**THE HIGH COURT**

[2021] IEHC 449

**[2016 No. 4255 P]**

**BETWEEN**

**NORA MARTIN**

**PLAINTIFF**

**AND**

**GENESIS PSYCHOTHERAPY AND FAMILY THERAPY SERVICE LIMITED**

**DEFENDANT**

**JUDGMENT of Mr. Justice Twomey delivered on the 5th day of July, 2021**

**Summary**

1. The plaintiff ("Ms. Martin") claims damages for defamation and the question for consideration in this case is whether the defendant ("Genesis") is entitled to rely upon the defences of qualified privilege and truth, where Genesis at the same time denies publishing the words which the plaintiff alleges are defamatory.

2. Ms. Martin claims that this approach by Genesis is totally inconsistent, either (a) the words were spoken but they were true and subject to qualified privilege or (b) the words were not spoken, in which case there is no necessity to claim privilege or truth – it is one or the other in her view and both positions cannot be adopted by Genesis.

3. This question arises in circumstances where Ms. Martin has brought a motion seeking to strike out of the pleas of qualified privilege and truth, or, in the alternative, her to be provided with the words allegedly spoken which are alleged to be defamatory (by the grant of an order allowing her to administer interrogatories or, in the further alternative, an order requiring the defendant to particularise the words allegedly spoken).

4. What is unusual about the circumstances of this case, and the very reason behind the present motion, is the fact that the allegedly defamatory words were spoken at a meeting at which the plaintiff was not present. This is not a case therefore, as might be more common in a defamation action, where the subject matter is a newspaper article or a television broadcast, where there is a record of what was said. Instead, what was said at the meeting is a matter of dispute which will require evidence at the trial.

5. Since evidence is a matter for the trial, Genesis claims that what Ms. Martin seeks on foot of the present motion is to effectively adduce evidence as to the words spoken prior to the trial. For her part, Ms. Martin claims that the relief sought is necessary to enable her to know the case that she will have to meet at the trial.

6. For the reasons set out below, this Court concludes that the plaintiff is entitled only to know in '*broad outline'* the case she has to meet and as noted herein, this Court does not accept that the plaintiff does not already know in general terms the case made by the defendant. On that basis therefore, and for the other reasons set out in this judgment, including the fact that (in line with *Kirkwood Hackett v. Tierney* [1952] I.R. 185) a defendant is entitled to deny making a statement and at the same time claim that the occasion is privileged, this Court refuses to grant the reliefs sought by the plaintiff.

**Background**

7. On 12th January, 2009, Ms. Martin commenced working as manager of Genesis. Genesis is a limited company that provides community-based psychotherapy services to families and individuals. At the time that Ms. Martin was employed with Genesis, the company was governed by a Board of Management, of which Ms. Martin was a member.

8. It appears that Ms. Martin worked as manager of Genesis from January 2009 to late 2013 without controversy. In late 2013, a charity event was organised as a means of fundraising for Genesis. That event was advertised as a '*Strictly Come Dancing'* event. Following the event, the money collected at the fundraising event was kept or stored by Ms. Martin in her private residence for an extended period of time. It is not necessary to set out the precise details of this event or its immediate aftermath, although it should be noted that it has not been suggested or implied anywhere in the pleadings that Ms. Martin misappropriated the fundraising monies in any way, rather that she kept the funds for safekeeping in her home for an '*extended period'* for the purpose, as claimed by the defendant, of conveying to third parties that Genesis had less funds available to it than was in fact the case.

9. On 23rd April, 2015, Mr. Richard Trehy ("Mr. Trehy"), treasurer of the Board of Management of Genesis at the relevant time, a role in which he acted in a voluntary capacity, had a meeting with Ms. Martin at which it is said he raised certain issues in relation to the safekeeping by her of the fundraising monies at her private residence. It seems that that meeting was a private meeting between Ms. Martin and Mr. Trehy. This is a relevant detail insofar as it is claimed that Mr. Trehy questioned Ms. Martin at that meeting regarding two issues, the first being the revaluation of the defendant's building in 2012 and the second being the accounting of fundraising monies raised at the '*Strictly Come Dancing*' fundraising event in 2013. Ms. Martin claims that at this meeting Mr. Trehy commented to her that '*at best it could be seen that you tried to defraud funders'* – in relation it seems to the holding of the fundraising monies at the plaintiff's private residence. No claim for defamation is made in respect of this meeting however.

10. Four weeks later, on 20th May, 2015, a staff meeting was held (the "meeting"). There were 12 members of staff of the defendant present at this meeting but the plaintiff was not in attendance. Representing management at the meeting was Mr. Trehy, treasurer of the Board, as well as Chairman of the Board, Mr. Damien Scattergood. Ms. Martin claims that at this meeting Mr. Trehy made certain defamatory statements in relation to her, and in particular her conduct as manager of Genesis and her role and motivation in storing the aforementioned fundraising monies at her home. As will be clear, what exactly was said by Mr. Trehy at the meeting is unclear, although the Amended Statement of Claim sets out in brief terms the nature of what was said, it is ultimately a matter for evidence at the trial.

11. In essence, Ms. Martin claims that certain statements were made by Mr. Trehy at the meeting '*to like effect'* that something had happened that could be classified as a '*criminal offence*' that would '*have a prison sentence going with it*' and which related to a '*higher level employee*', that Genesis had '*not been run well and was open to criminal charges'*,

that '*more changes in reporting to stakeholders were necessary'* to protect Genesis from '*criminal charges'* and that Ms. Martin had '*mismanaged the service'*.

12. As matters transpired, a week later, on 27th May, 2015, Ms. Martin's role as manager was abolished by Genesis. By letter dated 10th June, 2015, Ms. Martin was notified of the termination of her employment and it appears that her official termination date was 31st May, 2015. In this regard, it appears from the Amended Statement of Claim that Ms. Martin has issued unfair dismissal proceedings which are pending before the Employment Appeals Tribunal. However, the present status of those proceedings is unclear.

13. Reference is also made in the Amended Statement of Claim to a letter sent by Genesis to Ms. Martin on 13th July, 2015 in which Ms. Martin is advised that certain matters are '*reportable under the Criminal Justice (Theft and Fraud Offences) Act 2001'* – however it seems that no action has been taken on foot of this correspondence.

14. Almost one year to the day after the meeting, 13th May, 2016, Ms. Martin issued proceedings in which she claims damages for defamation against Genesis as the alleged publisher of an allegedly defamatory statemen under the Defamation Act 2009. Notably, Ms. Martin has not chosen to sue Mr. Trehy, as the person who spoke the allegedly defamatory words at the meeting in May 2015.

15. The original Statement of Claim was delivered on 15th July, 2016 and the original Defence was delivered on 14th October, 2016. However, the Defence was struck out on consent by Barniville J. on 26th February, 2018 for failure to comply with O. 19, r. 17 RSC. It appears to be common case that at that hearing for the strike out of the Defence it was agreed that the defendant was *'at large'* to amend its defence and therefore no issue is taken with the fact that a plea of truth was added, and that the plea of qualified privilege was expanded upon, in the Amended Defence. Some issue was taken with this in the written submissions although no great reliance was placed on this fact in the oral submissions to this Court. An amended Statement of Claim was then delivered on 6th March, 2018 and the plaintiff's Affidavit of Verification was sworn on 14th May, 2018.

16. The Amended Defence was delivered on 23rd March, 2018 and in that Amended Defence, Genesis expands on the defence of qualified privilege and also relies on a plea of truth per s. 16 of the Defamation Act, 2009. Both defences are particularised in the Amended Defence, which particulars are set out more fully later in this judgment.

17. Importantly, while Genesis has pleaded qualified privilege and truth in its Amended Defence, it has also denied that the words complained of were spoken. It is claimed by Ms. Martin that this is inconsistent, i.e. if the words were spoken they were true and subject to qualified privilege, but if the words were not spoken then there is no necessity for claiming such privilege – it is one or the other.

18. Ms. Martin says that this inconsistency means that she does not know the case that she has to meet at trial, as she does not know what words Genesis claims are privileged or were spoken as truth in circumstances where Genesis simultaneously denies that the

words complained of were spoken. Ms. Martin claims that she will not have a fair trial and that the defendant will be at an advantage if she does not know in advance of the trial what words were actually spoken by Mr. Trehy at the meeting. It is relevant to note however that a Reply to the Amended Defence was delivered on 3rd May, 2019 and in this Reply, Ms. Martin denies that the defences pleaded by the defendant apply, yet she does not seek to claim that the introduction of either defence will leave her unable to meet the case against her, nor does she make any allegation of prejudice in this regard. That Reply is set out and analysed in more detail later in this judgment.

19. In this motion therefore which was issued on 27th October, 2020, Ms. Martin seeks an order striking out the pleas of qualified privilege and truth contained in the Amended Defence or, in the alternative, an order giving liberty to administer interrogatories pursuant to O. 31 of the RSC or, in the further alternative, an order directing the defendant to particularise the words spoken by Mr. Trehy at the meeting in question. The interrogatories sought to be administered effectively ask the defendant whether Mr. Trehy spoke the words complained of and asks what those words were. However, while the second two reliefs are sought in the alternative to the first relief, it seems clear that Ms. Martin's aim is to have the words spoken by Mr. Trehy set out by the defendant, and submissions to that effect were made by counsel for Ms. Martin who described it as a matter of '*plain fairness'*. In those circumstances therefore it seems that what Ms. Martin really seeks is to either administer interrogatories or an order compelling the defendant to provide particulars of what was said by Mr. Trehy at the meeting.

20. The core issue therefore is whether Ms. Martin ought to know in advance of the trial exactly what was said by Mr. Trehy at the meeting, or whether, as is claimed by the defendant, the particulars sought by the plaintiff are not necessary for her to meet the plea of qualified privilege or of truth.

21. Although not determinative of the issue, it must be noted that there has been a level of delay on the part of the plaintiff in progressing these proceedings. In particular, some 31 months passed between the delivery of the Amended Defence (in which the plea of qualified privilege was expanded upon and a plea of truth included for the first time) and the issuing of the within motion (in which the plaintiff seeks to strike out the pleas of qualified privilege and truth on the basis that she will not otherwise be able to meet the case against her at the trial). Delay in progressing proceedings is something which the Court must have regard to in considering whether certain reliefs should be granted and this is especially so in defamation proceedings, where the plaintiff presumably has a special interest in finalising matters which are alleged to be of ongoing concern to their reputation. This is clear from the decision of the Supreme Court in *Desmond v. MGN Limited* [2009] 1 I.R. 737 (see the dissenting judgment of Kearns J. at p. 756) where it is stated that in that case, involving a claim for defamation, there was:

> "a particular obligation on the plaintiff to prosecute his claim vigorously and expeditiously if it was his intention to avail of these particular proceedings to vindicate his reputation."

22. It seems that the claim made by the plaintiff that she will be prejudiced as a result of not knowing what case she has to meet if she is not granted the relief presently sought, must be viewed in the context of her delay in progressing the proceedings and in particular the 31 month gap between the Reply to the Amended Defence, which makes no reference to the claim now advanced, and the issuing of the Notice of Motion seeking, *inter alia,* an order for particulars.

**ANALYSIS**

23. The underlying thrust of the present motion is the plaintiff's claim that a defendant cannot deny publication of a defamatory statement whilst pleading, in the alternative, that the statement or part of it is the truth or is covered by qualified privilege.

**Contradictory to deny publication yet plead qualified privilege and truth?**

24. The plaintiff's written submissions describes the position adopted by the defendant as *'inherently inconsistent or contradictory'* and the reliefs are sought on the basis that the plaintiff ought to know what statements are relied upon by the defendant as being covered by qualified privilege and/or are true in substance and fact.

25. The plaintiff places significant reliance on a decision of the New Zealand Supreme Court in *Heap v. Green* [1926] NZLR for the proposition that a defendant in a defamation action cannot deny publication while simultaneously pleading a defence, such as qualified privilege. In that case, the plaintiff sued the defendant for slander on foot of comments that the defendant made to the plaintiff's husband regarding alleged unchastity and dishonesty on the part of the plaintiff as well as comments made to the plaintiff's employer regarding dishonesty in the course of the plaintiff's employment. The defendant denied speaking the allegedly defamatory words but also relied on the defences of qualified privilege and justification. In his judgment, Alpers J. embarked on a somewhat detailed consideration of the defence of qualified privilege, ultimately concluding that the *'duty'* alleged by the defendant was a question of law for the trial judge and that plea was therefore allowed to stand. However, the court struck out the plea of justification on the basis that the defendant's plea that *'such words as may be admitted or be proved to have been used by her are true in substance and in fact'* was improper and so vague that it was unclear whether the defendant intended to *'justify the allegation of dishonesty or of unchastity, or both'.*

26. However, despite the force with which this decision was urged upon this Court, it is important to put it into its necessary context. First, it is a relatively short, three-page judgment delivered in 1926 by the Supreme Court of New Zealand, and in the first instance therefore it is not binding on this Court. Secondly, it is in truth not a decision that analyses in any great detail the issue as to whether a defendant can deny speaking words while simultaneously pleading certain defences such as truth or qualified privilege. That is evident from the final page of the judgment where Alpers J. simply refers to the fact that the plea of justification in that case was too vague and not particularised in any meaningful way. Alpers J. considered that the defendant ought to have given particulars as to '*the time, place and circumstances'* as to enable the plaintiff know what case she had to meet. Thirdly, although not necessarily determinative, there is no case in this

jurisdiction which cites with approval the decision in *Heap v. Green*, nor it seems is it cited in any judgment of the Irish courts.

27. In any case, there are certain factors that distinguish that case from the present one. In Heap v. Green, the defendant was the person who spoke the allegedly defamatory words and had within her knowledge the exact words spoken. Despite this there were no detailed particulars provided by the defendant as to the words over which a plea of truth was made. That is quite different from the present case where Mr. Trehy is not sued in a personal capacity and so the person who could provide particulars as to what precisely was said is not a party to the proceedings. However, particulars of the plea of truth have been provided by the defendant in this case, unlike in *Heap v. Green*, such that it could not be said that there is vagueness as to the case that will be advanced by the defendant at the trial of the action. In *Heap v. Green* the plea of justification was made over '*such words that may be admitted or proved'*. In contrast, the defendant here has pleaded truth over any of the meanings pleaded in the Amended Statement of Claim and has particularised that claim, which is clearly not the same as the vagueness with which the plea of justification was made in *Heap v. Green*.

28. This Court declines therefore to follow the decision in *Heap v. Green* and instead would place weight on the following relevant authorities which do not support the contention made by the plaintiff.

29. In this regard, a helpful starting point is to be found in the leading English text, *Gatley on Libel and Slander* (2013, 12th Ed.) where the author states at para. 27.4 that:

> "*Either in addition to or alternatively to his denial or some or all of the claimant's pleaded case, the defendant may put forward one or more substantive defences which defeat the claimant's claim*. The defendant may plead as many different, alternative defences as he wishes, even though the allegations are inconsistent, although it may not always be prudent for him to do so." (Emphasis added)

30. This principle that a defendant can plead many alternative and inconsistent defences in a defamation action is a reflection of the position as set out in case law, including that as set out in the judgment of O'Byrne J. in *Kirkwood Hackett v. Tierney* [1952] I.R. 185. That case involved a defamation claim made by the plaintiff, a student, against the President of UCD. The plaintiff claimed that he had been defamed at a meeting, at which he was present, as a result of an allegation made at that meeting by the President that the plaintiff had obtained under false pretences a grant for his third year of university. The defendant both denied speaking the words complained of and made a claim that the occasion in question was privileged. The plaintiff claimed that this alternative plea was not allowed. At p. 201 of the reported judgment, O'Byrne J. stated that the plaintiff's contention that the defendant was not entitled to plead privilege was '*not well founded'* and continued as follows:

> "The question whether an occasion is privileged depends upon the admitted or proved circumstances surrounding the alleged communication and I see no reason,

in principle or on authority for limiting this to cases in which the defendant admits the speaking of the words."

31. An analogy made by O'Byrne J. in his judgment, albeit a fairly archaic one, seems relevant to the present case. At p. 202, O'Byrne J. gave the example of a husband who is sued for his wife's tort. The wife is sued for defamation by her former servant, the husband was not present at the meeting at which the alleged defamation took place and the wife denies having spoken the relevant words. The question posed by O'Byrne J. was whether the husband ought to be denied the ability to plead privilege in circumstances where he did not, and arguably could not, admit that the words complained of were spoken? O'Byrne J. answered that question as follows:

> "To deprive him of relying on such plea seems to me to be opposed to the whole basis of the law of privilege and would limit the defence, in such a case, in a manner in which, so far, it has not been limited."

32. More recently, in *Nolan v. Laurence Lounge t/a Grace's Pub* [2018] IEHC 352, a case in which the plaintiff claimed he was defamed when accused of producing a fake €10 note in a pub, the defendant disputed the words allegedly spoken and also relied upon the defences of truth and qualified privilege. In considering whether the position adopted by the defendant was contradictory, MacGrath J. having reviewed the relevant authorities stated at para. 96 that:

> "On the face of it and as a matter of principle it does not appear to me to be impermissible for a defendant to plead and pursue both defences in an appropriate case. In my view, therefore, the defendant in this case is not prohibited by law from pursuing the defence of qualified privilege where he has not succeeded in the defence of truth."

33. Based on the foregoing, it seems that the defendant ought to be entitled to rely on whatever defences are available it – the onus being on it to prove these defences at the trial – and the availability of these defences ought not to be limited to cases where the defendant admits that the words complained of were spoken. It seems that to suggest otherwise would be to limit the defences available to a defendant, and would result in a position whereby a defendant who denies speaking certain words due to a genuine decline in memory with the passing of time, would be unable to rely on defences that might otherwise be available to them.

**Prejudice in not knowing what was said?**

34. Ms. Martin claims that the relief presently sought by her is necessary for a fair trial and she further claims that she will be prejudiced in her ability to know the case she will be required to meet at trial should the relief be refused.

35. However, the fact remains that in a defamation action the onus is on the plaintiff to prove publication of a defamatory statement. If the plaintiff is successful in this regard, the onus will then shift to the defendant to prove the two pleaded defences of qualified privilege

and truth. It is difficult therefore to see how the plaintiff will be prejudiced. Furthermore, while the plaintiff claims that she will not know what case she has to meet, that claim is difficult to reconcile with the Reply to the Amended Defence delivered by the plaintiff on 3rd May, 2019. That is because the plaintiff does not claim in that Reply that she is unaware, based on the Amended Defence, what case she will have to meet at the trial, rather she simply denies that the words complained of occurred on an occasion of qualified privilege (para. 3) and she further denies that the words published by Mr. Trehy were true in substance or in fact and denies that she acted in '*an unethical or morally blameworthy manner for improper motive'* (para. 5), which is the claim made by the defendant in the Amended Defence. It seems therefore that the plaintiff is aware of the case she has to meet and it is also to be noted that the most that the plaintiff says regarding the introduction of the plea of truth (as well as the plea of qualified privilege) is that it is '*an aggravation of the defamation'*.

36. Any claim of prejudice must therefore be viewed against the pleadings in the case and it does seem to this Court that the alleged prejudice in this case rings hollow when viewed in the context of the aforementioned Reply, as well as in the context of the Statement of Claim.

37. For example, in the Amended Statement of Claim (as amended on 28th February, 2018), Ms. Martin displays a significant level of knowledge of the events that occurred at the meeting, notwithstanding the fact that she was not present at that meeting. It is necessary to set out in full certain paragraphs of the Statement of Claim in order to illustrate the knowledge of the plaintiff in this regard:

"8. On or about 20th May 2015 the Defendant its servants or agents had a staff meeting at which approximately 12 members of staff attended. The management of the Defendant was represented by Richard Trehy and by Chairman, Damien Scattergood. The Plaintiff was not present due to being on sick leave at that time. *The Defendant its servants of agents announced that two roles were being abolished being the role of the Plaintiff and that of assistant to the Plaintiff, and that two new roles were being created both of which would report directly to a designated person on the Board of Management. In the course of the meeting Richard Trehy made the following defamatory statements of and concerning the Plaintiff or uttered words to the like effect:*

*(a) Something had happened that could be classified as a "criminal offence" which would have a "prison sentence going with it." This "had nothing to do" with the members of staff present as it related to a "higher-level" employee.*

*(b) The Defendant service had "not been run well and was open to criminal charges."*

*(c) In order to protect the Defendant service from "criminal charges more changes in reporting to stakeholders were necessary."*

> (d) *The Plaintiff "had mismanaged the service."*
>
> 9. *It was made clear to members of staff present at the meeting that the above utterances referred to the Strictly Come Dancing fundraising matter.* Further, the said utterance were understood to refer to the Plaintiff as the Manager/Administrator and/or as the only employee at a higher level to the employees present and as such the Plaintiff was reasonably identifiable as the subject of the statements and/or as responsible for the alleged wrongdoing." (Emphasis added)

38. It seems clear from the above extracts that the plaintiff is aware in broad outline of what was said at the meeting. Of course, the above represents the plaintiff's understanding of what was said, and it is not suggested by this Court that the above passages necessarily represent an accurate note of what was said by Mr. Trehy at the meeting. Nonetheless, it does seem that the plaintiff's claim that she does not know the case she is required to meet, when considered in the context of details given in the Statement of Claim, is somewhat hollow.

39. As noted already, what was said at the meeting is a matter for evidence and it may be that multiple witnesses will be required to give evidence in order to ascertain, with as much accuracy as possible, what was said at the meeting. Given that over six years have now passed since the meeting and the trial may not take place for a number of months, memories fade, and there may be a dispute as to what exactly was said, or a dispute as to whether certain statements were made or not. Once again however, that is a matter for evidence and insofar as there may be conflicting evidence given at the trial, it will be for the jury to decide what to believe as representing an accurate reflection of what was said at the meeting. Any other issues in this regard can be dealt with by the Judge hearing the matter, either through pre-trial directions or if necessary, in a voir dire.

40. The plaintiff relies in particular on *Cooney v. Browne* (No. 2) [1985] I.R. 185 for the proposition that a party is entitled to know what case the other party is going to make at the trial of the action. In *Cooney*, the plaintiff, the Minister for Defence at that time, and formerly the Minister for Justice, sued the defendants for libel on foot of an article published in *The Sunday Tribune* under the title *'Lost in the Mists of Introspection'*. In their defence to the action, the first and second defendants made *'a rolled-up plea'*, such that they pleaded that the article contained words which were fair comment on matters of public interest and that insofar as the article contained statements of fact these were true in substance and in fact and that insofar as the article contained expressions of opinion these were fair comment made in good faith and without malice on matters of public interest. The plaintiff sought particulars as to exactly what words were claimed to be true and the facts to be relied upon as supporting the factual statements made. The defendants refused to provide the particulars on the basis that the particulars sought were a matter of evidence for the hearing of the action.

41. In *Cooney*, Henchy J.'s decision that the defendants be ordered to provide particulars was informed largely by the particular circumstances of that case. Firstly, the alleged source of

defamation in that case was a newspaper article. It was therefore not a case in which publication of the allegedly defamatory words could be denied. In considering whether particulars should be ordered in *Cooney* therefore, the Supreme Court considered the case in its proper context, that being the fact that the article in question:

> "referred to a number of matters which were instanced as scandals in the public life of this State and alleged a connection between the plaintiff as Minister for Justice and at least some of those matters."

42. In giving judgment, Henchy J. considered that particulars were necessary where the defendants had advanced a '*rolled up plea'* consisting of pleas of truth and fair comment and in circumstances where:

> "the factual elements in the article complained of are so numerous and so unspecific that it would be unfair to expect the plaintiff to come to court and present his case properly without knowing in advance the true range of the factual case that will be presented in support of the rolled-up plea."

43. While Henchy J. considered that it would be unfair to require the defendants to make a '*detailed disclosure'* of their evidence in advance of the hearing, he considered that all they were required to do was to identify the words in the article that they claimed to represent factual statements and to state the facts that they intended to prove at the trial in support of those factual statements.

44. It is important to consider the Cooney decision in its context. First, that case concerned the publication of a newspaper article which the plaintiff alleged was defamatory of him. It was not a case therefore where the defendants could deny publication nor was it a case where the plaintiff was at a loss as to the words published by the defendants. Rather, what was in issue was the fact that the defendants had pleaded fair comment and truth but had refused to identify what matters they claimed to be facts and what factual matters they intended to rely upon in order to support the factual statements in the article. As a result therefore, the Supreme Court held that the particulars in that case were necessary in the interests of a fair trial in circumstances where, as referenced above, the factual elements of the newspaper article were *'so numerous and so unspecific'* that the plaintiff ought to know in advance the true range of the factual matters that would be relied upon by the defendants.

45. The circumstances of the present case are quite different from *Cooney.* There is no written newspaper article in the present case which the plaintiff can point to as being defamatory, rather the plaintiff claims that she was defamed at a staff meeting at which she was not present. The plaintiff has not sued Mr. Trehy, whom she claims was the person responsible for speaking the defamatory words, but has chosen only to sue Genesis, as the alleged publisher of the allegedly defamatory words. In those circumstances therefore, the exact words spoken at the staff meeting are unclear. In *Cooney,* the plaintiff had in his possession the newspaper article in relation to which the claim for defamation was made and the court also had in its possession the article when

deciding on the issue as to particulars. The question therefore was not what words were published by the defendants, but rather the question related to the factual matters which the defendants intended to rely upon in order to evidence the truth of certain aspects of the newspaper article. The defendants were not asked to produce evidence and rather what the defendants were requested to do, *per* Henchy J. at p. 192 was to:

> "identify the matters in the article which they claim to be matters of fact and to state the facts which they intend to prove at the trial for the purpose of supporting those factual statements in the article."

46. That is quite different from the present case, where what is requested of the defendant is to particularise the *exact words* spoken by a non-party at a staff meeting which took place in May 2015. That is clearly a request that the defendant adduce evidence as to the words spoken by Mr. Trehy. In *Cooney*, Henchy J. considered that it would '*of course be unfair to require the defendants to make a detailed disclosure of their evidence in advance*'. Yet, that is exactly what is sought in the present case. If Genesis is ordered by this Court to adduce evidence as to the exact words spoken by Mr. Trehy that would be in this Court's view to completely disregard the normal rule, which is that the onus is on the plaintiff to prove defamation by adducing evidence at the trial. The defendant is entitled to deny that the allegedly defamatory words were spoken, and this seems to be especially so in circumstances where the plaintiff has chosen, for whatever reason, not to sue Mr. Trehy. An order requiring Genesis to particularise the words spoken by Mr. Trehy would be particularly unfair, in circumstances where Mr. Trehy is not a party to the proceedings and where it is unclear whether the words spoken by him are necessarily within the knowledge of Genesis, having regard to the fact that the meeting complained of took place over six years ago.

47. Ms. Martin, at the trial of her action, will have to prove defamation and indeed it is accepted that she will have to call witnesses in order to prove her case. That is the normal way and it seems that the witnesses called will almost certainly include Mr. Trehy. Of course, it may be that there will be a variance in the accounts given by various witnesses as to what was said, especially given that the meeting occurred over six years and memories fade with the passage of time – but it is ultimately a matter for Ms. Martin to prove her case and it would be unfair to require the defendant to adduce evidence prior to the hearing of the action.

48. As noted, Ms. Martin was not present at the meeting and while the Statement of Claim sets out the 'gist' of what was said at the staff meeting, no affidavit has been sworn by Ms. Martin in support of her claim or in support of this motion. This is not a case therefore where a claim is made by Ms. Martin that the '*factual elements'* of what was allegedly said at the meeting are '*so numerous and so unspecific'* such that it would be unfair if Ms. Martin did not know at this stage what matters were to be relied upon by the defendant as true. It is simply the case that Ms. Martin does not actually know exactly what was said at the meeting, as she was not present at the meeting, although she seems to have a general idea of the import of what was said (when one has regard to the Amended

Statement of Claim), and it is not for the defendant in a defamation action to provide the plaintiff with evidence of what was said.

**Plaintiff entitled only to know broad outline**

49. The question then arises as to what exactly the plaintiff is entitled to know regarding the defendant's case in advance of the trial.

50. There a number of cases that are instructive in this regard and which show that the plaintiff is entitled to know in '*broad outline'* the case she will be required to meet (that a party know the *'broad outline'* of the case they have to meet appears to have its origins in *Mahon v. Celbridge Spinning Company Ltd* [1967] I.R. 1). The *'broad outline'* approach is also supported by the approach set out in *Gatley on Libel and Slander* (2013, 12th Ed.) at para. 27.54 where it is stated that a plaintiff is entitled to an order for further particulars only for the purpose of:

> "ascertaining the nature of his opponent's case that he has to meet, and not for the purpose of obtaining advance notice of the evidence by which his opponent proposes to prove it."

51. In *Quinn Insurance plc v. Tribune Newspapers plc* [2009] IEHC 229, a case in which the defendant pleaded both truth and qualified privilege in relation to an allegedly defamatory newspaper article, Dunne J. refused to order further and better particulars having concluded at p. 26 of her judgment that:

> "If necessary, particulars may be ordered to clarify the issues or to prevent the party from being taken by surprise at the trial of the action. *However, a party is only entitled to know the broad outline of the case that he/she will have to meet.* A party is not entitled to know the evidence that will be given against them in advance of the hearing." (Emphasis added)

52. Similarly, in *Ryanair v. Goss* [2016] IECA 328, Hogan J. refused to grant an order for particulars as sought by Ryanair on the basis that it knew in general terms the case it had to meet at trial and on the basis that particulars are not to be ordered where the plaintiff knows *'in broad outline'* the case it has to meet.

53. In this case, that the plaintiff is aware of the '*broad outline'* of the case she has to meet is clear from the Amended Defence as well as the Reply thereto. For example, the Amended Defence at para. 18 sets out particulars regarding the defence of qualified privilege as follows such that, *inter alia*:

> "*Any statements uttered by Mr. Trehy amounted to communications made by him in good faith,* in circumstances where he as publisher and *all of those to whom anything was published had a legitimate common and corresponding interest*.

[…]

*Any statement uttered by Mr. Trehy at the said meeting was published to persons who had a duty to receive, or interest in receiving, the information contained in the statement* (or where Mr. Trehy believed upon reasonable grounds that such persons had an interest) and *where Mr. Trehy had a corresponding duty to communication or interest in communicating the information to such persons*.

[…]

*All statements made by Mr. Trehy were made in good faith,* in the course of his advising the meeting regarding the review he had been asked to conduct by the Board of Directors." (Emphasis added)

54. At para. 27 of the Amended Defence particulars of the plea of truth are provided as follows:

"In late 2013, a "Strictly Come Dancing" fundraising event was held by the Defendant*. The monies raised were kept for an extended period in the Plaintiff's private residence.* This was done on the Plaintiff's initiative. The keeping of the said monies in the Plaintiff's private residence was highly unprofessional on the part of the Plaintiff, and constituted serious misconduct. *From a regulatory and governance perspective, this misconduct by the Plaintiff had the capacity to impact very seriously upon the Defendant in an adverse way and to expose the Defendant to serious prejudice and risk.* Moreover*, the Plaintiff's reasoning for not lodging the said monies in a timely manner, but instead keeping them for an extended period in her private residence, was to convey to third parties including Funders that the Defendant had less funds available to it than was in fact the case. The Plaintiff was thus acting for an improper purpose, and in an unethical manner, notwithstanding that she did not misappropriate any monies*." (Emphasis added)

55. When these particulars are viewed in the context of the claims made by the plaintiff at paras. 8 and 9 of the Amended Statement of Claim (as set out earlier in the judgment) and in the context of the pleadings overall, the plaintiff's contention that she does not know the case she has to meet seems not to be particularly well-founded.

56. In those circumstances therefore, it seems that the plaintiff will not be taken by surprise at the trial of her defamation claim. This Court does not accept that the case made by the defendant is so imprecise so as to justify the ordering of particulars. While one can see why it might certainly be advantageous for the plaintiff to know exactly what was said at the meeting, one cannot ignore the fact that, as stressed above, it is for the plaintiff to prove her case at the hearing and the onus is on her to adduce the evidence necessary to do so.

**Conclusion**

57. In summary, the words spoken at the meeting by Mr. Trehy are matter for evidence at the trial and the onus is on Ms. Martin, as the plaintiff, to prove at the hearing of the action what was said. Furthermore, Ms. Martin knows the broad outline of the case she

has to meet at the trial, and this is the extent of her entitlement. As a result, the reliefs sought by Ms. Martin are not necessary for her to know the case she must meet, nor are they necessary for a fair trial.

58. On the basis of the foregoing, the reliefs sought by the plaintiff in her Notice of Motion dated 27th October, 2020 are refused.

59. Insofar as the form of order is concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. If it is necessary for this Court to deal with final orders, this case will be put in for mention one week from delivery of this judgment, at 10.45am.