UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 93
Appeal Number: 2017/571

Edwards J.
Faherty J.
Murray J.

BETWEEN/

SEAN CORRIGAN

PLAINTIFF/
APPELLANT

- AND -

KEVIN P KILRANE AND COMPANY SOLICITORS

DEFENDANT/RESPONDENT

- AND –

JUDGMENT of Ms Justice Faherty dated the 8th day of April 2020

1. This case is an appeal of the Order of the High Court (Eager J.) striking out the appellant's proceedings (hereinafter "the proceedings" or "the defamation proceedings") pursuant to the provisions of O.19, r.28 of the Rules of the Superior Courts (RSC) on the grounds that the statement of claim discloses no reasonable cause of action against the respondent.

Background

2. The background to the within proceedings in fact involves another set of proceedings entitled Eamon Corrigan (plaintiff) and Sean Corrigan and Eoin Corrigan (defendants) and

bearing record number 2006 No. 64 SP. Those proceedings (hereinafter "the construction suit") involve the construction of the Will of Christopher Corrigan deceased who died on 5 March 2000. The late Mr Corrigan was the father of the parties in the construction suit. The first named defendant in those proceedings is the appellant in the within proceedings. The appellant is a practicing barrister. The plaintiff in the construction suit is a legal personal representative of the deceased Christopher Corrigan.

3. Under the Will of the late Mr Corrigan, the appellant was devised 21 acres of land to be held in trust "until there is an acquisition of my lands" in which case the proceeds were to be divided equally among all of the children of the deceased. The second defendant was entitled under the Will to the residuary estate.

4. Difficulties arose in the construction of the bequest to the appellant, in particular what was meant by the "acquisition of the lands". The legal representative brought the construction suit by special summons. Judgment was delivered by the High Court (McGovern J.) on 2 November 2007. McGovern J. determined that the bequest to the appellant lacked clarity and that there was an ambiguity contained therein. He was satisfied to admit extrinsic evidence which was found in the notes taken by the testator's solicitor for the drafting of the Will. Ultimately, he was satisfied that the bequest to the appellant was "void for uncertainty" and that it followed "that on this basis, the entire limitation and bequest fails." Mc Govern J. further concluded that the 21 acres devised to the appellant fell into the residuary estate of the testator.

5. On 6 December 2007, the appellant served a notice of appeal from the judgment and Order of McGovern J. At that time, he was represented by Michael F. Butler & Co Solicitors. Kevin P. Kilrane & Co (the respondent to the within appeal) represented Eoin Corrigan (the second defendant in the construction suit) and Eamon Corrigan (the personal representative) was represented by Groarke & Partners Solicitors.

6. The defamation proceedings, essentially, arise out of the progress of the appellant's appeal of McGovern J.'s judgment. Specifically, they relate to correspondence sent by Emma Brennan, solicitor with the respondent, to the appellant and the Supreme Court Office on 25 November 2015. By this time, the appellant's erstwhile solicitors, Michael F Butler & Co had ceased to act for him, having come off record on 20 April 2012. Thereafter, the appellant represented himself for the purposes of the appeal from the Order of McGovern J. to the Supreme Court.

7. At 11.53 on 25 November 2015, the appellant received an email from emmabrennan@kpk.ie to scorrigan@lawlibrary.ie. The email was copied to the supreme court@courts.ie. It read as follows: -

> "Dear Sean
>
> I refer to your below email of even date.
>
> Just to clarify there is no uncertainty around our client's booklet of pleadings. We were never served with an (sic) booklet of appeal as required in circumstances where this is your appeal and I have advised you, the appellant, of same. I await hearing with your book of appeal by return.
>
> Regards,
>
> Emma Brennan."

8. The defamation proceedings issued on 14 December 2015. The statement of claim was delivered on 18 December 2015**.** Therein, it is pleaded, *inter alia*, that "the words in the Defendant's email in their natural and ordinary meaning or by way of innuendo tend to injure the Plaintiff's reputation in the eyes of reasonable members of society." (at para. 4)

9. The statement of claim asserts that "the accusation 'of failing to deliver a booklet of appeal'" is untrue and that the "public chastisement of the plaintiff" is "unwarranted and

uncalled-for in circumstances where it can only be characterised as humiliating the Plaintiff/Appellant in front of the Supreme Court".

10. At para. 6. it is pleaded that in their natural and ordinary meaning or by way of innuendo, the words as published in the email mean and would be understood to mean that:-

"(1) The Plaintiff had mischievously published in an email of even date 'that there was some uncertainty as to the whereabouts of the [Defendant's] booklet of pleadings' when he knew that the Defendant was not served a booklet of pleadings.

(2) The Plaintiff set out to deceive and/or mislead the Defendant.

(3) The Plaintiff set out to deceive and/or mislead the Supreme Court.

(4) The Plaintiff was dishonest and/or underhanded and should not be believed or trusted.

(5) The Plaintiff was an unfit Appellant in failing to deliver a booklet of pleadings to the Defendant.

(6) The Plaintiff misrepresented the facts and was in default of his duty.

(7) The Plaintiff published a lie.

(8) The Plaintiff was an unfit person within his chosen profession.

(9) The Plaintiff was unprincipled.

(10)The Plaintiff was dishonest."

11. At para. 12 it is pleaded that "the timing of the defamatory email as published by the Defendant, is indicative of malice and indifference as to the truth and cannot be equated to carelessness, impulsiveness or irrationality where a party might have thoroughly investigated the whereabouts of a missing book of pleadings and arrive at a position which they believed to be true".

12. The respondent delivered a defence on 23 June 2016 denying that the email was defamatory and pleading, that "if, which is fully denied, the statements in respect of which the Plaintiff makes complaint are or could be held to be defamatory of the Plaintiff, the Defendant herein pleads that the said statements were published on an occasion of qualified privilege" and that the respondent relied on s.18 of the Defamation Act 2009 ("the 2009 Act"). Further, or in the alternative, the respondent relies on a defence of absolute privilege pursuant to s. 17(2) (g) of the 2009 Act and/or a defence of honest opinion pursuant to s.20 thereof.

13. On 4 July 2016, the respondent issued a motion seeking the following reliefs: -

1. An order pursuant to the provisions of O.19, r.28 RSC dismissing the appellant's proceedings on the grounds that the statement of claim discloses no reasonable cause of action against the respondent.
2. An Order pursuant to s.34(2) of the 2009 Act dismissing the proceedings on the grounds that the statement in respect of which the action was brought on 25 November 2015 is not reasonably capable of being found to have a defamatory meaning.
3. In the alternative, an Order pursuant to the inherent jurisdiction of the High Court dismissing the proceedings on the grounds that the proceedings are bound to fail.
4. In the further alternative, an Order pursuant to s.14 of the 2009 Act ruling whether the statement in respect of which the action is brought is reasonably capable of bearing the imputations pleaded by the appellant and, in the event that the court rules that the statement is reasonably capable of bearing those imputations, as to whether those imputations are reasonably capable of bearing a defamatory meaning.

14. The motion is grounded on the affidavit of Emma Brennan, solicitor with the respondent (and the author of the impugned email), sworn 30 June 2016.

15. She avers that after serving the notice of appeal in the construction suit proceedings in December 2007 the appellant did not progress the appeal. She states that on 12 March 2008, Groarke & Partners, solicitors for Eamon Corrigan, wrote to the appellant's then solicitors, Michael F Butler & Co, asking whether books of appeal had been lodged. A motion to dismiss the appeal was threatened unless books of appeal were lodged. Michael F Butler & Co responded on 14 March 2008 stating that there was a delay of 27 months in hearing Supreme Court appeals so that there was no prejudice in the delay in supplying the books of appeal. On 3 April 2008, they wrote to Groarke & Partners saying that they had received written instructions from the appellant to prepare books of appeal and that they would revert in the coming days. Groarke & Partners wrote on 23 April 2008 making complaint that unless the books of appeal were served on 30 April 2008, an application would be made to strike out the appeal.

16. In respect of the appellant's assertion, in the within proceedings, that a letter was sent to the respondent by Michael F Butler & Co on 3 May 2008, Ms. Brennan avers that the respondent never received that letter. She asserts that the letter of 3 May 2008 could not have been sent to the respondent because Michael F Butler & Co. did not have a full set of pleadings, as evidenced by a letter written by that firm to Groarke & Partners on 9 May 2008 stating: -

> "I have partly prepared the books of appeal for lodging in the Supreme Court Office. Unfortunately, my own papers are incomplete in that I have to furnish some of same to George Brady for the hearing. Could I trouble you to make a complete set of the pleadings available to me I will copy and return to you without delay.

My client is extremely anxious to ensure that the papers are lodged and thereby obviate the need for any motion !!"

17. Groarke & Partners replied on 12 May 2008 enclosing the book of pleadings as requested.

18. On 14 May 2008, Michael F Butler & Co wrote to Groarke & Partners in the following terms:

"We are now lodging the books of appeal and enclose herewith a copy of the index to these books and you will note that additions [sic] thereto. We will, of course however furnish a fully paginated book to you in due course. We thank you for courteousy [sic] afforded us."

19. At the same time as sending an index of books of appeal to Groarke & Partners, Michael F Butler & Co. sent a letter of 14 May 2008 to the respondent stating that they enclosed "copy index of documentary books of appeal now been lodged" and stating that they would furnish the respondent "with a full paginated booklet in due course".

20. Ms. Brennan avers that it is clear from the aforesaid correspondence that Michael F Butler & Co probably copied the pleadings received from Groarke & Partners, prepared indexes to books of appeal and then sent those indexes to Groarke & Partners and to the respondent under cover of letters of 14 May 2008. She avers that while "the intention seems to have been to follow up with books of appeal" no further correspondence was received from Michael F Butler & Co and that at some stage after 14 May 2008, Michael F Butler ceased acting for the appellant who then commenced acting for himself.

21. It appears that on 2 May 2012, a motion on behalf of Eamon Corrigan was brought in the construction suit proceedings seeking to strike out the claim for want of prosecution on the grounds of inordinate and inexcusable delay in prosecuting the appeal. On 20 April

2012, the Supreme Court directed that unless a certificate of readiness was filed within two weeks from 20 April 2012, the appeal would be struck out.

22. It is common case that the appeal to the Supreme Court was listed for hearing on 9 December 2015 but had to be put back to 26 January 2016, as explained in an email sent by Ms. Trish Cuddihy of the Supreme Court Office on 25 November 2015 to the appellant, Groarke & Partners and the respondent. The email stated: -

> "Dear all,
>
> I write to confirm recent telephone call you/your office in the above referenced matter- it is with regret that this matter will not now proceed for hearing on 9th of December next. The appeal will instead be heard on the alternate date of Tuesday, 26th of January.
>
> The matter will also be listed for call over in the [Chief Justice's] case management list on Thursday 14th of January – list commences at 10.00am.
>
> Please note that this matter will not now be listed in the [Chief Justice's] list tomorrow 26th November. You might please revert if there is a difficulty with listing this matter for hearing on 26th January next."

23. On the same day, the appellant replied by email to Ms. Cuddihy, copied to Groarke & Partners and the respondent, in the following terms: -

> "Dear Trish
>
> Further to our conversation this morning, I will appear at the Supreme Court call over list on the 14th of January 2016 after I have contacted Theresa Pilkington SC and James Dwyer SC regarding how long their oral submissions and replies on behalf of the Respondents may take.
>
> I would imagine that this appeal will take two days and most likely three because the legal arguments are considerably detailed with numerous authorities. I still

await both Respondents Booklets of Authorities, there is also some uncertainty as to the whereabouts of the Second Named Respondent's Booklet of Pleadings, they can advise your office in this regard."

24. On receipt of this email, at 11.53 Ms Brennan replied by email to the appellant, copied to Ms. Cuddihy, in the terms already outlined earlier in the judgment (the impugned email).

25. In her affidavit, Ms. Brennan avers that she sent the email because she was concerned that the respondent had not yet received books of appeal from the appellant.

26. Ms. Brennan's email was replied to by the appellant at 13.47 on 25 November 2015 wherein it was advised that the matters raised by Ms Brennan and other issues were addressed in a letter being sent to her office that day via Document Exchange. She was asked to pay "particular attention to what Michael Butler had to say…"

27. In fact, on 25 November 2015 the appellant wrote twice to Ms. Brennan. One letter referred to her email of the same date which the appellant noted she had "carbon copied" to the staff at the Supreme Court Office. Ms. Brennan was asked to confirm that she had received the appellant's booklet of pleadings on 3 May 2008. She was also asked to confirm that she would retract her email of 25 November 2015 with the Supreme Court Office when the appellant had "approved the wording of [her] retraction".

28. The appellant's second letter to Ms. Brennan (also sent to the Supreme Court Office) was accompanied by a letter dated 24 November 2015 from Michael F Butler & Co which had been sent to the appellant in response to queries he had raised with that firm on 20 November 2015. The queries emanated from correspondence the appellant had received from the respondent on 19 November 2015 which advised as follows: -

"We note do not appear to have ever [received] a Booklet of Appeal from you… we confirm we did indeed receive an Index however you might kindly let us hear by return with Booklet".

29. On 20 November 2015, the appellant responded to that communication in the following terms: -

"…

My sincerest apology, I was not aware that Michael Butler & Co Solicitors… did not send you a Booklet of Appeal. They lodged my appeal and when I received your [client's] Legal Submission, I was under the impression that you had a copy; especially as your Counsel did not raise any issues during the [Plaintiff's] Motion to have my appeal struck out.

In any event, I sincerely apologise and will forward a copy of this letter to Michael Butler & Co and ask them to send on a Book of Appeal to you, as they still hold my complete file and they prepared the Index which you refer to.

Can you please confirm that you received the [Appellant's] Book of Authorities which was sent to your offices in Mohill by DX earlier this week."

30. Michael F Butler & Co's letter of 24 November 2015 (as furnished to the respondent by the appellant) reads as follows: -

"…I must confess that I am more than surprised with the statement of Kevin P. Kilrane & Co., and attach a copy of my letter to them of 3.5.08 which clearly furnished a copy of the Booklet of Appeal with confirmation that same had been lodged.

A copy of the Booklet was also served on Groarke & Partners on the same date with a further copy directed to you at that time.

> I am no longer the Solicitor on record for you in this Appeal and it would, therefore be wholly inappropriate for me to enter into any form of correspondence with Kilrane & Co. I will leave it therefore to you to address the issue directly with Kilrane & Co."

31. The copy of the 3 May 2008 letter to which Michael F Butler & Co referred in their letter of 24 November 2015 is addressed to the respondent with reference to the construction suit appeal. It states-

> "We refer to the above matter and enclose herewith the copy Booklet of Appeal with confirmation that the Booklets have now been lodged in the Supreme Court Office. You might kindly acknowledge receipt."

32. Having sent the above correspondence to Ms. Brennan on 25 November 2015, the appellant wrote to her again on 27 November 2015 wherein he observed that there had been no response to his correspondence of 25 November 2015. He stated as follows:

> "For obvious reason, including your profession, your email continues to cause me a considerable amount of embarrassment."

33. Ms. Brennan was asked to confirm that she had received the booklet of pleadings of 3 May 2008 and again asked to confirm that she would immediately retract her 25 November 2015 email with the Supreme Court office, after the appellant had settled the wording of same. The correspondence exhibited by Ms. Brennan includes a letter dated 1 December 2015 to the appellant stating, *inter alia,* that the email of 25 November 2015 was forwarded to the Supreme Court Office in circumstances where the appellant had advised that Office that there was uncertainty around the booklet of appeal which was to be furnished to the respondent, and advising the appellant that "[t]here would never be a situation where we would liaise with the Supreme Court about the [Appellant's] Book of Appeal it would serve no purpose." In his replying affidavit sworn 1 September 2016, the

appellant denies receiving this letter, stating that he first saw it in July 2016 as part of Ms. Brennan's exhibited correspondence.

34. In a letter of 3 December 2015, the appellant noted that his correspondence of 25 November 2015 and 27 November 2015 had not been acknowledged or responded to and he reiterated his request that the respondent retract the 25 November email in default of which defamation proceedings would issue. As already outlined, the proceedings issued on 14 December 2015.

35. At para. 16 of her grounding affidavit Ms. Brennan avers that on 13 April 2016 she wrote to the appellant explaining that the contents of the letter from Michael F. Butler & Co to the respondent on 14 May 2009 indicated that Books of Appeal could not have been sent to the respondent on 3 May 2008. The appellant was asked to discontinue his defamation proceedings in default of which application would be made to dismiss them for failure to disclose a reasonable cause of action.

36. Ms. Brennan goes on to aver that the complaints made in the statement of claim are wholly misconceived and that the appellant has not been defamed. She states that even if the court were to accept that Books of Appeal had been served on the respondent in 2008 (which she says could not be the case for the reasons already stated) this would not give rise to a cause of action. She asserts that her email of 25 November 2015 was published to Ms. Cuddihy of the Supreme Court office on an occasion of qualified privilege and that the statement in the email was made to Ms. Cuddihy as a person who had a duty to receive, or interest in receiving the information contained in the email. She states that the respondent at all material times believed on reasonable grounds that the recipient of the email in respect of which the complaint is made had such duty or interest and that the respondent had a corresponding duty to communicate, or interest in communicating, information to

that person. It is in those premises that the respondent has pleaded the defence of qualified privilege pursuant to s.18 of the 2009 Act.

37. Ms. Brennan avers that the email is not really capable of bearing the imputations attributed to it by the appellant. She further states, at para. 24:

> "The Plaintiff may genuinely believe that Mr Butler served the books of appeal, and my email did not suggest that he was dishonest in asserting that belief. It is a regrettable fact that legal practitioners, and litigants, commonly dispute as to who sent what document to whom. There are often genuine mistakes, miscommunications or misunderstandings. Some letters may not be sent, some letters may not be received and some letters may be misfiled. A dispute as to whether papers were sent or received seven years previously does not reasonably carry the imputation that one or other of the parties is a liar, is dishonest or unprofessional. It just means that there is disagreement. I say and believe and am advised even if the words of my email were capable of bearing an imputation of dishonesty, that implication is not reasonably capable bearing a defamatory meaning because it was born of honest opinion and is protected by qualified privilege. The imputations as pleaded are unreasonable and hyperbolic."

38. In his replying affidavit, the appellant takes issue with the contention that the statement of claim discloses no cause of action. He asserts that "each passage of the impugned email conveys the impression that he is not trustworthy". He avers as follows:

> "5. …The overall tone and choice of words used by the author invites the reader to adopt a suspicious view of me. The email begins by contradicting my account of events and then wrongly accuses me of failing to deliver a booklet of pleadings. The author ends by admonishing me and tops it all off with a condescending statement; that they had advised me. (Which is also untrue)

6. I say that the Defendant's words were a bolt from the blue because there had been no dispute between us. None of the three passages in the impugned email are entirely true. I further say that this publication is not capable of easy explanation and given the facts could not be considered an honest opinion. I will further demonstrate to a jury that the Defendant was indifferent as to the truth and invite them to conclude that the Defendant's dominant motive was to injure my reputation."

39. At para. 9 he avers: -

"…when I read the impugned email I was upset because I realise that it tends to lower me in the eyes of its recipients. It could not be described as a fair and accurate account of the state of affairs and I say that the Defendant had no proper cause, duty or legitimate reason to send it to the Supreme Court Office. I further say and believe the Defendant either knew that their statements were not true or were reckless as to whether they were true or not. At paragraph 20 of Ms. Brennan's affidavit she pleads 'honest belief and substantial truth', 'substantial truth' is a term that I am not familiar with and I don't believe it could be allied to the defence of truth or honest opinion. I say that given the evidence which was available to the Defendant, prior to publication, the Defendant cannot now claim that they believed that all of their statements were true in all material respect."

40. The appellant asserts that the impugned email went a lot further than "truculence or bad manners" and that it is "especially dreadful because its falsehoods were concocted by a legal practitioner".

41. Insofar as Ms. Brennan relies on genuine mistake, miscommunication, misunderstanding and a purported letter from his previous solicitors as justification for the respondent's behaviour, at para. 12, the appellant emphasises that his cause of action only concerns the defamatory words published on 25 November 2015. He goes on to state:

> "Nevertheless, it now appears that since 2008 the Defendant neglected or failed to follow-up on a misplaced booklet of pleadings with my previous solicitor. I was totally unaware of this until the Defendant notified me on the 19th of November 2015. I say that when I was put on actual notice, I immediately wrote to my previous solicitors, they replied on 24th November 2015 and categorically stated they had furnished a booklet of pleadings to the Defendant on 3rd May 2008."

42. The appellant goes on to outline his assessment of the impugned email. He asserts that three specific passages are defamatory. In respect of the first passage, to wit, "[j]ust to clarify there is no uncertainly around our client's booklet of pleadings", it is asserted that that is "a belligerent comment and could not be regarded as a 'duty statement' which was appropriate to send to the Supreme Court Office, or that this office had a genuine interest in receiving it". He asserts that the statement "cannot be absolved under the umbrella defence of qualified privilege and/or absolute privilege". He describes it as "a confrontational denial" of what he himself had just published earlier at 11.40a.m. to the Supreme Court Office and that it clearly implies that he was misleading the Supreme Court Office. He asserts that it implies that he is not trustworthy and that the timing of the passage "along with any reasonable inferences which may be drawn from the words used, whether, in their natural and ordinary meaning or by way of innuendo, imply that [he] had just told the Supreme Court office a bare faced lie." He further avers:

> "This statement is not true in all material respects and could not be considered a fair and accurate account of the state of affairs. There was uncertainty as to the whereabouts of a booklet of pleadings and this failure was completely outside of my control. On the 20th of April 2012 my previous solicitor came off record. In May 2012, I furnished the Defendant with a copy of my Certificate of Readiness. Up to and until the 19th of November 2015 the Defendant neglected to inform me that my

previous solicitor, allegedly, failed to deliver a booklet of pleadings to them, which the Defendant now further alleges, they were promised on the 14th of May 2008, seven years earlier."

43. In respect of the second passage in the email, to wit "[we] were never served with [a] booklet of appeal as required in circumstances where this is your appeal and I have advised you, the Appellant of same", the appellant contends that, in their natural and ordinary meaning or by way of innuendo, the words imply that he was not a trustworthy person. He avers as follows:

"…These words also discredit and humiliate me in the eyes of legal professionals within the Supreme Court Office. This statement is exaggerated and not true in all material respects and it could not be regarded as a fair and accurate account of the state of affairs. Prior to its publication I had no dispute with the Defendant and they did not at any time advise me that '…this is your appeal and I have advised you, the Appellant, of same.' The grossness and falsity of this cavalier reprimand, coupled with the underhanded and calculated way in which it was despatched is indicative of malice. The Defendant knowingly deprived me of any opportunity to reply in private. I say that a public chastisement such as this by a Firm of Solicitor [sic] which contains an exaggerated, malicious falsehood, cannot be absolved under the umbrella defence of absolute privileged [sic] and/or qualified privilege."

44. The appellant contends that the statement "I await hearing with your book of appeal by return" is disingenuous because it clearly implies that he was dallying or ignoring the respondent's request. He so asserts in circumstances where the respondent had been made aware some five days earlier (by his letter of 20 November 2015) that he was doing everything possible to resolve the issue.

45. At para. 15 he avers:

"I believe it is important to emphasise that the words chosen in the impugned email were calculated to harm me and entirely disproportionate to legitimate interest, they could not by any stretch of the imagination be upheld under the defence of absolute and/or qualified privilege. There were no serious concerns that the Defendant needed the Supreme Court Office to address, in fact the Defendant was aware or should have been aware that the Supreme Court Office could not interfere in the situation, other than perhaps convey the Defendant's allegations to the Chief Justice. In aggravation of damages the matter for a jury to eventually consider will be: 'did the Defendant, for some obscure reason, seize upon the opportunity to maliciously libel me in a deliberate or negligent fashion while shutting their mind off to the truth'."

46. At para. 18, in requesting that the respondent's motion be denied, the appellant entreats the trial judge to be mindful of:

(a) the status of the parties and recipients;

(b) the tone and choice of language used in the publication;

(c) the author's failure to outline the facts as they knew them;

(d) the defendant's refusal to deliver a reply to particulars which would advance his case;

(e) the nature and gravity of the allegations with regards to his livelihood;

(f) the vexatious reprimand in the publication which goes to show the author's state of mind;

(g) the calculative effect of the publication that the allegations might be brought to the attention of the Chief Justice; and

(h) the extent of circulation, and the importance of his professional reputation.

47. On 3 May 2017, Ms. Brennan swore a further affidavit exhibiting correspondence dated 12 May 2008 from Groarke & Partners to Michael F Butler & Co and correspondence from that firm to the respondent dated 14 May 2008 which had been referred to in her earlier affidavit but which through inadvertence had not been exhibited.

The applicable law

48. Before referring to the trial judge's determination of the application to dismiss the proceedings, it is apposite to refer to the relevant rule of court and statutory provisions in issue in this appeal.

49. Order 19, r. 28 RSC provides:

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

50. Section 6(2) of the 2009 Act provides:

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

51. Section 14 provides:

> 14.-(1) The court, in a defamation action, may give a ruling—
>
> (a) as to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff, and
>
> (b) (where the court rules that that statement is reasonably capable of bearing that imputation) as to whether that imputation is reasonably capable of bearing a defamatory meaning,

upon an application being made to it in that behalf.

(2) Where a court rules under subsection (1) that—

(a) the statement in respect of which the action was brought is not reasonably capable of bearing the imputation pleaded by the plaintiff, or

(b) that any imputation so pleaded is not reasonably capable of bearing a defamatory meaning,

it shall dismiss the action in so far only as it relates to the imputation concerned.

(3) An application under this section shall be brought by notice of motion and shall be determined, in the case of a defamation action brought in the High Court, in the absence of the jury.

(4) An application under this section may be brought at any time after the bringing of the defamation action concerned including during the course of the trial of the action.

52. Section 18(2) provides:

"Without prejudice to the generality of subsection (1), it shall, subject to section 19, be a defence to a defamation action for the defendant to prove that—

(a) the statement was published to a person or persons who—

(i) had a duty to receive, or interest in receiving, the information contained in the statement, or

(ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and

(b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons.

53. Section 34 of the 2009 Act, in relevant part, provides:

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

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

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

The trial judge's ruling

54. In the context of the reliefs being sought by the respondent, the trial judge ruled as follows:

"61. The plaintiff's central allegation is that the email sent by the [defendants] carbon copied to the Supreme Court Office on the 25th November, 2015 is defamatory.

62. The court is satisfied that there is nothing in the email of Emma Brennan sent at 11:53 on the 25th of November, that is any way defamatory of the plaintiff. At its highest, the email could be described as terse. Correspondence between parties after a lengthy appeals process can understandably at times be terse.

63. The court is satisfied that the plaintiff may genuinely have believed what Mr. Butler had informed him about the books of appeal, but Ms. Brennan's email did not suggest that he was dishonest in asserting that belief.

64. Legal practitioners and litigants commonly dispute who sent what document to whom in the context of litigation, particularly after waiting for three or more years for an appeal to be heard.

65. In this case, the appeal had been initiated as far back as 2nd of November, 2007 to the appeal hearing in January 2016, a period of nine years. In this Court's view the

email does not carry any imputation that one or other of the parties is a liar, is dishonest or unprofessional, it just implies there is a disagreement between the parties as to who is in possession of what documents. In her affidavit, Ms. Brennan suggests that the imputations as pleaded are unreasonable and hyperbolic and the court agrees with this characterisation of the claims in this case."

55. For the purposes of s.18 (2) of the 2009 Act, the trial judge concluded that it was "clear that Ms. Cuddihy of the Supreme Court Office had a duty to receive the information contained in the email, in circumstances where she had initiated the email correspondence. It is clear that Ms. Brennan must have believed that she had a corresponding duty to communicate the information to such person or persons." (at para. 67)

56. He went on to state: -

"68. Section 19(1) of the Defamation Act 2009 provides: -

'In a defamation action, the defence of qualified privilege shall fail if, in relation to the publication of the statement in respect of which the action was brought, the plaintiff proves that the defendant acted with malice.'

69. The court is satisfied that the onus is on the plaintiff to prove that the defendant acted with malice, and the court is satisfied that the plaintiff must fail in this action.

Summary

(1) The decision of the court is that the words contained in the email and the email from Ms. Brennan to the plaintiff and carbon copied to the Supreme Court office did not contain any information which was false and that what was stated in the email was true.

(2) The court is satisfied that defence of qualified privilege is established by the defendant in relation to the statement which is claimed to be defamatory.

Decision

70. The court will dismiss the proceedings on the grounds that the statement of claim discloses no reasonable cause of action against the defendant. The court also will dismiss the proceedings on the grounds that pursuant to s. 34(2) of the Defamation Act 2009 that the statement in respect of which the action was brought in the email of the 25th of November, 2015 is not reasonably capable of being found to have a defamatory meaning.

71 The court also finds that pursuant to s. 18(2) of the Defamation Act 2009 the court finds that the statement was published to a person (namely Trish Cuddihy of the Supreme Court office) who had a duty to receive or interest in receiving the information contained in the statement and that the defendant had a corresponding duty to communicate or interest in communicating the information to such person or persons."

The grounds of appeal

57. In summary, the appellant appeals against the High Court Order on the basis that the trial judge erred:

(1) in his interpretation of the 2009 Act, in particular ss. 2, 18(2), 19 and 34(2) thereof.

(2) in his application of the common law principle that the jurisdiction to strike out proceedings should only be made in clear cases where there is no dispute as to relevant facts.

(3) in his application of the common law principle where there is a conflict of fact it should be resolved in favour of the party against whom the application to strike out has been brought.

(4) in his application of the common law principle that the court must accept fully all averments and assertions deposed to on the plaintiff's behalf, even where these are traversed in opposing pleadings or are contested on affidavit.

(5) in his application of the common law principle that it is for the defendant who pleads justification to prove the truth of all their statements in both substance and in fact, rather than mere opinion, and not for the plaintiff to show that the defamation was false.

(6) in stating that the defendant's email "… did not contain any information which was false and that what was stated in the email was true".

(7) when evaluating the entire email which contained untruths and innuendoes.

(8) in only accepting the defendant's evidence in circumstances;

(i) where the plaintiff had indicated to the court that despite numerous requests the defendant had refused to deliver a reply to particulars.

(ii) where the defendant was not required to prove the truth of each passage of the impugned email.

(iii) where the plaintiff has/had pleaded that each statement in the defendant's email were untrue.

(iv) where the plaintiff was not afforded an opportunity to cross examine the defendant on their evidence.

(9) in allowing the defence of qualified privilege which he ascribed to the occasion in circumstances where;

(i) the plaintiff was not afforded an opportunity to address this defence.

(ii) the plaintiff was not afforded an opportunity to show that all of the passages in the email were not true and could not have been genuinely held or supported with evidence.

(iii) the plaintiff was not afforded an opportunity to show that some passages were volunteered and therefore unlikely to attract privilege.

(iv) the plaintiff was not afforded an opportunity to show that the defendant relinquished privilege (if it existed) in circumstances where the closing passage was a malicious contrived reprimand with an untrue inference to having previously reprimanded the plaintiff.

(10) in his application of the common law in that liability for libel did not depend on the intention of the defamer but on the fact of defamation.

(11) in failing to uphold the plaintiff's right pursuant to Art.6 of the European Convention of Human Rights Act 2003.

(12) in failing to uphold the plaintiff's right to his good name pursuant to Art. 40.3.2 of the Constitution.

Discussion

58. It is clear that the trial judge's conclusions were informed by the fact that he determined that as of 9 May 2008 "whatever had been purported to have been served on behalf of the appellant by Michael Butler was not a book of appeal" (at para. 43). The trial judge's finding in this regard was influenced by the letter written by Michael F. Butler & Co to the respondent on 14 May 2008 enclosing a "copy index" and advising that the respondent would be furnished "with a fully paginated booklet in due course". He observed that "there is no correspondence which the court has seen enclosing a copy of the book of appeal to [the respondent] in relation to the Supreme Court appeal" (at para. 44).

The issues to be decided

59. I take the view that the issues which fall for consideration in this appeal are:

(1) whether the trial judge failed to adhere to the principle that in an application to strike out proceedings on the basis that they disclose no reasonable cause of action, where a conflict of evidence exists that conflict required to be resolved in favour of the appellant for the purposes of the application.

(2) whether the trial judge erred in finding that the statements in the email of 25 November 2015 were not reasonably capable of being found to have a defamatory meaning.

(3) whether the trial judge erred in determining that the statements in the impugned email of 25 November 2015 were made on an occasion of qualified privilege.

(i) The alleged failure of the trial judge to resolve conflicts of fact in favour of the appellant

60. At para. 60 of his judgment, the trial judge had regard to *McAuley v Aer Lingus Ltd*. [2011] IEHC 89, [2014] 3 IR 38, noting that Hedigan J. opined that *"for the purposes of considering whether to accede to an application based on rule 28 the court must proceed on the basis that the statements of fact contained in the pleadings sought to be struck out are true and can be proved by the party"*.

61. It is instructive to set out the full text of Hedigan J.'s consideration of the issue:

> *" 6.1 In this case the defendants are seeking an Order striking out the plaintiff's claim as being bound to fail, disclosing no reasonable cause of action, and/or being frivolous or vexatious. The courts have a power, pursuant to both Order 19, rule 28 of the Rules of the Superior Courts and their inherent jurisdiction to strike out proceedings where they can be shown to be unsustainable, frivolous or vexatious. For the purposes of considering whether to accede to an application based on rule 28 the court must proceed on the basis that the statements of fact*

contained in the pleadings sought to be struck out are true and can be proved by the party. A statement of claim can be struck out where the matters pleaded do not constitute a cause of action that is known to the law or is likely to be established. If the ingredients of a good cause of action are pleaded, the application pursuant to rule 28 will not succeed. An order to strike out proceedings will only be made in very clear cases where there is no dispute as to the relevant facts. In Barry v. Buckley [1981] 3 IR 206 at 208 Costello J. emphasised that the jurisdiction to strike out proceedings is one to be 'exercised sparingly and only in clear cases.' It is also well established that in so far as there is a conflict of fact, this must be resolved in favour of the party against whom the application to strike out has been brought. This was interpreted by O'Sullivan J. in O'Keefe v. Kilcullen, High Court, 24th June, 1998, to mean that the court must accept fully all averments and assertions deposed to on the plaintiff's behalf even where these are traversed in opposing pleadings or are contested on affidavit. It is clear therefore that that the facts as set out by the plaintiff have to be accepted."

62. Notwithstanding the trial judge having been alert to the above principle, the appellant contends that the conflict of facts before the High Court was not resolved in his favour for the purposes of the strike out application, as it ought to have been. He asserts that there was clearly such a dispute, as the statement of claim had pleaded that a booklet of pleadings was delivered to the respondent by Michael F Butler & Co in May 2008. Moreover, this had been deposed to by the appellant in his replying affidavit wherein he averred that delivery of the booklet of appeal to the respondent had been confirmed to him by Michael F Butler & Co on 24 November 2015. It is further asserted that the trial judge placed no weight on a letter from the Supreme Court dated 25 November 2011 which

acknowledged that a booklet of appeal had been filed in the Supreme Court Office on 24 June 2008.

63. In the course of the appeal hearing, the appellant proffered to the court a letter dated 5 June 2008 from Groarke & Partners to Michael F. Butler & Co which, he submitted, demonstrated that books of appeal had been sent to Groarke & Partners in June 2008 albeit under cover of a letter dated 3 May 2008. The letter from Michael F. Butler & Co also advised that books of appeal for delivery to the Supreme Court had been lodged with their Town Agent on 26 May 2008. The appellant contends that the existence of that correspondence should have been exhibited by Ms Brennan in her grounding affidavit in like manner as she had exhibited other correspondence from Groarke & Partners. It is submitted that Groarke & Partner's letter of 5 June 2008, coupled with the confirmation by the Supreme Court Office on 25 November 2011 that a booklet of appeal had been filed on 24 June 2008, show the extent of the dispute between the parties. The appellant further contends that the trial judge relied heavily on Ms. Brennan's affidavits and treated historic third-party correspondence in dispute as fact, all of which was in circumstances where the respondent had failed to reply to particulars arising from the defence.

64. Counsel for the respondent submits that the trial judge was correct to make the findings he did notwithstanding the correspondence of 3 May 2008 and 24 November 2015 from Michael F Butler & Co. Counsel pointed to the letter written by Michael F Butler & Co on 14 May 2008 declaring that they did not possess a full set of pleadings (having given their set to counsel instructed by them) and wherein they requested that Groarke & Partners furnish them with a copy of the pleadings. It is submitted that this establishes beyond doubt that the appellant's reliance on the 3 May 2008 letter from Michael F Butler & Co was mistaken. Counsel contends that all of this is in circumstances where the sworn

affidavit evidence of Ms. Brennan before the trial judge was that the respondents did not receive a booklet of appeal in 2008 or thereafter.

65. Again, it is instructive to recall how the courts should approach factual conflicts in applications like the present. As stated by Clarke J. in *Salthill Properties Ltd. v. Royal Bank of Scotland plc* [2009] IEHC 207:

> *"…in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim."*

66. In *Keohane v. Hynes* [2014] IESC 66, Clarke J. referred to what he had stated in *Salthill Properties* and went on to cite an earlier case of *Jodifern v. Fitzgerald* [2000] 3 IR 321 where, at p.323, Barron J. observed: -

> *"In my view, a defendant cannot succeed in an application to strike out proceedings on the basis that they disclose no reasonable cause of action or are an abuse of the process if the court on the hearing of such application has to determine an issue for the purpose of deciding whether the plaintiff could possibly succeed in the action. It is not the function of the court to determine whether the plaintiff will succeed in the action. The function of the court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself."*

67. Both sides in this appeal accept there was a conflict in the affidavit evidence before the trial judge. That being the case, to my mind, for the purposes of the application before him, which was to strike out the appellant's proceedings, the trial judge was obliged to take the appellant's case at its height rather than embarking on any analysis of the factual dispute. In light of the established jurisprudence, I find that the trial judge erred insofar as he determined that *"the only documents that were furnished [to the respondent] by letter of the 3rd May, 2008 were an index".* In all the circumstances, he should have refrained from resolving any conflict of fact and begun his analysis by accepting the factual matrix as deposed to by the appellant on affidavit. For reasons, however, which will become obvious, my conclusion in this regard is not entirely dispositive of whether the appellant should succeed in this appeal.

(ii) Whether the trial judge erred in finding that the statement of claim disclosed no reasonable cause of action and that the statements in the email of 25 November 2015 were not reasonably capable of being found to have a defamatory meaning.

68. In aid of his submission that the trial judge erred in finding that the statement of claim disclosed no reasonable cause of action and that statements in the impugned email were not reasonably capable of being found to have a defamatory meaning, the appellant asserts that for the purposes of a motion to strike out proceedings, the appropriate test is whether a plaintiff has demonstrated a suitable cause of action which is not frivolous or vexatious. He relies on his replying affidavit wherein he avers that the impugned email is defamatory and offensive because it contained volunteered statements that concerned him which were totally untrue and that they tended to injure his reputation in the eyes of reasonable members of society. He submits that, in effect, the respondent was permitted to run a full defence without having to prove the truth of each of the three statements set out

in the 25 November 2015 email or be cross-examined on them in open court. The appellant cites *Quigley v. Creation Ltd.* [1971] I.R. 269, where at p.272, Walsh J. stated:

> *"Basically, the question of libel or no libel is a matter of opinion and opinions may vary reasonably within very wide limits. When a jury has found that there has been a libel, this Court would be more slow to set aside such a verdict than in other types of actions and it would only do so if it was of opinion that the conclusion reached by the jury was one to which reasonable men could not or ought not have come. It is true that if words only tend to lower a person in the minds of a particular class or section of society, particularly if the standard of that particular section of society is one which the Court cannot recognise or approve, the words will not be held to be defamatory. On the other hand, words are defamatory if they impute conduct which would tend to lower that person in the eyes of a considerable and respectable class of the community, though not in the eyes of the community as a whole. The test is whether it will lower him in the eyes of the average right-thinking man. If it will, then it is defamatory if untrue. It follows naturally that in an action in this country the standard would be that of the average right-thinking person in this community. The law recognises the right of the plaintiff to have the estimation in which he stands in the opinion of the right-minded people in this community unaffected by false statements to his discredit.*
>
> *In defamation, as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of a defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied that it would be wholly unreasonable to attribute a libellous meaning to the words complained of. In determining this matter, the judge will construe the words in accordance with a fair*

and natural meaning such as would be given to them by reasonable persons of ordinary intelligence in our own community; and that necessarily involves a consideration of the standards of the community and the position of the plaintiff in that community."

69. The appellant submits that the trial judge could not have been satisfied that it was wholly unreasonable to let the matter go to the jury. He contends that it was wholly unreasonable for the trial judge to strike out the proceedings. In this regard, he relies on the dictum of Hogan J. in *Lennon v. HSE* [2015] IECA 92: -

"... the High Court has no jurisdiction to dilute the plaintiff's rights to jury trial in respect of [a] defamation action."

70. Counsel for the respondent submits that even if this court is not satisfied that the trial judge exercised his jurisdiction under O. 19, r. 28 RSC in accordance with law, he was nevertheless correct in dismissing the appellant's action pursuant to s.34 (2) of the 2009 Act.

71. It is submitted that the question of whether the respondent had received the booklet of appeal is not relevant to the court's consideration under s.34(2) of the 2009 Act and that, accordingly, the court can confine itself to the plain meaning of the words in the 25 November 2015 email, notwithstanding any conflict between the parties.

72. Counsel further asserts that it is implicit in s. 34(3) of the 2009 Act that extrinsic evidence is admissible in an application under s.34(2) in as much as it is provided that the application to dismiss is grounded on affidavit. It is thus submitted that in considering whether the impugned statement is not capable of being found to have a defamatory meaning the court is not confined to a consideration of the pleadings only. It is argued that the trial judge was correct in considering the words in the impugned email within their context which, in this case, was the chain of correspondence to which the trial judge

referred. While the appellant may not have been aware of the chain of correspondence dating back to 2008 when he was represented a Michael F Butler & Co, and although the correspondence may have spanned an unusually long interval, the only logical conclusion that could be drawn by the trial judge was that the words used by Ms. Brennan in the email of 25 November 2015 were true and that they could not conceivably bear a defamatory meaning. It is also contended that even if the statements in the email of 25 November 2015 are false, they are not capable of bearing the meaning or innuendo which the appellant ascribes to them at para. 6 of his statement of claim.

73. The trial judge dealt with the application to strike out the proceedings both on the ground that the statement of claim discloses no reasonable cause of action and that the statements in the impugned email were not reasonably capable of being found to have a defamatory meaning. Insofar as present application was determined by the trial judge pursuant to O. 19, r. 28 RSC, I would adopt the approach of Kearns P. in *McAuley v. Power & Anor* [2012] IEHC 174 that such an application in defamation proceedings is *"best understood as one of a* sui generis *character peculiar to the law of defamation"*. In any event, the respondent also sought to strike out the proceedings pursuant to ss. 14 and 34(2) of the 2009 Act. It seems to me that the most appropriate way of dealing with the issue that arises is by deciding whether the trial judge correctly determined that the respondent had met the threshold set out in s.34(2) of the 2009 Act.

74. In Cox & McCullough "Defamation Law and Practice", the authors helpfully suggest that the procedure provided for in s.34 should only be used where "…the claim or defence is clearly without merit or otherwise an abuse of process". (at p. 461).

75. As to the relevant principles to be applied when determining whether the impugned email was reasonably capable of bearing the meaning ascribed to it by the appellant, counsel for the respondent referred the court to *McGarth v Independent Newspapers*

(Ireland Ltd.) [2004] 2 IR 425. In that case, Gilligan J. dealt with a preliminary issue as to whether a newspaper article was capable of having the defamatory meaning or any of the defamatory meanings pleaded in the statement of claim so that he might dismiss the claim in circumstances where he concluded that the article or words were not so capable.

76. At para. 32 of his judgment in *McGarth*, Gilligan J. opined: -

> *"32 I take the view that the headline, the article, the accompanying photograph and the caption underneath the photograph have to be considered in totality as published and that further the correct criterion to be applied is the meaning which the title, the article, the accompanying photograph and the caption underneath would convey to the mind of the ordinary reasonable and fair minded reader."*

77. At para.34 he stated: -

> *"the preliminary issue to be tried before this court was as to whether the article complained of in para. 7 of the statement of claim is capable of bearing any of the defamatory meanings pleaded in para. 8 of the statement of claim".*

78. He went on to state, at para.38: -

> *"The issue which I have to determine is whether the words are capable of bearing a particular meaning and counsel for the defendant has conceded that he is not entitled to a (sic) re-argue this issue again before the trial judge if unsuccessful in this application. Counsel for the defendant accepts that he asks the court to determine the issue as a preliminary issue and that that has put the issue in the same position as if it was being determined during the course of the trial by the trial judge. At the trial it is for the judge to decide as a matter of law whether the words are capable of bearing a defamatory meaning on the principle that it is for the court to say whether the publication is fairly capable of a construction which would make it libellous and for the jury to say whether in fact that construction*

ought, under the circumstances, to be attributed to it. In determining whether the words are capable of a defamatory meaning the court is obliged to construe the words

according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence and will not consider what person setting themselves to work to deduce some unusual meaning might extract from them. The court should avoid an over elaborate analysis of the article because the ordinary reader would not analyse the article in the same manner as a lawyer or accountant would analyse documents or accounts. In deciding the issue I am satisfied that I am entitled to consider the impression that the article has conveyed to me personally in considering what impact it would make on the hypothetical reasonable reader and lastly, the court should not take a too literal approach to its task.

39 Accordingly, taking the article of Tuesday the 25th September, 2001, as a complete entity including the headline, the content of the article, the placing of the photograph of the plaintiff and the caption underneath the photograph and placing myself in the shoes of the ordinary reasonable fair minded reader, I take the view that the article complained of in para. 7 of the statement of claim is not capable of meaning that the plaintiff was a terrorist or a criminal or was involved with persons who had terrorist or criminal involvement nor is the article capable of bearing any of the defamatory meanings pleaded in para. 8 of the statement of claim."

79. Albeit that *McGarth* predates the coming into force of the 2009 Act, I am satisfied that it provides a useful guide as to how an application such as the present should be approached.

80. Reliance was also placed by counsel for the respondent on *McAuley v. Power & Anor*. There, the plaintiff brought an action in respect of an article written by the first defendant. The defendants brought a motion to have the plaintiff's claim struck out or dismissed, either under O. 19 RSC or under the inherent jurisdiction of the court, on the basis that the words were not reasonably capable of having the defamatory meaning ascribed to them in the statement of claim.

81. In his judgment, Kearns P. observed that the case predated the commencement of the 2009 Act which contained s.14, which, Kearns P. was satisfied, *"did nothing more than codify existing legal principles and did not, of itself, constitute any significant extensions of those principles."* He further stated: -

> *"This is evident from decisions such as McGarth v. Independent Newspapers (Ireland) Ltd. [2004] 2 I.R. 465, in which Gilligan J. also dealt with a preliminary issue as to whether an article was capable of having a defamatory meaning or any of the defamatory meanings pleaded in the statement of claim so that he might dismiss the claim in circumstances where he concluded the article or words were not so capable."*

82. As far as the present case is concerned, it is submitted on behalf of the respondent that applying the test set out in Gilligan J. in *McGarth,* the statements in the 25 November 2015 email are not reasonably capable of being defamatory.

83. It is acknowledged by the respondent that for the purposes of an application pursuant to s.34(2) of the 2009 Act, the onus on the respondent is necessarily a high one. As said by Kearns P. in *Lowry v. Smyth* [2012] IEHC 22, "*…where either party seeks relief under s.34, a high threshold requires first to be met."* It is important to recall that in its preliminary analysis of the email in issue in this case, as mandated by the present application, the court is not determining what the publication actually means but merely

whether or not it is reasonably capable of carrying a defamatory meaning. It is only where a trial judge regards the material as incapable of bearing the defamatory meaning complained of that the case will be removed from the jury. This, it comes down to the respondent having to establish that the appellant could never succeed at trial.

84. In this case, the question is whether the respondent has met the relevant threshold. Clearly, the trial judge took the view that the threshold had been met, having analysed the impugned email of 25 November 2015 through the prism of a chain of correspondence which passed between the parties from 19 November 2015 to 25 November 2015 and which referred to other correspondence from third parties, particularly that from Michael F Butler & Co dated 3, 9 and 14 May 2008 and 24 November 2015. He found that while the appellant may genuinely have believed what Michael F Butler & Co had informed him about the books of appeal, the impugned email of 25 November 2015 did not, however, suggest that the appellant was dishonest in asserting that belief or that he was a liar or unprofessional. The trial judge accepted the respondent's characterisation of the imputations as pleaded as being *"unreasonable and hyperbolic"* (at paras. 63-65).

85. It will be recalled that the statement of claim variously asserts, at paras.6 (1), (2), (3), (4), (5), (7), (8), (9) and (10), that the impugned email means that the appellant set out to deceive and mislead the respondent and the Supreme Court, that the appellant was mischievous, dishonest and/or underhanded and should not be believed or trusted, that he was an unfit appellant, that he published a lie, that he was an unfit person within his chosen profession and that he was unprincipled and dishonest.

86. To the extent that the trial judge rejected that the words in the impugned email by their plain and ordinary meaning or by innuendo suggested the above, I am of the view, taking the appellant's case at its height and bearing in mind the factors to which the appellant had asked the trial judge to have regard (as set out in para. 18 of his replying

affidavit), that the trial judge did not err in so holding. As I am entitled to consider the impression the words in the impugned email have conveyed to me personally in considering the impact they would make on the hypothetical reader, I am of the view that by no stretch of logic or reasonableness could the words in the email of 25 November 2015 be viewed, whether in their plain meaning or by innuendo (and/or when viewed in the context of the chain of correspondence which passed between the parties prior to the impugned email) as suggesting that the appellant was mischievous, dishonest, underhand or an unfit person within his profession or that he had set out to deceive and mislead the respondent and/or the Supreme Court.

87. I so find albeit that there are conflicts of evidence to be resolved in this case. However, I do not believe that they are relevant conflicts for the purposes of the consideration at hand. This is so because I have approached the present consideration having accepted the factual matters deposed to in the appellant's affidavit relative to the delivery of books of appeal. Even approaching the matter with the required abundance of caution that an application pursuant to s.34(2) mandates, to my mind, it is impossible to conceive that, in the words of Gilligan J.in *McGarth, "reasonable persons of ordinary intelligence"* would conclude that the statements in the impugned email, whether in their plain and ordinary meaning or by innuendo, mean that the appellant was mischievous, a liar, an unfit person in his profession or that he was dishonest or underhand in his dealings with the respondent and/or the Supreme Court. Bearing in mind the standards that a community of fair-minded persons would expect of the appellant as a member of the legal profession, in my view it would be wholly unreasonable to ascribe to the words in the impugned email what is set out at para. 6 (1), (2), (3), (4), (5), (7), (8), (9) and (10) of the statement of claim. Accordingly, I find that these pleadings not stateable even, as I have said, taking the appellant's case at its height.

88. That leaves the plea, at para. 6(6) of the statement of claim, that in their natural or ordinary meaning or by way of innuendo, the words mean and would be understood to mean that "the Plaintiff misrepresented the facts and was in default of his duty". In my view, it is not unreasonable or unstateable for the appellant to assert that the words used in the email, in their plain and ordinary meaning or by innuendo, mean that he misrepresented the facts and was in default of his duty as a party to litigation. The words are reasonably capable of having a defamatory meaning and it will ultimately be for the trier of fact to determine if the statements in the email ought to have or do have the meaning contended for by the appellant at para. 6(6) of the statement of claim. To the extent, therefore, that the trial judge determined that the impugned email was not reasonably capable of being found to have the defamatory meaning pleaded at para. 6 (6) of the statement of claim he erred in this regard.

89. The appellant has also complained that in arriving at his decision, the trial judge applied the wrong test in defining "defamation". At para. 56 of his judgment, the trial judge stated:

> "There is no definition of defamation provided in legislation, however, Gatley On Libel and Slander, 12th Edn. (2013) states as follows. 'Defamatory' implies a harm caused to a person's reputation, however;
>
> 'there is no wholly satisfactory legal definition of the term. Three formulae have been particularly influential:-
>
> > "(1) would the imputation tend to lower the plaintiff in the estimation of right thinking members of society generally?
> >
> > (2) Would the imputation tend to cause others to shun or avoid the claimant?
> >
> > (3) The words tend to expose the claimant to 'hatred contempt or ridicule'".

In s. 2 of the 2009 Act, a defamatory statement is defined as "a statement that tends to injure a person's reputation in the eyes of reasonable members of society and defamatory shall be construed accordingly". In my view, whether or not the trial judge had regard at that point in time to the statutory definition of defamation as set out in s.2 of the 2009 Act is not particularly germane because he correctly approached the question before him (which was whether the words in the impugned email were capable of bearing the meaning ascribed to them by the appellant) under the umbrella of reasonableness. Accordingly, I am of the view the manner in which defamation is defined in the judgment did not bear upon the approach adopted by the trial judge in determining the issue before him, or the correctness of his assessment that the words in the impugned email were not reasonably capable of bearing a meaning that the appellant was mischievous, dishonest or deceitful in his profession or a liar to which para. 6 (1), (2), (3), (4), (5), (7), (8), (9) and (10) all refer. Nor did the trial judge's definition of defamation bear upon his assessment of the pleading at para. 6(6) of the statement of claim, although as set out at para. 88 above, I have found that he erred in determining that the words in the impugned email were not reasonably capable of bearing the meaning ascribed to them in para. 6(6) of the statement of claim.

(iii) Whether the trial judge was correct to find that qualified privilege attached to the impugned communication.

90. The trial judge determined that qualified privilege attached to the impugned email. He found that Ms. Cuddihy of the Supreme Court Office had a duty to receive the information contained in the email in circumstances where she had initiated the email correspondence. He also found that *"Ms. Brennan must have believed she had a corresponding duty to communicate the information to such person or persons".* (at para. 67)

91. It is common case that malice, if proved, may deprive a defendant of the defence of qualified privilege. The trial judge, at para. 69, was satisfied that the onus was on the appellant to prove that the respondent acted with malice and was satisfied that "the [appellant] must fail in this action".

92. It is the appellant's contention that the trial judge erred in ruling on the defence of qualified privilege in circumstances where he has pleaded malice. He submits that it was not the role of the trial judge in hearing the motion to strike out proceedings to rule on the defence of qualified privilege in circumstances where the respondent was not asked to prove that all their statements were true. Furthermore, the appellant was not afforded an opportunity to cross-examine the respondent's witnesses or to prefer evidence to tease out the defence of qualified privilege as put forward on behalf of the respondent.

93. Counsel for the respondent contends that the appellant's submissions on the question on qualified privilege are based on the proposition that Ms. Brennan was untruthful in her communications with the Supreme Court Office which, it is submitted, is not borne out by the correspondence exhibited by the parties and accepted by the trial judge. Insofar as it is suggested that it was not the role of the trial judge to rule on the defence of qualified privilege, counsel contends that the trial judge was required to consider whether the defence of qualified privilege was made out on an assessment of the relevant facts. It is submitted that applying the definition of qualified privilege provided for in s.18 (2) of the 2009 Act, Ms. Cuddihy of the Supreme Court Office had a duty to receive the information offered by Ms. Brennan in circumstances where Ms. Cuddihy's email had invited comment on the logistics of the January 2016 hearing date as proposed by the Supreme Court Office. Counsel contends that Ms. Brennan had a corresponding duty to communicate a position on the whereabouts of the booklet of appeal in such circumstances. It is argued that the trial judge was correct in finding that it was for the appellant to prove that Ms. Brennan

was motivated by malice. It is submitted that the onus which the appellant bore was incapable of being discharged once the chain of correspondence was considered by the trial judge.

94. There is no dispute but that the onus falls on the appellant to establish malice. However, what falls for consideration is whether, in an application to strike out the proceedings on the basis that the statements in the impugned email are not capable of bearing the meanings ascribed to them by the appellant, the court should go further than to hold whether the words are capable of a defamatory meaning in circumstances where malice is pleaded to defeat the defence of qualified privilege.

95. In *McAuley v. Power & Anor,* Kearns P. addressed the question as to whether, on an application to strike out defamation proceedings on the basis that the words published were not reasonably capable of having the defamatory meaning ascribed to them, the court can delve into defences put up by the defendant. He did not believe that was the court's function *"at this point in the proceedings"* (at p. 13). He went on to state:

> *"...a defence of fair comment may in turn be defeated by malice or an absence of bona fides and, while a reply was not delivered to the defence of this case, it is clearly pleaded at para. 5 of the statement of claim, that the article was 'malicious'. For that reason and notwithstanding that no reply to the defence has been delivered in this case, I do not regard such omission or failure as undermining the plaintiff's capacity to join issue with the defendants on any defence that might be raised during the course of the trial to the effect that a defence of fair comment must succeed."* (at p.14)

96. Kearns P. was adamant that the court *"on an application of this nature, should confine itself strictly to the issue as to whether the words complained of are capable of bearing a defamatory meaning."* (at p. 15) I agree with this statement given the nature of

the pleadings in the present case, particularly in circumstances where there are factual questions to be determined, not least relating to what is pleaded at para. 12 of the statement of claim, namely that the timing of the email as published by the respondent "was indicative of malice…" The plea of malice is denied by the respondent in its defence in respect of which, as I understand matters, issue is joined in the appellant's reply, albeit that the reply was not before the court. Furthermore, it must be noted that Ms Brennan has not sworn that the impugned email was true.

97. Accordingly, I cannot agree with the respondent's submissions on the issue. I am satisfied that the trial judge erred in engaging upon any consideration of whether the email of 25 November 2015 attracted the defence of qualified privilege. Furthermore, in my view, the appellant could not, in a motion to strike out his proceedings, be expected to embark on the cross-examination of the respondent's witnesses in order to address the defence of qualified privilege in circumstances where he may wish to seek discovery to assist in defeating the defence of qualified privilege on grounds of malice.

98. Accordingly, in my view, in the circumstances of this case, the trial judge had no further function save to determine whether the words were reasonably capable of bearing the meaning ascribed to them by the appellant. For the foregoing reasons, the finding of the trial judge on the issue of qualified privilege cannot stand.

Summary

99. Having regard to the findings set out above, I would propose, therefore, striking out those portions of the statement of claim which I regard as not reasonably capable of bearing a defamatory meaning, but will otherwise decline to grant the relief sought by the respondent in its notice of motion dated 4 July 2016.

100. Accordingly, I would allow the appeal to the extent set out herein.

101. Having read the within judgment, Edwards J. and Murray J. are in agreement.