Neutral Citation Number: [2009] IEHC 187

THE HIGH COURT

2009 3270 P

BETWEEN/

MAURICE QUINLIVAN

PLAINTIFF

AND

WILLIE O'DEA

DEFENDANT

JUDGMENT of Mr. Justice Cooke delivered the 20th day of April, 2009.

1. This action has been brought by the plaintiff against the defendant as a claim for damages for an alleged slander.

2. On the present motion the plaintiff seeks an interlocutory injunction restraining any repetition of the alleged slander pending the trial of the action. The injunction is sought in two forms namely, an injunction to restrain the repetition of the alleged slander and, secondly, an injunction pursuant to s. 11(5) of the Prevention of Electoral Abuses Act 1923 restraining a repetition of the making or publication of false statements in relation to the personal character or conduct of the plaintiff as a candidate in the forthcoming local Government elections due to be held on 5th June, 2009.

3. The precise terms of those two injunctions as set out in the notice of motion are as follows:-

> "(1) An interim and/or interlocutory injunction restraining the respondent from uttering or otherwise publishing or causing to be published in any manner and in any media of and concerning the applicant, words or material intending to slander the applicant and to impute to him any connection with the activity of a brothel similar to those uttered to the "Limerick Chronicle" reporter Mr. Mike Dwane and subsequently published in the edition of the "Limerick Chronicle" dated 10th March, 2009;
>
> (2) An interim and/or interlocutory injunction pursuant to s. 11(5) of the Prevention of Electoral Abuses Act 1923 restraining any repetition by the respondent of the false statements in relation to the personal conduct and character of the applicant as reported in the edition of the "Limerick Chronicle" dated 10th March, 2009, or other such false statements of a similar character in relation to the personal conduct or character of the applicant."

4. As appears from the terms of the injunctions sought, the plaintiff claims that he was slandered by the defendant in the course of an interview which the defendant gave to a journalist, Mike Dwane, as reported in the edition of the Limerick Chronicle on 10th March, 2009. The plaintiff is a political activist for the Sinn Féin party in Limerick and has been nominated by it to stand as a candidate for election as a council member in the June election. The defendant is a sitting T.D. for a Limerick constituency and a Minister in the Government.

5. According to the plaintiff, this interview arose out of a press release issued by him to newspapers in Limerick on 9th March, 2009 in which he had criticised the defendant for employing six civil servants to work on constituency matters for him and for making unsolicited offers to assist applicants for planning permissions.

6. The plaintiff claims that in the course of being interviewed by the journalist the defendant made false and defamatory statements to the effect that he, the plaintiff, was involved as a part owner or otherwise in the operation of a brothel in an apartment at Clancy Strand in Limerick. The plaintiff relies in particular upon the title to that article, on its opening paragraph and on part of a direct quotation from the defendant in the body of the article as follows.

> The title reads: "Quinlivan says he may sue O'Dea over brothel"
>
> The opening paragraph reads: "Sinn Fein's Maurice Quinlivan says he's considering legal action against Willie O'Dea after the Minister for Defence claimed he part-owned a Clancy Strand apartment where a brothel was discovered in Garda raids."

The quotation is:

> "I suppose I am going a bit too far when I say this but I'd like to ask Mr. Quinlivan is the brothel still closed?"

7. The plaintiff claims that these references to the brothel were made by the defendant both in the interview and elsewhere for the sole purpose of damaging the plaintiff's reputation and damaging his political future including, obviously, his prospects of success in the forthcoming local elections.

8. In a replying affidavit the defendant candidly admits that he did indeed say to the journalist the quoted words "I suppose I am going a bit too far when I say this but I'd like to ask Mr. Quinlivan is the brothel still closed?", but he denies

"most categorically and emphatically" that he said to Mr. Dwane that the plaintiff was the co-owner of the apartment in question. The defendant also accepts that, contrary to a mistaken impression that may have been given in his solicitor's letter of 27th March, 2009, that the quoted statement was volunteered by him spontaneously and was not made in reply to any question by the journalist.

9. The defendant for his part takes issue with remarks attributed to the plaintiff in the report to the effect that Mr. O'Dea in common with "dissident republicans" was spreading the story that he owned the property and that he, Mr. O'Dea, was going around town slandering the plaintiff and was "up to every kind of dirty trick". The defendant claims that these allegations by the plaintiff are wholly unfounded, unsupported by any evidence and are made in an attempt to provide an appearance of support for the present application. Finally, the defendant maintains that he proposes to defend the present action vigorously. In submissions on his behalf, counsel stated that it was not intended to plead justification as such but, in so far as the claim is based on an alleged slander to the effect that the plaintiff was co-owner or part owner of the apartment, it is denied that any such statement was ever made by the defendant. In so far as it is based upon the quoted question as to the brothel being still closed, it would be denied that the words are defamatory and the question will be claimed to be one which the defendant was entitled to raise as a public representative for the area in question.

10. It is in these circumstances that the interlocutory injunctions are sought. In the course of submissions counsel have referred the court to the pertinent case law both on section 11 of the 1923 Act and on the criteria relevant to the grant of an interlocutory order in a defamation action. In particular the court has had opened to it and has considered the following authorities:

> *Cullen v. Stanley & Others* [1926] 1 I.R. 73
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> *Bonnard v. Perryman* [1891] 2 Ch. 269
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> *Sinclair v. Gogarty & Anor*. [1937] 1 I.R. 377
>
> *Evans & Ors. v. Carlyle* [2008] 2 I.L.R.M. 359
>
> *Cogley v. RTE* [2005] 4 I.R. 79
>
> *Reynolds v. Malocco & Ors*. [1999] 2 I.R. 203.

The statutory injunction

11. As counsel has placed particular emphasis upon it as being the appropriate remedy in the particular circumstances of this case, it is best to deal first with the application under s. 11 of the 1923 Act. The relevant provisions of that section are as follows:

> "(1) Every person who, before or during any election and for the purpose of affecting the return of any candidate at that election, makes or publishes any false statement of fact in relation to the personal character or conduct of such candidate, and the directors of any body or association corporate which before or during any election and for the purpose aforesaid makes or publishes any such false statement as aforesaid, shall be guilty of an illegal practice.
>
> (2) No person shall be guilty of an illegal practice under this section if he shows that he had reasonable grounds for believing, and did believe, the statement made or published by him to be true.
>
> (5) Any person who shall make or publish any such false statement as is mentioned in this section may be restrained by injunction from any repetition of such false statement or any false statement of a similar character in relation to such candidate, and for the purpose of granting an interim injunction *prima facie* proof of the falsity of the statement shall be sufficient."

12. The first observation that must be made is that s. 11 creates a criminal offence of making or publishing a false statement of fact in relation to a candidate. It follows, in the view of the court, that it should be strictly construed and applied so that the court should not intervene in the exchanges between candidates and their supporters in an election campaign unless it is clearly established that the statutory prohibition has been infringed. In other words, the court must be satisfied that a specific statement of fact has been made or published by a defendant; that it relates to the personal character or conduct of the candidate; and that it is false. (For the purpose of an interim injunction *prima facie* evidence of the falsehood will be sufficient.)

13. The crucial falsehood upon which the plaintiff relies for this purpose in the present case is the proposition that he, the plaintiff, is stated to be the owner or part owner of the Clancy Strand apartment in which the brothel was discovered. A statement to that effect, if proved to be made, would certainly be false as is clear from the very terms of the newspaper report itself where it is made clear that the apartment in question was owned not by the plaintiff, but by his brother and that the brothel was kept, not by that owner but by three Brazilian women who occupied it as tenants. As indicated, the defendant accepts that the apartment was owned only by the plaintiff's brother and denies ever having said otherwise either to the journalist or to anyone else.

14. The plaintiff relies in effect upon the article's opening paragraph to challenge the defendant's denial of having made such a false statement. He maintains that the phrase "after the Minister for Defence claimed he part-owned the Clancy Strand apartment" reflects what the defendant must have said in the interview. The court cannot agree. In its ordinary meaning the sentence as quoted above suggests that the author is quoting not the defendant, but the reason given to him by the plaintiff as to why he was considering legal action against Mr. O'Dea.

15. It is possible, of course, that at a trial of the action the plaintiff may prove that the defendant did in fact say to Mr. Dwane that the plaintiff was part owner of the apartment, but for the purpose of this motion and in the face of the defendant's categoric denial, the court considers the opening paragraph of the article does not constitute clear evidence of the making or publication of a false statement of fact as is required by section 11.

16. In so far as the application under that section relies upon the question as to whether "the brothel is still closed", that admitted remark by the defendant does not involve any statement of fact as such. As will be explained in a moment in relation to the alternative injunction sought, the question may give rise to an innuendo, but in the court's judgment the injunction provided for in s. 11(5) lies only against clearly identifiable statements of fact which are false and not against possible interpretations of statements capable of two or more meanings. For example, in the case of *Cullen v. Stanley* (above) the plaintiff, a trade union official standing for election to Dáil Éireann on behalf of the Irish Labour Party, had been directly described in a newspaper as having acted as a "scab" during a strike.

17. The substantive falsehood which constitutes the basis of the plaintiff's grievance here is the allegation that he was co-owner of the apartment. The quoted question of the defendant does not constitute a statement to that effect for the purpose of section 11. The court therefore considers that the evidence before it does not constitute a basis for the grant of the statutory injunction.

18. Unlike the *Cullen v. Stanley* case, the issue here is not whether the alleged statement of fact is *prima facie* false but whether the statement was ever made at all. The defendant denies he ever made such a statement and has sworn that he has never at any time said to any person that the plaintiff had any involvement in the operation of the brothel. The article itself does not constitute evidence which contradicts that denial. The grant of the injunction envisaging s. 11(5) is clearly at the discretion of the court - the provision uses the words "may be restrained"- and it therefore follows that an injunction should not issue unless it is necessary in order to afford the candidate the protection which this section confers. As there is, in the court's judgment, no basis for concluding that there is an established risk or likelihood that the disputed statement, if it was made, will be repeated, between now and the election, the need for the protection of the statute does not arise.

Injunction restraining repetition of a slander
19. Different considerations arise in relation to the alternative injunction sought to restrain repetition of the alleged slander.

20. It is not disputed that the well known criteria for the grant of interlocutory relief apply namely, whether the plaintiff has raised a fair issue to be tried; whether damages will be an adequate remedy and, if not, whether the balance of convenience lies in granting or refusing the injunction. (See *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88). Those criteria fall to be applied in cases where an injunction is sought to restrain publication or repetition of a defamation with the additional requirement that there is not only a fair issue to be tried but that there is no doubt that the words complained of are defamatory. The jurisdiction to grant interlocutory injunctions in defamation cases has been described as one "of a delicate nature" which should only be "exercised in the clearest cases". (See *Coulson v. Coulson* [1887] 3 T.L.R. 846 as approved by the Supreme Court in *Sinclair v. Gogarty* (above)).

The rationale for this approach lies in the recognition of the caution required to be exercised in interfering with the right to free speech. Even in advance of our own constitutional framework or the provisions of the European Convention on Human Rights, the common law courts recognised "the importance of leaving free speech unfettered (as) a strong reason in libel cases for dealing most cautiously and warily with the granting of interim injunctions". (See *Bonnard v. Perryman* above.)

21. It follows that the court must, a fortiori, exercise particular caution when invited to intervene in the course of an election campaign on behalf of one aspiring public representative to restrain alleged statements by another sitting public representative and political opponent.

22. As already indicated in the earlier part of this judgment, this is a case in which it is alleged that a slander of the plaintiff has already occurred and the injunction is sought to restrain its repetition rather than to obtain the prior restraint of a defamation not yet published. So far as concerns the crucial substantive complaint namely that the defendant claimed to Mr. Dwane that the plaintiff was part owner of the apartment, there is a full dispute as to whether the slanderous words were ever uttered. The defendant denies it; the article is ambiguous on the point and the plaintiff was not present and cannot himself prove the fact.

23. Moreover, the article as a whole does not support the proposition that either Mr. Dwane or any reader of the Limerick Chronicle of 10th March, 2009, understood that the plaintiff was a part owner of the apartment because the article accurately records the true ownership of the apartment and the fact that the brothel was run by the tenants.

24. In these circumstances the court finds that the plaintiff has not established that there is a fair issue to be tried as to the uttering by the defendant to Mr. Dwane during the interview of the slanderous words to the effect that the plaintiff was a part owner of the controversial apartment. In any event, if the slander is alleged to consist of the speaking of such words by the defendant to Mr. Dwane prior to the latter contacting the plaintiff to record his response to the defendant's "withering blast" (as the reporter describes it,) which forms the central thrust of the article, the court considers the damages would clearly be an adequate remedy. That communication, if it is proved to have taken place, had no irreparable effect of itself upon the political prospects of the plaintiff because, in so far as it could be said to form a part of the impugned newspaper article, it is accompanied by the full explanation of the context to the brothel incident and by the plaintiff's robust denial.

25. The defendant admits, however, that he did say to Mr. Dwane that he would like to ask the plaintiff whether the brothel was still closed. As a question to be posed to a candidate in a rival political party it is clearly open to the interpretation that some connection is intended to be made between that candidate and the operation of a brothel. It might not, perhaps, be defamatory at all if the candidate or addressee of the proposed question was someone with responsibility for policing such matters. It could be a straightforward enquiry of fact. It takes on its possible defamatory innuendo only when the reader knows that the apartment in question is owned by the plaintiff's brother because the question implies that the addressee of the question is in a position to give it an authoritative answer. On that basis, therefore, it can be said the plaintiff has established a fair issue to be tried as to whether the admitted statement by the defendant is defamatory of the plaintiff by virtue of that innuendo. Furthermore, in the case of a defamation of an

election candidate damages may not be an adequate remedy in the sense that if the candidate is unsuccessful it may well be impossible to know whether the damage to his reputation had a material influence upon the election result.

26. However, in so far as the plaintiff in this case may be considered to have raised a fair issue to be tried as to the defamatory nature of the admitted statement it is established in respect of a statement already made. In that regard any damage has already been done and the remedy can only lie in damages.

27. The crucial issue on this application, therefore, is whether this is a clear case in which a fair issue is raised as to the likelihood of a repetition of the alleged defamatory remark unless the court intervenes by way of injunction to prevent it. The court finds that it cannot reach a conclusion to that effect on the basis of the evidence before it. The defendant has emphatically denied that he ever made the substantive statement as to the plaintiff's co-ownership of the apartment and the true position as to that ownership and the absence of any involvement on the part of the plaintiff has already been made clear in the article of 10th March, 2009. Accordingly, even if it were necessary to have regard to the balance of convenience, the undesirability of fettering the freedom of speech of an elected representative must clearly outweigh the slim possibility, if such there be at this point, of any repetition of a clearly defamatory statement relating to the Clancy Street Strand apartment between now and the trial of the action.

28. For all these reasons, the motion will be refused.