

THE HIGH COURT

FRED MUWEMA

Record No. [2016] 4637P

-and-

Plaintiff

FACEBOOK IRELAND LIMITED

Defendant

JUDGMENT of Mr. Justice Binchy delivered on the 23rd day of August, 2016.

1. The plaintiff in these proceedings claims damages for defamation of character which he claims he has suffered by reason of articles posted on Facebook by a third party. Prior to issuing these proceedings, the plaintiff requested the defendant to take down the articles from its site, but it declined to do so. The plaintiff subsequently issued these proceedings, and by this application he seeks a number of interlocutory orders as follows:

(i) a permanent order pursuant to section 33 of the Defamation Act 2009, (hereafter "the Act of 2009") prohibiting the publication or the further publication of the Facebook page of one Tom Voltaire Okwalinga (hereafter "TVO"), hosted by the defendant and a number of articles posted by TVO (hereafter the "Reported Content"), which I will shortly discuss.

(ii) In the alternative, an Order pursuant to section 33 of the Act of 2009 prohibiting the publication or further publication of a number of posts set out in the schedule to the plenary summons and appearing on the Facebook page of TVO.

(iii) An order that the defendant or any person having notice of the order cease and desist in the further publication of the impugned articles.

(iv) An order directing the defendant to provide the plaintiff with any details which it holds relating to the identities and location of the person or persons who operate the Tom Voltaire Okwalinga Facebook page or the individual posters thereon i.e. "Norwich Pharmacal" order.

2. The plaintiff is a Ugandan lawyer and a partner in the Ugandan firm of Muwema & Co., Advocates and Solicitors. In his affidavit grounding the application herein, he avers that his firm is a "high profile and prestigious" law firm, which over the years has been involved in a series of landmark cases in Uganda. He says his firm specialises in the areas of Intellectual Property and Anti-Counterfeit Law

3. The plaintiff takes issue with what he describes in his grounding affidavit as three "highly offensive and defamatory publications" that have been posted on the defendant's site, by a person identified only by the pseudonym TVO.

4. The defendant is the operator of the "Facebook" social media site for users residing outside of the United States and Canada. The offending articles were posted between 17th March 2016 – 24th March 2016.

5. By way of letter dated 22nd March 2016, the plaintiff wrote to the defendant seeking the removal of the Reported Content from its site and also sought disclosure of the IP address of TVO. Following this letter, correspondence was exchanged between the parties. On 31st March 2016 White & Case LLP, representing the defendant, wrote to the plaintiff stating that the defendant was unable to comply with the plaintiff's request to remove the Reported Content stating :

"To the extent you claim that any content on the Facebook service is defamatory in nature, your complaint should be addressed to the user who created and posted the content, not Facebook. Moreover, Facebook is not in a position to evaluate the truth or falsity of such content and will not remove or block it absent proper service of a valid court order identifying the specific content deemed to be defamatory."

6. The plaintiff subsequently engaged Messrs. Lavelle, Solicitors, who on 19th April 2016 wrote to the defendants again calling on the defendant to remove the offending content. Messrs. Lavelle stated that the defendant was violating its own Statement of Rights and Responsibilities and highlighted that the plaintiff continued to suffer loss and damage. Following a further letter dated 4th May 2016, the defendant sent an email to the plaintiff's solicitors on 9th May 2016, stating that the Reported Content was no longer accessible in Uganda. However, it subsequently transpired that this was not the case.

The Reported Content : Plaintiff's Grounding Affidavit

7. In his grounding affidavit of 23rd May 2016, the plaintiff avers that the first publication complained of was posted on the TVO page on 17th March, 2016 and bore the title "*Betrayal in the City*." The second article to appear was entitled "*Scandal Lawyer Fred Muwema, is now guarded by Special Forces Command Operatives who follow him everywhere and are dressed in civilian clothes, and armed with revolvers*" and appeared on the TVO page on 19th March 2016. A third article entitled "*Muwema is a joke of a lawyer*" was posted on the TVO page on 24th March 2016. The above posts were updated and edited on 18th March, 22nd March and 24th March 2016. The plaintiff argues that the articles are false, scurrilous and defamatory of him and submits that the articles assert that:

1. That the plaintiff has accepted bribes in the amount of US\$ 260,000;
2. That the plaintiff staged a break in into the premises of his own law firm in order to jeopardise a presidential election and petition;
3. That the plaintiff is now constantly guarded by armed forces

8. The plaintiff avers that since these articles were published on the Facebook page of TVO, there have been an indeterminate number of subsequent comments and posts, which have "condemned, ridiculed and threatened both myself and my firm as well as endangering my safety, reputation and credit."

9. The plaintiff in his grounding affidavit highlights the gravity of the TVO allegations, particularly having regard to his professional standing as a lawyer and emphasising that taking a bribe is contrary to the disciplinary code of his profession. He also highlights the

fact that destroying evidence or obstructing the course of judicial proceedings, are offences that are punishable by seven years imprisonment in Uganda. The plaintiff avers that the Reported Content impinges on his standing and reputation as a lawyer and takes issue with the fact that they remain visible on the defendant's site. The plaintiff further avers that since the publication of the posts, a number of his colleagues, acquaintances, business associates and clients have queried and remarked on the articles, which according to the plaintiff, has caused him anxiety and severe stress; he also avers that he has been held up to public ridicule, contempt and threats.

Defendant's Replying Affidavit

10. The defendant delivered a replying affidavit sworn by a Mr. Jack Gilbert, its lead litigation counsel on 9th June, 2016. In his affidavit, which contains a mixture of averments as to fact and legal submissions, Mr. Gilbert avers that it is not legally required of or possible for the defendant to monitor proactively material published by its users on the Facebook site; as of March 2016, there were 1.09 billion daily active users of the Facebook service and 1.65 billion monthly active users. It is averred that given the sheer amount of content on the site, comment and opinion about public figures and politicians is inevitable. Mr. Gilbert refers to the defendant's community standards which are annexed to its "Statements of Rights and Responsibilities" and in respect of public figures those standards state (according to Mr Gilbert):

"Facebook permits open and critical discussion of people who are featured in the news or have a large public audience based on their profession or chosen activities. Facebook removes credible threats to public figures, as well as hate speech directed at them – just as it does for private individuals."

11. Mr. Gilbert avers that the defendant is not a publisher of content on the Facebook site, and that the defendant did not publish or cause to be published any of the Reported Content. It is stated that the defendant is an information society service provider within the meaning of the E-Commerce Directive, i.e. Directive 2000/31/EC (hereafter "the Directive") as transposed into Irish law by the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. 68 of 2003) ("hereafter "the Regulations") and as such, the defendant is not liable for any allegedly defamatory content created by its users. In this regard, Mr. Gilbert avers that the defendant will be entitled to rely upon the defence of innocent publication pursuant to Section 27 of the Act of 2009. It is further stated that the defendant is not an arbiter of fact and is not in a position to determine the truth or falsity of the Reported Content.

12. Mr. Gilbert avers that the plaintiff does not assert in his grounding affidavit that the Reported Content is untrue. The defendant also seeks to highlight the lack of contextual background provided by the plaintiff in respect of the publication of the Reported Content. It is averred that by conducting a simple "google" search, the defendant located a number of articles online concerning the plaintiff, including the following:

(a) A decision of Kitumba J. in the Supreme Court of Uganda of 3rd July 2014, wherein the Judge makes a number of comments about the plaintiff's misconduct as a lawyer, including that the plaintiff behaved unprofessionally throughout the proceedings and misrepresented events that occurred in the judge's chambers; that he completely lost control and treated the judge like a criminal or witness under cross examination; that the plaintiff was suspended from a certain court until his disciplinary proceedings before the Law Council were heard.

(b) An article entitled "*Court blocks sh8b payment of city lawyer*" dated 14th July 2014 wherein it is alleged that the plaintiff entered into an agreement with an oil company, whereby he would be paid costs plus 16% of the proceedings from a case, with an extra 4% if the case was appealed, by way of remuneration for representing the oil company concerned and that the Supreme Court ruled such an agreement as illegal;

(c) An article entitled "*Supreme Court Orders Lawyer Muwema Arrest over Shs 4bn*" dated 21st August 2015, in respect of the alleged agreement referred to at (b).

(d) An article entitled "*Lawyer Muwema Denies Taking Sh900m To Betray Mbabazi*" dated 21st March 2016, in which the plaintiff refuted social media allegations that he took a Shs900 million bribe to undermine a presidential election petition. The article goes on to allege that the plaintiff organised a break-in to his own chambers during the course of which affidavits were stolen.

(e) An article entitled "*Mbabazi Petition: Muwema Fires Back on Shs 900m Bribe*" dated 21st March 2016, wherein the plaintiff refuted social media claims of bribes and denied any involvement in the break-in at his law offices.

(f) An article in the "Uganda Drone" entitled "*Ugandan Lawyer Fred Muwema in trouble over illicit dealings with security operatives*" dated 24th March 2016 wherein it is alleged that the plaintiff was paid 900 Uganda shillings to cooperate in the hunt of Mr. TVO, an online activist.

(g) An article entitled "*I wasn't bought off to drop from Mbabazi case – Muwema*" where the plaintiff gives an interview and refutes the allegations against him, including allegations of bribery and states that because he is involved in high profile cases, "attacks" on him are inevitable.

13. On this basis, Mr. Gilbert avers that the plaintiff has, at the very least, been the subject of considerable controversy in Uganda. He suggests that the plaintiff's averment that his law firm enjoys an especially high standing in Uganda is false, especially in light of the fact that the Ugandan Supreme Court has condemned the plaintiff's misconduct and ordered his arrest. Mr. Gilbert avers that the plaintiff's description of his professional standing is misleading and also points to the fact that the plaintiff had recently separated from the partners in his law firm, and that this fact was not deposed to by the plaintiff when grounding his application.

14. On the basis of the foregoing, Mr. Gilbert argues, that the Reported Content does not cause the plaintiff reputational damage for two reasons. Firstly, content concerning the plaintiff's reputation is not limited to the defendant's site, but is freely available elsewhere on the internet. Secondly, content concerning the plaintiff's reputation has circulated the internet for a period of two years, while the Reported Content has only been available on the defendant's site for a period of three months. Mr. Gilbert avers that if the plaintiff suffered any reputational damage, that damage must have existed long before the Reported Content appeared on Facebook.

15. Therefore, Mr. Gilbert argues, that there would be no practical utility in removing the Reported Content when a number of other websites have content containing the same allegations for quite some time. In essence, "the genie has been let out of the bottle". Mr. Gilbert avers that the Reported Content is typical of content on the defendant's site involving public and especially political figures. He says the Reported Content is merely the opinion of an individual and is not for example news from a reputable news outlet.

16. Additionally, Mr. Gilbert avers that, in his affidavit grounding this application, that the plaintiff has failed to place all of the relevant material before the Court, by failing to mention matters already in the public domain that have a bearing upon his reputation.

17. Mr. Gilbert avers that in reality, the plaintiff's complaint is against the person who created or published the Reported Content and not against the defendant and on that basis, the defendant does not oppose a limited "Norwich Pharmacal" order in respect of TVO, but the defendant is not willing to consent to a similar order in respect of the identity of the potentially thousands of individual posters or the TVO page.

Replying Affidavit of the Plaintiff

18. The plaintiff swore an affidavit in response to the affidavit of Mr. Gilbert on 16th June 2016. This affidavit also contains a mixture of averments as to fact and legal submissions. He states that the defendant proffers no evidence to support the allegation that he was in receipt of bribes. It is also stated by Mr. Muwema that the defendant continues to allow TVO to post defamatory material and draws the Court's attention to a post by TVO on 1st June, 2016 which states:

"I am still busy collecting evidence on people who betrayed Ugandans in the recent election and I will be publishing a full report soon, and then this lousy Advocate Muwema, who pocketed bribes both in the Mukono-Katpso Road Project and represented a fake company (see attachment) where the tax payer lost trillions, comes up with his futile attempt to cleanse himself from his participation in his office "break in". He must be reminded that Facebook is not banana republic enterprise [sic], and it has been sued by lawyers basb [sic] in Manhattan, Times Square, to no result. For their ground rule is to protect freedom of information, so the lawyers Muwema hired from little suburb of Dublin, Ireland, may sound scarily to Ugandan ears, but they will hit a dead end."

19. The plaintiff seeks to argue that there is an obligation on the defendant to monitor and remove unlawful content, once it received proper notification from the plaintiff. He avers that the defendant has violated its own Statement of Rights and Responsibilities in not removing the Reported Content, despite having "found nothing to lead to a finding that the material is true." The plaintiff takes exception to the averment in Mr. Gilbert's affidavit that the posts amount to comment and opinion.

20. The plaintiff also takes issue with the defendant's stance that it takes no position with regard to the truth or falsity of the Reported Content. He argues if that were the case, no content would ever be removed by the defendant. The plaintiff states that the defendant cannot rely on section 27 of the Act of 2009, in circumstances where he avers that the defendant has failed to take any reasonable care in respect of the publication of the Reported Content. Mr. Muwema also avers that in a letter dated 19th April, 2016 from Messrs Lavelle it was unequivocally stated that the Reported Content was "false, offensive and grossly defamatory." He further avers that the Reported Content is "untrue and without foundation."

21. By way of response to a number of assertions in the defendant's replying affidavit, the plaintiff states that it is unclear what background he was expected to give in respect of the matters outlined by the defendant, and notes that the defendant did not provide any background itself in connection with the Reported Content. The plaintiff avers that in respect of the case in which he was subjected to censure by the Ugandan Supreme Court, he was also a party to those proceedings and that if the Court reads the judgment of the Ugandan Supreme Court in full, it will be clear that the judge acted beyond her powers and should have merely suspended the plaintiff from appearing in her court as opposed to the entire commercial court. The plaintiff also avers that no complaint had been lodged in the Ugandan Law Council against him, nor has any sanction been imposed on him in respect of any proven professional misconduct. It is also averred that the plaintiff has brought a constitutional challenge in the Ugandan courts in connection with the above.

22. The plaintiff also avers that the article discussed at paragraph 12(c) above dated 21st August 2015, was published in an online tabloid publication in Uganda, which he avers publishes mainly sensational stories and gossip. He states that nowhere in the judgment referred to in that article was it ordered that he pay the amount stated therein and he also denies that a warrant was issued for his arrest. He states that a number of the other articles referred to by the defendant deal with interviews and denials that he has given since the posting of the Reported Content. The plaintiff avers that he continues to be retained by clients in high profile litigation in Uganda.

23. The plaintiff goes on to state that prior to March 2016, his professional standing remained intact and contends that before this date there were no allegations of bribery. He avers that the break-up of his law firm and the departure of his former partner was unrelated to the issues the subject of these proceedings. The plaintiff denies that he failed to disclose any relevant material to the Court.

Submissions on behalf of the Plaintiff

24. Counsel on behalf of the plaintiff submits that the allegations contained in the Reported Content are extremely grave and that the nature of the allegations are extremely damaging for the plaintiff in light of his profession, and the fields of work in which his firm practices.

25. Counsel also submits that the defendant has a Statement of Rights and Responsibilities (hereafter "the Statement") with which it should comply. In particular, counsel points to section 3.9 thereof, which states "...[account holders] will not use Facebook to do anything unlawful, misleading, malicious or discriminatory." Counsel also points to the fact that the Statement purports to respect other people's rights by virtue of sections 5.1 and 5.2 thereof wherein it states that a user cannot post content that "infringes or violates someone else's rights or otherwise violates the law." Section 5.2 of the Statement states that Facebook will remove any content or information posted on the website, if they believe that it violates the Statement. Counsel also relies on section 14 of the Statement, which states that any violation of the Statement can result in the defendant discontinuing all or part of the Facebook account. It is submitted on behalf of the plaintiff that notwithstanding these commitments in the Statement, it was necessary for the plaintiff to issue these proceedings and to bring this application in light of the fact that there was no response by the defendant to the plaintiff's request to remove the Reported Content.

26. Counsel for the plaintiff acknowledges that the Directive and the Regulations provide a degree of protection to internet service providers (hereafter "ISPs"), such as the defendant, in connection with their activities, and that a number of defences for ISPs are set out at Regulation 18 of the Regulations. However, counsel for the plaintiff relies on Regulation 18(3) of the Regulations which provides:

"(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights."

27. Counsel for the plaintiff also relies upon the case of *Sony Music Entertainment (Ireland) Ltd. v. UPC Communications Ltd.* (No.1)

[2015] IEHC 317. In that case Cregan J granted the plaintiff an injunction pursuant to s.40 (5A) of the Copyright and Related Rights Act, 2000 (as amended) requiring that the defendant take *reasonable* steps to prevent its subscribers from using the defendant's internet service for the purpose of breaching the plaintiffs' copyright in the plaintiffs' sound recordings. Section 40(5A) of that Act was inserted into the Act in order to give effect to article 8(3) of EC Directive 2001/29 (the "Copyright Directive"). That article provides that:

"8(3) member states shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."

28. At paragraph 99 of his judgment in Sony, Cregan J. stated:

"It is clear therefore that Article 8(3) provides that Member States shall ensure that rights holders (such as the plaintiffs) are in a position to apply for an injunction against intermediaries (such as the defendants) whose services are used by a third party to infringe a copyright or related right. Thus it is clear that the directive envisages injunctions being obtained against intermediaries by rights - holders to ensure third party subscribers do not infringe copyright. Thus European law permits the granting of an injunction against a person (such as the defendant) even where they have committed no legal wrong."

Counsel for the plaintiff argues that Regulation 18(3) of the Regulations is analogous to Article 8(3) of the Copyright Directive and that the decision of Cregan J. makes it clear that the Court has the power to grant the kind of relief sought in these proceedings.

29. Counsel for the plaintiff acknowledges that interlocutory injunctions restraining publication of defamatory material are rarely granted by the courts. However, he argues that the authorities establish that the first question to be addressed in applications of this kind is whether the plaintiff has established a *prima facie* case that he will succeed at the trial. He refers to cases such as *Reynolds v. Malocco and Ors* [1999] 2 I.R. 203 and *Cogley v. RTÉ* [2005] 4 I.R. 79. While these cases make it clear that to obtain injunctive relief a plaintiff must be able to demonstrate that there is no doubt that the words complained of are clearly defamatory, nonetheless, counsel for the plaintiff argues that these authorities, and *Reynolds* in particular, also make clear that in resisting an application such as this, a defendant who intends to plead justification must put forward some credible basis to suggest that the plaintiff will not succeed at trial.

30. The plaintiff accepts that the defendant is not the author of the Reported Content but submits that the defendant is in an analogous position to the publisher of the same. In this regard, counsel for the plaintiff relies on *Byrne v. Deane* [1937] 1 KB 818, where the question of publication was discussed as follows:-

"It may very well be that in some circumstances a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other circumstances he may be doing so."

31. Counsel for the plaintiff also referred the court to Cox and McCullough's *Defamation Law and Practice* (Clarus Press, 2004 at 2.15) where it is stated:-

"Publication arises not just where an original defamatory statement is published, but also where an existing defamation is repeated or even where a defamatory statement is left in place where it is reasonably foreseeable that it could be noticed and where the person responsible for the location where the statement has been left can be taken to know of and to have assumed responsibility for its existence, and can therefore be regarded as having been involved in the act of publication."

32. Counsel for the plaintiff submits that Regulation 18 of the Regulations reflects these remarks to an extent, requiring as it does an ISP to have actual knowledge of defamatory content. He argues that in this case the defendant has had such knowledge since it was first put on notice of the same by the plaintiff. He also submits that the stringent test which hitherto applied to the hearing of an interlocutory application in a defamation action has been further diluted by section 33 of the Act of 2009 which empowers the Court to make an order prohibiting publication, or further publication of the statement if in the Court's opinion the statement is defamatory, or, the defendant has no defence to the action that is reasonably likely to succeed. He points out that the Regulations and the Act of 2009 both post- date *Reynolds* and *Cogley*.

33. The plaintiff also seeks to rely on the case of *XY v. Facebook Ireland Ltd.* [2012] NIQB 96, which concerned the grant of a "take down" order in respect of a Facebook page containing the name and photograph of a man convicted of sexual offences. In that case, the High Court of Northern Ireland held that the content of the offending web page constituted unlawful harassment of the applicant, and created a real risk of infringing his rights under the European Convention on Human Rights (hereafter "the Convention"). However, it was submitted on behalf of the plaintiff that in these proceedings the case for interlocutory relief is stronger insofar as there is continual repetition and publication of the Reported Content and that it will remain on the defendant's site until the hearing of the matter, unless interlocutory relief is granted. The plaintiff also relies on the case of *Tansey v. Gill* [2012] 1 I.R. 380 in support of this argument. In that case Peart J. granted the plaintiff injunctive relief as against the author of the defamatory content in circumstances where he was fully satisfied from the affidavits exchanged that the first named defendant could have no defence to the proceedings.

34. Counsel for the plaintiff also addressed potential defences open to the defendant in the proceedings. In this regard, it is submitted that the defendant did not suggest it intended to rely upon or even lay any ground in support of a defence of truth. It is further submitted that the defence of innocent publication, under section 27 of the Act of 2009 does not arise because the defendant is now aware of the Reported Content.

35. Counsel also addresses the defendant's argument that the plaintiff will not succeed at the trial of action because his reputation is already tarnished. In response to this argument, it is submitted on behalf of the plaintiff that any findings made by the Ugandan Supreme Court with regard to the plaintiff's misconduct, or any findings *vis-à-vis* the professional conduct of the plaintiff are wholly removed from the import of the Reported Content. Furthermore, it is submitted that any evidence in this regard merely goes towards mitigating damages at the trial of the action, and does not preclude the defendant pleading the defence of truth or adducing relevant evidence at trial regarding the plaintiff's reputation.

36. In addressing the defendant's argument that equity does nothing in vain and that there is no utility in granting the injunction, it is submitted on behalf of the plaintiff that that argument fails to take account of the fact that the interviews given by the plaintiff were given subsequent to the first postings by TVO and were given by the plaintiff to deny the allegations being made by TVO; it is submitted that such an argument, if successful, would undermine the ability of the Court to grant injunctive relief under section 33 of

the Act of 2009. Having regard to the fact that TVO has, since March 2016, posted further articles relating to the bribery allegation, the plaintiff submits that it is highly likely that TVO will persist in posting articles in the absence of the injunction.

37. The plaintiff argues that no prejudice will be suffered by the defendant as a consequence of the granting of the injunction. Finally, it is submitted that there has been no non-disclosure of any relevant material on the part of the plaintiff and that the material related to the proceedings in which the plaintiff was censured by the Supreme Court of Uganda was not material to the Reported Content.

Submissions of the Defendant

38. The defendant submits that it is not a publisher of the content complained of by the plaintiff. Accordingly, it may rely upon the defence of innocent publication, as provided for in s. 27 of the Act of 2009, which provides as follows:

"27 - (1) It shall be a defence (to be known as the "defence of innocent publication") to a defamation action for the defendant to prove that—

(a) he or she was not the author, editor or publisher of the statement to which the action relates,

(b) he or she took reasonable care in relation to its publication, and

(c) he or she did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation.

(2) A person shall not, for the purposes of this section, be considered to be the author, editor or publisher of a statement if—

(a) in relation to printed material containing the statement, he or she was responsible for the printing, production, distribution or selling only of the printed material,

(b) in relation to a film or sound recording containing the statement, he or she was responsible for the processing, copying, distribution, exhibition or selling only of the film or sound recording,

(c) in relation to any electronic medium on which the statement is recorded or stored, he or she was responsible for the processing, copying, distribution or selling only of the electronic medium or was responsible for the operation or provision only of any equipment, system or service by means of which the statement would be capable of being retrieved, copied, distributed or made available.

(3) The court shall, for the purposes of determining whether a person took reasonable care, or had reason to believe that what he or she did caused or contributed to the publication of a defamatory statement, have regard to—

(a) the extent of the person's responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of the publication, and

(c) the previous conduct or character of the person."

39. The defendant also submits that it is an information society service provider within the meaning of the Directive and the Regulations and as such has no liability for material published by users on the Facebook service. The relevant provisions in the Regulations are regulations 15-18 which provide as follows:-

"15. A provision of Regulation 16, 17 or 18 providing that a relevant service provider shall not be liable for a particular act shall be construed as a provision to the effect that the provider shall not –

(a) be liable in damages or, unless otherwise provided, be liable to be the subject of an order providing for any other form of relief, for infringing, by reason of that act, the legal rights of any natural or legal person or, by reason of that act, for breaching any duty, or

(b) be liable to be subject to any proceedings (whether civil or criminal) by reason of that act constituting a contravention of any enactment or an infringement of any rule of law.

16. (1) An intermediary service provider shall not be liable for information transmitted by him or her in a communication network if –

(a) the information has been provided to him or her by a recipient of a relevant service provided by him or her (being a service consisting of the transmission in a communication network of that information), or

(b) a relevant service provided by him or her consists of the provision of access to a communication network,

and, in either case, the following conditions are complied with –

(i) the intermediary service provider did not initiate the transmission,

(ii) the intermediary service provider did not select the receiver of the transmission, and

(iii) the intermediary service provider did not select or modify the information contained in the transmission.

(2) References in paragraph (1) to an act of transmission and of provision of access include references to the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communications network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

17. (1) An intermediary service provider shall not be liable for the automatic intermediate and temporary storage of information which is performed for the sole purpose of making more efficient that information's onward transmission to other users of the service upon their request, if —

(a) that storage is done in the context of the provision of a relevant service by the relevant service provider consisting of the transmission in a communication network of information provided by a recipient of that service,

and

(b) the following conditions are complied with —

(i) the intermediary service provider does not modify the information,

(ii) the intermediary service provider complies with conditions relating to access to the information,

(iii) the intermediary service provider complies with any rules regarding the updating of the information that have been specified in a manner widely recognised and used by industry,

the intermediary service provider does not interfere with the lawful use of technology, widely recognised and used by industry to obtain data on the use of the information, and

(iv) the intermediary service provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

(2) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

18. (1) An intermediary service provider who provides a relevant service consisting of the storage of information provided by a recipient of the service shall not be liable for the information stored at the request of that recipient if —

(a) the intermediary service provider does not have actual knowledge of the unlawful activity concerned and, as regards claims for damages, is not aware of facts or circumstances from which that unlawful activity is apparent, or

(b) the intermediary service provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(2) Paragraph (1) shall not apply where the recipient of the service is acting under the authority or the control of the intermediary service provider referred to in that paragraph.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

40. While the plaintiff relies upon Regulation 18(3) of the Regulations in support of this application, the defendant submits that Regulation 18 otherwise limits the liability of intermediary service providers in respect of claims of damages provided that, the intermediary service provider does not have actual knowledge of the unlawful activity concerned or, upon obtaining such knowledge, acts expeditiously to remove same. In this regard the defendant says that it does not know whether or not the Reported Content is unlawful, and that it is therefore entitled to the benefit of the protection afforded by Regulation 18.

41. The defendant relies upon the decisions of the Court of Justice of the European Union ("CJEU") in the cases of *Scarlet v. SABAM* [C-70/10, 24th November 2011] and *SABAM v. Netlog NV* (C-360/10) [2012] 2 C.M.L.R. 18. In those cases the CJEU had to consider whether or not the imposition upon the defendant, which in each case was an ISP used by third parties to access music and other materials protected by copyright, of an obligation to monitor the data of their customers in order to prevent infringement of intellectual property rights owned by members of the plaintiff, was in compliance with, *inter alia*, the e-commerce directive. The imposition of such an obligation would have required the defendant to install complicated and costly systems at its own expense, and would also have involved the identification and analysis of customers' data. The CJEU had to weigh on the one hand the protection of the intellectual property rights belonging to those represented by the plaintiff against, on the other hand, freedom to conduct a business, the right to protection of personal data and the freedom to receive or impart information. The CJEU considered that the imposition of an injunction requiring the defendant to install a system for filtering all electronic communications passing via its services, which would be applied indiscriminately to all of its customers and for an unlimited period, in order to prevent illegal downloads of music, to be disproportionate and contrary to the e-commerce directive. The defendant submits that the prior restraint orders sought by the plaintiff in this case would similarly offend the e-commerce directive.

42. The defendant relies also upon the decision of Clarke J. in *Mulvaney v. The Sporting Exchange Ltd. t/a Betfair* [2009] IEHC 133. In that case the plaintiff claimed to have been defamed by material posted on a Betfair chatroom by Betfair clients. In addition to bringing proceedings against those who posted the material, the plaintiff sought relief against Betfair as operator of the chatroom. Betfair relied successfully upon Regulation 18 of the Regulations in its defence. Clarke J. held:-

"As the service provided by Betfair, through its chatroom, clearly falls within the meaning of "relevant service" as defined by the 2003 Regulations, it follows that Betfair, in providing this service, is a "relevant service provider" and so an "intermediary service provider" within the meaning of the 2003 Regulations. Betfair is, therefore, entitled to the benefits of Regulations 15 and 18 of the 2003 Regulations."

The determination made by Clarke J. in *Mulvaney* was made by way of the determination of a preliminary issue, not in the context of an application for prior restraint orders. The effect of the decision was to declare that the defendant was eligible to avail of the defences provided by the Regulations, subject to the conditions concerning knowledge and expeditious action set out in the Regulations.

43. The defendant submits that it is in the same position as Betfair was in *Mulvaney* – the defendant merely posts comments and material in a manner entirely analogous to chatroom hosting. Accordingly, the defendant submits, it is entitled to benefit from the relevant defences set out in the Regulations and it must succeed with those defences in circumstances where it has never had actual knowledge that the content published by TVO about the plaintiff was defamatory or otherwise unlawful.

44. It is also submitted on behalf of the defendant that the substance of the Reported Content, and other highly critical commentary of the plaintiff is available on other internet sites; moreover, the plaintiff has given an interview to the media which was reported very widely, and in which he refuted the very allegations that he now seeks to suppress. Accordingly the “take down” orders sought by the plaintiff, even if granted, will be ineffective because the same material the plaintiff wants taken down from the defendant’s site remains easily accessible elsewhere on the internet. Accordingly, the defendant submits, the orders sought by the plaintiff should not be granted because “*Equity, like nature, does nothing in vain*”. The defendant relies on the authority of *Mosley v News Group Newspapers Ltd* 2008 EWHC 687 (QB), 36 wherein Eady J said:-

“In the circumstances now prevailing, as disclosed in the evidence before me, I have come to the conclusion that the material is so widely accessible that an order in the terms sought would make very little practical difference. One may express this conclusion either by saying that Mr Mosley no longer has any reasonable expectation of privacy in respect of this now widely familiar material or that, even if he has, it has entered the public domain to the extent that there is, in practical terms, no longer anything which the law can protect. The dam has effectively burst. I have, with some reluctance, come to the conclusion that although this material is intrusive and demeaning, and despite the fact that there is no legitimate public interest in its further publication, the granting of an order against this Respondent at the present juncture would merely be a futile gesture. Anyone who wishes to access the footage can easily do so, and there is no point in barring the News of the World from showing what is already available.”

45. The defendant argues that the prior restraint orders sought would also be ineffective because it is not practically possible for the defendant to exercise such restraint in circumstances where there are 1.09 billion daily active users of its service. Furthermore, the defendant argues, those reliefs sought that specify specific accounts would, if granted, impinge seriously on the fundamental rights of those affected and amount to censorship and invasion of privacy, the former amounting to an interference with freedom of expression as guaranteed by Article 40.6.1 of Bunreacht na hÉireann and Article 10 of the Convention, and the latter being contrary to the unenumerated constitutional right to privacy and Article 10 of the Convention. It is further submitted that such orders would also interfere with a number of rights under the EU Charter of Fundamental Rights, including Articles 7, 8, 11 and 16 thereof. Other reliefs sought requiring the defendant to prevent the re-posting of the existing posts and to prevent users from opening other Facebook accounts suffer from the same difficulties and also involve difficulties of enforcement.

46. The defendant submits that on his own account of things, the plaintiff is a public figure and that it is inevitable that some of the material published on the internet about the plaintiff will be critical in nature and will concern controversial matters. The defendant submits that it is well established both in this jurisdiction as well as in the European Court of Human Rights, that the right to freedom of expression, particularly insofar as it concerns public figures, takes priority over the private life of an individual and that the limits of permissible criticism are broader in relation to politicians and other public figures, than in relation to private citizens. Insofar as these proceedings are more concerned with the law of defamation than they are with privacy, the defendant submits that it is well established since the decision in *Bonnard v. Perryman* [1891] 2 Ch. 269 that a court will not restrain publication of material alleged to be defamatory because “*until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed*”. The defendant also relies upon the decision of *Reynolds v. Malacco* [1999] 2 I.R. 203 where Kelly J. (as he then was) remarked:

“This is “a jurisdiction of a delicate nature” and the court must be circumspect to ensure that it does not unnecessarily interfere with the right to freedom of expression.”

Kelly J. went on to say that “damages are the normal remedy for defamation and injunctions are not”.

47. Similarly, the defendant relies on the case of *Cogley v. RTE* [2005] 4 I.R. 79 in which Clarke J. held that the first question to be addressed in an application in which a plaintiff seeks prior restraint of a publication or broadcast of material on the grounds that it is defamatory is “whether, on the evidence available at interlocutory stage, it is clear that the plaintiff will ultimately succeed at a trial”.

48. The defendant further submits that where the reliefs sought are mandatory in nature the plaintiff must meet the more onerous requirements of proving not that he has established a *bona fide* question to be tried, but rather that he has demonstrated that he has a strong case, and the defendant relies upon the decision of *Maha Lingam v. HSE* [2005] IESC 89 in support of this proposition.

Discussion and Decision

49. The first question to be asked in consideration of the matters raised in this application, is whether or not the words complained of are defamatory? There can hardly be any doubt about the answer to this question. To suggest that a practising lawyer has taken a substantial bribe is manifestly defamatory of his character, unless it is proven to be true. Similarly, it seems to me that a suggestion or allegation that a practising lawyer staged a break-in to his own premises for the purposes of orchestrating political subterfuge is also defamatory, unless proven to be true.

Reliefs

50. As observed by Kelly J. in *Reynolds v Malocco*, the normal remedy for defamation of character is of course damages. By this application however, the plaintiff seeks three principle interlocutory reliefs: the first is to take down the material already posted on the defendant’s website platform, the second is to prevent the same activist, or others from re-posting the same material. The third is “Norwich Pharmacal” relief. It is apparent that the second relief sought is in the nature of a prior restraint order.

Criteria for interlocutory reliefs sought:

Defamation Act 2009

51. As stated above, s. 33 of the Act of 2009 provides that the Court may, upon the application of a plaintiff, make an order prohibiting the publication or further publication of the statement in respect of which the application was made if, in its opinion:-

- (a) The statement is defamatory, and

(b) The defendant has no defence to the action that is reasonably likely to succeed.

52. Section 27 of the Act of 2009, the relevant provisions of which I have set out above, provides a defence of innocent publication, the effect of which is that a person shall not be deemed to be the author, editor or publisher of a statement to which an action relates if, in relation to any electronic medium on which the statement is recorded or stored, he or she was responsible for the processing, copying, distribution or selling only of the electronic medium or was responsible for the operation or provision only of any equipment, system or service by means of which the statement would be capable of being retrieved, copied, distributed or made available. This appears to capture the circumstances giving rise to these proceedings.

53. On the face of it therefore the defendant has available to it a statutory defence to the proceedings issued against it. It was submitted on behalf of the plaintiff that the defendant cannot avail of the defence of innocent publication because it was made aware by the plaintiff of the defamatory material and declined to take it down from its platform. But the criteria for eligibility for the defence are not drawn in this way and at this remove at least it seems likely the defendant is entitled to avail of the defence provided for under s.27(2)(c) of the Act of 2009 and this conclusion by itself has the effect of precluding the plaintiff from obtaining an order under s. 33 of the Act of 2009.

Regulation 18(3) of the E-Commerce Regulations

54. Regulations 15-18 of the Regulations also provide another line of defence to the Defendant. In *Mulvaney*, Clarke J. held, in circumstances very similar to these, that the defendant was entitled to the protection of the Directive (and, therefore, the Regulations), subject to meeting the conditions concerning knowledge and expeditious action as set out therein. The defendant in my view has a reasonable likelihood of success in defending the proceedings on this ground also. For this reason too, the defendant is not eligible for relief under the Act of 2009.

55. The plaintiff however places reliance upon Regulation 18(3) of the Regulations. The effect of Regulation 18(3) is to preserve any power otherwise vested in the Court to make an order against an ISP requiring it not to infringe, or to cease to infringe, any legal rights. It is clear that this Regulation envisages that a court may make such an order even in circumstances where an ISP otherwise enjoys an exemption from liability to a plaintiff by reason of Regulation 18(1). In other words, under the Regulations, an ISP may enjoy immunity in suit for damages, but a court may nonetheless make an order against the ISP, if the Court otherwise has power to make such an order, requiring the ISP not to infringe, or to cease to infringe any legal rights. Importantly however, the Regulations themselves do not confer a power upon the Court to make such an order – the power to do so must be derived from elsewhere.

56. In this regard, the power of the Court to make such orders in actions for defamation is now set out in s. 33 of the Act of 2009, and is subject to the limitations set out therein. For the reasons given above, I have concluded that the plaintiff is not entitled to an order under this section, by reason of the defence that is available to the defendant under s. 27(2)(c) of the Act of 2009.

57. Before the Act of 2009, the Court did of course exercise much the same powers as are conferred by s. 33 of the Act of 2009 in appropriate cases. This jurisdiction was exercised by the court very sparingly, having regard to the importance attached by the courts and by society at large to freedom of expression, and on much the same terms as are expressed in s. 33 of the Act of 2009 i.e. it has always been the case that, in order to obtain an order for prior restraint, a plaintiff was required to demonstrate that there was no doubt that he words complained of were defamatory, and that it was clear that he would ultimately succeed at a trial and that *"none of the possible lines of defence which may be open to a defendant could reasonably succeed."* (Per Clarke J. in *Cogley v. RTE* [2005] 4 I.R. 79)

58. The Court held when granting the orders sought in the case of *Tansey v. Gill* [2012] IEHC 42, a case relied upon by the plaintiff in which Peart J. said:

"The internet has facilitated an inexpensive, easy, and instantaneous means whereby unscrupulous persons or ill motivated malcontents may give vent to their anger and their perceived grievances against any person, where the allegations are patently untrue, or where no right thinking person would consider them to be reasonable or justified. By such means, anything can be said publicly about any person, and about any aspect of their life whether private or public, with relative impunity, and anonymously, whereby reputations can be instantly and permanently damaged, and where serious distress and damage may be caused to both the target, children and adults alike, leading in extreme cases to suicide. So serious is the mischief so easily achieved that in my view the Oireachtas should be asked to consider the creation of an appropriate offence under criminal law, with a penalty upon conviction sufficient to act as a real deterrent to the perpetrator. The civil remedies currently available have been recently demonstrated to be an inadequate means of prevention and redress."

In that case, Peart J. went on to hold that the material complained of was seriously defamatory of the plaintiff and that the first named defendant would have no prospect of succeeding with any defence he wished to put forward at trial. Accordingly, he said that he had no hesitation in granting the interlocutory relief sought, and insofar as one of those reliefs included a mandatory interlocutory order, he was satisfied that the plaintiff had overcome the higher threshold for the granting of such an order.

59. The very significant difference between *Tansey* and these proceedings is that in *Tansey* the first named defendant was the author and publisher of the defamatory material and the Court had the benefit of being able to receive and consider his affidavits, and to form a view as to whether or not the first named defendant had a credible defence. The Court concluded that the defendant had no defence available to him that was likely to succeed, and therefore proceeded to make an order under s.33 of the Act of 2009. In these proceedings however, the only defendant before the Court is the ISP which, for the reasons set out above, I consider is likely to be able to avail of the statutory defence of innocent publication as provided for in s.27(2)(c) of the Act of 2009.

60. The plaintiff also relies upon the decision of Cregan J. in *Sony*, a decision recently upheld by the Court of Appeal. In *Sony*, Cregan J. noted that Article 8(3) of the Copyright Directive requires Member States to ensure that rights holders are in a position to apply to the courts for an injunction against intermediaries whose services are used by a third party to infringe a copyright. It is submitted on behalf of the plaintiff that Regulation 18(3) of the Regulations is analogous to Article 8(3) of the Copyright Directive. This is clearly not so however, because Article 8(3) of the Copyright Directive mandates Member States to ensure injunctive relief is available in cases of infringement of copyright; Regulation 18(3) as already observed (and indeed the corresponding article in the Directive, article 14(3)) merely confirms the continuation of powers otherwise vested in the Court.

61. Furthermore, the circumstances in which Cregan J. granted relief in *Sony* were very different. That was an action for breach of copyright in circumstances where the parties were in agreement that, in the words of Cregan J. *"there is wholesale theft of the plaintiff's intellectual property taking place on the defendant's network"* (paragraph 243). The order made by the Court in that case was made pursuant to powers expressly conferred upon the Court under section 40 (5)(A) of the Copyright and Related Rights Act

,2000 (an amendment to that Act that was made for the very purpose of complying with the obligations of the State under article 8(3) of the Copyright Directive), a very different statutory regime to that applying in this case.

62. These difficulties aside, I think that in this case the plaintiff faces the additional problem in the futility of the Court making the orders sought. Even though the equitable principle that "equity does nothing in vain" cannot, strictly speaking, have any application in circumstances where the remedy sought is pursuant to statute, nonetheless the statutory remedy is discretionary and in my view the Court should not grant the orders sought if they are unlikely to serve any practical purpose.

63. In this regard, the defendant has brought to the attention of the Court other content elsewhere on the internet concerning the plaintiff. Some of that content concerns comments made about the plaintiff by a Supreme Court judge in Uganda, which it may fairly be said is altogether of a different character to that complained of by the plaintiff in these proceedings, even though most, if not all, lawyers would prefer not to read of such matters concerning themselves in the media. However, there are also articles about the plaintiff concerning the very matters concerned in these proceedings. Those articles arise out of interviews that the plaintiff himself gave in order to deny the very allegations with which these proceedings are concerned. The plaintiff was perfectly entitled to give such interviews to defend his reputation, but having chosen to do so he himself becomes a participant in the publication of the allegations, so that anybody conducting the most rudimentary google search (to use the words of counsel for the defendant) will be presented with articles which repeat the same allegations about the plaintiff, albeit accompanied by a denial on the part of the plaintiff. There is therefore in this case significant merit in the argument made by counsel for the defendant that "the genie is out of the bottle" and injunctive relief would be in vain.

64. In conclusion, the jurisdiction of the Court to make the orders sought by this application (save for the "Norwich Pharmacal" orders) is now subject to the limitations prescribed by the Oireachtas in s. 33 of the Act of 2009. This section makes it clear that such orders may only be granted in circumstances where it is clear that the defendant has no defence that is reasonably likely to succeed. In my view this applies equally to a "takedown" order as much as it does to a prior restraint order. At this remove, it is difficult to see how it could be said that the defendant is not reasonably likely to succeed with the defence to the proceedings provided for in s. 27 of the Act of 2009. Moreover, I am of the view that in this case the application should also be refused because it would serve no useful purpose, having regard to the availability of publications containing the same and other damaging allegations about the plaintiff elsewhere on the internet. For these reasons, I consider that the application for takedown and prior restraint orders must be refused. I will however make a "Norwich Pharmacal" order in the terms that I understand the parties have agreed.

65. I have come to the first of the conclusions above with some unease. It is clear that the Regulations, while protecting ISPs from actions for damages in circumstances such as arise in this case, at the same time envisage the granting of appropriate injunctive relief to safeguard the legal rights of those whose rights might otherwise be infringed by the activities of the customers of ISPs. Similarly, the Act of 2009 protects ISPs from actions for defamation where they are innocent of the publication of the defamatory material. However, the Act of 2009 does not permit of the granting of injunctive relief against an ISP in circumstances where the ISP is likely to have a defence to the proceedings. It is true that this broadly reflects the law prior to Act of 2009. But the principles governing applications for prior restraint orders prior to 2009 were based upon the proposition that damages were the appropriate remedy in cases of defamation. The Act of 2009 now provides a shield against damages (as indeed do the Regulations) to defendants meeting its requirements, and the same shield also prevents the Court from granting injunctive relief to persons claiming to be defamed. Thus, it appears, a person who has been defamed by an internet posting may be left without any remedy at all, unless the author is identified and amenable to the jurisdiction of the Court. Moreover, because of the all encompassing nature of the defence afforded by s.27 of the Act of 2009, a person subjected to a defamatory posting to which the defence applies cannot succeed in any manner in the proceedings, and the problem is not therefore confined to interlocutory applications; the victim, it appears, can never obtain relief as against the ISP. This begs the question as to whether the Court has jurisdiction to grant takedown or prior restraint orders in proceedings for defamation otherwise than in the circumstances prescribed by the Act of 2009. The Court had such jurisdiction prior to the Act of 2009, but now that the Oireachtas has legislated in the area, it seems to me to be strongly arguable that such orders may only be made within the strictures of the Act. Unfortunately, this question was not addressed in these proceedings, other than it was argued on behalf of the plaintiff that such orders could be made pursuant to the Regulations, but for the reason given above I do not believe this is so. If my concerns are well founded however, it is a matter of grave concern. Persons whose reputations are seriously damaged by anonymous and untrue internet postings may be left without any legal remedy against the site hosting the publication, even in the most flagrant of cases. The reluctance of the courts here and in other jurisdictions to grant prior restraint orders reflects the importance attached by the courts and society at large to freedom of expression. There must be a doubt however about whether an ISP, which disclaims any responsibility for or interest in the material complained about, is entitled to assert in defence of an application such as this, the right to freedom of expression of a party who has chosen to remain anonymous and remains at the time of the hearing of the application unidentified and beyond the jurisdiction of the Court, and who in any event does not have a right to publish defamatory statements. If this is indeed a consequence of s.27 of the Act of 2009, I doubt very much if it is a consequence intended by the Oireachtas.