred to the provisions of the Rules (Order 23, Rule 1) which provides that no reply shall be necessary where all the material statements of fact in the relevant pleadings (here, the *Irish Times* Defence) are merely to be denied and put in issue. The absence of a Reply is something I shall refer to further below.

Request for Discovery and Response

14. On 10 September 2018 Mr Desmond's Solicitors wrote seeking voluntary discovery pursuant to Order 31, Rule 12(4) (as amended). No response was sent to this letter but the *Irish Times* did set out its response to the request in an affidavit subsequently sworn by Ms. Deirdre Veldon, a Deputy Editor, in response to Mr Desmond's discovery application.

15. For ease of understanding, I propose to set out in turn each of the categories of discovery sought and summarise the position of the parties in respect of each category.

Category 1

All documentation supplied to the Defendant, either by the ICIJ, the Süddeutsche Zeitung or otherwise relating to the Plaintiff and reviewed, relied upon, quoted from or otherwise considered as part of the series of articles referencing the Plaintiff, as referred to in the Statement of Claim.

16. The letter seeking voluntary discovery refers to the pleaded position of the parties and also states that the Plaintiff has been unable to access files relating to his and/or his companies affairs held by Mossack Fonseca (it appears that the firm is no longer in existence). It goes on to the state that Mr Desmond requires access to this category of discovery "*to effectively prove his case and in particular, to establish that the documents*

do not disclose any illegality, wrongdoing or other morally reprehensible behaviour that might legitimately justify publication in the 'public interest' as claimed by the Defendant."

17. The affidavit grounding the application – sworn by Mr Raymond Darcy, a solicitor in the firm acting for Mr Desmond – does not address the categories separately but, having referred to the *Irish Times'* reliance on section 26 and on a plea of qualified privilege, states:

> *"The categories sought are all directly relevant to the question of whether or not it was fair or reasonable to publish the material in question. Insofar as the Defendant has pleaded, in its Defence, substantial reliance upon the public interest, the requested categories are relevant and necessary in that context; and also in the context of the Plaintiff's plea (which is denied) that the Defendant elected to publish the material knowing that it had been unlawfully obtained and that it was confidential information. More generally, the requested Discovery is relevant and necessary having regard to what is pleaded at paragraphs 17-21 of the Statement of Claim (relating to the grounds upon which it is alleged that the Defendant was aware of the wrongfulness of its actions, and the wrongful circumstances in which confidential information had been removed from the law firm Mossack Fonsecca.) The Defendant has denied these matters in its Defence."*

18. As I have mentioned, there is also an affidavit before the Court from Ms Deirdre Veldon of the *Irish Times*. In respect of category 1, Ms Veldon objects to the discovery sought on a number of different bases. She says (i) that no documents were provided to the Irish Times by the *Süddeutsche Zeitung*, (ii) that the Irish Times accessed documents from the ICIJ but copies of any such documents used in the preparation of the article have since been destroyed; (iii) that documents in the ICIJ archive are not within the power, possession or procurement of the Irish Times, as it does not have a legal right to them (it being explained that the access previously given had been solely for the preparation of the articles published by the *Irish Times);* (iv) the documents were in any event "*protected by journalistic privilege*". In this context, Mr Veldon asserts that Mr Desmond clearly intends to use discovery as a means to investigate the original source of the documents emanating from Mossack Fonsecca and in these circumstances (Ms Veldon says) it would not be appropriate to order the discovery sought. She also states that even the listing of documents in an affidavit of discovery would "*run the risk of infringing this privilege*"; (v) whereas Mr Desmond had sought to justify the request by stating that he required the documents to establish that they did not disclose any illegality on his part, he had not pleaded that the article bore such a meaning and so the request fell outside the scope of the pleadings; (vi) Mr Desmond's asserted inability to get documents from Mossack Fonsecca was not a basis for seeking discovery from the *Irish Times*; (vii) the request is a fishing expedition in that Mr Desmond had, without evidence, made a "*speculative allegation in pleadings*" that the Irish Times knew that the documents has been illegally obtained and now was seeking an evidential basis for that allegation.

Category 2

(a) *All documentation concerning all efforts made by the newspaper to contact the Plaintiff or his representative for comment, to include all notes made of any discussions had or any communication received prior to publication.; and*

(b) *All documentation to include notes of or concerning any editorial decisions relating to the publication of the portion of the article by Colm Keena and Ciaran D'Arcy concerning the Plaintiff which appeared in the 7th April 2016 edition of the Defendant's newspaper to include all earlier drafts."*

19. The stated reason for this request is that Ms McNulty had provided a particular comment which had not been published and that the article as published asserted – inaccurately (so it is said) - that a spokesperson on behalf of Mr Desmond had indicated that he had no comment to make. A further justification advanced is that the discovery was required to ascertain whether or not a decision was taken by the Irish Times to edit out "*the proper and full statement*" which had been provided to Mr Keena "*which confirmed the private nature of the material and the fact that the Plaintiff's affairs are conducted lawfully*".

20. As to 2(a), Ms Veldon avers that the *Irish Times* has no documents relating to this part of the request other than two emails which, she says, Mr Desmond already has in his possession and which therefore it is unnecessary to discover. As to 2(b), it is stated that the *Irish Times* has no notes of editorial decisions relating to publishing the article and it is asserted that earlier drafts of the article were covered by legal professional privilege. Mr McCullough SC, Counsel for the *Irish Times*, did not seek to maintain that particular ground as an objection to discovery (whatever the position might be regarding production/inspection of any such drafts if directed to be discovered) and therefore it will not be necessary to say any more about it.

21. In the course of argument, I observed to Mr Quinn that the basis advanced for category 2(b) (which is limited to the editorial decision regarding the portion of the article which suggested that Mr Desmond's spokesperson had said that he did not wish to comment) appeared to be narrower in scope than the category as drafted (which refers generally to the article so far as it concerned Mr Desmond. In his reply, Mr Quinn suggested that category (b) might be reformulated to refer to editorial decisions relating to the publication of the portion of the article concerning "*the response of the Plaintiff's spokesperson.*"

Category 3

All documentation relating to, recording or evidencing the knowledge of the Defendant, its servants or agents as to the origins of the Panama Papers and specifically, the data/files/documents received by the Defendant and relating to the Plaintiff or his associated companies.

22. The voluntary discovery letter seeks to justify this category by reference to the Plaintiff's claim that the *Irish Times* was at all times fully aware that the files and documents referred to in its article had been unlawfully taken from Mossack Fonsecca and to the fact that this claim was denied.

23. In her affidavit, Ms Veldon objected to this category, largely on the same basis as her objection to category 1. However, in the course of his submissions, Mr McCullough SC indicated that his client would be willing to make discovery of this category, subject to it being revised so as to read as follows: "*All documentation recording the knowledge of the Defendant, its servants or agents as to the origins of the Panama Papers that relate to the Plaintiff or his associated companies.*" This offer effectively resolves the dispute in respect of this category though there remains a minor issue as to whether the words *"or evidencing*" should remain or not.

Category 4

All documentation relating to any discussions or communications as between the Defendant and other journalists (including without limitation, other members of the International Consortium of Investigative Journalists (ICIJ)) and/or with the persons who supplied to the Defendant the leaked material concerning the Plaintiff, relating to the identification of material considered to be relevant to Ireland and specifically relating to the Plaintiff and showing or attempting to show the reasons why that material was selected for publication and/or considered to be in the public interest.

24. In the voluntary discovery letter, reference is made to the *Irish Times'* claim that the publication was in the public interest and to the article published by the *Irish Times* on 9 April 2016 from which it appeared (so it was said) that its journalists, and in particular Mr Keena, had been involved "*in a process of sifting through the material and potentially engaging in real time chat with other journalists and members of the [ICIJ] and with a view to identifying what material might be 'in the public interest for your country*." The discovery sought (so the letter went on) *"will assist the parties in establishing what alleged public interest the Defendant and its contacts within the ICIJ identified in the course of any such communications or discussion*."

25. The *Irish Times* objects to this category. On its behalf, Ms Veldon says (i) that the question of whether the published material was published in the public interest is fundamentally a question of law, to which discovery is irrelevant.; (ii) that there are no documents because any communication took the form of "*real time chat*" on a website which did not generate documents or records; (iii) that any documents in this category would be protected by journalistic privilege and (iv) the documents were not relevant or necessary to deciding the issues between the parties.

DISCUSSION

Preliminary Points

26. This is an application for discovery. The principles applicable to such applications were not in any significant dispute before me. While I was referred to the relatively recent decision of the Supreme Court in *Tobin v Minister for Defence* [2019] IESC 57, it does not appear necessary to discuss that decision in detail. The battle lines between the parties were not at the level of general principle and I did not understand it to be suggested by the *Irish Times* that discovery in the terms sought would be disproportionately burdensome in any

practical sense. Nonetheless, it is perhaps appropriate to note Clarke CJ's reminder in *Tobin* that "*it is important not to lose sight of the valuable contribution that discovery can make. It improves the chances of the court being able to get at the truth in cases where facts are contested. In that way, it makes a significant contribution to the administration of justice.*"

27. I was also referred to a number of authorities which helpfully consider the application of the established principles governing discovery in the specific context of defamation claims and in particular claims involved defences similar to the defences relied on the *Irish Times* here, including a number of authorities from England and Wales, Australia, New Zealand and Canada which were provided to me subsequent to the hearing of the motion in response to a request from me. Ultimately, because of the significant differences between the law in those jurisdictions and the law here, those authorities have proven to be of limited assistance in addressing the application currently before the Court but I nonetheless very grateful to counsel on both sides for their researches.

28. As I have said, this is an application for *discovery*. It is not an application for inspection and/or *production*. That being so, it appears to me to follow that a number of the objections to discovery articulated by Ms Veldon in her affidavit do not properly arise at this stage of the proceedings. Thus, in my opinion, the fact – if fact it be – that the *Irish Times* has destroyed all documents used in the preparation of the article on which Mr Desmond sues does not of itself provide an answer to his application for discovery. If the Court is persuaded that discovery should be made of some or all of the categories of documents sought, the obligations of the *Irish Times* will extend to listing in the second schedule to its affidavit of discovery any documents coming within such category or categories which have been (bur are no longer) in its possession, power or procurement. The long-standing existence of such a requirement on a party making discovery necessarily reflects a judgment that such a requirement is in the interests of justice and potentially of benefit to the party getting discovery. I do not see any reason why Mr Desmond should be deprived of such a potential benefit here simply because the *Irish Times* states that it has destroyed some or all of the documents that are being sought by him. Such an approach would give litigants a unilateral power to foreclose the possibility of being subject to an order for discovery which would be wholly undesirable.

29. I have not overlooked the distinct point made by Ms Verling, in the context of asserting that the documents sought (or at least the majority of categories of documents sought) "*are protected by journalistic privilege*", that the listing of such documents in an affidavit of discovery would run the risk of infringing that privilege. I address that point below when I discuss the issue of journalistic privilege.

30. Equally, in my view, the further objection made by Ms Verling to the effect that documents in the ICIJ archive are not within the power, possession or procurement of the *Irish Times*, is not relevant at this stage. If an order for discovery is made, the obligation on the *Irish Times* extends, and only extends, to making discovery of relevant documents (by which I mean documents coming within the scope of the order) which are or have

been, in its possession, power or procurement: Order 31, Rules 12(1). If, when discovery is made, any dispute arises as to whether documents held by the ICIJ are or are not within the *Irish Times'* power, possession or procurement (and it may be that no such issue will arise), that issue can be addressed at that stage, in accordance with the principles set out by the Supreme Court in *Johnson v Church of Scientology* [2001] 1 IR 682 and *Thema International Trust Services (Ireland) Ltd v HSBC International Trust Services (Ireland) Ltd* [2013] IESC 3, [2013] 1 IR 274.

31. Finally, it does not appear to me that what is referred to by Ms Verling as "*journalistic privilege*" properly provides a shield against the making of an order for *discovery* in the circumstances presented here. In this context, Mr Quinn brought the Court's attention to the judgment of McKechnie J (Clarke and McMenamin JJ agreeing) in *Keating v RTE* [2013] IESC 22, [2013] 2 ILRM 145. While that was a claim for defamation, what was actually before the Supreme Court was an appeal from the High Court granting an application for non-party discovery brought by RTE against the Garda Commissioner and the Revenue Commissioners. One of the arguments advanced on appeal was that the material directed to be discovered was privileged from production on the basis of public interest privilege and that no useful purpose would be served by directing its discovery. This argument was rejected, for the reasons set out in the judgment of McKechnie J. Having noted the arguments of the parties and stated that the normal position was that issues of privilege were dealt with subsequent to discovery, McKechnie J continued:

> *"46. That being said however, there is also no doubt but that on a discovery motion the court has an inherent jurisdiction to refuse the application on the basis that its entire purpose, namely access to relevant evidence capable of aiding or defeating a particular claim, can never be achieved in the face of a privilege plea which inevitably must succeed. Before holding however that the normal process can be abridged in this way and that privilege can ground a refusal for a discovery order as distinct from an inspection order, the court will have to be satisfied that such plea permits of no other possible result. For if it should or might, the court will not refuse to grant a discovery order on such grounds. To view the situation otherwise would be to conflate distinct steps in a two-tier process which involve addressing different questions and determining different issues. Accordingly, when the matter is raised at this stage of the process, the first enquiry must be to determine whether success on the plea is unavoidable. It is only if it is, that an affidavit as to documents will not be required."* (emphasis added)

On the material before him, McKechnie J concluded that he was far from satisfied at that stage of the procedure that any privilege that might be asserted would "*inevitably succeed"* and thus the objection failed.

32. Even if (as Hogan J suggested in Cornec v Morrice [2012] IEHC 376; [2012] 1 IR 804, at para [42]) there is in strictness no such thing as "*journalistic privilege*", that term is a useful shorthand (one which I am happy to use) for the bundle of protection that the law recognises as appropriate to afford to journalists in respect of confidential

sources/disclosures. It has been considered in this jurisdiction in a number of decisions, notably *In re Kevin O' Kelly* (1974) 108 ILTR 97 (a decision of the Court of Criminal Appeal); *Mahon v Keena* [2009] IESC 64, [2010] 1 IR 336 (a decision of the Supreme Court) and in a series of decisions of this Court addressing questions of discovery/inspection: *Walsh v News Group Newspapers* [2012] IEHC 353, [2012] 3 IR 136; *Ryanair Ltd v Channel 4 Television Ltd* [2017] IEHC 651, [2018] 1 IR 734 and *Kean v Independent Star Limited* [2018] IEHC 206, as well as *Cornec v Morrice* (which concerned an application under the Foreign Tribunals Evidence Act 1856). As is evident from these authorities, and in particular the Supreme Court's decision in *Mahon v Keena*, the Article 10 jurisprudence of the European Court of Human Rights has been a significant contributory factor in the development of Irish law on this issue.

33. The precise parameters of journalistic privilege, including the issue of whether and/or to what extent and/or on what basis its protection extends beyond information liable to lead to the disclosure of the identity of a confidential source (and thus covers the substantive content of information supplied on a confidential basis even where the disclosure of such information would not disclose the source), while very interesting and important issues, are not ones which this Court needs to determine, or could properly determine, on this application.

34. What is clear – and there was no dispute between the parties on this point – is that journalistic privilege is not absolute: see again *Cornec v Morrice* at [44] and [45] and the authorities referred to in those paragraphs. In that regard, it differs from legal professional privilege (which, within its proper confines, is absolute i.e. is not subject to any general balancing test) and more closely resembles the kind of public interest privilege at issue in *Keating v RTE*. Again, it is neither necessary nor appropriate to seek to identify the circumstances in which and/or the interests by which journalistic privilege may be overridden. Those difficult issues do not arise at this stage.

35. Posing the test articulated by McKechnie J in *Keating*, it appears to me that the material before the Court on this application does not demonstrate that, in the event that an order for discovery is made in relation to one of more of the categories of documents at issue, an objection to production on the basis of journalistic privilege would "*inevitably succeed."* Of course, any such claim may well succeed if and when made in due course. I express no view on that. The point I am making is that the exceptional circumstances that might arguably justify the Court in refusing discovery on the basis that any order would be futile because Mr Desmond would end up empty-handed in any event do not in my opinion apply here.

36. In reaching that conclusion, I am mindful of the fact that in *Walsh v News Group Newspapers* this Court (O' Neill J) addressed the issue of journalistic privilege at the same time as discovery. The issues and evidence in *Walsh* appear to me to have been different to the case before me and, having regard to *Keating v RTE*, I have reached a clear conclusion that issues of journalistic privilege should be addressed in the ordinary way i.e. by way of an appropriate affidavit of discovery following which any extant dispute can be

addressed in the context of inspection/production. I do not believe that I could properly or fairly reach any view on whether (and if so to what extent) the documents sought here ought to be protected from disclosure on the basis of the contents of Ms Veldon's affidavit. I am also influenced in my conclusion by the fact that the interaction of journalistic privilege and the statutory fair and reasonable publication defence does not appear to have been considered to any significant extent by any Irish court to date. That issue warrants more detailed consideration than was practicable in the context of the discovery application here and it would be inappropriate to express any view on it in the absence of full argument. Unsurprisingly, the balance to be struck between protection and disclosure appears to be calibrated differently in different jurisdictions and it remains to be seen where the balance falls to be struck here.

37. I do however accept that, in swearing affidavits of discovery in defamation actions such as this, issues may arise as to how documents are described and, in particular, there may be a difficulty as to the level of detail required to be given in identifying documents in respect of which journalistic privilege is asserted. Here, as already noted, Ms Veldon has stated that even the listing of documents in an affidavit of discovery would run the risk of infringing journalistic privilege by which, I understand, she means a risk that the identity of the source might thereby be disclosed. Given the elaborate precautions that appear to have been taken regarding the manner in which information was shared by the ICIJ (as explained by the *Irish Times* to its readers in articles opened in the course of the hearing), that rather bald assertion might be thought to warrant a degree of scepticism. In any event, however, in *Ryanair Limited v Channel 4 Television Corporation*, this Court (Meenan J) recognised that the listing of documents the subject of a claim of journalistic privilege potentially gave rise to particular difficulty that did not arise - at least to the same extent - in respect of claims of legal professional privilege: para [39]. Accordingly, in Meenan J's view, it may be that a "*more general description of documentation over which journalistic privilege is being claimed"* will be acceptable. I agree. The law does not require a party to undermine a privilege in order to claim it. At the same time, however, I would observe that where a claim of privilege – of whatever kind – is made over documents in the context of discovery, the onus ultimately lies on the party claiming it to establish by evidence that it is applicable to those documents. The reconciliation of those competing considerations may present difficulties in practice but, fortunately, such difficulties do not present themselves at this stage.

38. In taking the view that issues of journalistic privilege do not fall to be determined at this stage, I do not mean to imply that the fact that the discovery here is sought against a newspaper is irrelevant. The Court can have – and I have had –regard to the fact that the discovery sought by Mr Desmond, if directed, would likely require the *Irish Times* to discover at least some material that, at least *prima facie*, would be protected from inspection/production by journalistic privilege. In these circumstances, it is incumbent on the Court to apply the established elements of the test for discovery – relevance, necessity and proportionality – with particular care.

The Defences pleaded by the *Irish Times*

39. As I have noted, a number of different defences are pleaded in the *Irish Times'* Defence. The defamatory meanings relied on by Mr Desmond are denied in paragraph 6. Mr McCullough submitted to me that the meaning of the article is a matter for the jury (or the judge in the event of trial by judge alone) and that no discovery can arise by reference to this defence. In my view that is correct and I note that Mr Quinn did not seek to justify any part of the discovery application by reference to any issue on meaning.

40. Paragraph 8 pleads an extended form of qualified privilege, including - but not, it appears, limited to - qualified privilege under section 18 of the 2009 Act. Section 18(1) of the Act expressly preserves the common law defence of qualified privilege. Section 18(2) effectively restates that defence in statutory form and subsections (3) and (4) give protection to particular categories of statement. As noted in Cox & McCullough, *Defamation Law and Practice (2014) ("Cox & McCullough") "an occasion of privilege will generally arise (both at common law and under the 2009 Act) where the publisher has a legal, social or moral duty to publish the offending material and the recipient has a reciprocal interest in receiving it, and it becomes a question of fact as to whether or not, in a particular case, such a mutuality of duties or interests exists*." (Para 8-01)

41. Paragraph 8 of the Defence also invokes the Constitution, the common law and the Convention and it appears reasonable to suppose that this pleading is intended to allow the *Irish Times* to argue at trial that some form of public interest speech defence arises such as was recognised by the House of Lords in its landmark decision in *Reynolds v Times Newspapers* [1999] UKHL 45; [2001] 2 AC 127 and further developed by it in *Jameel v Wall Street Journal* [2006] UKHL 44; [2007] 1 AC 359. Whether the so-called *Reynolds* defence is part of Irish law is uncertain. The issue is discussed with enviable lucidity in *Cox & McCullough*, at chapter 9. As is there explained, even if the *Reynolds* defence was part of Irish law prior to the commencement of the 2009 Act on 1 January 2010 (and the decisions of the High Court in *Hunter v Duckworth* [2003] IEHC 81 and *Leech v Independent Newspapers* [2007] IEHC 223 suggest that it was), there is significant uncertainty as to whether it survived the coming into force of section 15 of the 2009 Act. Section 15 abolished all pre-existing defences in defamation though saving (*inter alia*) the common law defence of qualified privilege. Whether the Reynolds defence (assuming it was part of Irish law prior to the 2009 Act) survived the enactment of section 15 therefore depends on whether or not that defence is properly characterised as a species of qualified privilege. As *Cox & McCullough* explain, there is (as yet) no clear answer to that question: paras 9-70 – 9-77. The position is further complicated by the fact that the *Reynolds* defence has been statutorily abolished in England and Wales by section 4 of the Defamation Act 2013, which creates a new statutory defence of publication on a matter of public interest. That defence has some similarity to, but also many significant differences from, the defence of fair and reasonable publication created by section 26 of the 2009 Act.

42. In any event, as to the section 18 qualified privilege plea, *Cox & McCullough* note that where such a plea is made "*the defendant may be required to discover documents that support or undermine his or her case that s/he was under a duty to communicate, or had*

an interest in communicating, the statement concerned." (at para 14-109). A similar statement is made in *Gatley on Libel and Slander* (12th ed; 2013) at para 31.7. Interestingly, the editors of that edition (which predated the enactment of the Defamation Act 2013) go on to state that *"[i]n the case of a plea of Reynolds privilege, that is liable to include disclosure of journalists' notes and other material relied on as giving rise to the existence of a duty to publish and as supporting a case of responsible journalism."*

43. Before turning to section 26 of the 2009 Act, one further aspect of the *Irish Times'* qualified privilege defence should be mentioned. Section 19(1) of the 2009 Act provides that a defence of qualified privilege shall fail if the plaintiff shows that the defendant acted with malice. It is a matter for the plaintiff to plead and prove malice. Typically, malice is pleaded by way of Reply. The Plaintiff has not delivered a Reply in these proceedings and, in my view, it follows that there is no issue of malice in the case. Whatever the effect of Order 23, Rule 1, I do not consider that it can be read as giving rise to an implied or deemed plea of malice.

44. Section 26 of the 2009 Act provides a new statutory defence of "*fair and reasonable publication*" and that defence is pleaded at paragraph 9 of the *Irish Times'* defence in terms already set out above. For ease of reference, section 26 is set out in full in a Schedule to this judgment.

45. Particulars of this section 26 defence have been sought and provided and, as I have noted, Mr Quinn accepts that the defence has been properly particularised at this stage.

46. As with the qualified privilege plea in paragraph 8 of the Irish Times' Defence, the section 26 defence pleaded in paragraph 9 brings into focus the fact that no Reply has been delivered by Mr Desmond in these proceedings. While the burden is on the *Irish Times* to establish the necessary elements of that defence (discussed further below), it is nonetheless surprising that a Reply has not been delivered joining issue with the pleas made by the *Irish Times* on this issue and/or identifying the particular facts and circumstances by reference to which (on Mr Desmond's case) it was not fair and reasonable to publish the article in suit.

47. In any event, Mr Desmond, through the affidavit of his solicitor Mr Darcy, asserts that the categories of discovery sought by him "*are all directly relevant to the question of whether or not it was fair or reasonable to publish the material in question*" and a significant part of the submissions made by Mr Quinn was directed to showing how the documents being sought were relevant to the ingredients of the statutory defence. The material available to the *Irish Times* and the communications it may have had with other members of the ICIJ were, he said, relevant to the editorial decision it had made to publish the article about his client and that was at the heart of the issue of whether the section 26 defence was available to the *Irish Times* here. Mr McCullough in response argued that section 26 was not concerned with the subjective state of mind of the publisher but rather was focused on the statement published. Thus, Mr McCullough contended, the editorial process was not relevant and the documents sought were not properly discoverable.

48. There does not appear to be any significant guidance available from the authorities as to the scope and effect of the new section 26 defence of fair and reasonable publication. In broad terms, that defence is similar to the *Reynolds* defence but there are undoubtedly material differences between the two. In *Meegan v Times Newspapers Ltd* [2016] IECA 327, Hogan J (with whose judgment Finlay Geoghegan and Peart JJ agreed) observed that the section is

> *"… a novel provision which, as we were informed at the hearing of the appeal, has yet to be successfully invoked in any reported defamation case. The section is clearly designed to provide a defence for publishers who show that they acted bona fide and that the publication was fair and reasonable having regard, in particular, to the matters set out in s. 26(2) of the 2009 Act. Section 26 may be regarded as an endeavour by the Oireachtas to move away in some respects from the strict liability nature of the common law tort of libel and to introduce – in, admittedly, some specific and limited respects – a negligence based standard in actions for defamation under the 2009 Act. This is reflected, in particular, in s. 26(2)(i) which requires the court to have regard to the endeavours made by the publisher to verify the contents of the article in assessing the defence of fair and reasonable publication."*

Hogan J's judgment in Meegan emphasises the need to ensure that where section 26 is pleaded by way of defence, such plea is adequately particularised. It is accepted here that the section 26 plea has been adequately particularised by the *Irish Times*.

49. Again, I remind myself that this is a discovery application. It is neither necessary nor would it be appropriate for the Court to reach any definitive view as to the precise nature and scope of the fair and reasonable publication defence. On the other hand, it is necessary to form some view at least as to the general contours of that defence, given that the parties' respective positions on the disputed categories of discovery in turn reflect different views on the scope and effect of section 26.

50. In the first place, it is clear that an essential element of the new defence is that the defendant must prove that "*in all of the circumstances of the case, it was fair and reasonable to publish the statement*": section 26(1)(c). While section 26(2) structures how the court (which in relation to a defamation action in the High Court means the jury, if the court is sitting with a jury) should determine whether it was fair and reasonable to publish, it is important to note that section 26(2) does not limit the matters that the court is to take into account. To the contrary, section 26(2) very clearly provides that the court *"shall .. take into account such matters as the court considers relevant"*. I would add that it is not open to a defendant, by its pleading, to circumscribe what it is required to establish by section 26. *In all cases, what must be shown by a defendant is that "in all of the circumstances of the case, it was fair and reasonable to publish the statement*" (emphasis added)

51. The matters to be taken into account *include* the matters specified at section 26(2)(a) to (j). These cover a wide variety of matters, some directed to the substantive content of

the statement/publication at issue ((a), (b), (c) (at least in part), (d) and (h)) but others appear to be directed to the circumstances in which the statement is published ((c) (insofar as it refers to the context of the statement) (e), (i)) and/or the background to publication ((f), (g) and (j)). Some of these matters are more open-ended than others. Thus, for instance (f) and (g) *prima facie* involve a potentially broad inquiry as to the extent to which the publication of the statement complained of adhered to the Press Council's standards, which cover matters such as fair procedures and honesty, respect for rights such as the right to one's good name and privacy.

52. I accept that, as Mr McCullough submits, many of the matters set out in section 26(2) are directed to the statement itself. I am not, however, persuaded that the assessment of whether it was fair and reasonable to publish is confined to a consideration of the statement. Any such contention would, in my opinion, be inconsistent with the language of section 26(1)(c) itself as well as being impossible to reconcile with the range of matters identified (on a non-exclusive basis) in section 26(2).

53. I do not think it can plausibly be said that editorial decisions - in terms of deciding whether to publish or not and decisions as to when and what to publish – are a *priori* excluded from the assessment of whether it was fair and reasonable to publish a particular statement. Subsection 26(2)(e) specifically addresses the timing of publication and clearly involves an editorial judgment. The *context* of the publication, which is expressly referred to in section 26(2)(c), also potentially involves consideration of editorial judgment. Section 26(2)(h) also potentially involves consideration of editorial judgment in terms of decisions as to how to report the plaintiff's version of events. Equally – so it appears to me - the actions taken by the journalists involved in the publication may be relevant to any assessment of the fair and reasonable publication issue. Section 26(2)(f), (g), (i) and (j) all focus on aspects of the preparation of the statement in respect of which a defamation action is brought.

54. At the level of general principle, it appears to me that the steps taken by a newspaper in the preparation of a story for publication and the editorial decisions that determine whether, when and in what form it is published are potentially relevant – and in many cases may potentially be of considerable significance - in determining whether it was fair and reasonable to publish. *As Cox & McCullough* note (at 14-217)"*[e]vidence will almost certainly be required to establish that it was fair and reasonable to publish the statement, with particular reference to the list of matters set out to be considered for those purposes in section 26(2) of the Act*" and, where such evidence is given, it seems to me that editorial decision-making must, in principle, be a legitimate area of inquiry in examination and/or cross-examination

55. Separately, section 26(1)(a)(i) requires the publisher to prove that the statement at issue was published in "*good faith*." As *Maher* notes (at para 9-63) it appears that "*defendants may be expected to go into evidence in order to demonstrate their 'good faith' and stand over not just the pre-publication procedures followed, but their state of mind at the time of the publication."* The same point is made in *Cox & McCullough* (at 14-217).

Interestingly, in this context *Maher* also notes that pleading a section 26 defence "*can 'open the door' to discovery by which the plaintiff may have access to the notes, emails and other material of the defendant relating to the period prior to publication*" which observation is consistent only with a view that the section 26 defence may involve scrutiny of the pre-publication/editorial process to scrutiny.

56. *Maher* makes this explicit in its discussion of discovery and journalistic privilege:

> *"A defendant pleading a section 26 defence may be required to give detailed particulars of how the offending statement was prepared and published, and may be directed to make discovery of documents and relevant material generated during that process. In addition to the normal privilege claims available to defendants facing discovery orders, media publishers may wish to claim journalistic privilege over reporter's notes and other preparatory material, such as memos created when journalists were first assigned their tasks, or early drafts of the impugned publication created in the editing process."*

57. *Cox and McCullough* is to the same effect, with the authors noting that *"[w]here there is a plea of s 26 of fair and reasonable publication on a matter of public interest, there may be a requirement to discover journalists' notes and other material relating to the issue of whether or not it was fair and reasonable to publish the statement concerned*." While in his judgment in *Meegan v Times Newspapers Ltd* Hogan J noted that no authority is cited for that statement, it appears to me that, as a matter of principle, it is plainly correct, having regard to the terms of section 26 which I have already discussed.

58. I should say that I agree with Mr McCullough that those elements of section 26 that require consideration of the public interest and/or public benefit – and I am here referring specifically to section 26(1)(a)(ii) - involve an objective assessment by the court (or, where relevant, a jury). Without going so far as to suggest that documents in the possession of the publisher may be never be relevant to such issues, documents directed to the publisher's assessment of and/or subjective views on those issues are unlikely to be relevant to the resolution of any issue under section 26(1)(a)(ii) – though such documents may be relevant to other elements of the section 26 defence.

59. It does not follow - and I do not intend to suggest – that, whenever a section 26 defence is pleaded by a publisher, journalists' notes and other such material relating to the pre-publication/editorial process will be *ipso facto* be discoverable. As Hogan J emphasised in *Meegan*, for such material to be discoverable, the plaintiff must satisfy the court that it is both relevant and necessary having regard to the particular defence being pursued: para 12. In other words, as in any discovery application, the party seeking discovery has the burden of establishing that the documents sought are relevant and necessary by reference to the issues actually in dispute in the proceedings. Where a section 26 defence is pleaded, it *may* be that journalist's notes and such will be relevant and necessary and thus discoverable but that will not *necessarily* be the case.

60. I note in passing that in *Walsh v News Group Newspapers* the defendant newspaper accepted that a variety of categories of document – including documents relating to the preparation and publication of the article at issue and the inquiries and investigation undertaken by the defendant – were accepted to be discoverable by the defendant and O' Neill J was satisfied that such documents could be of considerable advantage to the plaintiff in advancing his case, *inter alia*, in attacking the section 26 defence relied on by the defendant: para 11. The Judge also considered that the documents were relevant to the claim made by the plaintiff in those proceedings for aggravated and/or exemplary damages. Similar discovery was ordered by this Court in *Meegan v Times Newspapers Limited* (though that order was overturned by the Court of Appeal effectively on the basis that it was premature in the absence of adequate particulars of the defendant's section 26 defence), in *Ryanair Limited v Channel 4 Television Corporation* and in *Kean v Independent Newspapers*. In all of these proceedings, the defendant relied (*inter alia*) on the section 26 defence.

61. Finally, there are, of course, other issues arising from the pleadings in addition to those arising from the Plaintiff's claim in defamation. Mr Desmond sues for breach of his rights to privacy and breach of confidence, to which the *Irish Times* responds by denying that the information published was either confidential or private but also pleading that, in any event, the public interest in disclosure outweighed any private interests of Mr Desmond. I agree with Mr McCullough that any issue of whether publication of the material was justified in the public interest is an objective one and accordingly that documents directed solely to the publisher's assessment and/or belief as to where the public interest lay in a given case are unlikely to be discoverable. I did raise the question whether, given that Mr Desmond asserts that the material provided to the *Irish Times* is confidential to him, he might be entitled to be told precisely what information the *Irish Times* was provided with and/or had access to which related to him. In response, Mr McCullough pointed out that no relief directed to the identification or return of that information was included in the Statement of Claim and that the pleadings were confined to what had been published by the *Irish Times*. On that basis, he submitted, the discovery sought (and in particular category 1) could not be supported by reference to the breach of confidence claim made by Mr Desmond. I accept that submission, though I would add that the asserted confidential nature of the information provided to the *Irish Times* appears in any event to be potentially relevant to the section 26 defence pleaded by it.

The Disputed Categories

Category 1

All documentation supplied to the Defendant, either by the ICIJ, the Süddeutsche Zeitung or otherwise relating to the Plaintiff and reviewed, relied upon, quoted from or otherwise considered as part of the series of articles referencing the Plaintiff, as referred to in the Statement of Claim.

62. I have already summarised the parties' respective positions regarding this category. There is no doubt that the rationale advanced for the discovery of this category of documents has shifted somewhat as between the initial letter of request, the grounding

affidavit and the submissions made at hearing though perhaps not to a greater extent than is common in applications of this kind. It has been evident to the *Irish Times* at least since it received the Affidavit of Mr Darcy in or about March 2019 that in relation to this and the other categories being sought, the major emphasis was on its relevance to the qualified privilege defence and, particularly, the fair and reasonable publication defence being relied on by the *Irish Times*, as well as the claim for aggravated and/or exemplary damages.

63. I am, however, more concerned by the absence of a Reply. I have considered whether it might be appropriate to decline to rule on the application for discovery until a Reply is delivered. Something like that approach was taken by the Court of Appeal in *Meegan*, though the issue there was the failure of the plaintiff to seek appropriate particulars of the section 26 plea made by the defendant, rather than any failure to deliver a Reply. Ultimately, however, I have concluded that the parameters of the central issues between the parties, and in particular the issues arising in connection with the section 26 defence, are sufficiently clear to enable me to determine whether the categories being sought are relevant and necessary and to avoid any risk that any order for discovery made here would have the flavour of an order for general discovery. That being so, and having regard to the fact that the application for discovery was fully argued before me over a full hearing day, I do not think that it would be in the interests of either party not to adjudicate on the application now.

64. In my opinion, discovery of this category is relevant and necessary. I have reached that conclusion because a key issue in the proceedings is whether it was fair and reasonable to publish the article complained of by Mr Desmond. While no Reply has been delivered on his behalf, it is clear from Mr Desmond's Statement of Claim that he is contesting the decision to publish an article based on (confidential) information relating to him, which information (he says) did not disclose any wrongdoing on his part and which article (he says) was defamatory of him by effectively connecting him in the public mind to the unlawful activities disclosed by the Panama Papers. Mr Desmond also relies on these facts (as he says they are) for the purposes of seeking aggravated and/or exemplary damages. The *Irish Times* has pleaded that it was fair and reasonable to publish the statements of which Mr Desmond complains and that they were published in good faith. Even in the absence of a Reply, it is clear from the Statement of Claim that these pleas are the subject of intense dispute.

65. In these circumstances, the decision to publish the statements complained of by Mr Desmond is clearly going to be the subject of significant debate at trial. That being so, it seems to me that it is *relevant* for Mr Desmond to know what material relating to him was provided to the *Irish Times*. What material was available, what material was selected for inclusion in the article the subject of the proceedings and what material it was decided to omit are all matters which potentially bear on the fairness and reasonableness of the publication and thus on the *Irish Times'* section 26 defence in these proceedings, as well as being relevant to the issue of aggravated and exemplary damages.

66. As regards the question of whether such discovery is necessary, *Tobin v Minister for Defence* makes it clear that once relevance is established, it remains the default position that discovery of the document(s) concerned should be regarded as necessary: per Clarke CJ at para 7.16. That default position can, of course, be displaced. But no argument has been made here to the effect that, even if I were to take the view that this category was relevant, I should nonetheless refuse to direct its discovery on the basis that such discovery is not necessary. It has not been suggested that Mr Desmond has any other means of ascertaining what information relating to him was provided to the *Irish Times* and, absent discovery of category 1, he will remain unaware of what information was provided and the extent to which the published information reflected editorial selection.

67. Accordingly, I will direct discovery of category 1. As I have already made clear, that is without prejudice to any objection to inspection/production which the *Irish Times* considers it appropriate to make.

Category 2

> *(a) All documentation concerning all efforts made by the newspaper to contact the Plaintiff or his representative for comment, to include all notes made of any discussions had or any communication received prior to publication.; and*
>
> *(b) All documentation to include notes of or concerning any editorial decisions relating to the publication of the portion of the article by Colm Keena and Ciaran D'Arcy concerning the Plaintiff which appeared in the 7th April 2016 edition of the Defendant's newspaper to include all earlier drafts.*

68. As to (a), there appears to be no suggestion that the *Irish Times* made contact, or attempted to make contact, with Mr Desmond or Ms McNulty (or any other representative of Mr Desmond) other than by means of the two emails to which Ms Veldon refers in her affidavit. The only issue appears to be whether the Irish Times fairly reported what was said by Ms McNulty on Mr Desmond's behalf. Accordingly, in my opinion there is no basis for directing discovery of category 2(a).

69. As regards 2(b), this appears to me to be relevant to the issue just mentioned, namely whether Ms McNulty's statement was fairly reported. It will be recalled in this context that section 26(2)(h) of the 2009 Act specifies as one of the matters that a court should take into account in deciding whether or not a section 26 defence is made out is "*the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned*." It would have course be open to Mr Desmond and his legal team at trial to conduct an exercise of comparing the relevant part of the article with the statement provided by Ms McNulty. However, it appears to me that the editorial decision that resulted in Mr Desmond's position being recorded as it was is in itself relevant to the issue of whether it was fair and reasonable to publish the article in the form in which it was published and, given that discovery is the only means by which information regarding that decision can be obtained by Mr Desmond, I consider it appropriate to direct discovery of category 2(b), in the more

limited form suggested by Mr Quinn which (with some additional changes I have made for the sake of clarity) is set out below:

> *"All documentation to include notes of or concerning any editorial decisions relating to the publication of that portion of the article by Colm Keena and Ciaran D'Arcy (which appeared in the 7th April 2016 edition of the Defendant's newspaper) that referred to the response of the Plaintiff's spokesperson, to include all earlier drafts of that portion of the article."*

Again, this order is without prejudice to any objection to inspection/production which the *Irish Times* considers it appropriate to make.

Category 3

All documentation relating to, recording or evidencing the knowledge of the Defendant, its servants or agents as to the origins of the Panama Papers and specifically, the data/files/documents received by the Defendant and relating to the Plaintiff or his associated companies.

70. This category was substantially agreed. Mr McCullough very sensibly indicated his client's willingness to discover "*all documentation recording the knowledge of the Defendant, its servants or agents as to the origins of the Panama Papers that relate to the Plaintiff or his associated companies.*" Mr Quinn submitted that this was perhaps too narrow and suggested the retention of the reference to "*or evidencing*". That seems reasonable. Accordingly, I shall direct discovery of the following category:

> *"All documentation recording or evidencing the knowledge of the Defendant, its servants or agents as to the origins of the Panama Papers that relate to the Plaintiff or his associated companies."*

For the avoidance of doubt, this order is without prejudice to any objection to inspection/production which the *Irish Times* considers it appropriate to make.

Category 4

All documentation relating to any discussions or communications as between the Defendant and other journalists (including without limitation, other members of the International Consortium of Investigative Journalists (ICIJ)) and/or with the persons who supplied to the Defendant the leaked material concerning the Plaintiff, relating to the identification of material considered to be relevant to Ireland and specifically relating to the Plaintiff and showing or attempting to show the reasons why that material was selected for publication and/or considered to be in the public interest.

71. I am not satisfied that this category is relevant to any of the issues arising in these proceedings nor am I satisfied that discovery of this category of documents is necessary for the fair disposal of the proceedings or for the purpose of saving costs.

72. In the first place, I agree with Mr McCullough that the issue of whether publication of the disputed article was (as the *Irish Times* asserts) in the public interest, is a matter for

assessment by the court. The subjective views of the *Irish Times* itself, and/or of other members of the ICIJ involved in the Panama Papers exercise, do not appear to me to be relevant to that assessment. Secondly, and in any event, this aspect of the application must fail because it is wholly speculative. I am effectively asked to infer that other members of the ICIJ had an input into the decision of the *Irish Times* to publish the article the subject of these proceedings. There is no basis for any such inference in the material that has been put before me. Equally, there is no basis for any inference that other members of the ICIJ might have communicated a view to the *Irish Times* that the material relating to Mr Desmond was not such as to warrant public disclosure. It may be that the documents relating to Mr Desmond were brought to the attention of the *Irish Times* by others involved in the analysis of the Panama Papers but that falls far short of providing a basis for directing the discovery of this category of documents in my view.

73. Accordingly, the Plaintiff's application is successful to the extent that I am directing discovery of category 1, category 2(b) (in modified terms) and – effectively by consent – category 3 (again in modified terms). I refuse discovery of category 2(a) and category 4. I will hear the parties as to any consequential matters.

SCHEDULE – SECTION 26

26(1) It shall be a defence (to be known, and in this section referred to, as the "defence of fair and reasonable publication") to a defamation action for the defendant to prove that

(a) the statement in respect of which the action was brought was published

(i) in good faith, and

(ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,

(b) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and

(c) in all of the circumstances of the case, it was fair and reasonable to publish the statement.

(2) For the purposes of this section, the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters as the court considers relevant including any or all of the following:

(a) the extent to which the statement concerned refers to the performance by the person of his or her public functions;

(b) the seriousness of any allegations made in the statement;

(c) the context and content (including the language used) of the statement;

(d) the extent to which the statement drew a distinction between suspicions, allegations and facts;

(e) the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication;

(f) in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council;

(g) in the case of a statement published in a periodical by a person who, at the time of publication, was not a member of the Press Council, the extent to which the publisher of the periodical adhered to standards equivalent to the standards specified in paragraph (f);

(h) the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned;

(i) if the plaintiff's version of events was not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person; and

(j) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.

(3) The failure or refusal of a plaintiff to respond to attempts by or on behalf of the defendant, to elicit the plaintiff's version of events, shall not—

(a) constitute or imply consent to the publication of the statement, or

(b) entitle the court to draw any inference therefrom.

(4) In this section

"court" means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury;

"defamation action" does not include an application for a declaratory order."