[2019] IEHC 652

THE HIGH COURT

[2018 No. 2122 P]

BETWEEN

WILLIAM JONES

PLAINTIFF

AND

COOLMORE STUD

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 1st day of October, 2019

Introduction

1. This is an application on behalf of the defendant for an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the plaintiff's claim on the grounds that it discloses no reasonable cause of action and/or is frivolous and/or vexatious.

2. Further and alternatively, the defendant seeks an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim on the grounds that it is an abuse of process and/or otherwise bound to fail and/or is frivolous and/or is vexatious.

3. The core of the defendant's argument is that the High Court and the Court of Appeal have previously found, in another action brought by the plaintiff against the defendant, that the actions of the defendant of which the plaintiff complains are not actionable in law.

Background

4. The plaintiff is a former employee of the defendant, which owns and operates a commercial thoroughbred breeding and racing business from a stud farm in County Tipperary.

5. The plaintiff was employed by the defendant for nine years ending on 16th January, 2015. In August 2014 the plaintiff made a complaint to the Labour Relations Commission arising out of his employment. That complaint was compromised upon terms reduced to writing and signed by the plaintiff and on behalf of the defendant on 12th December, 2014. By the settlement agreement the plaintiff was to be paid, and he was paid, €30,000 as a gesture of appreciation for his service. It was agreed that the plaintiff would, and he did, retire from his employment on 16th January, 2015.

6. Of particular relevance to this application were clauses 7, 8 and 9 of the settlement agreement which provided:-

> *"7. This agreement is strictly private and confidential to the parties involved except where called upon by the statutory bodies or by law. Confidentiality is an essential term of this agreement on both parties.*
>
> *8. It is a term of this agreement that no records relating to animals or clients will be disclosed by claimant.*
>
> *9. Both parties agree that they will not make any derogatory comments about each other at any time in the future."*

7. In the summer of 2015 it came to the defendant's notice that the plaintiff was writing a book about Coolmore Stud. The defendant, by its solicitors, wrote to the plaintiff to remind him of his obligations under the settlement agreement and requested a copy of the manuscript so that it could be satisfied that publication of the book would not breach the agreement. The plaintiff replied that he had complied with the terms of the settlement agreement and declined to provide a copy of the manuscript.

8. On 23rd November, 2015 the plaintiff published his book, which was called "*The Black Horse Inside Coolmore"*.

9. The defendant took the view that the book (1) breached the plaintiff's obligations of confidentiality, (2) disclosed records relating to animals and clients, (3) was replete with derogatory comments about the defendant, (4) was defamatory of the defendant and others, and (5) infringed the copyright of a number of third parties.

10. On 26th November, 2015 the defendant, by its solicitors, wrote to Amazon.eu Sarl, UK branch, c/o Amazon UK Services Ltd., Legal Department, and in the following days and weeks wrote to a number of booksellers in Ireland and in the United Kingdom. The letters were headed "*NOTICE OF DEFAMATORY CONTENT*" and conveyed the defendant's view that the book contained material which was defamatory of the defendant, its clients, customers, owners and staff. The letters also expressed the defendant's belief that the book breached the plaintiff's confidentiality obligations and the defendant's intellectual property rights, privacy rights, and other legal rights. The defendant apprehended that the publication of the book might cause enormous reputational damage and could damage its business and business relationships. The letters invited the distributors and retailers to confirm that they would not sell or distribute the book and warned that unless such confirmation was provided, the defendant would hold them liable for any damage suffered by sales of the book through their shops or websites, and would rely on the letters to show that they had been put on notice of the matters complained of.

11. The plaintiff, in correspondence, protested that the defendant was not entitled to write the letters to the distributors and retailers and invited the defendant to sue him, saying that he would defend the book line by line.

The 2016 action

12. On 13th April, 2016 the plaintiff issued a plenary summons against the defendant and immediately applied to the High Court for injunctions:-

    "(i) Preventing the defendant and/or its representatives from threatening any bookshops or websites with legal action for defamation relating to the book, The Black Horse Inside Coolmore;

    (ii) Compelling the defendant and its representatives to immediately withdrawin writing all threats of legal action previously made to bookshops and Amazon in relation to The Black Horse Inside Coolmore;

(iii) Declaring that The Black Horse Inside Coolmore is not defamatory on the face of it and may be sold in outlets where books are sold;

(iv) Instructing the defendant to provide the plaintiff in this action all evidence without exception relating to their claim that The Black Horse Inside Coolmore is defamatory and if they refuse to do so they will pay the plaintiff's costs unless the court decides the refusal is reasonable."

13. By an order made on 24th June, 2016, for the reasons given in a comprehensive written judgment delivered on 14th June, 2016 [2016] IEHC 329 the High Court (Costello J.) refused the plaintiff's application.

14. Costello J. held that the plaintiff had not made out an arguable case that the writing of the letters had been wrong. She went on to find that, in any event, the plaintiff had not established that damages would not be an adequate remedy, and that the plaintiff's behaviour had been such that it would not have been appropriate for the court to grant equitable relief. Critically, however, the foundation of the judgment was that the plaintiff had no arguable case that the defendant was not entitled to have written the letters which it had written.

15. At para. 29 of her judgment, Costello J. held that the fact that the recipient of a letter threatening proceedings might have a full defence did not mean that the writing of such a letter gave rise to a cause of action. She went on to say that while it was possible that such a letter written without justification, in bad faith, and with a view to causing damage to another party rather than a *bona fide* defence of rights of the letter writer could give rise to a cause of action, that was not such a case. The evidence before Costello J. established that the defendant had at all times been anxious to rely on the settlement agreement and to defend itself, its staff and persons associated with it from defamation.

16. An appeal by the plaintiff was dismissed by the Court of Appeal by order made on 27th June, 2017. In his judgment delivered on 25th May, 2017 (in which Irvine and Barr JJ. concurred) [2017] IECA 164 Ryan P. identified the central question as whether it was permissible for the solicitors acting for Coolmore to correspond as they had with distributors or booksellers alleging possible or actual defamation and other wrongs with a view to dissuading them from dealing with Mr. Jones' book. If it was legitimate for the defendant's solicitors to communicate their client's concerns and its possible intentions as to litigation in the event of a refusal to abide Coolmore's wishes, he said, it was impossible to see how Mr. Jones could have succeeded in obtaining the relief he had sought in the High Court, or how he could have the order of Costello J. reversed by the Court of Appeal.

17. Having identified the issues and examined the arguments, Ryan P. set out his conclusions at paras. 54 to 58:-

"54. The defence of innocent dissemination has now been embodied in statutory form in s. 27 of the Defamation Act, 2009 set out above. It is implicit in the defence 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. The protection afforded to a person for his reputation would be seriously reduced if he was not entitled to head-off publication or distribution by putting such person in the position of knowing the complainant's allegations about the material.

55. The fact that it has not been established in a court that the publication is defamatory is irrelevant. There is no obligation on a person claiming to have been defamed to sue any particular defendant. He is free to choose between persons having liability so as to proceed against one or more and not against others. There are obvious practical reasons why this should be so, but it is also available as a matter of principle. An author cannot insist that a person claiming to be defamed in his work has to sue him as well as others or instead of others. This is the mistake that Mr. Jones is making in this case.

56. The complainant's protest about publication and endeavors to prevent it or to restrict distribution is no more than an allegation. The person to whom the letter is directed does not have to comply with the request or demand. He may proceed to distribute and the only thing the complainant can do in those circumstances is to sue for damages for defamation unless he can bring himself within the very restricted class of cases in which an injunction will be granted.

57. The distributor on receipt of correspondence alleging libel has a choice to make. He can proceed to distribute or follow the path of prudence and comply with the request to desist. If it subsequently transpires in an action against him that the publication was indeed defamatory, as claimed by the injured party, he will be in real difficulty in seeking to invoke the defence of innocent distribution in view of the explicit notice that the complainant gave. That, of course, is the purpose behind writing the letter but it is a legitimate legal purpose.

58. It follows, therefore, 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. Decided cases focus on the means of knowledge of the defendant claiming innocent dissemination. The defence will be jeopardised if the distributor has been expressly informed of a claim by a person alleging defamation and yet he has proceeded with distribution."

18. Ryan P., in his summary of the judgment of Costello J., noted the trial judge's caveat that a letter written in bad faith, rather than in defence of rights, might give rise to a cause of action, as well as her finding that this was not the case here. In his conclusion that the purpose behind the writing of the letters was a legitimate legal purpose, I think that Ryan P. must be taken to have endorsed what Costello J. said as to the writing of such a letter with an improper purpose.

19. An application by the plaintiff for leave to appeal to the Supreme Court was refused for the reasons given in a determination issued on 24th November, 2017 [2017] IESC DET 117.

20. No further step was taken by either side in the 2016 proceedings. The plaintiff's position is that those proceedings came to an end in 2017 when the courts found in favour of the defendant. On that the parties are agreed: although for different reasons, to which I shall come.

This action

21. This action was commenced by plenary summons issued on 12th March, 2018. By the general indorsement of claim, the plaintiff claims:-

> *"1. Damages for defamation pursuant to the Defamation Act, 2009 against Coolmore Stud, the defendant, contained in letters sent to various booksellers.*
>
> *2. Pending the trial of the above action, an ex parte interim injunction under the Defamation Act, 2009 and the Rome II Regulation 2009, to include:*
>
> *2.1 Restraining the defendant from threatening any bookseller selling the book, The Black Horse Inside Coolmore, with defamation proceedings for which it is statute barred pursuant to the s. 38 of the Defamation Act, 2009. Coolmore Stud cannot threaten booksellers with defamation proceedings they are prohibited by law from bringing.*
>
> *2.2 Restraining the defendant from threatening any bookseller in the UK selling the book, The Black Horse Inside Coolmore, with defamation proceedings under the Defamation Act, 2009, which has no authority in the UK. Coolmore Stud are prohibited from threatening booksellers under Irish defamation law which is excluded from any cross-border agreement pursuant to Article 1.2 (g) of the Rome II Regulations 2009."*

22. What prompted this action was a letter of 30th November, 2017 sent by the defendant's solicitors to an English company, Gardners Books Ltd. It is evident on the face of this letter that it was sent by registered post to Gardners Books at its address at Eastbourne, England, and to three e-mail accounts at gardners.com.

23. The letter is headed "*Notice of defamatory content, The Black Horse Inside Coolmore by William Jones"*. Insofar as is material, the letter reads:-

> *"Dear Sirs*
>
> *We are writing to you in relation to 'The Black Horse Inside Coolmore' by William Jones (the 'Book'); 44 copies of which are currently for sale to retailers through your website. We understand you have previously supplied unknown numbers of copies of the Book to sellers for distribution to consumers in the United Kingdom.*

The book is defamatory of our client, its employees and persons associated with our client. On behalf of our client, we request that it be immediately removed from sale through your website. We are obliged to put you on notice that, if the Book is not removed from your website, our client may hold Gardners Books Ltd liable for any damage caused by any ongoing sales made through your website. In the event that you continue to sell the Book, despite having been notified of the defamatory material it contains, the defence under Irish law of innocent publication set out in s. 27 of the Defamation Act, 2009 may no longer be available to you.

The Book contains material which is evidently defamatory and damaging to our client's good name and reputation as well as those of its employees and persons associated with it. In addition to the various untrue allegations Mr. Jones has made against our client and its staff, he has also breached our client's intellectual property and privacy rights by publishing photographs and personal information without permission or consent and in breach of contract. Mr. Jones has also breached the obligation of confidentiality he owes to our client.

Copyright infringement of third parties

The book also contains material which infringes the copyright of other third parties located in the Republic of Ireland, the United Kingdom, Canada and the United States. These four individuals are the authors or publishers of books relating to the horseracing industry and Mr. Jones has plagiarised their work without their permission. In fact, Mr. Jones has expressly acknowledged that he took material from these publications for the Book without permission. In an interview with the Irish newspaper, The Sunday Business Post, on 24 April, 2016 by reference to one of the other publications he stated '[a]nyone with half a brain will realise that chapter 1 is not my own work but is based on that of Muriel Lennox'. In the Irish High Court decision referred to below, the Judge stated, whilst refusing Mr. Jones' court application, that if she had granted the injunction sought it would '…involve affording protection to a work which itself infringes the copyright of four individuals'."

24. The letter went on to summarise the previous action brought by the plaintiff against the defendant and it gave links to the judgments of Costello J. and Ryan P. Gardner Books Ltd. was asked to confirm that the book would immediately be withdrawn from sale and to advise on the number of copies which had been sold and the retailers to whom they were sold. "*In the meantime*,", the letter concluded "*all of our client's rights are reserved in full."*

25. Having issued his summons on 12th March, 2018, the plaintiff applied to the court, by notice of motion dated 20th March, 2018 for a variety of interlocutory orders reflecting, more or less, his general indorsement of claim. That application, which was resisted on behalf of the defendant, was adjourned from time to time and was eventually listed for hearing on 14th December, 2018, when it was withdrawn. In the meantime, the plaintiff, who had delivered his statement of claim on 30th April, 2018, had been pressing

for delivery of a defence and on 25th January, 2019 issued a motion for judgment in default of defence.

26. The plaintiff's application for interlocutory relief having been withdrawn, all that the court was asked to do on 14th December, 2018 was to deal with the costs of that application but in the course of the argument on that issue, Mr. Jones made it clear that he would be applying for judgment in default of defence and Mr. Gallagher, for the defendant, made it clear that the explanation for the fact that no defence had been delivered was that his side intended to bring an application to have the action dismissed. In the event, Mr. Jones issued his motion for judgment about a fortnight before the defendant issued its motion to dismiss on 12th February, 2019.

27. In his submissions on this application the plaintiff complains bitterly and repeatedly that the defendant has frustrated the progress of the action by its refusal to deliver a defence. While it is true that this motion might have been issued much earlier than it was, it could not, when it came, have come as any surprise to the plaintiff. The affidavit of Gavin Woods, sworn on 13th April, 2018 in answer to the application for interlocutory orders clearly and unequivocally set out the defendant's position that the action, as well as the motion, was an abuse of process. It may have been hoped that the disposal of the plaintiff's motion would dispose of the action. In any event, I am satisfied that the plaintiff has not been prejudiced by any delay in the issuing of the defendant's motion.

The arguments

28. The defendant's case is that the plaintiff, by these proceedings, is seeking to re-litigate in substance the issues which were decided against him in the 2016 action and/or is seeking to raise issues in this action which could, and if they were to have been, should have been raised in the earlier action but which the plaintiff elected not to raise. This action, it is said, is an attempted collateral attack on the previous decisions of the High Court and the Court of Appeal.

29. The substance of the decisions in the earlier proceedings, it is said, is that it was lawful for the defendant's solicitors to write to the distributors complaining that the book was defamatory, breached confidentiality and copyright, and was derogatory of the defendant. The plaintiff, it is said, now seeks to repackage the same issues which have been conclusively decided against him.

30. The lynch-pin of the defendant's argument is the finding by Costello J., which was upheld by the Court of Appeal, that the plaintiff had no arguable case that the letters the subject of the 2016 action were defamatory of him. The fact that the decisions in the earlier proceedings were made on an application for interlocutory relief, it is said, is irrelevant.

31. Quite apart from the abusive nature of the proceedings, it is said, the claim is fundamentally misconceived and bound to fail. The statement of claim, it is said, does not support any claim that the defendant's solicitors' letter of 30th November, 2017 is defamatory of him.

32. The plaintiff's answer to the application is that "*… the 2016 proceedings only concerned an application for an injunction and the only determination by the High Court was to refuse the plaintiff's application."*

33. The plaintiff now argues that since no action for defamation was brought within the limitation period of one year from the date of publication, "*the book*" is statute barred from any defamation action. The plaintiff insists (as he did in the previous action) that the book is not and cannot be defamatory because no court has ever determined that it is. Now that any defamation action arising out of the publication of the book is time barred – so the argument goes – there can never be a determination by a court that it is defamatory.

34. The plaintiff's case is that the reference in the letter to the UK distributors and retailers to s. 27 of the Defamation Act, 2009 constituted an implied threat to sue for damages under Irish defamation law. This threat, it is said, was calculated to mislead the UK booksellers and was false and fraudulent.

35. The plaintiff focusses on an assertion in the letter of 30th November, 2017 that the book was "*evidently defamatory*" and that it contained "*various untrue allegations*" as meaning that the plaintiff had lied. This, the plaintiff contends, is profoundly defamatory of him.

Legal principles applicable on a motion to dismiss

36. The principles to be applied in determining whether an action is vexatious are well settled. The Irish courts have drawn on a number of Canadian authorities.

37. In *Murray and Air Ambulances Services Ltd v. Fitzgerald* (Unreported, High Court, White J., 18th January, 2012) [2012] IEHC 20, White J. first recalled the judgment of Costello J. in *Barry v. Buckley* [1981] I.R. 308 as to the inherent jurisdiction of the High Court to ensure that an abuse of the process of the courts does not take place. Proceedings which are frivolous or vexatious will be stayed, as will actions which are bound to fail. White J. emphasised (as do all of the cases) that the court must be careful in the exercise of this jurisdiction to ensure that it is exercised in cases of undisputed matters of fact by the application of clear legal principles.

38. In *Murray*, as in this case, the defendant relied on O. 19, r. 28 of the Rules of the Superior Courts as well as the inherent jurisdiction of the court. In *Lopes v. The Minister for Justice* [2014] 2 I.R. 301, to which I shall come, the Supreme Court explained the difference between the two jurisdictions but as White J. pointed out in Murray, in exercising the two jurisdictions, there is bound to be a certain overlap.

39. As White J. said in *Murray*, the court, in exercising its inherent jurisdiction in assessing whether proceedings are vexatious, is entitled to look at the whole history of the dispute and to look for one or more of a number of indicia of vexatious litigation. At para. 46 of his judgment, White J., citing *Dykun v.Odishaw* (Unreported, Alberta Court of Queen's Bench, Judicial District of Edmonton, 3rd August, 2000), which referred to a decision of

the Ontario High Court in *Re Lang Michener & Fabian* (1987) 37 D.L.R. (4th) 685 at 691, identified seven matters as tending to show that a proceeding is vexatious, which are:-

"(a) The bringing up of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding.

(b) Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

(c) Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights.

(d) It is a general characteristic of vexatious proceedings that grounds and issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.

(e) In determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action.

(f) The failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious.

(g) The respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings."

40. In *Lopes v. The Minister for Justice* [2014] 2 I.R. 301, Clarke J. (with whom Laffoy and Dunne JJ. agreed) explained the difference between the jurisdiction of the court under O. 19, r. 28 and its inherent jurisdiction.

"[17] 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."

41. Later in his judgment in *Lopes*, Clarke J. said:-

"[90] I should emphasise again that the proper approach to a motion like this is to take the evidence which it is suggested might be capable of being secured and presented to the High Court, at its high point. However, for the reasons already analysed, almost all of that evidence concerns what transpired at the hearings before the various courts which dealt with Mr. Lopes' case. The fact that Mr. Lopes makes assertions about many things does not amount to evidence. Either the evidence or potential evidence is capable, on an arguability basis, of supporting his accusations or assertions, or it is not.

[91] Having carefully analysed each of the matters which were set out in his written submissions, in the documents which he filed in support of same and in his oral submissions, it seems to me that there is just no basis for suggesting that there is any evidence, or any prospect of there being evidence, to support his factual accusations. On that basis, I am satisfied that the underlying factual assertion which lies at the back of all of the submissions made is bound to fail. If that factual assertion fails, then the legal issues, however interesting and important, just do not arise."

42. In *Keohane v. Hynes* (Unreported, Supreme Court, 20th November, 2014) [2014] IESC 66 Clarke J. (with whom Hardiman and Laffoy JJ. concurred) revisited the same question and put it thus:-

"6.8 What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward. Likewise, the Court can go into documentary facts where the relevant documents govern the legal relations between the parties or form the only possible evidential basis for the plaintiff's claim (as in Lopes). As Barron J. noted in Jodifern, a court can look at a contract and it may become clear beyond argument as to what that contract means. On that basis, it may follow that a plaintiff's claim may be bound to fail. But there may be cases where, notwithstanding the text of a contract, facts are asserted and backed up either by evidence or by the possibility that evidence might be found, which might lead to the contract being construed in some different way or the consequences for the wrong alleged in the proceedings being differently considered. In such cases, as Barron J. made clear, the case must go to trial.

6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard,

have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for the plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

Discussion

43. The core issue on this application is whether, or the extent to which, the plaintiff is entitled to relitigate issues decided against him in the 2016 action.

44. The defendant's case is that the decisions of Costello J. and the Court of Appeal conclusively establish its right to write to booksellers and distributors, generally, as well as its right to have written the letters which gave rise to the earlier proceedings.

45. The plaintiff's case is that his cause of action on foot of the defendant's solicitors' letter of 30th November, 2017 could not possibly have been included in the earlier action because it post-dated the disposal of that action. Moreover, says the plaintiff, the 2016 proceedings were an application for a temporary interlocutory injunction, whereas this action is "*for a substantive claim of defamation*".

46. It seems to me that the distinction which the plaintiff seeks to make between the substance of the earlier action and the substance of this action is unwarranted. The plaintiff's claim in the 2016 action was for permanent injunctions restraining the defendant from communicating with any bookshops or websites and compelling the defendant to withdraw all threats of legal action previously made. Having issued his summons, the plaintiff then applied to the High Court, firstly *ex parte* and later on notice, for the reliefs claimed in the summons. The paperwork is in some respects rather confusing, but it is clear that the application was for orders pending a trial of the action. Absent a substantive claim, the court would have had no jurisdiction to have considered granting interlocutory orders. The fact that the summons in the earlier action was not indorsed with a claim for damages is neither here nor there. While the reliefs claimed in the earlier action and in that now before the court may have been – to some extent – different, they are both substantive actions for defamation.

47. In support of his argument that the outcome of the earlier action is no bar to this action, the plaintiff seeks to attach great significance to the fact that the application which was refused in the earlier action was a motion for interlocutory relief, rather than a decision made at the end of a trial. Again, it seems to me that he is mistaken. The nature and

effect of the decision of a court depends on the issue which has been decided, rather than the issue identified by the moving party, or the procedural step by which the issue is brought before the court.

48. The plaintiff points, correctly, to the fact that neither Costello J. nor the Court of Appeal made an order declaring that Coolmore Stud could continue writing letters to distributors and argues that absent such order he is entitled to apply to prevent it doing so. While it is true that there is no 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 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.

49. In the course of argument, the court was referred to a passage at para. 5.31 of Spencer Bower and Handley on *Res Judicata* (4th ed.) where the authors offer a view as to the circumstances in which interlocutory decisions can be final for *res judicata*. It seems to me however that the starting point is to consider whether the decisions of Costello J. and the Court of Appeal, although made on an application for interlocutory orders, were interlocutory decisions.

50. The distinction between interlocutory motions and other applications was considered by Murphy J. in an ex tempore judgment in *F & C Reit Property Asset Management plc v. Friends First Managed Pension Funds Ltd.* (Unreported, High Court, Murphy J., 1st June, 2017) [2017] IEHC 383. That was a motion brought on behalf of the defendant to inspect documents on which an issue was raised as to the admissibility of an affidavit of the plaintiff's solicitor which had been filed. The solicitor's affidavit was not confined to such facts as he was able of his own knowledge to prove but might have been admitted under O. 40, r. 4 if the application before the court was an interlocutory application.

51. On the authority of the decision of the Supreme Court in *Minister for Agriculture v. Alte Leipziger AG* [2000] 4 I.R. 32, Murphy J. found that the application was for the determination of a discrete issue within the proceedings which was not to be revisited in the course of the plenary hearing, the decision of the court on which would be final, subject only to an appeal, and so was not an interlocutory motion. That being so, the affidavit of the plaintiff's solicitor was not admissible.

52. F & C Reit Property Asset Management plc changed its name to BMO Rep Property Asset Management plc and in *BMO Rep Property Asset Management plc v. Friends First Managed Pension Funds Ltd*. [2018] IECA 357, the Court of Appeal upheld the decision of Murphy J. as to the nature of the motion and the admissibility of hearsay evidence.

53. The plaintiff's application in the 2016 action which was ruled on by Costello J. and the Court of Appeal was an application for interlocutory orders but it by no means follows that the decision was an interlocutory decision. The first issue raised on the application was whether the plaintiff had established a *bona fide* issue to be tried as to his entitlement to

a permanent injunction. That issue was decided against the plaintiff by the High Court and his appeal was dismissed by the Court of Appeal on the same basis. The decision of Costello J. was not one which was to have been or which might have been revisited in the course of a trail, but was final, subject only to an appeal, which was brought and failed.

54. 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.

55. It is true, as the plaintiff says, that the letters written on 30th November, 2017 were written after the 2016 proceedings came to an end, but it does not follow that the defendant's entitlement to write those letters was not, or could not have been, decided by the earlier case. It will be recalled that while the 2016 action complained of various letters written in 2015 and 2016, the orders sought were not confined to those letters but would have extended to distributors and booksellers generally. The issue, identified by Ryan P. as the decisive question in the case, and which has already been determined, is whether the defendant is entitled to write to distributors and booksellers warning or threatening them with legal action in the event that they proceeded to deal with the plaintiff's book. In the event, the Court of Appeal decided that it was. If the plaintiff had secured the orders which he sought, they would have prevented the writing of the letters the subject of these proceedings. It necessarily follows that the challenge to the 2017 letters is, to that extent, an attempt to relitigate issues which have finally been decided against him.

56. The plaintiff, on the one hand, appears to accept that the 2015 and 2017 letters are substantially similar, and on the other argues that they are different. In particular, the plaintiff seeks to contrast the allegation in the earlier letters that the book "*contains material which is defamatory of our client*" with that in the later letters that the book "*makes various untrue allegations*" against the defendant and its staff. There is no difference in substance. The allegation that the book contains defamatory material is necessarily an allegation that the material is untrue.

57. As to the case that the plaintiff would now make in relation to the 2017 letters, it is variously argued on behalf of the defendant that all of the issues and arguments which the plaintiff would now raise have been heard and determined in the earlier proceedings, and that the plaintiff ought to be precluded from raising any new issue by the application of the rule in *Henderson v. Henderson*.

58. Besides his core argument that the book cannot be defamatory unless and until there was a determination of a court to that effect – which was unquestionably fought and lost in the earlier action – the plaintiff makes a number of points which were either not made or not developed in the earlier action. He argues first that the recipients of the letters complained of were English companies which, he argues, if they are to be sued, must be

sued in England. Second, he says, any action against the English companies would be subject to English law, under which law, he argues, only the author and publisher and not the distributor are liable in defamation. Thirdly, he would argue that any action that the defendant might take against the distributors (the plaintiff says "*against the book*") would be statute barred.

59. It is not apparent from the judgments of Costello J. or of Ryan P. that these arguments were made in the earlier action. In the earlier action, many of the letters complained of were addressed to English distributors, so any argument as to the place where any action might be brought, or the applicable law could have been made then. The proposition that any action against the distributors would be statute barred is, I think, something which has arisen in the meantime. However, I do not think that it is necessary to decide whether the rule in *Henderson v. Henderson* should be formally applied because it is clear from the decisions of Costello J. and Ryan P. that the plaintiff's new arguments cannot avail him.

60. The earlier judgments 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. 28 and Ryan P. at para. 54, it will be a matter for the recipient of such a letter to make his own assessment as to whether to publish the material complained of. 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. The assessment of the complaint and threat of litigation is a matter for the recipient of the letter and not the subject of the complaint. *A fortiori* it is not sensible that the subject of the complaint should seek to dictate the terms of the complaint or the threat of litigation.

61. The plaintiff's argument in the earlier action was that the distributors to whom the letters were sent had, or would have, a full defence to any action that might be brought against them. That was rejected. The substance of the plaintiff's new arguments is that the distributors would have additional defences, or additional grounds of defence. But if the law is, and it is, that the fact that the recipient of a letter threatening litigation would have a full defence does not mean that the making of the threat is actionable, then the basis or detail of the alleged full defence is immaterial.

62. As the Supreme Court spelled out in its determination of 24th November, 2017 [2017] IESC DET 117, an author cannot insist that a person claiming to be defamed in his work has to sue him, as well as, or instead of, a distributor or seller. It is implicit in the defence of innocent dissemination that a person who apprehends that a publication may contain defamatory material about him is entitled to communicate that apprehension to the distributor or seller. In this case, the plaintiff cannot invoke a hypothetical right to be sued in order to use proceedings that might be brought by the defendant as a platform for ventilating his concerns as to how Coolmore worked.

63. 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. In his statement of claim in this action he recognises that the 2016 proceedings came to an end in 2017. The Court of Appeal having confirmed the judgment of Costello J. that he had no arguable case, any attempt to progress it could have been countered by an application to have it dismissed as frivolous and vexatious.

The letters the subject of this action

64. The plaintiff is adamant that the only issue in this case is whether the book is defamatory of the defendant. He is plainly wrong about that. It was undoubtedly a significant part of the complaint made to the distributors that the book was defamatory, but the letters also complained of breach of contract, confidence and copyright which the plaintiff has not sought to contradict.

65. The plaintiff submits that the onus is on the defendant to show that the facts that underpin his action cannot possibly be true. He refers to the decisions of Clarke J. in *Salthill Properties Ltd. v. Royal Bank of Scotland* (Unreported, High Court, Clarke J., 30th April, 2009) [2009] IEHC 207, *Lopes v. The Minister for Justice* [2014] 2 I.R. 301 and *Keohane v. Hynes* (Unreported, Supreme Court, 20th November, 2014) [2014] IESC 66. That can be the basis on which a defendant applies to have an action dismissed as bound to fail, but it is not the basis of the defendant's application in this case. Rather, what is said is that even if all that the plaintiff alleges is true, his statement of claim discloses no cause of action and his case is bound to fail as a matter of law. As the plaintiff himself points out, the letter of 30th November, 2017 and its contents are not in dispute.

66. The plaintiff's case is that the distribution and sale of his book has been suppressed by the defendant. That is uncontested. Indeed, the declared object of the letter complained of was to do just that.

67. The plaintiff submits that because no court has found that the book is defamatory, it is not defamatory. That is a point which was fought and lost in the earlier litigation. As Ryan P. pointed out at para. 55 of his judgment, the fact that it has not been established in a court that the publication is defamatory is irrelevant. If it was, as it was, irrelevant that no finding had been made that the book was defamatory, it follows that it is irrelevant whether such a finding might or might not now be made.

68. Repeatedly the plaintiff asserts that these proceedings concern defamation only and that any other allegations that the defendant might wish to make are a matter for the defendant. All of the letters written on behalf of the defendant complain of breach of contract, breach of confidentiality and breach of copyright, as well as of defamation. The plaintiff complains bitterly about the allegation that he has defamed the defendant but has not engaged with the other complaints. He now argues that because his only complaint is in relation to the defendant's allegation that the book is defamatory, the defendant's other allegations are irrelevant. I cannot agree. The defendant's solicitors' correspondence was prompted by a number of concerns. In this action as well as in the earlier action, the defendant relies on each and all of those concerns in justification of the

action it took to suppress the book. In precisely the same way that the plaintiff is not entitled to insist that he should be sued for defamation, he is not entitled to insist that he should be sued for breach of contract, confidentiality, or copyright.

The defendant's motive in writing the letters complained of

69. In my summary of the judgments of Costello J. and Ryan P. I noted that the judgments of the High Court and the Court of Appeal left open the possibility that the writing of a letter such as those written on behalf of the defendant might be actionable if written in bad faith and for the purpose of injuring the plaintiff rather than the *bona fide* defence of rights. The evidence then before the court that the defendant was and at all times had been anxious to uphold the settlement agreement and to defend its reputation does not appear to have been contested.

70. In the earlier action, the plaintiff's claim was that the defendant was not entitled to have written the letters because (broadly) that the book was not defamatory. In this action, and on this application, the plaintiff would argue that the letters now complained of were written maliciously.

71. As I noted in my introduction, part of the defendant's case is that the plaintiff is seeking not only to relitigate issues already determined against him but to raise new issues which might have been but were not raised in the earlier proceedings. Specifically, I understand part of that the complaint to be that the plaintiff now seeks to make the case, and ought not be allowed to make the case, that the defendant's solicitors' correspondence to the booksellers was motivated by malice.

72. The first issue that arises is whether such case as the plaintiff would make by reference to alleged malice is *res judicata* or whether he should be prevented from making any such case by the application of the rule in *Henderson v. Henderson*.

73. The letters now complained of were in very similar terms to the earlier letters and they were all written on behalf of the defendant to various distributors of the same book, but they were, at least, written on different dates as much as two years apart. The legal definition of malice, to which I shall shortly come, engages the motive or purpose of the publisher of an allegedly defamatory statement rather than the meaning of the words or the relationship between the maker and the recipient of the statement. If the test is motive or purpose, it seems to me that in principle the publication of precisely the same statement to the same person might on one occasion be privileged but on another not. If that is so, a finding that a statement was made in good faith on one occasion would not preclude an action based on a later publication in different circumstances. The plaintiff in this action does not seek to revisit the defendant's motive or purpose in writing the letters which it wrote in 2015 and 2016 but alleges malice in connection with the 2017 letters. This, it seems to me, rules out any question of *res judicata*.

74. The case that the plaintiff would now make is shortly stated in the statement of claim as being that the defendant has deliberately and maliciously misled UK booksellers, forcing them to withdraw the book from sale by making illegal threats to sue for damages. As

Mr. Gallagher points out, there are no particulars in the statement of claim of the alleged malice, but in a long affidavit filed in answer to the defendant's motion the plaintiff sets out, in 21 numbered paragraphs, the matters relied on as amounting to malice. While Mr. Gallagher makes the point that the necessary particulars ought to have been pleaded, he does not press that the action should be dismissed on that basis. Rather the argument is that the matters relied on by the plaintiff do not amount to malice in law: so that even if (or strictly speaking, on the premise that he will be able to do so) if the plaintiff were to succeed in establishing his assertions by evidence, the action is bound to fail.

75. Messrs. Cox and McCullough in their work on *Defamation Law and Practice* deal with the question of malice in chapter 8. Paragraphs 8-106 and 8-107 are particularly instructive.

> *"8-106 As far as qualified privilege is concerned, the meaning of malice relates back to the reason why the privilege exists in the first place. Thus, it will be remembered that what is privileged is the occasion of communication, and that the occasion is privileged because of the public interest in its protection. … The parameters of the defence are constructed by reference to the public policy considerations that underpin it, and malice therefore (as far as qualified privilege is concerned) arises whenever a person uses the occasion of privilege for some indirect or wrong motive unconnected to the public policy justification for the privilege – as, for example, where one uses the occasion of writing a character reference about a person as a way to exact revenge on that person for what s/he has done in the past, or where one uses the privileged occasion of publishing a rebuttal to an earlier attack, not as a means of clarifying the situation, but exclusively for retaliatory purposes. The key consideration is not whether one is hurting another person or is behaving in a nasty fashion, but rather whether one is abusing the occasion of privilege. Thus, it would appear that even if one publishes a statement in the knowledge that another person will be injured, or even perhaps with the intention of injuring that person, this will not amount to malice, provided that one is using the occasion for its proper purpose.*
>
> *8-107 it should further be noted that, at common law, proof by the plaintiff of the incidental presence of an improper motive will not suffice to establish malice. Rather, the plaintiff must prove that the dominant motive for publication was malicious – in other words that the defendant's dominant motive for publishing the impugned material was unconnected to the occasion of qualified privilege. This will be a difficult task in any case and particularly in the very common situation where the defendant acts out of a combination of different motives."*

76. Paragraph 59 of the plaintiff's affidavit filed on 28th February, 2019 starts with the recurring theme that his book is not defamatory, that no determination has ever been made to that effect, and that any defamation action "*against it"* is statute barred. The plaintiff then goes on to list the matters he relies upon as constituting malice.

77. The particulars, if I will be forgiven for saying so, are prolix and repetitive but the substance is that the letter to Gardners Books was written by a senior solicitor in a reputable firm; that the Defamation Act, 2009 (which was referenced in the letter) does not apply in the UK; that any action against the book became statute barred - incidentally under Irish law - one year after it was published; that the book could not properly have been described as defamatory when no determination had ever been made to that effect; that under UK law only the author, editor or publisher can be sued for defamation; that the letter was written intentionally; that after receiving the letter Gardners Books withdrew the plaintiff's book; and that the letter "*was deliberately written with malice, with the sole aim of getting the book withdrawn from sale and with the obvious intention of doing me harm".*

78. The plaintiff, in addition, refers to the progress of the litigation and to the correspondence exchanged since the institution of the proceedings but these cannot possibly go to the defendant's motive or purpose in sending of the letter.

79. I accept the submission on behalf of the defendant that the particulars relied on by the plaintiff as amounting to malice do not amount to malice in law. There is no issue as to the writing of the letters complained of. The defendant's case is that the letters were written in good faith in defence of its legal rights and this is uncontested. There is no issue in fact that the writing of the letters has had the consequence that several booksellers and distributors have withdrawn the plaintiff's book. That was the object of the defendant's correspondence but the decision to withdraw the book was a matter for the recipients of the letters.

80. The statement of claim also complains that the letter to Gardners Books was published "*far and wide*". Giving the plaintiff the benefit of the doubt, this might be construed as a complaint that the letter was published to a person or persons who had no legitimate interest in receiving it. The general assertion, however, is not supported by the facts relied on. The plea is, and it is the fact, that the letter of 30th November, 2017 was sent by post to Gardners Books at its address in East Sussex and to three e-mail accounts at gardners.com, namely, sales@gardners.com, uksales@ gardners.com, and intenationalsales@gardners.com. Those communications could or would and were intended to immediately reach different people in different divisions of Gardners Books, but the defendant unquestionably had a legitimate interest in communicating with whomever it was was responsible for sales generally, UK sales and international sales, and each of the recipients had a legitimate interest in receiving the letter. It is not material that the letter was not sent to named individuals.

81. The plaintiff submits that the defendant's malice is evident from what happened after the letter was sent, namely that the book was withdrawn. He is quite wrong in that. There is no issue but that the defendant's object in writing to the distributor was to have the book withdrawn. What motivated the letter, however, was the protection of the defendant's reputation rather than any desire to cause wanton damage to the plaintiff.

Conclusions

82. This is an action claiming damages for defamation and a variety of injunctions arising from the publication by the defendant's solicitors, on the defendant's behalf, of a letter to a book distributor. The substance of that letter was a complaint that a book written and published by the defendant contained material which is defamatory of the defendant and material the publication of which is a breach of contract, confidentiality and copyright.

83. 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 these 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.

84. To the extent that the plaintiff seeks to relitigate the defendant's entitlement in principle to write to distributors, it is vexatious.

85. The letter the subject of these proceedings is in substantially the same terms as those the subject of the previous decisions.

86. There is no issue as to the fact that the letter was written, or as to by whom or to whom it was written.

87. 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 a legitimate legal purpose. The plaintiff's assertion that the letter was "*deliberately and maliciously misleading*" is based upon a misunderstanding of the law. It is unsupported by the facts pleaded.

88. I accept the plaintiff's submission that the bar on an application such as this is a high one and that the jurisdiction which has been invoked is to be exercised sparingly and with great caution.

89. On the uncontested facts, the plaintiff's case is bound in law to fail. Accordingly, it is frivolous.

90. The plaintiff's object in bringing these proceedings is 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.