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	ICOS No:
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **24/03/2026**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

Fisher and Fisher Solicitors Limited, practising under the name of Fisher and Fisher Solicitors

Plaintiff

and

Tughans, practising as a firm Tughans Solicitors

First Defendant

and

Assetz SME Capital Limited

Second Defendant

and

Edward Page

Third Defendant

and

Mark Reidy

Fourth Defendant

and

Concept Financial Group LLP

Fifth Defendant

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Mr Hopkins KC (instructed by DWF Solicitors for the First Defendant)
Mr Lavery KC and Mrs Cleland (instructed by Fisher and Fisher, solicitors for the Plaintiffs)

MASTER BELL

Introduction

[1] The current actions (hereafter "these actions") are three defamation actions which arise out of an earlier conveyancing transaction. The plaintiffs in the current actions represented Sandra Patterson, the purchaser of a property in the conveyancing transaction and the first defendant in these actions, Tughans, represented Assetz SME Capital Limited, a property finance lender, in that conveyancing transaction. Assetz SME Capital Limited is also the second defendant in these actions. The third and fourth defendants in these actions were employees of the fifth defendant in these actions, Concept Financial Group LLP, which acted as a broker in the conveyancing transaction.

[2] The heading on this written judgment refers to the first defamation action (ICOS2020/38354). In the other two defamation actions, the plaintiffs are Meabh McArdle (2020/38252) and Mark Kinkaid (ICOS 2020/38248) who, at the time of the conveyancing transaction, were solicitors in Fisher and Fisher. This judgment, however, deals with identical applications by Tughans in all three defamation actions.

[3] The applications consist of two main limbs. Firstly, Tughans applies to have the three actions against the firm struck out under Order 18 Rule 19(1)(c) and (d). Secondly, Tughans apply under section 8 of the Defamation Act 1996 that the three actions against the firm be struck out on the ground that they have no realistic prospect of success and that there is no reason why they should be tried.

[4] The defamation actions are based on the contents of three emails which the three plaintiffs say defamed them. The complained of portions of those emails were are follows.

[5] In an email sent by Edward Page to the client in the conveyancing transaction on 23 May 2019, Mr Page stated, inter alia, that he had received the following from Assetz:

> "Our solicitors have advised that they have over £12,000 on the clock in terms of fees. Their quote was originally £950 + VAT. However they have agreed to reduce what's on the clock to £6,000 + VAT in total. Can you liaise with Sandra to get her acceptance on this fee increase. (I do not want to hear any complaints about this fee increase, given the performance of here (sic) solicitor has caused this.) This fee will be netted off the loan completion, reducing the amount sent to her solicitor for completion. If not accepted by Sandra, then we can't provide the loan and stop here."

[6] In an email sent by Mark Reidy to the client in the conveyancing transaction on 3 September 2019, Mr Reidy stated, inter alia, that:

> "I have spoken with Assetz and they have advised me that Tughans are chasing your Solicitor weekly and have been from the start of August."

[7] In an email sent by Mr Page to the client in the conveyancing transaction on 7 October 2019, Mr Page stated, inter alia, that:

> "This is not normally the way we do business, but in this case the increase is fully justifiable, based on the considerable additional work that has been delivered by our Solicitors, that should have been picked up by other lawyers in the transaction."

[8] It should be noted that none of the three emails were sent by Tughans who make these applications. However the three defamation actions each state that the actions concern "defamatory words written or spoken by the defendants in the course of the conveyancing transaction" and that "insofar as the words were published in writing, the action is in libel. Insofar as the words were communicated orally the action is in slander." The allegations against Tughans in the three Statements of Claim are essentially that defamatory words were written or spoken by Tughans, their servants of agents, concerning the plaintiffs which were then repeated to the client of the plaintiffs by Mr Page and Mr Reidy.

First Defendant's Submissions

[9] Mr Hopkins submitted that the Statements of Claim allege three defamatory publications were made by Tughans. However, given the manner in which the statement of claim was pleaded, Tughans served a Notice for Further and Better particulars upon the three plaintiffs. In their replies, the plaintiffs stated that they did not know:

(i) The date of each alleged publication;
(ii) The individual within Tughans alleged to have published it;
(iii) The form of that publication; or
(iv) The words complained of as having been defamatory.

[10] Mr Hopkins submitted that the words actually spoken or written are the most important material fact in a defamation action. Yet here the plaintiffs had failed to specify what those words were. In the light of this inability to plead with specificity, Mr Hopkins argued that the plaintiffs were in breach of Order 82 of the Rules of the Court of Judicature. In support of this argument Mr Hopkins referred me to the decisions in *British Legal v Sheffield* [1911] 1 IR 69, *Irish Peoples Assurance v City of Dublin Assurance* [1928] IR 204, *Jackson v Wine* (1905) 39 ILTR12, *Butcher v Dowden* [1981] 1 Lloyds R 310 and *ABC v Chief Constable of West Yorkshire* [2017] EWHC 1650 (QB).

[11] Mr Hopkins argued that the three defamation actions should be struck out against Tughans under section 8 of the Defamation Act 1996. He referred me to the decision in *MacAirt v JPI Media NI Limited* [2021] NIQB 52 where Scofield J said:

> "In dealing with the present application under the Rules of the Court of Judicature 1980 (as amended) ("RCJ"), I am required to seek to give effect to the overriding objective: see RCJ Order 1, rule 1A(3). The overriding objective is to deal with the case justly, including so far as practicable saving expense, ensuring that it is dealt with expeditiously (as well as fairly), and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases. These various factors appear to me to favour grasping the nettle where, as here, the court has reached a view that the defamation claim rests on an unsustainable foundation."

[12] Mr Hopkins also referred me to the decision in *Kelly v O'Doherty* [2024] NIMaster 1 where I adopted the language used by Lewison J in *Easyair v Opal* [2009] EWHC 339 (Ch) in respect of the approach to section 8 of the 1996 Act. Counsel summarised that approach as being that the court must consider whether the plaintiff has a realistic claim in the sense of one which carries some degree of conviction, being more than merely arguable, as opposed to having a fanciful prospect of success.

[13] An important issue raised by Mr Hopkins was the matter of privilege. The essence of his argument was that, even if the court was to order the disclosure of all communications from Tughans to Assetz and they were found to contain material which was defamatory of the plaintiffs, a trial judge would nevertheless not be able to take those communications into account at trial because they were privileged. Counsel argued that communications between a solicitor and a client were either absolutely privileged, or subject to qualified privilege which meant that the privilege could only be defeated by proof of malice. The authorities cited by Mr Hopkins in this regard were *More v Weaver* [1928] 2KB 520, *Adam v Ward* [1917] AC 309 and *Horrocks v Lowe* [1975] AC 135.

[14] Mr Hopkins argued that in defamation cases there was undoubtedly a power, and indeed a need, for the courts to case manage proceedings and, if appropriate, to strike out claims. The court should not hesitate to use those case management powers, including the power to strike out, where it concluded that it was appropriate. Furthermore, the court had jurisdiction to stay or strike out a claim as an abuse of process where no real or substantial wrong had been committed and litigating the claim would yield no tangible or legitimate benefit to the plaintiff proportionate to the likely cost and use of court procedures. Such situations are those where the court concludes "the game is not worth the candle." (This expression apparently comes from 16th-century French gambling. It refers to low-stakes games where winnings were too small to cover the high cost of candles needed to light the table, meaning the effort was pointless).

Plaintiff's Submissions
[15] Mr Lavery submitted that the strike out application by the first defendant rested solely upon the absence of precision in the plaintiffs' pleading and an unpleaded, and hopeless, putative argument of privilege.

[16] In respect of the pleadings argument, Mr Lavery argued that the three emails from the other defendants referred to communications they had received from Tughans. At the current stage, Tughans knew exactly what case was being made against them. Although Order 82 required a plaintiff to give sufficient particulars, Mr Lavery asserted that, at this time, sufficient particulars had been given and that the plaintiffs were unable to give more details of the publications that Tughans had engaged in as the specifics of Tughans' publications were not within the power, custody or control of the plaintiffs. The precise detail and circumstances of those communications would emerge upon the provision of discovery by Tughans. Once all relevant discoverable documentation was provided by the defendants, it was anticipated that an application would be made to amend the pleadings so that the claim was further particularised. At the current moment the plaintiffs were unable to plead specifically whether the action was grounded in the tort of libel or the tort of slander. Hence both claims were pleaded. Nevertheless, the plaintiffs had set out the background giving rise to the claim, and had identified the context in which the defamatory works were written or spoken, the timeframe within which the defamatory words were written or spoken, and the gist of the defamation.

[17] Mr Lavery further submitted that, although the authorities relied upon by Mr Hopkins established that an application such as the current one could be made prior to the filing of a defence, the granting of an order was a matter at the court's discretion.

[18] In respect of the privilege argument, Mr Lavery argued that the issue of privilege "dangled before the court" had not been pleaded and that the plaintiffs were "embarrassed by the raising of the plea prior to a defence being raised." Mr Lavery submitted that the privilege argument was wholly without merit as it had been waived by the client and was being made in circumstances where the motivation for the communication was to justify a higher fee. Mr Lavery stated in his skeleton argument that the plaintiff declined to address Tughans' submissions on privilege because Tughans were raising matters which were relevant to a defence and no defence had yet been filed. Hence counsel argued that, if Tughans sought to rely on absolute privilege, they should first file a defence and any consideration of that defence should occur thereafter.

DISCUSSION

The Defamation Act 1996 Application
[19] Section 8 of the 1996 Act provides:

"(1) In defamation proceedings the court may dispose summarily of the plaintiff's claim in accordance with the following provisions.

(2) The court may dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried.

(3) The court may give judgment for the plaintiff and grant him summary relief (see section 9) if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried.

Unless the plaintiff asks for summary relief, the court shall not act under this subsection unless it is satisfied that summary relief will adequately compensate him for the wrong he has suffered.

(4) In considering whether a claim should be tried the court shall have regard to—

(a) whether all the persons who are or might be defendants in respect of the publication complained of are before the court;

(b) whether summary disposal of the claim against another defendant would be inappropriate;

(c) the extent to which there is a conflict of evidence;

(d) the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication); and

(e) whether it is justifiable in the circumstances to proceed to a full trial.

(5) Proceedings under this section shall be heard and determined without a jury."

[20] There is clearly an overlap between this statutory test for striking out defamation proceedings on the basis that there is no realistic prospect of success and the test for striking out applied under Order 18 Rule 19 that the cause pleaded must be unarguable or almost incontestably bad. However the tests are not identical and require to be considered separately.

[21] Borrowing from and adapting the language used by Lewison J in *Easyair v Opal* [2009] EWHC 339 (Ch), where he set out the principles applicable to the equivalent test for summary disposal in summary judgment applications, I consider that the approach under section 8 of the Defamation Act 1996 should be as follows:

(1) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success.

(2) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

(3) In reaching its conclusion, the court must not conduct a "mini-trial".

(4) This does not mean that the court must take at face value and without analysis everything that a plaintiff says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by the documentary evidence.

(5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary disposal, but also the evidence that can reasonably be expected to be available at trial.

(6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

(7) If the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

[22] *Gatley on Libel and Slander* (13th edition) states at paragraph 32-017:

> "The test to be applied in the assessment of the strength or weakness of the claim and defence is the same, namely existence or absence of realistic prospect of success. This phrase has become familiar not just in the summary judgment context but in other areas also. It has been accepted that the test under s.8 of the Defamation Act 1996 is the same as that under CPR Pt 24. Thus the explanations of Lord Woolf MR in *Swain v Hillman* as to the meaning of "no real prospect", and as to the circumstances when the summary procedure should be employed, offer material guidance. He said that:
>
> > "[t]he words 'no real prospect of succeeding' do not need any amplification, they speak for

> themselves. The word 'real' distinguishes fanciful prospects of success … (the words 'no real prospect of succeeding') direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success".
>
> The party resisting an application for summary judgment has to have a case which is better than merely arguable."

Gatley goes on to observe that, in the House of Lords debate on the Bill, Lord Hoffman observed that the object of using the wording "realistic prospect of success" was to encourage judges to use the power to grant summary relief "in a vigorous, humane and commonsense way."

[23] In *Alsaifi v Amunwa* [2017] EWHC 1443 (QB), Warby J explained why applications under section 8 are now few and far between in England and Wales:

> "Mr Amunwa's application is made in reliance on s 8 of the Defamation Act 1996. This is another slightly antique procedural weapon which is little used today. It allows the Court to deal with hopeless claims or defences in various ways. One of these is to 'dispose summarily of the plaintiff's claim' by dismissing it 'if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried.' That form of wording is familiar to lawyers from CPR 24.2, although there are some small differences. Section 8 was introduced because, at that time, defamation was outside the scope of the general powers to enter summary judgment. Now, causes of action for defamation are within the scope of those powers. Since that change in the law all or most applications for summary determination of such claims are made under Part 24. One reason for that is that Part 24, unlike s 8, permits summary determination of individual issues in a case. Section 8 has some remaining uses, but it has been largely left to gather dust."

That reasoning does not, of course, apply in Northern Ireland where the Civil Procedural Rules do not apply, and hence section 8 applications for summary disposal may be of very significant use to plaintiffs or defendants in this jurisdiction.

The Privilege Issue

[24] It may well be that, as this case proceeds against the second, third, fourth and fifth defendants, correspondence is handed over as a result of the discovery process which demonstrates that a solicitor working in Tughans did use the words complained of by the plaintiffs, either orally or in correspondence. It is at this point that the privilege argument made by Mr Hopkins is crucial.

[25] I do not accept Mr Lavery's submission that an argument in relation to privilege cannot be dealt with at this stage before a defence has been filed. In *Alsaifi v Amunwa* [2017] EWHC 1443 (QB) Warby J granted the defendant's application for summary disposal (advanced on the footing that a defence of reporting privilege under s.14 or s.15 of the Defamation Act 1996, was bound to succeed). Warby J observed at paragraph 5 of his decision that, at the time of the application, no defence had been filed but that the nature of the defence which would be relied on was sufficiently clear from the application before the court. Warby J's approach was a clear application of the overriding objective and saved expense.

[26] *Gatley* summarises the position regarding privilege in the context of defamation proceedings at paragraph 14-001:

> "The law recognises that there are certain situations ("privileged occasions") in which it is for the public benefit that a person should be able to speak or write freely and that this should override or qualify the protection normally given to reputation by the law of defamation. In most cases the protection of privilege is qualified, i.e. the defence is displaced by "malice", but there are certain occasions on which public policy and convenience require that a person should be wholly free from even the *risk* of responsibility for the publication of defamatory words and no action will therefore lie even though the defendant published the words with full knowledge of their falsity and even with the express intention of injuring the claimant."

[27] In paragraph 14-050 *Gatley* further explains:

> "An evidential privilege attaches to communications between solicitor and client for the purposes of actual contemplated litigation ("litigation privilege") or for the purposes of obtaining legal advice, even if no litigation is contemplated, if the purpose of the communication is the obtaining of legal advice by the client ("legal advice privilege"). The first is a product of the adversarial system, the second of the special nature of the relationship of confidence between solicitor and client. In other words, unless the client waives the privilege, the solicitor cannot give evidence relating to the communication nor are documents relating to it subject to disclosure. The privilege is "absolute", i.e. it is not capable of being overridden on any public interest ground. In practice that will protect *the client* against any action for defamation for statements made by him, unless they are provable by another means. However, it has been said that an absolute privilege (in the sense of a defence to a claim for defamation) applies to such communications, the effect of which would be to protect the solicitor in respect of statements made by him, even where the client waived the evidentiary privilege. However, in *Minter v Priest* an opinion was strongly indicated (though it was not

necessary to decide the point) that the privilege is qualified, not absolute."

[28] If solicitor-client communications are covered by qualified privilege, then the position is that, for a court to take account of them in defamation proceedings, the plaintiff must prove that the statements made in the communications were prompted by express malice. *Gatley* explains this in the following manner in paragraph 18-002:

> "Proof of malice defeats the defence of common law qualified privilege. The traditional approach was put very clearly by Bankes J in *Smith v Streatfeild*:
>
> > 'The principle upon which the law of qualified privilege rests is this: that where words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and … the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege … Although the occasion remains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence … Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion.' "

[29] The issue of qualified privilege being defeated by malice was reviewed by Lord Diplock in his speech in *Horrocks v Lowe* [1975] A.C. 135. The defendant is entitled be protected by the privilege unless some dominant improper motive on his part is proved. Lord Diplock stated:

> "Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests."

[30] In *Fox v Wokingham District Council and others* [2003] EWCA Civ 499 the defendants claimed, *inter alia*, qualified privilege. The defendants issued applications for summary judgment, pursuant to s 8 of the Defamation Act 1996 and CPR Pt 24. The judge ruled that there had been, on all occasions of publication relied upon,

occasions which had attracted the defence of qualified privilege. In so ruling, he distinguished that issue from issues of disputed fact. Accordingly, he granted the defendants relief under section 8 of the Act. The claimant applied for permission to appeal on the ground, inter alia, that the matter of qualified privilege was an issue of fact which should have been left to the jury to decide. The Court of Appeal refused the claimant's application. It held that in a case where the defence of qualified privilege arose, the burden of proving malice lay upon the claimant. In such a case, the court was entitled to take a robust stance and dismiss the claim unless the evidence raised a probability of malice, in the sense that the evidence was more consistent with its existence than its non-existence. Accordingly, in the instant case, the judge had been right to address the question of qualified privilege, it being a matter for him to decide. The conclusion that he had drawn from the basic facts as set out in regard to the position of the defendants could not be challenged.

[31] In *ABC (A Mother) v The Chief Constable of West Yorkshire Police* Warby J stated:

> "A defence of qualified privilege is defeated by proof that the defendant published the words complained of maliciously. To make such an allegation good, a claimant must prove that the defendant had a dominant improper motive: see *Horrocks v Lowe* [1975] AC 135 and the discussion in Gatley on Libel and Slander 12th edn. paras 17.1 ff. The test is notoriously hard to satisfy in practice. When it is satisfied, this is usually done by establishing the defendant's knowledge of or reckless indifference as to falsity (Gatley para 32.35). If this is proved, the inference can easily be drawn that the defendant had some dominant improper motive for saying what he did. There may in some cases be language so far in excess of the occasion as to be evidence of actual malice. But this will rarely be the case, and that is not the contention of the claimant here."

[32] Not only is there no malice pleaded but it is difficult to imagine what desire to injure the firm of Fisher and Fisher that Tughans might have had. Fisher and Fisher are a reputable, long-established firm of solicitors which was founded in 1898. It currently consists of some 14 solicitors and trainees and its practice areas are Family, Crime, Property, Estates and Wills, Business and Corporate, and Litigation. Fisher and Fisher have offices in Newry, Belfast, Rathfriland, Kilkeel, Donaghadee, and Newcastle. On the other hand, Tughans is a much larger firm, consisting of some 75 lawyers operating in Belfast city centre and the firm's practice area are Contracts and Technology, Corporate, Dispute Resolution, Employment, Environment and Planning, Estate Planning and Administration, Finance and Restructuring, Healthcare, Insolvency and Business Recovery, Real Estate, Procurement and Residential Conveyancing. While there is inevitably some overlap in the type of business the two firms seek to attract, it would be difficult to perceive them as bitter rivals whose success can only be achieved by one harming the reputation of the other. Malice is therefore improbable and the more likely motivation behind any

communication by Tughans was the justification to its client for the amount of fees being charged.

[33] It was therefore unsurprising that Mr Lavery offered me no basis whatsoever whereby it could be established that Tughans had acted with malice. Indeed, the plaintiff's Statement of Claim at paragraph 16(4) alleges an entirely different motive when it alleges that the alleged defamatory statements:

> "…were made for the First Named Defendant to justify their final fee charged which was twelve times more than their original fee quotation."

This perspective was reinforced by Mr Lavery's skeleton argument which submitted that :

> "the motivation for the communication was to justify a higher fee."

Clearly therefore this falls utterly short of showing that the dominant motive for any defamatory statements was a desire to injure the plaintiffs.

[34] *Gatley* at paragraph 3-014 states that it is clearly established at common law that, in determining the meaning of words, the intention and knowledge of the publisher are in general immaterial. However, the general rule does not apply where the defendant speaks on a privileged occasion and the issue is whether he was actuated by malice.

As Hirst LJ stated in *Loveless v Earl* [1999] EMLR 530:

> "Meaning is an objective test, entirely independent of the defendant's state of mind or intention. Malice is a subjective test, entirely dependent on the defendant's state of mind and intention. Thus, in a case where words are ultimately held objectively to bear meaning A, if the defendant subjectively intended not meaning A but meaning B, and honestly believed meaning B to be true, then the plaintiff's case on malice would be likely to fail".

[35] I find it difficult to see how any words said or written by Tughans for the apparent purpose of justifying their fees can survive an encounter with this principle. Nevertheless, in his oral submissions Mr Lavery stated that there "may be" an answer to Mr Hopkins' privilege argument in terms of malice. Essentially, in response to Mr Hopkins' argument on behalf of Tughans that there should be no trial because any communications between Tughans and Assetz were privileged, Mr Lavery's response on behalf of the plaintiffs was that this should be discussed at the trial. This argument is unsustainable.

The Pleadings

[36] The applications by Tughans also raise the issue of whether the plaintiffs have properly pleaded their allegations of defamation. Mr Hopkins has submitted that the

actual words spoken or written are the central material facts in a defamation claim. Hence Order 82 Rule 2 states that a plaintiff must provide sufficient particulars of the publications in respect of which the action is brought to enable them to be identified.

[37] Material facts are all those facts necessary for the purpose of formulating a complete cause of action: *Bruce v Odhams Press Ltd* [1936] 1 K.B.697 at p.712; It is not sufficient that a Statement of Claim simply express a conclusion drawn from facts which are not stated: *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 F.C.R. 109 at p.114. Not only must all material facts be pleaded, but they must be pleaded with a sufficient degree of specificity, having regard to the general subject-matter, to convey to the opposite party the case that party has to meet: *Ratcliffe v. Evans* [1892] 2 Q.B. 524 at p.532. The absence of material facts is a fundamental stumbling block in litigation. In their decision in *Michael O'Higgins v Barclays Bank plc* [2022] CAT 16 Marcus Smith J and Anthony Neuberger commented,

> "Bare or unparticularised assertion is not enough: a pleading must set out (but does not have to prove) all the material facts on which a party relies for his or her claim or defence."

Likewise, Popplewell LJ explained in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18] that a pleading must be supported by evidence which establishes a factual basis for an allegation. It is not sufficient simply to plead allegations which, if true, would establish a claim. There must be evidential material which establishes a sufficiently arguable case which undergirds it.

[38] In *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) Leggatt J explained:

> "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

[39] The court cannot be invited to make a conjecture as to the words that were communicated by Tughans to their clients in the conveyancing transaction. In *Jones v Great Western Railway Company* (1930) 144 LT194 at p 202, Lord Macmillan observed that:

> "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."

Collins Rice J explained in *Sivananthan v Vasikaran* [2023] EMLR 7 at [53]:

> "There is a difference between inference and speculation. The components of an inferential case must themselves be sufficiently evidenced and/or inherently probable to be capable of adding up to something which discharges a claimant's burden".

[40] In addition to those general authorities on pleadings, there are a number of authorities on the subject of pleadings in defamation actions. *British Data Management plc v Boxer Commercial Removals plc and another* [1996] 3 All ER 707 was a pre-CPR decision of the Court of Appeal for England and Wales which considered the issue of sufficiency of pleading in defamation actions. Counsel for the defendant argued that it was a fundamental principle of defamation law that the exact words of the libel should be set out verbatim in the statement of claim, and that it was not sufficient merely to state their gist or substance and that its rationale was that otherwise the defendant did not know the case he had to meet on the first and basic issue as to whether or not the words were defamatory. Hirst LJ, giving the decision of the court, stated that the importance of the actual words had been repeatedly stressed in the authorities, as demonstrated, for example, by the very well-known passage in the judgment of Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 1 All ER 497 at 504–505. Hence the court agreed with the proposition that in a libel the words used are the material facts, and must therefore be set out in the statement of claim: it is not enough to describe their substance, purport or effect [see *Harris v Warre* (1879) 4 CPD 125 at 127, 129].

Hirst J analysed the leading case of *Collins v Jones* [1955] 2 All ER 145. The facts were that the defendant, who was a medical practitioner, wrote a letter to the chairman of the children's committee of a county borough council, as a result of which an inquiry was held before a sub-committee of the council during which the defendant made oral statements, including a statement that before he wrote to the chairman he had seen the medical officer of health, that two letters had passed, and that he had then written to the chairman. A transcript of the proceedings of the inquiry was shown to the plaintiff, who was a children's officer employed by the council.

In the statement of claim she pleaded, inter alia, that in or about September or October the defendant wrote and published two letters addressed to the medical officer of health; and that the defendant further wrote and published the following words:

> "… the children's officer (meaning thereby the plaintiff), has persecuted the matron of the West Cross nursery and thereby retarded her recovery to health and systematically persecuted the master and matrons of the cottage homes with the result that they left their employment and retired prematurely."

The defendant asked for particulars of this paragraph, to which the plaintiff replied that particulars could not be given, as inspection of the letter could not be obtained.

The defendant then applied for an order for particulars of each of the letters, specifying the date time and place of each, identifying the person or persons to whom they were alleged to be published, specifying which of the words were alleged to have been published or contained in each of the letters, and setting out the precise words complained of in each. Both the registrar and the judge at first instance refused the order. In the Court of Appeal Denning LJ gave the leading judgment, and having quoted from Lord Coleridge CJ in *Harris v Warre*, said:

> "Assuming that these letters did contain some statements defamatory of the plaintiff, that is not sufficient to ground a libel action. She must show what the actual words were. A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty: and to do this he must have the letter before him, or at least have sufficient material from which to state the actual words in it. A suspicion that it is defamatory is not sufficient. He cannot overcome this objection by guessing at the words and putting them in his pleading. The court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one. If he cannot give the particulars, he will not be allowed to go on with the charge … If the plaintiff can give proper particulars, she can of course go on with the action: and she can prove her case by subpoenaing the holder of the letter to produce it … but before she can do this, she must first be able to launch a case with sufficient certainty. She must give the required particulars."

Hirst LJ observed that it was important to bear in mind the purpose of a Statement of Claim. That was to enable the defendant to know the case that he had to meet so that he could properly plead his case, with the result that the issues were sufficiently defined to enable the appropriate questions for decision to be resolved. In a libel case, the first question was whether the words were defamatory of the plaintiff, which depended on their meaning; unless the plaintiff succeeded on this fundamental issue, his action would fail. Next, a number of questions might arise on defences which the defendant might wish to raise, for example a plea of justification, which depends on whether the words are true or false, and similarly mutatis mutandis in the case of a plea of fair comment. Hirst LJ then stated:

> "This purpose will not be achieved unless the words are pleaded with sufficient particularity to enable the defendant not only to understand what it is the plaintiff alleges that they meant, but also to enable him to decide whether they had that meaning and, if not, what other meaning they had or could have. Equally, unless the words are so pleaded the defendant will not be able to determine whether the words in their alleged meaning or other perceived meaning are true, or fair comment, and plead accordingly. Moreover, whenever an injunction is sought, such particularity is needed to enable the court to

frame an injunction defining with reasonable precision what the defendant is restrained from publishing.

This is why there must in all cases be reasonable certainty as to the words complained of, or in the case of a quia timet injunction what words are threatened, and normally this will require the pleading of the actual words or words to the same effect. Only on this basis can the case proceed properly through the interlocutory and pleading stages to trial, and then to the formulation of the questions to be put to the jury and to a proper answer to them."

[41] In a post-CPR decision in England and Wales, *ABC (A Mother) v The Chief Constable of West Yorkshire Police* [2017] EWHC 1650 (QB) Warby J stated:

"Any claimant in a defamation case has to prove that the defendant published a statement about them, or is vicariously responsible for someone who did so. The following passages from *Bode v Mundell* [2016] EWHC 2533 (QB) are pertinent:

'12 … precision in the pleading and proof of publication, including the actual words used, is always essential. It is not enough to plead or prove the gist or substance of what was said. In libel this is rarely a problem. In slander, it often is.' "

Warby J went on to say:

"There are good reasons for these requirements, which are long-established. The actual words spoken are critical, because everything else flows from the words: meaning, whether defamatory, defences and damages: see *Best v Charter Medical of England Ltd* [2001] EWCA Civ 1588, [2002] EMLR 18 [7] (Keene LJ), *Umeyor v Ibe* [2016] EWHC 862 (QB) [39]. Put another way, these requirements protect freedom of speech by requiring a claimant to prove strictly the factual basis on which the court is asked to interfere with that freedom. Only then is the court able reliably to evaluate whether such an interference is necessary. One must not be too precious about this. Proof that words close to those specifically alleged were used will be enough. But it has never been acceptable to call evidence of the gist or meaning of the spoken words, rather than the words themselves."

[42] Although court rules in defamation actions have differed between England and Wales and Northern Ireland since the passage of the CPR in that jurisdiction, a similar approach to pleadings in defamation actions is nevertheless taken in our jurisdiction. In *Mawhinney v Fitzpatrick* [2013] NIQB 96 Gillen J said;

"[11] There is no doubt that the law requires reassuring clarity in this area of defamation. Plaintiffs cannot proceed on the basis of glimpses

and suggestions, turning phrases until they catch the light. Hence it is unsurprising to find in *Gatley on Libel and Slander* 11th Edition at para 28.13 the author asserting:

> "the actual words spoken had to be set out verbatim in order that the defendant may know the certainty of the charge and may be able to shape his defence. It is not sufficient to allege that the slanderer used such – and – such words, or words to an alleged effect."

[12] In *Best v Charter Medical of England Ltd* [2002] EMLR 18 at para 7 et seq, [2001] All ER (D) 395 (Oct) the Court of Appeal said:

> "A crucial question in defamation actions is always whether the words used have a defamatory meaning, and it is therefore impermissible to plead the meaning but not to plead the words used. The words may be capable of bearing more than one meaning, and in such circumstances the claimant must plead the meaning he asserts that the words have. But the defendant may wish to contend that that is not how the words would reasonably be understood. He may also wish to try to justify any defamatory allegation, but he cannot make that decision until the claimant sets out the allegations which it is said he published. It follows that it is not enough for a claimant to plead the gist of what was allegedly said or written; he must set out the words with reasonable certainty, a test long established.
>
> "8. [It]would not normally suffice for a claimant to plead that the defendant made a statement "to the effect that" a claimant was a liar or had behaved in a discreditable way. To do that … is to plead the meaning of the words used and one does not know whether that meaning derives from inference or not."

Is the Game Worth the Candle?

[43] Mr Hopkins also submits that the three actions ought to be struck out on the basis that they are an abuse of process as no real or substantial wrong has been committed and that litigating the claim will yield no tangible or legitimate benefit to the plaintiff proportionate to the likely costs and use of court procedures. This means that the court is obliged to reach a decision as to whether, in the words of Eady J first used by him in *Schellenberg v The British Broadcasting Corporation* [1999] EWHC 851 (QB) where he stated that, for the purpose of applying the overriding objective, he was not only entitled, but indeed bound, to ask whether "the game is worth the candle."

[44] Neither counsel addressed the court specifically on the meaning of the words used in the three complained of emails (which Mr Lavery invites me to believe clearly reflect words spoken or written by an employee or partner of Tughans.) However I do have the benefit the plaintiff's pleadings which provide the meanings that they allege flow from the communications. They are:

(a) That the Plaintiff was unprofessional in the conduct of the conveyancing transaction;
(b) That the actions of the Plaintiff caused the legal fees payable by her client to the First Named Defendant to increase from £950.00 plus VAT, to £6,000 plus VAT and then £12,000 plus VAT;
(c) That the Plaintiff caused unnecessary delay to the completion of the transaction;
(d) That the Plaintiff caused unnecessary complication to the transaction;
(e) That the Plaintiff had delayed unnecessarily and unreasonably, in responding to correspondence;
(f) That the Plaintiff was incompetent and not fit to be a practising Solicitor
(g) That the Plaintiff was indolent during the course of the conveyancing transaction; and
(h) That the Plaintiff could not be trusted to act in a conveyancing transaction.

[45] In *Jeynes v News Magazine Limited* [2008] EWCA Civ 130 Sir Anthony Clarke MR explained how the meaning of words ought to be approached in defamation actions:

> "The legal principles relevant to meaning have been summarised many times and are not in dispute. …
>
> They are derived from a number of cases including, notably, *Skuse v Granada Television Limited* [1996] EMLR 278, per Sir Thomas Bingham MR at 285-7. They may be summarised in this way:
>
> (1) The governing principle is reasonableness.
>
> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
>
> (3) Over-elaborate analysis is best avoided.

(4) The intention of the publisher is irrelevant.

(5) The article must be read as a whole, and any 'bane and antidote' taken together.

(6) The hypothetical reader is taken to be representative of those who would read the publication in question.

(7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the product of some strained, or forced, or utterly unreasonable interpretation…' (see Eady J in *Gillick v Brook Advisory Centres* approved by this court [2001] EWCA Civ 1263 at paragraph 7 and Gatley on Libel and Slander (10th Edition), paragraph 30.6).

(8) It follows that 'it is not enough to say that by some person or another the words *might* be understood in a defamatory sense.' *Neville v Fine Arts Company* [1897] AC 68 per Lord Halsbury LC at 73."

[46] In terms of the reasonable meaning of the words written by Mr Page and Mr Reidy in the emails which they sent, I do not consider that the words set out in the Statement of Claim would be so understood by a hypothetical reasonable reader. Such a reader would not understand the words said or written as being defamatory in the manner claimed.

Conclusion

[47] Firstly, I consider, having taken into account the statutory factors set out in section 8(4) of the Defamation Act 1996, together with other relevant matters adduced by counsel, that I should dismiss the plaintiff's defamation claim as it appears to me that it has no realistic prospect of success and there is no reason why it should be tried. The basis for this decision is that, even if the action were to proceed to discovery, and details of the communications made by Tughans were discovered, that those communications are covered by absolute or qualified privilege. If the correct view is that they are covered by absolute privilege, then the plaintiff cannot succeed in the action. If the correct view is that they are covered by qualified privilege, then the plaintiff must prove express malice in order to succeed. No such malice is pleaded in the plaintiff's Statement of Claim. To suggest that there "may be" malice is either a McCawber submission (something may turn up) or, in circumstances where the plaintiffs have alleged in their Statements of Claim that the motivation behind the communication was to justify their final fee to their clients, is a mere tilting at windmills.

[48] Secondly, even if this view on privilege is incorrect, I would nevertheless have granted the first defendant's application and dismissed the plaintiffs' claims under section 8 of the Defamation Act 1996 given the manner in which it had been pleaded. Order 82 of the Rules of the Court of Judicature require a plaintiff to provide sufficient particulars of the publication in respect of which the action is brought to enable them to be identified. This has not been done. The publications of which particulars have been provided are publications brought into being by the third and fourth defendants, not the first defendant. Not only have the plaintiffs' claims been inadequately pleaded, but in addition, there is, in my view, serious doubt as to whether the meaning attributed by the plaintiff to those publications is a reasonable interpretation of them. I do not accept that the meaning of the words to the hypothetical reasonable reader would be that they had had the effect of harming the reputation of the reputable and long-established form of Fisher and Fisher or of its solicitors. Accordingly, I also consider on these grounds that the action has no realistic prospect of success and there is no reason why it should be tried.

[49] Thirdly, I would dismiss the plaintiffs' action' on the basis that they were an abuse of process in the sense that the game was not worth the candle. As the plaintiffs accept in their Statements of Claim, this litigation stems from a potential dispute over the professional fees of the first defendant in a conveyancing transaction. The plaintiffs seek to escalate that into a defamation action. Although no statutory "serious harm" threshold has been introduced in connection with defamation litigation in Northern Ireland, the combination of the overriding objective and authorities such as *Schellenberg v The British Broadcasting Corporation* has the effect of requiring the court to dismiss some defamation actions where they do not merit the expenditure of the court's resources.

[50] I will hear counsel as to costs at their convenience.