[2021] IEHC 75

THE HIGH COURT

[2016 No. 8887P.]

BETWEEN

WILLIAM J. P. EGAN

PLAINTIFF

AND

MICHAEL FENLON, BARRY SULLIVAN, GERARD BURNS, RAY DEVINE, SHANE O'CONNOR, JOHN FLANNERY, SEAMUS HERATY, PADRAIC BREEN, MARGARET NEILE, TOM O'DONNELL, SEAMUS O'BRIEN, PAT DONLON, PAUL DORAN, DAN CURLEY, PADDY FLYNN, JOE O'LOUGHLIN, DES FURLONG, JOHN DIVER, CARMEL MAGEE, PETER CRINNION, TOM O'SHEA, LEONARD RASMUSSEN AND JOE SYNNOTT

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 4th day of February, 2021

1. The plaintiff in this case is a solicitor who for many years acted as the solicitor for an unincorporated association called the National Association of Regional Game Councils *("NARGC").* That is the umbrella body for a number of regional game councils, whose members are local gun clubs, or the members of local gun clubs. In 2015 the plaintiff decided that that he would cease to act for the NARGC and gave notice with effect from 17th October, 2015, which was the date of the association's annual general meeting, and was the date on which the first defendant, Mr. Michael Fenlon, was elected chairman.

2. The plaintiff had a number of ongoing cases for the NARGC and he presented bills for his fees and outlays. In addition, the plaintiff issued Civil Bills on behalf of a number of members of the NARGC to recover from the association the fees and outlays payable to him by those members arising out of a dispute with the association. A dispute as to the plaintiff's entitlement, or at least the extent of his entitlement, to fees went to mediation and on 31st March, 2016 was settled upon terms reduced to writing which included a provision in respect of the plaintiff which read*"6. Cessation of any professional involvement with the NARGC."*

3. In 2016, as Murphy J. observed at the time, the NARGC was an unhappy organisation. Having dealt with the claims of its former solicitor and the members for whom he had acted, it became embroiled in litigation with a long standing senior employee. A number of the regional councils were concerned with the manner in which that litigation was being conducted and in July, 2016 requisitioned an extraordinary general meeting. The NARGC instituted High Court proceedings to restrain the holding of such a meeting. An interim order was made by O'Connor J. but the plaintiffs' motion for an interlocutory injunction was refused. Mr. Egan acted for the defendants in that action. Mr. Fenlon took exception to that, alleging that it was a breach of the settlement. Mr. Egan also acted against the NARGC on behalf of a former employee, which Mr. Fenlon thought was a breach of the settlement agreement. A complaint was made to the Complaints and Client Relations Committee of the Law Society which was rejected.

4. The 2016 annual general meeting of the NARGC was scheduled to take place on 15th October, 2016 in Kilkenny. In advance of that meeting the annual general report was circulated. The report included a proposed resolution 6, proposed by Wicklow Game Conservation Council:-

"That because of the agreement reached at mediation with William Egan of William Egan & Associates and his failure to honour that agreement, the following shall apply:

- *No Associate Member, Regional Game Council, or any Sub Committee of the NARGC shall engage the legal services of William Egan & Associates Solicitors in any dealings with the NARGC.*

- *If they do they shall immediately be referred by the National Executive to the Disciplinary Committee and if the complaint is upheld those who are the subject of the complaint shall cease to be members of the NARGC and their membership of the Compensation Fund shall not be renewed.*

- *All NARGC indemnity shall be null and void from the date William Egan & Associates Solicitors were engaged."*

5. The plaintiff assumed that Mr. Fenlon was responsible for the proposed resolution and on 6th October, 2016 commenced this action, then naming only Mr. Fenlon as the defendant, claiming a variety of injunctive reliefs, damages for defamation, aggravated and punitive damages for defamation, a correction order pursuant to s. 30 of the Defamation Act, 2009, and costs.

6. On the same day the plaintiff applied *ex parte* to O'Connor J. for an interim injunction restraining the defendant his servants or agents or any person acting in concert with him or having knowledge of the making of the order (1) from uttering or publishing any words to the effect that Mr. Egan had breached the settlement agreement, (2) from circulating, publishing or proposing resolution 6, or (3) from publishing or circulating the annual report so long as it contained the text of resolution 6. O'Connor J. directed that the defendant be put on notice of the application and on 12th October, 2016 he refused the motion for the reasons given in an *ex tempore* judgment, including that Mr. Fenlon had denied that he was responsible for the publication of the material complained of, and that the judge was not persuaded that damages would not be an adequate remedy. As the judgment shows, while Mr. Fenlon denied that he was responsible for the publication of the annual report, he indicated to the court that he would take certain steps to prevent its further circulation and to replace the page complained of in those copies which had already been circulated. The costs of that motion were reserved. *Egan v. Fenlon* [2016] IEHC 566.

7. Mr. Fenlon's denial that he was the publisher immediately prompted a motion to join the five other officers of the Wicklow Regional Game Council, the fourteen members of the executive committee of the NARGC, and the three trustees of the NARGC. An order permitting the joinder of those additional defendants was duly made on 14th October, 2016 but by the time the statement of claim was delivered on 24th March, 2017 the action against the officers of the Wicklow Regional Game Council, other than Mr. Fenlon, had been discontinued.

8. Although the terms of the orders sought were wider, the focus of the application made to O'Connor J. was on the annual report, specifically the proposed resolution. The statement of claim was wider. The plaintiff claims to have been defamed in the letter of complaint to the Law Society: which is said to have said that he acted unethically, put himself in a position of conflict of interest, and acted in breach of contract, in acting for the former employee and for the defendants in what I will call for shorthand the EGM action. He also claims to have been defamed at a meeting of the governing body of the NARGC on 6th August, 2016, a meeting of the executive committee of the association on 10th August, 2016, and another meeting of the governing body on 1st October, 2016, at which the outcome of the EGM injunction application was discussed: at each of which it is said to have been said that he acted unethically, in breach of his professional obligations, and in breach of the settlement agreement. The statement of claim goes on to set out the plaintiff's case in relation to the proposed resolution 6 which is said to have meant and been understood to mean that the plaintiff was dishonourable, devoid of professional integrity, a person who flouted his professional obligations, unscrupulous, untrustworthy, actuated professionally by greed, unfit to be a solicitor and so on, and that no right thinking and well informed person would retain him as a solicitor. The words in resolution 6 are said to have been published with malice and to have been specifically purposed to injure the plaintiff in his reputation and practice. The statement of claim alleges an apprehension of repetition or republication and asks for orders more or less in the same terms as the plenary summons.

9. The defence, which was delivered on 2nd August, 2017, is robust. The defendants not only deny malice on their part but assert that the plaintiff has exhibited malice, has engaged in conduct aimed at undermining his previous client – the NARGC – and was responsible for a schism in the association. If the wording is not absolutely precise, I understand the plea that the plaintiff provided legal services to the former employee and the defendants in the EGM action "*despite a term of the mediated settlement requiring 'cessation of any professional involvement with the NARGC'*" as an allegation that the plaintiff thereby was in breach of the settlement agreement of 31st March, 2016. The defence admits the correspondence with the Law Society and the three meetings of the governing body and executive committee. There is no express admission of the words spoken at the meetings, but the defendants plead qualified privilege, honest opinion, innocent publication, and fair and reasonable publication on a matter of public interest. It is denied that the words used at the meetings were defamatory of the plaintiff or that they bore the meanings alleged or any of them. As to resolution 6, the defence pleads qualified privilege, denies that the words are defamatory, and asserts that to the extent that the words bore the meanings alleged by the plaintiff they are true. In support of their reliance on ss. 16 and 20 of the Defamation Act, 2009 (truth and honest opinion) the defendants assert that the plaintiff has breached the settlement agreement, has acted unethically, has breached his professional obligations, was by his unethical conduct responsible for the refusal of the EGM injunction, and was not a man of his word. For good measure, the defendants plead that they "have concerns" that the plaintiff's claim is "*generated*" by the plaintiff's malice, spite or ill will towards Mr. Fenlon personally.

10. The defence calls (twice) for proof of the plaintiff's good standing as a solicitor and his compliance with the statutory duties and obligations under the Solicitors Acts and for proof that the defendants have alleged such misconduct as would bring his reputation into opprobrium or ridicule or otherwise would diminish him in the eyes of right thinking persons.

11. The defence was followed promptly on 9th August, 2017 by a 23 paragraph notice for particulars of the claim and a request for voluntary discovery by the plaintiff of three categories of documents. Among the questions asked in the notice for particulars are whether the plaintiff, at any time in the course of his 35 year career, has been found to have been in breach of his professional obligations to the Law Society; whether he was ever sanctioned by the Law Society; whether he was ever the subject of a complaint or claim by a client; and whether he has ever been the subject of proceedings in his capacity as a solicitor. The three categories of discovery are directed to any investigation into the plaintiff's practice; any complaint, claim or proceedings against him; and any complaints made by any third party in relation to the plaintiff in his capacity as a solicitor. Why it may be thought that the third category would not be captured by the second is not immediately obvious to me.

12. Neither the notice for particulars nor the request for voluntary discovery was answered and on 15th February, 2019 separate motions were issued seeking orders requiring compliance. Those motions were grounded on affidavits sworn by the defendants' solicitor and were answered by affidavits sworn by an assistant solicitor in the plaintiff's office on 13th May, 2019. The answer to the discovery motion was not based on the pleadings or the request for discovery but on a letter, which had been written three days previously, on 10th May, 2019, the object of which appears to have been to try to take out of the case any issue as to previous complaints or professional difficulties.

13. Whatever the object of the letter of 10th May, 2019 may have been, the effect of it, say the defendants, was to so hollow out the claim that there is nothing left in the action and by the motion now before the court, which was issued on 19th November, 2019, the defendants apply for an order pursuant to O. 19, r. 28 striking out the proceedings on the grounds that they disclose no reasonable cause of action, or an order pursuant to the inherent jurisdiction of the court striking out the proceedings on the grounds that they are frivolous and vexatious and bound to fail.

14. The letter of 10th May, 2019 from William Egan & Associates, solicitors, to Connellan, solicitors (reference WE/bw/WEA02) said:-

> *"William J.P. Egan v. Michael Fenlon & Others*
>
> *High Court Record No. 2016/8887P*
>
> *Clarification of Redress Sought*
>
> *Dear Sirs,*

We refer to the above matter and the defendants' two motions herein, which are largely predicated on seeking information and material which touch upon the reputation of the plaintiff in these proceedings, in a manner intended to cast him in a poor light. The relevance advanced in respect of the discovery, where it is argued in support of the application, is that in net terms it will be necessary for a court to assess the extent of the damage caused to the plaintiff's reputation and that anything which might negatively impact on reputation public or private is sought.

The plaintiff represented the NARGC for upwards of three decades and it was he who saw fit to terminate the retainer. The relationship was not terminated by reason of any dissatisfaction on the part of the NARGC. While a claim for damages was included in the plenary summons, as is normal, the principal purpose of the proceedings was to obtain an injunction. Mr. Egan proposes to waive the claim for the damages to which he would be entitled in these proceedings, and to limit his claim to a correction order and also payment of his legal costs to be taxed in default of agreement to include the reserved costs.

It is a material consideration of which Mr. Egan has had due regard that in the course of the injunction hearing, your clients withdrew the report complained of which was what was sought in the injunction application.

The purpose of this letter is to give you formal notice that the plaintiff's claim in respect of damages will not be maintained.

This has a bearing on the basis for your discovery and particulars and needs to be set against the question of whether a person can ever through an act of misconduct lose their reputation to such an extent that there is nothing left of the reputation to injure, regardless of what may be published in respect of that person. You will be aware that such a proposition has been considered in Magee v. MGN and also Watters v. Independent Star Ltd. and in extreme circumstances and was not accepted in either case.

Your client is aware that the plaintiff and his former partner, had negative findings made against them historically in respect of accounting issues, the determination of which was the subject of publication. It was also the subject of consideration by NARGC at the AGM which immediately followed the publication of that determination and the NARGC, through its AGM endorsed the continued retention of the services of the plaintiff's offices as its legal advisor up to the date of the plaintiff terminating his retainer. It cannot be credibly argued the matters in respect of which the defendants now seek discovery could under any circumstance be contemplated as casting the plaintiff in a position that he had no reputation left to injure by virtue of defendants continuing the plaintiff's retainer. It is not a matter that was raised in the defence. Notwithstanding that Mr. Egan has been advised that the discovery request is an aggravation of the defamation, he maintains his position in relation to not seeking damages. In respect of the notice for particulars

he is advised that the particulars sought similarly aggravate the defamation and are not and were never proper matters for particulars.

It appears to us that the only issue now to be determined in this case is whether the publication complained of by the plaintiff constituted a statement that tended to injure his reputation in the eyes of reasonable members of society and whether the plaintiff's application for an interlocutory injunction was warranted.

We accordingly invite you by way of open correspondence to agree to pay the plaintiff's legal costs and to make proposals in relation to a form of correction order that can be agreed."

15. There was a short armistice while counsel was on leave and the plaintiff's letter was answered by a long letter of 4th July, 2009, the substance of which was that the abandonment of the claim for damages amounted to the discontinuance of the action so that the plaintiff was liable to pay the defendants' costs. The defendants contested the plaintiff's assertion that the principal purpose of the action was to obtain an injunction which, they said, was inconsistent with the continued prosecution of the action after the interlocutory motion had been determined.

16. The defendants' strike out application travelled with the motions for particulars and discovery and the three motions came into the list for hearing together. However, it was recognised that if the strike out application succeeded the other motions would fall away and the court was asked to deal with the strike out application first.

17. The defendants' motion was grounded on an affidavit sworn by their solicitor. The application is said to stem from the "*recent discontinuance by the plaintiff of his claim for damages against the defendants and his parallel attempt to continue to seek a correction order under s. 30 of the Defamation Act, 2009*." The defendants' position is that "*the discontinuance of the action for damages is, in fact, a discontinuance of the entire action such that the claim now discloses no reasonable cause of action and is bound to fail." The plaintiff's letter is referred to as "the Letter of Discontinuance*". It is said that the letter was "*designed to ensure*" that the previous negative findings in respect of accounting issues were eliminated from the case before the discovery and particulars orders were made and to try to obtain the costs of the unsuccessful injunction application. The affidavit goes on to summarise the defendants' arguments as to the "*Legal effect of purported partial discontinuance"*.

18. In reply Mr. Egan swore an affidavit rejecting the premise of the application "*that the discontinuance of the action for damages is a discontinuance of the entire action*". Having rehearsed the history of the proceedings, Mr. Egan characterises the letter of 10th May, 2019 as a proposal. He suggests that the defendants' position that the action, which was a defamation action when it was started, ceased to be a defamation action is untenable. He says that the defendants' application is based on a letter which put forward a proposal to draw the proceedings to an end and not on the grounds that the statement of claim discloses no reasonable cause of action.

19. Mr. Declan Doyle S.C. and Ms. Jennifer Goode filed concise and focussed written submissions identifying and summarising the jurisdiction which they invoke and setting out the basis upon which it is said that the action is now bound to fail.

20. It is submitted on behalf of the defendants that a "defamation action" is defined by s. 2 of the Act of 2009 as (a) an action for damages for defamation, or (b) an application for a declaratory order. It has to be one or the other. Since this is not an application for a declaratory order it can only be a defamation action if it is an action for damages for defamation.

21. Section 28(6) of the Act of 2009 allows the court to make a correction order after it has made a declaratory order: but, it is said, that is not this case.

22. Otherwise, by s. 30(1) a correction order may be made:-

> "*Where,* in a defamation action*, there is a finding that the statement in respect of which the action was brought was defamatory and the defendant has no defence to the action, the court may, upon the application of the plaintiff, make an order (in this Act referred to an a 'correction order') directing the defendant to publish a correction of the defamatory statement."* [Counsels' emphasis]

23. Counsel also point to s. 30(3) which makes specific provision for notice to be given of any application for a correction order to the defendant no later than seven days before the trial of the action, and to the court at the trial of the action. It is submitted that the finding that the statement was defamatory, on which the jurisdiction to make a correction order is based, can only be made by a jury, and the defendants have an absolute right to a jury trial.

24. It is common case that this action, when commenced, was a defamation action but it is submitted that the action for damages was discontinued by the plaintiff, clearly for his own strategic reasons. It is submitted that having regard to the progress of the action after the injunction application was decided, the plaintiff's assertion that the principal purpose of the action was to obtain an injunction is not credible.

25. Mr. Doyle in his oral argument (as had been done in the written submissions) sought to anticipate that the plaintiff might attempt to "*resile from his decision to discontinue his action for damages*". If he did so attempt (which at the date of the defendants' written submissions and by the time at which Mr. Doyle sat down, he had not) he could not – or ought not to be permitted to – do so. In this case, it was said:-

> *"[T]here is no doubt that the decision to discontinue was, and is, a conscious and advised decision. By extension and analogy with the position under O. 26, r. 1, it would be wholly prejudicial to the defendants and facilitative of an abuse of process to permit the plaintiff to resile from his considered and advised discontinuance of his defamation action, and to use the courts to seek relief which he no longer*

wants, and apparently never wanted in the first place. Therefore, not only is the plaintiff's action bound to fail, it is irredeemably so."

26. Reference was made to *Smyth v. Tunney* [2009] IESC 5, *A. v. Minister for Education and Science* [2016] IEHC 268 and *O'Neill v. Appelbe* [2012] IEHC 409, [2014] IESC 31.

27. Mr. Frank Callanan S.C. and Ms. Miranda Egan Langley filed written submissions on behalf of the plaintiff which quote at some length from some of the more recent restatements of the principles to be applied in the exercise of the inherent jurisdiction to dismiss: *Togher Management Company Limited v. Coolnaleen Developments Limited (In receivership)* [2014] IEHC 596, *Irish Bank Resolution Corporation v. Purcell* [2014] IEHC 525 and *Fox v. McDonald* [2017] IECA 189. Counsel emphasise that the jurisdiction is to be exercised sparingly and only in clear cases and that the moving party on such an application carries a heavy burden.

28. The argument on behalf of the plaintiff is that the letter of 10th May, 2019 was a proposal by the plaintiff to withdraw his claim for damages. It is submitted that the defendants' "*interpretation of the definition*" of a defamation action in s. 2 of the Act is untenable, if not actually absurd and that, if necessary, the plaintiff will rely on s. 5 of the Interpretation Act, 2005. The defendants' "*narrow and tendentious focus*" on the definition of a defamation action is said to ignore the nature of the reform effected by the Act of 2009, specifically the jurisdiction introduced to grant a correction order. That jurisdiction, it is said, was "*concerned precisely with mitigating the correlation of the defamation action with a claim for damages, both at common law and under the Defamation Act, 2009"*.

29. Apart altogether from the legal merits, the plaintiff cannot understand why the defendants should be looking a gift horse in the mouth. That is easily disposed of. *Equo ne credite… quidquid id est.*

30. The point is also made that there has been no amendment to the statement of claim which, it is said, reflects the fact that what was put forward was a proposal. The plaintiff argues "*furthermore*" that the court should not strike out a pleading which is capable of amendment to remedy the deficiency and that if the court were to accept that the defendants are correct in their argument it would be open to the plaintiff to amend the statement of claim to include a claim for a declaratory order.

31. The application under O. 19, r. 28 is, I think, easily disposed of. The rule allows the court to order that any pleading be struck out on the ground that it discloses no reasonable cause of action or answer. The application is directed to the action rather than the statement of claim and the statement of claim clearly discloses a cause of action.

32. The substance of the motion is the application pursuant to the inherent jurisdiction to strike out the action on the grounds that it is frivolous and vexatious and bound to fail.

33. For what it is worth, I do not accept that the plaintiff's principal purpose in instituting this action was to obtain an injunction. I say for what it is worth because I do not believe that whatever may have been the plaintiff's hope or objective may have been at the time he commenced the action is material in an objective analysis of the case made. While it is undoubtedly the case that on learning of the content of the annual report the plaintiff moved swiftly for an interim, and then an interlocutory, injunction, his case from the start was that he had been grievously injured in his credit and reputation. After his injunction application had been disposed of, the plaintiff joined twenty two additional defendants, against whom he claimed aggravated and punitive damages as well as compensatory damages. The letter of 10th May, 2019 was written upwards of two years after the statement of claim was delivered and coming up to two years after the pleadings were closed. It is clear from the timing and terms of the letter that the plaintiff's immediate object in writing it was not to refine or clarify the redress sought at the time the action was commenced, or in light of the fact that the injunction application had been dealt with, but to try to cut down the orders for particulars and discovery that might be made on the defendants' motions which were by then three months old and which were based on requests made coming up to two years previously which had not been answered. The plaintiff's response to each of the defendants' requests for discovery and particulars was by separate letters of 10th May, 2019 and was predicated on the hope or belief that the letter now under consideration had been effective to shift the goalposts. I am satisfied that it was an strategic interlocutory move which was prompted by the defendants' motions and not a clarification of what the plaintiff wanted all along.

34. The present application is said to be opportunistic. I am sure that the word is used in a pejorative sense because this motion is said to come in succession to other highly aggressive and unwarranted applications. Because I have not heard the motions for particulars and discovery I could not say that they are unwarranted but if, as Mr. Callanan argues, those motions were doomed from the outset and could never have succeeded it is difficult to see the purpose of the manoeuvre which sought to avoid them. As to whether the present motion is opportunistic, I do not see why a defendant might be properly criticised for seizing any opportunity that might present itself to escape from protracted and expensive litigation. Whether the plaintiff's letter created such an opportunity is a separate issue.

35. As to whether this motion or the defendants' other motions are aggressive, I see no merit on the plaintiff's complaint. Within the bounds of the rules of procedure, a defendant is entitled to meet a case in whatever way he may think is best calculated to defeat it, or otherwise to see it off. In this case, I cannot see that the defence is any more forceful or determined than the statement of claim. I could understand that the plaintiff might be upset that the defendants are trying to turn his strategic manoeuvre against him but if by writing his letter he has shot himself in the foot, it was he who fired the shot.

36. As to the plaintiff's submission that the defendants' interpretation of defamation action in s. 2 of the Act of 2009 is untenable, if not actually absurd, the fact of the matter is that the defendants' submission is squarely based on the legislature's definition. The remedy

at common law for defamation was damages. The Act of 2009 created a new remedy of a correction order. That remedy is available, by s. 30, where, in an action for defamation, there is a finding that the statement was defamatory, and that the defendant has no defence, or where, on an application under s. 28 for a declaratory order, the court is satisfied that the statement was defamatory, and that the respondent has no defence, and that the applicant requested but the respondent refused to make and publish an apology, correction or retraction. The primary remedy of a declaratory order is an alternative to the primary remedy of damages. By s. 28(4), an application under s. 28 is a bar to any other proceedings. In the case both of an action for damages and an application under s. 28 there is power to make an order under s. 30 but the foundation of the jurisdiction is not the same. The requirement in s. 28(2)(a) that the court should be satisfied that the statement is defamatory and that the defendant has no defence to the application is substantially the same as the requirement in s. 30(1) of a finding that the statement was defamatory and that the defendant has no defence to the action, but an applicant for a declaratory order must also prove that he requested, and that the respondent refused, to apologise, correct or retract.

37. I am satisfied that the defendants are correct in their submission that there is no free standing right to apply, or to sue, for a correction order. It may very well be that in a particular case such an order is what a plaintiff or applicant most hopes to achieve by the application or action, but it is an ancillary order in the sense that it can only be made when the court has decided to make a declaratory order, or the necessary findings have been made in an action for damages.

38. As to Mr. Callanan's argument that the action if it might otherwise be doomed might be saved by amendment, I do not believe that that is well founded. It is clear from the scheme of the legislation that a plaintiff must choose between an application for a declaratory order and an action for damages for defamation. If there is no express prohibition in the Act equivalent to that in s. 28(4) on the making of an application for a declaratory order after the conclusion of an action for damages, that must be implicit. If, theoretically, a plaintiff who has commenced an action for damages might decide to discontinue his action and make an application for a declaratory order instead, any such application would be subject to the limitation period in s. 11(2)(c) of the Statute of Limitations, 1957, as inserted by s. 38 of the Act of 2009, which has long ago expired. If, for the sake of argument, the plaintiff in this case might meet the requirements of showing that the statements complained of are defamatory and that the defendants have no defence, he never asked for an apology, correction or retraction. Finally, but by no means least, the jurisdiction to make a declaratory order is confined to the Circuit Court so that the statement of claim could not be saved by the suggested amendment.

39. As to the effect of the letter, I had considerable sympathy with Mr. Doyle when, after hearing Mr. Callanan's answer to the application, he declared himself to be struggling to understand what the plaintiff's case then was. The plaintiff's position was that the letter was a proposal which had been rejected, but that notwithstanding the rejection of the proposal he would not be maintaining the claim for damages. It was said that the plaintiff

contested that the letter had the effect contended for by the defendants and that he never considered himself to be abandoning the action. It was said that the plaintiff's wish was to proceed as he had proposed but that if the legal position was that he could not, he would wish to maintain his claim for damages.

40. As to the meaning and effect of the plaintiff's letter of 10th May, 2019, a very great deal more time and effort went into its construction than its composition. In one breath it was a proposal, in the next a formal notice. The plaintiff's object appears to have been to try to avoid making disclosure in relation to a professional difficulty of which the defendants were well aware, and of which, if they had forgotten, they were reminded. The plaintiff dismissed as untenable an argument which he said the defendants had never made. His declared object was to seek to influence the outcome of the outstanding motions which, he said, would in any event have been bound to fail.

41. After careful consideration I have come to the conclusion that the letter of 10th May, 2019 was correctly described by the defendants' solicitor in his affidavit grounding this application as a purported discontinuance of part of the claim. Without any criticism, I do not believe that it is quite right to characterise the letter as *"formal notice of discontinuance of his claim for damages."* In one breath the plaintiff declared that he proposed to waive his claim for damages, and in the next he gave formal notice that his claim for damages would not be maintained. If the plaintiff's proposal or notice had any bearing on the pending motions for particulars and discovery, it is not obvious. The proposition that all that was left in the action was whether the publication constituted a statement that tended to injure the plaintiff in his reputation in the eyes of reasonable members of society and whether his application for an interlocutory injunction was warranted was plainly wrong.

42. I am satisfied that the defendants' submission that the plaintiff was not entitled to discontinue part of the claim is correct. If that it so, the letter can only have had the consequence contended for on behalf of the defendants if – having failed to do what the plaintiff intended – it did something which he plainly did not intend. The issue, then, is whether the legal effect of the letter was to discontinue the action in its entirety.

43. Order 26, of the Rules of the Superior Courts provides:-

> *"1. The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing in the Form No. 20 in Appendix C, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed. The plaintiff may, however, at any time prior to the setting down of any cause for trial wholly discontinue his action, with or without costs to be paid by any party, upon producing to the proper officer a consent in writing signed by all parties or by their solicitors and such costs (if any) shall be taxed. Such discontinuance or*

withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to discontinue the action without leave of the Court, but the Court may before, or at, or after, the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

2. *When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing signed by the parties or by their solicitors. The consent shall include the list number and trial venue of the case.*

3. *Any defendant may enter judgment for the costs of the action, if it is wholly discontinued against him, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued, in case such respective costs are not paid within four days after taxation.*

4. *If any subsequent action shall be brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the Court may order a stay of such subsequent action, until such costs shall have been paid."*

44. I have set out the text of the order in full because, as the Supreme Court held in *Smyth v. Tunney* [2009] 3 I.R. 322, O. 26, r. 1 forms a complete code as to the discontinuance of an action. The issue in that case was whether the High Court had jurisdiction to permit the withdrawal of a notice of discontinuance by the party who had served it and the Supreme Court decided that it did not. Having observed that until the introduction of the Civil Procedure Rules in 1998 the rules in England and Wales were for all practical purposes identical to the rules in Ireland, Finnegan J., at paras. 16 and 17 of his judgment, said:-

"16. A starting point as to the law in this jurisdiction is Wylie on the Judicature Acts (1st ed., 1906). At p. 437 he states that O. 26, r. 1 forms a complete code as to the discontinuance of an action or the withdrawal of a counterclaim and cites as authority Fox v. Star Newspaper Company [1898] 1 Q.B. 636, a judgment of the Court of Appeal. That judgment was upheld by the House of Lords, reported at [1900] A.C. 19. The rule in issue in that case is identical to that in the Rules of 1905. Chitty L.J. in the Court of Appeal said at p. 639:-

> *'It seems to me that Order XXVI is intended to form a complete code applicable to the whole subject of discontinuing an action.'*

> *17. This view of O. 26, r. 1 persisted in England and Wales – service of a notice of discontinuance put an end to an action but without prejudice to the right of the plaintiff to institute fresh proceedings on the same grounds, but subject to an exception where service of a notice of discontinuance was an abuse of the court's process when the discontinuance could be set aside on application by the other party to the cause."*

45. Thus a plaintiff who serves notice of discontinuance rings a bell which cannot be unrung and which, if the limitation period has expired, is the death knell of the cause of action.

46. The defendants characterise the plaintiff's letter of 10th May, 2019 as "*the Letter of Discontinuance*" and rely on that document as having effectively discontinued the action. As a general proposition the court will look to substance rather than form but sometimes form is essential. The consequences of serving notice of discontinuance are such that strict compliance with the rule is necessary. The prescribed form is obviously a formal document. It is very short and leaves no room for doubt in the mind of either the giver or recipient as to its the effect. The same cannot be said of a letter. In my view, the defendants' argument that the plaintiff has, by letter, accidentally discontinued his action is inconsistent with the law that O. 26, r. 1 is a comprehensive code which prescribes precisely how, if at all, an action may be discontinued. By the plain words of O. 26, r. 1, service of notice of discontinuance gives rise to an automatic right to costs, to be taxed. If, as the defendants argue, the plaintiff has hollowed out his case, he has not discontinued it.

47. If one starts from the defendants' proposition – which I believe is correct – that the plaintiff was not entitled to partly discontinue his case, he was not entitled, in the sense that he was not able, to do what he said he wanted to do. On the pleadings, the plaintiff's claim for damages stands. He has not sought to amend his statement of claim and may not do so simply by writing a letter. It seems to me that if the defendants, instead of taking the course which they did, had set the action down for trial, the plaintiff could not have been heard to object. If that is so, the letter did not fundamentally change the nature of the action.

48. I am not persuaded that the plaintiff's letter of 10th May, 2019 had the effect that the action was thereafter bound to fail.

49. Whatever the intention or effect of the letter may have been, it was recognised by the defendants, at the latest from the time this motion issued, that its success depended not only upon the proposition that the waiver or abandonment of the claim for damages has the effect that the claim for the correction order and costs cannot stand alone, but, at least potentially, upon an argument that the letter cannot be withdrawn.

50. In *Smyth v. Tunney* the Supreme Court made it quite clear that O. 26, r. 1 does not permit the withdrawal of a notice of discontinuance by the party who has given it. That applies to a notice in the form prescribed by the rule, that is the form set out at No. 20 in Appendix C. This is not such a case and I am not persuaded that the same rule should

be applied to the conscious and advised service of a notice in the prescribed form as to an ill thought out letter. When the issue arose in argument as to whether – if the court was against the plaintiff's primary argument – the letter could be withdrawn, the plaintiff's position was that while he wished to proceed as he had declared, if the legal position was that he cannot, he would wish to maintain a claim for damages. I took this as a roundabout way of saying that the plaintiff would withdraw the letter if he needed to, to keep his action alive, or to revive it.

51. Apart from his argument that the plaintiff was not, as a matter of law, permitted to resile from the position taken in his letter, Mr. Doyle argued that he should be estopped from doing so. He pointed to the additional costs which have been incurred because the letter was written and to the time which has since passed.

52. As to the additional costs which have been incurred by reason of the writing of the letter and the plaintiff's determination to stand over it, it seems to me that absent any suggestion that any costs which might be awarded in favour of the defendants would be irrecoverable, any such prejudice to the defendants can be met by an appropriate order for costs.

53. As to delay, I am not convinced that the motion now before the court has contributed very significantly to the long delay in the progress of this action. There was a very long delay on the part of the plaintiff in replying to the notice for particulars and notice seeking voluntary discovery but equally, the defendants might have brought their motions very much earlier than they did. This motion, issued on 19th November, 2019 was answered reasonably – or at lease relatively – promptly by an affidavit of the plaintiff sworn on 14th January, 2020. In the meantime, the exchange of correspondence and affidavits in relation to the particulars and discovery had continued until 15th November, 2019, albeit fuelled by the letter of 10th May, 2019. When the motions were eventually ready for hearing they were assigned a date on 13th May, 2020, which had to be abandoned owing to the first Covid-19 lockdown. I accept that but for the plaintiff's letter the defendants' particulars and discovery motions might very well have been heard before the lockdown, but the trial would inevitably have been stalled. In any event, all the appearances are that the wounds on both sides are still raw and it is not suggested that the delay has given rise to a risk of an unfair trial.

54. The jurisdiction invoked by the defendants on this application is the inherent jurisdiction of the court to dismiss an action which is bound to fail. It is well established since *Barry v. Buckley* [1981] I.R. 306 that the court will be slow to exercise this jurisdiction and will do so only in clear cases. It has, since McCarthy J. in *Sun Fat Chan v. Osseos Ltd*. [1992] 1 I.R. 425 first expressed himself inclined to that view, become well established that an action ought not to be dismissed where it might be saved by amendment of the statement of claim.

55. If the mistake which I have found the plaintiff to have made in his letter had been made in his statement of claim, I would not have been persuaded to strike out the action without first affording the plaintiff an opportunity to amend. The terms of the plaintiff's

strategic letter were such that the defendants could not know with any degree of certainty what case they were required to meet. On the one hand, they had formal notice that the claim for damages was not being pursued but on the other they identified the risk that the plaintiff might later seek – or be forced – to resile from that position. I am not persuaded that the defendants have so altered their position in reliance on the plaintiff's letter that it would be unjust to allow the plaintiff to change his position.

56. I accept the defendants' submission that the plaintiff's letter of 10th May, 2019 was ineffectual to do what it tried to do, but not that it inadvertently did something which it plainly did not intend to do.

57. I find that the plaintiff is not entitled to prosecute this action otherwise than as an action for damages for defamation. I will hear counsel as to the precise form of order. Provisionally, it seems to me that if the plaintiff is determined to prosecute the action in the way he has indicated, he can only do so by appealing against an order dismissing the action.