COURT OF APPEAL

Neutral Citation Number: [2020] IECA 116
Record No: 2019/446

Donnelly J.
Faherty J.
Haughton J.

BETWEEN/

WILLIAM JONES

PLAINTIFF/APPELLANT

-AND-

COOLMORE STUD

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered this 27th day of April, 2020

Introduction

1. This is an appeal from a decision of Allen J. striking out the appellant's claim on the grounds that it discloses no reasonable cause of action and is frivolous and vexatious (see *Jones v. Coolmore Stud* [2019] IEHC 652). An understanding of the issues in this appeal requires reference to the salient history of the parties' relationship and previous litigation.

2. The appellant is a former employee of the respondent. The respondent owns and operates a commercial thoroughbred breeding and racing business from a stud farm in Co. Tipperary. Having been in employment with the respondent for about nine years, the appellant made a complaint to the Labour Relations Commission about his employment. On the 12th December 2014, the claim was compromised and the terms of compromise were reduced to writing (hereinafter, "the agreement"). Pursuant to the terms of the agreement, the appellant retired in January 2015 and he received from the respondent the sum of €30,000 as a gesture of appreciation, in consideration of which he agreed *inter alia* not to disclose any records relating to animals or clients and not to make any derogatory comments about the respondent in the future.

3. On the 23rd November, 2015, the appellant self-published his book: "*The Black Horse Inside Coolmore*" (hereinafter, "the book"). The respondent alleged and the High Court found in earlier proceedings brought by the appellant (hereinafter, "the 2016 proceedings"), that the book is in manifest breach of the terms of the agreement. The appellant has never disputed this basic fact but in the 2016 proceedings, he claimed a type of duress in entering into the agreement.

4. Following the publication of the book, the respondent (through its solicitors) wrote to various booksellers and distributors asserting that the book contained material which was defamatory of the respondent, its clients, customers, owners and staff. These letters (hereinafter, "the 2015 letters") also expressed the view that the book breached the

terms of the agreement, breached the respondent's intellectual property rights and was in breach of copyright, and called on the distributors and booksellers to withdraw the book from sale. Failure to do as requested, the respondent would hold the recipients liable for any damage suffered by sales of the book.

The 2016 Proceedings

5. In his 2016 proceedings, the appellant sought injunctions preventing the respondent or its representatives from threatening any bookshops or websites with legal action for defamation relating to the book and compelling the respondent and its representatives to withdraw immediately all threats of legal action made previously. The plenary summons also sought a declaration that the book was not defamatory on its face and may be sold where books are sold. A claim for evidence that the book was defamatory was also made.

6. The appellant's application for interlocutory injunctive relief in similar terms to that claimed in the plenary summons was refused. Both the High Court and the Court of Appeal determined that the respondent was entitled to write to third parties complaining that the appellant's book was defamatory; was in breach of the appellant's contractual obligations and infringed the respondent's intellectual property rights and right to threaten to sue the third party should they see fit to publish the appellant's book.

7. In refusing relief in the High Court, Costello J. held *inter alia* that the defendant was perfectly entitled to write the 2015 letters. In doing so, Costello J. held that these "*were not improper letters to write*" and that the "*right to send such a letter is inherent in the right of access to the courts*"

8. In dismissing the appellant's appeal, the Court of Appeal (Ryan P.) held *inter alia* that it was implicit in the defence of innocent dissemination under s. 27 of the Defamation Act, 2009 "that a person who apprehends that a publication may contain defamatory material about him is entitled to communicate that to the distributor or seller or other person involved who is not the author, editor or *publisher*." Ryan P. concluded that that "*there is no valid objection in law to a person seeking to protect his good name by notifying a distributor or other secondary disseminator of his complaint of defamation with a view to preventing distribution*".

9. On the 24th November, 2017, the appellant's application for leave to appeal to the Supreme Court was refused. In its determination, the Supreme Court observed that court time is "*a precious resource*" and not one "*to be used as a platform or a vehicle for ventilating personal grievances*".

10. No further steps were taken in the 2016 proceedings.

The Present Proceedings

11. On the 30th November, 2017, the respondent (through its solicitors) wrote to Gardner's Books Ltd (hereinafter, "Gardner's"), in similar terms to the 2015 letters. The material parts of the letter of the 30th November, 2017 (hereinafter, "the 2017 letter") are set out at paragraph 23 of the judgment of Allen J. and need not be repeated here. The 2017

letter again expressed the view that the book breached the terms of the agreement, was in breach of copyright and in breach of the respondent's intellectual property rights. The 2017 letter gave links to the judgments of the High Court and Court of Appeal in the 2016 proceedings. The 2017 letter was sent by post to Gardner's and to three email addresses in Gardner's concerned with sales.

12. The appellant issued the present proceedings on the 12th March, 2018. The claims made in the general endorsement of claim of the plenary summons are set out at paragraph 21 of the judgment of Allen J. In brief, the appellant claims damages for defamation contained in letters sent to various booksellers. In his written submissions to this Court, the appellant confirmed that the 2017 letter is his "*cause of action against Coolmore Stud*".

13. The plenary summons also claimed injunctive relief, and on the 16th March, 2018, the appellant sought an interim injunction on an *ex parte* basis. The appellant delivered his statement of claim on the 30th April, 2018 and pressed for a delivery of a defence. The appellant subsequently withdrew his application for injunctive relief on the 14th December, 2018, the respondent having indicated resistance to that application. During the argument on costs, each side made clear their intention to pursue further applications in the proceedings.

14. The appellant issued a motion for judgment in default of defence on the 25th January, 2019. Two weeks later, the respondent issued its motion seeking to have this action dismissed.

15. On the 1st October, 2019, Allen J. delivered his judgment.

The High Court Judgment

16. Allen J. made the following relevant findings (the words in *italics* are direct quotes from his judgment):

    (i) "In my view the decisions in the previous litigation finally and conclusively established the right of the defendant to communicate to distributors and booksellers its apprehension that the Plaintiff's book was defamatory of Coolmore and breached Coolmore's rights and the Plaintiff's obligations of confidentiality and the copyright rights of the third parties. The Plaintiff quite rightly recognises that the 2016 action came to an end when his appeal was dismissed."

    (ii) While the reliefs claimed in the 2016 proceedings are – to some extent – different to the reliefs claimed in the 2018 proceedings, "*they are both substantive actions for defamation*"

    (iii) While neither the High Court nor the Court of Appeal, in the 2016 proceedings, made an order "formally declaring the defendant's entitlement to have written the letters it wrote, or to continue to write similar letters in defence of its legal rights, there is a decision of the High Court, affirmed on appeal, to the effect that the defendant (sic) has no arguable ground on which to seek to prevent the defendant

from doing what it has done, or from continuing to do so in the future. That, it seems to me, amounts to the same thing."

(iv) While the appellant's application in the 2016 proceedings, was an application for interlocutory orders, "*it by no means follows that the decision was an interlocutory decision*". The issue on whether there was a *bona fide* issue to be tried was decided against him and was final subject only to an appeal, which had been brought and failed.

(v) It follows that the challenge in the present proceedings to the entitlement of the respondent to send the 2017 letter is "*an attempt to relitigate issues which have finally been decided against [the appellant]*".

(vi) There is no difference in substance between the 2015 letters and the 2017 letter;

(vii) As regards the appellant's argument that any action against the distributors would be statute barred, it is not necessary to determine whether this infringes the rule in *Henderson v. Henderson* "*because it is clear from the decisions of Costello J. and Ryan P. that the plaintiff's new arguments cannot avail him*".

(viii) The judgments of the High Court and the Court of Appeal in the 2016 proceedings make clear "that the right to send letters such as were sent by the defendant is inherent in the right of access to the courts. A person claiming to be defamed has a right to write to the distributor to convey his belief that the material is defamatory of him […] As Costello J. said at para. 29, the fact that the recipient of such a letter may have a full defence to threatened proceedings does not mean that the writing of the letter gives rise to a cause of action."

(ix) "The issue as to whether Mr. Jones has an arguable case that the defendant is not in principle entitled to write to distributors in good faith and in defence of its rights is not to be revisited."

(x) The fact that it has not been established by a court that the book is defamatory is "*irrelevant*".

(xi) The Plaintiff has not engaged with the "other complaints" made in the letters concerning "breach of contract, breach of confidentiality and breach of copyright".

(xii) The particulars of malice (on the part of the Defendant in writing the 2017 letter), as set out in the Plaintiff's replying affidavit "*do not amount to malice in law*".

(xiii) "In previous proceedings between the same parties the High Court and the Court of Appeal have determined that the writing of such letters to book distributors is a legitimate legal purpose. If, strictly speaking the Defendant's entitlement to have written the letter the subject of the proceedings is not res judicata, the issue as to the Defendant's entitlement in principle to write such letters has been finally and conclusively determined".

(xiv) "To the extent that the Plaintiff seeks to relitigate the Defendant's entitlement in principle to write to distributors, it is vexatious."

(xv) Neither is there any issue as to the Defendant's motive or purpose in writing the letter. That motive and purpose was the same as that previously found to be legitimate legal purpose. The Plaintiff's assertion that the letter was 'deliberately and maliciously misleading and was based upon a misunderstanding of the law. It is unsupported by the facts pleaded."

(xvi) "On the uncontested facts, the Plaintiff's case is bound in law to fail. Accordingly, it is frivolous."

(xvii) The Plaintiff's object in bringing these proceedings to seek to revive and relitigate issues which have been finally and conclusively decided against him. To allow it to proceed would be to expose the Defendant to the trouble and expense of defending it, and would be a waste of court time. Accordingly it is vexatious, and the Defendant is entitled to the order which it seeks."

The Grounds of Appeal

17. The appellant, who has represented himself throughout these proceedings, filed a very lengthy notice of appeal. Many of his grounds are repetitive, prolix and more suited to submissions than to grounds. Some of his "grounds" range from hyperbole to scandalous. It is entirely improper to accuse a judge of "legal treason" for example, simply because of a belief that a decision was wrong in fact and in law. Judges may err in their conclusions but that is not an indication of *mala fides* and such improper imputations should not be made. The appellant is a litigant who is well aware of the impropriety of extreme and intemperate criticisms of trial judges following the observations of the Court of Appeal and the Supreme Court in the 2016 proceedings.

18. Having made those comments on his written grounds and submissions in this case, it is also important to record that the bulk of the appellant's written submissions were entirely properly presented, albeit repetitive. His oral presentation to the Court was articulate, concise and respectful. The appellant also handed in his speaking note for the consideration of the Court.

19. The appellant appeared to net down his grounds of appeal in his written and oral submissions. From a careful perusal of all his documentation and consideration of his oral presentation, I see that the core issues in the appeal from the appellant's perspective are as follows:

a) A primary point at issue is the motion judge's finding that on the uncontested facts, the appellant's case is bound in law to fail and accordingly it is frivolous. He says that many of the facts were contested by him and the case law prohibits a court from dismissing a case as bound to fail in those circumstances. In support of that contention, he submits:

(i) There was no finding that the book was defamatory and no legal proceedings have been brought against him;
(ii) That the 2017 letter was defamatory of him;
(iii) That Gardner's were threatened with breach of Irish law which has no effect in the United Kingdom; and
(iv) That in the previous proceedings his denial of allegations made by the respondent had been recorded. He says that the Court of Appeal decision records that he did not consider himself bound by the agreement.

b) Issue is taken with the finding that although there was no *res judicata* or *Henderson v. Henderson* abuse of process, there was an attempt to relitigate the 2016 proceedings.

c) The question of malice is of fundamental importance. Issue is taken with the finding that there was no malice in law. He submits that the motion judge did not take into account his definition of malice from Black's Law Dictionary.

d) The findings of the motion judge that the 2017 letter was written with the object of having the sale and distribution of the book suppressed was exactly the type of improper conduct that is prohibited according to the definition of malice in Black's Law Dictionary.

e) It is submitted that it is significant that the trial judge made no finding that the letter was written on an occasion of qualified privilege.

f) The earlier proceedings were interlocutory in nature and therefore did not determine anything of substance in these proceedings. Therefore, it was incorrect to say that the appellant's object in bringing these proceedings is to seek to revive and relitigate issues which have been finally and conclusively decided against him.

g) The respondent is statute barred from commencing any defamation proceedings.

Analysis and Determination

I. *The Legal Principles on a Motion to Dismiss*

20. Allen J. was asked to dismiss the case under O.19, r.28 of the Rules of the Superior Courts as well as under his inherent jurisdiction. He cited the (by now, well-known) passage from *Lopes v. The Minister for Justice* [2014] 2 I.R. 301 at 309, in which the Supreme Court (Clarke J) explained the difference between the two types of applications as follows:-

> "The distinction between the two types of application is therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in Barry v. Buckley [1981] I.R. 306, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even

> though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked."

21. Allen J. also cited the dicta of Clarke J. at p.335 in Lopes which stated that the High Court has "*to take the evidence which it is suggested might be capable of being secured and presented to the High Court, at its high point*". Clarke J. indicated however, that the fact that a plaintiff makes assertions about things does not make it evidence. As Clarke J. held,

> "[e]ither the evidence or potential evidence is capable, on an arguability basis, of supporting his accusation or assertions, or it is not."

22. The appellant views the findings of Allen J. as being made on the basis of his inherent jurisdiction. He does not take any general issue with the law. His submission is that the judge wrongly failed to take into account that the facts were contested. He also submits that the statement of claim did disclose a cause of action and was not therefore bound to fail. The respondent however, submits that the finding was based upon O.19, r.28 and that even if all the appellant alleges was true, the statement of claim discloses no cause of action and his case was bound to fail as a matter of law.

23. The Order of Allen J. reflects the wording of the judgment and that of the first relief in the motion *i.e.* a strike out pursuant to O.19, r.28. The trial judge ordered that the appellant's claim be struck out on the grounds that it discloses no reasonable cause of action and is frivolous and vexatious.

II. *The binding nature of the findings of law in the 2016 proceedings*

24. Much of the appellant's submission relates back to the 2016 proceedings. He points to the fact that they were interlocutory, that there was no finding that his book was defamatory and that malice was identified as a ground which could give rise to a cause of action, as conclusive of his right to pursue these proceedings. While the 2016 proceedings have relevance to the present proceedings, the appellant is incorrect in his understanding of the import of the findings therein.

25. The findings of law that were made in the previous proceedings are binding on this Court as a matter of precedent. As held in *Kadri v. The Governor of Wheatfield Prison* [2012] I.L.R.M. 392:-

> "A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing."

The mere fact that findings of law were made in an interlocutory application is not a reason to depart from the previous decision of the same court. They were proceedings which were and were intended to be conclusive of the issue of whether there was a *bona*

fide issue to be tried in the case. The obligation to follow precedent is all the more binding where the previous decision is that of a higher court.

26. The Court of Appeal, having noted that s. 27 of the Defamation Act, 2009 affords a statutory defence to innocent publication, stated that the respondent sought to exploit this provision by putting potential distributors/retailers on notice of their claim that the book is defamatory. The purpose of writing these letters was to put those parties on notice that they could not avail of the defence themselves. The Court stated that a party was not obliged to sue any particular person such as the author of the allegedly libellous material before taking steps against other persons to protect their reputation. By sending the letters, the respondent had put those other parties in the position of electing between publishing, thus jeopardising the ability to rely upon innocent publication or, abandoning publication. The Court of Appeal expressly held "*[t]hat was a legitimate legal manoeuvre in the circumstances and the trial judge was correct in so holding."*

27. Costello J., the trial judge, had held, in answer to the appellant's claim that he could prove the truth of the contents of the book, that *"[t]he fact that a party may have a full defence to a letter threatening proceedings does not mean that the writing of such a letter itself, whether to the party concerned or a third party, gives rise to a cause of action."*

28. Although the Supreme Court determination is not cited by me for its precedential value I find it appropriate to adopt the wording used in that determination in articulating the legal findings of the Court of Appeal. The clarity of how it is expressed could not be improved upon by me and it is for that purpose I adopt the following:-

> "The defence of innocent dissemination is set out in statutory form in s.27 of the Defamation Act, 2009. It is implicit in the defence that where a person apprehends that a publication may contain defamatory material about him, he is entitled to communicate that apprehension to the distributor or seller, or other person involved, who is not the author, editor or publisher. The publication was not prevented by court order or otherwise. Whether or not distributors choose to sell the book is a matter for themselves. An author cannot insist that a person claiming to be defamed in his work has to sue him, as well as other parties, or instead of other parties."

29. As a proposition of law therefore, the position is crystal clear. The writing of a letter to a potential publisher or distributor threatening defamation proceedings is an entirely legitimate activity for a person or entity to engage in when concerned about their good name and reputation. That proposition of law is not affected by the fact that it was given in an interlocutory hearing. It applies across the board to all persons and subject to the issue of malice considered further below, to all situations. Allen J. correctly identified the principle. It was binding on him (as on this Court) irrespective of any principle of *res judicata*.

III. ***The irrelevancy of the absence of a finding that the book contains defamatory allegations***

30. The foregoing proposition of law is central to the understanding of the decision of Allen J. and of this decision. This means, contrary to what the appellant asserts, the truth or otherwise of the allegation of defamation is immaterial to the right of a party to write a letter informing a third party of the alleged defamatory contents of a publication and bringing the third party's attention to s. 27 of the Defamation Act, 2009 (subject to the issue of malice considered below).

IV. ***The irrelevancy of the argument that the respondent is statute barred from claiming the book is defamatory***

31. The appellant claimed that any defamation "against it" *i.e.* the book, was statute barred. Aside from the misunderstanding that proceedings are not taken against a publication (but against a publisher), in light of the findings of law in the 2016 proceedings, the issue of limitations of proceedings is irrelevant. A party is entitled to write to a potential publisher to warn them that certain material is considered defamatory. The third party recipient is entitled to weigh in the balance the question of whether they could avail of the statute of limitations if they chose to publish the disputed material. It is not necessary to consider the issue of whether a fresh publication (or if the publication in dispute is itself a fresh publication) is the date of accrual of the cause of action in defamation. The respondent was entitled to write the letter, the choice to publish the book or not was for the recipient of the letter.

V. ***The irrelevancy of the argument that the letter addressed to a UK firm referred to Irish law on defamation***

32. Similarly, the finding that a party is entitled to write a letter conveying the belief that certain material is defamatory is not affected by the fact that the letter refers to Irish law and not the law of the country of the address of the recipient. Again, it is for the recipient to weigh in the balance all the issues prior to deciding to publish. It is not for this Court to consider the jurisdiction in which a party may sue for defamation. The respondent was entitled to alert the recipient of the letter to relevant provisions of Irish law.

VI. ***The issues of qualified privilege and malice***

33. A ground of fundamental concern to the appellant related to the issue of qualified privilege. A related issue concerns the question of whether malice exists.

34. These issues arise from the dicta of Costello J. in respect of a letter written *mala fides* to a potential publisher. Costello J. held:-

> "It is possible that a letter written without any justification, mala fide and with a view to causing damage to another party rather than a bona fide defence of the rights of the letter writer, could give rise to a cause of action but that is very far from the case here. The evidence establishes that the defendant has at all times been anxious to rely upon the agreement of 12th December, 2014, and to defend itself, its staff and persons associated with it from defamation. This is entirely legitimate and in the circumstances the writing of the letters in question does not give rise to a cause of action by the plaintiff against the defendant."

35. This finding was not disturbed by the Court of Appeal. It demonstrates that in certain very particular circumstances a letter threatening defamation proceedings might be actionable. This would require malice on the part of the letter writer. A significant part of the appellant's complaint in this regard was that the motion judge did not have regard to the appellant's definition of malice and did not in fact define malice.

36. The appellant insists that the definition of malice is that contained in Black's Law Dictionary which he submits "defines malice as when a wrongful act is done intentionally, without legal justification or excuse". The problem with that definition from the appellant's perspective is that it refers to a "wrongful act". What the appellant does not accept is that the writing of the 2017 letter (or any similar type letter) is not a wrongful act. In light of the potential for a distributor to rely upon a defence of "innocent publication", the law permits these letters to be written. At the risk of being repetitive, it is a perfectly legitimate legal manoeuvre to write a letter warning that certain material is defamatory (or alleged to be defamatory). On that basis, the appellant's argument can be rejected.

37. It is nonetheless appropriate to examine the manner in which Allen J. in fact dealt with the issue of malice. He quoted a passage from Cox and McCullough in their work on Defamation Law and Practice at paragraphs 8-106 and 8-107. In doing so he stated the passage was instructive and thus he was indicating his approval of it. The appellant made a number of complaints about the reliance on this textbook by the motion judge. His main complaint was that he was not given an opportunity to consider this passage, it having been introduced by the respondent in oral argument and not on the authorities. The transcript does not reveal that appellant objected to its introduction. In any event it was introduced in response to the appellant's reliance on a particular definition of malice and the appellant had an opportunity to take issue with it. Moreover, neither in his notice of appeal nor in his submissions does the appellant address why he says that reliance on this textbook was wrong, save for a submission that he should have relied upon a further passage from it (an aspect to which I will return). Instead, the appellant repeats his reliance on the definition of malice from Black's Law Dictionary; a definition which if it were applicable to the situation would expressly defeat any argument based on malice.

38. In citing the textbook, Allen J. utilised the concept of malice as applied in defamation proceedings for the purpose of defeating a defence of qualified privilege, to the particular circumstances of the case at hand. This was entirely appropriate in circumstances where the issue of malice had been identified in the 2016 proceedings as the basis for establishing a cause of action, even though it is ordinarily a legitimate exercise to send such a preliminary letter.

39. For the purpose of identifying malice in this type of situation, the motion judge identified that it engages the motive or purpose of the publisher rather than the meaning of the words or the relationship between the maker and the recipient of the statement. I have no doubt that this was and is the type of malice envisaged by Costello J. in the 2016 proceedings when she referred to a letter written without justification, *mala fides* and with

a view to causing damage to another party rather than a *bona fide* defence of the rights of the letter writer.

40. The particular passage from Defamation Law and Practice referred to by Allen J. was more favourable to the appellant than his own definition. More importantly, the principles set out in the passage are highly relevant and appropriate to apply to the circumstances of the present case. They deal with issues of publication and defamation and can and should be applied *mutatis mutandis* (to be altered as necessary) to the situation here. In my view, it was entirely appropriate to apply the principles in those passages to the circumstances at issue here. I would add however that the appellant is correct in his assertion that a more complete reference would include a further excerpt from Cox and McCullough. That excerpt relates to the knowledge of the publisher that a statement was false, or being reckless as to its truth, was evidence of malice.

a) *Were the facts uncontested?*

41. The appellant's ground of appeal and submissions were replete with references to how the judge was incorrect in holding that the facts were uncontested. It is appropriate to deal with those claims under the claim relating to malice. It is important to recall that it is facts relevant to the issue *i.e.* whether there is a cause of action that must be found before the court is entitled to exercise its jurisdiction to strike out the claim on the basis that it is bound to fail and is thus frivolous and vexatious.

42. When the jurisprudence refers to the "facts as pleaded" or indeed "uncontested facts", those are facts which are relevant to the issue at stake. That is the only rational interpretation of the case law. To hold otherwise would permit a plaintiff to plead irrelevant but highly contentious matters thereby ensuring that a case that is bound to fail and is vexatious and frivolous must nonetheless go to trial with the consequential cost to the other party and to the administration of justice generally that would ensue.

43. Undoubtedly, the finding that the facts were uncontested related to the relevant facts. For example, Allen J. was well aware that the appellant claimed that the book was not defamatory and specifically referred to that in his judgment. That was a contested issue. Allen J. correctly held that the fact that there had been no court determination as to whether it was defamatory was immaterial to the issue before him given the finding of the Court of Appeal in the 2016 proceedings. The contested issue of whether the book was defamatory was irrelevant to the issue of whether the case was bound to fail.

44. On the other hand, the most important relevant uncontested fact to which Allen J. referred, was the appellant's own statement that the 2017 letter was written "with the sole aim of getting the book withdrawn". Both parties were in agreement that this was the aim and indeed as the judge records "*there is no issue in fact that the writing of the letters has had the consequence that several booksellers and distributors have withdrawn the [appellant's] book.*" This was the object of the respondent's correspondence but as Allen J. noted, the decision to withdraw the book was a matter for the recipients.

45. The appellant in his submissions refers to the finding of the motion judge that the clear object of sending the letter "was to get the [appellant's] book withdrawn from sale to protect the [respondent's] reputation". The appellant goes on to state that "this is exactly the type of improper action that is referenced in both the Cox and McCullough definition of malice and that in Black's Law Dictionary". As a legal proposition, that submission is fundamentally misconceived. The action of writing to publishers to seek to have a book withdrawn to protect reputation is precisely the type of legal action that the 2016 proceedings expressly established was entirely legitimate. On the other hand, the acceptance by the appellant of that finding by the motion judge demonstrates that the central uncontested fact establishes that he has simply no ground of appeal in this case. There is no malice in those circumstances.

46. The fact that the appellant has made the submission set out in the preceding paragraph reveals the driving force behind the appellant's appeal; he simply does not accept that the respondent should be allowed write these letters which have had the effect of "doing him harm". The harm referred to is the effect of stopping publication of his book with all the attendant impact on the appellant, financial or otherwise. Yet, the law permits the respondent to do precisely that in circumstances where it is seeking to protect its reputation from what it perceives is defamatory material.

b) ***The Malice Asserted by the Appellant***

47. The motion judge noted that the statement of claim did not contain particulars of malice. The statement of claim in fact on its face, links the plea of malice to the reference to Irish law in the letter and to the claim that an action for defamation was statute barred. Those grounds do not constitute malice for the reasons set out above.

48. The respondent had expressly brought the motion on a wider basis than a mere pleading point *i.e.* the lack of particulars of the plea of malice. Indeed, the appellant in his replying affidavit expanded on his claim of malice. At paragraph 58 of his affidavit, the appellant stated that "the proof of malice listed below defeats qualified privilege every time." The paragraph then itemised 21 separate issues. These were referred to by the trial judge at paragraph 77 of his judgment (which mistakenly refers to paragraph 59 of the appellant's affidavit, but that mistake is of no consequence). As the judge stated, these are prolix and repetitive. Indeed, it is clear that 21 separate items of malice are not alleged therein. For example, the first three items on the list simply identify the respondent's solicitors, the partner dealing with this issue therein and the fact that he signed the 2017 letter.

49. The motion judge synopsised the allegations of "malice" contained therein. He found that those particulars do not amount to malice in law. For the reasons set out in this judgment, and referred to above, he was entirely correct.

50. I am entirely in agreement with the trial judge's finding and reasons set out in paragraph 80 of his judgment concerning the submission that by sending the letter to a number of email addresses (all in Gardner's) this was somehow malicious as it was sent to persons who had no legitimate interest in receiving it. As the trial judge stated, this plea is not

supported by the facts relied upon. The email addresses to which the letter was sent are to those sections in Gardner's who would have a legitimate interest in communicating with whomever was responsible for sales generally. It was not material that the letter was not sent to named individuals. The facts relied upon by the appellant do not in this case amount to malice as a matter of law.

51. In reality, there has never been any contest in these proceedings or in the 2016 proceedings that the respondent was seeking to suppress the publication to protect themselves from defamation (as they claimed) and to protect their other rights (confidentiality and intellectual property rights). The 2016 judgments established that they (and others in a similar position) were entitled to do that by way of writing the type of warning letter that they did. Therefore, as a matter of law there is nothing asserted by the appellant that amounts to malice in law. On the basis of the case before the High Court, there was nothing on the pleadings (including the affidavit) which amounted to a cause of action and the case was bound to fail.

52. There is one aspect of the appeal that is worthy of specific mention. The appellant refers to paragraph 79 of the High Court judgment and strongly disputes the judge's finding that "*[t]he defendant's case is that the letters were written in good faith in defence of its legal rights and that is uncontested*." If the motion judge was correct that this was not contested then there is no cause of action. That accords with the findings of the relevant courts in the 2016 proceedings, that writing a letter to a potential publisher in *bona fide* (good faith) defence of legal rights is permitted.

53. The appellant mistakenly believes that he has a good claim because the respondent is not entitled to write a letter which he claims has defamed him. He has misunderstood or simply decided not to accept the findings in the 2016 proceedings. He has made assertions of malice but not identified any particulars as to how or why there might be malice as recognisable in law. Similarly, his dispute that the letters were not written in good faith is not based upon any factual contention that he makes. In the statement of claim, his claim that the book is defamatory is based upon assertions of lack of entitlement to send the letter. These are not sufficient in law to demonstrate a lack of good faith.

54. In his submissions, in this Court and the High Court, the appellant referred to claims that in writing the 2017 letter, the solicitors on behalf of the respondent were acting fraudulently and therefore maliciously. These claims, which the appellant apparently links to the claim of malice, are based upon his arguments about Irish defamation law having no relevance and the claim for defamation being statute barred. In his submissions on this appeal, the appellant ties this in with a further quote from Cox and McCullough to the effect that "any evidence that goes to prove that the publisher knew that the statement was false or was reckless as to its truth when publishing it, is evidence of malice, including, possibly, evidence that the statement was patently untrue and that the publisher was sufficiently intelligent and perceptive that it was inconceivable that s/he would not have known this."

55. Again, the appellant is asserting matters which have no relevance to the issues. His claims that the solicitors knew or must have known that the claims they made about Irish law or that the "book is statute barred" have no relevance to the issue before the court. These are not evidence of malice on the part of the respondent in any legal sense and are not relevant to the issue at hand.

56. In short there has been no assertion by the appellant in his statement of claim, in his affidavit, in his notice of appeal or in his submissions, of any indication of malice on the part of the respondent that grounds a cause of action in this case. By way of observation, it goes without saying that there has been no indication of any evidence reaching a threshold of arguability that there is any such malice. The respondent exercised it rights in writing the letter. In the absence of even an assertion of a plea that amounts to malice in a legal sense, this is a case that is bound to fail.

c) ***The Relevance of Qualified Privilege***

57. The issue of qualified privilege was raised at trial and again at appeal. The appellant points to the lack of any finding of qualified privilege by the motion judge and objects to the respondent raising it as a point in the appeal.

58. The respondent appears to make an argument that because of its right to make complaints regarding the agreement in relation to confidentiality, there can be no malice in writing the letter to protect that. It is true that the appellant has not in these proceedings put in issue the agreement or its terms, preferring instead to say these proceedings are about defamation. I do not accept that breach of the confidentiality agreement could be an answer to a claim in defamation (if one was entitled to make one in these circumstances, which is not the position).

59. A claim of breach of agreement is entirely different to alleging that someone has lied in their book *i.e.* to claim that the book contains untruths. In my view, there is no necessity to examine in detail the issue of qualified privilege. I say that for two reasons. The first is that strictly speaking we may not have reached the stage where it is necessary to consider the issue of qualified privilege at all. The writing of the letter did not give rise to a cause of action based upon the finding of the Court of Appeal. Thus, it can be said that there is no occasion of qualified privilege because there is no cause of action. As there is no cause of action, the defence of qualified privilege does not arise for consideration.

60. Secondly and perhaps more importantly, even if it were an occasion of qualified privilege, that defence could only be defeated by a claim of malice. That malice would be the same malice as outlined above. For the reasons outlined above, the appellant has not established any cause of action based upon a claim of malice in a legal sense.

VII. ***Repetitive litigation***

61. The appellant claims that the trial judge erred in finding that there were vexatious proceedings in that he was seeking to revive and relitigate issues which had been finally and conclusively decided against him. He submits that where there was no finding of *res judicata* or a *Henderson v. Henderson* abuse of process, this was an illogical finding. In my view, the appellant is incorrect in this. The writing of a different letter to a different

recipient took this out of those categories. The important issue in terms of vexatious litigation is that the overall legal issues had been finally and conclusively decided against him. In that sense, he was attempting to relitigate manners that had recently been decided against him and as it was going to cause expense and trouble to the same defendant to defend, it was vexatious.

Conclusion

62. For the reasons set out in the judgment, the trial judge was correct in his finding that the appellant's claim disclosed no reasonable cause of action and was frivolous and vexatious. I would dismiss the appeal.

Faherty J:

I have had the opportunity to read the judgment delivered by Donnelly J. and I agree with the conclusions reached therein.

Haughton J:

I have had the opportunity to read the judgment delivered by Donnelly J. and I also agree with the conclusions reached therein.