Neutral Citation: [2016] IEHC 62

THE HIGH COURT

Record No. 2015/10694P

BETWEEN/

DAN PHILPOTT

PLAINTIFF

AND
IRISH EXAMINER LIMITED

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 8th February, 2016.

Part 1: Overview
1. The essence of the within application is simply stated: the Irish Examiner newspaper has published certain articles on its website; Mr Philpott wants them removed. He seeks to achieve this by having the court grant interlocutory orders prohibiting the Irish Examiner, its servants or agents, from continuing to publish the impugned articles on-line.

Part 2: A Brief Aside
2. Before proceeding with its judgment proper, the court pauses to address a specific concern that, it is claimed, presents for Mr Philpott at this time. A married man with two young children, he maintains that as a result of the articles that remain on the *Irish Examiner* website, it is proving difficult for him to get employment. To the extent that this is so, if it is so, it may assist Mr Philpott if the court briefly sets the record straight insofar as it can:

> Mr Philpott is the former CEO of Marymount University Hospital and Hospice Limited. During the course of his employment as CEO, he sought to draw attention to what he perceived to be serious shortcomings in the operation of Marymount. Subsequently, there was a parting of the ways between himself and Marymount. This parting resulted in employment-related court proceedings between Mr Philpott and Marymount. However, the parties eventually settled their differences and the Board of Management of Marymount has given Mr Philpott a positive reference and publicly wished him well in his future career. The within application involves an attempt by Mr Philpott to have certain articles that he alleges are defamatory of him removed from the website of the Irish Examiner. Mr Philpott was entitled to bring the proceedings that he has settled. Moreover, while this Court is of the view that it cannot, as a matter of law, grant him the reliefs that he now seeks, he was fully entitled to bring the within application.At this time, there is nothing more to matters than that.

Part 3: The Nature of the Application Now Made
3. The within application is brought pursuant to s.33 of the Defamation Act 2009. That provision allows the court to make an order prohibiting the publication of a defamatory statement. So far as relevant to the within application, it provides:

> *"33. – (1) The High Court…may upon the application of the plaintiff, make an order prohibiting the publication or further publication of the statement in respect of which 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 [so no 'super-injunctions'] 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."*

4. Notably, the premium placed by our society on freedom of speech is such that our elected lawmakers provide merely that the High Court *"may"* grant a s.33 order even when the court is of the opinion that an indefensible defamatory statement presents. That the High Court "may" grant such an order, but need not do so, indicates that our elected lawmakers contemplated that there will be instances when a court is of the opinion that an indefensible defamatory statement presents but may nonetheless elect not to bring the hammer of a s.33 order to bear in all the circumstances arising.

5. Notable too is the fact that the High Court need merely be of the opinion that the factors identified in s.33(1) present. In *Reynolds v. Malocco* [1999] 2 I.R. 203, Kelly J. indicated the position at common law as regards the granting of injunctions in situations of a type now governed by s.33 was that there should be no doubt but that the words complained of were defamatory. By reducing the test to a matter of judicial opinion, our elected lawmakers, in enacting s.33, appear to have lowered the bar for plaintiffs in this regard. Even so, a court in a liberal democracy such as ours that places a high premium on freedom of speech, may be slow in any event to issue a s.33 order, notwithstanding that the court is of the opinion that an indefensible defamatory statement presents. Indeed the profound importance of free speech – a freedom inextricably linked to the freeness of our nation –is such that it is arguable that a court ought to be slow to do so. One possible situation that occurs to the court in which the s.33 criteria might be satisfied but where, nonetheless, a s.33 order might not issue, would be where a court was possessed of the necessary opinion but not sufficiently confident of that opinion, whether on the facts presenting or otherwise, to wield the hammer of injunctive relief.

6. What does "defamatory" mean for the purposes of s.33? The term is defined in s.2 of the Act of 2009 as meaning "a statement that tends to injure a person's reputation in the eyes of reasonable members of society, and 'defamatory' shall be construed accordingly". The term "statement" is also defined in s.2 and includes (a) a statement made orally or in writing, (b) visual images, sounds, gestures and any other method of signifying meaning, (c) a statement that is (i) broadcast on the radio or television, or (ii) published on the internet, and (d) an electronic communication. There is no doubt but that the on-line articles published by the *Irish Examiner* and which are the focus of the within application either comprise two statements and/or are two publications comprised of multiple statements.

7. Counsel have been unable to identify any previous Irish case-law that examines the precise nature of the test to be applied before a s.33 order will issue in circumstances such as those now presenting and have effectively invited the court to arrive at some formulation of the relevant test, and to determine whether, for example, a *Campus Oil or Maha Lingham*-style test applies. However, it seems to the court that the tapestry of law woven by the Oireachtas does not invariably or even generally require additional embroidery by the courts. The Act of 2009 posits simply that there are three criteria which must be satisfied before an order can issue under s.33, viz:

In the opinion of the court:

(1) is the statement complained of defamatory?

(2) does the defendant have a defence to the claim of defamation?

(3) is that defence reasonably likely to succeed?

8. The great strength of the common law is that so many judges have said so much; the great weakness of the common law is that so many judges have said so much. Either way, to borrow from Sati, there comes a time for everybody when words and reason become a great weariness. To add more to the plain words of statute, to afford those words a meaning other than what ordinary English requires, seems to this Court to be unnecessary.

9. The court is conscious that Kearns P. in *Lowry v. Smith* [2012] IEHC 22 did seek to define, in the context of s.34 of the Act of 2009, what was meant by the phrase *"no defence to the action that is reasonably likely to succeed"* which appears in that section also. However, that was a case dealing with s.34 of the Act and the very different scenario of summary disposal. Our courts are generally especially careful as regards exercising a power of summary jurisdiction because of the inherent potential for unfairness that arises. Consequently Kearns P. (in this Court's respectful opinion, rightly) sought to pitch the test for summary judgment under s.34 in such a way as to favour defendants as much as possible, and thus reduce, so far as possible, the risk of a summary judgment issuing inappropriately. The same concerns do not present in the context of a s.33 application. The judgment of Kearns P. in Lowry, a case concerned with s.34, is clearly not binding in any way upon the court in the context of an application under s.33. Nor does it appear to this Court to be appropriate to apply, by analogy, the principles identified in Lowry to the very different form of relief established by s.33.

Part 4: A Chronology of Events

10. The court sets out a summary chronology of events below. It then proceeds to consider the substance of the three documents that are central to the within application, namely the judgment of Judge O'Donohoe on 12th June, 2015, and the *Irish Examiner* articles of 13th June, 2015, and 5th December, 2015. The key events arising are as follows:

06/05/2014. Mr Philpott commences employment as CEO of Marymount University Hospital and Hospice Limited.

02/02/2015. Mr Philpott's employment with Marymount ceases.

12/06/2015. Judge O'Donohoe of the Circuit Court issues a written judgment determining in effect that certain disclosures made ('whistleblowing' done) by Mr Philpott during his tenure as CEO are not 'protected disclosures' for the purposes of the Protected Disclosures Act, 2014.

- Prior to that judgment issuing, application was made on behalf of Mr Philpott that Judge O'Donohoe recuse himself. This application was refused.

- Mr Liam Heylin, a reporter with the Irish Examiner seeks to make contact with a solicitor for Marymount. By the time the solicitor returns his call on the same day, Mr Heylin has already written up an article by reference to Judge O'Donohoe's written judgment. Mr Heylin advises the solicitor that he does not require anything from her. Their conversation ends.

> 13/06/2015. The Irish Examiner publishes an on-line article entitled "Former CEO loses case against hospice". The author of the article is identified as Mr Heylin.He was not in attendance at the Circuit Court on the previous day.
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> 16/06/2015. Mr Philpott attempts at 11:29 and 12:32 to e-mail Mr Heylin asking that the Irish Examiner publish a paragraph of text outlining Mr Philpott's motivation for doing as he did. Both e-mails are sent to the wrong address and never received by Mr Heylin.
>
> 19/06/2015. Mr Philpott speaks with and thereafter e-mails Mr John O'Mahoney, a news editor with the Irish Examiner, raising his concerns regarding the article of the 13th.
>
> 04/12/2015. Appeal against Circuit Court decision called on for hearing before High Court (Noonan J.). The dispute is settled between the parties and the orders and findings of fact of the Circuit Court are set aside by the High Court. (There was some dispute between the parties at the hearing of the within application as to whether the findings of fact were in fact set aside. The High Court order, as perfected on 9th December last, orders "that this Motion be struck out with no further order and the Court noting that the orders of finding of fact in the Circuit Court be set aside". The most natural reading of the order, this Court considers, is that the entirety of what happened in the Circuit Court is being struck out on consent, the court noting, in particular, that the embrace of that strike-out extends to such findings of fact as were made in the Circuit Court. The court is buttressed in this finding by certain submissions made to it by Mr Harty, SC, who appeared for Mr Philpott at the within application and also represented him at the High Court proceedings on 4th December last).
>
> 05/12/2015. Irish Examiner publishes an on-line article entitled "Ex-Marymount Hospice executive's legal case resolved". The author of the article is identified as Mr Heylin.
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> 07/12/2015. Mason Hayes and Curran, the then solicitors for Mr Philpott, issue a letter to the Irish Examiner claiming the article of the 5th is defamatory, skewed, not fair and accurate, malicious and unprivileged. The letter, inter alia, seeks the removal of the articles from the internet.
>
> 10/12/2015. Ronan Daly Jermyn, solicitors for the Irish Examiner, issue a letter to Mason Hayes and Curran disputing that the articles are defamatory and declining to remove them from the internet.

14/01/2016. Successful ex parte application made to the Master of the High Court seeking leave to issue notice of motion seeking, inter alia:

"1.An interlocutory order prohibiting the [Irish Examiner]…its servants or agents from any further republication of an article on its on-line newspaper dated the 13th June 2015 titled 'Former CEO loses case against hospice'

2. An interlocutory order prohibiting the [Irish Examiner] its servants or agents from any further republication of an article on its on-line newspaper dated the 5th December 2015 titled 'Ex-Marymount Hospice Executive's Legal Case Resolved'…".

05/02/2016. Application for above ordersis heard by the High Court (Barrett J.).

Part 5: The Judgment of Judge O'Donohoe

11. Judge O'Donohoe's judgment of 12th June last is divided into four parts. The first part (headed "Facts") briefly outlines Mr Philpott's employment history and the essence of the dispute arising. The second part (headed *"The Law")* outlines the content of applicable sections of the Protected Disclosures Act, 2014.The third part (headed "Analysis") considers the various allegations made by Mr Philpott as 'whistleblower'.Judge O'Donohoe rejects the allegation that there was an improper use by Marymount of charitable funds that were given in good faith; rejects the suggestion that there are significant health and safety issues with the Marymount building, describing it as *"a state of the art facility in a wonderful peaceful setting";* and rejects various contentions concerning the mismanagement of financial resources. Finally, in part 4 of his judgment (headed *"Decision"),* despite finding on all grounds against Mr Philpott, Judge O'Donohoe states that *"[T]he Court accepts without reservation the sincerity of the plaintiff[i.e. Mr Philpott]*", an observation that was referenced in the subsequent Irish Examiner article.

Part 6: The First Irish Examiner Article

A. The text of the article

12. It is necessary to quote this article in full. The square-bracketed numbers that appear in the quoted text are cross-references to the court's numbered notes below, which notes in turn refer to and consider certain contentions made for Mr Philpott at the hearing of the within application. The article reads as follows:

"Former CEO loses case against hospice

Saturday, June 13, 2015

by Liam Heylin

The former chief executive officer of Marymount Hospice in Cork who was dismissed from his post in February after seven months for 'significant interpersonal difficulties' between him and other staff members[1]failed in his application for a court injunction against the hospice yesterday.

Dan Philpott was appointed as CEO of Marymount University Hospital and Hospice Ltd in May 2014 and dismissed in February of this year and the reason given for the termination of his contract was "significant interpersonal difficulties between the applicant (Mr Philpott) and other members of staff, in particular the executive team".[2]

Judge James O'Donohoe said in his judgment at Cork Circuit Court yesterday on Mr Philpott's application for injunctive relief against Marymount that it was based on the applicant's claim that he had made allegations against the employer.

The judge said that in legal terms an employee was outside the protection of the Unfair Dismissals Act if his contract was terminated before 12 months had passed but he said that if the allegations of wrongdoing made by the employee against the employer, referred to as 'protected disclosures', were accepted by the court then the employee could get the protection of the Act.

Judge O'Donohoe ruled against Mr Philpott on these key allegations.

"This court has only to satisfy itself that the beliefs and disclosures were reasonable and although the court accepts without reservation the sincerity of the plaintiff, objectively on the facts, in the court's view, he had not satisfied that test. Accordingly, the court refuses interim relief."

Firstly, Mr Philpott alleged that charity funding was being used for needs other than palliative care and was being used to fund administration, portion of salaries, expenses of board members and other staff and that this was an improper use of funds given in good faith.

"The court rejects this assertion out of hand. It is patently clear that the Marymount Hospice is a registered charity for a considerable length of time and any further money spent from donors is for the good of the community and is fully compliant. Furthermore, there have been no complaints made to any authority," Judge O'Donohoe said.[3]

He also said that the assertion of a lack of transparency on fundraising and spending was not borne out by the evidence from the Marymount witnesses.

Secondly, the former CEO complained of a possible Legionnaire's contamination of water and the evacuation of patients from a ward in 2014.

This was challenged by Marymount witnesses as alarmist and completely overstated for what they described as a water leak.[4]The judge accepted the hospice evidence on this issue.

Judge O'Donohoe found against the applicant's criticism of the building noting that the building passed two Hiqa registrations and was, according to the judge, 'a state-of-the-art facility in a wonderful peaceful setting'.

The third issue raised by Mr Philpott was alleged mismanagement of financial resources at the hospice.

Judge O'Donohoe noted in his judgment: 'He (Mr Philpott) cautions against an over-reliance on charity funding as a

working capital source and labels the executive committee as disengaged and that the hospice financial control procedures are ad hoc and an inadequate budget planning approach. Again there was no financial information tendered to support these contentions.'

The judge acceded to an application by Lucy Walsh BL representing Marymount for an award of legal costs in the three-day action in their favour. He refused an application by David Kent BL to put a stay on the order for costs.

** Mr Philpott is appealing the court decision and is also seeking a judicial review.[5]"*

13. Re. [1] and [2].The introductory line to the *Irish Examiner* article – the line that, in effect, lures the reader into reading the balance of the article – states: *"The former chief executive officer of Marymount Hospice in Cork…was dismissed from his post in February after seven months for 'significant interpersonal difficulties' between him and other staff members."* Counsel for Mr Philpott noted at the hearing of the within application that the Irish Examiner article commences by stating as a fact what Judge O'Donohoe indicates in his judgment is merely an assertion by Marymount. Per Judge O'Donohoe, at para. 1 of his judgment: *"The Respondent [Marymount] asserts that the Applicant [Mr Philpott]was dismissed by reason of significant interpersonal difficulties between the Applicant and other members of staff".* Notably, however, the next succeeding line to that just quoted from the Irish Examiner article correctly states that: *"Dan Philpott was…dismissed in February of this year and the reason given for the termination of his contract was "significant interpersonal difficulties between the applicant (Mr Philpott) and other members of staff, in particular the executive team" "*.This was, at least, the reason asserted in court.

14. To the extent that the *Irish Examiner*article contains an inaccuracy, the court would simply note that sometimes the best and nicest of people do not get on. This is a common feature of life. That such a difficulty was represented by the Irish Examiner as having existed in the case of Mr Philpott, instead of having merely been asserted to exist, does not seem to this Court, in its opinion, to involve a statement that would or does injure Mr Philpott's reputation in the eyes of reasonable members of society. Indeed, this Court would hazard that reasonable members of society would be only too aware that (a) there are few managers who are universally beloved by all of the staff in their charge, and (b) if a manager enjoys a completely un-fractious relationship with all other staff, that may well point to that manager being a weak leader who consistently puts personal popularity ahead of organizational efficiency.

15. Re. [3].As indicated above, the Irish Examiner article states:

"Firstly, Mr Philpott alleged that charity funding was being used for needs other than palliative care and was being used to fund administration, portion of salaries, expenses of board members and other staff and that this was an improper use of funds given in good faith.

"The court rejects this assertion out of hand. It is patently clear that the Marymount Hospice is a registered charity for a considerable length of time and any further money spent from donors is for the good of the community and is fully compliant. Furthermore, there have been no complaints made to any authority," Judge O'Donohoe said."

16. It was contended by counsel for Mr Philpott at the hearing of the within application that, in fact, the assertion rejected by Judge O'Donohoe was an assertion that the diversion of charitable donations represented an improper use of funds given in good faith. What Judge O'Donohoe stated in his judgment is as follows:

"1. Charity funding being used for needs other than Palliative Care.

[The allegation is that the charity funding]…is being used as a working capital fund, to fund administration, portion of salaries, expenses of board members, executives and employees etc. This diversion of charitable donations represents an improper use of funds given in good faith. This court rejects this assertion out of hand on the evidence as such expenditure is not contrary to the provisions of the Charities legislation 2009 and updated provisions which came into force in 2014. It is patently clear that the Marymount Hospice is a registered Charity for a considerable length of time and any money spent from donors is for the good of the community and is fully compliant. Furthermore there have been no complaints made in this regard to any authority."

17. The court struggles to see that there is much divergence of real substance between the text of the *Irish Examiner* and the above-quoted portion of Judge O'Donohoe's judgment, certainly not to the extent as to convert the text of the *Irish Examiner* article into a statement that, in the Court's opinion, would tend to injure Mr Philpott's reputation in the eyes of reasonable members of society.

18. Re. [4].The Irish Examiner article states:

"[T]he former CEO complained of a possible Legionnaire's contamination of water and the evacuation of patients from a ward in 2014.

This was challenged by Marymount witnesses as alarmist and completely overstated for what they described as a water leak."

19. It was contended by counsel for Mr Philpott at the hearing of the within application that it was the usage of the term 'evacuation' that was found to be alarmist, not the possibility of contamination. What Judge O'Donohoe has to state in this regard is as follows:

"2.Significant issues with the building which posed and continued to pose critical risk to the health and safety of patients, staff and public.

[Mr Philpott's]…assertions in this regard refer inter alia to possible Legionnaires contamination due to failure to monitor water temperatures and the necessity to install contingency hot water tanks and other measures to offset a potential explosion risk adjacent to the busy palliative care wards. He refers in particular to an incident on September 14th 2014 which resulted in critically ill patients having to be evacuated. This was entirely refuted in cross examination as completely overstated as the occurrence involved a few patients being transferred to a nearby ward for a short time until the situation came under control and was not anything as grave as was portrayed by the Applicant. This court was of the view that the use of the term evacuation in this context was alarmist and not reasonable terminology to describe this water leak."

20. Mr Philpott did make 'complaint' as regards the contamination of water and the evacuation of patients. It is true that the word

"alarmist" appears, at least from the text of the judgment, to have been used by the judge only, not by the witnesses, though it is difficult to see what substantive significance any error in this regard is seen to present if the facts as posited by Mr Philpott in his assertions were *"entirely refuted in cross-examination".* Again, the court sees nothing in any of this that, in its opinion, constitutes a statement that would tend to injure Mr Philpott's reputation in the eyes of reasonable members of society. That he would make certain assertions based on an understanding of the facts that was later refuted by others, is an everyday occurrence: honest people often see things one way, even though the truth of matters is later found to lie in another direction. Such is life.

21. Re. [5].The asterisked text *"* Mr Philpott is appealing the court decision and is also seeking a judicial review"* is the sole amendment that has been made to the article since it was published and appears to have been added sometime after the interaction between Mr Philpott and the Irish Examiner on 19th June.

B. Key Learnings

22. The above dissection of the Irish Examiner article represents a highly unnatural manner of reading. What are the key learnings that someone viewing the above-mentioned article would likely glean? First, that there was an employment-related dispute between Mr Philpott and his onetime employers. Second, that Mr Philpott had been dismissed, ostensibly because of some sort of difficulties between him and other staff. Third, that Mr Philpott had made various allegations about how Marymount was run – and, perhaps implicitly, that this might have been the real reason for his dismissal. Fourth, that a Circuit Court judge had gone through Mr Philpott's allegations in some detail and did not find them credible, though he did not doubt that they were sincerely made. In short, the reader would have garnered the truth of matters, as this Court did on its first reading of the article. Anyone who elected to run a fine tooth-comb over every element of the article would have ended up with the same understanding.

Part 7: The Second Irish Examiner Article

A. The text of the article

23. It is necessary to quote the second Irish Examiner article in full:

> *"Ex-Marymount Hospice executive's legal case resolved*
>
> *Saturday, December 05, 2015*
>
> *Liam Heylin*
>
> *Legal proceedings between the former chief executive officer of Marymount Hospice in Cork and the hospice board were resolved amicably yesterday at the High Court sitting in Cork.*
>
> *The case which arose out of proceedings at Cork Circuit Court earlier this year was listed for hearing before Mr Justice Seamus Noonan yesterday.*
>
> *However, the parties sought time to discuss the issues outside the court and returned shortly before lunchtime to tell Mr Justice Noonan that those discussions had borne fruit.*
>
> *Mark Harty, counsel for the plaintiff, Dan Philpott who was formerly CEO of Marymount University Hospital and Hospice Ltd, thanked the judge for allowing the parties time and said that thankfully it had borne fruit.*
>
> *'By consent the orders of the Circuit Court hearings are set aside,' Mr Harty said.*
>
> *'Thereafter all matters have been resolved. The board of management of Marymount wishes him well in his future career.*
>
> *Mr Justice Noonan congratulated barristers and solicitors on both sides on resolving matters in this fashion.*
>
> *'It is not an easy case to come to grips with. I am glad the parties have been able to resolve their differences,' the judge said.*
>
> *In June, this case was dealt with at Cork Circuit Court where Mr Philpott had failed in injunctive proceedings against Marymount.*
>
> *Mr Philpott was appointed as CEO of Marymount University Hospital and Hospice Ltd in May 2014 and dismissed in February of this year and the reason given for the termination of his contract was 'significant interpersonal difficulties between the applicant [Mr Philpott] and other members of staff, in particular the executive team.'*
>
> *Judge James O'Donohoe said in his judgment at Cork Circuit Court in June on Mr Philpott's application for injunctive relief against Marymount – a judgement that was in effect set aside by mutual agreement of the parties yesterday – that it was based on the applicant's claim that he had made allegations of wrongdoing against the employer.*
>
> *Judge O'Donohoe ruled against Mr Philpott on these key allegations.*
>
> *'This court has only to satisfy itself that the beliefs and disclosures were reasonable and although the court accepts without reservation the sincerity of the plaintiff, objectively on the facts, in the court's view, he has not satisfied that test,' said Judge O'Donohoe. 'Accordingly the court refuses interim relief.'*
>
> *In the June case, Mr Philpott alleged that charity funding was being used for needs other than palliative care and was being used to fund administration, portion of salaries, expenses of board members and other staff and that this was an improper use of funds given in good faith.*
>
> *'The court rejects this assertion out of hand,' Judge O'Donohoe said. 'It is patently clear that the Marymount Hospice is a registered charity for a considerable length of time and any further money spent from donors is for the good of the community and is fully compliant.*
>
> *'Furthermore, there have been no complaints made to any authority.'"*

24. The court must admit to being somewhat mystified by Mr Philpott's concerns regarding this article. The whole thrust of the article is that peace has broken out between the parties, that all has been resolved, that Marymount wishes Mr Philpott well, that a line has been drawn under past events and that everybody is now moving on. It seems thata good day's work was done on the 4ththat ended with an amicable resolution of matters to the satisfaction of everyone involved.

25. Counsel for Mr Philpott argued at the hearing of the within application that the article does not make expressly clear that all findings of fact in the Circuit Court had been set aside. It does not, but that does not, in this Court's opinion, convert the article or any part of it into a statement that tends to injure Mr Philpott's reputation in the eyes of reasonable members of society. If anything, it suggests Mr Philpott to be a practically-minded gentleman who is capable of finding an amicable means of resolving a difficult situation. That, this Court would suggest, is precisely the type of skill that one would expect to find in a competent manager.

26. Mr Philpott also complains that the text from *"In June..."* to the end of the article is a recitation of what had gone before even though Judge Donohoe's findings of fact had been set aside. The court sees nothing in this text but an abridged, condensed or summarised account of the trial and appellate proceedings. That this is what the *Irish Examiner* intended to, and in this Court's view, did achieve is clear from the affidavit evidence of the author of the articles, Mr Heylin, who avers, inter alia, as follows:

> *"With respect to the second article, it was clear to any reader of such article that the proceedings had resolved amicably and that the Circuit Court orders had been set aside. It would have been an incomplete article if the reader was not then informed about what precise Circuit Court Orders had been made or what in fact the Circuit Court case was about…".*

Part 8: Some Applicable Law
27. Counsel for the respective parties have, between them, brought the court on something of a 'whistle-stop' tour of the law applicable to the within application, not least, though not only, by opening to the court various helpful extracts from the recentl earned treatise by Dr Cox and Mr McCullough, SC, *Defamation Law and Practice* (2014). The key points arising from this *'tour de loi'* can be summarised as follows:

A. Existence of defamatory statement
(1) At common law, for injunctive relief to be granted, the court had to be satisfied that the material complained of was unarguably defamatory.(*Mercury Engineering and Others v. McCool Controls and Engineering Ltd and Others* [2011] IEHC 425; *Cogley v. RTÉ* [2005] IEHC 180). If anything, this Court would note, the position appears even stronger under s.33. Under that provision, the court must be of the opinion that an impugned statement *"is defamatory",* not that it is arguably or even unarguably so, but that, in the court's opinion, it "is" so. This is a high threshold for a plaintiff to satisfy. Indeed it is so high that the court would suggest that (a) the very height of that threshold, coupled with (b) the present cost of coming represented to court, may yet have the result that for many, if not most, people,(i) the financial risk involved in seeking s.33 relief, and (ii) the fact that the court need not issue a s.33 order even where it is of the opinion that an impugned statement *"is defamatory",* will colour the initial attractiveness that such a line of action might be perceived to entail, ensuring perhaps that, more often than not, applications will be brought only (I) by the very rich and/or (II) those who have been so demonstrably and disgracefully defamed that the justice of their case cries out for injunctive relief.

B. Burden and nature of proof regarding defamatory statement
(2) At common law, the burden of proving the defamatory nature of the material complained of rested on the plaintiff. That position has not expressly been displaced by statute and it would seem thoroughly illogical were some other arrangement to apply. How could it possibly make sense that a party would come to court complaining that a statement "is defamatory" – a most powerful assertion to make – and seek the hammer of injunctive relief, but not be subject to the burden of proving matters to the extent that the High Court comes to be of the opinion that the assertion so made is correct? Notably, it was accepted for Mr Philpott at the hearing of the within application that the burden of proof in this regard fell to him to discharge.

(3) At common law, the plaintiff had to prove not merely that there was a serious question to be tried but that her/his case is absolutely clear. (See, for example, *Cogley*, op. cit.). A similar but not identical position appears now to present under s.33 of the Act of 2009. As noted above, under s.33 the court must be of the opinion that an impugned statement "is defamatory". This is a high threshold for a plaintiff to satisfy (and, again, even when it is satisfied, an order need not issue under s.33).

(4) The jurisdiction to make a s.33-type order involves a jurisdiction of a delicate nature and should only be exercised in the clearest cases (*Sinclair v. Gogarty* [1937] I.R. 377). Obviously the decision in *Sinclair* long preceded the Act of 2009. However, a constant societal and legal standard, in the near-80 years since, has been our national commitment, as a liberal democracy, to free expression, free speech, and a free press. This constancy has the result that the principle identified in *Sinclair* falls to be applied with the same rigour and vigour today, as in yester-year.

C. No defence reasonably likely to succeed
(5) When it comes to determining that a defendant has no defence that is reasonably likely to succeed, courts should be careful not to intrude upon a factual determination that a jury might later make at trial. (Cox and McCullough, para.12–26). This carefulness would appear to have as its natural corollary that the benefit of any doubt as to the potential for success of a defence ought generally to be resolved in favour of the defendant.

D. Burden of proving defence
(6) The burden of proving the existence of a defence that is reasonably likely to succeed rests with the defendant. This was the position at common law (see, for example, the judgment of Kelly J. in *Reynolds*, op. cit.) and, perhaps even more significantly, it is consistent with the general and still-extant rule that once publication of defamatory material is established, the law presumes a plaintiff's good name and the falsity of the publication, with it being for the defendant to prove any defences pleaded.

E. Absence of presumption
(7) A question arises whether certain presumptions extant at common law in the context of interlocutory injunctive relief also apply under s.33, e.g., presumptions as to (i) the truth of facts (if honest opinion is pleaded), (ii) the presence of the elements of qualified privilege (if qualified privilege is pleaded and no malice presents), or (iii) the possibility of nominal damages being a bar to relief under s.33. Although s.33 does not expressly suggest that these presumptions have been displaced, this Court must admit that it would be hesitant to graft onto the unvarnished wording of a statutory provision which creates a new basis for relief, the application of difficult-to-overcome presumptions which our elected lawmakers could so easily have included, expressly or by reference, in the Act of 2009. Indeed, the fact that they did not do so may represent a re-drawing of the line as regards the protection of the good name of citizens. Fortunately, this is not an issue that needs to be resolved in the context of the within application and thus the court's

observations in this regard are entirely *obiter*. Suffice it to note that even if these presumptions do not apply, a plaintiff seeking relief under s.33 is still faced with a difficult up-hill task: s/he must come to court and lead the court to form the opinion that an impugned statement *"is defamatory",* not that it is arguably or even unarguably so, but that it *"is defamatory"* – and even when that high threshold is met, a s.33 order need not issue.

F. Internet publications
(8) There is nothing in the technology-neutral wording of s.33 to suggest that internet publications fall to be treated differently from other publications when it comes to the granting of a s.33 order. To the extent that the decision in *Tansey v. Gill*[2012] IEHC 42 suggests that the opposite may apply, this Court's instinctive preference is to look to the plain wording of statute as the key determinant of matters –and there is nothing in s.33 to suggest that the opposite applies. As a society, we were well into the Internet Age when the Act of 2009 was enacted. If our elected lawmakers had wanted to make some differentiation in this regard, they would surely have done so, and they did not. That said, s.33 remains ultimately an equitable discretion and this Court does not mean in the foregoing to tie the hands of any later court coming to an application of the type now presenting.

Part 9: The Reporting of Court Proceedings

A. Overview
28. Court reports are not just of interest to the public; they meet a great public interest. In a liberal democracy that prizes individual freedoms, all branches of government are rightly subject to the scrutiny of an ever-watchful public. Reporters perform an essential role in ensuring that members of the public learn of what is being done in their courts and why. In this regard, Burke did not exaggerate when he reputedly observed in the House of Commons that there were three estates in Parliament but that in the Reporters' Gallery sat a 'Fourth Estate' that was more important than all. It is by and through the media that a critical eye is so often brought to the work of all branches, offices and officers of government. This is so important a task that – except insofar as is necessary to ensure that the right of every citizen to her or his good name is protected and capable of vindication – the media must go relatively unconstrained in their efforts. Our individual freedoms are more fully assured in the collective freedom of journalists to discharge the role so eloquently identified for them by the late President Kennedy, in a speech to the American Newspaper Publishers Association back in 1961, being *"not primarily to amuse and entertain, not to emphasise the trivial and the sentimental, not to simply 'give the public what it wants' – but to inform, to arouse, to reflect, to state our dangers and our opportunities, to indicate our crises and our choices, to lead, mould, educate and sometimes even anger public opinion",* and, it might be added, not just to report, but to comment. A court must bring a consciousness of this great public interest to the adjudication of private proceedings such as the application now presenting.

B. Privilege afforded Court Reports
29. Privilege is either absolute or qualified. When it is absolute, a defendant is entirely protected in respect of any statements made, regardless, e.g., of any malice presenting. When privilege is qualified, a defendant is protected, except for statements made maliciously. So great is the protection given by absolute privilege, that the occasions which give rise to it are greatly limited in number. Section 17 of the Act of 2009 identifies various occurrences to which absolute privilege attaches. Section 17(1) establishes the overriding principle that any defence of absolute privilege recognised by the Irish courts before commencement of the Act of 2009 continue to be privileged thereafter. But it is s.17(2) of the Act that is of the greatest interest in the context of the within proceedings. It provides as follows:

> *"Subject to [a statutory provision that is not of relevance to the within application]…and without prejudice to the generality of subsection (1), it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was…*
>
> *(i) a fair and accurate report of proceedings publicly heard before, or decision made public by, any court -*
>
> *(i) established by law in the State…".*

30. Clearly, the Circuit Court is a court established by law in the State.

31. The effect of s.17 is that the statutory privilege contained in s.17(2) is additional to the privilege which historically attached to fair and accurate reports of judicial proceedings at common law. A case could conceivably present in which the differences between the ambit of the statutory privilege under s.17(2) and the still-continuing privilege that exists at common law would be of relevance. However, in the within application, that distinction does not arise to be considered. Matters can be decided by reference to s.17(2). The public/in camera dichotomy that presents ins.17(2) is also not of relevance to the within proceedings.

32. So, are the impugned Irish Examiner articles capable of attracting absolute privilege? Or to put matters otherwise, do they appear to this Court, in its opinion, to be court reports that are "fair and accurate"?

C. "Fair and Accurate"
33. The privilege attaching to court reports under s.17(2) of the Act of 2009 (and the related privilege arising at common law) only applies to court reports that are *"fair and accurate".* What exactly does this phrase embrace? The court has been referred to various statements of principle in the renowned English textbook, *Gatley on Libel and Slander* (12th edition), pp. 310–320, and considers the principles identified below to be good law in this jurisdiction also:

> (1) It is not necessary that a court report should be verbatim.
>
> (2) An abridged or condensed court report will be privileged, provided it gives a correct and just impression of what took place in court.
>
> (3) It is sufficient to publish a fair, summarised account of court proceedings.
>
> (4) If the whole of a court report is a substantially accurate account of what took place, the fact that there are slight inaccuracies or omissions is immaterial. Fair and reasonable latitude must be given by the courts; trifling slips do not deprive a court report of privilege.
>
> (5) A report in a daily newspaper is not to be judged by the same strict standard of accuracy as a report coming from the hand of a trained lawyer.
>
> (6) Where an inaccuracy is of a substantial kind, a report is not privileged.

(7) An abridged or condensed court report must be fair and not garbled so as to produce a misrepresentation.

(8) A court report must not by deliberate suppression of some portion of the evidence give an entirely false and unjust impression to the prejudice of one of the parties involved.

(9) It is not enough to report part of the proceedings correctly, if by leaving out other parts, a false impression is thereby created.

(10) Reports assuming a verdict are not privileged.

(11) A report which accurately sets out the summing-up or judgment of a judge is privileged, even though the summing-up or judgment may contain statements that are defamatory.

(12) Gatley suggests that in a protracted trial a newspaper could be liable if it reported, e.g., Days 1–3 of a trial but failed to report what happened on the conclusion. This point does not fall to be decided in the within proceedings. However, this Court would be of the view that Irish law may well depart from what Gatley states in this regard. Why, for example, should a newspaper prove ultimately liable for publishing what, in and of themselves, are separate, fair and accurate reports? And why should the law dictate to editors what the contents of tomorrow's newspapers or news programmes should be?

(13) A more liberal view of the immunity of reporters is taken now than in former times. Common-sense is allowed a larger share in determining any liability that may arise on their part.

34. There was some criticism voiced at the hearing of the within application that certain aspects of the proceedings before Judge O'Donohoe (specifically, the application that he recuse himself) were not witnessed, and hence not reported, by the Irish Examiner or its agents. To the extent that it is suggested that a court reporter needs to be present for any, let alone every, aspect of court proceedings on which s/he reports, this proposition is entirely rejected by this Court. Provided the above principles are observed, it is perfectly possible, reasonable and lawful for a court reporter to rely solely on the written judgment of a court as the basis for formulating a court report that later appears in print, 'on-air' or on-line, and for that report to be "fair and accurate".

35. The court notes in passing that it considers that a court report about appellate proceedings, even settled appellate proceedings that are the subject of a court order regarding or pursuant to the settlement, does not cease to be a court report because it refers to matters that were addressed before the court of trial. Such a form of court report falls rightly to be treated as a court report that comprises an abridged, condensed or summarised account of the relevant trial and appellate proceedings.

36. The court does not consider that either of the impugned articles that are the subject of the within application offend against or, as appropriate, ought not to benefit from, the liberality and latitude that is afforded court reporters and court reports pursuant to, and consistent with, the above-identified principles.

Part 10: Publication and re-publication on the Internet

34. An issue that was suggested to arise in the within application was the date on which the *Irish Examiner's* two on-line news articles are to be treated as having been published. In this regard, the court understands the issue to be that (1) the articles were published first on the internet on the respective dates shown on the articles, (2) they have been accessible ever since, and (3) each time one or both of the articles is now communicated to a third party this, it is claimed, amounts to a new publication giving rise to a fresh cause of action.

37. This aspect of matters, it seems to the court, is addressed by the technology-neutral provisions of s.11 of the Act of 2009, which is concerned with what it refers to as instances of *"multiple publication".* Section 11(3) of the Act defines a *"multiple publication"* as *"publication by a person of the same defamatory statement to 2 or more persons (other than the person in respect of whom the statement is made) whether contemporaneously or not."* When it comes to electronic publications, could there, at this time, be any better example of a *"multiple publication"* than the same on-line newspaper article being accessed over time by two or more people other than the person in respect of whom a statement in that internet article refers? Probably not. So what does s.11 state in respect of such a *"multiple publication"?* Section 11(1) states that *"Subject to subsection (2), a person has one cause of action only in respect of a multiple publication."* Section 11(2) empowers the court to grant leave to a person to bring more than one defamation action in respect of a multiple publication in circumstances *"where it [the court] considers that the interests of justice so require."* So s.11(1) sets the general position, and s.11(2) allows for what seem likely to be exceptional instances.

38. What is not expressly answered in the foregoing is what date is to be treated as the date of publication of a multiple publication that is accessed on-line on different dates over time. It seems to this Court that, at least in the context of on-line publications, and despite such longstanding decisions as *Duke of Brunswick v. Harmer* [1849] 14 Q.B. 185 – a decision which, the court would hazard, with some confidence, was not made with an eye to the Internet Age – it must, logically, be the case that it is the date of first publication that is to be treated as the date of publication of a multiple publication that is accessed on-line at different times and/or on different dates. Were this not so, on-line news providers would be under a never-ending duty at all hours of every day to re-visit constantly each and all of their archived articles and reports and repeatedly up-date them so that those archived articles and reports reflected any changes of relevance that might have occurred between the moment the articles initially went up on-line and each time those articles might be freshly accessed thereafter. Such an end would be a complete nonsense, commercially, practically and legally. Logically, sensibly, and properly, the only way to read s.11 when it comes to on-line publications – a type of publication that had long existed by 2009 and which our elected lawmakers can be presumed to have had within their contemplation when enacting that Act –is that (if only to avoid the nonsense just identified) it is the date of first publication that is to be treated as the date of publication of a multiple publication that is accessed on-line at different times and/or on different dates over time. The court proceeds on this basis when approaching the three-pronged test that arises under s.33. And it sees some support for its conclusion as to the centrality of the date of first publication in the insertion into the Statute of Limitations 1957, by s.38 of the Act of 2009, of a new s.11(3B) whereby the date of accrual for a defamation action in respect of an on-line publication is *"the date on which it is first capable of being viewed or listened to through that medium."* Any potential for unfairness that the approach favoured by this Court may entail seems to it, and appears also to have seemed to our elected lawmakers, to be met by the power accorded the court by s.11(2) of the Act of 2009.

Part 11: Conclusions

39. The court proceeds now to apply the three-pronged test arising under s.33 of the Act of 2009.

40. Q. In the opinion of the court, are the statements complained of defamatory?*

** As noted above, s.2 of the Act of 2009 defines the phrase "defamatory statement" as meaning "a statement that tends to injure a person's reputation in the eyes of reasonable members of society, and 'defamatory' shall be construed accordingly."*

A. In the opinion of the court: (1) (i) neither of the two articles published by the Irish Examiner, however viewed, and (ii) no statement contained in either of those two articles, contains or constitutes a statement that tends to injure Mr Philpott's reputation in the eyes of reasonable members of society; and (2) none of the statements complained of is therefore defamatory.

41. Q. In the opinion of the court, does the defendant have a defence to the claim of defamation?

A. Yes. For the reasons stated above, the court is of the opinion that the defence of absolute privilege is open to the Irish Examiner in respect of both impugned articles.

42. Q. In the opinion of the court, is that defence reasonably likely to succeed?

A. Yes. For the reasons stated above the court is of the opinion that the defence of absolute privilege is likely to succeed in respect of each of the impugned articles and any statements therein contained.

43. In light of the above conclusions, the court is coerced by law into declining all of the reliefs sought by Mr Philpott in the within application.