THE HIGH COURT ON CIRCUIT

EASTERN CIRCUIT COUNTY OF WICKLOW

[2014 No. 13 CAT]

BETWEEN

THOMAS CULLEN

PLAINTIFF

AND

EDWARD SHEEHY AND WICKLOW COUNTY COUNCIL

DEFENDANTS

THE HIGH COURT ON CIRCUIT

EASTERN CIRCUIT COUNTY OF WICKLOW

[2014 No. 14 CAT]

BETWEEN

BARRY NEVIN

PLAINTIFF

AND

EDWARD SHEEHY AND WICKLOW COUNTY COUNCIL

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 10th day of July, 2017.

1. This judgment is given in two appeals from an order of Judge O'Donnell in the Circuit Court, Eastern Circuit, County of Wicklow on 11th April, 2014, by which he dismissed the respective claims of the plaintiffs for damages for defamation against the defendants arising from the publication by the defendants of a press release on 23rd April, 2013. The two proceedings are identical in their terms and were conducted as one appeal before me. Save as is otherwise indicated in the course of this judgment, my conclusions are identical in respect of each appeal.

Background

2. The plaintiffs were at all material times elected members of Wicklow County Council. The first defendant was at all material times the County Manager or Chief Executive of the County Council, and the Council is the second defendant. In broad terms, the contents of the press release related to the making of a Compulsory Purchase Order by Wicklow County Council on 30th November, 2004 which gave rise to a considerable degree of political debate in the Chamber of the Council, in various other political and public fora and amongst certain members of the public.

3. As it will appear in the course of this judgment, arising out of disquiet and concerns expressed at public meetings of the Council, privately to elected members of Dáil Éireann, and to ministers of Government, an independent review by senior counsel was requested by the Department of the Environment and Local Government concerning the facts and legal arrangements surrounding the acquisition pursuant to its power of compulsory purchase by the County Council of certain lands at Charlesland, Greystones, County Wicklow.

4. Mr. Seamus Woulfe SC conducted the independent reviews and prepared two reports, one dated 12th March, 2012 and the second dated 8th February, 2013. The second report was forwarded to the Council on 23rd April, 2013 by the Department of the Environment and Local Government, and gave rise to the publication of the press release in respect to which the claim is made.

5. The press release was prepared and sanctioned by the first defendant in his role as County Manager or Chief Executive of the Council.

6. I quote the press release in full. For the purpose of the present proceedings, it is accepted that the press release is a sufficient publication by the defendants to found a claim in defamation.

The press release

7. "Wicklow County Council

> Press Release 23/04/2013
>
> **WOULFE REPORT REJECTS COUNCILLORS' ALLEGATIONS REGARDING THREE TROUTS CPO**
>
> Wicklow County Council (today Tuesday) received a copy of the Independent Review of the Compulsory Acquisition of land at Charlesland, County Wicklow which was carried out by Mr. Seamus Woulfe SC.
>
> The Council welcomes the fact that in his review, Mr. Woulfe rejects the very serious allegations which were made by Councillors Cullen, Nevin and O'Shaughnessy.
>
> In relation to the specific 'concerns' of the three Councillors, he concluded that: 'almost all of the concerns are not well founded or are misconceived'.
>
> In relation to a 'concern' by the three Councillors, which appears 'to imply some wrongdoing by some unnamed member of the Council staff', Mr. Woulfe has found that 'this entire concern is inaccurate and misconceived and unfair to the staff of the Council'.

Mr. Woulfe concluded that in his opinion 'there was no deviation by the Council from the relevant legal requirements and administrative requirements or practices'.

The Council notes that the delay in sanctioning the loan to purchase this site (caused by the need to carry out this independent review of the unfounded and misconceived allegations of Councillors Cullen, Nevin and O'Shaughnessy) has resulted in a loss to the Council of circa €200,000 in respect of interest foregone and administrative costs. This is in addition to the costs of the Independent Review commissioned by the Minister." (Emphasis added)

The claim

8. The plaintiffs commenced proceedings seeking damages for defamation by separate Civil Bills on 22nd July, 2013, and claim that the last paragraph of the press release was defamatory of and concerning each of them. For convenience, I have highlighted by underlining the relevant part of the press release.

9. Councillor O'Shaughnessy named in the press release has not brought proceedings.

10. The press release was released into the national and local media and was carried in two locally circulating newspapers, the Wicklow & Bray People, a hard copy newspaper, and wicklownews.net, an online news provider. The story was carried also on Eastcoast FM Radio.

11. The plaintiffs plead that the relevant portion of the press release in its natural and/or ordinary meaning and/or by way of innuendo, meant and was understood to mean:

(i) That the responsibility, or sole responsibility for the carrying out of the Independent Review was caused by the plaintiff;

(ii) that the Independent Review resulted in a loss of approximately €200,000 to the second named defendant (the Council);

(iii) that the plaintiff was incompetent in the discharge of his duties as a County Councillor and

(iv) that the plaintiff was unfit to represent his constituents and be a member of Wicklow County Council.

12. The claim made in the Civil Bills is that the publication of the words complained of have gravely injured the reputation of each plaintiff and exposed them to ridicule, contempt, odium and harassment and have caused great embarrassment and distress. It is pleaded that the material contents of the press release were false and that the defendants were reckless as to whether the contents were true or untrue. Damages, including aggravated and exemplary damages for defamation and damages for negligence are claimed. The negligence claim was not pursued at trial.

13. The defence in each case denies that the words complained of were defamatory of or concerning the plaintiffs, or in the alternative, that the words were defamatory in their natural or ordinary meaning and/or by way of innuendo. It is denied that the reputation of the plaintiffs has been injured, or that publication exposed them to ridicule, contempt, odium, harassment, embarrassment or distress. There is a plea in reliance on the defence of truth as provided in s. 16 of the Defamation Act 2009 ("the Act"), and a separate plea that the press release was issued in circumstances of qualified privilege as provided by s. 18 of that Act. There is a separate plea of honest opinion under section 20.

The compulsory purchase

14. For the purposes of its statutory housing function and in order to provide social housing to comply with its statutory obligations, Wicklow County Council began the process of identifying suitable sites for such housing the Greystones/Delgany area after the Council published its Development Plan in 1999. There was difficulty in acquiring land by agreement in the Greystones area because it was considered by private developers to be particularly attractive as a location for family housing. In the early years of the 21st century, central government encouraged local authorities to purchase and develop social housing in their functional areas and at that time there was a general assurance from central government that any money expended on the acquisition or development of social housing would ultimately be reimbursed from central funds. Central government urged local authorities to show considerable "ambition" in the delivery of social housing in its functional area, and to utilize the statutory power of compulsory purchase where desirable.

15. Wicklow County Council placed advertisements in locally circulated newspapers seeking expressions of interest by persons who had land in the Greystones area which they might be prepared to sell. In the early part of the decade, 2001/2002, two members of the local authority, Tony O'Neill and Des O'Brien, had made a desktop assessment and identified 21 available sites in the Greystones area which the local authority might pursue. On analysis, most of these were considered unsuitable, primarily because they were in the course of being developed privately, or planning permission had already been sought by private developers. The Council took the view that it was not prudent to seek to compulsorily acquire sites which had been acquired by private developers or where they had obtained planning permission as this would not, in general, have added to the stock of available land for housing generally.

16. Tony O'Neill identified a site known locally as Three Trout Stream which might be available and suitable for public housing. For reason to do with the persons who owned that land it transpired not to be possible to reach an agreement for a private sale to the Council of this land. On 30th November, 2004, the County Manager made an order pursuant to his statutory function that the land be acquired by compulsory purchase. This then activated the statutory procedure for the confirmation by An Bord Pleanála of a Compulsory Purchase Order, and after an oral hearing in April, 2006, An Bord Pleanála confirmed the Order.

17. Objection was received from one John Nolan to the making of the Compulsory Purchase Order as Mr. Nolan claimed to have acquired title to some or all of the field by overholding on the expiry of a yearly tenancy from William Irwin, the owner of the paper title. Mr. Nolan in his letter of 10th January, 2007 to An Bord Pleanála said the lands were known colloquially as the "Bog Field" and noted that the field had flooded as recently as November, 2002.

18. A Notice to Treat issued on 12th July, 2006, and thereafter a valuation was prepared by JB Devlin of Messrs. Donal O Buachalla, valuers, on 30th June, 2008. The valuation was done noting that the owner or reputed owner was one William Irwin and that John Nolan was the occupier. An assumption was made that Mr. Irwin owned the freehold and that Mr. Nolan had acquired title by adverse possession. An assumption was also made, which came to have considerable importance in the course of the trial, that there were no adverse ground conditions such as flooding or environmental issues. The writer noted that a portion of the lands adjacent to the

Three Trout Stream was zoned green corridor with a stated planning objective of protecting the "flood plain of the stream". Certain matters which negatively impacted on valuation including some difficulty with access along the existing local public road were noted. The value was given at €4.6m in round figures in the event that the lands were wholly owned by Mr. Irwin, and at €5.2m, in round figures if the lands were owned by Mr. Nolan, this latter larger valuation arising because Mr. Nolan owned adjoining lands through which suitable access could be obtained.

19. The matter was referred to the property arbitrator under the scheme of the Act. During the course of arbitration, agreement was made on 24th March, 2011 for the purchase of the lands for lands for €3m.

20. It is not doubted that at the time when the settlement was reached in 2011, after the catastrophic fall in land and house prices, the land, which comprised 1.4022 hectares without planning permission, had a market value of only a fraction of the amount agreed to be paid.

21. It is this discrepancy between the market value of the land in 2011 and the amount agreed to be paid that gave rise to concern on the part of the plaintiffs and other councillors, public representatives and the public generally, and which formed the political backdrop to this litigation.

22. In the time between the service of the Notice to Treat on 12th July, 2006 and the compromise on value reached on 24th March, 2011, the Council sought approval for capital funding from central funds pursuant to s. 106 of the Local Government Act 2001 under a scheme for capital funding known as SHIP. This funding scheme was discontinued or stayed by the exchequer in the middle of 2008 for reasons of central government funding.

23. By letter of 20th July, 2011, after the compromise of the arbitration was reached in March, 2011, the Council made a fresh application to the Department to sanction borrowings of €3m for the acquisition of the land at Charlesland. A resolution of the members of the Council had been made on 18th July, 2011 for that purpose, and the events surrounding the making of that resolution will be dealt with more fully later in this judgment. For present purposes, it is sufficient to note that reservations were expressed by a number of elected members of the Council regarding the amount agreed to be paid by way of compensation for the lands, arising from the much reduced market value of the land and because it was perceived that the purchase was not therefore financially prudent or value for money.

24. The events that gave rise to the proceedings the subject matter of this appeal then commenced to evolve.

25. The sale closed in August, 2011, and the Council used its own funds initially while it awaited drawdown of a loan from central funds. Throughout the summer months of 2011, a number of public representatives, including the two plaintiffs, Councillor James O'Shaughnessy, Anne Ferris TD, Simon Harris TD, Councillor Irene Winters, John McGuinness TD and the Public Accounts Committee of Dail Éireann expressed disquiet regarding the consideration to be paid for the purchase. Throughout the period, a number of newspaper articles appeared in the Wicklow Times, the first of which was on 26th July, 2011, and which raised public awareness of the issue.

26. The matter was referred to the Attorney General and she advised that the service of a Notice to Treat by the local authority as a matter of law by virtue of s. 84 of the Housing Act 1966 bound the authority to purchase the land at a price either agreed or assessed at arbitration, and that the relevant date for valuation was the date of the service of the Notice to Treat and not the date at which the agreement to compromise the arbitration process was reached.

27. At a Council meeting in July, 2011, the discussion became heated, and in order to achieve a resolution, a unanimous decision was taken in September, 2011 that the files relating to the CPO would be made available to the Councillors. These were placed together in a room which came to be called the "Room of Documents" or the "Room" in the course of the hearing. The plaintiffs and other councillors attended in the Room and the arrangement was that they were entitled to obtain copies of any documents they identified. Rather than being satisfied from their perusal of the papers with the course of the Compulsory Purchase Order, the plaintiffs and Councillor O'Shaughnessy came to the view that the circumstances giving rise to the choice of the Three Trout Stream site in 2003 were opaque. They made representations to the then Minister for Housing Mr. Willie Penrose TD, and met him on 3rd November, 2011. The three Councillors presented the Minister's special adviser with a confidential memo in which they expressed an identified number of concerns regarding how the matter had been dealt with by the Council and by the Department. This document became known as "the List of Concerns" in the course of the appeal.

28. The plaintiffs say they were acting bona fide and responsibly as public representatives in raising these queries. The position articulated by the defendants, and by Mr. Sheehy in particular, is that the Councillors were not genuine in their concerns, that they were obtuse, and that no "independent, open-minded person" could have come to the conclusion that the matter was one of concern or could have failed to understand what had transpired and why.

The Woulfe Reports

29. Mr. Woulfe prepared two reports following an examination of the documents in the Room of Documents, the other documents furnished to him and discussions with personnel in the Council and with Mr. Devlin of O Buachalla valuers. Mr. Woulfe had a specific report prepared at his request relating to flooding on the site and neighbouring sites.

30. The first report related to the management by the Department of the Environment, Community and Local Government of the application of Wicklow County Council for loan approval in relation to the CPO. In his first report, Mr. Woulfe concluded that there was "no deviation by the Department from the relevant legal requirements and administrative requirements or practices" in regard to the compulsory acquisition of the lands at Charlesland.

31. The terms of reference for the second report required Mr. Woulfe to engage a review arising from the fact that the compulsory acquisition of the land "has been the subject of public and media comment and representations by a number of Wicklow public representatives to the then Minister for Housing and Planning". The review arose in the context of the "List of Concerns" dated 3rd November, 2011, and a revised document of 7th November, 2011. Mr. Woulfe was asked to engage the following six matters:

> (i) Review the relevant records of the Council.
>
> (ii) Consult as necessary relevant officers of the Council.
>
> (iii) Establish the process followed by the Council in regard to the CPO including its consistency with the relevant legal requirements and administrative requirements or practices.

(iv) Identify any deviation from such requirements and practices.

(v) Address the specific concerns of the public representatives and consult as necessary with them.

(vi) Make such findings and recommendations as may be appropriate, including identifying any shortcomings.

32. Mr. Woulfe's second report ran to 77 pages and four appendices. He made six conclusions and recommendations and dealt specifically and separately with each of the 15 concerns raised by the Councillors. Mr. Woulfe set out in detail the legal background to the CPO and of the negotiations with the owners of the land. He examined the steps required by the statutory scheme created by the Housing Act 1966, the role of An Bord Pleanála under s. 214 of the Planning and Development Act 2000 and the effect of the service of a Notice to Treat pursuant to s. 79 of the Act of 1966.

33. An entire chapter of his report was dedicated to the process and the legal import of various stages of that process.

34. The third chapter of Mr. Woulfe's report dealt with the actual process engaged by Wicklow County Council in regard to the Charlesland CPO. A considerable amount of detail is contained with regard to the valuation report by Mr. Devlin of 30th June 2008 and the "special assumptions" made in the report. He deals with what occurred in the arbitration stage of the process which led ultimately to the compromised compensation figure. In the early subparagraphs of Chapter 4, he dealt with the fact that two persons were claiming title to the CPO lands and how this was dealt with. At para. 4.15, he made the following observation regarding the report to the Councillors of the result of the negotiations at the arbitration:

> "The report to the Councillors could also have included some material along these lines regarding the expert advice available to the Council in agreeing the settlement figure, and it seems to me that it would have been in the interests of greater openness and transparency for the report to have included this type of additional information, and it would have saved some of the difficulties which later arose."

35. Mr. Woulfe then went on to deal with the 15 stated concerns of the Councillors and I will briefly outline his observations on each.

The first concern; flooding
36. The report prepared by Messrs. J. B. Barry & Partners Ltd ("the Barry Report") had identified that the Three Trouts stream had a somewhat limited capacity in certain parts of the stream and that lengths of the stream were inadequate to cater for a storm with a return period of five years. Mr. Woulfe took the view that the Council believed that recommendations made in an engineering report from M/S Barry could be met in the development of the site so as to avert the risk of flooding. At para. 4.20, he stated his conclusion:

> "In conclusion on this issue, I think it is overstating the matter quite a bit to suggest that the Council were aware that the lands in question were subject to serious flooding or were in fact a flood plain. At its height, the Council were aware from the Barry Report that there was a risk that flooding could occur in the lower levels of the field immediately adjacent to the stream and that this lower level area could constitute an area of flood plain. However, this area would be used for the provision of a linear park and walkway in the northern section of the subject site, and detailed flood prevention measures could be introduced at the design stage by the Council to safeguard this area. In these circumstances, it does not appear to me correct to claim that the Council was acting in contradiction of national building policy and base common sense."

The second concern: the sanction in 2006 of €5m for the purchase of the land
37. Mr. Woulfe dealt with this by reference, *inter alia*, to his first report and to the position adopted by Wicklow County Council that the 22 acres of land would be severed by the construction of a new road, that part of the lands would be more suitable for a hotel than for residential units, the policy of the Council not to accommodate up to 160 units in one block for social housing, as well as the perceived need to hold this site as a "guarantee or part-fund" for the development of the harbour, all amounted to matters of policy in respect of which there could be "legitimate arguments". His conclusion was that the choices made by Wicklow County Council were not unreasonable.

The third concern: the undrawn funds
38. The third concern related to the original loan finance of €5m which was not drawn down because the purchase price was subsequently negotiated at a lower figure and did not form part of the second report.

The fourth concern: the valuations
39. This was a matter of some great controversy in the course of the trial and the Devlin valuation was considered by Mr. Woulfe not to have been "revised" in the letter of 27th August, 2010. Mr. Woulfe took the view that the "settlement figure of €3m had now superceded any pre-existing valuation reports and it was not necessary for the Council to rely upon any such reports when seeking loan approval" (para. 4.26). He confirmed that the Council did not rely upon a valuation when it sought loan approval for the €3m, but sought loan finance on the basis of an agreed valuation.

The fifth concern: was the Department told of the flood risk?
40. The issue was whether Wicklow County Council had made the Department aware of the "serious flood plain difficulties on the site". At para. 4.28 of his report, Mr. Woulfe said the following:

> "In my opinion, this language [with regard to the serious flood plain difficulties] is something of a misdescription and an overstatement of the nature of any information in the Council's possession with regard to the risk of flooding issue. At its height, the Council had information in its possession which suggested that approximately one-third of the total area, being the area to the north at the lower levels which are immediately adjacent to the stream, could constitute a flood plain in the sense that it was then liable to flooding, having regard to ground levels in that area and the maximum predicted flood levels."

The sixth concern: the negotiated purchase price
41. The Councillors expressed concern that there was no written memo, records or any documentation relating to the meeting at which settlement on price was reached. Mr. Woulfe took the view that the negotiations between the parties, conducted through senior counsel, were "a normal part of these types of proceedings" and did not find any irregularity in the way in which the negotiation was conducted. Mr. Woulfe did have memoranda of the agreement signed by the parties or their representatives and

other attendance notes. At para. 4.30 of his report, he found the claim of the Councillors "to be entirely incorrect" with regard to the fact that the settlement meeting was not recorded in any written document or memo.

The seventh concern: no date
42. The negotiated agreement was undated. At para. 4.32 Mr. Woulfe identified this as "an oversight on the part of the legal representatives who drafted and/or approved the text of the settlement agreement" and then expressed the view that such an oversight could "easily occur in the pressurised atmosphere" of negotiation. He was of the view that there was no significance in the absence of a date as there was plenty of secondary evidence to verify the date if necessary.

The eighth concern: copy of compromise agreement
43. Mr. O Buachalla, the arbitrator, had sought a copy of the compromise agreement of 24th March, 2011, but none was available. Mr. Woulfe had available the transcript of the arbitration hearing at which the compromise was ruled and it seems that from this he was able to glean that the arbitrator had been given sight of the text of the second agreement, had handed it back to counsel and had then sought to take it back to further look at some aspect of the draft. Mr. Woulfe expressed the view, at para. 4.34 of his report:

> "In any event, this issue was of no significance, as in many cases a copy of any settlement agreement is not made available to an Arbitrator or indeed to a Judge in Court proceedings, and he simply is asked to make whatever Order that is required arising out of the settlement agreement and he simply told the details of the Order requested."

The ninth concern: the mode of payment
44. Initially two separate payments of €2m to the Irwin estate and €1m to the Nolan estate were to be made to close the sale, but ultimately Wicklow County Council issued payment of €3m to the solicitor for the Irwin estate. A letter from the Law Agent had suggested that this approach was more straightforward as otherwise "awkward questions" might be raised. The Councillors expressed a concern regarding the nature of such "awkward questions". Mr. Woulfe detailed the background to the settlement negotiation and the correspondence between the solicitors for the Nolan and Irwin estates and the Law Agent of the Council. The Law Agent had come to the conclusion that the convenient way to deal with the matter was "on a streamlined basis", and that he would proceed by way of one paying order as a more straightforward way of dealing with the Council accounting system, and that the solicitors for the Irwin and Nolan estates could themselves make arrangement for the apportionment of the purchase monies. The sale would be closed with one bank draft and title would be taken from the registered owner, leaving the solicitor for the legal owner to deal with the payment of the agreed apportionment. Mr. Woulfe dealt with this by saying at para. 4.39:

> "All of these potential issues could have caused delay at closing if they had not been properly dealt with, and in my opinion it was clearly in order for the Law Agent to raise with his opposite number the issue of potential queries arising at the last minute, in the event that he was asked to furnish two Paying Orders rather than one at the time of closing."

The tenth concern: information given to valuer
45. The Councillors believed that Wicklow County Council had taken a decision not to inform Mr. Devlin of the "serious legal conflicts" between the Nolan and Irwin estates, or the flood risks. Mr. Woulfe found that there was "no decision" to withhold information from Mr. Devlin and "no evidence" that Mr. Devlin lacked the necessary information to come to an informed estimate of value (para. 4.41). Mr. Woulfe went on to say:

> ". . . in my opinion, this entire concern is inaccurate and misconceived and unfair to the staff of the Council."

The eleventh concern: valuation
46. The Councillors were concerned that the Council's Law Agent had originally "valued" the land at €600,000 and asked whether Wicklow County Council had made this information available to the Department. Mr. Woulfe pointed to the obvious fact that the Law Agent is not a valuer and that the letter of 27th August 2010 from Mr. Devlin in which he suggested pleading a market value of €693,000 was for the purpose of the response to the statement of claim served in the compensation claim. Mr. Devlin had identified this figure as being one "for the purposes of negotiations". Mr. Woulfe confirmed the view he had already expressed in his first report, that the Council had not made this background information and advices regarding pleadings and figures that might be used for the purposes of negotiation available to the Department for their consideration of loan approval:

> ". . . but this is probably because neither the Council nor the Department would have regarded any such information as particularly relevant in the context of an application for sanction to borrow the cost of acquisition of the land." (para. 4.42)

Any earlier information relating to the valuation of the land had now been overtaken by the agreed compensation figure, and neither the Council nor the Department had any reason to go behind the agreed figure as conveyed by the Council.

The twelfth concern: the Nolan claim
47. The Councillors raised the concern as to why the Nolan estate had "abandoned and waived all claims to the land". Mr. Woulfe referred to the fact that a deal was done between the Irwin and Nolan estates to which the Council was not privy, although it does seem from correspondence with senior counsel that there was an agreement for the apportionment of the composition figure between the two estates. At para. 4.44, Mr. Woulfe said as follows:

> "As regards why this claim was withdrawn, one can easily surmise that the Nolan family were not confident that their claim would ultimately succeed in the High Court, and they must have felt it prudent to accept a deal whereby they would be paid off by the Irwin estate in return for withdrawing their claim."

The thirteenth concern: the other Council land
48. Wicklow County Council already had a landbank in Greystones which it was argued could have been used to provide social housing and the Councillors raised the question whether it was reasonable, in those circumstances, to seek to acquire the subject lands at all. The CPO site was described as "landlocked" and a flood plain. Mr. Woulfe said that the site would not be landlocked having regard to the evidence given by the Council at the oral hearing in March, 2006 that access could be obtained via Burnaby Lawns and via a new bridge over the stream itself, and this evidence had been accepted by An Bord Pleanála and the Board's Inspector.

The fourteenth concern: Zapi
49. This concern arose from evidence given by a nephew of Mr. John Nolan at the An Bord Pleanála hearing that Wicklow County Council was using their CPO lands to obtain land for the benefit of Zapi Developments which owned adjoining lands. Mr. Woulfe had the benefit of the transcript and concluded that Mr. Nolan was "more asking a question about a possible land swap with Zapi than making a claim as to such". He concluded that Mr. Nolan's question was "pure speculation in the absence of any supporting evidence". At para. 4.49 of his report, Mr. Woulfe concluded:

> "My review of the relevant files shows no evidence of any discussion between the Council and Zapi in relation to this site. When I consulted with the Council as to whether they had any evidence they said they were simply drawing to the Minister's attention the question raised by Mr. Nolan."

The fifteenth concern: meetings with the Minister
50. This was a political question and related to a meeting held with the then Minister for Housing, Mr. Willie Penrose TD, from which it was said members from the Labour group and a Sinn Féin delegation were excluded. Mr. Woulfe noted that the Councillors had said to him that it was "inappropriate and contrary to established practice" for the Private Secretary to the Minister to have excluded elected members from a political party. Mr. Woulfe concluded, at para. 4.51:

> "There is therefore a dispute as to what the established practice was, and I have been unable to resolve this by my review of the files or by consulting with the relevant officers of the Council and with the public representatives."

The Woulfe conclusions
51. Mr. Woulfe concluded with a short Chapter 5 in which he listed his conclusions and recommendations. This is set out in six separate paragraphs. His conclusion was that:

> "There was no deviation by the Council from the relevant legal requirements and administrative requirements or practices."

52. With regard to site selection, Mr. Woulfe made the following conclusion at para. 5.02:

> "As discussed in Chapter 3, it seems to me that the site selection procedure was somewhat bare and inadequate, even if it did not lead to a poor outcome in this particular case."

53. Mr. Woulfe summarised his conclusions with regard to the specific concerns of the public representatives by saying the following at para. 5.03:

> "I have concluded that almost all of the concerns are not well founded or are misconceived"

54. Mr. Woulfe recommended that "consideration be given to putting in place a more comprehensive site selection procedure as discussed above".

55. Mr. Woulfe then went on to draw attention to the complexity of proceedings and processes relating to a CPO and identified that the multiplicity of applications and different decision makers:

> ". . . is a recipe for overlap and duplication, and yet at the same time a potential cause of confusion and 'lack of joined up thinking'. A Local Authority is liable to minimise any deficiency in certain lands under the first procedure above, and yet seek to maximise any such deficiency under the second procedure. This is liable to cause some confusion for the Department in dealing with the third and fourth procedures (application for funding) and may also have caused some confusion for the public representatives in the present case."

The meanings for which the plaintiffs contend
56. The plaintiffs have pleaded four meanings alleged to have been borne by the press release.

57. It is a matter for a court hearing a claim in defamation to determine whether the language used is capable of and does, in fact, bear the meanings actually pleaded. The case law suggests that the meaning must be derived from the literal words of the publication, in the context of the publication taken as a whole and in a suitable case having regard to the nature of that publication, and be the fair and natural meaning of those words.

58. Meaning "is essentially a matter of the impression it conveys subjectively to recipients": *Bond v. BBC* [2009] EWHC 539 (QB). The recipients are the hypothetical "reasonable" reader, the analysis is not in a "detailed, morbid or far fetched analysis" of the words, but as stated by the High Court in *McGrath v. Independent Newspapers (Ireland) Limited* [2004] IEHC 157, [2004] I.R. 425:

> "In determining whether the words are capable of a defamatory meaning the court is obliged to construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence and will not consider what person setting themselves to work to deduce some unusual meaning might extract from them. The court should avoid an over elaborate analysis of the article because the ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. In deciding the issue I am satisfied that I am entitled to consider the impression that the article has conveyed to me personally in considering what impact it would make on the hypothetical reasonable reader and lastly the court should not take a too literal approach to its task." (para. 38)

59. I turn now to examine the meanings to which the plaintiffs contend.

Meaning 1: responsibility for the carrying out of the review
60. The plaintiffs claim that the press release in its natural sense conveyed and was understood to have the meaning that the responsibility, or the sole responsibility, for the carrying out of the independent review lay with the plaintiffs.

61. There is no doubt that taking the press release as a whole, the plaintiffs are identified as the prime movers in the decision to carry out a review. I consider that the meaning that an ordinary prudent reader would take from the press release was that the plaintiffs were centrally involved in the decision to conduct a review, and that the impetus to appoint Mr. Woulfe were the

"concerns". I am satisfied that the ordinary reasonable reader would regard it as perfectly proper and indeed commendable for a councillor to engage with the valuation and suitability of the land agreed to be purchased and to do so was a matter within his or her mandate, and reflected well on their engagement with matters in the public interest.

62. I do not consider that taken alone that meaning is defamatory.

Meaning 2: costs of approximately €200,000 to the Council
63. That the press release has this meaning is not in issue but the defendants seek to justify the meaning on the basis that it is true in substance.

64. I heard evidence regarding the basis of the claim of the defendants that the review had cost the Council this sum. The evidence was broadly that the sum arose by reason of lost interest and additional administrative costs.

65. The evidence is that the Council closed the sale following the agreement reached in the course of arbitration, and drew the purchase monies from a current account. Initially, the evidence of Mr. Sheehy was that the money had been drawn from a twelve month demand account, but this is not borne out by later evidence.

66. Mr. Sheehy gave evidence on Day 4 that his calculation was based on:

> "firstly, the interest which we lost on Council funds because we had to fund the acquisition back in August 2011 from the Council's own resources. So there was money that we would have otherwise have earned on the €3m".

67. He made his calculation of €137,500 from November, 2011 to the end of April, 2013, eighteen months, and applied an interest rate of 4.25% deposit interest on €3m. For one year he then applied a lower interest rate for six months of 2.4% and rounded a calculation of €36,000. These were gross figures. At no point did Mr. Sheehy give any evidence as to the DIRT payable on the interest or any other taxation that might have been relevant.

68. DIRT rates for the relevant period were 30%, or 33% from 1st January, 2013. This would reduce Mr. Sheehy's figures by approximately €50,000 and bring the lost interest figure back to a figure closer to €100,000.

69. Initially, the Council hoped to fund the purchase of the lands through the Social Housing Investment Programmes (SHIP). On 18th July, 2011, the Council passed a resolution sanctioning the borrowing of €3m. The application was paused and the advice of the Attorney General was sought. Geraldine Tallon, then Secretary General of the Department, gave evidence that the documentation was on her desk awaiting sign off in early November, 2011, but that the application was stayed pending "the examination of the validity or otherwise of the claims made in respect of the actions of the Department and Wicklow County Council" (extract from letter of 16th November, 2011 to office of the AG).

70. Ms. Tallon, however, was dealing not with the SHIP scheme but the Land Aggregation Scheme. I accept that the Council "hoped" that the loan under this scheme would be granted, and evidence of what transpired at a meeting between Minister Penrose and a delegation from the Council makes this clear. No promises or guarantees had been given at the time the Council entered into the compromise to purchase the lands. The lost interest claim is based on an unsupported hypothesis that the monies would be recouped from central funds.

71. As to the administration costs, evidence was given by Ms. Lorraine Gallagher of time spent by persons in her department dealing with the paperwork, the requisition of information by Mr. Woulfe and meetings. There was no evidence that any member of staff received extra payments in respect of this work, but I can readily extrapolate that, if those members of staff were engaged in the exercise of collating the paperwork for the purposes of Mr. Woulfe's review and preparing additional reports and documentation for him, that their time engaged might have been available to perform other tasks within their department and I accept also that having regard to the public service recruitment embargo, that the department was short staffed.

72. What I have not heard however is any evidence that would enable me to distinguish between the costs of the exercise engaged in collating and copying files to place them in the "Room of Documents", and those that arose from the resolution of the Council and not as a result of Mr. Woulfe's review.

73. I accept as a matter of fact the evidence of Ms. Tallon that the granting of the loan sanction was delayed as a result of the reviews, but I am not satisfied that the defendants have established the loss of interest at a level broadly in the region of €200,000.

74. I do not consider that the defence of justification must be tested with regard to the accuracy of the actual figure of €200,000 but the figure must be broadly speaking correct, and I consider that taking the case of the defendant on which justification is claimed to be shown, the cost is closer to €100,000 than €200,000 and even those figures are predicated on an assumption that the Land Aggregation Scheme grant would have been available at the time the Ms. Tallon suspended consideration of the loan in November, 2011. No evidence was adduced as to how long a loan took to draw down, whether central funds could meet the claim at that time etc. I am informed that the Land Aggregation Scheme was discontinued in 2013, but the evidence on which the defendants rely is not sufficiently robust to establish to my mind the truth or substantive material truth of the statement that the Council incurred costs of circa €200,000 arising from the review. Truth is not established.

75. I consider that the statement that the conduct of the Woulfe second review had cost the Council €200,000 at a time when funds were short is defamatory of the plaintiffs and would have negatively impacted on the respect had for them by persons who lived in the Wicklow functional area. The meanings and effect of the statement is bound up with the next pleaded meaning to which I now turn.

Meanings 3 and 4: competence or fitness to hold public office
76. These two meanings can be conveniently dealt with together, and the plea that the words carried these meanings is central to the appeal.

77. The plaintiffs claim these meanings are conveyed by innuendo, and accept that this alleged innuendo must be seen in the context of the entire document: *Griffin v. Sunday Newspapers Ltd.* [2011] IEHC 331, [2012] 1 I.R. 114. In coming to a view on meanings the court is not to treat an isolated passage or sentence in an article, and this is especially so when the argument relies on an alleged meaning by innuendo.

78. The key to this meaning is the use of the words "unfounded" and "misconceived" as adjectives describing the concerns or

"allegations" of the two plaintiffs and Mr. O'Shaughnessy.

79. It is not true to say that Mr. Woulfe found that the Councillors had acted mischievously or in bad faith in raising their concerns. To say, as he did, that they are "unfounded" is to say that they were not borne out by his investigation or by the facts that he found or by the legal propositions that he explained. The word "unfounded" has a unique legal meaning to express a view after consideration of the relevant facts and law that a particular finding is or is not to be made, or a particular assertion made out. It relates to a view expressed by an adjudication following an investigation. It is not the same as saying that a concern was baseless or capricious or obtuse or ill-conceived. A judge might say that he or she does not find a particular allegation to be found on the facts, and a judge may equally, on the other end of the spectrum, conclude that a case is without substance, frivolous, vexatious or made purely to cause annoyance, inconvenience or concern to another, or without any sufficient belief that the cause is likely to succeed. "Unfounded" in legal parlance is not the same as vexatious or frivolous. Mr. Woulfe did not use language that suggests he took the view that the concerns were frivolous or vexatious, but reported that his investigation led him to the view that the concerns were not borne out by the facts or law.

80. I consider that on a plain reading of this part of the press release, and the connection sought to be made between the lost costs to the Council from the review, the suggestion is that the two Councillors and Councillor O'Shaughnessy caused this loss, or were responsible for this loss, and that they did so in a manner which was without cause or substance.

81. The use of the words "unfounded" and "misconceived" in the press release is one of blame, not merely the attribution of causation, but an attribution of causation by reason of actions that were irresponsible, made without cause or good reason. To attribute such loss to a member of the Council particularly at a time when the evidence points to the impact of the financial crisis on Council funding and services, is a matter which was gravely damaging to the reputation of those councillors in their role as public representatives. The words in their ordinary meaning to my mind reflect the view that these Councillors were responsible for the wasting of a very significant amount of money which could have been applied to more deserving causes.

82. I consider that any discerning and reasonably intelligent reader would have understood that the Council had lost a significant amount of money, and that the cause of such loss was a matter of public concern, and that the person or persons responsible were not worthy of respect, and had caused the loss irresponsibly, and were therefore unworthy of public office.

Truth?

83. The defendants argue the truth of the statement.

84. As a matter of fact, the plaintiffs were not the only persons who had raised issues regarding the CPO, and the evidence points to Councillor O'Shaughnessy, various public representatives in the Wicklow area, and the Public Accounts Committee of Dáil Éireann at one or other relevant time expressing concern primarily with regard to the compensation agreed to be paid, but also a lesser extent regarding the selection process. Deputy Harris and Deputy Ferris were both involved and an amount of consultation occurred with the then relevant Minister and with the chair of the Public Accounts Committee.

85. I consider it fair to say that the issues raised by the plaintiffs and Councillor O'Shaughnessy, who chose not to bring a civil action, related not merely to the purchase price of the CPO lands but also to the suitability of those lands and the process generally. The Attorney General had advised in October, 2011 that the basis of the compromise regarding value was legally sound. This advice was given by a letter of 11th October, 2011, and the matter giving rise to the setting up of the reviews by Mr. Woulfe SC, crystallised in November, 2011.

86. I find that the meetings of Wicklow County Council in the summer and autumn of 2011 show a degree of concern among members of the Council in general regarding the matter. As a matter of fact, the engagement of Mr. Woulfe to carry out the two reviews had as a starting point the questions raised in the confidential letter sent by the plaintiffs and Councillor O'Shaughnessy to the Minister. I accept in particular the independent evidence of Ms. Tallon that she put the loan application of the Council on hold in the light of the serious issues raised in the documentation submitted to Minister Penrose by the letters of 3rd and 7th November, 2011. She in correspondence of 16th November, 2011, to the Director General of the Office of the Attorney General made it clear that it was "necessary to address the specific concerns of the public representatives and to consider whether the Department was fully compliant with relevant statutory and public policy obligations". The concerns of Ms. Tallon were with regard to the actions of the Department.

87. I also find as a matter of fact that the terms of reference for the two reviews conducted by Mr. Woulfe echo the concerns expressed in the two letters from the plaintiffs and Councillor O'Shaughnessy of 3rd and 7th November, 2011. I quote from the relevant part of the terms of reference:

> "The manner in which this matter has been addressed by both the Department and Wicklow County Council has been the subject of representations by a number of Wicklow public representatives to the then Minister for Housing and Planning. The Minister's Special Adviser met with these representatives at the request of the Minister on 3 November 2011 and he was at that meeting given the annexed document dated 3 November 2011. He was subsequently sent a further document dated 7 November 2011 (also annexed).

In the light of the serious allegations made in these documents, concerning the Department's management of the loan application by the Council to fund the compulsory land acquisition, Counsel is requested to… ."

88. The plaintiffs and Councillor O'Shaughnessy were unhappy with the terms of reference and they emailed Minister Hogan on 21st February, 2012, setting out their dissatisfaction:

> "Can you please confirm our exclusion from this investigation process as it is our intention to take this matter and your conduct to another Authority. It is your duty as Minister to properly have investigated our complaints of Wicklow County Council on this issue for which you have a duty of overall responsibility."

89. The terms of reference for the first review were amended on 29th February, 2012, the amendment being made "to address the specific concerns of Public Representatives regarding the role of the Department and consult as necessary with these Public Representatives".

90. I am satisfied having regard to the evidence that the plaintiffs and Councillor O'Shaughnessy were the prime movers in regard to the request for the review, albeit the review was to deal with two separate questions, the first with the role of the Department and the second with the role of Wicklow County Council in the CPO process.

91. However, I accept the argument of the plaintiffs that the decision to appoint Mr. Woulfe was not one within their gift, and was one ultimately to be made by the Minister in consultation with the Attorney General. It was the Minister who commissioned the review. I am satisfied that there is a difference in meaning between imputing "responsibility" for the conduct of the review, and the ultimate formal decision to conduct that review. I am satisfied that the review was conducted at the instigation and following representations and further involvement by the plaintiffs and Councillor O'Shaughnessy, but the cause of the delay was the commissioning by the Minister of the review.

92. Mr. Sheehy, and Ms. Gallagher in particular, engaged detailed scrutiny of all of the documents relating to the CPO and in their evidence displayed a degree of preparedness and understanding of the files which is to be admired. But this degree of detail, explanation, analysis and scrutiny was not applied to the matters when this sorry tale came to the fore in the County Council in the summer of 2011. The Councillors were as politicians concerned about the lack of financial resources in the county. They were understandably conscious that the expenditure by the Council of €3m on the CPO site was not value for money in the context of the date on which the sale was closed. They did not fully appreciate the extent of the legal obligation that the Council had following the service of the Notice to Treat, and that in relative terms the figure of €3m was good value when compared with the amount of the claim made by the landowners. It was the comparison with current market value that made it appear excessive, and the opaque and arcane law relating to the CPO process to which Mr Woulfe had expressly made reference, and which was not mentioned at all in the press release.

93. I have heard the plaintiffs in evidence, and I have also heard officials of the Council, and Mr. Sheehy who is now retired from his role as County Manager/Chief Executive. The degree of animosity between the parties even now is palpable, and each "side" was intractable and blind to the observations or the starting point of the other.

94. These plaintiffs were prepared to, and did, conduct a political campaign in locally circulating newspapers, which they availed of with great enthusiasm, and on the floor of the council chamber.

95. Mr. Sheehy was an intelligent and competent witness, but at no point in the course of his long evidence expressed any degree of understanding whatsoever of the position and concerns of the Councillors, concerns which were justified in a broad sense having regard to the difference in the value of the lands of the CPO lands from the sale was closed, and the price agreed to be paid.

96. The CPO process and the questions engaged by the Councillors were particularly heated because of the financial crisis, and because the legislation is complex. Mr. Sheehy's evidence shows a view, that he still holds, that the plaintiffs were neither reasonable nor *bona fide* in regard to the concerns they raised. He did not in my view sufficiently appreciate that some of the allegations arose from concerns which could have been readily dealt with, and the approach of Mr. Woulfe to certain questions bears this out. Had the time spent on dealing with Mr. Woulfe's very reasonable enquiries and requests for further information and reports been spent dealing in public with the concerns of the Councillors, and had Mr. Sheehy addressed the meetings of the Council with the details and analysis that was finally brought to bear on the matter for the assistance of Mr. Woulfe, then it could have been said that the Councillors were unreasonable or obtuse had they persisted with their questioning. However their concerns were not dealt with to their reasonable satisfaction, and the Attorney General and the relevant Minister took the view that a publicly funded review by an expert senior counsel was required in regard to the matters they raised. It could not be said that the broad sweep of their concerns were obtuse, wrongheaded or not made *bona fide*.

97. Nor in my view can it be said that they persisted in their questioning notwithstanding that they had sufficient answers. The information in the documents that were in the "Room of Documents", and the way in which the "Room of Documents" was established so that a councillor or other relevant party could copy documents, but not have them explained, was a manner of dealing with these serious public concerns that did not answer, and was not focused on answering, the reasonable concerns of the councillors.98. Furthermore, Mr. Woulfe had available to him certain documents, but more importantly, explanations and had consultations with some of the key relevant people in Wicklow County Council, and he was able to use his legal knowledge of the complex area of compulsory purchase, the technical expertise in the Council, a site visit and the assistance of staff members who were familiar with the file. Mr. Woulfe sought clarification and reports were prepared for him with regard to flooding, and valuation, and had the advantage of meeting with the County Manager and technical experts in the Council who assisted him in understanding the background and context of the decisions and process.

99. An issue that arose in the course of the hearing was the extent to which the documents in the "Room of Documents" fully explained the initial choice of the site, and the sequence of events that led to the agreement to pay €3m for the site. Certain documents furnished to Mr. Woulfe for the purposes of his investigation were not in the "Room of Documents", as documents and reports were created for him for the purposes of his review and at his request.

100. Some important documents available to Mr. Woulfe were not in the "Room of Documents", and I list a few of those I consider to be relevant:

a. Documents otherwise publicly available including a flooding report, zoning reports and policy documents.

b. Documents evidencing the ownership by the Council of a site comprising 22 acres adjoining the subject CPO site.

c. Documents evidencing the choice made by the Council that it would hold the 22-acre site in anticipation of requiring to exchange that site or part of the site for certain works which were contemplated in the harbour area.

d. Documents evidencing the bisection of the 22-acre site to create a dual carriageway.

e. Transcript of the CPO hearings before An Bord Pleanála.

f. All managers' orders from November 2003 relating to the CPO.

g. A report prepared by Murray O Laoire, a firm of architects, relating to flooding.

h. An OPW flood map.

i. Documents relating to flooding in 2002 in Burnaby Lawns which is adjacent to the CPO site.

j. A housing report compiled by Ms. Lorraine Gallagher and a flooding memo compiled by Des O'Brien.

k. A composite report of housing sites listing 21 sites compiled by Des O'Brien.

101. The Barry Report identified a problem with flooding on the site. An issue that arose in the course of the trial was whether that report was in the "Room of Documents". As the copy in evidence is paginated in the same was as other documents that are known to have been in the Room, I consider it likely that the Report was in the Room.

102. The Councillors were unable to put together the pieces of the jigsaw from the documents in the "Room of Documents" and the evidence that they had. Mr Woulfe, who had legal expertise in the field of CPO, needed materials and explanations not in the "Room".

103. Mr. Woulfe's report was based on evidence and explanation not available to the elected representatives. He did note the complexity of the legal process and a lack of clarity in the site selection process. He did express himself broadly satisfied with the process engaged by the Council, but this was after a detailed examination, site visits and assistance from experts etc. His report is evidence of the result of his professional specialist scrutiny. It is not evidence that the Councillors were wrong or acted in bad faith in raising the concerns, but rather of the fact that their concerns could be put to rest and that the process was not flawed.

104. The press release imputes to the Councillors an irresponsible approach to the matters of site selection and price. Mr. Woulfe's report is not evidence of the truth of this meaning, but rather that an expert and experienced senior counsel did not find errors in the price or process. It is not correct to say that the result of the Woulfe Review is that the Councillors are to be considered to have acted in bad faith. Rather the Woulfe Report found no substantial error of process but did so in the light of the documentation, evidence and analysis carried out for the first time by Mr. Woulfe. It is not true to say that on the information they had that the plaintiffs raised unnecessary or irresponsible concerns without cause.

105. For all these reasons I consider that the meanings pleaded are not true, and that the Councillors were not behaving in manner inconsistent with their roles as public officials.

Privilege
106. The defendants do not seek to rely on a defence of absolute privilege and this is a prudent concession as ss. 17(2)(s) and (u) of the Act afford such privilege only to statements:

> "(s) made in the course of an inquiry conducted on the authority of a Minister of the Government, the Government, the Oireachtas, either House of the Oireachtas or a court established by law in the State,
>
> …
>
> (u) contained in a report of an inquiry referred to in paragraph (s) or (t),"

107. Mr Woulfe's report was not a report of an inquiry conducted within this statutory framework. It was an opinion of senior counsel with experience in the area of law, and had for the purposes of the Act no protected or privileged status.

Qualified privilege
108. Section 18 of the Act sets out the provisions in relation to the defence of qualified privilege in defamation:

> "18.—(1) Subject to section 17, it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of this section, have been considered under the law (other than the Act of 1961) in force immediately
>
> before such commencement as having been made on an occasion of qualified privilege.
>
> (2) Without prejudice to the generality of subsection (1), it shall, subject to section 19, be a defence to a defamation action for the defendant to prove that—
>
> (a) the statement was published to a person or persons who—
> (i) had a duty to receive, or interest in receiving, the information contained in the statement, or
>
> (ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and
>
> (b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons.
>
> (c) contained in a determination referred to in that Part.
>
> ….
>
> (6) A defence under this section shall be known, and is referred to in this Act, as the "defence of qualified privilege".
>
> (7) In this section—
>
> "duty" means a legal, moral or social duty;
>
> "interest" means a legal, moral or social interest."

109. The defendants argue that they had a legal, social or moral duty to communicate the conclusions of the second Woulfe Report. It is for the defendant to establish that he or she was under such an obligation: *Watts v. Times Newspapers* [1997] 1 Q.B. 650 at 670.

110. Mr. Sheehy initially claimed the aim of the press release was to inform the public, but later accepted that the publication of the press release was unprecedented and that he had not issued such a press release on any occasion before or since. He gave evidence

that he felt that the Council and staff had been under a cloud of suspicion arising from the matters and that he wanted to deal with "a number of issues that I felt were important for the Council to make". He accepted that he did not include any of the contents of the report which were not favourable to the Council. A fair and balanced report would have included some observation at least with regard to the Mr Woulfe's observations regarding the opaque nature of the CPO legislation which dates from the 19th century, the lack of clarity with regard to site selection, and the fact that Mr. Woulfe accepted that there was a marked difference between the purchase price of the CPO lands and the market value at the time of their sale.

111. *Cox v. Richards* [1846] 2 C.B. 569 is authority for the principle that at common law a volunteered statement was "far less likely to attract privileges" other than under exceptional circumstances (Maher *The Law of Defamation*, 2011 at para. 8.19). The statement impugned in the present case was voluntary in that sense, as the statement at para. 5 of the press release, which was not a direct quote from the Woulfe Report, and was not related to a matter which Mr. Woulfe had considered in his review.

112. The CPO was a matter of interest to the public. The defence have not shown that they were under obligation to issue the press release with the narrative or comment impugned.

113. The defence of qualified privilege will fail if a plaintiff proves a statement was made with malice: section19. The term malice in the context of defamation has a narrow meaning, where an expressed statement is not genuinely believed or an occasion where privilege is abused.

114. The evidence regarding the purpose in issuing the press release, and the fact that the press release selected only those parts of the second Woulfe Report that favoured the Council points to a degree of malice or an improper purpose.

115. For these reasons, I find that the defendants cannot avail of qualified privilege as a defence.

Rebuttal?
116. The defendants argue that the press release was in effect a response or rebuttal of criticisms made in public regarding the matters at issue.

117. An attack on the integrity of a plaintiff will also not attract qualified privilege if it is not reasonably necessary to rebut the original charge: *Hamilton v. Clifford* [2004] EWHC 1542 (QB).

118. The response of the defendants to earlier "allegations" by the Councillors was not for the reasons outlined necessary and proportionate, and it to be observed that the press release issued by the Department on 24th April, 2013, did not stray outside the Woulfe findings.

Honest opinion
119. The common law defence of fair comment has been restated and renamed the defence of honest opinion in the Defamation Act 2009. The relevant provisions are to be found in Part 3 of the Act at s.15 (abolishing the old defences including that of fair comment) and ss. 20 and 21 (creating the defence of honest opinion).

120. The relevant parts of Section 20 provide as follows:

> "(1) It shall be a defence (to be known, and in this section referred to, as the "defence of honest opinion") to a defamation action for the defendant to prove that, in the case of statement consisting of an opinion, the opinion was honestly held.
>
> (2) Subject to subsection (3), an opinion is honestly held, for the purposes of this section, if –
>
> (a) at the time of the publication of the statement, the defendant believed in the truth of the opinion or, where the defendant is not the author of the opinion, believed that the author believed it to be true,
>
> (b)
>
> (i) the opinion was based on allegations of fact –
>
> (I) specified in the statement containing the opinion, or
>
> (II) referred to in that statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published,
>
> or
>
> (ii) the opinion was based on allegations of fact to which –
>
> (I) the defence of absolute privilege, or
>
> (II) the defence of qualified privilege,
>
> would apply if a defamation action were brought in respect of such allegations,
>
> and
>
> (c) the opinion related to a matter of public interest.

121. Section 21 deals with the meaner of distinguishing between fact and opinion:

> "21.—The matters to which the court in a defamation action shall have regard, for the purposes of distinguishing between

a statement consisting of allegations of fact and a statement consisting of opinion, shall include the following:

(a) the extent to which the statement is capable of being proved;

(b) the extent to which the statement was made in circumstances in which it was likely to have been reasonably understood as a statement of opinion rather than a statement consisting of an allegation of fact; and

(c) the words used in the statement and the extent to which the statement was subject to a qualification or a disclaimer or was accompanied by cautionary words."

122. Cox & Mc Cullough suggest at paragraph 14.56 of their text, *Defamation: Law and Practice*, 2014, that in order for the defence to be available the statement must:

(i) either be believed by the defendant or if the defendant is not the author, then he or she must believe that the author believed it to be true;

(ii) be based on allegations of fact which the defendant can prove to be true;

(iii) relate to a matter of public interest, and

(iv) must be an opinion rather than a fact.

123. Mr. Woulfe's conclusions and opinions are not facts but a statement of the opinion of specialist counsel. Mr Woulfe's findings that "almost all of the concerns are not well founded or are misconceived" (para. 5.03) does not establish the fact of that statement. Further Mr. Woulfe accepted some but not all of the concerns. He made no finding regarding the costs to the Council. No attempt was made to distinguish the findings of Mr Woulfe from the opinion of the Council.

124. The press release stated a number of the findings of Mr. Woulfe. The last paragraph is not a repeat of the findings of Mr Woulfe, not all of the concerns were "unfounded and misconceived", and the word "allegations" imputes blame where none was found by Mr Woulfe.

125. I do not consider for that reason that the press release contains matters of opinion which are identified as opinion, or that they were honestly held within the meaning of the Act.

Damages

126. I accept the evidence given by the two plaintiffs that the personal effect on them of the press release was public odium, and that they were directly referred to as "money wasters" by members of the public. The local elections occurred not long after the newspaper report was published, and Mr. Nevin lost his seat. I do not take any view as to whether this is directly attributable to the newspaper article, but in my mind the meaning of the press release was that the two plaintiffs were responsible for wasting money at a time when money was scarce.

127. The claims were commenced in the Circuit Court. The plaintiffs therefore do not seek a large sum in damages. I consider that their purpose was to be publicly vindicated and the level of damages is a secondary consideration. With this in mind, I propose an award of €20,000 in each case. I will allow the appeals.