[2020] IEHC 425

THE HIGH COURT

Record No. 2015/1418 P

BETWEEN

CHRIS GORDON

PLAINTIFF

AND

THE IRISH RACEHORSE TRAINERS ASSOCIATION

DEFENDANT

Judgment of Mr. Justice Bernard J. Barton in respect of the Ruling made on the 20th March 2020

1. This is the judgment of the Court on the Defendant's application to have the Plaintiff's case in a defamation suit withdrawn from the jury on all claims for insufficiency of evidence. The reader may find the background to the case set out in the judgement of the Court in *Gordon v. The Irish Racehorse Trainers Association* [2020] IEHC 363, to be of assistance in contextualising the application.

2. Written and oral submissions were made on the application and have been considered by the Court. What follows is not intended to be a comprehensive summary thereof but rather an attempt to encapsulate as briefly as possible the relevant contentions advanced. There are seven impugned statements, five of which have been met with a plea of qualified privilege. The statement of claim pleads express malice on the part of the Defendant. Suffice it to say that the principle ground advanced for withdrawing the case is that there is insufficient evidence upon which the Jury could find as a matter of probability that the Defendant was actuated by malice at the time of the relevant publications.

3. As to the other two statements, the alleged petition to have the Plaintiff removed as head of security of the Turf Club (the petition) and the article published in 'The Irish Field' on the 9th August 2014, (the August 9th article) the contention advanced in relation to the former is that there is no evidence the petition existed let alone evidence of publication to the members of the Defendant association or horse trainers in general or otherwise and as to the latter that in giving the interview he did there is no evidence Noel Meade did so on behalf of or with the authority of the Defendant, furthermore, there is no evidence the article was understood to refer to the Plaintiff.

Preliminary Observations;

4. Given the issues which have arisen, I consider it necessary to make some preliminary observations concerning the pleadings pertinent to the subject application. The Plaintiff pleaded seven separate defamatory publications which he contends are interrelated and evidence a campaign by the Defendant to have him removed from his post as head of security. The Defendant contends that the Court should approach the application by taking each statement separately and test the evidence of malice, if any, against it. As mentioned already, the Defendant has chosen to meet the claims in respect of the first, second, fifth, sixth and seventh publications by pleading qualified privilege and in respect of the latter three by traversing the allegation of publication. The defence of justification/truth is not pleaded by way of defence to any of the impugned statements. For discussion on the general principles and test to be applied by the trial judge on the

application to dismiss civil jury proceedings see *Tracey and another v McDowell and* others [2018] 446

Burden of Proof

5. The law requires the Defendant to carry the burden of proof in respect of the defence of qualified privilege and it continued to do so throughout the trial until Mr Harty interrupted Mr McDowell's oral submissions to concede on behalf of the Plaintiff that the first, second, fifth, sixth and seventh statements were published on occasions of qualified privilege. It follows the only issue with which the Court is concerned on these statements is whether there is sufficient evidence of malice as pleaded. The Defendant's written submissions were prepared in advance of the concession and have been read by the Court taking this concession into account.

6. In opening the defence case to the Jury, Mr McDowell explained the concept of proof and the burden carried, by the Defendant in respect of qualified privilege and by the Plaintiff in respect of malice and publication. The Jury was informed that provided the publication of a defamatory statement was on an occasion of qualified privilege the law afforded the Defendant a complete defence to the action in damages unless the Defendant was actuated by legal malice at the time of publication. As a consequence of the concession, Mr Harty fairly accepted the proposition advanced by Mr McDowell that the onus carried by the Plaintiff in relation to malice is a heavy one. Although the parties were ad idem in relation to the law to be applied by the Court, I consider it appropriate in the circumstances to refer briefly to a number of authorities and legal texts which were opened to the Court on the application.

The Law; Withdrawal / Leaving Issue of Malice to the Jury;

7. The issue of malice *must* be left to the jury where the trial judge is satisfied that the existence of malice as a matter of probability is an inference which the jury would be entitled to draw from the evidence. In reaching a conclusion as to whether the evidence supports the probability of malice the court is entitled to have regard to different pieces of evidence which appear to the trial judge to be interrelated. If it would be reasonable for the jury to hold as a matter of probability that any one of a number of instances or examples pointed to by the plaintiff in respect of one or more publications represents malice, the trial judge must allow the case to go to the jury. [*emphasis* added]

8. It follows that where none of the pieces of evidence or instances of malice pointed to by the plaintiff could reasonably be held as a matter of probability to amount to malice the case must be withdrawn because it would not be open to the jury to hold that the aggregate of a number of pieces or instances of evidence could amount to malice, no one of which could itself be held to be evidence of malice. The mere possibility of evidence of malice from several pieces or incidents of evidence cannot by reason of multiplicity alone render probable that which is merely possible. In brief, evidence of malice cannot be obtained from incidents or pieces of evidence no one of which is in itself evidence of malice

9. In this regard, the attention of the Court was drawn to the judgement of O'Byrne J., in the decision of the former Supreme Court in *Kirkwood Hackett v. Tierney* [1952] I.R. 185 approved by Finlay C.J., in *Hynes-O'Sullivan v O'Driscoll* [1988] I.R. 436 at 445, where he set out the test to be applied as follows

> "This firstly was that a trial judge should leave an issue of malice to the jury only if he was satisfied that the evidence given was more consistent with the existence of malice than with its absence, or to put the matter in another but identical way, that the existence of malice as a matter of probability, was an inference which the jury would be entitled to draw from the evidence given. Secondly, that judgment appears to establish that, as was stated by O'Byrne J. at page 204 of the report, having cited the principle laid down by Lord Porter in Turner v. Metro Goldwyn Meyer Pictures Ltd. 1951 All. E.R. 449:
>
> > *'Applying the foregoing principle, which I consider to be sound in law, it is clear that you cannot get evidence of malice from a number of items of evidence, no one of which is in itself evidence of malice.'*
>
> *I do not construe the second proposition as prohibiting a trial judge from having regard to different pieces of evidence which appear to him to be interrelated so as to reach a conclusion as to whether the evidence supports the probability of malice in the manner which I have indicated above. Rather, do I construe it as simply laying down a principle which may indeed be of more general application than merely to the question of a judge's ruling concerning malice, that a number of separate items of evidence establishing a mere possibility of the existence of malice cannot by reason of their multiplicity alone convert that mere possibility into a probability."*

10. This statement of the law is particularly apposite to the contention advanced on behalf of the Defendant that the Court is required to consider each of the impugned statements separately and that the exercise undertaken by the Plaintiff in constructing a case by what was described as 'a joining up of the dots' was inappropriate and impermissible. Mr. Harty's contention, however, was that the statements were interrelated, by which I understood him to mean they were not to be viewed in isolation but rather considered together having regard to the circumstances of the case and the sequence of events material thereto. In this context, the judgment of Henchy J. in *Hynes-O'Sullivan v. O'Driscoll* [1988] I.R. 436 at p.451 seems to me to be particularly on point:

> *"When a libel or slander action is tried with a jury it is for the judge to decide whether the evidence is such as would reasonably entitle the jury to hold, as a matter of probability, that the publication was actuated by malice, in the legal sense, on the part of the defendant. Where the plaintiff, on whom the onus of proving malice lies, points to a number of examples of malice in regard to the publication, the judge must allow the case to go to the jury if it would be reasonable for the jury to hold as a matter of probability that any one of those instances represents malice. However, if no one of the instances pointed to could*

reasonably be held by the jury to amount to malice, the case should be withdrawn from the jury because it would not be open to the jury to hold that a number of instances, no one of which could in itself be held to evidence malice, could in their aggregate amount to malice".

11. Both parties referred the Court to the decision of the House of Lords in *Horrocks v. Lowe* [1975] A.C. 135 where the law in the context of qualified privilege was restated by Lord Diplock and with whom three other Law lords agreed. The following summary of the law as so stated, which I consider pertinent in the present context, is offered by Gately on Libel and Slander 12th ed. at para. 17. 3

"(1) Improper motives.

(a) There is some special reason of public policy for giving immunity in all cases of qualified privilege. If the maker of the statement uses the occasion for some other reason he loses the protection of the privilege.

(b) The defendant is entitled to be protected unless some dominant improper motive on his part is proved."

12. I digress for a moment to observe that whereas malice is not defined for the purposes of the Defamation Act 2009 (the 2009 Act) neither is there a reference in the relevant statutory provisions to dominant motive vis a vie malice and qualified privilege. The omission in this context does not appear to have been the subject of any reported case in this jurisdiction, however, the significance and/or relevance of the presence of a dominant motive has certainly been questioned in England and Wales.

13. Returning to the summary

(1)(c)(i) states:

"The usual motive relied on is that of injuring the plaintiff but there may be others"

This is potentially significant in the circumstances of this case where the Plaintiff claims there was a campaign of defamation the purpose of was to have him removed as head of security for the Turf Club.

And finally, (c)(ii) states "Knowledge that a statement will injure the claimant does not destroy the privilege if the defendant was using the occasion for its proper purpose".

(2) Absence of honest belief:

(a) If it can be proved that the defendant did not believe that what he published was true, that is generally conclusive evidence of express malice. 'for no sense of duty or desire to protect his legitimate interests can justify a man in telling deliberate and injurious falsehoods of another' the burden of proof, at

least where conduct extraneous to the privileged occasion is not relied on, is not a light one.

(b) If the defendant publishes untrue matter recklessly without considering or caring whether it be true or not, he is treated as if he knew it to be false but carelessness, impulsiveness or irrationality in arriving at a belief is not to be equated with indifference to the truth".

14. In my view, this statement has a particular application in circumstances where, as in this case, the Defendant adopted without questioning the beliefs of the Doyles and, to use field sports parlance, accepted the truth of what was being said "lock stock and barrel."

Returning to the summary;

"(c) There are exceptional cases where a person may be under a duty to pass on defamatory reports made by another even if he believes them to be untrue. He is not then malicious.

(3) Positive belief

(a) Positive belief in the truth of what is published will usually protect the defendant unless he can be proved to have misused the occasion. Judges and juries should be slow to draw the inference that he has misused the occasion, and the defendant's desire to use the occasion for its proper purpose must be shown to have played no significant part in his motives if malice is to be found.

(b) Where the defendant believes in the truth of what he has published and conduct extraneous to the privileged occasion is not relied on, the claimant can only succeed if he shows that the publication contains an irrelevant matter and that it can be inferred that the defendant did not believe it to be true or realised that it was irrelevant, and brought it in for some improper motive. Judges and jury should be slow to draw this inference too".

15. Again, in the context of the subject application, it was submitted by Mr. Harty that in determining whether or not the test had been met the Court was entitled to have regard to the interrelationship between the impugned statements as well as to material events and the behaviour of the Defendant up to and including the conduct of the trial extraneous to the occasions of privilege. He argued that in determining whether there was sufficient evidence which called into question the bona fides of the professed belief in the truth of the relevant statements and which thus went to malice, the Court was not confined to considering the statements themselves or evidence of malice which had been particularised.

16. In my view the following statement from Gatley at para. 17.5 under the heading "Matter believed to be true but purpose to injure", is also potentially relevant to the question of

malice in circumstances where, as here, the Plaintiff claims the Defendant engaged in a campaign against him:

> *"There is no doubt that Lord Diplock's speech in Horrocks v. Lowe contemplates that even if the defendant firmly believes his statement to be true he is guilty of malice if his sole or dominant purpose is to harm the claimant."*

17. As stated earlier, in determining whether there is evidence which amounts to malice a distinction is to be made between behaviour on the part of a defendant consisting of indifference to the truth on the one hand, which is evidence of malice, and irrationality, carelessness, spite, or prejudice, to name but a few behaviours on the other, which generally are not. This topic is discussed and commented upon by Gatley at 17.17 and by Cox and McCullough at p. 527.

18. At para 17.18 Gately goes on the examine the question of unreasonableness in the context of claimed belief and failure to make available inquiries; the following extract merits repetition:

> "*All this is not to say that a defendant who asserts a belief that others find absurd will necessarily succeed in the defence of privilege, for the unreasonableness of the belief may lead the jury to reject his contention that he holds it. Similarly, failure to make available inquiries may be evidence from which it may be inferred that the defendant was consciously indifferent to the truth or falsity of the situation".* [emphasis added]

Now that again is a statement which, in my judgment, is material to the present application since it is the belief of the Defendant and not that of the Doyles which will be material to the deliberations of the Jury in the event the issue of malice is left to them.

19. Mr. McDowell impressed upon me by reference to a number of authorities, including *Hennessy v. K-Tel (Ireland)* (Supreme Court, unreported, 12th June 1997) the duty which lies on the trial judge on an application such as the present and the heavy burden carried by the Plaintiff with regard to the sufficiency of evidence of malice. I mentioned *Hennessy* as well as passages from the other authorities cited above to high light the requirements made of the Court in testing the evidence of malice and in determining the application.

20. By way of a footnote to this observation, Lord Diplock's restatement of the law was recently the subject of a lengthy and comprehensive judgment by McGrath J. in *Nolan v. Laurence Lounge Trading as Grace's Pub* [2018] IEHC 352. In the course of the judgement, he referred to the learned law lord's statement of the law in the context of privilege on the nature of honest belief at para. 70, which has a particular resonance with the circumstances of this case and is worth repeating:

> *"…. what is required on the part of the defamer to entitle him to the protection of the privilege is a positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue*

defamatory matter recklessly, without considering or caring whether it is true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in the protection of a legitimate interest the law must take them as it finds them." [emphasis added]

Qualified Privilege; Consequences; Constitutional Rights

21. I would place emphasis on the requirement of "good faith" since it is not the fact of belief *per se* which is relevant but rather whether the belief was honestly held, or as it is sometimes said held *bona fide* at the time of publication, even though it transpires afterwards to have been mistaken. The law presumes malice and damage from the publication of a defamatory statement, however, once the entitlement to rely on a plea of privilege is established the legal presumption with respect to malice is displaced and a full defence afforded unless malice is proved as a fact by the party pleading same.

22. As mentioned earlier, the burden carried is a heavy one, and with good reason. Subject to the satisfaction of well-settled requirements, the defence of qualified privilege amounts to a vindication of the constitutional right to freedom of expression notwithstanding the defamatory nature of the statement is injurious to the claimant's right to a good name also guaranteed under Article 40 of the Constitution;

No Plea of Truth/ Justification

23. The Defendant did not come to Court to stand over the Doyles' contention that they were shown something quite different to the document which the Plaintiff says he produced at the time of the inspection, rather the case made is that the officers of the Defendant who subsequently became involved in the controversies originating in the inspection of Liz Doyle's yard acted on the basis that they believed in the truth of what had been said to them at the time when the impugned statements were published.

Decision

The Plea of Malice; Particulars; Evidence to be Considered; Limitation

24. Ordinarily, malice is pleaded by way of a Reply to a Defence where privilege is pleaded on grounds the publication occurred on an occasion of privilege. However, in this suit, the allegation of malice is contained in the Statement of Claim, particulars of which are also set out, though not for all of the impugned statements. This omission was followed up by way of a notice for particulars. The Plaintiff delivered replies stating these were matters for evidence at the hearing of the action. And so, the matter lay until the action came to trial.

25. In the course of the submissions it became apparent that the parties disagreed on what evidence of malice, if any, the Court was entitled to take into consideration in determining the application. In this regard, the question which arose was whether the Court was confined to considering evidence of malice which had been pleaded and particularised, as

contended by the Defendant, or evidence which also went to the pleas of malice in general, as argued by the Plaintiff

Conclusion

26. On this issue, I accept the submissions made on behalf of the Plaintiff. It would be wholly wrong, in my judgment, for the Court, or the jury as the case may be, to disregard evidence adduced in relation to a general plea of malice whether given in chief or obtained on cross-examination, that had not also been particularised in advance of the trial. To do otherwise would deprive the Plaintiff of the benefit of evidence going to the issue on which he carries the onus of proof

27. It may be trite, but a party cannot be expected to plead and particularise malice the existence of which was unknown at the time when the relevant pleading was delivered. The proposition is well illustrated by circumstances where evidence of malice material to a generalised but express plea emerges for the first time in the course of examination or cross-examination. In the event, it may transpire to be a matter of good fortune that a gift of evidence unknown at the commencement of the trial is handed to the party carrying the onus of proof on the issue.

28. To repeat what the Court stated when making rulings on previous applications herein, the purpose of pleadings is to define the issues between the parties. In this instance express malice, particularised in part, has been pleaded in the statement of claim. For the reasons given above I cannot accept as legally sound the proposition that the evidence of malice which the Court may consider on an application to withdraw the case from the Jury is limited or confined to evidence of malice pleaded in general but not been particularised. In my judgment, the appropriate course to be taken by the Court is to consider all of the evidence adduced and/or admitted in relation to the allegations of malice set out in the pleadings.

The Defendant's Belief

29. The question of whether or not the Doyles and thus the Defendant had come to Court to stand over the truth of their statements was canvassed at some length during the trial in the course of the examination and cross-examination. As non-lawyers, the Doyles were no doubt puzzled by the controversy which arose from their assertion that the truth of what had transpired in the yard was not the basis upon the Defendant had chosen to meet the claim. Indeed, evidence given to this effect by Ms Doyle led to an application to have the defence of qualified privilege struck out but was refused for the reasons set out in the separate judgement of the Court herein, referred to earlier.

30. From the outset it was made clear to the jury by Mr McDowell that the Defendant had not come to Court, as would have been its right, to establish the truth of what the Doyles say they were shown in the yard rather what was material to their deliberations on the issue of malice was the Defendant's belief in the truth at the time of publication. The belief steadfastly maintained by the Doyles throughout the trial was that the documents produced to them by the Plaintiff and by Mr Buckley were false/concocted and were quite

different to the document proved in evidence by the Plaintiff which he said he had produced.

31. The Doyles' view of these matters was adopted by the Defendant "lock stock and barrel" or to put it another way 'at face value'. The evidence given by the officers of the Defendant in relation to this aspect of matters is that they accepted without question the truth of what they were told by the Doyles. In making a previous ruling the Court found that the belief of the Doyles and that of the Defendant's witnesses on this issue was interrelated, a conclusion from which, all of the evidence having been given, the Court does not demur nor seek to modify in any way.

32. While the belief of the Doyles and the Defendant's witnesses and thus the Defendant are interrelated, the belief which is material to the Jury's considerations is the belief of the Defendant. In the event the issue of malice is left to the Jury, matters for their consideration will include (i) the professed belief in the truth of the defamatory statements held by the Defendant's officers called as witnesses, (ii) the bona fides of their belief in the truth of the published statements and (iii) the attitude adopted to all of the information available to them concerning the matters in controversy prior to and at the time of the relevant publications and not just the information received from the Doyles.

33. Accordingly, with regard to the first, second and fifth statements, in particular, it is the belief of the Defendant rather than the Doyles which is relevant; for present purposes, this principally means the belief of Mr. Meade and Mr. Grassick. There was some criticism that the Court had not heard from Mr Halford, another officer of the Defendant who had been involved in the events giving rise to the proceedings, however, I consider it necessary to state that no negative inference is drawn from the fact that he was not called as a witness; there may well have been very good reasons for not doing so but about which I am unaware and the fact we did not hear from him has had no bearing upon the Court's deliberations. With regard to the belief of the Defendant, the Court has the evidence of Mr. Meade and Mr. Grassick who, given their involvement in and knowledge of the matters in controversy, are well qualified to give evidence on the Defendant's behalf in this matter.

34. Questions were properly put on cross-examination of the Plaintiff and the witnesses called on his behalf which involved matters of fact that could only be proved by calling the Doyles, an undertaking in this regard having been given by counsel. They gave evidence on behalf of the Defendant as did Mr. Meade and Mr. Grassick, neither of whom questioned what they were being told by the Doyles, rather their evidence is that they accepted and took at face value what was said about the matters in issue. The reason offered for this approach, particularly by Mr. Meade, was stated as a desire "to get justice for Liz", a motive repeated many times during the trial with such regularity it was termed the Defendant's 'mantra' by Mr. Harty. As far as he was concerned the Plaintiff was in the wrong and that was that.

Malice Subjective Test; Effect of Knowledge/Awareness of Falsity; Indifference;

35. The test to be applied in all instances to the determination of malice in the legal sense is subjective. Of particular relevance, but by no means only relevance, to the circumstances of the case is the law as to knowledge of falsity and indifference, is quite clear. Save in the exceptional circumstances referred to earlier by Lord Diplock, knowledge of falsity or an awareness thereof or of the likely falsity of a statement or *indifference* to the truth thereof is normally fatal to the defence of qualified privilege. [*emphasis* added]

36. However, as discussed previously, there is ample authority for the proposition that irrationality, negligence, carelessness, prejudice and impulsiveness are to be distinguished from indifference and do not alone establish malice. Depending on the circumstances, the fact that a defendant does not bother inquiring into something or makes a poor enquiry of itself is in general not sufficient evidence on which to find malice nor to draw an inference that the defendant used the occasion of the publication for an improper purpose or, put another way, abused the proper purpose of the occasion.

37. To this must be added the proviso that although in general absurdity or unreasonableness of belief do not constitute evidence of malice if either the nature of the absurdity or unreasonableness of the belief would lead a jury to reject the contention that the belief was held honestly malice may be inferred. In all circumstances, however, the absence of honesty or bona fides by the holder of the belief in the truth of the statement is generally fatal to the defence of qualified privilege is evidence from which malice may also be inferred.

Third Statement; August 9th Article

38. I shall return presently to the impugned statements in respect of which qualified privilege has been pleaded. Suffice it to say, these have been approached with a view to the Court being satisfied as to whether there is sufficient evidence, if accepted, upon which the Jury would be entitled to find malice as a matter of probability on the part of the Defendant. However, the August 9th article, to which there is no plea of privilege, is not subject to the considerations or constraints material to the statements in respect of which the plea has been raised because, to use Mr Harty's words, it is *sui generis*. It follows that Mr Meade's intention with regard to whom he was referring or intended to refer when giving the interview is not relevant, proof of malice as a fact not in these circumstances being required by law since if the statement is defamatory and is found to have been understood as referring to the Plaintiff malice is presumed.

39. In a letter dated the 8th October 2014, the late Mr Ward asserted that the August 9th article was published on an occasion of qualified privilege. Given the publication was to the world at large the Defendant, quite properly, did not pursue that line of defence but rather chose to meet the claim, as we have seen, by a plea the publication, if found to refer to the Plaintiff, (a fact also in issue), was not made by, on behalf of, or with the authority of the Defendant. The case made in this regard is that although Mr Meade had been invited to give the interview because of his position as chairman of the Defendant association, the views expressed by him and about which complaint is made were his opinions and not those of the Defendant.

40. While it was undoubtedly the case his position as chairman of the Company most likely explained the reason why he had been invited to give the interview, it was submitted that it did not follow he was speaking on behalf of or with the authority of the Defendant so as to render the Defendant vicariously liable for the impugned statement. Mr. McDowell gave a number of examples to illustrate the proposition which included the giving of interviews or the making of statements by the chairman of the Bar Council or the President of the Law Society that do not render the Bar Council or the Law Society, as the case may be, vicariously liable for a wrong unless the officeholders concerned were expressly authorised by their respective professional bodies.

41. Having considered the submissions and the statements of law on vicarious liability set out in Gatley 12th ed. at para. 8.30 et seq. it appears to me in this context that the language of 'principle and agent' rather than that of 'master and servant' is more appropriate to the circumstances of the case. Either way, however, where the issue of liability for the acts of others arises the question to be addressed is whether the author or publisher of the impugned statement was acting within the scope of express or ostensible authority or within the scope of employment.

42. The August 9th article was opened and read to the Jury on a number of occasions during the course of the trial. It is abundantly clear from my reading of it, as I think it would be to the Jury, that Mr. Meade spoke in the plural rather than in the singular person and that by doing so he held himself out as speaking on behalf of the association, a company limited by guarantee. Mr. Meade did not make it clear that the views he expressed were his personal opinions rather than those of the Defendant. The drawing a distinction by an officer of a company or unincorporated association between personal views and those of the company or association or by those holding public office is a common occurrence, particularly where the media is involved; indeed, the distinction is very often emphasised. No doubt there are a myriad of reasons why this might be so but counted amongst these must surely be the necessity to avoid the imposition of potential liability on others arising from what is said.

Conclusion; August 9th Article

43. In determining the issue as to whether Mr. Meade was expressing personal opinions or was speaking on behalf of the Defendant the Court is, of course, concerned with the circumstances of the case. As already mentioned earlier, in giving the interview Mr. Meade did not speak in the singular but rather used the plural "we" when addressing topics which are now the source of contention. It is quite clear that 'we' in this context meant the members of the Defendant association, racehorse trainers like himself. In this regard it was not suggested to Mr Meade, nor did he volunteer that he was speaking in a personal capacity rather than on behalf of the Defendant as a director and its chairman. In my judgment, it would be open to the jury to find the Article was understood by those who read it to be the views of Defendant on the matters about which Mr Meade spoke rather than his personal opinions alone.

44. This conclusion also gains traction from the quotation from of a statement issued by the committee of the Turf Club carried in the August 16th, 2014 edition of The Irish Field and

published in response to Mr. Meade's comments in the August 9th article which essentially portrayed his comments as having been made on behalf of the Defendant association. In particular, the article contains a passage which recognises that while Mr. Meade is entitled like everyone else to make comments of his own on racing matters, on this occasion, having chosen to speak in his capacity as chairman of the Defendant company, he had elevated the views expressed to an altogether different level, meaning he was expressing the position of the Defendant association and its members on these matters. That position could also be inferred from subsequent correspondence Indeed, it was only when the case came to the defence stage that the Defendant sought to distance itself from the remarks through the plea that the reported remarks were personal views which had not been made by, on behalf, or with the authority of the Defendant and thereby, to use a colloquial term adopted by counsel for the Plaintiff, "threw him under the bus".

45. I am satisfied that the claim in respect of the August 9th article must be left to the Jury. Not only will they have the articles as evidence, but they will also have the statements contained in the letter dated the 8th October 2014. This letter was written on behalf of the Defendant by the late Mr. Frank Ward in response to the Plaintiff's letter of claim dated 1st October 2014. Mr Ward went out of his way to deal expressly with the allegations that the remarks published in the August 9th article was part of a concerted campaign of defamation by the Defendant against the Plaintiff.

46. While the letter rejects the contention that the article could be construed in this way it is also made perfectly clear that Mr. Meade was entitled to express his opinion, "…in his capacity as chairman of the IRTA…". There is no suggestion in the letter that Mr. Meade was not talking on behalf of or with the authority of the Defendant or that the Defendant was not legally liable for what was said, rather, the assertion made is that the article was published on an occasion of qualified privilege, and thus, protected by law.

Onus of Proof: Agency; Authority

47. The Plaintiff carries the onus of proof to establish on the balance of probabilities that Mr. Meade was authorised by and/or was acting on behalf of the Defendant when he gave the interview published the 9th August. An express allegation to this effect contained in the statement of claim is traversed by the defence. It was urged on the Court by Mr. Harty that in the circumstances of the case the onus of proof in respect of the allegation Mr Meade was speaking personally rests with the Defendant, however, I cannot accept that proposition. I cannot see from the circumstances any basis upon which the Court would be warranted in disregarding the ordinary requirement that he who alleges must prove, particularly in circumstances where there is an express traverse in the defence of the allegations made against the Defendant in respect of the August 9th article, accordingly, I reject the submission made on behalf of the Plaintiff in this regard.

48. I am satisfied, however, that there is evidence from which, if accepted, the Jury would be entitled to find that when Mr. Meade gave the interview in his capacity as chairman of the Defendant, he did so as its agent and was consequently acting on its behalf rather than expressing personal opinions at the time. It follows that if the Jury were also to find that the article was understood to refer to the Plaintiff – an issue on which he again carries the

onus of proof – the Defendant would be vicariously liable as concurrent wrongdoer for the defamatory publication.

Conclusion; Identity

49. As stated earlier Mr. Meade's intention as to whom he was referring when giving the interview, namely Mr. Louis Reardon, is not relevant. The question for the Jury on this question will be whether the impugned statement in the article was understood to refer to the Plaintiff. As to that, I am satisfied there is cogent evidence on which to found a conclusion that it did. Indeed, Liz Doyle gave evidence that she understood the remarks published in the article referred to the Plaintiff. Moreover, as she put it, everybody in the world of Irish horse racing knew what had happened in her yard.

Ruling

50. For the reasons set out above, I am satisfied, and the Court finds there is evidence which, if accepted, would entitle the jury to find (i) that when Mr Meade made the impugned statements he did so on behalf of the Defendant and (ii) that the impugned statements were understood to refer to the Plaintiff, all of which are matters of fact for the Jury. Accordingly, the application to withdraw the case in respect of the third statement is refused.

Fourth Statement; Petition to Remove the Plaintiff as Head of Security of the Turf Club

51. The petition is the fourth publication about which the Plaintiff complains. Considerable emphasis is placed on the creation and circulation of a petition by the Defendant the object of which was to have him removed as head of security for the Turf Club. In support of this contention Mr. Weld, Mr. Hickey and Mr. Egan were called as witnesses on his behalf. The evidence of Mr. Hickey and Mr. Egan was categorised by Mr. McDowell as nothing more or less than hearsay. There was no admissible evidence the alleged petition ever existed and any finding by the jury to that effect would be wholly wrong; in any event, there was no evidence of publication. Accordingly, he submitted the claim in respect of the petition should be withdrawn. At its high-water mark, all the Plaintiff had to go on to establish the case for a petition was the evidence of Mr. Hickey and Mr. Egan, which was nothing more than a repetition of what they say they were told by Mr. Weld.

52. I have looked carefully at the transcript of evidence on this as on other issues. Mr. Harty drew the attention of the Court to the response elicited from Mr Weld when it was put on cross-examination that Mr. Hickey and Mr. Egan had learned of the petition during telephone calls each had with him. Mr Weld did not deny the calls had been made; he just couldn't be sure of the detail of what had transpired as it was over six years since same had occurred. I understood Mr Harty's submission in this regard to be that without an express denial the Jury would be entitled to conclude that Mr. Weld told Mr. Egan and Mr. Hickey that he had been asked by the Defendant to sign a petition to have the Plaintiff removed from his position as head of security.

Conclusion; Fourth Statement; the Petition

53. Having completed the exercise of considering all of the evidence avialable in relation to the alleged petition I am satisfied that Mr. McDowell is correct in his submissions that there is no evidence wholly insufficient evidence to warrant a finding by the Jury on the

balance of probabilities that the Defendant had drawn up a petition to remove the Plaintiff from his position, nor is there sufficient evidence to ground a finding of publication, the absence of which is, of course, fatal to a cause of action in defamation. As to that aspect of the matter, the allegation is that the petition was circulated to the members of the Defendant association and to horse trainers in Ireland generally, however, I am also satisfied, such ever occurred. At its high watermark, the case for the existence of the alleged petition, not to mention the matter of publication, is the existence of a draft letter with which Mr. Grassick sought the assistance of the late Mr. Ward, the final version containing the names of the Defendant's executive committee.

54. In fairness to Mr. Grassick, he accepted that people might well describe a letter with a list of names attached as a petition, though that was not a term he would have used to describe it. That said, he denied any knowledge of the alleged petition or that such ever existed when it was put to him that it did, moreover, it is clear from the letter which he had intended to have signed by the committee, and offered to Mr Weld for that purpose, that the objective was quite different to a call for the removal of the Plaintiff. I am satisfied and find as a fact if it is necessary to do so, that Mr. Weld made the telephone calls to Mr Egan and Mr Grassick during which he may well have described the letter as a petition, although in evidence he said he wasn't sure what was meant by the term. He had been approached just before a race meeting but because of his commitments there he asked Mr. Grassick to come back to him on another occasion after other committee members had signed. Although I'm satisfied Mr. Grassick made some representation when he spoke to Mr Weld regarding the nature of the document he wanted to be signed, I'm also satisfied it was not a petition to have the Plaintiff removed as head of security.

55. Furthermore, there is no evidence Mr. Grassick told Mr. Weld, nor is there any evidence to support the proposition that Mr. Weld knew about a policy to try and have the Plaintiff removed from his position. It seems to me that what probably happened was that a conversation took place between Mr. Grassick and Mr. Weld during which he was asked to sign a letter by Mr Grassick which intended to have signed by all of the committee members and that as a result of that conversation Mr Weld probably described the letter as a petition during the subsequent phone calls he had with Mr. Egan and Mr. Hickey. I do not think the Jury would have any reason to doubt the evidence of Mr. Egan or Mr. Hickey about what they say they were told, however, I am quite satisfied on Mr. Grassick's evidence and having seen a number of versions of the letter produced by him, that the document Mr Weld may have glimpsed at or that was described to him was not the alleged petition. Accordingly, the Court finds there is insufficient evidence upon which the Jury would be entitled to find that the Defendant drew up and published any such petition.

56. Finally, I am confirmed in coming to this conclusion by a forceful submission with regard to the discovery made on behalf of the Defendant, a task undertaken no doubt under the watchful eye of the late Mr Ward with whom this Court was very well acquainted. It must be immediately said in fairness to the Plaintiff that it was not suggested on his behalf the late Mr. Ward had failed to have the sworn affidavit drawn up properly. However, it was

argued that a finding by the Court in the context of this application that there was evidence to support the existence of a petition would create precisely such an inference in circumstances where the alleged petition had been sought but not discovered. As it is the affidavit and the schedules thereto are quite clearly drawn up in accordance with the Rules of Court.

57. If a petition of the nature alleged by the Plaintiff existed it would have had to have been discovered and listed in the first schedule or if it had existed but had ceased to exist or had been lost it would have had to have been identified in the second schedule and an explanation given as to how it was destroyed or was otherwise came to be lost and no longer in the power and possession of the deponent. There is none such. It follows from the foregoing that the Plaintiff has failed to discharge the onus of proof with regard to the existence and publication of the alleged petition, accordingly, I accept the submissions made on behalf of the Defendant that there is insufficient evidence to warrant the fourth statement being left to the Jury.

58. In the interests of completeness, I should add the version of the letter drawn up by Mr Grassick with the assistance of the late Mr Ward, dated the 27th August, which was used to cross-examine the Plaintiff and the witnesses called on his behalf, was succeeded by a final version of the letter dated August 28th. This materialised later in the trial and, interestingly enough, contained the names of all of the Defendant's executive committee. This was the version which Mr. Grassick intended to have signed by each of the committee members, however, he thought the better of this; the letter was neither signed nor circulated. Even if it had been, as stated earlier, it is clear from the text of the drafts and the final version that these do not constitute an attempt to have the Plaintiff removed from his office as head of security.

Ruling

59. For all these reasons the Court will accede to the application to withdraw the case in relation to the fourth statement from the Jury.

Fifth Publication; Meeting in the Keadeen Hotel

60. On the 15th August 2014, a meeting took place at the Keadeen Hotel, Newbridge Co. Kildare attended by the Doyles, representatives of the Turf Club, including Mr. Egan and the late Mr O'Byrne and by representatives of the Defendant, including Mr. Meade, Mr. Grassick and Mr. Halford. The essence of the case advanced by the Defendant in relation to this publication is that the meeting was arranged so that the Doyles could give their account of what had transpired in Liz Doyle's yard. The Plaintiff complaint is that at the meeting he was defamed by allegations of misconduct in the execution of his duties at and by calls for his removal as head of security for the Turf Club. Leaving the defence of qualified privilege to the side for a moment, the position taken by the Defendant in relation to these allegations is that it did no more than facilitate the meeting which brings us to the matter of legal responsibility for publication.

The Law; Liability for Publication by those Arranging / Participating in Defamatory Publication;

61. The general rule at common law is that a person who creates or authors a defamatory statement (the originator) is liable for the publication provided there was an intention to publish or where there was a failure to take reasonable care to prevent publication. Where the publication was unintentional, the general rule is that liability will only arise where it is shown publication was reasonably foreseeable. The 2009 Act makes express provision for unintentional publication where the defamatory statement is misdirected. In this regard, section 6 (4) provides that no publication shall take place where the defamatory statement is published to a person other than the person to whom it relates provided the publication to the other was unintentional and it was not reasonably foreseeable publication to the person to whom the statement relates would result in publication to the other person. In my judgment, this provision is an augmentation of rather than replacement for the common law rule.

62. Subject to certain rules which developed to excuse mere distributors of liability, such as where a lack of knowledge of the defamatory nature of the statement is demonstrated and reasonable care was taken, the general rule at common law is that liability for publication extends to any person who participated in, secured or authorised the publication. See *Watts v. Times Newspapers Ltd (Schilling & Lom (a firm), third party*) [1997] Q.B. 650 at 670 and *Mahfouz v. Brisard* [2005] EWHC 2304 at 11. However, provided certain criteria/ requirements are satisfied no liability will attach for innocent publication. In this regard, Section 27 of the 2009 Act provides for the defence of innocent publication in circumstances where the defendant is:

    (i) not the author, editor or publisher of the statement,

    (ii) reasonable care was taken in relation to the publication, and

    (iii) there was no knowledge or reason to believe that what was done caused or contributed to the publication of a statement that would give rise to an action in defamation.

    It follows from the rule at common law that if a person or persons arrange and/ or attend at a meeting for the purposes of enabling others to make statements concerning a third person about which they are aware or have reasonable grounds for believing will likely be made and such statements are published by others attending the meeting and such statements are proved to be defamatory, those arranging and/ or participating at the meeting are concurrent wrongdoers with the authors and publishers and are jointly and severally liable with them in damages.

63. The main reason proffered by the Defendant for arranging the meeting at the Keadeen Hotel was to try and get some sort of resolution to the issue/issues which had arisen. Of critical importance to the matter in hand, Mr. Meade and Mr. Grassick organised and attended the meeting in the knowledge and for the purpose of communicating to the representatives of the Turf Club, the Plaintiff's employer, the complaints and grievances previously published by the Doyles. Having accepted without question the veracity of their accounts, Mr. Meade and Mr. Grassick were not only aware of what was likely to be said

at the meeting, they condoned and supported it. On my view of the evidence, they were content that the Doyles should repeat what had been discussed in the late Mr. Ward's office, including the content of witness statements and subsequent correspondence concerning the Plaintiff and his behaviour and that such should be published to those present at the meeting, including Mr Egan, chief executive of the Turf Club.

Conclusion; 5th Statement

64. As discussed earlier it was accepted on behalf of the Plaintiff that the publication of the impugned statements at the Keadeen Hotel was an occasion of qualified privilege. In the circumstances outlined above and having considered the available evidence on the issue I cannot accept the suggestion that an essential ingredient to sustain the plea in respect of which that defence was pleaded is missing, namely sufficient evidence of malice, accordingly, I reject the Defendant's submissions in relation to the impugned statements published at the meeting in the Keadeen.

65. As with the first, second, sixth and seventh statements, the Defendant has not sought to defend the 5th publication on the grounds of truth but rather on the basis that the occasion was privileged. It follows that if the Jury find the statements made were published maliciously in the legal sense, as alleged by the Plaintiff, the Defendant will be robbed of the defence and rendered liable as a concurrent wrongdoer, notwithstanding the Doyles were not joined as parties.

Ruling

66. For the reasons aforesaid, the Court will refuse the application to withdraw the case in respect of the fifth statement from the Jury.

First, Second, Sixth and Seventh Statements

67. Insofar as the sixth and seventh publications are concerned, suffice it to say, having regard to the determination to be made in relation to the first and second publications, the Court accepts Mr Harty's submission that these are interrelated in the sense set out in the judgments of the Supreme Court in *Hynes-O'Sullivan* referred to earlier; namely, the statements are interrelated and interconnected pieces of evidence which, when taken together and viewed in context, are capable of bearing the defamatory meanings pleaded by the Plaintiff.

Defamatory Meanings; Application for Ruling; Section 14 (1) 2009 Act

68. I digress here to observe that any party to defamation proceedings may make an application pursuant to s. 14 (1) of the 2009 Act for a ruling by the court: --

> *"(a) as to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff, and*
>
> *(b) (where the court rules that that statement is reasonably capable of bearingthat imputation) as to whether that imputation is reasonably capable of bearing a defamatory meaning…"*

Although subs 4 provides that the application may be brought at any time after the bringing of the action up to and including the trial, the appropriate course is to bring the

application prior to trial where practicable and possible to do so in accordance with the practice direction set out in *Ryanair v. Van Zwol and others* [2017] IEHC 798 at para 29 *et seq*. It is also clear from the provisions of subs. 3 that whenever the application is made it must be brought by motion on notice and determined by a judge sitting alone, even if brought at the commencement of and/or during the course of a trial by jury.

69. It follows that if a party to proceedings intends to dispute an allegation or assertion that an impugned statement is reasonably capable of bearing the imputation/s pleaded by the Plaintiff, the appropriate course is to bring a motion for a ruling thereon as provided for by s. 14 (1). That no such application was made in this suit is entirely consistent with the chosen defences to the claim, particularly the pleas of qualified privilege, proceeding as they do, subject to other legal requirements as to proof being satisfied, on the premise that the impugned statements are capable of bearing the defamatory meanings attributed thereto by the Plaintiff. (the Plaintiff is on proof of various matters other than malice such as publication/authority/meaning in relation to some/all of the statements). It may be trite, nevertheless, there would be no point in raising a plea of qualified privilege to a statement which is factually correct/true.

70. The defence of privilege provided by law in certain circumstances is underpinned by public policy grounded in the State's obligation to vindicate as best it may the fundamental rights of the citizen guaranteed by Article 40 of the Constitution, the prerequisite to the defence being the publication of a defamatory statement about another whose right to a good name is also guaranteed and represents an attempt where a conflict arises to strike a fair balance between competing constitutional rights.

71. Returning to the sixth and seventh statements, although these consist of separate instances or occasions of publication the interrelationship with pre-existing events, in particular with the events giving rise to the first second and fifth statements, warrants the Court in considering the statements together. This approach is consistent with the Court's conclusion that all of the evidence which goes to establishing malice as pleaded is to be considered, including the behaviour of the Defendant up to and during the trial of the action.

72. In taking this approach I am cognisant of the statement by the Chief Justice in *Hynes-O'Sullivan* referred to earlier that evidence of malice cannot be obtained from a number of items of evidence no one of which is in itself evidence of malice. While the remaining statements taken individually are clearly capable of bearing the meanings attributed to them by the Plaintiff, the question for determination by the Court is whether there is evidence from which, if accepted, a reasonable jury would be entitled to draw inferences and find as a matter of probability malice in the legal sense on the part of the Defendant at the time of the alleged publications.

Circumstances; First and Second Publications; Analysis

73. It is the first and second publications and the events which gave rise to them which the Plaintiff claims led to the subsequent occasions of publication about which complaint is made. It is not intended to summarise the evidence relating to the earlier publications;

the background may be found in the previous judgement of the Court referred to earlier. So far as the Defendant's belief in the truth of these statements is concerned I am satisfied from my perusal of the transcripts the Jury could be left in no doubt but that the Defendant adopted the belief of the Doyles as its own and did so without inquiry; there is no evidence the officers questioned what they were being told in any way.

74. The law as to what is required to found malice in this circumstance has been set out earlier. It is generally unnecessary to embark on inquiry unless what is being said and/ or other available information calls into question the correctness of the impugned statement or an enquiry is otherwise called for in the circumstances since the presence of any one of these factors or a combination thereof impacts directly on the *bona fides* of the professed belief in the truth of the publication. While unreasonableness of belief in the truth per se is generally insufficient, the nature of the unreasonableness may lead a jury to reject the assertion that the belief is held *bona fide* and to infer malice. Similarly, a failure to make available enquires may be evidence from which a jury could infer that the Defendant was consciously indifferent to the truth or falsity of the relevant statement.

75. This is not to be taken as an attempt to depart in any way from the statements of the law referred to earlier regarding the distinction to be drawn between recklessness/indifference to the truth on the one hand and, behaviours such as carelessness, impulsiveness, irrationality, prejudice, or stubbornness in coming to a positive belief on the other. Rather, what is material here is whether there were circumstances which called for an enquiry and or there was information available to the officers of the Defendant involved in these events which called into question what was being said and consequently went to the formation and honesty of the belief which the Defendant held at the time of the relevant publications. That, it seems to me, is a material consideration to the Court's deliberations because it is the kind of evidence which is necessary if the Plaintiff is to have any prospect of discharging the heavy burden of establishing as a matter of probability malice on the part of the Defendant.

76. Mindful that behaviour of a defendant up to and including trial may also warrant an inference by the jury of improper motive, the very latest point at which, in my judgment, there was available information which called into question the truth of what was being asserted by the Doyles was at the meeting in the Keadeen Hotel on the 15th August 2014. On the evidence given by Mr. Egan, there was a patent conflict between the accounts given by the Doyles on the one hand and the position of the Turf Club on the other, particularly with regard to the nature and content of the documentation produced at the time of the inspection. Not for the first time, Denis Egan admitted having been the author of Liz Doyle's name on the bank lodgement docket.

77. As it is, I am satisfied this particular fact amongst others was apparent at an earlier point in time; I shall return to this presently. On Mr. Egan's evidence, both sides set out their respective positions at the meeting, especially with regard to what had transpired in the yard and associated events. According to Mr Egan, the copy of the lodgement docket given to Mr. Buckley to show Liz Doyle at Fairyhouse races a few days following the

inspection was produced at the meeting [reference in the transcript of the ruling to the production of the lodgement docket/book of evidence rather than to this document is accidental/ mistaken] The Doyles maintained this document was materially different to the document which they contended had been produced by the Plaintiff in Liz Doyle's yard. Under cross-examination, Mr Egan said he had always admitted to having written the name "Liz Doyle?" on the document produced by the Plaintiff and by Mr Buckley and that he had made that admission on a number of occasions, including on the 15th April 2014 in the course of a telephone conversation with Avril Doyle as well as at the meeting in the Keadeen Hotel.

78. Although the Defendant's officers knew there were conflicting versions as to what documentation had been produced and that it was Mr. Egan who admitted to having written the name "Liz Doyle?" on the copy of the bank lodgement and no one else, on the evidence of Mr. Meade and Mr. Grassick their position irrespective of which version is correct is that they wanted 'justice for Liz' and that as far as Mr. Meade, in particular, was concerned, the Plaintiff was and remained wrongdoer. While I have said that any doubt about the conflict arising from the respective positions and the factual basis for the assertions made by the Doyles in so far as these involved the Plaintiff would have been abolished by the time of the meeting at the Keadeen, as mentioned already I am satisfied from a perusal of the evidence the signs of critical factual conflict were apparent at the time of the meeting in the late Mr. Ward's office, being the occasion of the first publication. Apart from the discussion on foot of which Mr. Ward wrote the letter of the 12th June, 2014 that contains the second impugned statement, there were emails containing accounts relevant thereto from Avril Doyle, Barry Murphy and Liz Doyle, all dated June 5th 2014.

79. Taking the evidence of the Doyles at face value, it was clarified for the jury that when reference was made in these e-mails to Mr Egan denying responsibility for the documentation which they maintained had been produced by the Plaintiff in the yard, it was accepted, significantly in my view, and it was understood at the time of the meeting that Mr. Egan was not denying responsibility for writing Liz Doyle's name on the document produced by Mr Buckley, or to put it another way he was accepting responsibility for doing so; either way, the Plaintiff wasn't the author.

80. Leaving aside the contest as it then was over what had transpired in the yard and why it should be noted that the letter of the 12th June 2014 did not contain an allegation the Plaintiff had written 'Liz Doyle?' on the lodgement docket produced in the yard. Indeed, the defence expressly pleaded that there was no necessity to allege in the Particulars of Malice that the Defendant was "well aware" at the time of the inspection that the Plaintiff had not written her name on the bank lodgement. Rather, the allegation made is that the Plaintiff uttered the words complained of for the purposes of entrapping Liz Doyle in circumstances where her name having been found on a lodgement docket was untrue. The inference which may, however, be drawn from this is that the Plaintiff knew the truth about this matter when he made the statement at the inspection that her name had been found on a bank lodgement used in the prosecution of Mr Hughes. Indeed, in this regard,

Avril Doyle stated in evidence that the Plaintiff's behaviour was reprehensible, unlawful and illegal, hugely serious allegations against anybody, never mind a former police superintendent and head of security of the Turf Club.

81. Whatever about these assertions, if the issue is left to the jury the evidence which they will have is that Mr Egan wrote the name "Liz Doyle?" on the copy of the lodgement docket contained in his copy of the book of evidence, that he subsequently gave his copy to the Plaintiff without alerting him to authorship of the entry and similarly with the copy he gave Mr Buckley, who added a circle on his copy around Liz Doyle's name. Whatever the contest and versions of events the allegations made against the Plaintiff, including those that he had acted unlawfully, illegally, improperly and was guilty of reprehensible conduct are without foundation. His corroborated evidence is that it was only after the inspection that he became aware Liz Doyle's name had not been written on the original lodgement docket contained in his copy of the book of evidence and that her name had been written in subsequently by Mr Egan. While there may have been a legitimate complaint against the Turf Club there was none such against the Plaintiff in this regard.

82. This begs the question as to why, depending on which evidence of what transpired in Mr. Ward's office the jury accepts, (there is a conflict between the accounts given by the Defendant's witnesses in this regard) Mr. Egan and Mr. Buckley were not put in the firing line especially as the uncontroverted evidence is that it was the entry made by Mr. Egan on the lodgement docket which set off the chain of events which gave rise to these proceedings. I should add for completeness that in subsequent correspondence the late Mr. Ward adopted the position that the Plaintiff's lack of awareness as to the how, when, where and why Liz Doyle's name came to be written on the lodgement docket, was irrelevant. In my view his lack of awareness is very relevant, particularly having regard to the seriousness of the charge made in the letter of June 12th. Having regard to the passages on the law cited earlier I am satisfied there is ample evidence extraneous to the impugned statements which is material to the matters under consideration and relevant to the issues in the action.

83. The sixth and seventh defamatory statements, when considered with the surviving statements, are in one sense examples of evidence extraneous to the earlier statements which will fall for consideration by the Jury in the context of the overall charge against the Defendant that it was engaged in a campaign against the Plaintiff. Evidence to that effect may be obtained from the statements themselves as well as from relevant extraneous evidence. At the route of the question which the Court has posed for itself is whether there was information available and there were circumstances material to a level of awareness which calls into question the *bona fides* of the Defendant's belief in the truth of the impugned statements at the time of publication and if so whether the adoption of the Doyles beliefs without question and or the failure to make available enquiries amounts to recklessness in the legal sense and/or indifference to the truth. I am satisfied there is evidence if accepted by the jury, which would warrant reaching just such a conclusion. Furthermore, lest there should be any doubt about it, the Court finds that the information

and circumstances material to awareness as aforesaid first arose at the meeting in Frank Ward's office.

Conclusion; First, Second, Sixth and Seventh statements

84. As the trial judge, my function is clear, namely, to be satisfied that there is evidence which, if accepted, would entitle the jury to find on the balance of probabilities that there was malice on the part of the Defendant at the time of publication of the relevant statements; I am satisfied that there is sufficient evidence. As stated earlier at the core of the Plaintiff's case, evidenced by the impugned statements and the events to which they refer, is a campaign by the Defendant to have him removed from his office as head of security. In my judgment, it would almost certainly be open to the jury to reach a conclusion that there was a campaign at the very least to 'clip the Plaintiff's wings' to the point of neutralising or rendering nugatory his interaction with the members of the Defendant association, particularly in the context of yard inspections.

85. Notwithstanding the nature of the complaints following the inspection which, on the evidence of Avril Doyle at least, implicated Mr Egan and Mr Buckley in a conspiracy with the Plaintiff, he was the only person singled out by the Defendant as the focus for attention, a fact from which the jury would be entitled to draw a further inference that the object of the complaint the Plaintiff rather than the Turf Club. In the event, if the Jury were to accept the evidence available to them on these matters and make findings of malice in relation to all or any of the surviving statements such conclusions would amount to an abuse of the occasion or occasions of publication in respect of which the plea of qualified privilege has been raised which the law does not permit.

Ruling

86. For all these reasons the application to withdraw the case in respect of the first, second, sixth and seventh statements from the jury is refused and the Court will so order.