THE HIGH COURT

[2024] IEHC 134

[2016 No. 6187P]

BETWEEN:

DERMOT DESMOND

PLAINTIFF

AND

THE IRISH TIMES LIMITED

DEFENDANT

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 5th day of March 2024.

1. Section 26 of the Defamation Act (2009 Act) gives a defendant who can establish "fair and reasonable publication" in the public interest a defence to a defamation action. Dermot Desmond claims that the Irish Times defamed him in articles published in April 2016. One of these articles contained information relating to him which came from the Panama Papers.

2. The main issue in this application is whether proposed evidence of Dr Joseph Stiglitz is admissible to establish that the article in which the statement published about Dermot Desmond appeared was "discussion of a subject of public interest, the discussion of which was for the public benefit" within s.26(1)(a)(ii) of the 2009 Act.

3. A second issue is whether this proposed evidence is admissible to establish a defence of publication in the public interest in response to a claim by Dermot Desmond for damages for breach of privacy. He claims that the information published by the Irish Times was private and should not have been published.

4. Expert evidence is admissible wherever a subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience. Order 39 rule 58(1) of the Rules of the Superior Courts states "expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings." This type of evidence may be received on matters which are outside common knowledge.

5. Existence of offshore tax havens and use of corporate structures to avoid paying tax and to hide wealth are within common knowledge. Long-running debate about such arrangements and concerns about the extent of these practices, and their effect on taxation equity and on economies are also within common knowledge.

6. It is not necessary for the Irish Times to prove that society or the economy have received "benefit" as a result of disclosures in this reportage in order to establish the defence provided by s.26(1) of the 2009 Act.

7. Proof of such benefit is not a necessary ingredient of any defence of disclosure in the public interest as an answer to a claim for damages for breach of privacy rights.

8. As the proposed evidence of Dr Stiglitz is not relevant to any issue which must be decided, it follows that it is not admissible. The Irish Times may not call Dr Stiglitz to give the proposed evidence.

9. The Panama Papers comprise 11.5 million documents which were leaked from files of Panamanian lawyers in 2015. Journalists in several newspapers, including the Irish Times, the Guardian and the Washington Post and in the International Consortium of Investigative Journalists (ICIJ) worked on this source material for a number of months. On 3 April 2016, this news story broke in articles published by these newspapers. Further articles containing disclosures from the Panama Papers were published during the following weeks.

10. One of these articles which was published by the Irish Times on 7 April 2016 referred to Dermot Desmond. The theme of this article was that a number of Irish people and businesses used the Panamanian lawyers to conduct business through offshore legal structures in tax havens such as Panama and the British Virgin Islands. This article included information on transactions conducted by Dermot Desmond.

11. Dermot Desmond claims that, read together with content of earlier articles in the Irish Times which referred to disclosures from the Panama Papers as "expos[ing] an alarming list of clients involved in bribery, arms deals, tax evasion, financial fraud and drug trafficking", that the words published on 7 April 2016 defamed him by conveying that he was involved in financial wrongdoing.

12. He also claims that the information relating to him came from material illegally purloined from the Panamanian lawyers which was published by the Irish Times breach of his right to privacy.

13. The Irish Times relies on the defence of fair and reasonable publication on a matter of public interest, given by s.26(1) of the 2009 Act. It says that the article which referred to Dermot Desmond was published in good faith, and in the course of, or for the purpose of, a discussion of public interest, the discussion of which was for the public benefit, namely the growth of offshore tax and regulatory havens.

14. The Irish Times wishes to call Dr Joseph Stiglitz as a witness at trial. The Irish Times says that his expert evidence is relevant to public interest and public benefit elements of its defence of fair and reasonable publication on a matter of public interest. It says that this evidence is also relevant to its defence of disclosure in the public interest in answer to the claim for damages for breach of privacy.

15. Dr Stiglitz is an expert in public economics and public finance. He has been awarded the Nobel Prize in Economic Sciences for his work on information economics. This "broadly studies the importance of information in a wide range of settings." He has produced a report dated 19 May 2023 which sets out his intended evidence. This report was

commissioned long after this action was set down for trial and listed for allocation of a date for hearing.

16. Dr Stiglitz provides an economist's perspective on the value of transparency in the international financial system and the economic significance of the Panama Papers revelations in the context of use of tax havens and tax avoidance vehicles.

17. In summary, his proposed evidence is that use of offshore havens providing tax avoidance vehicles and regulatory structures which impede transparency has adverse economic effects. These activities reduce efficiency of markets, reliability of information for economic planning and money available for governments to use in ways which will promote efficient markets which generate wealth. They distort competition.

18. Dr Stiglitz states that offshore wealth increases global wealth inequality. Studies using data from the Panama Papers and other similar investigations illustrate this. Lack of information makes it difficult to understand the full scope of the problem. If such information is in the public domain, the media, academics and voters can be more effective in influencing policy. The media have a key role in aggregating and distilling information. The media subjected the 11.5 million documents in the Panama Papers to this process. Without that input the value of this information would have largely gone unrealised. The media have a role in public policy decisions. Societal value of such information is only realised if that information is presented in a manner which stimulates public interest.

19. Highlighting practices disclosed by the Irish Times from the Panama Papers such as use of bearer shares aligns with the economic understanding of the public interest in the effective functioning of markets, the value of information, the value of transparency in the international financial system and the value of the media.

20. Dr Stiglitz states that publication of disclosures from the Panama Papers has resulted in significant public benefit. Scholars have credited the Panama Papers revelations with changing public perception on tax avoidance and corporate transparency. He states that publicly traded firms lost a cumulative €174 billion in stock value as a result of being implicated in the Panama Papers. He takes this stock price movement as showing the importance of the information revealed.

21. Dermot Desmond contends that Dr Stiglitz's report does not contain admissible evidence. He contends that this report is not the product of expertise of Dr Stiglitz as an economist and could be advanced by counsel as a submission or by a judge giving reasons for a decision on a point of law based on that judge's general knowledge.

22. Dermot Desmond also contends that Dr Stiglitz's evidence is not admissible because issues of "public interest" and "public benefit" are objective matters of law which are not for the jury and that views or opinions of journalists and economists on such matters are in any event irrelevant. He submits that evidence of matters which postdate the Irish Times articles, such as results of economic research on the effects of the Panama Papers, is

irrelevant, as the defence under s.26(1) of the 2009 Act must be made out by reference to circumstances existing at time of publication.

23. I agree that in assessing whether an occasion of qualified privilege exists or whether an opinion in relation to a matter of public interest is honestly held, a court is generally confined to considering material known to the publisher of the statement at time of publication: see *Loutchansky v. Times Newspapers Ltd* [2002] QB 321 ([2001] EWCA Civ. 536); *Cohen v. Daily Telegraph Ltd* [1968] 1 WLR 916.

24. However, these decisions relate to defences of qualified privilege and fair comment in which knowledge by a defendant of a particular matter was relevant to proof of matters such as honesty, malice or proper journalistic standards. These types of issue have no bearing on whether the evidence of Dr Stiglitz could be admissible in this action.

25. Dermot Desmond contends that Dr Stiglitz should be prohibited from giving evidence on grounds that he is partisan. He says the Dr Stiglitz exceeded his brief by referring to Dermot Desmond when commenting on use of bearer shares and because he had a fleeting involvement with a Panamanian Government Commission.

26. There is nothing in these allegations of partisanship. Nothing has been identified which gives me any concern that Dr Stiglitz might be a partisan hack. I do not consider that he overstepped the mark in mentioning use of bearer shares as a tool for opaque corporate control. There is no evidence of bias in his report.

27. Nothing arises from the disclosure by Dr Stiglitz that he declined to be involved in a committee of experts to recommend changes in the financial and legal system in Panama. He stated that his involvement ceased because the Panamanian authorities refused to guarantee that the committee's findings would be made public. Dermot Desmond has not demonstrated that this could have any bearing on the content of his report. His report is not based on misuse of material obtained during his brief time on this committee.

28. Dermot Desmond complains that the Irish Times did not refer to intention to call Dr Stiglitz as an expert in its defence and indicate the nature of his proposed evidence, as required by O.21 r.23(1) of the Rules of the Superior Courts. He complains the Stiglitz report should have been commissioned long before 2023. He says that these failures are abuses of court procedures which were introduced to bring discipline to use of expert evidence. He submits that the proposed evidence should not be permitted for these reasons.

29. I agree that the Irish Times failed to comply with these requirements. However, these failures, taken in isolation, might not be decisive.

30. Section 26(1) of the 2009 Act provides: "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."

31. By s.26(2) of the 2009 Act: "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; (j) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement."

32. By s.26(4) of the 2009 Act: "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; …"

33. This statutory intervention occurred against a background of development by English courts of a variant of the common law defence of qualified privilege called the "Reynolds public interest defence": See *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127([1999] UKHL 45); *Bonnick v. Morris* [2003] 1 AC 300 ([2002] UKPC 31) and *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 ([2006] UKHL 44). The law in this jurisdiction took a similar course: see *Leech v. Independent Newspapers (Ireland) Ltd* [2007] IEHC 223. Much of the content of s.26 of the 2009 Act appears to have been informed by the English experience.

34. Historically, issues of whether comment or opinion are on a matter of public interest or whether words are published on an occasion of qualified privilege have been matters of law which are decided by a judge.

35. The reason for these rules is explained by the following passage from Willes J. in *Henwood v. Harrison* (1872) L.R. 7 C.P. 606 at 628 which was cited with approval by Viscount Finlay

in *Sutherland v. Stopes* [1925] AC 47 at 63,64: "It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the church, the army, the navy, parliament itself, to be of no national or general importance, or the liberty of the press to be of less consequence than the feelings of a thin-skinned disputant. In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded."

36. The effect of this "division of labour" is that a judge decides whether a comment or opinion was "on a matter of public interest." A jury gets to decide whether a comment or opinion was honestly held. In general, a judge decides on whether the words complained of were published on an occasion of qualified privilege. For instance, this may be because the circumstances prove reciprocal duty and interest in communicating and receiving information. A jury decides on whether that occasion of privilege has been abused to convey defamatory material (malice or no malice) or on some other issue of fact such as whether a report to which qualified privilege attaches was fair and accurate or whether a defendant believed that a person had a duty to receive information contained in a statement: see s.18 of the 2009 Act. Whether that person had reasonable grounds for such a belief may be a matter for a judge.

37. The House of Lords has applied this rule to the Reynolds public interest defence. Per Lord Hoffman in *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 ([2006] UKHL 44) at 382, para. 49: "The question of whether the material concerned a matter of public interest is decided by the judge. As has often been said, the public tends to be interested in many things which are not of the slightest public interest and the newspapers are not often the best judges of where the line should be drawn."

38. The purpose of s.26 of the 2009 Act is to protect responsible journalism or other responsible discussion of matters in the public interest. As was stated by Lord Nicholls in *Bonnick v. Morris* [2003] 1 AC 300 ([2002] UKPC 31) at 309, para. 23: "Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved."

39. The law must strike a balance between journalistic and other freedom to publicly discuss matters and the public interest in both receiving relevant information and preventing injury to private reputations: see *Flood v. Times Newspapers Ltd* [2012] 2 AC 273 ([2012] UKSC 11) at 290, para. 44 per Lord Phillips PSC.

40. Section 26(1) of the 2009 Act regulates this balancing exercise. Section 26(1)(a)(ii) and (b) lay down legal tests. A trial judge acting as a judge of law considers whether these statutory requirements are met. The balancing exercise for the trier of fact is set out in 26(1)(c). This provides that issues of fairness and reasonableness which involve

assessment of conformity with proper journalistic standards are matters for the jury in any case where the High Court is sitting with a jury. The issue under s.26(1)(a)(i) of whether a statement claimed to be defamatory was published "in good faith" is also a matter for the jury in any case where the High Court is sitting with a jury and good faith is in issue. Good faith may be assumed unless a plaintiff is able to prove absence of good faith.

41. The issue of whether a disclosure is in the public interest and is therefore a good defence to an action for damages for privacy is also a matter of law for a trial judge.

42. It follows from this that Dr Stiglitz, were he permitted to give evidence at this trial, could only provide material relevant to issues which a judge must decide.

43. Fair comment and honest opinion related to a matter of public interest are established concepts in the law of defamation. Public interest in communicating and receiving information was an ingredient in the Reynolds public interest defence. Section 4 of the Defamation Act 2013, which replaces the Reynolds public interest defence in England and Wales, also provides a defence of publication of a statement "on a matter of public interest."

44. It does not follow that "a matter of public interest" as understood the context of defences that words published consisted of fair comment or honest opinion related to a matter of public interest is identical to "a subject of public interest, the discussion of which was for the public benefit" in the context of the defence of fair and reasonable publication.

45. Section 26(1)(a)(ii) of the 2009 Act requires more than that the statement complained of be established to have been "in the course of, or for the purpose of, the discussion of a subject of public interest". The discussion of this subject must also have been "…for the public benefit".

46. The issue in this application differs from that which was considered in the judgment of Collins J. *Desmond v. The Irish Times Limited* [2020] IEHC 95. The question there was whether documents which recorded views or beliefs of Irish Times staff on the issue of "public interest" or "public benefit" of publication of material from the Panama Papers which included references to Dermot Desmond were discoverable.

47. Collins J. concluded that as the issue of whether a statement claimed to be defamatory came within s.26(1)(a)(ii) of the 2009 Act was a matter "for assessment by the court." Documents disclosing views of Irish Times staff or other members of the ICIJ on whether they were acting in the public interest were not relevant. Evidence on such matters could not assist a trial judge.

48. Any subjective belief of an author or publisher that a subject was of public interest or for the public benefit is not relevant to the defence of fair and reasonable publication. Section 26(1) of the 2009 Act does not include a requirement, such as exists in England and Wales by virtue of s.4(1)(b) of the Defamation Act 2013, that "the defendant reasonably believed

that publishing the statement complained of was in the public interest." Section 26(1)(a)(i) requires only that the statement be published in good faith.

49. The issue in this application is whether the trial judge can receive expert evidence of Dr Stiglitz to assist in forming a view on whether the discussion within which a statement published came within parts of the test set out in s.26(1)(a) (ii) of the 2009 Act. This requires that the statement complained of was published "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".

50. What does this phrase "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" mean?

51. This wording differs from that used in the statutory defence of qualified privilege which centres on whether there are reciprocal duties or interests in communicating and receiving communication of information: see s.18(2) of the 2009 Act.

52. This wording is also different from wording used in the statutory "defence of honest opinion" which must be "related to a matter of public interest." The concept of "a matter of public interest" in the context of this defence is well established. It has a specific, if not particularly well-defined, meaning which relates to anything which may be the proper subject of free public comment or opinion and courts should not confine it within narrow limits: see *London Artists Ltd v. Littler* [1969] 2 QB 375 at 391 per Lord Denning MR. Honest comment and opinion may be freely expressed. Such comment or opinion may relate to trivia in the public sphere.

53. The Reynolds public interest defence did not protect defamatory content within such trivia. That defence required "a real public interest in communicating and receiving the information" which went beyond what might be newsworthy to the target audience of a publisher. "There must be some real public interest in having this information in the public domain. But this is less than a test that the public 'need to know,' which would be far too limited": see *Jameel v. Wall Street Europe Sprl* [2007] 1 AC 359 ([2006] UKHL 44) at 408, para. 147 per Lady Hale.

54. This concept of a "matter of public interest" embraced a wide category of matters of importance which the public may discuss and exercise informed judgement on. There is no exhaustive list of such subjects: see Charleton J. in *Leech v. Independent Newspapers (Ireland) Ltd* [2007] IEHC 223.

55. While the meaning of the term "on a matter of public interest" is not further defined or explained in s.4 of the Defamation Act 2013, it continues to have a narrower meaning than that which applicable to the defence of honest opinion on a matter of public interest. However, the term "on a matter of public interest" does not mean "in the public interest": see *Serafin v. Malkiewicz* [2020] 1 WLR 2455 ([2020] UKSC 23) per Lord Wilson at 2477, para. 75 (A).

56. The judiciary exercise scrutiny over asserted public interest: see *Cogley v. RTÉ* [2005] 4 I.R. 79 ([2005] IEHC 180) at 98, para. 55. However, that scrutiny must be within the confines of s.26(1)(a)(ii) and s.26(1)(b) of the 2009 Act. So long as these conditions are met, free speech is protected. It is not for the judiciary to interpret this provision in a manner which impedes informed public debate on issues of importance.

57. There are two elements to s.26(1)(a)(ii). The first element is that publication of the statement complained of must have been either "in the course of… the discussion of a subject of public interest" or "for the purpose of…" that discussion. The second element is that "discussion" of that "subject" must have been "for the public benefit". This test centres on promotion of public discussion subject raised rather than the statement complained of.

58. The first element asks whether the context ("…in the course of, or for the purpose of, …) within which the statement was published was "discussion" of "a subject of public interest".

59. The second element asks whether discussion of that subject was "for the public benefit". What was the subject being discussed? Was that subject of public interest? Was discussion of that subject for the public benefit?

60. "Discussion" in this context means dialogue, conversation or raising an issue relating to the subject. The term "for the public benefit" connotes some value or benefit that accrued to the public, such as where the discussion of a subject or issue had value in informing public opinion, knowledge, debate or understanding. This excludes publication of material which is predominantly for a private benefit and publication of material which is purely for public entertainment. I refer to the comments of Charleton J. in *Leech v. Independent Newspapers (Ireland) Ltd*, summarised at para. 54 of this judgment.

61. The purpose of this requirement that the discussion of the subject matter be "for the public benefit" clarifies that the test has an additional element and is not to be equated with the "matter of public interest" test used in the defence of honest opinion provided by s.20 of the 2009 Act.

62. Section 26(1)(a)(ii) requires a trial judge to make a value judgment on content within context. In my view this is not a complicated task. It involves an assessment of the material published. Concepts such as enlightenment of public opinion or the value bringing prominent issues to public attention are easily understood.

63. It will often be obvious from the content of an article in a newspaper or a television programme that the subject matter has the necessary "public interest" characteristics. These characteristics are central to investigative journalism.

64. Dr Stiglitz can demonstrate that revelations from the Panama Papers which were put into the public domain by newspapers had significant positive economic impact because they consisted of reliable information which was presented in a manner which engaged the

attention of the public. He can also show that lack of transparency and tax avoidance driven regimes result in market inefficiency.

65. However, it is a matter of common knowledge that tax avoidance jurisdictions exist and that their regulations and corporate models promote opaque business dealings and conceal wealth. It has long been known that Panama and the British Virgin Islands which are mentioned in the Irish Times article are tax havens. The same goes for Jersey and the Isle of Man which have featured in other disclosures and public discourse relating to dealings of Irish people.

66. It has also long been known that Switzerland, which was mentioned in the Irish Times article, is used by the rich because of the Swiss reputation for keeping financial secrets. These are all matters of common knowledge. Potential public interest and potential public benefit from information of this type of discussion are not matters which require expert evidence on economic benefit from press disclosures of content from the Panama Papers.

67. The defence of fair and reasonable publication as provided for by s.26(1) of the 2009 Act does not require proof that the public at large or the economic system have received some discernible benefit as a result of discussion of a subject of public interest. This defence would have a very narrow ambit if such proof were necessary. It cannot have been the policy of the Oireachtas that changes to existing law which were codified in this section would be so narrowly confined.

68. Any evidence from Dr Stiglitz which goes to demonstrate beneficial economic effect as a result of publication by the press of disclosures from the Panama Papers is not relevant because proof of this is not necessary.

69. The same point applies to the public interest defence which is raised by the Irish Times in answer to Dermot Desmond’s claim for damages for breach of privacy. The law must act consistently when dealing with issues which are identical. If such a defence exists, there is no reason to use different “public interest” criterion in determining whether the Irish Times is entitled to succeed in that defence.

70. This matter will be listed on the 11 of March 2024 at 10am to deal with costs.