

THE HIGH COURT

[2016/8887 P]

BETWEEN

WILLIAM J.P. EGAN

PLAINTIFF

AND

MICHAEL FENLON

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 12th day of October, 2016

Introduction

1. The Court has a particular reason which will become apparent later in this judgment to set out the specific reliefs now sought by way of interlocutory application on behalf of the plaintiff:-

(i) *"An injunction restraining the defendant his servants or agents or any person acting in concert with him, or having knowledge of the making of this order, from uttering or publishing any words to the effect that the plaintiff had breached the terms of the mediated settlement of proceedings involving the National Association of Regional Game Councils ("NARGC") of 31st March, 2016;*

(ii) *An injunction restraining the defendant, his servants or agents or any person acting in concert with him, or having knowledge of the making of the order, from circulating, publishing or proposing resolution 6 as listed in the NARGC annual report or words to the like effect;*

(iii) *An injunction restraining the defendant, his servants or agents or any person having knowledge of the making of the order from publishing or circulating in any way whatever the annual report of the national association of regional game councils for so long as it contains the text of the said resolution 6."*

Dramatis personae

2. The NARGC is an unincorporated body made up of local gun clubs from parishes throughout the country. The plaintiff who has at least 33 years knowledge of the NARGC and its constitution explained on affidavit how those local gun clubs affiliate with the regional game councils on a county basis. The regional game councils constitute the membership of the NARGC. Two nominated delegates from each individual regional game council form "the governing body" which in turn elects an executive committee of fifteen including officers to run the affairs of the NARGC when the governing body is not in session. The governing body and the executive committee have the ability to appoint sub-committees to deal with matters as fall within their jurisdictions. They may also delegate work to them.

3. The plaintiff ("Mr. Egan") has practised as a solicitor for over 35 years. He terminated his long standing retainer with the NARGC with effect from its 2015 annual general meeting ("AGM") held on 17th October, 2015.

4. There is no controversy between the parties that the defendant ("Mr. Fenlon") is the chairman of the NARGC. The plaintiff referred to the constitution of the NARGC when outlining how the defendant has overall responsibility for the day to day functioning of the association including the management of staff.

Chronological summary

31.03.2016 - Following a confidential mediation process the plaintiff's professional fees and outlays including fees due to counsel for 22 cases were agreed to be discharged by the NARGC within 28 days. The mediated agreement included the following term which the parties agree refer to the plaintiff:-

"6: Cessation of any professional involvement with NARGC".

June \ July, 2016 - Murphy J. in her judgment on Friday, 29th July, 2016 in proceedings between NARGC, Mr. Fenlon and three others as plaintiffs versus seven defendants from six regional game councils vacated interim *ex parte* orders granted by this Court to the claimants in those proceedings and refused the orders sought restraining the holding of an extraordinary general meeting ("EGM") of NARGC among other reliefs. The transcript of the judgment discloses the court's description of the NARGC as being "a very unhappy organisation..." with the following excerpts as particularly noteworthy:-

"The members are concerned by the executive committee's handling of the affairs of the organisation... – the amount of their money being spent on multiple legal proceedings in which the association is embroiled... whether or not these concerns prove to be well founded they are there and members are entitled to express them".

Ultimately, Murphy J. found that those claimants including the defendant in these proceedings could not establish the claim that those seven named defendants had acted unlawfully in convening an EGM of NARGC on Tuesday 28th June, 2016 for Saturday 2nd July, 2016 given the provisions of the NARGC's rules and constitution and particularly r. 2(j) thereof. The learned judge discharged the interim order made by the Court on Friday 1st July, 2016 upon the *ex parte* application of counsel for those five claimants which had prevented the holding of the EGM on the following day when refusing the other reliefs sought by the claimants.

The Law Society

5. By letter dated 21st July, 2016 with a NARGC address and signed by Mr. Fenlon as chairman, the Law Society was advised that Mr. Egan had agreed that he "would not act for the association" going forward and that Mr. Egan had "an intimate knowledge of the association's affairs". The letter complained that:-

(i) Mr. Egan had failed to respond to the assertion made on behalf of the NARGC on 1st July, 2016 that he had a conflict

of interest in representing a former employee of NARGC in a claim against the NARGC;

(ii) Mr. Egan acted unethically in taking instructions from the successful defendants in the application determined by Murphy J on 29th July, 2016.

6. The complaints and client relations committee of the Law Society by letter of 6th October, 2016 notified Mr. Egan that the committee was of the view that he did not have unique special knowledge in the proceedings in which Murphy J. gave judgment while pointing out that there may be situations in the future whereby there could be a potential conflict of interest. Mr. Fenlon averred at para. 18 of his replying affidavit of 10th October, 2016 that it was now for the executive committee to decide whether to appeal that decision.

These proceedings

7. Last Thursday evening (6th October, 2016) counsel for Mr. Egan on an *ex parte* basis outlined to this Court how the annual report for 2015-2016 of the NARGC included as an ordinary resolution proposed by the Wicklow regional council for consideration at the 47th AGM of the NARGC scheduled for Tullamore on Saturday 15th October, 2016 the following:-

"That because of the agreement reached at mediation with William Egan of William Egan and Associates Solicitors and his failure to honour that agreement the following shall apply:-

- No Associate Member, Regional Game Council or any Sub-Committee of the NARGC shall engage the legal services of William Egan and Associates in any dealings with the NARGC;

- If they do they shall immediately be referred by the National Executive to the Disciplinary Committee and if the complaint is upheld those who are the subject of the complaint shall cease to be members of the NARGC and their membership of the Compensation Fund shall not be renewed.

- All NARGC indemnities shall be null and void from the date William Egan and Associates were engaged."

8. It was explained that the said annual report had been sent to the regional councils for distribution to their members and Mr. Egan was anxious to prevent further circulation of what he termed as the defamatory statement about his breach of the mediated agreement. Among the papers made available to the Court was the exchange of correspondence between Mr. Egan, the NARGC and the solicitors on record for Mr. Fenlon who also acted for the NARGC after Mr. Egan had terminated his retainer.

9. The Court directed that Mr. Fenlon be put on notice for last Friday morning in regard to the most pressing issue concerning the further circulation of the annual report with the impugned proposed resolution.

10. In accordance with the further order of this Court last Friday, the Notice of Motion seeking the interlocutory reliefs sought by Mr. Egan was made returnable for Tuesday 11th October, 2016 with directions for the delivery of legal submissions and replying affidavits to be exchanged and filed during the course of Monday 10th October, 2016.

11. Senior counsel for Mr. Fenlon undertook on behalf of Mr. Fenlon last Friday, without prejudice to any rights of the parties, to inform the regional councils of the existence of these proceedings and to request them not to circulate copies of the annual reports to their constituent gun clubs. The said communication which was sent asserted that Mr. Fenlon and I quote *"would be fully contesting these proceedings both in respect of the alleged defamatory nature of the material and even more cogently in respect of any responsibility for the material"*.

Most relevant submissions

12. Senior counsel for Mr. Egan submitted that the clear import of the impugned proposed resolution is that Mr. Egan breached a mediated settlement and he was thereby unethical. It was an extremely gross defamation of a professional person and it was submitted that Mr. Fenlon's suggested defence of justification or honest opinion does not stand up to scrutiny. It was urged upon the Court to decide that Mr. Fenlon had adopted a well thought out course to attack the constitutional right of Mr. Egan to his good name and professional reputation.

13. It was suggested in oral submissions also that Barrett J. in *Philpott v. Irish Examiner* [2016] IEHC 62 while acknowledging the high barrier for a claimant like Mr. Egan to overcome in establishing defamation in an application under s. 33 of the Defamation Act 2009 (*"the 2009 Act"*), was content to leave it to the opinion of the Court as to whether that was established.

14. "Disingenuous charade" was a term used to characterise Mr. Fenlon's averments that he was unaware of the proposed impugned resolution by Wicklow regional game council and the absence of any discussion at the executive committee of the NARGC of that same proposed resolution when the annual report had been considered on 27th September, 2016.

15. It was also emphasised that the Gorey and District rifle and pistol club had notified its intention to consider action concerning Mr. Egan having regard to his behaviour.

16. There were exchanges between both counsel and the Court about the relevance to the Court's consideration of the application, of damages, adequacy of damages and the wide scope of the orders sought.

Mr. Fenlon's submissions

17. Mr. Fitzgerald, senior counsel for Mr. Fenlon, urged the Court to consider following an opportunity given to him to narrow the issues after senior counsel for Mr. Egan had outlined the nature of the application initially:-

(i) The open offer made to Mr. Egan's counsel which on Tuesday 11th October, 2016 was made to Mr. Egan and then disclosed to the Court as follows and I quote:-

"I, Michael Fenlon exercising my power as chairman of the NARGC will call for a meeting of the executive committee to be held on Thursday 13th October next at which I will propose that:-

1. That resolution number 6 will be redacted from the annual report;

2. That all delegates be requested to bring with them to the AGM (to be held on 15th October next) all copies of the report;

3. That a separate page will be printed for distribution at the AGM in lieu of that page upon which resolution number 6 appears.

4. I will be urging that all members of the executive committee will pass that resolution.

5. If that resolution is passed relevant delegates will be notified without delay.

a. I repeat that I will be urging all members of the executive to pass the resolution." [end of quote]

(ii) The inability of Mr. Fenlon to guarantee that the executive committee will agree the redaction proposals despite his urging in the interest of all parties to save further expense and angst.

18. Senior counsel for Mr. Fenlon when the opportunity came to make his submissions in full reply went on:-

(i) To bring the Court's attention to a letter dated 11th October, 2016 addressed to Messrs. Connellan solicitors to confirm that:-

1. Wexford regional game council intended to distribute the annual report with the impugned proposed resolution redacted and;

2. Wexford Regional Game Council's assertion that the level of esteem in which Mr. Egan is held remains unchanged.

(ii) Address the futility of making orders which no one, including the Court, could supervise or enforce ultimately, given the terms of the reliefs sought in the Notice of Motion which were set out at the beginning of this judgment.

(iii) Refer to the traditional availability and adequacy of damages criteria which should be taken into account by the Court if Mr. Egan established at trial that Mr. Fenlon uttered words or caused to be published words which were defamatory of Mr. Egan.

Reply of Mr. Egan

19. Despite the open offer, senior counsel for Mr. Egan highlighted the right of Mr. Egan to his good name under Article 40.3.2 of the Constitution which he said may not be vindicated by an award of damages. Furthermore, the unascertained nature of future reputational damage ought to be considered by the Court. As for the reference to "servants, agents" etc. in the reliefs sought, Mr. Egan was merely adopting a long established fashion of the reliefs sought in such notices of motion which allowed for ease of use.

The Court's determination

The law

20. Section 33 of the Defamation Act 2009 provides as follows:-

"(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)...

(3) In this section " order " means—

(a) an interim order,

(b) an interlocutory order, or

(c) a permanent order."

21. The Court quotes subs. (3) in order to show that the Oireachtas recognised the various stages at which orders could be made by the Court. The Oireachtas in that way acknowledged that courts have the discretion to determine such different types of orders as the courts choose and may have been established at common law.

22. Undoubtedly, the first hurdle which Mr. Egan must tackle is the proof that the impugned statement is defamatory. Section 6(2) of the 2009 Act provides:-

"(2) The tort of defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person)..."

23. The publication is not disputed although Mr. Fenlon has averred that he did not draft or propose the publication. Mr. Fenlon accepts that he was a member of the executive committee which authorised the publication of the annual report but he has sought to put distance between such membership of an executive committee which did not consider the impugned resolution and the actual fact of publication. The extent to which Mr. Fenlon bears personal responsibility at law for the publication remains to be determined and for the reasons which follow the Court declines to make any such determination at this interlocutory stage.

24. Despite the cogent argument of Mr. Egan's counsel that the Court should consider malice and forethought on the part of Mr. Fenlon, the Court is not prepared to decide these issues on foot of affidavit evidence and speculation which have not been tested on cross-examination. It may yet be decided by a judge or jury that Mr. Fenlon has acted unlawfully or disingenuously before or since the impugned proposed resolution first appeared in writing and throughout the limited number of days during which these proceedings have existed. However, proof of malice or machiavellian chicanery on the part of Mr. Fenlon is difficult, if not impossible, to determine without having the benefit of oral examination with cross examination. This Court is disinclined to make such an adverse finding.

25. Furthermore, the Court is mindful of the potential consequences in this regard for the consideration of damages when the plenary trial of these proceedings comes before a jury or the Court. In those circumstances, it could be invidious to make any further comment on what may or may not be pursued at trial following the exchange of detailed pleadings which are required for such proceedings before the plenary trial.

26. It could be contended and will probably be pleaded in any Statement of Claim on behalf of Mr. Egan that Mr. Fenlon's participation in the executive committee's decision to publish the annual report amounted to publication by Mr. Fenlon. In view of the further consideration of issues arising, the Court repeats that it is not necessary to make a definitive decision at this point on Mr. Fenlon's contribution to the publication that Mr. Egan has breached a mediated agreement.

Is it defamatory?

27. The relevant term of the mediated agreement envisaged that Mr. Egan would cease to have any professional involvement with the NARGC. On its face, representation of other parties who may be involved with litigation involving NARGC does not immediately fall within the meaning of that term. The Court does not see the necessity to recite case law relating to the parol evidence rule but merely says that it again finds itself unwilling to get involved with deciding definitively the meaning of the term when the Court, for all the reasons which it now seeks to explain, does not need to be determined at this stage.

28. All that the Court can observe now is that it appears Mr. Egan was not precluded from representing parties other than the actual NARGC. Again, it is not necessary now for the Court to find that NARGC did not include its constituent regional game councils or members of committees. The Court's hesitancy in this regard is supported by its consideration of the reliefs sought which it will outline.

Potential other defences

29. Apart from the reluctance of the Court to determine the extent of Mr. Fenlon's contribution or acquiescence to the publication and whether there is any merit to an ambiguous interpretation of the relevant mediated term, the Court is further troubled by the effect on the potential overriding right to express an opinion which is based on empirically true and accessible facts, having regard in particular to the opinion expressed by Murphy J. in her judgment delivered on 29th July, 2016 relating to the general authority of the NARGC to discuss issues affecting the well being of the organisation.

30. The Court, in view of the open offer to redact the impugned resolution (which according to Senior Counsel for Mr. Fenlon) is being implemented irrespective of this decision of the Court on this interlocutory injunction application, does not find it necessary to interfere any further in the running of the AGM next Saturday. Mr. Fenlon and other members of the NARGC may be chastened, if not by their own sense of decency, by the effects of a full blown defamation action to which other parties may now be joined as the Court has yet to hear a motion to join other defendants.

31. Whether the fostering of improved relations or the reduction of potential liability in damages dictate, it seems that it behoves Mr. Fenlon and any party who contributed to the publication of the impugned proposed resolution to assist Mr Egan in his efforts to limit the reputational damage which he anticipates. The Court is not prepared however to grant the wide reliefs sought in the Notice of Motion set out at the beginning of this judgment.

32. The Court appreciates the assistance of counsel for both parties when the Court sought views on the potential supervision difficulties for the orders now sought and the adequacy of a remedy in damages if Mr. Egan succeeds at trial based on pleadings which have yet to be exchanged.

33. Even if the Court was minded to make some order to restrain further publication, which it is not now prepared for the reasons outlined, the Court adds that it was not satisfied that the Plaintiff has established the need for the wide ranging interlocutory orders sought in the Notice of Motion dated 6th October. Despite the Plaintiff's scepticism of Mr. Fenlon's replying affidavit sworn on 10th October 2016 and specifically paragraph 24 thereof, the Court cannot ignore the sworn averment of Mr. Fenlon that he has done what he can to limit further circulation of the Annual Report in advance of the AGM next Saturday. It is asking too much of the Court to infer now that Mr. Fenlon lacks candour or lies when he makes that averment.

34. I am reminded by the simple proposition of Denham CJ in *Derrybrien Development Society Ltd v Saorgus Energy Ltd* [2015] IESC 77 that "There is a element of futility in seeking an order to restrain the deforestation" in circumstances where the relevant forest has been cleared and that "the Court does not make futile orders". Therefore, any publication which can ultimately be attributed to Mr. Fenlon has occurred and irrespective of this awaited judgment, he is implementing his offer to assist in mitigating the damage which Mr. Egan fears.

35. Moreover, and despite the submission of Senior Counsel for Mr. Egan, this Court does not accept that it is customary or right for the Court to make orders which:

- (i) Restrain persons who on the evidence before the Court can act in defiance of Mr. Fenlon;
- (ii) Restrain persons who are not now represented in Court and who ordinarily and in view of the judgment of Murphy J. on 29th July, 2016, have a right to consider and express views;
- (iii) Place a potentially intolerable burden and potential conflict on a defendant in plenary proceedings such as Mr. Fenlon, given his role as Chairman of NARGC and the effects of these proceedings on his own private circumstances;
- (iv) Ignores the implementation of the open offer for redaction measures which indicates that Mr. Fenlon will not be party to any further publication of defamatory material. In other words, the Court is not satisfied that Mr. Fenlon will commit a wrong which should be restrained. It will be open to Mr. Egan to return to the Court for interlocutory injunctive relief if there is evidence of non compliance by Mr. Fenlon with the open offer that is akin to an undertaking often given to the Court to avoid the necessity to make orders.

36. The Court will be slow to grant injunctions which may cause confusion for those affected including those seeking to enforce. There are occasions when orders may need to be clarified or modified when the wording is imprecise or circumstances change. Every effort should be made by all parties, including the Court, to craft orders which will not give rise to further disputes. In this application, despite the request of the Court, there was a persistence to apply for orders restraining not only the Plaintiff but his servants, agents and more particularly "any person acting in concert with" Mr. Fenlon "or having knowledge of the making of" the order. The Court disapproves of applications for such wide ranging orders and specifically when, as in this case :

(i) the Court only has the sworn and uncontradicted evidence of Mr. Fenlon denying the control alleged by Mr. Egan (despite the scepticism expressed by Senior Counsel for Mr. Egan) that Mr. Fenlon does not control those who are responsible for initiating the alleged defamatory proposed resolution.

(ii) It may be impossible for either of the parties to supervise the order against any party other than Mr. Fenlon whatever about seeking to use the executive arm of the State to enforce. In this regard, the Court notes the judgment of O'Hanlon J. in *Lennon v. Ganly* [1981] I.L.R.M. 84.

Damages in lieu

37. In view of the submission that Mr. Egan's constitutional right to his good name may not be vindicated by an award of damages, the Court has not been satisfied in this case that an award of damages will not be an adequate or recoverable remedy for the alleged breach of his right to a good name. S 2 of the Chancery Amendment Act 1858 (commonly called Lord Cairns' Act) provides:

"In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against ... continuance of any wrongful act It shall be lawful for the same Court, if it shall think fit to award damages to the party injured, either in addition to or in substitution for such injunction."

38. The case law before and since the Supreme Court's judgment in *Campus Oil Ltd v Minister for Industry and Energy (no 2)* [1983] I.R. 88 is replete with references to the fact that adequacy of damages is one of the most important factors in the analysis of whether or not to grant an interlocutory injunction. Suffice to say that Mr. Egan has expressed fears about his professional reputation but, in fairness, he did not exaggerate to the extent that he would not be able to explain his position to those who may be influenced by the alleged defamation or that damages which are awarded in defamation cases would not compensate him ultimately. Presently, the Court cannot infer anything other than that the parties will proceed to a plenary hearing which will be focused on matters that are specifically pleaded unlike the situation which faced this Court over the last few days.

39. For all of those reasons, the Court refuses the reliefs sought in the Notice of Motion issued on 6th October and which were limited during the hearing to paragraphs 1 to 3 of the Notice of Motion.