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*Judgment: approved by the Court for handing down* | *Delivered:* **30/11/09**
*(subject to editorial corrections)**

**2006 No. 15272**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**GERARD McDONNELL, trading as Microclean Environmental**

**Plaintiff/Appellant:**

**-and-**

**DAWSON ADAIR**

**Defendant/Respondent:**

_____

**McCLOSKEY J**

## I INTRODUCTION

**[1]** The Plaintiff appeals against the order of Master McCorry, whereby, acceding to the Defendant's application, it was ruled that the Plaintiff's claim be struck out pursuant to Order 18, Rule 19 of the Rules of the Court of Judicature or, alternatively, in the exercise of the inherent jurisdiction of the court.

## II THE PLAINTIFF'S CASE

**[2]** This is a libel action. The context surrounding the alleged libel is understood by reference to the following agreed facts:

(a) The Plaintiff is the owner of the business known as Microclean Environmental which trades throughout the island of Ireland. The

firm is engaged in the provision of oil remediation services, which is acknowledged to constitute a specialist field.

(b) The Defendant is the managing director of Messrs. Davies Adair & Partners, who trade as chartered loss adjusters with a place of business in Belfast. This is one of only four firms of loss adjusters in Northern Ireland actively involved in the sphere of oil remediation claims.

(c) The Plaintiff initially wrote to the Defendant, by letter dated 7th January 2004. The essence of this letter, which essentially took the form of a self-declared business introduction, is ascertained from the following passage:

> "*As experts in the field of oil remediation with a proven track records for over ten years we feel that your company would benefit significantly by allowing us to join your panel of approved oil remediation contractors. We would therefore ask that you consider our application and forward any details as to the criteria to join your panel.*"

This was the first of six letters transmitted by the Plaintiff to the Defendant, all couched in virtually identical terms. The last of these letters is dated 2nd November 2005.

(d) Ultimately, by letter dated 10th November 2005, the Defendant replied. This is the allegedly defamatory item.

**[3]** The following is the text of the Defendant's letter dated 10th November 2005, addressed to the Plaintiff:

> "*Dear Sir,*
>
> *We refer to yours dated 2nd November 2005.*
>
> *We have no record of previous applications to our company bar one but we have had occasion to consider using your firm and discreet and prudent enquiries were made in the past. Competitors in the profession strongly advised us against using your company on the basis of various criteria.*
>
> ***Firstly, we have been advised by more than one party that your charges are not merely uncompetitive but excessive to a point where bad faith is suspected.*** *Reliable sources whom we respect in the Republic of Ireland have indicated that you have been in litigation over such issues.*

> ***Secondly, we have had occasion to examine a sample of your work in the Republic during the course of work in progress and we were alarmed by the poor quality of the procedures and the lack of safety measures.*** *We were called on to the site by a client as consultants for this reason and a conclusion was that* ***your work was far below the standard we would expect. ...***
>
> *You indicate that you are the only specialist oil remediation contractor in Northern Ireland that we have not used.* ***This statement is untrue and indicates poor research. Such a sweeping statement could, in any event, only be made by breach of the Data Protection Act and/or improper access to confidential information. Either way, indiscretion or dishonesty, or both, is suggested by these contentions.***
>
> *The last time we heard from you we received a solicitor's letter suggesting that we were acting unfairly in terms of appointments made by this office. Now you write to us inviting to consider your firm …*
>
> *The chronological order of the correspondence and all of the above indicates that* ***you are a disingenuous entity devoid of good faith and willing to abuse the law on both sides of the Irish border.***
>
> *On the basis of visual examination of your site work, references from numerous respected colleagues in Ireland and the very dubious content of such correspondence that we have actually received from you we can clearly state that we have no intention of using your firm under any circumstances.*"

While this letter must, of course, be read as a whole *and* in the context of the antecedent correspondence, I have highlighted those passages about which the Plaintiff claims most bitterly in contending that he and his firm have been grievously defamed. This is duly reflected in the Statement of Claim.

**[4]** As appears from the chronology set out above, the offending letter was the only reply of substance to the six letters sent by the Plaintiff to the Defendant during the period January 2004 to November 2005. In the course of this period, the Plaintiff instructed a firm of solicitors who, by letter dated 20th April 2005, expressed their client's concern that the Defendant had never engaged his services and advanced the suggestion that the Plaintiff may have been the victim of unlawful discrimination on the ground of religious belief and/or political opinion. Based on the evidence before the court, there was no reply to this letter. Ultimately, following receipt of the offending letter, the same firm of solicitors wrote to the Defendant again, by letter dated 13th January 2006, intimating instructions from the Plaintiff "*… to pursue a claim for unlawful discrimination against your client*" and indicating that appropriate

proceedings would soon be initiated. [In passing it would appear that no such proceedings materialised, in the event]. Shortly afterwards, by letter dated 30th March 2006, the Plaintiff's present solicitors wrote to the Defendant, contending that the offending letter was defamatory of their client, in the terms of a conventional letter before action. Proceedings were then initiated with commendable expedition, by Writ of Summons issued on 28th April 2006.

**[5]** On 27th June 2006, the Plaintiff secured judgment in default of any appearance on behalf of the Defendant. By summons dated 4th September 2006, the Defendant moved to set such judgment aside. This application generated, *inter alia*, an affidavit sworn by the Defendant, which contains averments relating to the various items of correspondence highlighted above. In this affidavit, the Defendant makes no real attempt to explain his failure to reply to the succession of letters transmitted by and on behalf of the Plaintiff during the period in question. Further, he avers:

> "*The gist of the Plaintiff's correspondence related to canvassing for business and such correspondence was uninvited, presumptive and demanding*".

This particular averment invites three observations. Firstly, it does not appear germane to the purpose for which the affidavit was being sworn. Secondly, its tone is regrettably belligerent and unapologetic. Thirdly, whereas an affidavit of this kind should be strictly confined to exclusively factual averments, I consider this to be pure comment and, therefore, inappropriate. I would add that a person's private correspondence is to be distinguished from affidavits sworn for the purposes of legal proceedings.

**Publication**

**[6]** In his first affidavit, the Defendant further avers that the offending letter was send by recorded delivery to the Plaintiff's address, was addressed to the Plaintiff and was contained in a sealed envelope. This prompted a replying affidavit sworn by the Plaintiff, which contains the following averments:

> "*Mr. Adair states that the envelope was sealed and addressed to me and at no stage were the contents of the letter communicated to any other person. This is not correct. The correspondence was opened by my father and read by my father. The letter presumably was dictated by Mr. Adair to an employee of his staff. There has been clear publication by Mr. Adair to others. The envelope was not identified as being private and confidential and in the circumstances publication has clearly taken place.*"

In a rejoinder affidavit, the Defendant avers that the offending letter came into existence as a result of its contents having been dictated by him to one Phyllis McKillen, a fellow director of the Defendant's company.

**[7]** In his Defence, the Defendant admits that he composed the offending letter and transmitted same to the Plaintiff. He denies any publication of the letter. He pleads, in the alternative, that if there was any publication, this occurred on an occasion of qualified privilege. He denies that any of the offending words, whether by their natural and ordinary meaning or by innuendo or a combination of both, were defamatory of the Plaintiff. He pleads, in the alternative, that the offending words were true in substance and in fact.

**[8]** On its face, the offending letter was posted by recorded delivery to the address at 8 Grainemore Road, Keady, County Armagh. This is identified as the Plaintiff's business address in the succession of letters noted in paragraph 2(c) above. The Plaintiff alleges that the letter was published to the following audience:

(a) Phyllis McKillen, who typed the letter and is identified as a director of the Defendant's firm.

(b) Eugene McDonnell, the Plaintiff's father, who opened the letter and read its contents.

(c) Three members of staff employed by the Plaintiff – a receptionist, the Plaintiff's personal assistant and the operations manager.

As was highlighted during argument, the assertion of publication to the last three-mentioned persons is not easily reconciled with the Plaintiff's averments, noted above. The Defendant admits publication of the allegedly defamatory material to Phyllis McKillen, his case being that he dictated the offending letter and she subsequently typed same. He admits further that he is the author and signatory. He denies the other aspects of publication asserted by the Plaintiff. Of course, in the context of an application of this kind, the Plaintiff's allegations of publication must be assumed to be correct and I shall proceed on this basis.

**[9]** In short, as regards publication, two separate "camps" fall to be considered. Membership of the Plaintiff's "camp" is allegedly constituted by his father and three of his employees. The sole member of the Defendant's "camp" to whom publication was made is a fellow director of the Defendant.

## III GOVERNING PRINCIPLES

**[10]** Invoking Order 18, Rule 19 of the Rules of the Court of Judicature and, in the alternative, the inherent jurisdiction of the court (which, properly analysed, seems to add nothing of substance in the present context), the essence of the Defendant's contention is that the Plaintiff's case is an abuse of the process of the court and should be dismissed in consequence. The Master concurred with this contention and ordered accordingly.

**[11]** Adaptability and elasticity are two of the chief characteristics of the doctrine of abuse of process. The word "abuse", with its connotations of intentional and deliberate misfeasance, is something of a misnomer in this context. It is aptly substituted by "misuse". In ***Hunter –v- Chief Constable of West Midlands Police*** [1982] AC 529, Lord Diplock explained (at p. 536) that there exists an –

> "*… inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique.* ***It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kind of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power***".

[My emphasis].
The characterisation of the court's function as the performance of a duty, to be contrasted with the exercise of a discretionary power, is striking. It serves to underline the sanctity of the court's process and the severity of the sanction which must follow for any misuse thereof.

**[12]** In ***Johnson –v- Gore Wood & Company*** [2002] 2 AC 1, where the litigation context was one of a professional negligence action, Lord Bingham pronounced on the doctrine of abuse of process in these terms:

> "*The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise dissolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court …*
>
> ***This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward***."

[Emphasis added].

As Lord Bingham observed further, the power enshrined in Order 18, Rule 19 of the Rules of the Court of Judicature (the present English equivalent being CPR Rule 3.4) is one manifestation of the power described by Lord Diplock in ***Hunter***. It might be said that given the increasing prominence of the over-riding objective (enshrined in Order 1, Rule 1A of the Northern Ireland Rules) and the principles and values which it seeks to protect and promote, there is, in contemporary litigation, a sharper focus on the inherent power grounded in the doctrine of abuse of process than ever before.

**[13]** There is one particular feature of applications of this kind which may properly be highlighted. Where a Defendant moves to strike out proceedings, whether invoking the doctrine of abuse of process or any of the other grounds encompassed in Order 18, Rule 19, all of the averments in the Statement of Claim "*… must be assumed to be true*" (per Carswell LCJ in ***O'Dwyer and Others –v- Chief Constable of the Royal Ulster Constabulary*** [1997] NI 403, p. 406) and "*… any reasonable doubt must be resolved in favour of the claimant*" (per Lord Bingham in ***Johnson,*** *supra,* p. 36E). Furthermore, as expressed by Sir Thomas Bingham MR in ***E (a minor) –v- Dorset CC*** [1995] 2 AC 633, at 693-694 (in a passage subsequently approved by the House of Lords):

> "*I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on grounds of a Plaintiff's choosing, since he may generally be assumed to plead his best case and there should be no risk of injustice to Plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached*".

Furthermore, by long established authority and as recorded by Carswell LCJ in ***O'Dwyer and Others***:

(a) The summary procedure for striking out a claim is to be invoked only in plain and obvious cases.

(b) It should not be applied to an action involving serious investigation of ancient law and questions of general importance.

(c) It should be confined to cases where the cause of action is obviously and almost incontestably bad.

(d) An order should not be made unless the case is unarguable.

The Lord Chief Justice continued (p. 406E):

> "*That said, it is to be recognised that if the claim is bound to fail on the law, the courts should not shrink from striking it out*".

**[14]** In the particular sphere of defamation actions, a discrete stream of jurisprudence has evolved during recent years. The leading authority is ***Jameel –v- Dow Jones and Co*** [2005] QB 946, a decision of the English Court of Appeal. The Plaintiff, a Saudi Arabian national, alleged that he had been defamed in an article which claimed that he was a funder of Al-Qaeda. The Defendant, the publisher of a US newspaper, posted the article on an internet website based in the USA, which was available to subscribers in England. The Defendant claimed that only five subscribers in England had secured access to the offending publication and moved to dismiss the Plaintiff's defamation action as an abuse of process, on the ground that no or, at most, minimal damage had been inflicted on the Plaintiff's reputation. The Defendant succeeded, ultimately.

**[15]** In formulating the correct doctrinal approach to an application of this nature, Lord Phillips MR recorded, firstly, the development of the test of whether a real and substantial tort had been committed within the jurisdiction, in the context of applications to set aside service of proceedings outside the jurisdiction, traceable to the decision of the English Court of Appeal in ***Kroch –v- Rossell*** (etc.) [1937] 1 All ER 725 (especially per Slesser LJ, at p. 729 and per Scott LJ, at p. 732). His Lordship also adverted to two recent developments which make the courts more willing than previously to accede to the contention that the pursuit of a libel action is an abuse of their process. The first is the introduction of the over-riding objective in the Civil Procedure Rules – which is mirrored in Order 1, Rule 1A of their Northern Irish counterpart. The second is the advent of the Human Rights Act 1998, which Lord Phillips explains in these terms:

> "*[55] … Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, insofar as it is possible to do so. Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process* ***defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.***"

[My emphasis].

Lord Phillips MR also highlighted that under English law a declaration of falsity at the conclusion of a libel action is not an available remedy: see paragraph [67].

**[16]** The following passage in paragraph [68] of the judgment is a reflection of the first of the two considerations emphasized above viz. the impact of the over-riding objective:

> "*[68] …We anticipate that these defences* [i.e. qualified privilege] *are likely to prove cumbersome to try with a jury, involving a lengthy and expensive trial. At the end of the day the trial will determine whether the publications made to the five subscribers were protected by qualified privilege. If they were not, it does not seem to us that the jury can properly be directed to award other than very modest damages indeed. These should reflect the fact that the publications can have done minimal damage to the claimant's reputation.*"

In reasoning thus, Lord Phillips noted that three of the five subscribers belonged to the claimant's camp and he recorded the contentious issues of whether they were previously aware of the offending allegation and whether the other two subscribers had ever heard of the Plaintiff previously. Lord Phillips continued:

> "*[69] If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.*
>
> *[70] If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that* ***the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort ...***
>
> ***It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake.***"

This passage confirms the importation of the test of 'real and substantial tort' to the sphere of strike out applications of the present *genre*.

**[17]** In Jameel, the court also rejected an argument that to dismiss the claim as an abuse of process would contravene the claimant's rights under Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Per Lord Phillips:

> "*[71] We do not consider that this Article requires the provision of a fair and public hearing in relation to an alleged infringements of rights when the alleged infringement is shown not to be real or substantial.*"

Finally, the court considered the claim for an injunction, noting that, *in principle,* the pursuit of an injunction restraining further publication of the alleged libel, where this is a real risk, could justify the perpetuation of the proceedings. However, the court was unpersuaded that such justification existed in the particular context:

> "*[76] In these circumstances, if this litigation were to proceed and to culminate in judgment for the Plaintiff, it seems to us unlikely that the court would be able, or prepared, to formulate and impose an injunction against repetition of the defamation in terms that would be of value to the claimant. We do not believe that a desire for this remedy has been what this action has been about or that the possibility of obtaining an injunction justifies permitting this action to proceed.*"

**[18]** ***Jameel*** was decided some four years ago. Other decisions, all belonging to the same territory, were brought to the attention of the court. These include ***Bezant –v- Hans Anderson and Others*** [2007] EWHC 1118 (QB); ***McBride –v- The Body Shop International plc*** [2007] EWHC 1658 (QB); ***Carrie –v- Tolkien*** [2009] EWHC 29 (QB); and ***Noorani –v- Calver*** [2009] EWHC 561 (QB). These are all first instance decisions. It seems to me that they are properly described as illustrations of the application of the governing principles to their particular, fact sensitive contexts. This is not to gainsay the erudition which characterises all of them. Furthermore, I have derived assistance from the reminder in paragraph [130] of ***Bezant***:

> "*[130] Whilst the power to strike out an action undoubtedly exists, it is equally clear that it is a Draconian power which should only be exercised in a clear case.*"

**[19]** For the avoidance of doubt, I would add that Mr. Jameel, together with the trading company of which he was president and general manager, brought separate defamation proceedings, complaining of the same newspaper article, against the publisher itself viz. The Wall Street Journal, which culminated in a decision of the House of Lords: see ***Jameel and Another –v- Wall Street Journal Europe*** [2007] 1 AC 359 and [2006] UKHL 44. The two questions of law of general public importance considered, and determined, by the House were (a) the entitlement of a trading

corporation such as Mr. Jameel's company to sue and recover damages without pleading or proving special damage and (b) the scope and application of the so-called "***Reynolds***" defence, described by Lord Bingham as "*an important form of qualified privilege*": see paragraph [1]. Mr. Jameel and his company succeeded on the first of these issues, but not the second, with the result that the jury's awards of £30,000 and £10,000 respectively were reversed.

## IV THE JUDGMENT OF THE MASTER AND THE PARTIES' ARGUMENTS

**[20]** Master McCorry acceded to the Defendant's application in a carefully constructed, reserved ruling. Having adverted to Order 18, Rule 19, the over-riding objective, the decision in ***Jameel*** and some of the other decided cases in this field, the Master reminded himself of the exceptional nature of the power which he was being invited to exercise and he noted, correctly, the fact sensitive nature of certain other decisions cited to him. He continued:

> "*[21] It appears to me that what this court must do is, having regard to the facts of this case, but without reaching decisions on matters of fact which are in dispute, ask the following questions, which by their very nature overlap. Firstly, can publication of an alleged libel to four people in the Plaintiff's camp, but against a background of probable close contact within a small commercial field, amount to a real or substantial tort? Secondly, given the limited publication, but again taking into account the narrow commercial field, is there a need for vindication of the Plaintiff's reputation? Thirdly, given the limited publication but having regard to the narrow commercial field, are any damages likely to be proportionate to the damage caused?*"

The Master expressed his conclusion in the following terms:

> "*If one takes the factor of the narrow commercial field out of the equation, then it seems to me that publication to just four people within the Plaintiff's own camp does not amount to a real substantial tort, does not require vindication of his reputation and even if the Plaintiff was to succeed, any damages likely to be awarded would be disproportionate to the cost of the action and the use of court resources. In short, the gain would not be worth a candle.*"

The Master then considered the factor of the narrow commercial field and, emphasizing the narrow and limited scope of publication of the alleged libel, concluded that this did not warrant a different outcome.

**[21]** The main criticism of the Master's ruling advanced by Mr. O'Donoghue QC (appearing with Mr. Cleland), on behalf of the Plaintiff, was his suggested failure to acknowledge that those to whom the alleged libel was published included Ms McKillen, who does not belong to the Plaintiff's "camp". While this criticism may have some force, having regard to the terms in which paragraphs [21] and [22] of the ruling are framed, it may be noted that in paragraph [7], the Master specifically recorded that the offending letter had been dictated by the Defendant and typed by Ms McKillen, a director in the Defendant's firm. Mr. O'Donoghue further submitted that had the Master, in the key passages of his ruling, acknowledged the publication to Ms McKillen he would have declined to make the order sought.

**[22]** On behalf of the Defendant, Mr.Bentley QC (appearing with Mr. McCrea) broadly supported the approach and reasoning of the Master. He laid emphasis on the limited scope of publication of the offending letter and, in particular, the positions and characteristics of the members of the publication audience. He highlighted that four of these plainly belong to the Plaintiff's "camp", while the fifth, Ms McKillen, is a member of the Defendant's "camp" and presumably subscribes to the views expressed in the letter or, alternatively, probably knows little or nothing about the Plaintiff – and, in either case, is unlikely to think any worse of him in consequence of the impugned letter.

## V CONCLUSIONS

**[23]** The rationale underpinning the correct doctrinal approach in matters of this kind is encapsulated in ***Jameel*** in the following passage:

> "*[54] …An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.*"

This formulation was foreshadowed in paragraph [40] of the judgment:

> "*[40] We accept that in the rare case where a claimant b rings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the Defendant may well be to challenge the claimant's resort to English jurisdiction or to seek to strike out the action as an abuse of process …*

*An alternative remedy may lie in the application of costs sanctions.*"

Simultaneously, the court rejected an invitation to abolish the presumption of damage in the law of libel. The over-riding objective enshrined in Order 1, Rule 1A requires the court to deal with individual cases in a manner proportionate to what is at stake. This includes the importance of the case and the complexity of the issues. The court is also enjoined to consider the appropriate allocation of its resources, which are finite in nature, taking into account other demands on court time and attention.

**[24]** It cannot be gainsaid that the offending letter is manifestly critical of the Plaintiff and is framed in blunt and strong language. Indeed, aspects of its contents may fairly be described as intemperate. The letter is an undisguised attack on the good faith, standing and credentials of the Plaintiff in his business capacity. It represents a frontal assault on the Plaintiff's integrity. Furthermore, it is not purely factual in nature. Rather, it is replete with comment which is characterised by a lack of self restraint and balance. In addition, it seems to me that the Plaintiff was the victim of a plain discourtesy, inasmuch that there was no acknowledgement by the Defendant of any of the Plaintiff's earlier letters which, on their face, were received by the Defendant. In passing, the Defendant's apparent claim in the impugned letter that his firm had received only one of the previous letters from the Plaintiff is, at the least, surprising and seems objectively unsustainable. While all of these considerations (excepting the last-mentioned matter) are undoubtedly important, they must be balanced with the issue of publication, which I consider to be the key consideration in the present litigation context.

**[25]** On the Defendant's side, publication was confined to one other person, a fellow director, who typed the letter. When one considers all the evidence available at present, including the agreed facts, it seems to me a relatively strong inference that Ms McKibben subscribed to the contents of the letter in full. Moreover, her capacity of fellow director is a matter of obvious significance. In my view, she stands in contrast to either an uninformed third party or some other person working, in whatever capacity, in the commercial field in question.

**[26]** The other four members of the audience to whom publication was allegedly effected all belong to the Plaintiff's "camp". One is his father, while the other three are employees. They too must be contrasted with the kind of third party considered above. In the particular case of the Plaintiff's father, there is a reasonably strong inference that he dissents from the allegedly defamatory material and, further, that his evaluation of his son both personally and professionally has not been diminished in consequence. A similar inference, perhaps with somewhat less force, applies to the other three persons concerned. Moreover, one would expect all of these four persons to be reasonably informed. This means that, presumptively, they would be possessed of sufficient information and, moreover, would subscribe to personal views and opinions impelling them to reject the sting of the libel. For them, the

allegations would be considered untrue and unjustified. Mr. Bentley QC submitted, with some justification, that on the present state of the evidence, including the affidavits, there is no suggestion that any of those concerned thought any worse of the Plaintiff in consequence of the offending letter.

**[27]** I consider that the issue of publication, in particular the membership and size of the asserted publication audience, bears heavily on the question of whether, making the assumptions appropriate in the present context, the Plaintiff is the victim of a real and substantial tort. The audience is undeniably small in number and its members have the characteristics noted above. While I acknowledge that the inferences mooted in paragraphs [25] and [26] above could be dislodged at the trial, in exercising the jurisdiction which is engaged in the present context, it is incumbent on the court, while accepting the Plaintiff's case at its reasonable zenith, to make a balanced and realistic forecast of future developments in the litigation, including its likely outcome. I acknowledge the emphasis that was placed on the small and specialised commercial field within which the Plaintiff operates. However, in argument, the only consideration highlighted on the Plaintiff's behalf was the possibility that his operations manager might leave his present employment and be re-employed by a competitor. This suggestion has no evidential support and does not, in my view, undermine the Master's assessment of this issue – in paragraph [22] of his ruling – with which I concur. I accept the argument that in paragraphs [21] and [22], the Master appears to have overlooked the fact of publication to Ms McKibben. However, this appeal takes the form of a full rehearing and, considering the application *de novo*, I find that this in no way contaminates the cogency of his reasoning and conclusions.

**[28]** In short, weighing the various factors highlighted above in the round, I concur with the Master. In the particular circumstances, I consider that while it cannot be gainsaid that the offending letter is *prima facie* defamatory of the Plaintiff, it does not give rise to a real substantial tort, with the result that there is no compelling need for vindication of the Plaintiff's reputation. I conclude that if the Plaintiff were to be successful ultimately, damages would be of a very modest amount, in the context of a trial which would, conservatively, have a duration of at least one week, giving rise to an obvious asymmetry from the perspective of the over-riding objective and the justified invocation of the court's process. Accordingly, this is one of those exceptional cases where the Plaintiff's claim should properly be dismissed *in limine*, without a substantive trial.

**[29]** It follows that this appeal must be dismissed. As this order is exceptional in nature, and bearing in mind the observations of the court in paragraph [24] above, together with the decision in ***Ritter –v- Godfrey*** [1920] 2 KB 47 (as applied in this jurisdiction in ***Re Kavanagh's Application*** [1997] NI 368, pp. 382-383], costs may not automatically follow the event. This will require further consideration and, in default of an agreed position, both parties will have an opportunity to address the court accordingly.