Neutral Citation Number: [2012] IEHC 22

THE HIGH COURT

2011 18 CA

BETWEEN

MICHAEL LOWRY

PLAINTIFF

AND

SAM SMYTH

DEFENDANT

JUDGMENT of Kearns P. delivered on 10th day of February, 2012.

This is an appeal brought by the plaintiff against the order of the Circuit Court dated 31st January, 2001, whereby Her Honour Judge Heneghan refused to grant summary relief to the plaintiff pursuant to s. 34 of the Defamation Act 2009.

The plaintiff is a T.D., businessman, and former Government Minister. The defendant is a well known journalist and broadcaster.

The indorsement of claim in the Civil Bill recites that on 24th June, 2010, in a TV3 programme entitled "Tonight with Vincent Browne" the defendant uttered the following words concerning the plaintiff:-

> *"But the first that we caught sort (sic) on video with hand in till was Michael Lowry and he resigned as you might remember as Minister for Communications which all this has led on from …"*

The interviewer Vincent Browne then said:-

> *"Now lets be clear now, lets be careful about the hand in till. There is no suggestion at all anyway that Michael Lowry used his position as Minister to extract public funds that weren't, that he wasn't entitled to."*

Sam Smyth:-

> *"No but was in receipt, in allowed?? the biggest business in the country to pay for the refurbishment of his home. I mean …"*

Vincent Browne:-

> *"There was a tax that was a tax fraud …"*

Sam Smyth:-

> *"and that well, there was not only a tax fraud, I really don't think most people think it's a good idea for Ministers to have their bills picked up by businessmen …"*

The plaintiff contends that these words, in their natural and ordinary meaning and/or by way of innuendo meant and/or were understood to mean and that the plaintiff was a thief, a corrupt politician, unfit to be a T.D. or Government Minister and was or is a dishonest or untrustworthy politician.

The plaintiff further contends that on 27th May, 2010 the defendant published an article in the Irish Independent newspaper concerning the plaintiff which was headlined "*Tribunal will reveal findings on money trail to ex-Minister*", the words following or words to the effect of the following namely:-

> *"The total value of all the property transactions involving Mr. Lowry was around 5 million pounds sterling."*

The plaintiff complains that these words in their natural and ordinary meaning and/or by way of innuendo meant and were understood to mean that the plaintiff had unlawfully benefited from transactions concerning property valued at £5m.stg by awarding a mobile phone licence while he was Minister for Communications and had the other meanings detailed in relation to the television interview.

In his Civil Bill the plaintiff claimed the following reliefs:-

> (a) A declaration pursuant to s. 28 of the Defamation Act 2009 that the statements as contained in the endorsement of claim were false and defamatory of him;
>
> (b) A correction order pursuant to s. 30 of the Defamation Act 2009 directing the defendant to publish a correction of the defamatory statement in a form, content, extent and manner such as the court might deem fit;
>
> (c) An order pursuant to s. 33 of the Defamation Act 2009 prohibiting the publication or further publication of the statements in respect of which defamation was alleged.
>
> (d) Relief pursuant to s. 34 of the Defamation Act 2009 for summary disposal of the action.

The application was heard on affidavit evidence before the learned Circuit Court judge. However, the application proceeded only in relation to the s. 34 relief and not in relation to the other reliefs claimed in the Civil Bill. Having referred to the publications of which

he complains, the plaintiff contended that the accusations made by the defendant were false and constituted a grave defamation of his character. He deposed that members of his family, constituents and colleagues had interpreted the words used by the defendant in both the newspaper article and the TV3 programme as meaning that he had been accused of stealing money and unlawfully benefiting from property transactions valued at £5m stg. He further deposed that he called upon the defendant by letter dated 30th July, 2010, to undertake to publish an apology and correction and to desist from making further defamatory statements concerning him. The defendant declined to furnish such undertakings.

In his replying affidavit, Mr. Sam Smyth stated that in respect of the TV3 programme, the words which he used did not have the meaning contended for by the plaintiff, and/or were true in their natural and ordinary meaning and/or consisted of honest opinion. He further stated that he had been advised that the words he used were a fair and reasonable publication on a matter of public interest. He offered a similar line of defence in respect of the words contained in the Irish Independent article.

The defendant in his affidavit made extensive reference by way of background to the reports of both the McCracken Tribunal and the Moriarty Tribunal. The affidavit referred to portions of the report of the former which detailed various payments made to Mr. Lowry and to a company set up for the benefit of Mr. Lowry by Ben Dunne, and certain payments made into offshore accounts held by or for the benefit of Mr. Lowry by or on the instructions of Mr. Dunne, which were intended to and did facilitate the evasion of tax. The McCracken Tribunal further noted that a sum of £395,000 had been paid to contractors for refurbishment work done on the home of Mr. Lowry in County Tipperary which, in the opinion of the Tribunal chairman, had been made by Dunnes Stores on the instructions of Ben Dunne with a view to assisting the plaintiff to evade tax.

The defendant's affidavit then referred at length to information gleaned from proceedings before the Moriarty Tribunal and from an article in the Irish Times by Colm Keena to state that the Tribunal was investigating links between the plaintiff and certain property transactions in Doncaster, Cheadle, Mansfield and Carysfort, the total value of which was of the order of £5m stg.

Based on the foregoing, Mr. Smyth contends that his article and comments were all made on matters of significant public interest.

In relation to the TV3 programme, Mr. Smyth denies that any words he spoke on that occasion were uttered either falsely or maliciously. He contends that seen in context, the words are true in their natural and ordinary meaning. He states that the words spoken by him on TV3 related to the fact that the lengthy trail of investigations into the plaintiff's affairs culminating in the Moriarty Tribunal had its origin in the fact that he was found to have engaged in wholesale tax evasion and to have told lies about his business and financial affairs. It was made clear that the plaintiff had not used his position as Minister to extract public funds for his own benefit, but rather that he had engaged in a tax fraud. This was true. It therefore followed that the plaintiff had lied and cheated. Mr. Smyth further deposed that no conclusions were drawn from that as to the plaintiff's fitness and/or suitability to be a Minister or T.D., but if and insofar as they were present by inference, they were matters of honest opinion and were fair and reasonable publication on a matter of public interest. He further deposed that the only conclusion that one could reasonably draw from what had been discovered about the plaintiff led inevitably to the conclusion that he was indeed corrupt, dishonest, untrustworthy and both unfit and unsuitable to be a Minister or a T.D.

In relation to the Irish Independent article Mr. Smyth denied that the words were published falsely or maliciously or that they had the meanings contended for by the plaintiff. In order to read them in context, the impugned words had to be read in conjunction with the preceding paragraphs in the Independent article which stated:-

> *"In a ruling in 2005, the judge said he would be looking into the circumstances in which Mr. Lowry purchased a house in County Dublin as well as English property transactions in Cheadle, Mansfield and Doncaster. The Tribunal chairman wrote that he would be looking into whether or not any of those transactions were part of a train of transactions related to the conferral of a benefit on Mr. Lowry. The total value of all of the property transactions involving Mr. Lowry was around 5 million sterling."*

Mr. Smyth contends that the words referred to what the Moriarty Tribunal was, as a matter of fact, investigating. He further deposed that, in his opinion, the words used are true in their real meaning because the ruling of the Tribunal on 29th September, 2005 specifically refers to whether the various property transactions in England related to the conferral of a benefit on the plaintiff.

He therefore contended that he had a full and valid defence to any defamation proceedings brought by the plaintiff.

At the conclusion of the hearing, the learned Circuit Court judge, having taken time to read the alleged defamatory material attached to Mr. Smyth's affidavit, including matters to do with the McCracken and Moriarty Tribunals, Mr. Lowry's dealings with Dunnes Stores and his personal statement to the Dáil in 1996 after his resignation from Cabinet, ruled against the plaintiff. She held that test for Mr. Lowry's case was very high, that it must be shown that the defendant had "*no defence*" reasonably likely to succeed. She could not find that such was the case and the matter now comes by way of appeal to this court from that decision.

Before turning to a consideration of the relevant legal provisions, it might be appropriate at this stage to emphasise that the hearing before this court is a full rehearing of the original application. That being so, I do not regard either side as being confined in argument or submissions to the identical arguments or submissions placed before the learned Circuit Court judge.

THE DEFAMATION ACT 2009

The purpose of the Defamation Act 2009 is stated in the explanatory memorandum as follows:-

> *"The purpose of the Act is to revise in part the law on defamation and to replace the Defamation Act 1961 with modern updated provisions taking into account the jurisprudence of our courts and the European Court of Human Rights."*

The part of the Act with which the court is concerned is Part 4 which relates to remedies.

The following sections are of relevance and importance in the context of the present application:-

> *"28. — (1) A person who claims to be the subject of a statement that he or she alleges is defamatory may apply to the Circuit Court for an order (in this Act referred to as a 'declaratory order') that the statement is false and defamatory of him or her.*
>
> *(2) Upon an application under this section, the court shall make a declaratory order if it is satisfied that –*

(a) the statement is defamatory of the applicant and the respondent has no defence to the application,

(b) the applicant requested the respondent to make and publish an apology, correction or retraction in relation to that statement, and

(c) the respondent failed or refused to accede to that request or, where he or she acceded to that request, failed or refused to give the apology, correction or retraction the same or similar prominence as was given by the respondent to the statement concerned.

(3) For the avoidance of doubt, an applicant for a declaratory order shall not be required to prove that the statement to which the application concerned relates is false.

(4) Where an application is made under this section, the applicant shall not be entitled to bring any other proceedings in respect of any cause of action arising out of the statement to which the application relates.

(5) An application under this section shall be brought by motion on notice to the respondent grounded on affidavit.

(6) Where a court makes a declaratory order, it may, in addition, make an order under sections 30 or 33, upon an application by the applicant in that behalf.

(7) The court may, for the purposes of making a determination in relation to an application under this section in an expeditious manner, give directions in relation to the delivery of pleadings and the time and manner of trial of any issues raised in the course of such an application.

(8) No order in relation to damages shall be made upon an application under this section.

(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.

30.— (1) Where, in a defamation action, there is a finding that the statement in respect of which the action was brought was defamatory and the defendant has no defence to the action, the court may, upon the application of the plaintiff, make an order (in this Act referred to as a 'correction order') directing the defendant to publish a correction of the defamatory statement.

(2) Without prejudice to the generality of subsection (1), a correction order shall -

(a) specify -

(i) the date and time upon which, or

(ii) the period not later than the expiration of which,

the correction order shall be published, and

(b) specify the form, content, extent and manner of publication of the correction,

and shall, unless the plaintiff otherwise requests, require the correction to be published in such manner as will ensure that it is communicated to all or substantially all of those persons to whom the defamatory statement was published.

(3) Where a plaintiff intends to make an application under this section, he or she shall so inform -

(a) the defendant by notice in writing, not later than 7 days before the trial of the action, and

(b) the court at the trial of the action.

(4) An application under this section may be made at such time during the trial of a defamation action as the court or, where the action is tried in the High Court sitting with a jury, the trial judge directs.

33.— (1) The High Court, or where a defamation action has been brought, the court in which it was brought, may, upon the application of the plaintiff, make an order prohibiting the publication or further publication of the statement in respect of which the application was made if in its opinion:-

(a) the statement is defamatory, and

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

(2) Where an order is made under this section it shall not operate to prohibit the reporting of the making of that order provided that such reporting does not include the publication of the statement to which the order relates.

(3) In this section 'order' means -

(a) an interim order,

(b) an interlocutory order, or

(c) a permanent order

34.— (1) The court in a defamation action may, upon the application of the plaintiff, grant summary relief to the plaintiff if it is satisfied that -

(a) the statement in respect of which the action was brought is defamatory, and

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

(2) The court in a defamation action may, upon the application of the defendant, dismiss the action if it is satisfied that the statement in respect of which the action was brought is not reasonably capable of being found to have a defamatory meaning.

(3) An application under this section shall be brought by motion on notice to the other party to the action and shall be grounded on an affidavit.

(4) An application under this section shall not be heard or determined in the presence of a jury."

Some of the definitions contained at s. 2 of Act are also of particular importance. A "*defamation action*" is now defined as meaning:-

"(a) an action for damages for defamation, or

(b) an application for a declaratory order, whether or not a claim for other relief under this Act is made."

"*Summary Relief*" means, in relation to a defamation action:-

"(a) a correction order, or

(b)an order prohibiting further publication of the statement to which the action relates."

While the defence of "*fair and reasonable publication on a matter of public interest*" remains a defence to a defamation action by virtue of s. 26 of the Act, the same section provides that a defamation action does not include an application for a declaratory order so that the defence would not appear to be available to an application for a declaratory order under section 28.

It is also a matter of considerable significance that an applicant who makes an application to court under s. 28 is not entitled to bring any other proceedings in respect of any cause of action arising out of the statement to which the application relates. Section 28 also provides that no order in relation to damages shall be made upon an application under that section. Further, where the court makes a declaratory order, it may, in addition, make an order under s. 30 or s. 33, upon an application by the applicant in that behalf. Relief under all of these sections was originally sought in the instant case. Somewhat strangely, however, when the matter came to court the plaintiff saw fit to proceed under s. 34 alone. This would suggest that a view was taken that an application brought on the basis that the defendant had "*no defence*" (as provided in s. 28) offered less prospect of success than one brought under s. 34 which provides for relief where it can be shown the defendant has "*no defence to the action which is likely to succeed*".

The explanatory memorandum to the Bill explains the purpose and function of s. 34 in the following manner:-

"This section provides a mechanism whereby defamation proceedings may be disposed of in a summary fashion, on the application of the plaintiff, where the court is satisfied that the statement was defamatory and the defendant has no defence that is reasonably likely to succeed. The court may also dismiss the action, upon the application of the defendant, where it is satisfied that the statement in respect of which the action was brought is not reasonably capable of being found to have a defamatory meaning."

Given that the part of the summary relief available under s. 34 is an order from the court directing the publication of a correction, the wording of the section seems to address itself to media outlets such as newspapers or television (where a correction might be expected to appear) rather than to private individuals. For some reason, however, the plaintiff has not joined either TV3 or Independent Newspapers as defendants to this application. However, while that omission may appear somewhat surprising, the section does not preclude the making of an application directed against an individual.

Having regard to the nuclear nature of the relief available to either party under the section some consideration of what test the Court should apply in deciding whether or not to grant relief is clearly required.

THE TEST

Given the understandable reluctance on the part of the courts to strike out proceedings and thereby deprive either a plaintiff or defendant of access to the courts, the test on applications for summary judgment generally seem entirely appropriate to an application brought by a party under this part of the Act. This was the test argued for by the defendant and the appropriateness of adopting such an approach was not challenged in any way by counsel for the plaintiff on the hearing of this application.

That test was outlined succinctly by Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 when he said as follows (at p. 623):-

"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendants affidavits fail to disclose even an arguable defence?"

The test of "*arguable defence*" is that which is argued before judges of the High Court on a daily basis to persuade them to allow contested cases proceed to plenary hearing, notwithstanding assertions by a plaintiff that he is entitled to summary judgment. A refusal to accede to such an approach in all but the clearest of cases would altogether deprive a defendant of his legal and constitutional rights to defend himself, either in accordance with Article 6 of the European Convention on Human Rights or by reference to the principles laid down in *In Re Haughey* [1971] I.R. 217.

By the same token, an application brought under s. 34 by a defendant to dismiss a plaintiff's claim would also require to measure up to a test as to whether or not the plaintiff has demonstrated a stateable cause of action and not merely one which is merely vexatious or frivolous.

As was pointed out by Keane C.J. in *Twohig v. Bank of Ireland* (Unreported, Supreme Court, 22nd November, 2002):-

> *"…[T]here is an understandable reluctance on the part of the courts to strike out proceedings in limine, as it were, and to deprive the plaintiff in the proceedings of what would normally be his constitutional right of having access to the courts."*

In summary, therefore, it seems to this court that, where either party seeks relief under s. 34, a high threshold requires to first be met. In the instant case, it can only mean that the plaintiff must satisfy the court that the defendant has no arguable case to suggest that his defence might be reasonably likely to succeed. While s. 28 provides for relief where there is "*no defence*" and s. 34 provides for relief where the defendant has "*no defence which is likely to succeed*", I think in practical terms the test under both sections is a high one, though that under s. 28 must necessarily be at the very highest, being that of no defence at all.

SUBMISSIONS OF THE PARTIES
On behalf of the plaintiff, Mr. Martin Giblin S.C. submitted that both statements were clearly defamatory. The defendant was not entitled to rely in defence on findings or evidence given before various tribunals of enquiry set up by the Oireachtas. The learned Circuit Court Judge had erred in taking the view that such material was admissible as hearsay evidence on an interlocutory proceeding. The affidavit sworn by the defendant on 19th November, 2010 effectively provided the basis for the assertion by the defendant that the statements in respect of which the action was brought were true in all material respects.

In essence therefore the plaintiff's case might best be summed up as follows: "Your statements are false and on the face of them defamatory and you cannot stand them up because to do so you would have to rely on the findings of Tribunals of Inquiry which are inadmissible in other proceedings"

On behalf of the defendant, Mr. Oisín Quinn S.C. first argued that the meanings ascribed by the plaintiff to the words published were incorrect. He submitted that he could contest the case on that basis alone. His client's second line of defence would be that the statements complained of were in fact true and correct. Third, the defendant was entitled to express an honest opinion on matters of public importance, particularly where the same involved public figures and had been the subject matter of extensive investigation by one or more tribunals of inquiry.

Insofar as the first complaint was concerned, it could not conceivably be the meaning of the words complained of that Mr. Lowry had his hand in a physical till or even, slightly less literally, that he was thieving in that sense. The plaintiff had always accepted that the bill for the house renovation in Tipperary had been paid by Dunnes Stores and that the plaintiff had not paid tax for the benefit received, having only settled with the Revenue in April 2007, shortly before the 2007 General Election. The defendant therefore clearly had an arguable case to make on all three mentioned grounds of defence in relation to the TV3 interview.

In relation to the second complaint, Mr. Quinn argued that he was not relying on evidence or findings of the Tribunals themselves, but was entitled to make a statement that the Moriarty Tribunal was investigating the possible involvement of Mr. Lowry in four property transactions and the value of those transactions. For the purpose of recording that fact, it was not necessary for the defendant to rely on evidence or findings made by the Moriarty Tribunal.

DECISION
I must commence by acknowledging the correctness of the submission advanced on behalf of the plaintiff that the evidence given to, or a finding made by, a Tribunal of Enquiry has no evidential value in other proceedings. This was made abundantly clear by Finlay C.J. in *Goodman International & Laurence Goodman v. The Hon. Mr. Justice Liam Hamilton, Ireland & The Attorney General* [1992] 2 I.R. 542 when he stated at p. 590:-

> *"A finding by this Tribunal, either of the truth or of the falsity of any particular allegation which may be the subject matter of existing or potential litigation, forms no part of the material which a court which has to decide that litigation could rely upon. It cannot either be used as a weapon of attack or defence by a litigant who in relation to the same matter is disputing with another party rights arising from some allegation of breach of contract or illegal conduct or malpractice."*

Any suggestion that tribunal reports could be admitted as evidence on the basis that it is a public document and thus admissible in subsequent civil proceedings as an exception to the hearsay rule was strongly rejected by Irvine J. in *Director of Corporate Enforcement v. Michael Bailey & Anor* [2008] 1 I.L.R.M. 13, a decision later upheld by the Supreme Court [2011] I.E.S.C. 24. I am not aware of any case law which would suggest that a different approach is possible in defamation cases.

But of course tribunal hearings and findings may be reported upon by the media and tribunal findings may certainly provide a roadmap or trail for other bodies or persons with an interest in the subject matter of inquiry, be it the Oireachtas, the Office of the Director of Public Prosecutions or litigants who engage in private litigation. Shorn of this characteristic, the function of tribunals would be rendered totally nugatory and pointless. The critical consideration in the cases cited above is that tribunal findings do not of themselves constitute material of probative value in such proceedings. They may however point to sources of evidence which may then be accessed in that separate context. Thus to the extent that the learned Circuit Court judge had regard to the tribunal materials as evidence, hearsay or otherwise, upon which she could rely to reach her decision, she would, on the authorities, have been in error. However, to the extent that she had regard to the material in question as pointing to potential sources of evidence to which the defendant, quite apart from tribunal findings, could resort to formulate a defence to the plaintiff's claims, she was in my view entirely correct.

The demanding test in an application of this sort requires the judge dealing with it to be satisfied that the defendant has no defence with a reasonable chance of success. I do not believe the Circuit Court judge could have been so satisfied in this case. This is not in my view a case where the defence to either allegation can only be made or necessarily depend only on evidence or findings delivered

by tribunals of enquiry. I believe a roadmap has been disclosed in the tribunal reports which is indicative of how and in what way the defendant can marshal his defence without actually being forced to rely on the findings of either tribunal. The fact that the roadmap has been extensively referred to by Mr. Smyth in his affidavit should not be taken as an assertion that he cannot otherwise defend the proceedings than by relying on tribunal material.

In relation to the first allegation, I believe it is certainly open to the defendant to quite separately establish all or some of the grounds which would enable him to argue his defence successfully. Evidence of payments made to the plaintiff via his offshore accounts and in relation to the refurbishment of his home in Co. Tipperary and any failure to pay tax thereon are matters quite capable of being established otherwise than by evidence given or findings made by any tribunal. The defendant avers that, quite apart from anything said or found to have occurred by tribunals, the plaintiff has himself made admissions elsewhere with regard to the payments in question. In the course of his replying affidavit the plaintiff does not challenge specifically the receipt of the payments referred to by Mr. Smyth and indeed admits arriving at a settlement with the Revenue in 2007. It is hardly to be supposed that officials of the Revenue are not compellable witnesses for the purpose of demonstrating non-payment of tax.

In relation to the other matter complained of, I certainly believe it is open to the defendant to argue that to report the mere fact that a tribunal is investigating a person's possible involvement in a series of property transactions with a possible link to the awarding of a mobile phone license is not necessarily defamatory *per se*.

Two cases amply bear out this proposition. Both were cited to this court in *Griffin v. Sunday Newspapers* [2011] I.E.H.C. 331. in which the defendant newspaper sought an order under s. 14(1)(a) of the Defamation Act 2009 to narrow down the scope of the plaintiff's claim on the basis that certain imputations ascribed to an article were not reasonably capable of bearing the defamatory meanings contended for by the plaintiff.

That case concerned a newspaper article which stated that there was a military investigation underway into allegations that members of the Army Rangers Wing took leave of absence to give weapons training to police in the Seychelles.

The issue which the court had to consider was whether a statement that an inquiry or investigation was under way was of itself indicative of wrongdoing and of having the defamatory meanings contended for by the plaintiff.

In the course of argument, reference was made to two cases which provided considerable assistance.

In *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234, the facts were that the City Fraud Squad in London were inquiring into the affairs of a limited company of which Mr. Lewis was chairman. Both he and the company of which he was chairman issued writs against the newspapers who had issued front page stories to that effect. It was alleged that the words were defamatory in their ordinary and natural meaning and were meant and were understood to mean that the plaintiffs had been guilty of fraud or dishonesty. In the course of his judgment Lord Reid stated as follows in relation to reports about ongoing investigations (at p. 259):-

> *"What an ordinary man, not avid for scandal, would read into the words 'complained of' must be a matter of impression. I can only say that I do not think he would infer guilt of fraud merely because an inquiry is on foot. And, if that is so, then it is the duty of the trial judge to direct the jury that it is for them to determine the meaning of the paragraph but that they must not hold it to impute guilt of fraud because as a matter of law the paragraph is not capable of having that meaning."*

A similar view was expressed by Lord Justice Hirst in *Mapp v. Newsgroup Newspapers Ltd.* [1998] Q.B. 520 to emphasise that the reference to an investigation could not reasonably be read as imputing guilt to the plaintiffs as contrasted with reasonable suspicion of guilt. In that case the court had to consider whether the reference to the suicide of a police officer in conjunction with a report of the existence of an investigation was such as to transform a reasonable suspicion of guilt into something more.

In *Griffin*, this Court endorsed the approach taken by Lord Reid in Lewis and by Hirst L.J. in *Mapp* to hold that, while the impugned article contained many statements to the effect that allegations had been raised, there was no suggestion that these allegations had been proven or that findings had been made adverse to the plaintiff.

Turning now to the substance of the statements or articles complained of, I am satisfied that the defendant may argue that the words "hand in till" in their correct meaning may be taken as referring to tax fraud and bills inappropriately picked up for the benefit of the plaintiff by business interests. The fact that Dunnes Stores paid €395,000 to the contractors who had refurbished his home in Co. Tipperary and that the plaintiff was availing of offshore accounts to receive other payments are also matters capable of being established in evidence other than exclusively through evidence or findings of any tribunal of enquiry. In this context, I note that the plaintiff in his various affidavits does not dispute that he had engaged in tax fraud, although he deposes that his tax affairs are now in order having reached a settlement with the Revenue in 2007.

In relation to the article in the Irish Independent, it is equally open to the defendant to report and comment on the fact, as fact it was, that the Moriarty Tribunal was following a "money trail" into certain property transactions to which it felt the plaintiff was linked and which had a combined value in the region of £5m Stg. The Carysfort Avenue transaction involved an examination of a sum of £147,000 Stg moving from accounts involving the plaintiff. The Cheadle and Mansfield property transactions being investigated had valuations of £445,000Stg and £250,000Stg and the Doncaster Rovers property transaction had an approximate value of £4.3 million Stg.

I am satisfied therefore that it cannot be said that the defence of this claim must necessarily fail. On the contrary, it seems clear that the defendant has a good arguable case in respect of both publications. That being so, the plaintiff's claim for summary relief under s. 34 of the Act must fail. Having regard to the higher test imposed on a plaintiff applying to court for relief under s. 28 or s. 30 of the Act, it follows a fortiori that any claim maintained by the plaintiff under those sections must also fail. For all the reasons set out in this judgment I am also satisfied that the plaintiff has no entitlement to relief under s. 33 of the Act either. I will accordingly dismiss the appeal.