Neutral Citation Number: [2011] IEHC 425

THE HIGH COURT

2011 734 P

BETWEEN

MERCURY ENGINEERING, MICHAEL KENNEDY AND

FRANCIS MATTHEWS

PLAINTIFFS

AND

McCOOL CONTROLS AND ENGINEERING LIMITED

EUGENE McCOOL (OTHERWISE FINN) AND

M AND G. VENTILATION AND AIR CONDITIONING LIMITED,

SANDYFORD VENTILATION LIMITED,

BARRY CLARKE TRADING AS CLARKE ELECTRICAL,

D.M.I.A.C. ENGINEERING LIMITED

GERRY McCOOL TRADING AS D.M.C. ELECTRICAL SERVICES TEMPLE MECHANICAL CONTRACTORS LIMITED ((IN LIQUIDATION) GLENMORE ELECTRICAL SERVICES LIMITED, S. & S. ELECTRICAL LIMITED (VOLUNTARY LIQUIDATION)

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy dated the 19th day of July 2011

The 2010 Proceedings
1. Present Notice of Motion

By notice of motion dated the 26th January, 2011 the plaintiff applied for the following orders:

> 1. An order restraining the defendants or either or any of them, their servants or agents from communicating to third parties, including but not exclusively, third parties with business relations with the plaintiff, verbally, by media interviews, by any written form, including e-mails and by any symbolic or pictorial means, false and/or misleading information of and concerning the plaintiff and its business relations and dealings with the defendants or any of them, their servants or agents.
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> 2. An order restraining the defendants or either or any of them their servants or agents from maliciously communicating to third parties, including but not exclusively, third parties with business relations with the plaintiff (in the same manner) false and/or misleading information of and concerning the plaintiff and its business relations and dealings with the defendants or any of them or their servants or agents.

2. Previous Notice of Motion (2010)
Identical reliefs were sought by the first named plaintiff against the first two defendants in proceedings entitled Mercury Engineering v. McCool Controls and Engineering Limited and Eugene (otherwise) McCool in Record No. 2010 6258P (the 2010 proceedings) in respect of which a notice of motion dated the 5th July, 2010 issued.

It is necessary to refer to that motion in the 2010 proceedings before addressing the present application.

In the 2010 proceedings by an affidavit of Frank Mathews, company director of the plaintiff, sworn on the 5th July, 2010, it was averred that the plaintiff was one of the main contractors and was responsible for mechanical and electrical engineering works in connection with the construction of the then new terminal No. 2 ("T2") for the Dublin Airport Authority at Dublin Airport. In that capacity, the plaintiff was responsible for appointing sub contractors to carry on various aspects of the said works.

By agreement between the plaintiff and the first named defendant dated the 7th and 9th July, 2008, McCool Controls and Engineering Limited were appointed as subcontractor for the supply and installation of the building management system, software and controlled engineering systems on part of the site. The second named defendant was a director and the third named defendant and employee of the first named defendant and son of the second named defendant. The T2 project was due for completion in August 2010. From early stages of the project difficulties arose regarding the work being carried out by the first named defendant. The plaintiff commenced the process of agreeing final work schedules and final accounts for the relevant sub contractors which numbered in excess of 70. By the end of April 2010, agreement had been reached with a number of subcontractor firms while negotiations were still ongoing with the remainder. Agreement could not be reached with two subcontractors whose contracts had been determined by the plaintiff including that of the first named defendant.

The deponent referred to correspondence and, in particular to three invoices dated the 18th of May, 2010, contained in a letter of the 27th May, 20010, which claimed sums due approaching almost €1.5 million which the plaintiff alleged had no basis in fact. The plaintiff refuted these invoices and claimed over €1.8 million from the first named applicant.

By e-mail dated the 7th May, 2010, the third named defendant wrote to various persons, including companies with which the plaintiff had ongoing business relationships, setting out the defendants view of the matter in dispute, alleging that the plaintiff was delaying or possibly avoiding reaching a commercial settlement with the first named defendant, who claimed copyright in the software of works.

The deponent stated that rather than pursue the resolution procedures provided for an agreement between the parties, the defendants engaged with an unofficial group described as the "T2 Subcontractors Group" and conspired by pressure tactics to force conclusions to disputes in the plaintiff. The second named defendant spoke disparagingly of the plaintiff in or about the conduct of their business affairs, e-mail was sent to Chris Ainsworth of Ultra Electric Airport Systems and Colm Moran of the Dublin airport Authority. The deponent wrote to Mr. Ainsworth in an attempt to refute the contents of that e-mail. The T2 subcontractors group organised and held a demonstration outside the plaintiffs head office on the 30th June, 2010 and thereafter outside Dáil Éireann and planned a further demonstration for Friday 2nd July, 2010 outside the constituency offices of Minister Noel Dempsey. Many of the demonstrators carried placards bearing comments defamatory to the plaintiff.

It was alleged that, unless restrained by the court the plaintiff, would continue to be defamed by the defendants and would be seriously damaged in connection with their present and future business activities.

An application to have the matter dealt with in the Commercial Court was refused.

There were exhibits in relation to the breakdown of the invoices claimed by the first named defendant and the valuation by Mercury of the sums claimed in the letter of the 10th June, 2010.

The 2010 notice of motion of the 5th July, 2010, to which that affidavit grounded, was heard by the court on the 8th July. The court noted the second named defendant's undertaking on behalf of the defendants to refrain from communicating to third parties in the manner referred in the plenary summons and notice of motion until further order, adjourned the matter reserving costs.

The matter came before Ryan J. on the 29th July, 2010, on the basis of two affidavits from Mr. Mathews, an affidavit from Francis Craven on the 6th July, 2010, of Denis McSweeney of the 7th July, 2010, the affidavit of Barbara Tanzler of the 15th July, 2010, and the affidavit of Eugene McCool filed the 16th July, 2010 and the documents and exhibits respectively referred to. The motion was refused and it was ordered that the plaintiff pay the defendants their costs of the motion.

3. The 2011 Proceedings

By plenary summons on the 26th January, 2011, the plaintiffs' claimed for damages for defamation, for interference with contracts by inducement, for conspiracy to injure the business and reputation of the plaintiffs in order to achieve, by extra judicial means including intimidation, ends otherwise clearly and properly provided for in the subcontract in the first named plaintiff and the first named defendant:

> An order restraining the defendants from communicating or maliciously communicating false and/or misleading information to third parties, including but not exclusively, that the third parties with business relations with the plaintiff.

The court notes that the general endorsement of claim reproduces claims 5 to 11 in the 2010 proceedings and that the notice of motion dated the 26th January, 2011, is in identical terms to the notice of the 6th July, 2010.

4. Grounding Affidavit

The grounding affidavit of Frank Mathews sworn on the 25th January, 2011, referred to a total of number subcontractors working on the project in excess of 55 rather than 70.

Reference was made to agreements between the first named plaintiff and the first named defendant of the 6th August, and the 15th October, 2008, rather than the 7th and 9th July, 2008 for the installation of building management system, software and controlled engineering systems on parts of the site.

The affidavit referred to the e-mail of the 2nd May, 2010, and a letter of the 12th May, 2010 from the plaintiffs' solicitors claiming defamation. The affidavit further referred to the previous affidavits and proceedings for interlocutory relief and its refusal by Ryan J.

Paragraph 17 of the grounding affidavit referred to Ryan J.'s indication that the defendants should not publish unjustified defamatory statements. The order of the 30th July did not contain any such indication.

Paragraphs 18 to 49 had detailed the events since the 29th July, 2010. It is averred that the T2 Group "has escalated its campaign of vilification in that firstly, it has published further defamatory material to a much wider audience including, in particular, companies in which Mercury had ongoing commercial relations, secondly, it has now started to make highly defamatory statements relating to the second and third named plaintiffs and, thirdly, it has made serious threats to further vilify Mercury and its officers until its objective are achieved".

The defendant referred to an e-mail of the 18th September 2010, which stated that most of the defendants ("the T2 Group") having suffered severe financial loss as a result of Mercury's actions and that some have gone into receivership/liquidation, three members of the T2 Group have been hospitalised since the events with two having suffered heart attacks and the T2 Group had organised a joint subcontractor and supplier campaign to fight against what Mercury had done on T2 and would now extend the campaign. The large number of recipients of that e-mail were referred.

The affidavit continued saying that it was clear that the defendants were working in concert to inflict as much damage as possible to the reputation of Mercury and undermine its relationships with its customers with a view to recovering, by extra judicial means monies to which they claim to be entitled, but which, in the case of the first and second named defendants are subject to arbitration. It was stated that it was the defendants' intention to publish and republish as far as possible unjustified defamatory concerning the plaintiff in their business affairs.

The second named defendant had persistently written directly to the plaintiffs other than through their solicitors.

Reference was made to an e-mail dated the 25th October, 2010, addressed to Mr. Enda Kenny TD and Mr. Shane McEntee TD alleging that the contract price of the plaintiff was approximately was €10 million too low and that the Dublin Airport Authority were also aware of that.

Reference was also made in that e-mail to the issue of fire sealing of the building and the engagement for an alternative company to

take over the project and that it would not be possible to obtain a fire certificate for the building.

A further e-mail dated the 12th November, 2010, was published an circulated to a number of politicians and a large number of business entities whereby the T2 Group again made an attack on Mercury in respect of the manner in which the fire certificate was obtained. That certificate was issued in the name of, inter alia, some of the defendants and others.

In an e-mail dated the 17th December, 2010, the second named defendant acting on behalf of the T2 Group, having accused Mercury of tendering below cost for the T2 contract, said that none of the T2 Group would issue any certification or O. and M. Manual for the T2 site and that it was critical that all suppliers would support them on that. The e-mail further stated that Mercury or the Dublin Airport Authority would not be offering to pay anyone's outstanding account for T2. This, the deponent stated, was a clear inducement for breach of contract.

A further e-mail of the 16th December, 2010, sent by the second named defendant to members of management of Mercury and members of the Dublin Airport Authority advised that if Mercury persisted they would have not choice but to involve individual personnel in the Mercury organisation including the shareholders and directors of the company.

By e-mail dated the 7th January, 2011, the threat to involve officers of Mercury was implemented and sent to a series of recipients under the name "Frank Murphy" whose identity was unknown to the plaintiffs. It was alleged that that e-mail clearly threatened to dramatically extend the scope of the publishing of defamatory material to a much wider audience. The e-mail stated that:-

> "We have identified literally hundreds of witnesses to call, including ex and current Mercury staff, DAA personnel and other connected parties and if necessary we can subpoena those who we identify as necessary to the particular case and of course we are aware of the penalty for perjury in a court environment."

The court notes the averment that those words, by innuendo, or otherwise, attempted to suggest that the plaintiffs, their servants or agents were not aware of penalty of perjury and were prepared to perjure themselves which was a most serious and malicious defamation and an attack on the business and personal reputation of the plaintiff.

A request for an undertaking from the defendants that no further defamatory material would be published was sent on the 12th January, 2011, which, in fact, no such undertaking was given but instead a further e-mail was issued on the 13th January, 2011 on behalf of the T2 Group by a Dan Moran whose identity was unknown to the plaintiffs.

The second named plaintiff, Michael Kennedy, had been a member of the Mechanical Building Services Contractors Association for the previous eight years and had been president for the previous two years and had been actively involved in supporting the proposals and lobbying of the joint mechanical and electrical body in the proposal for a draft constitution contract builders to protect the rights of those main contractors and all levels of subcontractors.

The deponent said that Barry Clarke trading as Clarke Electrical was not a subcontractor on the T2 project. High Court proceedings issued by Barry Clarke resulted in the first named p making an application to have those stayed pending arbitration.

The deponent says that there were no court proceedings in relation to M. & G. Ventilation, notwithstanding that seven day warning letters had been sent.

The dispute between John Law of Temple Mechanical had been settled amicably, the account had been closed and a subcontractor final account agreement had been signed.

The reference to Sandyford Ventilation was to a dispute which was settled amicably on the same basis.

In an adjudication involving James French Engineering Limited resulted in a decision of the adjudicator in favour of Mercury and, on the second occasion in favour of James French Engineering Limited. However, no payment was required to be paid to that firm as Mercury had overpaid them.

The deponent said he was not aware of any dispute in DMIAC. Electrical. The account had closed in the subcontract account and a final amount agreement form had been signed.

It had not responsibility in respect of the alleged collapse of Gerry Duffy's over the Cork Hospital project. There was no dispute between Mercury and City Ventilation. The dispute between Mercury and Glenmore Electrical had been settled amicably on the same basis on the 13th January, 2011.

On the 13th January, 2011, the account with Keane Electrical Contractors had been closed and payment certificate had issued. The deponent was not aware of any dispute between Ballon Electrical Services Allied Mechanical Limited and Spectron. The accounts had been closed, payment certificates had issued and agreement forms had been signed. The deponent strongly refuted any allegation of coercion against Mr. Conlon, the managing director of Manutec Limited who had written a letter refuting the allegations which was exhibited.

The deponent referred to a letter of the 7th December, 2010 from the National Employment Rights Authority to Mercury confirming compliance with statutory employment for charge rates in Dublin Airport project in respect of Mechanical Electrical Trades and General Labour. He refuted the allegation that Mercury employed staff back on site to an agency at "reduced rates and conditions".

It was also misleading to say that Mercury had "failed to engage in the arbitration process". On the 14th and 19th July, 2010, Mercury had nominated three persons who were experience arbitrators in that complex area. Mercury solicitors had asked for confirmation of one the persons to act as arbitrator but the solicitors for the first and second named defendants had not responded. It was indicated that there had been no such confirmation, Mercury would apply to the President of the Institute of Engineers in Ireland for an appointment in accordance with the terms of a contract between Mercury and McCool.

In a letter dated the 16th December, solicitors for the defendants proposed five persons might act as arbitrator. On the 19th January, 2011, an application was made to the President in the Institute of Engineers seeking the nomination of an arbitrator. Correspondence was exhibited.

The note complained of made reference to requests of the Board of the Dublin Airport Authority and the Minister for Transport to hold an independent investigation into Mercury's interest in the T2 project. He believed that that statement was merely intended to be

damaging to the plaintiffs and suggestive of an element that had no basis in fact and that no investigation had been embarked upon or even proposed.

He referred to a further e-mail dated the 12th January, 2011 and says that it was clear that, as the plaintiffs had only been forwarded that e-mail on the 19th January that certain e-mails published to third parties were not sent to the plaintiffs. It was clear from that e-mail that the response of Ian Kehoe of RTE that the T2 Group had made an approach to RTE was in furtherance of the intention of the T2 Group to publish material defamatory of the plaintiff to a wider audience.

Reference was made to an annual general meeting of MEBSCA, a Committee of the Construction Industry Federation, which was held on the 14th January, 2011, where "Frank" a person whose identity was unknown to the plaintiffs, exhorted various "lads" to attend at this meeting to demonstrate with placards and T-shirts made available to them and asking for the "good turn out".

The deponent summarised the actions of the defendants as seeking to achieve, by extra judicial and, he believed, unlawful means, either the payment and monies the entitlement which was in dispute or additional payments and contracts which are already the subject of concluded settlements. It was averred that while that campaign would confer no benefit on the defendants it had the potential to inflict serious damage on the business and reputation of Mercury and on the reputations of the second and third named defendants.

5. Affidavit of Mr. Priestly
Jack Priestly, director of Mercury Engineering, swore an affidavit on the 4th February, 2011, referring to the proceedings and the grounding affidavit of Mr. Mathews. He also referred to an e-mail dated the 25th January, 2011, from the T2 Group which made certain allegations regarding him, where it was alleged that he made phone calls of an intimidatory nature to members of the T2 Group "demanding a retraction of issues raised in previous e-mails". He said that those allegations were inaccurate and untrue and were an attempt to prejudicially imply false motives for his actions. He said he phoned the directors of DMIAC Engineering inquiring if they had any dispute with the first named plaintiff as their account had bee settled and already paid. The intention was an attempt to avoid having to name as defendant any such person or companies not active in publishing libellous material of and concerning the plaintiff. He said he spoke with Mr. Tom Murphy of DMIAC indicating that he needed to know what attitude was being taken regarding the T2 matters. Mr. Murphy had said he would contact his partner Mr. Carl Lee. Mercury had since received a letter from Mr. Tom Murphy (which was not exhibited) confirming that DMIAC had no dispute with Mercury, were not members of the T2 Group and had not participated in the publishing in defamatory material regarding Mercury.

6. Supplemental Affidavit of Mr. Mathews
Frank Mathews swore a further affidavit on the 4th February, 2011, which had referred to an e-mail of the 25th January, 2011 issued in the name of a Paul Mooney which made certain allegation regarding Jack Priestly, director of Mercury.

The court notes that the reference to Mr. Priestly in the e-mail of the 25th January, 2011 stated that: "we have been contacted by members of the T2 Group this morning who say that Jack Priestly of Mercury has been calling them and demanding a retraction of issues raised on previous mails by 1.00 pm today otherwise they will serve High Court proceedings against members of the T2 Group".

There would appear to be no allegations other than that Mr. Priestly had contacted some of the Group.

A second e-mail of the 26th January, 2011 entitled "Important Message to Mercury from the subcontractors" addressed to staff of Mercury was again issued under the name of Paul Mooney and was and attempt to interfere with the relationship between Mercury and its employees by publishing to the employers libellous and disparaging material in an attempt to further the defendants aims by extra judicial means.

The third e-mail of the 28th January, 2011, issued under the name of Finn McCool, the second named defendant is a response to the issue of service of the within proceedings, which Mr. Matthews averred, showed that the members of the T2 Group or, certainly the second named defendant, were aware of the damage being sustained by Mercury.

Mr. Matthews averred that the second e-mail (26th January) was an attempt to interfere with the relationship between Mercury and its employees by publishing to them libellous and disparaging material in an attempt to further the subcontractors aims by extra judicial means.

The second e-mail of the 26th January, 2011, to which Mr. Matthews referred related to the ongoing issue between subcontractors and Mercury. The e-mail stated that the subcontractors wanted the employees to understand that they were only looking to be treated in a decent manner and to have their legitimate accounts resolved; that the campaign had not set out to damage Mercury that the actions of the current management team in Mercury had brought the company into disrepute (in that they continually refuse to engage or take any steps to rectify the situation). Some of the people affected were ex employees of Mercury; some of the contractors had been working for fifteen year or more with Mercury and provide loyal and diligent service over the years. Many of the companies had since gone into liquidation as a result of what had happened and this had cause devastation to the staff and families of these companies, some of whom had been in business for many years and have been burdened with huge debts for staff, suppliers and the Revenue.

On the T2 site Mr. Mooney said that the subcontractors were told by Mercury and by other mechanical contactors who bid for the job that Mercury took on the project in spite of being €10 million too low. The director of Mercury had told some of their group that "we all had to take a hit here". The €10 million only represented less than 2% of Mercury's annual turnover, yet the bulk of this amount had been taken by the small subcontractors, some of whose losses represented a whole years turnover, hence the collapse of so many. Obviously none of the subbies were aware of this massive shortfall when they undertook on works on T2.

The e-mail stated that the outgoing issue was causing severe damage to the standing and reputation of Mercury in Ireland and overseas. (The subcontractors) had been contacted by numerous people in the trade and had been invited to meetings to explain the background to the issues raised.

It referred to mismanagement, the use of crude and crude methods to achieve a goal and that Mercury management had used the same "heavy handed methods" that had been employed which caused the problems in the first instance.

The resolution was patently obvious and could be resolved very quickly. However, the subcontractors had no choice but to continue the campaign to have their grievances resolved. They called on the directors and the board to put an end to and deal with the problems and sort it out in a professional and efficient way and to act immediately and if necessary to employ the services of outside management consultants.

On the 28th January, 2011, (the third e-mail) Finn McCool had e-mailed the other defendants, members of the Oireachtas and directors of Mercury copying to them notices of the High Court proceedings and calling for a meeting.

Reference was made in that third e-mail to Mr. McCool being singled out personally. His opinion was that the group should consider what loss and damage he had suffered. He refereed to his being personally threatened by a Mercury director and stated that the courtroom was the venue to raise those matters and to come to a settlement.

7. Replying Affidavit
The replying affidavit of Eugene McCool sworn on the 21st February, 2011, referred to the previous application for and injunction before Ryan J. on the 29th July, 2010. He referred to the subcontract entered into between his company and Mercury in July 2008.

He referred to the group of the defendants which, he said were not a pressure group but rather formed as a direct consequence of the plaintiffs' failure to resolve the contractual dispute which was born of necessity. He said he was not the creator or instigator of the group. The number of subcontractors working on the construction of the terminal No. 2 were not in excess of 55 nor indeed 70, but were a total of 24 of whom the defendants formed the bulk and majority of the subcontractors who worked on the site from August 2008 onwards.

Mr. McCool said that Mr. Mathews was aware of difficulties which had arisen from an early stage. He referred to two memos dated the 1st December, 2009, to the plaintiffs. The programme at tender stage was to run until November, 2009, but the completion date was extended as a consequence of what he termed the plaintiffs and management when coordination on site which was responsible for "massive delays" and payment and ultimately non payment of subcontractor accounts which, in turn, had the direct consequence of creating difficulties and agreements between the subcontractors and their various suppliers. The scope of works were also contractors that had increased steadily and exponentially from the original tender for work. He said that the Dublin Airport Authority was aware of this increase which was referred to as "scope creep" in the industry. This had a detrimental effect on subcontractor relations with suppliers as the scope creep had been so significant that they were unable to sustain the increase in cost. He referred to correspondence with one of his major suppliers, Cyclon Controls Limited and exhibited that correspondence. He said the Mercury had contractual obligation to enter into an arbitration process should any dispute arise. He had incurred unnecessary costs as a consequence of Mercury's failure to engage in discussion and resolution of the difficulties. Mercury had no contractual entitlement to remove him from the site in the summary fashion or at all. He said that on the 28th April, 2010, he met with Jack Priestly to discuss the breakdown on their working relationship. Mr. Priestly advised that McCool Controls come back onto the site and finish the job.

He said that substantial work was carried out by his company's subcontractor and the mechanical and electrical elements of terminal 2 were approximately 90% completed when Mercury removed him from the site without payment of works completed causing his company to incur losses estimated at over €1.15 million. Mercury proceeded to appoint another subcontractor to complete the remaining 10% of the works outstanding as a result of which his company incurred further losses.

He said that in his extensive experience within the industry he had never observed or participated in such a badly managed project in relation to control of timescale issues and practical material problems which had damaged his company immeasurably.

The plaintiffs' decision to bring the present proceedings for a second time was an abuse of process. During the 2010 proceedings for injunctive relief the plaintiff sought to invoke the arbitration clause for the first time in a letter dated the 14th July, 2010. That clause should have been invoked prior to any action in the High Court.

The unilateral determination by Mercury of his contract followed by continued action for injunctive relief against him and his company constituted not only an abuse of process but amounted to harassment and defamation.

The plaintiffs' reference to a campaign of defamation and harassment failed to exhibit any evidence to substantiate such claims.

The essence of defamation is that matters stated are untrue and which is not the case. allegations of "pressure tactics and other extra judicial means to force Mercury to pay Finn McCool the sums wrongfully alleged to be due and owing to it by Mercury" was not substantiated. The plaintiffs' claim for over €1.8 million had no basis in fact. As matters progressed it had become more complex, he had proposed that discussions would take place directly with Dublin Airport Authority.

He said that Mercury embarked on a campaign with his company's suppliers which outlined that his company was in financial difficulty and unable to sustain ongoing business. This suggestion had caused irreparable damage to this reputation in the construction industry and the business relationship with his primary supplier had degenerated. Staff who had previously worked with his company were recruited directly by Mercury and despite continued discussions with Mr. Priestly the ongoing dispute between the plaintiff and his company could not be resolved.

He refuted all allegations of defamation. The necessary correspondence with the Dublin Airport Authority was justified in its content. He had no option but to raise awareness of the financial pressure exerted upon his company by Mercury. He did not engage in behaviour which could be regarded as defamatory. The plaintiffs' exhibits contained neither defamatory statements or images. The 2010 proceedings were vexatious in nature and an abuse of natural process and he had exercised his right to free speech and engagement in political discourse in order to gain a resolution to the difficulties arising from the unresolved dispute with Mercury. Mercury had failed to provide evidence of highly defamatory statements. Mercury's own actions have led to the perceived loss of reputation which they may have suffered. Any demise in customer relations stays squarely with the plaintiffs themselves.

The statements were not false, malicious or in any way defamatory. At no stage was the correspondence "a tactical weapon in their intimadatory activities". No evidence was exhibited or elaborated on Mercury claims of intimidation.

He said he did not know how the practical completion certificate was obtained. He noted that the fire safety certificate had not been exhibited by the plaintiffs.

Not false, malicious or defamatory statements were distributed. Much of the information was hearsay but was believed to be true.

He said the Temple Mechanical had gone into liquidation. He understood that Mr. Duffy's company and City Ventilation had collapsed.

It was more appropriate to have a centre of ventilation, DMIAC Electrical and Glenmore electrical respond as appropriate. The Manutek letter referred to by Mr. Matthews did contain a statement refuting "any allegation of coercion" but was rather a letter refuting the suggestion that the plaintiffs did not pay monies owed to the subcontractors, but this was a statement made by Manutek having been paid all due sums.

Mr. Mathews in his affidavit did not deny that members of staff were employed on a different rate from that which members had been originally be employed.

Mercury had failed to exhibit the responses sent to their letters which the deponent then exhibited regarding the appointment of arbitrator.

He referred to the approach to RTE and stated that no defamatory material had ever been published or communicated by him.

All attempts need to recover disputed debts from mercury had not been resolved.

He said that in reference to the affidavit of Mr Priestly sworn on the 4th February, 2011, that he wrote the e-mail exhibited and could stand over its contents and is true and accurate to the best of his knowledge and understanding, but that he was personally under duress and that that e-mail was sent at a time when Mercury had brought legal proceedings against him and his son personally. Mercury's action had caused extreme personal stress and put pressure on his family and associates.

8. Replying Affidavit of Derry McCool
Derry McCool, sole trader of DMIAC. Electrical Services, a defendant in the proceedings, averred that he had a contract with the first named defendant, McCool Controls and Engineering, to carry out the installation of a computer based systems for the control, heating, ventilation and energy systems at Dublin Airport terminal 2 and Pier E building.

As a consequence of the dispute arising from the subcontract between the first named defendant and the plaintiffs in which the plaintiffs had not paid monies owed, he had not received monies owing to him by McCool Controls and Engineering. The amount outstanding is a sum in excess of €300,000. He had been put under financial pressure as a result of this outstanding debt. He agreed with the replying affidavit of Eugene McCool. He believed the plaintiffs' action was entirely misconceived and there was no basis for the plaintiffs' contention that he had or that he had intended to make or publish false or misleading information.

9. Supplemental Affidavit of Mr. Mathews
The second supplemental affidavit of Frank Mathews sworn the 16th March, 2011, refereed to the affidavit of Mr. Eugene McCool, sworn on the 21st February, 2011 which he said was misleading and untrue in that it was an identical application to the application made on the 29th July, 2010, before Ryan J. He said that the extent of the defamation against the parties had increased dramatically since July 2010, and that the defendants had been increasingly emboldened in their action and scope of dissemination of the defamatory material had increased dramatically by extension to officers of the plaintiff which is not confined to their role as directors of Mercury.

He said he believed that e-mails and other exhibits in his earlier affidavits were abundant evidence of the defamation of the defendant. He denied that the plaintiffs embarked on a campaign with the first named defendants' suppliers as alleged or at all.

10. Submissions on Behalf of the Plaintiffs.
The plaintiffs submit that the application for injunctive relief in July 2010, which was dealt with by Ryan J., was refused on the basis that the court was informed that the defendants intended to plead justification in respect of the defamatory statements.

It was submitted that the McCool defendants appeared to have interepreted that refusal as the carte blanche to embark on a campaign of widespread of highly defamatory material not only of the first named plaintiff but also to its directors and had threatened to escalate their campaign of defamation by extending it to officers of the plaintiff by making seriously defamatory statements about the second and third named plaintiffs in an intimadatory and threatening manner.

It was further submitted that most of the non McCool defendants whose names were appended to a number of offending e-mails had disclaimed authorship of these e-mails. It would appear that the second named defendant had placed the names of those parties on these e-mails without their consent. For that reason those parties have been informed that no interlocutory relief was being sought against them. The only remaining parties against whom relief was being sought were the first, second and seventh named defendants.

The McCool defendants had admitted that some of the e-mails were written under fictitious names.

The plaintiff submitted that *Smith Sinclair v. Gogarty* [1937] I.R. 377 applied where O'Sullivan C.J. stated at the granting of an interlocutory injunction to restrain the publication of a libel as the exercise of a jurisdiction by the court of a delicate nature and should only be granted on the clearest case where any jury would say that the matter complained of was libellous and where if jury did not so find, the court would set aside the verdict as unreasonable.

In *Cogley v. RTE* [2005] 4 I.R. 79 Clarke J. referred to the plaintiff failing to cross the first hurdle if, on the basis of the argument and material before the court, it appeared that there was any reasonable basis for contending that the defendant might succeed in the trial of the action.

However, in *Reynolds v. Molloco* [1999] 2 I.R. Kelly J. stated:

> "I do not think that a rule which permits a defendant to in effect oust the ability of this Court to intervene by way of injunction in an appropriate case by the simple expedient of expressing an intention to plead justification at the trial of the action is consistent with the obligations imposed on the Court under the Constitution. Furthermore, the application of such a rigid rule, without an ability on the part of the Court to ascertain whether the plea of justification had any substance or not, would provide a happy hunting ground for unscrupulous defamers.

I am therefore satisfied that it is open to the Court to examine the evidence adduced by the defendant in support of the justification plea so as to ascertain whether it has any substance or prospect of success."

Section 33 of the Defamation Act 2009, provides that the court on application of a plaintiff make an order prohibiting the publication or further publication of statement in respect of which the application is made if in its opinion the statement is defamatory and the defendant has no defence to the action that is reasonably likely to succeed.

It is submitted that the defence upon which the McCool defendants rely on is the defence of justification. Consequently, in order to succeed, they will have to satisfy the jury that the defamatory statements may have been made in the e-mails in question concerning the plaintiff company and the plaintiff directors are true.

The plaintiffs submit that the circumstances of a case are such that not only is the defence "not reasonably likely to succeed" but is in fact doomed to failure in the following circumstances:-

> "The defendants have admitted in their replying affidavit that a number of the e-mails were published under fictitious names;
>
> It is established in evidence that the defendants appended to a number of the e-mails containing defamatory statements the names of real companies and persons (including the non McCool defendants) without their permission, forcing those parties to subsequently disclaim authorship of the e-mails in question
>
> - This raises a serious question of whether the McCool defendants will be permitted to rely on a defence of justification at all;
>
> - The defendants have not produced evidence to the court to prove the truth of any of the defamatory statements about the plaintiff company and the plaintiff directors.
>
> - In their affidavits the McCool defendants have not attempted to identify to the court the basis upon which they propose to prove the truth in numerous defamatory statement contained in the e-mails about the plaintiff company and the plaintiff directors.
>
> - The McCool defendants have not even mentioned the more serious defamatory statements including statements relating to the plaintiff directors concerning their position professional bodies.
>
> - Mr. McCool admits to some of the allegations contained in the e-mail exhibited but believes them to be true.

11. Submissions of the First, Second and Seventh Named Defendants
Counsel refers to the application for in interim injunction being the second application seeking prior restraint of any communication between the defendants and third parties of what was alleged to be "false and misleading information" on the basis that communications are defamatory.

The 2010 application refused by Ryan J. was on the basis that although there was fair issue to tried, damages were an adequate remedy and the courts respect the right of free speech was much more than the plaintiff herein gave them credit for. The court had held that the defence was not a bare plea of justification but that the defendants set out the details of the defence in affidavit, as the defendants had done again in this application.

The notice of motion is in identical terms but was issued by two further named plaintiffs against a further seven defendants including the son of the second named defendant, Derry McCool, the seventh named defendant. The only change since the order of Ryan J. on the 29th July is that further e-mails had been sent.

The facts set out in the affidavits filed before the court are hotly disputed. Essentially, this is a commercial dispute in which sides claim that the other owes money and has breached contractual obligations. Since the 2010 injunction application, an arbitrator ahs been nominated but no progress has been made in the defamation action, the substantive action in these proceedings.

Counsel submits that McDonnell: Irish Law of Defamation, 2nd Ed. 1989, at 262, describes an interlocutory injunction in a defamation action as "nothing short of total denial of free speech which is based on meagre, uncertain, opinionated, hearsay and untested . . . evidence".

However it was not the function of the court to resolve conflicts of fact at an interlocutory stage. Only if a plaintiff was bound to succeed in the main action should an order be granted. The onus was on the plaintiff to prove that they will succeed in the main action.

Before the court even considers the adequacy of damages of the risk of republication, the court must determine the issue of whether or not the material is defamatory. In order for the plaintiff to prove that it is, he must prove that there is no reasonable prospect of him losing the case or, in the words of Kelly J. in *Reynolds v. Malocco* there must be "no doubt" that the words are defamatory.

It is submitted that it is unusual for such an order to be made, Kelly J in *Foley v. Sunday Newspapers Limited* [2005] I.E.H.C. 14 held that save in "truly exceptional circumstances" the court would not impose a prior restraint on publication unless it was clear that no defence would succeed at trial.

The defendants in this case maintain and have always maintained that they have not been paid and their communication has been to inform others including suppliers, so as to explain why they in turn cannot meet contractual payment obligation and try to obtain payments themselves from the first named plaintiff. It is submitted that *Reynolds v. Malocco* was based on facts which were quite different. Reynolds was the subject of an article written by Malocco and about to be published in which the overall innuendo was that he had allowed drugs to be supplied in a nightclub and that he benefited from the sale of such drugs and that there were reference to him being a "gay bachelor". There was no attempt by the defendant to support the allegations but only the assertion that he would in future be justification. The only reference in his affidavit was that he had witnessed drug dealing by third parties on an occasion on the plaintiff's premises.

In the present case the second named defendant has set out in full the factual basis for his claims that he had not been paid and that many of the other subcontractor had not been paid and that his contract was termination unfairly and wrongfully. Those matters had all been confirmed in sworn affidavits.

Applying the law to the facts of the present case, it was submitted that it was clear from the exhibits that the campaign was supported by a large number o subcontractors many of whom were sued by the plaintiff.

Not only were the averments of the second named defendant supported by correspondence in the e-mail exhibits but they were supported by material in the plaintiffs own affidavit and by the very fact that the commenced proceedings against the defendants. A large number of subcontractors were both involved in or interested in the group known as T2 which comprised a large group including men women and children. The two defendants named personally in the proceedings did not appear in any of photographs exhibited. There was no suggestion that the protesters were linked only to the individual defendants named. The defendants were not the only

ones affected by the termination of contracts for the non payment of commercial sums due and owing and arising out of the construction.

The majority of defendants once worked on the T2 project. Two are now in liquidation. These defendants believed that is it not a coincidence that they are insolvent and that it was as a result of the non payment by the first named plaintiff. The letter from the liquidator of Temple Mechanical Contractors Limited, the eight named defendant, gave the view that the first named plaintiff was responsible for that company's insolvency.

It was submitted that the other defendants would clarify that they were not authors of the two e-mails sent does not render the T2 Group a shell. The plaintiffs own evidence does not support this. The letters from the co-defendants contained differing views as to the costs of the hearing. None of the defendants sworn in affidavit or even written a letter which the plaintiff could exhibit which refutes the contents of the e-mails in question. The nearest any defendant could come to repudiate in agreement is the letter of Mr. Weafer of Glenmore Electrical, the ninth named defendant, in which he states that he and his company are not members of the T2 Group. It is submitted that the at an early stage there was a campaign for payment of debts owed by the first named plaintiff, none of the defendants communicated with the plaintiffs at any stage to dissociate themselves from this campaign. It is further submitted that until this evidence that other co-defendants repudiate the views set out by the second named defendant, it was not possible for the plaintiffs to discharge the evidential burden on them.

It is submitted that it is understandable that a defendant may not want to defend a High Court injunction and may be happy to confirm that he or she or personally or through an agent make a particular statement. Notwithstanding, no such conformation has been exhibited nor is there any actual evidence of the issues in the action to date. It is immaterial to this action if the other defendants are not specifically adopting the words of the second named defendant. It is very significant that not one of them refutes the second named defendant's claims.

The defendants have not simply made a bare assertion but have given details of their claims.

They submitted that the material changes since the 2010 application for an injunction were that the defendants claim that the plaintiff knowingly undervalued the tender, that they were surprised that a fire certificate had been obtained and that there had been an escalation of the dissemination of communications and an attempt to involve the press.

It is submitted that the undervaluing of the tender was far from being a serious defamation as alleged as endemic in the construction industry.

The original co-defendants were, taken together, responsible for the vast majority of the woks carried out on the site and the McCool defendants expressed surprise that a fire certificate had been obtained. This was a matter of opinion, it was not an issue which the court could resolve in the interim stage.

The communication between the defendants and the media was at the instigation of the latter.

It was further submitted that the evidence before the court did not justify the curtailment of the defendants' right to bring the matter into the public domain. The application for an injunction only added to the dissemination of the material that the plaintiff says they wanted to suppress. The process of arbitration could have been pursued more expeditiously.

The defendants deny that any unlawful conduct whatsoever had been engaged by them, still less of any criminal conduct. There had been no blackmail of any description. The defendants were involved in a campaign to pressurise the first named plaintiff to pay a disputed debt and there was nothing unlawful in the methods employed by them.

Moreover, the statements are true, as the defendant maintains that they are, and there is no threat involved, merely the dissemination of information which is of huge interest to those in the industry and indeed to the public, given the size of the plaintiffs company and the project in question.

Moreover there is no example of any intimadatory or threatening communication by the defendants directly to the plaintiffs as a group or one of them.

The plaintiffs claim that the use of a false name by the second named defendant bars him from relying on justification, as does the appending of other names to the e-mails in question. No authority is cited for this proposition. It is not correct.

The second named defendant and one of his sons had already been the subject of the 2010 High Court proceedings. This may have led to the use of fictitious names as has been confirmed in the defendants' affidavit.

The McCool defendants acted with the full knowledge and participation of the other persons named in the e-mails and there was no indication at that stage from any individual company that it wished it dissociate itself from the group. It is incorrect to say that the defendants had nothing to do with the T2 Group. There is not one e-mail exhibited by the plaintiffs in which any of the named defendants distances himself or his company from the statements of the T2 Group at the time that this campaign was ongoing. The ninth defendant confirmed that he is not a member of the T2 Group but makes not comment on whether he ever was.

The plaintiff cannot point to any statement of the defendants which is demonstrably untrue without a court hearing testing evidence in relation to that statement.

The defendants submit that the court should refuse the reliefs sought.

12. Decision of the Court

12.1 The court notes the differences between the present application and the 2010 application for interlocutory relief in relation to the addition of two directors of the plaintiff company and seven other defendants. In the 2010 motion Ryan J. refused the relief sought.

The plaintiffs rely substantially on allegedly defamatory e-mails published widely since the 2010 proceedings.

The court has already commented on each to these e-mails being the e-mail of the 7th July, 2011 from a Frank Murphy, two from a Paul Mooney of the 25th and 26th and the e-mail of Finn McCool dated the 28th January, 2011.

There would appear to have been no allegation in respect of Mr. Priestly save that he contacted some of the defendants as members of the T2 Group.

The court is not satisfied from the affidavit evidence that any of the additional defendants, apart from appearing to be part of the T2 Subcontractor's Group, made any of the remarks complained of. The court having considered the position of those that withdrew from the proceedings, and those who settled with the plaintiff and is of the view that none of them deny having been part of the original T2 Group. They did not dissociate themselves from the aims of the Group even where they did not adopt the means of the Group.

The plaintiffs allege that Paul Mooney's two e-mails of the 25th and 26th January last contain libellous and disparaging material in an attempt to further the subcontractors aims by extra judicial means.

More significant is the averments of the escalation of e-mails to the wider group than in 2010.

It seems to this Court that the actions of the defendants, and in particular of the McCool defendants, are indeed an attempt to escalate the dispute through extra judicial means. However, it does not follow, from that reason alone that the court should exclude them from so doing.

The court is conscious of the number of subcontractors involved in the construction of the second terminal at Dublin Airport. It is clear that some 24 contractors, at least, were involved though not the 70 or 55 referred to by the plaintiff.

The court is conscious of the critical importance of cash flow to subcontractors as highlighted in their statements. The mechanism of alternative disputes resolution to achieve this is preferable to litigation. Negotiation is indeed preferable to either.

12.2. Legal Principles
What are the legal principles applicable? In *Bonnard v. Perryman* (1891) 2 Ch. 269 at 284 Coleridge L.J. posited the importance of leaving free speech unfettered:-.

> "Rights of free speech of which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed and publication and repetition of an alleged libel. Unless it is clear that an alleged libel is untrue. It is not clear that any right at all has been infringed, and the importance of leaving free speech unfettered is the strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions." (at 284).

Coleridge approved of the language of Lord Esher, N.R. in *Coulson v. Coulson* (3 Times L.R.) 846 as follows:-

> "To justify the court in granting in interim injunction it must come to a decision upon the question of libel or no libel, before the jury had decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside that the verdict was unreasonable."

Indeed the head note of *Bonnard v. Perryman* summarises the position of the court in the following terms:

> "An interlocutory injunction ought not to be granted where the defendant avers that he will be able to justify the libel, and the court is not satisfied that he may not be able to do so. It is clear that there are two elements to this statement reflecting what the courts have laid down toward the end of the 19th century. This, indeed, allows the court to intervene if it is not satisfied that the defendant may not be able to justify the libel."

Kelly J. inn *Reynolds v Malocco* [1999] 2 I.R. 203 at 211 said there appeared to be two conflicting decisions in this jurisdiction as to the proper approach to take on the topic. He referred to *Gallagher v. Tuohy* [1924] 58 I.L.T.R. 134 at 135 where Murnaghan J. referred to the decision in *Bonnard* being reasonably clear that the Court should not readily restrain the publication of any matter which was not obviously a libel. He would have had no difficulty at all in deciding that the statement was defamatory but for the plea of justification.

> "That plea having been raised, it seems to me that I cannot prejudge the issue… and decide that the plea of justification is erroneous. That would be the effect of granting the injunction sought."

On the other hand Kelly J. points out that the decision of the Supreme Court in

Cullen v. Stanley, [1926] I.R. 73 (the Baker's strike "scab" statement by the defendants) demonstrates a different approach where the Supreme Court, notwithstanding the defendant's submission that the allegations were true, granted an interlocutory injunction. O'Connor J., for the Supreme Court, examined the detailed affidavit of the plaintiff which he contrasted with the "baldest affidavit". The defendant then held that on the evidence for the Court, that there was nothing to support the plea of justification.

Kelly J. in *Reynolds v. Malocco* preferred the latter approach. He did not think that a rule which permitted a defendant to, in effect oust the ability of the Court to intervene by way of injunction was an appropriate case by the simply expedient of expressing an intention to plead justification of the trial of action, is consistent with the obligations imposed by the Court under the Constitution. He categorised the application of such a rigid rule as providing "a happy hunting ground for unscrupulous defamers.

However, in this case there is not a bald assertion of justification. Matters of fact and opinion are relied on in the statements impugned by the plaintiffs.

12.3 The view of Coleridge L.J. are in the court's view, followed in the Convention.

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which is headed "Freedom of Expression" provides as follows:-

> "1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Sub Article 2 refers to formalities, etc., as are prescribed by law . . . for the protection of the reputation or rights of others . . .

The prescription by law includes, of course, the Defamation Act already referred to.

The second named defendant in his affidavit refers to acts and opinion which he believes to be true and appears at the interlocutory state, accordingly, to be within Sub Article 10.1.

12.4 The Court in the present case is not satisfied on the affidavit evidence opened that unless the alleged libel is untrue, there is no wrong committed. It is not clear at this stage that the alleged libel is untrue, nor is it clear that any right at all has been infringed.

The defendant's affidavits go much further than the "baldest affidavit" of the defendant in Cullen v. Stanley.

Moreover, there is no denying that emails made under factious names have not been made or on behalf of the second named defendant.

Whether a pseudonym or not emanated from a ISP address which is traceable, Mathew Collins, *The Law of Defamation and the Internet* (2nd Ed. 2006) at p. 80-5 deals with the matter as follows:

> "In the vast majority of cases, Internet users send e-mails, post bulletin board messages, or upload material to websites from traceable computers. Each computer connected to the Internet has a unique numeric address [ISP]. That [ISP] will be attached to each message sent from a particular computer. In the case of Internet users who gain access to the Internet via a commercial ISP, the ISP will generally have the technical ability to monitor how each subscriber uses the Internet, and to trace any given communication back to the computer from which Ti was sent.

While some of the defendants have resiled from the statement made, there is no indication from them that they were opposed, at the time the emails were sent, to the content thereof.

The second and third named plaintiffs are directors of Mercury. The 2011 notice of motion, being in identical terms to that of the 2010 proceedings, does not it claim any relief for, nor does it distinguish the position of the second and third named defendants.

Notwithstanding, the affidavit of the third named plaintiff averred that the defamatory material published about the second and third named plaintiffs was not confined to that role as directors but extended to their involvement in industry representative bodies such as MEBSCA, ECA and CIF.

There is no affidavit sworn by the second named plaintiff.

The reference to the e-mail of the 7th January, 2011, to "we are aware of the penalty for perjury in a court environment" is ambiguous. It can refer to the defendants as much as to Mercury staff who might be subpoenaed.

There is no necessary innuendo that the plaintiffs would be prepared to perjure themselves.

12.5 The grant of injunctive relief is always discretionary. The Court must be satisfied that what appears to be robust and sustained communications by or on behalf of the defendants is unjustified. The Court is not satisfied that this is so. If the injunction is refused, the defendants will not be restrained and the plaintiff would be left to its remedy and damages at a trial.

It is clear that the Court must refuse the injunction in this case. However, nothing in this judgment should be taken to pre-judge the issue of damages that the plaintiff will be likely to recover against the defendants on trial.

In the meantime the court is conscious that there has been an attempt to arbitrate the matters and that the substance of that arbitration will resolve the issue of the claims that are made by the defendants as against the plaintiff and by the plaintiff as against the defendants, in particular against the first named defendant.

There is an issue to be tried by the court.

The court will accordingly, refuse the application.