

## THE HIGH COURT

Record No. 2013/73 CA

## IN THE MATTER OF ARTICLE 24 OF COUNCIL REGULATION (EC) NO. 44/2001

CSI MANUFACTURING LIMITED

Applicant

AND

DUN AND BRADSTREET

Respondent

**Judgment of Kearns P. delivered on the 29th November, 2013.**

1. This is an appeal from the Circuit Court in which the applicant seeks an order under s.28 of the Defamation Act 2009 declaring that certain statements allegedly questioning the applicants' creditworthiness and published by the respondents on the internet are false and defamatory of the applicant. The applicant also seeks ancillary reliefs under s.30 and s.33 of the Act of 2009 for orders directing the respondent to publish a correction of the defamatory statements and prohibiting further publication of the statements.

2. The applicant is a producer of industrial bespoke labels and signage used for identification and health and safety purposes and has its business premises at Ballymount, Dublin 22.

3. The respondent is the United Kingdom registered arm of a major multinational corporation and has offices and operations globally. It is domiciled outside the jurisdiction of this court but is within the European Union.

4. The respondent publishes credit information and ratings and make it available on a subscription basis on the internet. On the 15th May, 2012, they placed online an assessment report in respect of the applicants which the applicants contend called their creditworthiness into question. However, the only evidence of access to the report was of access by Thales Ltd. a limited liability company based in Northern Ireland.

5. A preliminary issue of jurisdiction arises in that the respondent claims that under s.28 of the Defamation Act 2009 relief of the type sought can be granted only when two conditions are met. Section 28 of the Act provides:

"(9) An application under this section shall be made to the Circuit Court sitting in the circuit where—

(a) the statement to which the application relates was published, or

(b) the defendant or one of the defendants, as the case may be, resides."

6. The respondent contends that the 'publication' requirement of s.28 has not been met in this case and seeks an order pursuant to the inherent jurisdiction of this Court striking out the proceedings against the said respondent for want of jurisdiction or, in the alternative, an order setting aside the service of the summons herein upon the respondent on the grounds that this Court does not have jurisdiction to hear and determine the applicant's claim, as claimed under the provisions of Council Regulation (EC) No. 44/2001 or the provisions of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters.

7. Article 5(3) of the Regulation sets out that:-

"A person domiciled in a Member State may, in another Member State, be sued:..... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

8. It is alleged by the respondent that the only publication of the defamatory material occurred outside the jurisdiction of the particular circuit court and hence that court had no jurisdiction. The publication in question was an online publication and hence the issue of jurisdiction depends on the location of publication.

9. Amongst the cases opened to the court to interpret Article 5(3) of the Brussels I Regulation were *EDate Advertising GmbH v. X and Martinez & Anor. v. MGN Limited* [2012] Q.B. 654 (hereafter *Martinez*), *Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd. v. Presse Alliance SA* (C-68-93), E.C.R. [1995] I-00415 (hereafter *Shevill*), and *Coleman v. MGN Ltd.* [2012] IESC 20, (Unreported, Supreme Court, 15th March, 2012) (hereafter *Coleman*).

**INTERNET PUBLICATION**

10. The Supreme Court in *Coleman* examined an instance where there was an alleged defamation by an English newspaper of the plaintiff. The defendant brought a motion in the High Court seeking "an order that the Court decline jurisdiction in this case pursuant to Council Regulation EC No. 44/2001 and/or S.I. 52 of 2002 and/or the Rules of this Court" and "a declaration that in the circumstances of this case the Court has no jurisdiction over the subject matter of the proceedings". The High Court refused to grant the order sought and the defendant appealed to the Supreme Court. The claim of publication in Ireland was a claim of internet publication only and it was submitted that the paper could be found online every day. There was no evidence, however, of publication or of a person accessing the site. It was presumed that given that the paper was online there would probably be hits on the site. The difficulty with the plaintiffs' claim was that pleadings did not in fact refer to online publication and only pleaded that the "newspaper was circulated in Ireland and within the jurisdiction of this Honourable Court and was read by people in this jurisdiction". There was also no evidence before the court of online publication and no evidence of hits on the website. Thus the court did not have jurisdiction to determine the plaintiff's claim.

11. The complexities of internet publication were addressed by the Supreme Court in *Coleman* at paras. 12-15:

"12. The case is now one where it is the plaintiff's case that the defamation was published on the internet. Specifically he referred to the Daily Mirror on line. There was also reference to UKPressOnline, which is an archival website, to which institutions, such as academics, have access if they subscribe, but there is no general access other than to a thumbnail

miniature of part of the article and photograph. It was agreed by counsel that the plaintiff could not be recognised on such a miniature, which could not be legibly enlarged. Further, as the plaintiff's name was not mentioned in the articles in question he could not be identified by a search on that basis. Thus, the case for the plaintiff is now based on a publication of the Daily Mirror on line in 2003.

13. There has thus been a shifting nature to this appeal in its progress in this Court.

14. There are several relevant difficulties which arise on the plaintiff's case. First, there is no pleading that the publication alleged of the relevant articles is by internet publication of the relevant newspaper. Nor could such a pleading be inferred from the words of the Statement of Claim. Secondly, there is a need for evidence of publication to establish the tort of defamation. There is no evidence before the Court that the Daily Mirror was published on line in 2003. There is no evidence that the daily edition of the Daily Mirror was on the world wide web in 2003. Thirdly, there is no evidence of any hits on any such site in this jurisdiction. These are fatal flaws in the plaintiff's case.

15. The basic grounds upon which the plaintiff now moves his case in this Court was never pleaded and is not established in evidence. In spite of the ingenuity of counsel for the plaintiff in his submissions, these difficulties are insurmountable. Neither on the pleadings nor on the evidence does the Court have jurisdiction. Consequently, I would allow the appeal, and order that in the circumstances of the case the Court has no jurisdiction over the subject matter of the proceedings."

12. In the judgment of the European Court of Justice in *Martinez*, the court proceeded in three stages. Redmond in referring to this case in "The ECJ *eDate* Decision: A Case Comment" (2011) Yearbook of Private International Law, Vol.13 pp.493-506 examines the three stages in the following manner:

(i) The court first examined the nature of the internet publication and recognised the need for a more adapted response.

(ii) For this purpose it created a new jurisdictional ground, referable to the location of the centre of interest of the affected party, which would allow for the recovery of all the damages.

(iii) Otherwise it confirmed the existing rules as laid down in the *Shevill* case.

13. The rules as per *Shevill* set out where the alleged victim may bring an action:

(i) The courts of the state in which the publisher of that content is established, for the entirety of the damage;

(ii) The courts of each state in which the publication was distributed and where the victim claims to have suffered damage to his reputation, for the part of the damage linked to that state's publication.

14. In *Martinez* the court clarified that for internet publications it suffices that the content has been placed online or *otherwise made accessible in the country of receipt*. It is alleged by the applicant that the publication in the instant case is different to that in the *Coleman* case. It was alleged in *Coleman* that, as the site in question was a site accessible only to subscribers, the defamatory publication could not be deemed to have been published in this jurisdiction. The site in the present case is a subscription site. Akin to *Coleman* it cannot be inferred that publication has occurred. Where a site is a subscription site the information is not readily available across jurisdictions. The court in *Coleman* required evidence of internet publication and access from Ireland. The only evidence of access to the information in the present case is of access by Thales International, a company situated in Belfast.

15. The "accessibility" of the defamatory statement on the internet is discussed in *Martinez* at para. 52:

"Consequently, the answer to the first two questions in Case C-509/09 and the single question in Case C-161/10 is that Article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised."

Although the information in the present case was technically "accessible" in Ireland due to the fact that the respondent company has Irish clients it must still be proven that it has been accessed in this jurisdiction to show publication within s.28 of the Act of 2009. This has not been made out by the applicant.

16. The fact that the site is subscription only means that the information is only available to those who subscribe and in this instance the only subscribers who requested the defamatory information were in fact Thales. Thus the only publication was to Thales. This is evident from the spreadsheet attached to Ms. Moorcroft's affidavit of the 17th January, 2013. Further, the only publication was to Thales Limited in Belfast.

17. On a strict interpretation of *Martinez*, which is the relevant law on the matter, and on an application of the rules in that decision, this Court considers: first that the particular nature of the publication in this case was to a restricted audience; and second, that the centre of interest of the injured party in this case requires examination.

18. The centre of interest test is set out in the *Shevill* rules which acknowledge the importance of both the place of the act of publication and the place of receipt of communication. The victim in the within case was an Irish company, the offending website of the respondent was based in the United Kingdom. The fact that the publication only occurred in Belfast also raises a controversial issue.

19. The centre of interests test is strongly relied on by the applicant. The centre of interests test is set out in *Martinez* at paras. 42-52:

"42 In relation to the application of those two connecting criteria to actions seeking reparation for non-material damage allegedly caused by a defamatory publication, the Court has held that, in the case of defamation by means of a

newspaper article distributed in several Contracting States, the victim may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all of the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised (*Shevill and Others*, paragraph 33).

43 In that regard, the Court has also stated that, while it is true that the limitation of the jurisdiction of the courts in the State of distribution solely to damage caused in that State presents disadvantages, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established (*Shevill and Others*, paragraph 32).

44 Those considerations may, as was noted by the Advocate General at point 39 of his Opinion, also be applied to other media and means of communication and may cover a wide range of infringements of personality rights recognised in various legal systems, such as those alleged by the applicants in the main proceedings.

45 However, as has been submitted both by the referring courts and by the majority of the parties and interested parties which have submitted observations to the Court, the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control.

46 It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.

47 The difficulties in giving effect, within the context of the internet, to the criterion relating to the occurrence of damage which is derived from *Shevill and Others* contrasts, as the Advocate General noted at point 56 of his Opinion, with the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis.

48 The connecting criteria referred to in paragraph 42 of the present judgment must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in paragraph 40 above.

49 The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.

50 The jurisdiction of the court of the place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction (see Case C-144/10 BVG [2011] ECR I-0000, paragraph 33) also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content. The view must therefore be taken that the centre-of-interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, paragraph 22 and the case-law cited).

51 Moreover, instead of an action for liability in respect of all of the damage, the criterion of the place where the damage occurred, derived from *Shevill and Others*, confers jurisdiction on courts in each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

52 Consequently, the answer to the first two questions in Case C-509/09 and the single question in Case C-161/10 is that Article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised."

20. However for the centre of interest test to apply it must also be established that material was published and read in Ireland. Based on the test in *Coleman* and the fact that the subscription site is not readily accessible it cannot be said that the centre of interest can apply where the *Shevill* rules acknowledge the two steps of publication and the place of receipt of communication.

## CONCLUSION

21. The publication in question by the respondent was on a subscription site only accessible to people paying a fee. In the instant case the publication was seen only by a subscriber in Belfast and the publication was from a company based in the United Kingdom. Hence publication which fulfils the requirements of s.28 of the Act of 2009 has not been made out.

22. Looking at the European jurisprudence as outlined in *Martinez* and *Shevill* the court will only proceed to apply the centre of interest test after publication is made out. The Supreme Court examining the same jurisprudence in *Coleman* could not infer publication from a subscription site where the information was not readily accessible in this jurisdiction. Furthermore no evidence of

publication in Ireland has been made out.

23. *Shevill* confers jurisdiction on courts in each Member State in the territory where the content is accessible. Although the content is available to subscribers in Ireland it has not been proven to have been accessed by subscribers in Ireland. I would therefore allow the respondent's appeal.