



**THE COURT OF APPEAL
CIVIL**

**Court of Appeal Record No. 2020/224
High Court Record No. 2015/1418 P
Neutral Citation No.: [2022] IECA 303**

**UNAPPROVED
NO REDACTION NEEDED**

**Murray J.
Noonan J.
Ní Raifeartaigh J.**

BETWEEN

CHRIS GORDON

PLAINTIFF/RESPONDENT

– AND –

THE IRISH RACEHORSE TRAINERS ASSOCIATION

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 22nd of December 2022

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I BACKGROUND

This appeal

1. The plaintiff was, in 2014, the head of security of a body known as ‘*the Turf Club*’. At that time the Turf Club, although a private organisation, had responsibility for regulating horseracing in this jurisdiction and thus for enforcing the Rules of Racing.¹ It licenced all trainers and jockeys in Ireland.
2. The defendant is the representative body for racehorse trainers in the State. It is a private company limited by guarantee. At the times relevant to these proceedings it comprised an Executive Committee or Council, and a membership body. The evidence at the trial was that the membership was composed of 300 or so racehorse trainers.
3. In this action the plaintiff sought damages for defamation. The claim arose from seven different alleged publications. Each was said to relate to the discharge by the plaintiff of his duties as head of security of the Turf Club and all were allegedly made in circumstances which – it was claimed – gave rise to legal responsibility on the part of the defendant. Following a thirty day trial, a jury found five of these publications to have been made when the defendant had no honest belief in their truth and as part of an orchestrated campaign against the plaintiff. An award of damages was made in his favour in a total amount of €300,000. The award included sums by way of aggravated and exemplary damages.

¹ In 2018 (and after the events giving rise to these proceedings) the defendant’s regulatory function was transferred to the Irish Horseracing Regulatory Board. The history and scope of the Turf Club’s function and powers are outlined in the judgments in *O’Connell v. The Turf Club* [2015] IESC 57, [2017] 2 IR 43.

4. As well as raising questions relevant to the quantum of the award made in favour of the plaintiff, this appeal presents a number of distinct issues regarding the correct test to be applied in determining whether a defendant has acted with malice on an occasion of qualified privilege, how a jury should be instructed in connection with such an allegation, when a body corporate may be fixed with liability as a result of statements made by one of its officers, when such a body will be liable for words spoken at a meeting arranged by it and how a party can become liable for publications to, and letters issued by, its solicitor on its behalf. Some of these issues do not commonly arise. That said, the context in which they present themselves here is far from usual.

The 'book of evidence'

5. It begins with a criminal prosecution. The evidence in the High Court was that on 4 October 2013 Mr. John Hughes, a retired Department of Agriculture veterinary inspector, pleaded guilty before Carlow District Court to possession of significant quantities of nitrotain, a powerful (and banned) anabolic steroid. The prosecution coincided with the emergence of other cases in which performance enhancing drugs had been found on the properties of persons associated with the horseracing industry in Ireland (and, as it happens, with the biggest doping scandal in British racing). Obviously, all of this was of concern to the Turf Club and, therefore, the plaintiff. According to the plaintiff's evidence, his conversations with bookmakers, racegoers and others involved in the industry disclosed a '*view*' that there was '*a problem in Irish racing*' and that he was being constantly asked what the Turf Club was going to do about it.

6. In that context, and shortly after Mr. Hughes' prosecution, the plaintiff wrote to the Chief Executive Officer of the Turf Club (Mr. Denis Egan) recommending that consideration be given to the possibility of joint investigations by, and sharing of information between, the Turf Club and the Department of Agriculture. Joint investigations of this kind held a particular attraction for the plaintiff, as the Turf Club had no statutory powers to enter and inspect the premises of horse trainers. While under the Rules of Racing it had a right to demand such access to certain premises under the control of those licensed by it (and indeed membership of the Club required that such a demand be acceded to), the Turf Club still required permission to enter a property, and the range of premises it could so enter was limited. According to the plaintiff in his evidence, this resulted in a situation in which trainers' yards could not be searched by the Turf Club if the trainer was not present, and indeed in which there was a risk that a trainer could arrange to have any drugs present on his premises removed by the time any inspection commenced.
7. In contrast, the Department of Agriculture, insofar as it had a function in investigating breaches of and enforcing the law relating to animal remedies, had the statutory powers to enter a widely defined field of premises excluding a dwelling home. It required neither a search warrant nor owner permission for that purpose. Its Special Investigations Unit had been heavily involved in Mr. Hughes' prosecution and indeed in the searches leading to the other cases to which I have referred. The plaintiff in his evidence said that it was because the Department of Agriculture had these powers that its officers had been successful in finding prohibited substances in those cases. He felt that the very fact that inspections were taking place on foot of such powers would deter the use of these substances. When those inspections did begin, he said, *'the Trainers Association made sure all their members and everyone else knew about it'*.

8. On foot of the plaintiff's suggestion, contact was duly made with the Department of Agriculture. A meeting took place in December 2013 with two of the most senior vets in the Department. They referred the plaintiff to the Special Investigations Unit. A meeting between representatives of the two bodies took place on 22 January 2014. The meeting was attended on behalf of the Turf Club by the plaintiff, Mr. Egan and Mr. Declan Buckley (the plaintiff's deputy), and on behalf of the Department of Agriculture by the head of the Special Investigation Unit, Mr. Brian Flaherty, the head vet in the Department Mr. Noel Kenny, and Mr. Louis Reardon, also a vet employed by that Department. At that meeting a method of collaboration between the two organisations was agreed, including the prospect of joint inspections and the development of a protocol for such visits. These, it was also agreed, would be undertaken with the Department of Agriculture as the lead agency.

9. In the course of that meeting, Mr. Reardon produced and gave to Mr. Egan a photocopy of what was referred to at the trial of this action as the '*book of evidence*' that had been used in the course of the prosecution of Mr. Hughes. Mr. Egan looked through the '*book of evidence*' during the meeting as the participants sought to identify other persons implicated by the documents. There were also various initials recorded in the documentation, and Mr. Egan discussed with the others present whether these were the initials of trainers and, if so, who the relevant people might be. Mr. Egan was writing while doing this. The plaintiff said he believed that Mr. Egan was writing on a pad, although in fact it subsequently emerged from Mr. Egan's evidence that (he said) he had been writing on the copy of the documents comprised in the '*book of evidence*' from which he was reading. Mr. Egan said that he took these documents away with him at the conclusion of the meeting, subsequently sending one copy of the '*book of*

evidence’ by post to the plaintiff and giving one directly to Mr. Buckley at a race meeting on 24 January.

10. One of the documents contained in the ‘*book of evidence*’ and reviewed by Mr. Egan at the meeting was a slip purporting to record a lodgement of €590 to a bank account in the name of John Hughes and his wife. The slip contained handwriting, breaking the amount of the lodgement into two sums of €390 and €200. The initials ‘*TH*’ appeared handwritten opposite the entry for €390, while the initials ‘*LD*’ appeared (also in handwriting) opposite that for €200.
11. Elizabeth (or ‘*Liz*’ Doyle) is a horse trainer based in Co. Wexford. On 29 October 2013 (two weeks after the plaintiff wrote to Mr. Egan making his suggestion of collaboration with the Department of Agriculture) the Turf Club received an anonymous letter identifying trainers who (it was alleged) were cheating by administering illegal performance enhancing substances to their racehorses. The Department of Agriculture received a similar letter at around the same time. Ms. Doyle’s name was one of those appearing on that anonymous letter.

The inspection of 26 March 2014

12. The first four inspections jointly conducted by the Turf Club and the Special Investigations Unit of the Department of Agriculture occurred on 26 and 27 March 2014. The evidence before the Court was that insofar as the Turf Club officials were concerned, their duties on such visits (which were referred to throughout their evidence as ‘*random inspections*’) were to ensure that there was a medicines register in place, that any drugs that had been administered were recorded in the medicines register, to

make sure that all passports for the horses were there and to confirm that all horses that were supposed to be on the premises were duly accounted for.

13. The second premises visited on the first of these days was Ms. Doyle's. The inspection was attended by the plaintiff, Mr. Buckley and a vet, Mr. Terry Smith, (all from the Turf Club) and by Mr. Reardon, Mr. Brendan Daly, Mr. Noel Kelly and Mr. John McConville (from the Department). In advance of the visit, the plaintiff had obtained a letter of introduction from Mr. Egan requesting permission to inspect the premises under the Rules of Racing. As I have noted earlier, the plaintiff had also been sent a copy of the '*book of evidence*' by Mr. Egan.

14. There were significant differences between the parties as to a critical event that occurred in the course of the visit. The plaintiff said that towards the conclusion of the inspection Ms. Doyle asked why she was selected for inspection. The plaintiff then explained that a bank lodgement slip had been seized from John Hughes, and that this had her name on it. Ms. Doyle and her mother, Mrs. Avril Doyle (who, on occasion I will refer to collectively as '*the Doyles*') requested sight of this document. The plaintiff said that he asked Mr. Buckley to get the '*book of evidence*' (which was said by the plaintiff to have comprised approximately 300 pages) from the car in which they had driven to the premises, that Mr. Buckley came back with the document and that the plaintiff opened it up (Mr. Buckley in evidence did not recall if he had or had not gone back to his car to fetch the document). The plaintiff said that he showed the Doyles the lodgement slip contained in the book of evidence as sent to him by Mr. Egan. The page containing a copy of that slip contained the initials '*LD*' opposite the sum of €200 and then, a little over an inch and a half to the left of this in the margins of the page the words '*Liz*

Doyle?'. It was the plaintiff's evidence that he opened the book at the relevant page and that this was what the Doyles were shown, although he said that he used another page on the book to obscure the initials '*TH*' which, as I have earlier noted, appeared opposite the entry for €290. He also said that he obscured the €590. Thus, according to the plaintiff, the Doyles would have seen on the page the initials '*LD*', the name '*Liz Doyle?*' and the reference to a sum of €200. This account was generally supported by Mr. Buckley, who had witnessed the incident.

15. Ms. Doyle (who was accompanied throughout by Mrs. Doyle, and Ms. Doyle's then partner Mr. Barry Murphy) said in her evidence that in the course of the inspection her mother called her over to say that there was something she wanted to show her. She walked over and the plaintiff, who was standing beside her mother, had a document in his hand, and he said words to the effect that Ms. Doyle's name had been found on a Department of Agriculture book of evidence from the John Hughes prosecution. She said that Mr. Gordon then showed her a single sheet of A4 paper. Ms. Doyle said that this single sheet of paper contained no initials and no question mark but instead the handwritten name '*Liz Doyle*' right beside the reference to €200. Ms. Doyle was clear that at no point did anyone leave her yard to retrieve anything from a car. Mrs. Doyle's evidence was similar, if different in some of the details: she said that the plaintiff told her that he needed Ms. Doyle's attention, and Mrs. Doyle called Ms. Doyle over. She said that Mr. Gordon said that Ms. Doyle's name had been found on a lodgement docket contained in the John Hughes book of evidence, and that he had that document in front of him.

16. The Doyles and the plaintiff did agree that at some point during these exchanges a conversation took place between the plaintiff and Ms. Doyle in the course of which the

plaintiff asked Ms. Doyle if she had had dealings with John Hughes. She said in response that she had had no dealings with him for some time and that she disliked him. However, she said that she was a friend of, and had ridden for, his brother, Pat Hughes.

17. The inspection proceeded satisfactorily insofar as the Department of Agriculture was concerned. Mr. Reardon reviewed the medications stored at the premises and indicated that everything was fine with them (it was the plaintiff's evidence that it was after he said this that Ms. Doyle asked why she had been selected for inspection). It was also common case that Ms. Doyle said that the entry on the lodgement slip did not refer to her, and it was suggested that the initials might refer to another identified person. The plaintiff said that he assured Ms. Doyle that this was the end of the matter as far as the Turf Club was concerned and, it was his evidence and that of Mr. Buckley, that as they left Mrs. Doyle said that such inspections should happen more often. Ms. Doyle said that her mother had requested a copy of the document the plaintiff had shown to her and Ms. Doyle, and that the plaintiff pulled the document away, folded it and put it into his jacket pocket. That was denied by the plaintiff.

18. While leaving Ms. Doyle's premises, Mr. Reardon said to the plaintiff that he did not believe the entry '*Liz Doyle?*' appeared on the original document used in Mr. Hughes' prosecution. The plaintiff said he believed that this was the form in which the document had been provided to Mr. Egan by Mr. Reardon, and by Mr. Egan to the plaintiff. Over the following days it emerged that in fact, according to Mr. Egan, he had in the course of the meeting with the Department written '*Liz Doyle?*' on the copy of the '*book of evidence*' furnished to him, and then sent that copy on to the plaintiff. The plaintiff said in evidence that he was so advised by Mr. Egan around the 30 or 31 March.

19. So, Mr. Reardon was correct. The name '*Liz Doyle*' did not appear on the document used as part of the '*book of evidence*' in the proceedings against Mr. John Hughes. Meanwhile, Ms. Doyle had independently ascertained that this was the case. She had contacted Pat Hughes who arranged to obtain the lodgement slip in question directly from John Hughes. He e-mailed it to Ms. Doyle on 29 March and she saw that the lodgement slip in the '*book of evidence*' contained the initials '*LD*' but not her name.
20. The plaintiff accepted in the course of his evidence that he did not draw Ms. Doyle's attention to the anonymous letter referring to Ms. Doyle. This, he said, was '*soft intelligence*': it guided the plaintiff to the premises but, he said, once he had a clean inspection he was '*satisfied on the day.*'

Fairyhouse

21. All of this was, quite understandably, of great concern to the Doyles. On 30 March, Ms. Doyle met with Mr. Buckley at the races in Limerick. She told him that she had obtained the relevant lodgement slip through Pat Hughes and that it was not the same as the document that had been produced in the course of the inspection. She requested that she be given a copy of the document as produced at the yard on 26 March. The following day, Mrs. Doyle e-mailed Mr. Buckley requesting a copy of the document and a list of those present at the inspection. She also sought an apology. According to Mr. Buckley this was followed on 2 April by a telephone conversation between him and Ms. Doyle during which, he said, he explained to Ms. Doyle that someone else had written her name on the lodgement slip. Ms. Doyle's evidence was that she thereupon said that that was not right, and that '*that's some form of entrapment or something*'. Mr. Buckley arranged to meet Ms. Doyle the following week at Fairyhouse racecourse

and to then give her a copy of the document as produced on 26 March. Mr. Buckley's evidence was that in the course of that conversation, Ms. Doyle said that she wanted a letter explaining why the Turf Club had visited her yard, and that she wanted an apology.

22. Mr. Gordon thereupon drafted a letter to be signed by Mr. Buckley. That letter referred to the various inspections that had taken place, and stated:

'These visits were targeted on the basis of intelligence gathered by the Turf Club and DAFM. In your case, the entry in the document, shown to you, with the initials "LD" raised the possibility that this referred to you as no other licensed trainer has or is referred to by these initials. Similarly, your name appeared in an anonymous letter to the Turf Club as a trainer who was allegedly using illegal substances on your horses. These two factors provided reasonable cause for an inspection of your yard. It should also be noted that the Turf Club officials accepted your assurances following a discussion on the matter. ...

... the Turf Club has a responsibility as the regulator of horse racing to inspect your yard and to put its concerns to you given that the threat of illegal animal remedies pose to the industry and in conclusion it should be noted you remain in excellent standing with the Turf Club.'

23. The Fairyhouse meeting took place on 6 April. Mr. Buckley gave Ms. Doyle this letter, a copy of the anonymous letter received by the Turf Club on which all names but her own had been redacted, and he produced to her a copy of the document which, he said, she had been shown on 26 March. On this copy of the document Ms. Doyle's name

had been circled. It was Mr. Buckley's evidence that he had drawn this circle. Ms. Doyle responded by stating that this was not the document she had been shown on 26 March. According to Mr. Buckley, Ms. Doyle became upset. There was a tussle and the document was torn. The Doyles thereafter claimed that the tussle arose because Mr. Buckley realised that the document he had shown to Ms. Doyle was not the same as the document shown to Ms. Doyle by the plaintiff on 26 March and for that reason had tried to get it back from her. Mr. Buckley disputed that account: he said that Ms. Doyle looked at the document, snatched it from his hand and '*started roaring and shouting ... about how I was telling lies and how we were forging documents.*'

24. It is to be noted that strictly speaking, and on any account, the document shown by Mr. Buckley to Ms. Doyle at Fairyhouse was not the same as the document produced after the inspection on 26 March: as I have said, the version shown by Mr. Buckley had a circle around Ms. Doyle's name. In the course of submissions to this Court, counsel for the defendant frequently stressed that the first time it was ever said that the version of the document proffered by Mr. Buckley to Ms. Doyle at Fairyhouse was in fact different from that shown to her in the course of the inspection, was in the course of Mr. Buckley's evidence.

25. It was Mr. Egan's evidence that he did not speak to the Doyles at this time. In the course of his cross-examination he was asked the following question:

'Is it fair to say then at that time ... you knew that the Doyles were very upset, certainly they were upset about what they had been shown in Fairyhouse ?

Yes, Yes.

Did you think to pick up the 'phone ? Again, did you think to pick up the 'phone to the Doyles and say: Look, you have the wrong end of the stick here ?

I didn't, for the simple reason that I ... thought there was a possibility of a forged document and I said maybe when Liz went home and looked at the document with her mother that may not be the case, but I didn't pick up the phone.'

26. However, it is clear that eventually, and following the event in Fairyhouse, Mrs. Doyle and Mr. Egan had a telephone conversation during the course of which (according to his evidence) Mr. Egan said it was he who had written Ms. Doyle's name on the lodgement slip. It was Mr. Egan's evidence that this telephone conversation took place on 15 April. Mrs. Doyle in fact gave evidence under cross-examination that they had an earlier conversation on 31 March when she rang Mr. Egan after receiving the lodgement docket sent to her daughter by Pat Hughes; Mr. Egan (who was recalled for the purposes of addressing this claim) emphatically denied that any conversation occurred between himself and Mrs. Doyle on 31 March. Counsel for the defendant did not challenge Mr. Egan's evidence when he was recalled on this point. Mrs. Doyle further said that Mr. Egan told her that he was not responsible for the document shown on 26 March in the yard, but that he was responsible for the document Mr. Buckley gave Ms. Doyle in Fairyhouse. Either way, it is clear that on 22 April, Mr. Egan wrote to Ms. Doyle confirming that she was in good standing with the Turf Club. That letter did not contain either an apology for, nor an explanation of, what had occurred on 26 March.

27. According to his evidence, Mr. Gordon thereafter (on 30 April) met with Ms. Doyle at Punchestown Racecourse. On this occasion, the plaintiff said, Ms. Doyle and he had a civil discussion, and she said she wanted an apology, which the plaintiff said he could not give as there were valid reasons to inspect the yard. His evidence was to the effect that he did not feel it was a matter for him to give an apology, that this was a matter for someone more senior in the Turf Club. He claimed that in the course of that conversation, Ms. Doyle indicated to the plaintiff that Mr. Meade was putting pressure on her mother to make a complaint against the plaintiff. They parted, according his evidence, on good terms.

28. It is to be noted that at this point there were four alleged versions of the lodgement slip asserted by various parties. First, there was the document as it appeared in the '*book of evidence*', containing only the initials '*LD*' and '*TH*'. Second, the version which the plaintiff and Mr. Buckley said was shown to Ms. Doyle on 26 March. It had the initials '*LD*' immediately opposite the sum of €200, and the name (with a question mark) to the side – '*Liz Doyle?*'. Third, there was the version Ms. Doyle said she had seen on 26 March. It had no initials and instead had the name '*Liz Doyle*' without a question mark immediately beside the sum of €200. Fourth, there was the version Ms. Doyle was shown by Mr. Buckley in Fairyhouse. It had both the initials and the name '*Liz Doyle?*', the name being circled (as I have noted Mr. Buckley's evidence was that he drew that circle). The first and fourth of these documents were before the Court. Discovery of the second was sought in the course of this action, but it never materialised.

The positions of the plaintiff and of the racehorse trainers

- 29.** The events over the three weeks or so from 26 March to the middle of April provoked divergent perspectives which were to influence subsequent events and dominate the trial. As the plaintiff saw it, and according to his evidence, an unfortunate error had occurred insofar as he had told Liz Doyle that her name appeared in the '*book of evidence*' used in the prosecution of Mr. Hughes when this was not true. This was not, he felt, his fault as he had shown her a page from the '*book of evidence*' as it was sent to him. Unbeknownst to him at the time, Mr. Egan had added Ms. Doyle's name to the copy of the lodgement slip. That version of events was supported by Mr. Egan himself.
- 30.** The Doyles' conviction that this was not a correct account of what had actually transpired was, as recounted in their evidence, fuelled by their belief that the document shown to them on 26 March was not in the format alleged by the plaintiff and was different from that shown in Fairyhouse. In particular, the events on that day led the Doyles to believe that the difference between the document provided to Ms. Doyle then, and the document they believed was shown to them on 26 March was in some sense sinister and indicative of improper conduct by Mr. Gordon.
- 31.** In the course of her evidence, Liz Doyle said that she and her mother formed the view that Mr. Gordon had affixed her name to the lodgement slip with a view to obtaining an admission from her regarding her dealings with Mr. John Hughes: she said in the course of her evidence that her mother had said it was '*an old fashioned Garda trick to get them to admit to stuff*' (prior to his taking up his position with the Turf Club in 2010, the plaintiff had enjoyed a successful thirty year career as a member of An Garda Síochána). This was confirmed by Mrs. Doyle in the course of her cross-examination, who added significantly to the account of what she and her daughter believed had happened.

32. She referred to a telephone conversation she had with Mr. Egan on 31 March. As I have noted already, Mr. Egan did not accept that there had been any such conversation and indeed it was neither put to him in evidence nor referred to by Ms. Doyle in her evidence. Nonetheless, Mrs. Doyle gave evidence that in the course of that conversation she said to Mr. Egan the following:

‘And I went on to say if there had even been a question mark on the side and the initials had been left on the docket we were shown, I would have understood why the seven inspectors from the two bodies arrived in our yard, I would have understood it Denis but it wasn’t, it was presented as a fait accompli ... I said, ‘Denis, I would understand if you were querying who the “LD” was with the question mark beside Liz Doyle and the “LD” so we would have understood it ...’

33. Thus, when Mr. Buckley met Ms. Doyle at Fairyhouse and produced a document with just such a question-mark and the initials on it, Mrs. Doyle said she formed the view that Mr. Egan had participated in an attempt to cover up Mr. Gordon’s effort to entrap her. In that regard she stressed that the document produced by Mr. Buckley corresponded to the type of document she had described to Mr. Egan in the course of the telephone conversation she said had taken place on 31 March. Mrs. Doyle said that when she spoke to Mr. Egan on 15 April she reminded him that she had said in the course of the call on 31 March that had the initials been kept on the document and a question-mark beside Ms. Doyle’s name she and Ms. Doyle *‘would have had to accept it’*, asking him *‘what were you at?’*.

34. Thereafter, joint inspections of the premises of racehorse trainers involving representatives of the Turf Club (including the plaintiff) and officials from the Department of Agriculture continued. This ongoing process of joint inspection, according to the plaintiff, generated deep antipathy on the part of the racehorse trainers – a hostility (the plaintiff said) driven by the fact that unlike earlier inspections carried out by the Turf Club alone, they were now undertaken by and with the powers of, the Department of Agriculture.

35. That complaint is central to the plaintiff's claim of malice as advanced at the trial, as it formed the basis for his contention – critical to everything that followed – that the racehorse trainers and their association were determined to remove him from his position as head of security and to stop the joint inspections. Effectively, according to him, the circumstances surrounding the inspection of 26 March were used as the pretext for seeking to achieve that objective. Each of the publications for which the defendant was alleged to have been responsible were, according to this version of events, part of this orchestrated campaign. For this reason the plaintiff stressed in his evidence the order in which events unfolded, and the context in which – in June and August 2014 - the publications giving rise to the proceedings were uttered.

II THE PUBLICATIONS

The sixth publication: the inspection of Mr. McGuinness' property

36. What was referred to throughout the trial as the '*sixth publication*' was, in fact, the first in time. On 4 June 2014 a joint inspection was undertaken by representatives of the Turf Club and of the Department of Agriculture at the premises of another trainer, Adrian McGuinness, in Lusk, Co. Dublin. Both the plaintiff and Mr. Reardon were involved in that inspection. Mr. McGuinness was not at the property when they arrived, and – the plaintiff said – Mr. Reardon and a colleague of his from the Department, a Mr. Brendan Daly, proceeded to enter a portacabin office, as they were entitled to do. As they conducted their inspection, the plaintiff said that he remained outside Mr. McGuinness' property, standing beside his car. Mr. McGuinness arrived a short time later and asked the plaintiff what was happening. The plaintiff said that he explained and produced his letter of introduction from Mr. Egan and they entered the portacabin together. In the course of this inspection, a quantity of unauthorised animal remedies was found on Mr. McGuinness' premises. He was subsequently prosecuted and convicted of offences arising from that seizure. The gravity of this prosecution gave rise to a difference of opinion: having regard to the possession of substances which resulted in conviction, Mr. Meade – the Chairman of the defendant – described these in his evidence as '*two bottles of antibiotics*'.

37. Mr. McGuinness was a member of the executive of the defendant. The morning following the inspection, 5 June 2014, Mr. Michael Grassick telephoned Mr. Egan regarding the visit. Mr. Egan's evidence was that Mr. Grassick alleged that the plaintiff

had been standing in Mr. McGuinness' office when Mr. McGuinness arrived at the property. Mr. Grassick said that he had told Mr. Egan that the plaintiff was standing in Mr. McGuinness' yard, elaborating on this further in the course of his cross-examination by saying that Mr. Reardon was standing in the doorway to the portacabin office, and that the plaintiff was standing beside him.

38. Mr. Egan said in evidence that he would be '*horrified*' if something of this nature had happened, and that he immediately contacted the plaintiff who said that the claim made by Mr. Grassick was not correct. According to Mr. Egan the complaint was never repeated by Mr. McGuinness himself, and was never committed to writing. This statement made by Mr. Grassick was referred to throughout the trial as the '*sixth publication*'. As pleaded in the statement of claim, it was to the effect that '*the plaintiff had unlawfully entered the office of a trainer whose yard had been inspected the previous day.*'

39. The plaintiff's case was that it was following and as a result of this inspection that (as he put it in his evidence) '*the guns were being turned on me*'. In that regard he attached significance to the timing of Mr. Grassick's telephone call, and to the events that immediately followed.

The first publication: the Doyles' statements and the instructions to Mr. Ward

40. On 5 June – the same day as Mr. Grassick called Mr. Egan to relay his complaint regarding the inspection of Mr. McGuinness' yard – Liz Doyle, Avril Doyle and Barry Murphy each dated and signed written statements they had prepared outlining their version of events on and after 26 March.

41. These three statements presented a similar account, and included (as between them) the following:

- (i) That on 26 March 2014 the plaintiff had told Liz Doyle that her name had been found on a bank lodgement docket of Mr. John Hughes and that this was part of the Department of Agriculture's '*book of evidence*' relating to an investigation into Mr. Hughes.
- (ii) That having obtained a copy of the original lodgement document on 27 March, it had present on it only the initials '*LD*' and '*TH*', whereas the document shown to the Doyles had no initials but had '*Liz Doyle*' in signature format directly beside the figure of €200.
- (iii) That Pat Hughes told Liz Doyle that John Hughes had informed him that the '*LD*' referred to on the lodgement docket was not Liz Doyle.
- (iv) That at some point in early April Mr. Buckley told Ms. Doyle that it was not the Department of Agriculture that had written her name in the lodgement slip, but the Turf Club.
- (v) That Ms. Doyle thereupon said to Mr. Buckley that '*it's some form of entrapment*', and that he had agreed with this, was apologetic and said that Ms. Doyle should have been shown the original document from the '*book of evidence*'.
- (vi) At the races in Fairyhouse on 6 April, Declan Buckley approached Liz Doyle and handed her a piece of paper purporting to be a copy of that document. However, this was yet another version of the original document: the initials '*TH*'

and 'LD' were present with 'Liz Doyle' written over to the left hand side with a question mark and circled.

(vii) That when Liz Doyle pointed this out to Declan Buckley, he tried to grab the document back from her and that in the course of the ensuing tussle the document was torn.

(viii) That thereafter Mrs. Doyle telephoned Des Egan who denied any knowledge of the document the Doyles were shown on 26 March 2014 in the yard, but admitted that he was responsible for the document Denis Buckley gave Liz Doyle in Fairyhouse.

42. While the statements of Ms. Doyle and of Mr. Murphy are free standing documents, that of Mrs. Doyle – although signed – is dated 5 June 2014, and appears in the form of an e-mail to Mr. Frank Ward (the solicitor to the defendant, who by the time of the full trial, had passed away). It concludes '*please contact me before next move, to discuss*'. In the course of the trial, the document was represented by counsel for the plaintiff as an instruction to Mr. Ward. It was Ms. Doyle's evidence that these statements were prepared at the request of Mr. Ward and that while her mother's statement was e-mailed to him the other statements were sent to him in the post.

43. At around this time, a meeting occurred at Mr. Ward's offices. Mrs. Doyle's evidence was that this took place on 4 June, that at that meeting handwritten notes prepared by the Doyles were discussed, and that they were asked in the course of the meeting to put the notes in a statement form – giving rise to the documents of 5 June. It will be noted that those statements made it clear that Mr. Egan had accepted responsibility for (at the

very least) the document produced in Fairyhouse. It was clear that the words spoken at the meeting were similar to those contained in the statements: Mrs. Doyle thus agreed with counsel for the plaintiff when he said that at that meeting she had '*made an accusation tantamount to fraud against*' the plaintiff.

44. The plaintiff, for obvious reasons, adduced no evidence of the meeting. Some of the witnesses called by the defendant were unclear as to who was in attendance. Mr. Meade '*couldn't guarantee*' that there was a meeting at the time, but was sure that '*we spoke it out*' with Mr. Ward. In the course of his cross-examination Mr. Meade referred to an occasion on which Ms. Doyle came to Frank Ward's office with her mother where she was met by Mr. Meade, Mr. Grassick and Mr. Halford (the Deputy Chairman of the defendant). Ms. Doyle's evidence was that a meeting took place at Mr. Ward's office attended by herself, her mother, Mr. Meade, Mr. Grassick, Mr. Halford and Mr. Ward and what were described as the latter's '*associates*'. Mr. Grassick's evidence was that the purpose of the meeting was to let the Doyles '*tell their story*', as the defendant was '*looking for a recommendation from Frank Ward ... on how to proceed.*'

45. The evidence was that in the course of that meeting, the handwritten account produced by Ms. Doyle was discussed and that the term '*entrapment*' came from a meeting or discussion in Mr. Ward's office (Mr. Meade was unclear about this and he said that he '*presumed*' and '*imagined*' that it was used there). Ms. Doyle's evidence was that at this meeting '*we went through all the events and everybody's version of events on the day, everything was discussed*'.

46. Ms. Doyle also gave evidence to the effect that the first time an '*investigation*' was mentioned was in Mr. Ward's office, and that it came from the trainers. She said that all those at the meeting agreed that normal procedure would be that an investigation

should take place into what she described as '*such a serious incident*'. It is to be noted that it was both Mrs. Doyle's and Mr. Grassick's evidence that at this meeting the Doyles did not merely recount their grievance against the plaintiff, but also aired their view that Mr. Egan had been involved in concocting the document produced in Fairyhouse. This concoction, she claimed, had been produced in order to replicate what Mrs. Doyle on 31 March had (as she alleged) hypothesised as a reasonable basis for the inspection.

47. The plaintiff categorises as the '*first publication*' the words published at this meeting by the attendees. These words are said to give rise to the '*second publication*', a letter from the defendant's solicitors of 12 June 2014. Obviously, it is the plaintiff's case that the defendant is liable in law for what was said at this meeting.

48. Three days after the statements were sent to Mr. Ward, the plaintiff met with Ms. Doyle at the Curragh Racecourse. He said that at this, their second meeting after the inspection of the Doyles' property, Ms. Doyle expressed her upset at what had happened, that she said to him that the defendant was encouraging her mother to make an issue of what had occurred at the inspection and that as far as she was concerned an apology to her would suffice. It is to be noted that Mr. Hickey gave a similar account of Ms. Doyle's attitude to the matter as, he said, she had reported it to him. He said that in the course of a meeting in March 2015 Ms. Doyle had said to him '*we don't want to be pursuing this issue but the trainers want us to go ahead with it*'. According to Mr. Gordon's evidence, Ms. Doyle pleaded that he give her an apology, '*that's all she wanted, she didn't want to anything to do it* [sic.]. Mr. Gordon's evidence was that he said he would get '*something*' to her.

The second publication: Mr. Ward's letter

49. At the time of the events giving rise to these proceedings, the Turf Club was run by '*the Stewards*'. These were elected, and there were eight of them. The Senior Steward of the Turf Club – Mr. Neville O'Byrne (who by the time of the trial had passed away) – was the equivalent of the Chairman of the Board. The Senior Steward of the National Hunt was regarded as the Deputy Chairman, while the other stewards acted as board members.

50. The letter of 12 June 2014 was sent to Mr. O'Byrne marked '*Private, Personal and Confidential*'. It began by recording that '*very serious matters*' had come to the defendant's attention '*in relation to the conduct of some of the employees of the Turf Club and the Department of Agriculture Officials.*' The letter referred to the inspection of Ms. Doyle's premises on 26 March and enclosed Mrs. Avril Doyle's statement. It said that Mrs. Doyle's statement was unambiguous, and that '*given her high reputation is unlikely to be challenged*'. It accused those involved in the event on behalf of the Turf Club of misconduct and of unlawful behaviour which, it was said, '*reflects very poorly on the integrity of the Turf Club*'. It included the following statement:

'We believe that the allegation of Ms. Doyle's name being found on a lodgement docket in connection with Mr. Hughes' bank account was untrue and uttered by Mr. Gordon in the hope of entrapping Ms. Doyle into an admission of some wrongdoing which might jeopardise or destroy her professional reputation as a horse trainer. Ms. Doyle considers as indeed do our clients that this misconduct on the part of Ms. Gordon is entirely reprehensible and reflects very poorly on the integrity of the Turf Club

...

... I would request that an immediate investigation be launched with regard to the behaviour of the Turf Club personnel involved as their misconduct as alleged was inter alia unlawful and reflects very poorly on the integrity of the Turf Club.'

(Emphasis added)

- 51.** While, as I have noted, the statement of Avril Doyle was enclosed with the letter, those of Liz Doyle and Barry Murphy were not.
- 52.** According to the plaintiff, he had composed a letter of apology regarding the '*book of evidence*' to Liz Doyle intending to give it to her on 13 June at Clonmel races as he had suggested he would do in the course of their meeting at the Curragh on 8 June. However, before he met Ms. Doyle he was informed by Mr. Egan of the fact of the letter from Mr. Ward and, because the matter had '*gone legal*', he decided not to give the apology to her (but, he said, he told her that he had prepared the apology).
- 53.** Mr. Egan's evidence was that this caused an investigation into the contents of the letter in mid-June. The letter from Mr. Ward was passed by the Turf Club to its solicitors, Beachcroft, who were requested to conduct such an investigation. They responded in a letter to Mr. O'Byrne of 18 July. That letter made clear that Beachcroft had not conducted an investigation into the allegations as to the Turf Club's treatment of Ms. Doyle, but did conclude that the actions and behaviour of Turf Club representatives '*were appropriate, proportionate and reasonable*'.

The third publication: The Irish Field article

54. I have earlier noted that Noel Meade was at the relevant times the Chairman of the defendant. This was a non-executive position. He was also a director of the company. On 9 August 2014 an interview with Mr. Meade appeared in ‘*The Irish Field*’ newspaper, a publication for those involved in the horseracing industry. This interview was referred to as ‘*the third publication*’. It was the plaintiff’s case, as pleaded in his statement of claim, that the statements in this interview were made by Mr. Meade when he was ‘*acting with the authority of the defendant*’. The article described Mr. Meade as ‘*active as chairman of the Irish Racehorse Trainers’ Association*’. Referring to inspections undertaken by the Turf Club and the Department of Agriculture, the newspaper recorded Mr. Meade as saying:

‘IRTA members are angered ... by what they view as a Little Hitler syndrome, whereby they are treated almost as guilty from the moment the inspection begins.

Unfortunately, the behaviour of some of the inspectors when they’ve come to the yards hasn’t actually been professional. They’re not treating people properly. We as trainers have no problem being looked at. We just don’t like being treated like criminals when they come to do it. I think 99% are 100% straight and that’s the way we’d like to be treated. Unfortunately, some of these inspectors haven’t behaved that way. And that has annoyed us quite a lot.

They're also coming down on people with drugs and antibiotics that have been common in any trainer's yard or farmer's yard as long as we know, and would make no difference to anybody. And they are coming down as if they were on cocaine or something. There's no common sense.'

(Emphasis added)

55. In the course of his evidence on behalf of the plaintiff, Mr. Reardon of the Department of Agriculture drew attention to the timing of this article: he said that he believed it significant that the article was dated 9 August 2014 while in June 2014 the Department and Turf Club representatives had searched Mr. McGuinness' yard, that Mr. McGuinness was a member of the defendant, and that the search had recovered unauthorised animal remedies. He noted that no complaints had been made to the Department arising from any of these inspections. Mr. Reardon in his evidence strongly disagreed with the suggestion in Mr. Meade's evidence that the issue of the use of performance enhancing drugs was '*miniscule*'.

The fourth publication: the petition

56. The plaintiff also claimed that about this time the defendant falsely and maliciously published to its members and/or horse trainers in Ireland a petition to have the plaintiff removed from his position as head of security of the Turf Club on the grounds of misconduct. The alleged production of this petition was described throughout as the '*fourth publication*'. The claim insofar as based upon this alleged publication was withdrawn from the jury by the trial judge.

The fifth publication: the meeting at the Keadeen Hotel

57. On 15 August 2014 a meeting occurred at the Keadeen Hotel in Naas. It was attended by Noel Meade, Michael Grassick and Michael Halford, Liz Doyle (who was a member of the defendant) and Avril Doyle (who was not a member of the defendant), and Denis Egan, Neville O'Byrne, and Michael Hickey. The defendant said that this meeting was jointly arranged as between Mr. Egan and Mr. Grassick and that its purpose was (as it was put by counsel) to '*sort something out*'. That was supported by the evidence of Ms. Doyle, who said that the meeting was organised by the Turf Club, the Trainers Association as well as her mother and herself '*to try and find a resolution to the matter, put our case forward to just try and bring it to a resolution.*' Mr. Egan, who was the point of contact in the Turf Club regarding the meeting said in evidence that he could not recall exactly how the meeting came about, but that he did remember that there had been e-mail correspondence between Mr. Grassick and himself about setting the meeting up. He thought it might have followed from correspondence from Beachcroft Solicitors which, Mr. Egan said, '*had opened the door for a meeting with the Doyles*'. Mr. Grassick's evidence was that the meeting was organised between Mr. Egan and himself, and that Mr. Meade was also involved. His evidence was that the room in which the meeting was held was paid for by the Turf Club.

58. Mr. Egan said that the meeting took approximately two hours, and that Ms. Doyle was invited to set out what had happened in the yard on 26 March. Mr. Hickey's evidence was that Mr. Meade introduced the meeting stating that he was now representing the Doyles, and that they were taking over the Doyles' case. Mr. Egan was not certain who had invited Ms. Doyle to thus speak: he thought that it might have been Mr. O'Byrne. Mr. Egan's evidence was that Ms. Doyle produced the '*mock up*' document and the

document she had taken from Mr. Buckley in Fairyhouse, and that she added a further point of difference between the document she was shown in Fairyhouse and the document produced on 26 March (she said that the 'z' in her name was not the same in the two documents). He said that what the Doyles said at this meeting was that a forged/altered document had been presented to them during the stable inspection.

59. Mr. Egan's evidence as to what Ms. Doyle said was as follows:

'she set out that there was – the Department and the Turf Club came in to inspect her yard. At the end of the inspection they produced a document and referred to the fact that she had been – her name had been found in the file, the John Hughes file, and that she was shown a document. And she explained then that when she said, that couldn't be me, and she said Chris Gordon accepted it, and the one comment she passed on the day was that she couldn't understand how easily he accepted that when he said it wasn't her, he just accepted it. So then she went on and said that she requested a copy of the document from Pat Hughes who is a brother of John Hughes. She got a copy of the document and when it arrived she realised that the document was not what she was shown in the yard. At that stage then she outlined what had happened with Declan Buckley, the meeting in Fairyhouse. And she went on then and just, I think that was the end of what she said at that point in time'.

60. Mr. Egan said that in the course of the meeting 'both sides' set out what they believed the situation was, with the representatives of the Turf Club outlining how in their view there was a difference over the documents being presented and that Mr. O'Byrne left the meeting saying that he would revert back to the Doyles. Mr. Grassick said that the representatives of the defendant 'said very little'. The meeting, he explained, 'was sort

of Liz and Avril Doyle giving their version of what they felt had happened in their yard and in Fairyhouse.’ It was Mr. Grassick’s recollection that the only person mentioned in the course of the meeting was the plaintiff, and that the accusation made against him was that *‘he produced a false document to Liz and Avril Doyle in their yard in March ... that was their view.’* It seems clear that in the course of the meeting, Mr. Egan told the defendant’s representatives that it was he who had written Ms. Doyle’s name on the lodgement slip in the *‘book of evidence’*.

61. The plaintiff contended that as a result of what was published by the defendant’s *‘servants or agents’* at that meeting, an inquiry was launched into allegations against the plaintiff. He said that inquiry concluded that the plaintiff had done nothing wrong and was simply performing his duties to ensure that proper inspections took place in respect of anabolic steroids. He was told by the Chairman and Deputy Chairman of the Turf Club to continue with the joint inspections with the Department and (the plaintiff said in evidence) that they accepted that the document the Doyles had said was shown to them was not in fact the one produced by the plaintiff on 26 March. Mr. Buckley gave evidence that after the meeting at the Keadeen hotel he was shown the *‘mock up’* document that had been produced by the Doyles at that meeting. He said that that document bore no resemblance to the document shown by him to Liz Doyle on 26 March. Liz Doyle’s evidence was that this document had been prepared for what she described as *‘clarification purposes’* and that it reflected what she believed she had seen in the yard. It was, she said, a *‘very friendly’* meeting.

62. The words spoken at the meeting at the Keadeen hotel were described as *‘the fifth publication’* and, again, it was contended by the plaintiff that the defendant was responsible for those statements.

The seventh publication: the inspection of Mr. Flood's premises

- 63.** On 9 July a joint inspection took place at the premises of Frank Flood, a trainer based in Wicklow. On 21 August 2014, Mr. Grassick contacted the Turf Club and spoke with Mr. Egan. He was said by the plaintiff (and this was Mr. Egan's evidence) to have alleged that this inspection had been invalid and had been misconducted by the plaintiff in that he had failed to provide Mr. Flood with a letter of introduction on the day of the inspection and had thus not obtained authority to inspect the yard. These statements were alleged to have been made in connection with an application for the adjournment of a disciplinary hearing involving Mr. Flood which was scheduled to take place that morning before a Turf Club body known as '*the Referral Committee*'. The complaint against Mr. Flood was that he did not have on his establishment horses that were recorded as being in training with him (the Turf Club rules require that trainers advise it if horses they have in training at any particular point in time leave the trainer's establishment) and, according to the plaintiff's evidence, Mr. Grassick wished for Mr. Ward to (as it was put in the plaintiff's evidence) '*vindicate the rights of Mr. Flood*'.
- 64.** It was the plaintiff's case (and Mr. Egan's evidence) that the following day, 22 August, Mr. Meade contacted Mr. Egan by telephone and requested the immediate suspension of Mr. Gordon. According to Mr. Egan, Mr. Meade said in the course of that telephone conversation that the defendant believed the plaintiff to be '*guilty*' and that the defendant had no confidence in him. Mr. Egan's evidence was that he understood the reference to '*guilt*' as being to what he described as '*the Doyle matter*'.
- 65.** The hearing of Mr. Flood's disciplinary hearing was adjourned to 28 August. On that date, Mr. Flood appeared before the relevant committee and admitted all of the breaches

of discipline alleged against him. He was not represented by any solicitor. According to the plaintiff in his evidence, Mr. Flood made no reference to not obtaining a letter of introduction from Mr. Egan.

III THE PROCEEDINGS, THE TRIAL AND THIS APPEAL

The proceedings

66. The plaintiff said in evidence that it was as a consequence of learning of the alleged petition that it was claimed Mr. Dermot Weld, a horse trainer, said he had been asked to sign by Mr. Grassick, that he decided to seek legal advice. On 1 October 2014 the plaintiff's solicitors wrote to the defendant complaining that members of the defendant were involved in a campaign of defamation against the plaintiff, the purpose of which was to remove him from his position as head of security of the Turf Club. The letter referred to the correspondence from Messrs. Frank Ward of 12 June, the *Irish Field* article, the alleged petition, the publication by the defendant of allegations against the plaintiff at the meeting of 15 August 2014, the conversation between Mr. Grassick and Mr. Egan of 5 June 2014 and the telephone call made by Mr. Grassick to Mr. Egan on 21 August 2014. It was stated that each of these publications was defamatory of the plaintiff and threatened proceedings in the absence of an adequate reply.

67. On 8 October Messrs. Frank Ward replied to this correspondence. They stood over the contents of the letter of 12 June 2014, asserted that the inspection of 26 March had been misconducted, protested that the plaintiff had not checked his facts properly prior to that inspection, and asserted that at all times the defendant, Mr. Meade, Mr. Grassick and Ms. Doyle had acted in the best interests of IRTA. It said that the various publications were made on an occasion of qualified privilege. It said the following of the *Irish Field* article of 9 August 2014:

‘Mr. Meade is entitled to express his opinion, in his capacity as the Chairman of the IRTA, regarding the manner in which the Turf Club and/or the

Department of Agriculture carry out their duties. In doing so he is expressing a properly informed opinion of his in his capacity as the head of IRTA. Once again this article was published on an occasion of qualified privilege by the Irish Field which, as you know, is a highly reputable journal promoting the best interests of Irish horse racing and show jumping.'

(Emphasis added).

- 68.** It is important to observe that the qualified privilege asserted here in respect of Mr. Meade's comments in *The Irish Field* is a privilege that was said to arise *because* Mr. Meade was speaking '*in his capacity*' as head of the IRTA. The '*entitlement*' to express his opinion is related to that '*capacity*' and the interest is said to be the same as that deployed in the letter in relation to the first and second publications ('*[o]nce again*').
- 69.** These proceedings were instituted in February 2015. According to the plaintiff's evidence, upon the commencement of this action the Chairman of the Turf Club agreed that the plaintiff should not go on inspections of members of the defendant until the proceedings concluded. The Department of Agriculture, he said, more or less withdrew from such inspections once the plaintiff's duties were so restricted.
- 70.** In his statement of claim, the plaintiff alleged that each of the seven publications I have described were defamatory of him, asserting that the publications in question had been made falsely and maliciously. He sought exemplary damages, pleading that the publications were part of an orchestrated and severe campaign of defamation against him. The defendant did not justify any of the publications, pleading qualified privilege

in relation to the first, second, fifth, sixth and seventh. Towards the conclusion of the trial, the plaintiff conceded that these publications were indeed made on occasions of qualified privilege. The defendant also denied that it was responsible for the third and seventh publications and denied outright the fact of the fourth publication. In respect of the third publication it also denied that it referred to the plaintiff. Importantly, in relation to none of the alleged defamations did the defendant plead justification. At the same time, it pressed its claim that it acted without malice and in the interests of its members asserting (as it was repeatedly put by Mr. Meade in the course of his evidence) *'all we have ever tried to do is to try to get justice for Liz All we needed was some justice for Liz'*.

71. The case originally came on for hearing on 2 July 2019. On the first day of the action it was disclosed by counsel for the defendant that the defendant was not, as had been originally pleaded (and admitted in the defence) an unlimited company, but instead was a company limited by guarantee. The hearing was aborted, the defence amended to reflect the defendant's true status, and a new trial commenced seven months later.

The trial

72. The matter came for hearing for the second time before Barton J. and a jury on 4 February 2020. The trial concluded on 25 March. In the course of the hearing, Barton J. delivered two reserved judgments. The first ([2020] IEHC 363) rejected the application of the plaintiff that the trial judge direct the jury to disregard the evidence given on behalf of the defendant by Liz Doyle and that he strike out the defence of qualified privilege in relation to three of the publications. The second ([2020] IEHC 425) addressed the defendant's application at the conclusion of the plaintiff's evidence

to have the plaintiff's claims in respect of each publication withdrawn from the jury due to insufficiency of evidence and, in particular, on the basis that there was insufficient evidence of malice (*'the withdrawal application'*).

73. A variety of disparate issues were canvassed in the course of the ruling on the withdrawal application, but the essential findings for present purposes were this:

- (i) That there was sufficient evidence as to malice to go to the jury on the first, second, fifth, sixth and seventh statements.
- (ii) That it was open to the jury to find (as regards the third publication) that Mr. Meade's comments as recorded in the *Irish Field* article of 9 August 2015 were made on behalf of the defendant and that those statements were understood to refer to the plaintiff.
- (iii) That there was no evidence to warrant a finding by the jury that the defendant had drawn up a petition to remove the plaintiff from his position as head of security of the Turf Club and that, accordingly, the case in relation to the fourth publication would be withdrawn from the jury.
- (iv) That there was sufficient evidence to go to the jury that the defendant – through the agency of Mr. Meade and Mr. Grassick – was aware of what the Doyles were likely to say at the meeting on August 15, condoned and supported it and were content that the Doyles should repeat at that meeting what had been discussed in Mr. Ward's office and outlined in his correspondence of June 12.

74. So, all but the fourth of the seven alleged publications fell to be determined by the jury, while in respect of five of the remaining six publications there was a claim of qualified privilege (there being no such plea as regards the third).

The issue paper

75. An issue paper was, after submissions by the parties, settled by the trial judge. It presented the following questions, which were answered by the jury in the terms I have included and highlighted below:

First and second alleged defamations (Ward letter of 12 June 2014)

1. *Has the Plaintiff proved that the Defendant, either in its instructions to the late Mr. Frank Ward Solicitor or in authorising him to send the letter of 12 June 2014 addressed to the late Neville O'Byrne had no honest belief in the truth of the allegations contained therein? (Yes)*

Third alleged defamation (The Irish Field)

2. *Has the plaintiff proved that Noel Meade was speaking on behalf of the Defendant when making the statements ascribed to him concerning the inspectors and inspections of trainers' premises in the article in in the Irish Field? (Yes)*
3. *If yes, would the reader of the article have taken the relevant statements to refer to the Plaintiff? (Yes)*

Fifth alleged defamation (Keadeen Hotel)

4. *Has the Plaintiff proved that the Defendant, without any honest belief in the allegations made by Liz Doyle and Mrs. Avril Doyle, caused them to be repeated to senior members of the Turf Club on 15 August 2014 at the meeting at the Keadeen Hotel, Newbridge? (Yes)*

Sixth alleged defamation (Grassick to Egan regarding Aido McGuinness)

5. *Has the Plaintiff proved that Michael Grassick in bad faith and for the purposes of injuring the Plaintiff passed on to Denis Egan a complaint received by him from the trainer Aido McGuinness concerning the plaintiff? (Yes)*

Seventh alleged defamation

6. *Has the Plaintiff proved that Michael Grassick, in bad faith and for the purpose of injuring the Plaintiff, passed on to Denis Egan a complaint received by him from the trainer Francis Flood? (No)*
7. *If any of the questions 1, 4, 5 and 6 is 'Yes' and/or if both of the answers to questions 2 and 3 are 'Yes', assess general damages. (€200,000.00)*
8. *Is the plaintiff entitled to aggravated damages? If 'Yes', assess damages. (€50,000.00)*
9. *If any of the questions 1,4, 5 and/or 6 have been answered "Yes", and/or if both of the answers to questions 2 and 3 are "Yes", did the Defendant publish the said*

words maliciously knowing them to be false and/or reckless as to whether they were true (having no honest belief that they were true) and did the said publications constitute an orchestrated and severe campaign by the Defendant against the Plaintiff's good name? (Yes)

10. *If the answer to Question 9 is "Yes", is the Plaintiff entitled to exemplary damages?*
(Yes)

11. *If the answer to Question 10 is "Yes", write the award of Exemplary Damages here.*
(€ 50,000.00)

76. Following the verdict and in a third reserved judgment ([2020] IEHC 446), the trial judge ordered that the defendant bear all of the costs of the proceedings.

This appeal

77. As I have earlier noted, the trial took thirty days. Although the account I have given above is lengthy, it is necessarily much abbreviated and I have identified only those issues that arose in the course of the evidence that appear relevant to the extensive span of grounds now live in this appeal.

78. In the course of the very comprehensive oral submissions made before this Court on behalf of the appellant, three questions assumed central importance. The first related to the issue of malice and, in particular, whether there was evidence of malice to go to the jury and/or the basis on which they could have made the findings of malice they did regarding five of the publications. The second arose from the *Irish Field* article, and specifically the question of whether, and if so how, the defendant could be liable for

the statements made by Mr. Meade in the course of the interview quoted in that piece. The third related to the meeting at the Keadeen Hotel, and the issue of whether – and once again, if so how – the defendant could be liable for comments made at that meeting. I will deal first with these three questions, and from there a fourth which assumed prominence during the defendant’s reply – how the defendant could face legal liability for statements made in the course of its giving instructions to its solicitors and a letter from those solicitors. I will conclude my consideration of the liability issues by a shorter examination of a number of other, miscellaneous, points made throughout the papers. Then, I will consider the question of *quantum*. The issues arising in that regard, it should be observed, are simpler than they seemed at the time of the submissions on this appeal: in *Higgins v. Irish Aviation Authority* [2022] IESC 13, [2022] 2 ILRM 121 the Supreme Court has clarified the principles governing a jury award of damages in a defamation action. Following the delivery of that decision, each party was invited to, and did, make written submissions arising from the judgments in that case.

79. Finally, and for the avoidance of any doubt on the question, I should emphasise that the analysis that follows is based on my review of the entire transcript of the trial, not only those extracts from the evidence furnished by the parties in their agreed core books or otherwise opened by them in the course of the hearing of the appeal.

IV MALICE

The objection

80. Malice, counsel for the defendant said in opening this appeal, was at the heart of this case. It also occupied a central role in the appeal. A plea of qualified privilege was maintained in relation to five of the six publications put to the jury (it was accepted that it did not arise in relation to the *Irish Field* article). Given that the plaintiff – eventually – accepted that each of those five publications arose on an occasion of qualified privilege, there was no issue but that the plaintiff bore the onus of proving malice. The requirement is clearly specified in s.19(1) of the Defamation Act 2019. Neither party, nor for that matter the trial judge, was under any illusion but that that onus is a heavy one.

81. The core point made by the defendant was that that burden had not been discharged. The defendant, it said, had acted at all times with an honest belief in the truth of the complaints made by the Doyles. Having regard to the evidence it adduced in support of that belief, it said that there was no basis on which (a) the judge could have allowed the issue of malice to go to the jury and/or (b) the jury could have made the finding of malice in respect of the four publications it did (the first, second, fifth and sixth). In parallel to these objections were a number of complaints around the charge to the jury.

Malice and the judge's charge

82. It makes sense to start there. There was, the trial judge said, '*a very heavy burden*' on a party seeking to establish malice so as to displace a plea of qualified privilege and, he

made clear, the jury had *'no function in lightening that burden'*. This meant, he said, that the defendant *'doesn't have to prove anything in this case'*, that *'the Plaintiff has to satisfy you ... on the evidence that the occasion was used for improper motive or purpose by the Defendant'*, and that *'it is a heavy burden, but it is a burden to satisfy you on the balance of probabilities that the Defendant misused the occasion of qualified privilege'*. He made it clear to the jury that they *'should be slow to jump to conclusions ... because qualified privilege ... is a vindication of the right to free speech in certain circumstances ... [y]ou lose that right if you have acted without good faith in making the statement.'* He said *'the Plaintiff must prove to your satisfaction on the balance of probabilities that the Defendant had no honest belief, essentially had no honest belief in the truth of the statement about which the complaint was made.'*

83. From there Barton J. explained what was involved in establishing such malice. He said that the plaintiff had to prove that the defendant *'made the statement maliciously without honest belief about what was said about Mr. Gordon'*. Earlier in the charge it was put thus:

'the Plaintiff has no cause of action unless the Plaintiff can prove that the occasion has been abused or misused for improper motive or purpose'

84. He said:

'the only way Mr. Gordon can get out of that is by proving that the Defendants were using these occasions for purposes other than that purpose they were designed improperly'

85. He explained:

'I say it is a heavy onus, it is a heavy onus in the sense that you have to be satisfied from the evidence that the Defendant, the maker of the statement, about which the Plaintiff complains, had no belief in good faith and no, what we call honest belief, in the truth of the statement that was being made. If they didn't, so in other words, if you were aware, the maker of the statement is aware, that the statement is false or likely to be false, they had no honest belief in the truth of the statement that they are making and that they are publishing, they can be deprived of their defence.'

86. From there, the trial judge addressed the position of the Doyles, the fact that the defendant *'adopted what they were saying as being true'* and that the defendant's evidence was that they *'believed what they were saying as being true'*. He continued:

'What is relevant here is the belief, the mind, this is a subjective test, the mind of the Defendant through its officers, in this case Mr. Meade, Mr. Grassick, what did they honestly believe was the case? Were they aware, were they actually aware, of something else than what the Doyles were saying? If they were, were they in any way concerned in an intentional way with the truth? In other words were they reckless as to whether or not what the Doyles were saying was true?'

87. He put this in context as follows:

'You, the jury, are entitled if there is evidence to infer from evidence of facts that occurred before or even after the publication of the event that in fact there may not have been or that the maker of the statement didn't have an honest belief in the statement that was being made, or in this instance, several statements which were being made. You are entitled to have regard to evidence from which such an inference may be drawn if that's what you should decide given at the trial of the action.'

88. The critical question, he repeated, was whether the plaintiff had satisfied the jury that the defendant, represented by Mr. Grassick and Mr. Meade *'did not have an honest belief in the statements they published'*. The judge attached significance in this regard to the extent to which the officers of the defendant sought to interrogate what the Doyles had told them. He said this of Mr. Grassick and Mr. Meade:

'Now, of course, what they told you is that they adopted, this is my phrase, not something that they used, they adopted the Doyles, what the Doyles told them hook, line and sinker/lock stock and barrel. 'We accept it', they just accepted what the Doyles said. That is what they say was the situation in the office when the first of these statements was published.'

89. Here, the judge focussed on the letter of 12 June and the allegation of an attempt by Mr. Gordon to entrap Ms. Doyle contained in it. He continued:

'That implies or infers ... that Mr. Gordon was aware that her name had not been, the complaint here is that it is untrue that her name was on the original

document. He knew that. He either knew that Denis Egan had written the name there before he went to the yard or he had been told that. Either way when he stood in that yard he knew that the fact of her name being on that document, on the original prosecution file was untrue and so did the Turf Club and that therefore the use of this was for a specific purpose, to entrap.'

90. The judge then explained that the plaintiff was making the case that it was known to Mr. Grassick and to Mr. Meade at the time of the making of the statements that in fact Mr. Egan was '*claiming a responsibility for this mess up*'. He said that the plaintiff was inviting the jury on the evidence to find that Mr. Meade and Mr. Grassick knew that that was the situation when they were in Mr. Ward's office. He explained that the plaintiff said that they were using the occasion of qualified privilege for an improper purpose, that this '*wasn't just about getting justice for Liz ...[t]his was about gripe that the Defendant had about joint inspections*'. The judge was also clear in stating that the mere fact that Mr. Meade and Mr. Grassick may have known of '*the other contention*' and yet '*didn't bother investigating*' would not '*have significant consequences*'. The plaintiff had to go further, the judge said, and this meant proving malice. He observed:

'You could be guilty of unreasonableness of such an extent that it was observed such that you could infer from the degree of unreasonableness on the part of Mr. Grassick and Mr. Meade that they really had no belief, no true belief, on bona fide belief in the truth of what was being said here.'

91. While carelessness and negligence would not be enough to establish malice, '*recklessness*' could. He put this as follows:

'Recklessness in this context, Ladies and Gentlemen means that Mr. Grassick and Mr. Meade actually didn't care, they were actually, and I don't mean that in a – they were indifferent, I am using the word indifference, reckless in the sense of being whether it was true or not they were indifferent as to whether or not this statement about Mr. Gordon was true. Indifference is sufficient, Ladies and Gentlemen. If I am indifferent, reckless, that will be sufficient for the purpose of constituting legal malice because it runs counter to the requirement that the Defendant has and [sic.] honest belief in the truth of what is being said.'

92. The judge gathered these various issues together in the following passage in his charge, in which he outlined what '*sufficient evidence*' would be required to establish malice:

'Sufficient evidence being ... evidence which you can accept and which allows you to infer or conclude on the balance of probabilities that there was an improper motive or that this was used for an improper purpose, these occasions ... actual knowledge or knowledge, awareness that something is untrue or is likely to be untrue is ordinarily fatal to this defence. An actual intention to injure somebody is not a necessary ingredient, but ill-will towards somebody or an intention to injure somebody, you really want to do that, could be evidence from which a jury would be entitled to infer that the person making this statement was motivated by malice in the legal sense of the word.'

Malice 'in the legal sense of the word'

93. The legal definition of malice is well travelled in the authorities. For present purposes, the following are relevant, and follow from the lapidary speech of Lord Diplock in *Horrocks v. Lowe* [1975] AC 135 at p. 149 to 151 (which has been adopted in Irish law – see *Talbot v. Hermitage Golf Club and ors.* [2014] IESC 57):

- (i) ‘*Express malice*’ is the term of art descriptive of the dominant or improper motive that deprives the publisher of a statement of the protection of qualified privilege.
- (ii) It generally describes malice in the popular sense of a desire to injure the person who is defamed. To destroy the privilege, that desire must be the *dominant* motive, so that it will not have that effect if the defendant is acting in accordance with a sense of duty or in *bona fide* protection of his own legitimate interests.
- (iii) Proof that the person seeking to invoke the privilege did not believe that what he published was true will *generally* be conclusive evidence of express malice: the theory is that there will *usually* be no circumstance in which the propagation of deliberate and injurious falsehoods will be justified by a sense of duty or desire to protect the publisher’s own interests.
- (iv) Save in exceptional circumstances (to which I will return), proof that the person *did* honestly believe in the truth of the statement will generate an entitlement to protection of the privilege.
- (v) However for this latter purpose (a) a person who publishes a statement recklessly and without caring whether it is true or false is treated as if he knew it to be false, yet (b) carelessness, impulsiveness or irrationality in arriving at the positive

belief that a statement is true is *not* to be equated with indifference to the truth of that statement.

- (vi) However, even a positive belief in the truth of what is published may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for a purpose other than that for which the privilege is accorded in law. This will arise where the dominant motive actuating the publisher is not a desire to protect the relevant interest or discharge the relevant duty, but to give vent to personal spite or ill-will or the obtaining of a personal advantage.
- (vii) Juries must be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said was true or was indifferent to its truth or falsity: it is only where his desire to comply with the relevant duty plays no significant part in his motives for publishing what he believes to be true that express malice can be properly found.

94. These are well condensed and captured in the definition of ‘*malice*’ suggested in Cox and McCullough, *Defamation Law: Law and Practice* (2nd ed., 2022 at para. 8-192):

‘Malice exists where the publisher’s dominant motive for publishing the relevant statement involves an abuse of the occasion of qualified privilege.

Generally, though not always, this will arise where a statement is published and where the publisher knows it is false or is indifferent as to its truth, but not

where s/he believes, on unreasonable grounds or as the result of his or her negligence, that it is true.

Even if s/he does believe the statement to be true, malice will still be established if it can be demonstrated that the dominant motive for publication entailed an abuse of the occasion or privilege, for example where it was to damage or injure the plaintiff.

On the other hand, if such damage or harm is a by-product (even an inevitable one) of a publication where the dominant motivation of the publisher was not abusive of the occasion of privilege, then malice is not established.'

Assessment of the charge

- 95.** The defendant made three points about this aspect of the charge which, I think, can be dealt with shortly. First, complaint is made that the trial judge failed to properly explain the heavy burden imposed on the plaintiff in seeking to prove malice for these purposes. A cursory consideration of my summary shows this to be misplaced. 'Heavy' burden is a term readily comprehensible to a lawyer and lay person alike, and the trial judge made it clear that this meant (variously) that the defendant had to prove nothing, that the onus was on the plaintiff, that he had to discharge that onus on the balance of probabilities and that this meant he had to satisfy the jury by reference to that standard '*that the Defendant misused the occasion of qualified privilege*'.
- 96.** The trial judge in thus (a) stating that the burden was heavy, (b) advising the jury that it was required to find it proven on the balance of probabilities and (c) in stressing that the

burden was on the plaintiff and that the defendant did not have to prove anything, identified each element recited by Lynch J. in *Hennessey v. K-Tel Ireland Ltd.* [1998] WJSC-SC 8033 (at p. 7):

‘The onus is a heavy one and is not discharged by showing circumstances which could possibly be construed as showing malice but equally as not so showing. The existence of qualified privilege raises a presumption of no malice in relation to the publication and that presumption must be clearly negated if a Plaintiff is to be entitled to succeed.’

97. Second, the defendant complains of the emphasis placed by the trial judge upon recklessness as an ingredient of the plaintiff’s claim. The only mention in the statement of claim of the defendant being reckless as to whether or not the publications were true, appeared in that part of the pleadings addressing exemplary damages, it is said, and not as a pleaded particular of malice. Therefore, the defendant says recklessness only becomes relevant if liability were established and (it seems to be suggested) the trial judge ought not to have directed the jury to take account of recklessness in determining whether there was malice.

98. The point appears to me to confuse issues of law, pleading and evidence. There is and can be no doubt but that *‘recklessness’* is a component of the legal construct of malice – and the defendant clearly did not suggest otherwise. It is an inherent part of the legal test, being thus explained in Lord Diplock in *Horrocks v. Lowe* at p. 150:

‘what is required on the part of the defamer to entitle him to the protection of the privilege is 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 be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false.'

99. The plaintiff here had pleaded malice. That, on its face, meant malice in the legal sense of the term and, accordingly, necessarily incorporated this element of recklessness. To present a proper pleading it was necessary for him to particularise the facts upon which he would rely in establishing malice but not – of course – either a treatise on the legal meaning of the term he pleaded, nor an excursion through the evidence by reference to which the allegation of malice would be proved. The pleading did furnish particulars of malice, referring in particular to the inspection, the production of the lodgement slip, the plaintiff's belief at the time that Ms. Doyle's name appeared on that slip, the fact that Mr. Egan explained that he had written her name on the slip, the fact that Ms. Doyle had said that the defendant was inciting her to make a complaint and the fact that the defendant notwithstanding the foregoing had accused the plaintiff of setting out to entrap Ms. Doyle. He specifically pleaded that the defendant was aware at that time that any allegation of misconduct against the plaintiff was without foundation. The trial judge permitted the jury to have regard, in addition to these matters, to events that emerged in the course of the trial, and that was as practically sensible as it was correct in law.

100. Insofar as I can ascertain, at no point in the course of the trial was it suggested by the defendant that the manner in which the pleading had been formulated was such as to reduce the scope of the legal meaning of the term '*malice*'. It followed that *prima facie* at least, if the trial judge was to give a proper legal direction to the jury as to the meaning of '*malice*' he had to include reference to this, indispensable, feature of the test. No

objection was taken following the charge to the trial judge's reference to recklessness in the course of his direction. It is to be noted that it is *not* suggested that the trial judge erred in relating the concept of '*recklessness*' to any particular item of inadmissible evidence or to any unpleaded fact: the parties instead appear to have agreed that the trial judge would not address them on the facts. I cannot, therefore, see how he can be said to have erred in stepping outside the pleaded case in his direction.

101. Third, it was suggested in the course of oral submissions that the trial judge erred in failing to direct the jury that if they concluded that the defendants had honestly believed the truth of what the Doyles were saying, they should find for the defendant. A consideration of the charge as a whole shows this to be misplaced. As is evident from the extracts quoted above, the judge repeatedly explained to the jury that malice meant the absence of honest belief; in fact at one point he specifically said that the jury had to be satisfied from the evidence that the defendant had no belief in good faith in the truth of the statement that was being made. Honest belief was not merely central to the charge, but to the questions as presented to the jury on the issue paper. In respect of each of the statements in relation to which a plea of qualified privilege was advanced, the jury was specifically asked to state whether the statements had been made without honest belief in the truth thereof (in the case of the first, second and fifth statements) and whether they had been made in bad faith and for the purposes of injuring the plaintiff (in the case of the sixth and seventh). The final substantive question was directed to whether the defendant published '*the said words maliciously knowing them to be false and/or reckless as to whether they were true (having no honest belief that they were true) and did the said publications constitute an orchestrated and severe campaign by the Defendant against the Plaintiff's good name?*'.

Accepting the Doyles' account

102. A further objection is taken to both the judgment on the withdrawal application and to the charge. In respect of each it is said that the judge erred in suggesting that the defendants had unquestioningly accepted the Doyles' account of their dealings with the plaintiff. It seems appropriate to deal with the objection to the withdrawal ruling, and to the charge, together.

103. As to the first, in the course of his ruling the trial judge referred to the defendant as having accepted unquestioningly the evidence of the Doyles, and to the fact that if they had unquestioningly accepted the Doyles' account, that in itself would have been evidence of malice. He quoted a passage from *Gatley on Libel and Slander*, 12th Ed. 2013 at para. 17-0033 (now para. 18-003 of the 13th Ed. 2022) in which (reflecting my earlier summary) it is stated that a publisher who acts '*recklessly without considering or caring whether it be true or not*' is treated as if he knew his statement to be false. Based upon this, Barton J. said (at para. 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"'.

104. The defendant highlights the following – similar - statement by the trial judge (at para. 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.’

105. Thereafter, the judge said that indifference to the truth is *‘normally fatal to the defence of qualified privilege’* (at para. 35) and commented in the context of the fifth publication that the defendant *‘accepted without question the veracity of [the Doyle’s] accounts’* (at para. 63), thereafter observing (at para. 73):

‘... 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’.

106. Barton J. continued (at para. 74): *‘a failure to make available enquiries may be evidence from which a jury could infer that the Defendant was consciously indifferent to the truth or falsity of the relevant statement.’* He then placed that proposition in the context of the information available to the defendant (at para. 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.'

107. However, the judge proceeded to observe that he was satisfied that there was evidence that the fact that Mr. Egan had affixed Ms. Doyle's name to the lodgement slip was evident to the defendant from an earlier point in time. He noted that Mr. Egan had said that he had so advised Mrs. Doyle on 15 April. At para. 78 of his judgment he said the following:

'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 [sic.]. 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.'

108. Mrs. Doyle's statement, it will be recalled, recorded Mr. Egan as saying he was responsible for the document shown to Ms. Doyle at Fairyhouse. The judge then noted that the letter of 12 June 2014 never alleged that the plaintiff had written '*Liz Doyle?*' on the document produced on 26 March, but that instead the allegation was that the plaintiff had used the document to entrap Ms. Doyle, and that the consequent claim that the plaintiff had acted unlawfully, illegally, improperly and was guilty of reprehensible conduct were without foundation. He continued (at para. 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.'

109. He said (at para. 83):

'At the route [sic.] of the question which the Court has posed for itself is ... 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'.

110.The defendant says in its written submissions that in so concluding the trial judge overlooked important evidence. This objection depends upon this statement made by Mr. Meade under cross-examination:

'Oh, look. I think we did question Liz. It's not that we didn't question her, we did question her but we were, we had no doubt that she was telling us the truth.'

111.Accordingly, it is said, the '*key basis*' of Barton J.'s decision to leave the issue of malice to the jury was incorrect. The defendant stresses that the trial judge stated in the course of his judgment that '*indifference*' to the truth is '*normally fatal to the defence of qualified privilege*'. It also emphasises that Mr. Meade noted in his evidence that Ms. Doyle's account never changed, and that Mr. Egan when called by the plaintiff gave evidence to similar effect. The defendant submits:

'Hearing an account on multiple occasions before taking action, and noting that the account never changed is a form of questioning of the account (in contrast with a hypothetical situation where an account consistently changed, but the latest version of which was nonetheless adopted).'

112. The argument appears to me to be both misconceived in law, and based upon the slenderest of evidential bases. A trial judge *must* allow a plea of malice in a defamation case to go the jury where he or she 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 (*Kirkwood Hackett v. Tierney* [1952] IR 185 at p. 208). In determining whether there is evidence from which it may be inferred that the defendant was consciously indifferent to the truth or falsity of a situation, the jury is entitled to have regard to whether there has been a ‘*failure to make available inquiries*’ which may be evidence from which it might be inferred that the defendant was consciously indifferent to the truth or falsity of thereof (*Gatley* 13th Ed. at para. 18.18). However – as was expressly acknowledged by the trial judge in the course of his ruling – the fact that a defendant has not undertaken inquiries prior to making a statement in respect of which a claim of privilege is advanced does not itself always constitute evidence on which to find malice or to draw an inference that the defendant used the occasion of publication for an improper purpose or abused the proper purpose of the occasion (see para. 36 of Barton J.’s ruling on the withdrawal application).

113. That said, circumstances will present themselves in which a failure to undertake inquiry will afford such evidence. The trial judge explained this, as follows (at para. 75):

‘... 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.’

114.In deciding that there was evidence of malice to go to the jury, the trial judge was not merely concerned with the absence of any inquiries: his focus was upon the fact that at the core of the plaintiff's case was an alleged campaign by the defendant to have him removed from his office, and his conclusion was that there was evidence that would enable the jury to conclude that there was a campaign – at the very least – to (as the trial judge put it) '*clip the Plaintiff's wings*' (at para. 84). Relevant to *that* was the fact – as evident from my earlier quotations from the judgment - that although it was known by the defendant from an early stage that Mr. Egan had written the words '*Liz Doyle?*' on the lodgement slip neither he, nor for that matter Mr. Buckley, were '*put in the firing line*' (at para. 82). It follows that even if he had erred in his view that no inquiries had been undertaken by the defendant, this would not have precluded the case from being sent to the jury.

115.Moreover, the evidence from Mr. Meade upon which the defendant relies in this regard is both thin and incomplete. It was never the foundation of his evidence in chief that the defendant had undertaken inquiries prior to sending the letter of 12 June, Mr. Meade's comment was introduced in tentative terms ('*I think we did ...*'), having made this short statement he never elaborated upon it, no other witness testified to such inquiries having been undertaken (including either of the Doyles), and most importantly of all, the relevant question was *not* simply whether Mr. Meade had posed '*questions*' of Ms. Doyle but of whether they had undertaken sufficient inquiries having regard to all the available information (including making any inquiry of Mr. Egan).

116.Thus, when he was asked by counsel for the plaintiff whether the defendant had ever conducted an investigation, Mr. Meade (having asked what counsel meant by '*an investigation*'), continued:

'The only way I can answer that is that when Liz told her story, or her version of what happened to myself and Michael and Michael Halford I think Jim Gorman and Eric McNamara and a few more were the same we all believed her.'

117. Ms. Doyle's own evidence matches precisely with the trial judge's assessment. She explained of the meeting in Mr. Ward's office:

*'We relayed what had happened, and I mean it wasn't lost on anybody in the room how serious what we were putting forward, how serious the situation it was. Huge concerns for trainers going forward, and I'd have to thank the Trainers Association, **never once did they doubt what I said, never once was there any question 'are you sure' because the situation was so serious, I think they knew everything I said was there and I was being truthful.**'*

(Emphasis added)

118. Later in her evidence Ms. Doyle said this:

'I was never questioned to whether I was correct or incorrect or not

.... I was never questioned by them as to whether what I was saying was true.

Q. Had you any impression at any time that Mr. Grassick or Mr. Meade might not accept the account you gave?

A. *No never.*'

119.Indeed, Mr. Grassick accepted under cross-examination that neither himself, Mr. Meade nor Mr. Halford asked questions of the Doyles, and that it was the late Mr. Ward *'who spoke to them.'* He summarised the meeting thus:

'We weren't asking questions, no. It was Liz and Avril Doyle giving their version of what happened in their yard to the late Frank Ward. Simple as that'

120.Similarly, Mr. Grassick said that everyone was impressed with the Doyles' account of what happened *'and it was believed ... everybody appeared to accept what they had said was correct'*.

121.This is the context in which the trial judge framed the issue as follows in his judgment on the withdrawal application (at para. 83):

*'At the route [sic.] of the question 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.'***

(Emphasis added)

122. Whether or not Ms. Doyle was asked questions, the point was that there was more than ample evidence that there had been a failure on the part of the defendant to take any steps to interrogate the other information available (and in particular the fact that Mr. Egan consistently said it was he who had written the relevant inscription on the lodgement slip) that generated the basis for allowing the matter to go to the jury. Accordingly (a) there *was* evidence that no proper inquiries had been made of the Doyles, (b) there *was* evidence that their account had been accepted ‘*lock, stock and barrel*’, (c) there *was* evidence of the conduct of a campaign against the plaintiff and (d) the evidential basis on which the defendant submits that the trial judge was precluded did *not* afford a ground on which the judge could have withdrawn that matter from the jury.

123. From there, the defendant then says that the error it alleges in the withdrawal application ruling was repeated in the charge to the jury. It cites two extracts from the charge. In the first, Barton J. is quoted as saying this of Mr. Grassick and Mr. Meade:

*‘Now, of course, what they told you is that they adopted, this is my phrase, not something that they used, they adopted the Doyles, what the Doyles told them hook, line and sinker/lock stock and barrel. ‘We accept it’, **they just accepted what the Doyles said.** That is what they say was the situation in the office when the first of these statements was published.’*

(Emphasis in the defendant’s submissions)

124. In the second, Barton J. said this:

*‘Recklessness in this context, Ladies and Gentlemen means that Mr. Grassick and Mr. Meade actually didn’t care, they were actually, and I don’t mean that in a – they were indifferent, I am using the word indifference, reckless in the sense of being whether it was true or not they were indifferent as to whether or not this statement about Mr. Gordon was true. **Indifference is sufficient, Ladies and Gentlemen.** If I am indifferent, reckless, that will be sufficient for the purpose of constituting legal malice because it runs counter to the requirement that the Defendant has and [sic.] honest belief in the truth of what is being said.’*

(Emphasis in the defendant’s submissions)

125. The defendant contends that because the first statement was wrong (that Mr. Meade and Mr. Grassick *‘just accepted what the Doyles said’*), it is not difficult to see how they might have considered the pair *‘indifferent’* and thus, on the trial judge’s definition, guilty of malice. Once the defendant establishes the fact of a misdirection, it is argued, it is entitled to a re-trial.

126. The applicable legal test is well explained in the full passage in the penultimate edition of *Gatley* upon which the defendant relies. It cites the following (12th Ed. at para. 36.18):

‘Where a new trial is applied for on the ground of misdirection, traditionally the onus of showing that the alleged misdirection did not cause a substantial miscarriage of justice lies on the respondent, and he must show it by authentic evidence. In determining whether a substantial wrong or miscarriage of justice has been occasioned by reason of the judge’s misdirection, the court will not

*speculate what might have been the result if the judge had rightly directly [sic.]
the jury ...'*

127. The passage continues:

'In determining whether there is such misdirection, the summing up will be considered as a whole. Too much weight will not be attached to isolated or detached expressions nor will a single sentence be separated from its context, unless it dominates the reasoning on which that part of the summing up is based'.

128. The defendant's argument is based precisely upon this '*single sentence*'. Having regard to the evidence as I have summarised it above, the judge's summary was an entirely reasonable account of the evidence given on behalf of the defendant. Moreover no attempt was made by the defendant's agents to go beyond the Doyles' theory. Mr. Meade gave evidence at one point that he had no recollection of knowing that Mr. Egan had written on the '*book of evidence*' until the meeting in the Keadeen Hotel on 15 August (he later said in cross examination '*perhaps I was mistaken on that*'). The trial judge, it appears to me, completely and correctly summarised the stance adopted by the defendant in the course of its evidence when he said this:

'The intention of the Doyles ordinarily would be of no relevance whatsoever in this case if it wasn't for the fact that the Defendants adopted, the Defendant adopted, what they were saying was true. They believed what they were saying was true. That is what they say. That is what their evidence is.'

129. Insofar as Mr. Grassick is concerned, the defendant cannot point to a single statement by him which is inconsistent with the proposition that the Doyles were not questioned – this was exactly what Mr. Grassick had said. Further, the trial judge’s comments reflected precisely what Ms. Doyle had said – she was not questioned. Mr. Meade never said otherwise in the course of his evidence in chief. Certainly, under cross-examination (but not in chief) he made the tentative, non-committal and uncertain statement upon which the defendant relies (*‘I think we did question Liz ... we did question her’*) but what is critical is what followed (*‘we had no doubt that she was telling the truth’*) and, more importantly, that this was the position adopted without ever asking a single question of any other party involved before the serious allegations regarding the plaintiff were published to the Senior Steward. I cannot see how it might be said that this gives rise to a *‘misdirection’* as alleged.

130. But even if this is wrong, the failure of the defendants to make any issue of this aspect of the charge seems to me to be fatal to the objection. The defendant seeks to diminish the significance of this, stating that *‘a failure to object may not be dispositive’*. Framed in these qualified terms, the defendant’s submission is correct but incomplete. As the defendant submits, the former Supreme Court in *Campbell v. Irish Press Ltd.* (1956) 90 ILTR 105 held that the judge in a libel trial had misdirected the jury insofar as they might have been led to believe that it was necessary for a plaintiff in such an action to prove that he had suffered actual damage where no objection had been taken to that direction at the time. To justify upsetting the jury’s verdict, the misdirection must be of such a kind as to present *‘a substantial wrong or miscarriage of justice’* (see the judgment of Kingsmill Moore J. at p. 112). In *Cooper Flynn v. Radio Teilifís Éireann* [2004] IESC 27, [2004] 2 IR 72 at para. 40 the Supreme Court articulated a similar test,

based upon the language of Order 58 Rule 7(2) of the Rules of the Superior Courts, but placed the failure to object following the direction within that test: *‘the fact ... that the ground on which it is sought at the appeal to argue that the direction or ruling was erroneous was not advanced at the trial, although not necessarily a conclusive factor, can undoubtedly be of considerable importance in determining whether the trial was either essentially unfair or lacking in the appearance of fairness’*. This, inevitably, follows from the weight attached by an appellate court to *‘the run of the trial’* (at para. 113 to 114 per Denham J.). Indeed, this Court has described the threshold for setting aside a jury award based upon a misdirection as arising only where not to do so would *‘lead to a gross injustice’* (*Kinsella v. Kenmare Resources plc* [2019] IECA 54, [2019] 2 IR 750 at para. 55). The consideration of the evidence as a whole as outlined by me above leaves no doubt but that, on this aspect of its appeal, the defendant has not met this test. The failure of the defendant’s counsel to object to the trial judge’s direction was both unsurprising and understandable: the sliver of a comment under cross examination on which this aspect of its appeal is based was swamped by an overwhelming body of evidence to the contrary.

The focus on improper motive

131. The next objection levelled at the judge’s charge arose from what was described as the focus on improper motive which was (as it is put by the defendant in its submission) *‘at best questionable’*. The defendant cites this statement of the trial judge in the course of his charge:

‘Sufficient evidence being ... evidence which you can accept and which allows you to infer or conclude on the balance of probabilities that there was an improper motive or that this was used for an improper purpose, these occasions’.

132. In this regard the plaintiff refers to comments in the course of the judgment of Eady J. in *Lillie v. Newcastle City Council* [2002] EWHC 1600 at para. 1091:

‘I am not aware of any example of malice having been found (in a case where the judge or jury concluded that the relevant defendant was honest) simply on the basis that the dominant motive was to injure the claimant. It is, in the light of Lord Diplock’s speech, at any rate a theoretical possibility. It may be, however, that it is an increasingly remote one in the light of recent authorities.’

133. It is important to put the comments of the trial judge in context. He was explaining the argument advanced by the defendant as to privilege. Immediately before the statement to which the defendant points, he said this:

‘They say, by the way, we don’t have to prove that we did anything. The plaintiff has to prove that we did something wrong. We say, and you are being invited by the defendant to say: there is no such evidence and there is no sufficient evidence ... ’

134. It was then the judge explained what *‘sufficient evidence’* was: it was evidence, as he said, that there was an improper motive or that the occasion of privilege was being used

for an improper purpose. In the course of his charge he put the matter quite clearly (at p. 97):

*‘... actual knowledge or knowledge, awareness that something is untrue or is likely to be untrue is ordinarily fatal to this defence. An actual intention to injure somebody is not a necessary ingredient but ill-will towards somebody or an intention to injure somebody, you really want to do that, **could be evidence** from which a jury would be entitled to infer that the person making this statement was motivated by malice in the legal sense of the word.’*

(Emphasis added)

135. An intention to injure or ill will, in other words, *could be evidence* of malice – a statement which should be viewed in the light of very clear directions by the judge as to the relevance and importance of whether the defendant’s agents in fact had an honest belief in the statements as I have quoted them at length above. That it seems to me to be legally unexceptional. Without dipping into the academic debate around whether there are two different tests for malice (knowledge or recklessness as to falsity, and presence of an improper motive) or one (improper motive, one way of proving which may be knowledge or recklessness as to truth), I do not think it can be plausibly said that the presence of an improper motive is other than relevant to the issue of malice.

136. Thus, as matters presently stand in this jurisdiction the comments of Eady J. upon which the defendant relies should be viewed as recording his experience, not the law. The

remarks of Lord Diplock in *Horrocks v. Lowe*, at p. 151 to which he was referring, were emphatic as to the legal position:

'Logically it might be said that.... irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in Adam v. Ward [1917] A.C. 309, 326-327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference.'

(Emphasis added)

137. Given that the trial judge here took some pains to stress the heavy burden involved in establishing malice (and thus observing the proviso to Lord Diplock's comment) it is difficult to see where the legal error is. The law is clear (*Gatley* 13th Ed. at para. 22-107):

'So, if a privilege is accorded to D to make a report to A for the protection of the interests of A or the public, D would lose the protection of the privilege if it could be shown that he made the report, believing in its contents, in order to injure C or to further his (D's) own business interests'

138. This reflects the summary proposed by Henchy J. in *Hynes-O'Sullivan v. O'Driscoll* [1988] IR 436, at p. 451:

'Malice in that sense will be shown if the defendant acted from any indirect or improper motive, not merely personal spite or ill-will, which shows that the reason for which the occasion is recognised as privileged has been exceeded or violated.'

139. More importantly, here the fact of the wrongful motive is clearly a matter to which the jury is entitled to have regard in deciding whether there was an honest belief in the truth of the critical allegation – that the plaintiff had knowingly set out with a false document to entrap the Doyles. As I have already explained, it is by reference to that honest belief

the matter was framed in the issue paper (in relation to publications one, two and five) and by reference to '*bad faith*' that it was expressed in regard to the sixth and seventh. There can be no doubt here as to what it was the jury were being asked to find, and there can be no dispute but that lack of honest belief and bad faith were at the heart of any version of the correct legal formulation of malice.

The established relationship

140.In this connection, the defendant says that because there was an '*established relationship*' between it and the Turf Club officials to whom all but the third and fourth publications were made, it was necessary for the plaintiff to demonstrate what it describes as '*deliberate conduct rather than an alleged lack of questioning or indifference*'. In that regard, it relies upon certain comments of Tugendhat J. in *W. v. Westminster City Council* [2005] EWHC 102.

141.Those comments need to be viewed in the context of two important features of the established law relating to qualified privilege. First, in the course of his judgment in *Horrocks v. Lowe* (at p.150) Lord Diplock observed that while the general legal position was that no sense of duty or a desire to protect his own legitimate interests could justify a person in telling deliberate and injurious falsehoods about another (and this included doing so when indifferent to the truth), there would be exceptional circumstances in which this general proposition would not apply. He defined those circumstances as arising '*where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person*'. The validity of this exception had been questioned – as a matter of principle and as one not grounded in the authorities (see McDonald

'*Irish Law of Defamation*' (1987) at p. 206), but for present purposes – while noting the limited reach of the proposition as formulated by Lord Diplock – it can be taken as at least acknowledged in the leading formulation.

142.Second, generally the taking of steps to verify information will not be a prerequisite to the *establishment* of a relationship of qualified privilege (as opposed to proving malice attaching to a publication made within such a relationship). In *Reynolds v. Times Newspapers Ltd.* [2001] 1 AC 127, 205 it was said that in the case of publication *to the world at large* the steps taken to verify information published would be taken into account in deciding whether qualified privilege attached to a publication. The limits of that proposition were addressed in *Kearns v. General Council for the Bar* [2003] 2 All ER 534. There, the Bar Council issued a circular to those in charge of certain aspects of barristers' chambers advising that the claimants were not qualified solicitors and that counsel should not accept instructions from them. The statement was false. The claimants did not plead malice, and the defendant applied for summary dismissal of the claim. The dismissal of the action by the High Court judge was upheld by the Court of Appeal because the relationship between the Bar Council and those who received the communication was existing, established and depended on the free flow of information. Because of that relationship, the claimants' assertion that the Bar Council had failed to verify the information before publishing it was not relevant. There was an established relationship, therefore the publication was made on an occasion of qualified privilege. However, that case was not concerned with how a failure to verify might relate to a plea of malice if advanced in respect of a communication within such a relationship and, indeed, that was stressed in the judgments (see para. 3 of the judgment of Simon Brown LJ). As he explained there, the question arising in that case was exclusively whether the

failure to take steps to verify information was relevant at the earlier stage of determining whether qualified privilege attached in the first place.

143. The decision in *Kearns v. The Law Society* was referred to in the passage from the judgment of Tugendhat J. in *W. v. Westminster City Council* relied upon by the defendants here. That case concerned a communication in the report of a child protection conference published by the defendant local authority to five persons which (it was claimed) implied that there was a possibility that the claimant was grooming or would groom a child for the purposes of sexual abuse. The claimant contended that the information communicated was irrelevant to the function of the defendant because it was unverified, submitting that it was only ‘*evidence based*’ information that was so relevant and thus entitled to benefit from qualified privilege. He contended that the departures from statutory guidance governing the production of reports of the kind in issue was so great that the words could not be viewed as being made as part of the defendant’s statutory duties. Tugendhat J. concluded that because there was an established relationship between the mother of the child in question (one of five publishees – the others were childcare professionals) and the social services department of the defendant, the occasion was one of qualified privilege. The fact that the information in the words complained of was not ‘*evidence based*’ or ‘*verified*’ could not take the case outside of that protection.

144. The passage in the judgment of Tugendhat J. upon which the defendant relies appears at paras. 149 and 151, and is as follows:

‘This is a case of an existing and established relationship, going back many years, between the mother’s family and the social services department of the

council. Accordingly, Kearns [v. General Council of the Bar] supports the following conclusion. The fact that the information in the words complained of was not verified (or not 'evidence based') could not take the case outside the protection of qualified privilege unless [the authors of the report] were deliberately publishing what they knew to be outside the official guidance known to them.

...

However, in my judgment what matters is that the relationship between the Defendants and the publishees was an established one which plainly requires the flow of free and frank communications in both directions on all questions relevant to the discharge of the Council's functions'.

145. In that case, having found that the *relationship* was one which thus generated a qualified privilege for information exchanged in the course of it, Tugendhat J. proceeded to find that there was no malice. He reached that conclusion not because the case fell within the exception suggested by Lord Diplock in *Horrocks v. Lowe* (there was in fact no *duty* on the defendants to publish defamatory words as to the truth or falsity of which they had no view one way or the other), but because the officials responsible for the report had been acting in good faith and seeking to perform a statutory duty of the defendant by communicating with others who had a common and corresponding duty. They made an error in exceeding the limits of what should have been communicated, but – critically – there was no motive to injure the claimant (see para. 157 of the judgment).

146. That being so, I do not see that either the findings in the case or the comments of the trial judge in reaching them assist the plaintiff here. In this case, there is no dispute that the relationship is one giving rise to a qualified privilege. The issue is whether there was malice. This case is not within the exception identified by Lord Diplock to the general proposition that indifference to the truth may be relevant to malice, and it is not contended that it is. Therefore, there was no error either in the judge allowing the matter to go to the jury on this ground, or in the charge that was made to the jury insofar as it referred to that feature of the legal test for malice.

No evidence of malice?

147. It is in the light of this analysis of the factors that could be taken into account in determining if there was malice that the core point made in oral submissions in this Court now falls to be considered: that there was no evidence on the basis of which the jury could have concluded that the defendant acted with malice in connection with the first, second, fifth or six named defendants. All of the defendant's witnesses, it was stressed, said that they accepted and believed the account that Ms. Doyle gave them. In relation to the first and second publications, it was said that there was no evidence that the IRTA officials who were present at the meeting in Mr. Ward's office set out to pull the wool over Mr. Ward's eyes and to get him to write a letter which they knew contained a false allegation. Before the High Court it was submitted that there was no evidence that what was termed '*this corrupt state of mind*' existed in the minds of Mr. Grassick and Mr. Meade and that they did not believe the truth of what they were getting their solicitor to allege. It was stressed that no witness had stated that Mr. Meade or Mr. Grassick in briefing Mr. Ward or Mr. Halford disbelieved the account that they had been given. As

regards the sixth statement, it was said that Mr. Grassick had merely relayed a complaint as reported to him and that there was nothing on the evidence to suggest otherwise: Mr. Grassick gave evidence as to his own belief in that regard and there was nothing to contradict him.

148. The objection that that was ‘*no evidence*’ to support the claim of malice in these circumstances requires some careful interrogation. Malice will in many cases be – and it certainly was in this case – an inference that either can, or cannot, be drawn from primary facts: ‘*[t]he motive with which a person published a defamatory matter can only be inferred from what he did or said or knew*’ (*Horrocks v. Lowe* at p. 149). The inference can be made from the terms of the allegedly defamatory statement, or it can be deduced from the circumstances surrounding the publication. That can include the context of the publication, and the conduct of the defendant before, during and after the making of the statement.

149. The deduction of that inference is a matter for the finder of fact – here the jury. It is well established that an appellate court must be slow to substitute its own inference of fact where this depends on oral evidence or recollection of fact and a different inference has been drawn by the trier of fact (*Hay v. O’Grady* [1992] 1 IR 210, at p. 217): ‘*the court of appeal will only set aside a finding of fact based on one version of the evidence when, on taking a conspectus of the evidence as a whole, oral and otherwise, it appears to the court that, notwithstanding the advantages which the tribunal of fact had in seeing and hearing the witnesses, the version of the evidence which as acted on could not reasonably be correct*’ (*Northern Bank Finance v. Charlton* [1979] IR 149, 191 per Henchy J.). Those principles apply with particular force to findings of a jury in a defamation case having regard to its ‘*pivotal*’ role in such proceedings (*Cooper-Flynn*

v. RTE [2004] IESC 27, [2004] 2 IR 72 at p.121 per Denham J. and *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 46, [2017] 1 IR 1, at para. 94 per McKechnie J.).

150. That test is helpfully viewed in the first instance having regard to the case as presented by the plaintiff, and the evidence upon which he relied in connection with his contention that the statements were made without honest belief in their truth (this being the critical finding of the jury in that regard). It began (he said) with evidence given by Mr. Grassick who said – under cross-examination - that in 2012 Mr. Gordon had said to him that the jockeys ‘*were all corrupt*’ and that from that day he would avoid all contact with the plaintiff as he believed he had ‘*a terrible attitude*’ towards Irish racing and the jockeys and trainers, which he thought was ‘*dreadful*’. That, the plaintiff’s counsel said, showed that Mr. Grassick thought that the plaintiff was (as counsel put it) ‘*a wrong ‘un*’ who was not to be the person deciding on the business of trainers. Then, the case was, the plaintiff made a mistake and Mr. Grassick and Mr. Meade decided that they would take that mistake and ‘*use it to bury him*’. It was stressed that Mr. Meade had said in evidence that as far as he was concerned the plaintiff – if left in position – could be planting evidence or ‘*fitting up*’ other trainers.

151. From there, the argument went, when the Doyles met with personnel of the defendant in Mr. Ward’s office, the evidence was that they revealed their conviction that Mr. Egan had been involved in the production of a document to be given to Ms. Doyle by Mr. Buckley. The Doyles, however, knew that Mr. Egan had given the explanation that he had written on the ‘*book of evidence*’ which had been sent to the plaintiff but that this ‘*did not suit the agenda*’. The ‘*agenda*’ – to get rid of the plaintiff – was not advanced by making the allegations Mrs. Doyle made against Mr. Egan. The defendant did not

pursue any line of inquiry to see if what was alleged to have happened – that the plaintiff set out to entrap Ms. Doyle – had actually happened. That, it was contended, amounted to wilful blindness.

152. Particular emphasis was placed by the plaintiff on the evidence of Mrs. Doyle insofar as she alleged a conversation with Mr. Egan on 31 March and to the extent that she deduced from that conversation his participation in the production of a document to be given to Ms. Doyle on 6 April. This was described by his counsel in the course of his address to the jury as '*preposterous*' and '*fictitious*'. It was (he said) '*done and constructed in a way so that ... the jury, would have an explanation as to why they didn't accept Denis Egan's explanation*'. It was, he said, done to cover up the fact that they knew that they should have accepted that explanation. Then, the plaintiff said, faced even with Mr. Egan's explanation as tendered by him directly at the meeting in the Keadeen Hotel, the defendants still ignored his account and adhered to a narrative whereby the plaintiff had seriously misconducted himself and should, on that account, have been removed from his duties.

153. While it is today the law that malice cannot be woven from separate strands of evidence none of which is themselves evidence of malice, it is clear that where the plaintiff 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 that any one of those instances represents malice (*Hynes O'Sullivan v. Driscoll* [1988] IR 436, at p. 451 per Henchy J.).

154. Here, the jury had before it separate streams of evidence all of which were capable of demonstrating that the defendant in making the various publications it did was actuated

by malice. These included the evidence that Mr. Grassick had formed an ill view of the plaintiff as early as 2012, that Ms. Doyle had said that she was being incited to proceed with a complaint by the defendant, evidence that was consistent with the letter of 12 June being written when the defendant well knew that Mr. Egan's position was that it was he who had affixed Ms. Doyle's name to the lodgement docket, and the fact that the letter of 12 June accused the plaintiff of setting out to entrap Ms. Doyle when this claim could have been no more than a deduction reached by the Doyles themselves from the documents shown to them on 26 March and 6 April. That deduction in turn fell to be viewed in the light of the contemporaneous conclusion by the Doyles that Mr. Egan had also been actively involved in concocting documents to enable a cover up of the plaintiff's malfeasance. The defendant accepted without question or inquiry the deduction that implicated the plaintiff, but failed to act on the other one, and refused at trial to even challenge Mr. Egan on his denial that the lynchpin of this theory – that a conversation occurred between himself and Mrs. Doyle on 31 March in which she referenced the format of a document which he then caused to be created – ever happened. Notwithstanding all of this Mr. Grassick failed to make contact with Mr. Egan in relation to the events in the Doyles' yard in accordance with his usual practice. The defendant's Chairman then proceeded to publicly make an extremely damaging statement to a wide circulation which the jury was entitled to (and clearly did) decide referred to the plaintiff ('*Little Hitler*'), and when faced with a clear explanation from Mr. Egan himself on 15 August that was utterly inconsistent with the theory of '*entrapment*', proceeded to stand over the claims.

155. This is only a partial snapshot of the evidence that was available to the jury, all or any one part of which would have entitled them to conclude that the defendant was not only

indifferent to the truth or falsity of the allegations made concerning the plaintiff, but that the defendant was indeed acting in furtherance of an orchestrated campaign to disable him in the discharge of his functions as head of security of the Turf Club and to stop the joint inspections. The submission that there was insufficient evidence on which the jury could have concluded that there was malice must be rejected.

V THE IRISH FIELD ARTICLE: AGENCY

The issue

156. The claim insofar as based upon the *Irish Field* article raised a distinct issue. The defendant did not itself have any direct involvement in the publication of that article. The evidence was that the first the Chief Executive of the defendant learnt of the interview was on the morning the publication came out. There was no evidence adduced as to the ordinary functions and responsibilities attending the office of Chairman of the defendant, and thus no direct evidence as to what the defendant itself held him out to say or do on its behalf. Mr. Meade was not in an employment relationship with the defendant so that the question of whether his words were uttered in the course of such employment did not arise. In these circumstances, the defendant contends that it had no legal liability for the allegedly defamatory statements of Mr. Meade and that there was no basis on which the jury could have concluded otherwise. Insofar as the plaintiff in his case before the High Court relied upon the fact that Mr. Meade was, at the time of the interview, both Chairman and a director of the defendant, that the evidence was that the interview was conducted with him because he was Chairman, that throughout the interview Mr. Meade referred to himself and the defendant collectively, and that Mr. Grassick referred to Mr. Meade in evidence as '*his boss*', the defendant says that none of these are sufficient to justify the imposition of liability on the defendant for the words of a third party.

157. The question of who, in law, is the '*publisher*' of a statement so as to incur liability in defamation can be a vexed one. The general position at common law is that every person who knowingly takes part in the publication of a defamatory matter is *prima facie* liable

in respect of that publication. This reflects the general principle that a person who procures or authorises the commission of a tort is liable as a joint tortfeasor.

158.Legal responsibility for the publications of another may also arise through generally applicable principles of vicarious liability or of agency. In that situation, there is no requirement that the defendant have any direct involvement in the publication: the issue is instead whether it faces legal liability for the publication because, in accordance with well-established principle, it is proper that A be held liable for statements made by B having regard to the nature of the legal association between A and B. As I explain, it is here that the plaintiff's pleading, the trial judge's decision on the withdrawal application, and the debate around the issue paper were focussed.

159.In theory, a body corporate may in addition face liability for at least some torts committed by its officers, employees or agents on the basis that the company should be '*identified*' with the actions of a person (often referred to in cases dealing with this heading as '*the controlling mind*' of the company) so that his or her actions are treated in law as if made by the company itself. This is the principle used to attribute fault, knowledge and intention for the purposes *inter alia* of imposing criminal liability on a corporation. I have been unable to identify any legal authority in which that concept has been applied to the law of defamation (perhaps because the circumstances in which a person would be a '*controlling mind*' of the company but not an employee or agent are likely to be rare) and mention it only because, for whatever reason, the legal authorities relied upon in the plaintiff's written legal submissions were concerned exclusively with this theory of liability (*Lennards Carrying Co. v. Asiatic Petroleum Co.* [1915] AC 705, *Taylor v. Smyth* [1991] 1 IR 142 at p. 166, *Superwood Holdings plc v. Sun Alliance and London Insurance plc* [1995] 3 IR 303, *El Ajou v. Dollar Land Holdings* [1993] EWCA

Civ. 4, [1994] 2 All ER 685 and *The Lady Gwendolen* [1964] 3 WLR 1062). This reflected the apparent belief that simply because Mr. Meade was the Chairman of the defendant, the defendant faced liability for defamatory statements made by him relating to its activities.

160. There may have been some confusion around the import of these cases, as the plaintiff moved seamlessly from the proposition that '*a company can be held vicariously liable for the wrongs of its chairman*' to the argument that there was '*ample evidence in this case which showed that Mr. Meade was the controlling mind of the company*'. These are not the same thing: liability because the person who committed the wrongful act was '*the controlling mind*' is a primary liability, whereas vicarious liability is – by definition – secondary. The proofs for each are quite different.

161. In particular, the type of liability with which the '*controlling mind*' cases are concerned arises because the person responsible for the tort is identified with the corporate defendant so that his actions or intentions are treated as its actions or intentions, and his tort is the defendant's tort. In order for this to occur, the person whose actions or intentions are in issue must enjoy a relationship with the body corporate such that his actions are those of the company itself. It is here that the phraseology I have noted arises: the former must be (for the purposes of the activity in question) the '*directing mind and will of the corporation*' (*Lennards Carrying Co v. Asiatic Petroleum Co.*, approved in *Taylor v. Smyth* at p. 166). This, it must again be emphasised, is a distinct legal basis for attribution of wrongdoing to a body corporate, and arises because an artificial legal person can only act, acquire knowledge, or form an intention through the acts, knowledge or intention of natural persons who are responsible for the relevant aspect of the company's activities. The principle may be applied to liability for some

torts where these ‘*may properly be said to be the result of the company’s own acts – such as where they are done or authorised under the direction of the board of directors or the shareholders in general meeting*’ (Courtney *The Law of Companies* 4th Ed. 2016 at para. 4.052). For this to occur, however, it is necessary to locate the natural person whose actions comprised the tortious conduct within the corporate structure so that those actions should be regarded not as *attributable* to the company, but as the actions *of* the company itself.

162. In this particular case, there is a striking artificiality to all of this. It follows from what I have said that the theory arises only where, having regard to the organisation of the company and function of the individual tortfeasor within it, he is for the purposes of the statement in question to be identified with the company. However, the plaintiff made no plea to this effect. More importantly, the factual issue presented to the jury as to whether Mr. Meade acted ‘*on behalf of*’ the defendant does not capture the inquiry appropriate to this basis for liability. Were the judge and jury to have been invited to embark upon the less than straightforward task of deciding if any of the individuals in question were, for the purposes of the defamations in issue, the ‘*directing mind and will*’ of the company, the judge would have had to engage with the legal meaning of this term in the light of the particular actions alleged to give rise to liability. While it seems to me to be more likely than not that the issue of whether a person is the controlling mind of a company for these purposes is likely to be an exclusively legal one (at least where the only evidence is of position in the company) to the extent that it required findings of fact, the jury would have had to address itself in some way not to the question of authority, nor of whether the individuals were acting ‘*on behalf*’ of the company, but whether their position at the relevant point in time was such that they *were* the company.

Reducing the metaphysics of this to an issue on the jury paper (if that was necessary or appropriate) would have been an unenviably complex undertaking: the point for present purposes is that it was not done, and that no-one asked that it be done. Liability could not, accordingly, be imposed on the defendant simply because Mr. Meade was its Chairman, the opportunity to make the statements arose because he was Chairman and/or because the statements related in some way to the interests of the defendant in representing the trainers. Something more was required.

The pleading, the decision of the trial judge and the issue paper

163. The statement of claim pleaded the basis on which the defendant was liable for the statements of Mr. Meade as recorded in the ‘*Irish Field*’ article in summary terms (on which no particulars regarding the issue of authority were raised):

*‘On a date prior to 9 August 2014, Mr. Noel Meade, **Chairman of the Defendant** and at all material times **acting with the authority of the Defendant**, whilst giving an interview to ‘The Irish Field’ newspaper, falsely and maliciously published words defamatory of and concerning the conduct and actions of the Plaintiff as an employee of the Turf Club in carrying out inspections. The said defamatory statements were **published by the Defendant, its servants or agents**, in the knowledge that the said defamatory statements would be republished to a very wide audience of readers of ‘The Irish Field’.*’

(Emphasis added)

164.In the course of his judgment on the withdrawal application, Barton J. expressed the issue around the defendant's liability for the statements made by Mr. Meade and published in the *Irish Field* article of 9 August, as follows (at para. 41):

'... 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.'

165.From there, Barton J. noted that Mr. Meade did not make it clear that the views he expressed were his personal opinions rather than those of the defendant, and clearly regarded as significant the fact that Mr. Meade throughout the article did not speak in the singular but rather used the plural 'we'. He said (at para. 43):

'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 the Defendant on the matters about which Mr Meade spoke rather than his personal opinions alone.'

166.In that connection, the plaintiff had attached some significance to the fact that following the publication the defendant's solicitors wrote a letter part of which I have earlier quoted (dated 8 October 2014), in which it was stated that Mr. Meade was expressing his opinion '*in his capacity as chairman of the IRTA*'. From there, having rejected an argument advanced on behalf of the plaintiff that the defendant bore the onus of establishing that Mr. Meade was speaking personally lay with the defendant, Barton J. continued (at para. 48):

'I am satisfied ... 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 ... the Defendant would be vicariously liable as concurrent wrongdoer for the defamatory publication.'

167. While the defendant sought to have the question presented on the issue paper on this matter defined by reference to whether Mr. Meade was acting with the authority of the defendant, Barton J. determined that it should be framed as follows:

'Has the Plaintiff proved that Noel Meade was speaking on behalf of the Defendant company?'

168. The trial judge explained that he preferred this formulation because it both reflected the basis for his judgment on this aspect of the withdrawal application, and because the jury should – he said – be concerned with issues of fact and not their legal implications. Thereafter, he instructed the jury that the question they were being asked to address was whether Mr. Meade was *'talking on his own behalf of the Defendant. Was he talking on behalf of the Racehorse Trainers Association'*.

169. In the course of their submissions, counsel for the defendant urged that the question as formulated by the trial judge was nebulous, and that the jury was liable to be confused

into thinking that the mere fact that Mr. Meade was IRTA's Chairman meant that his statements must have been made on its behalf.

Agency and vicarious liability

170.In this case it seems appropriate to concentrate on the principles of agency: that was how the claim was pleaded and how it was presented to the jury. If Mr. Meade was in a position sufficiently similar to that of an employee to give rise to vicarious liability, it is not obvious on the facts of this particular case that the essential test would be different (and it was not argued that it was).

171.In order for liability to be imposed on the basis of agency, it must be established that the act which is complained of is within the scope of the agent's authority. To this end, it is not necessary to establish that the particular act has been authorised, '*it is enough that the agent should have been put in a position to do the class of acts complained of*' (*Colonial Mutual Life Assurance Society Ltd. v. Producers and Citizens Co-operative Assurance Company of Australia Ltd.* (1931) 46 CLR 41 at p. 50 per Gavan Duffy C.J. and Starke J.).

172.*Colonial Mutual Life Assurance Society Ltd.* itself affords a good example. The defamation arose from a publication of an insurance agent engaged by the defendant who, while attempting to generate business for his principal, made defamatory comments about a rival company. Because he was acting not independently but as a representative of the principal, it was found liable for the statements even though he had been specifically directed not to make comments of this kind (at p. 47):

‘The class of acts which Ridley was employed to do necessarily involved the use of arguments and statements for the purpose of persuading the public to effect policies of insurance with the defendant, and in pursuing that purpose he was authorised to speak, and in fact spoke, with the voice of the defendant.’

173. The rationale was explained by Dixon J. (at p. 50) as follows:

‘If the view be right which I have already expressed, that the ‘agent’ represented the Company in soliciting proposals so that he was acting in right of the Company with its authority, it follows that the Company in confiding to his judgment, within the limits of relevance and of reasonableness, the choice of inducements and arguments, authorised him on its behalf to address to prospective proponents such observations as appeared to him appropriate.’

174. Similar principles were applied more recently in the English High Court in *Monir v. Wood* [2018] EWHC 3525, the exposition of the law in which was not dissented from by either party before this Court. There, the issue was whether the defendant, the Chairman of the Bristol branch of the United Kingdom Independence Party, was liable for defamatory comments published on Twitter by the Vice Chairman of the branch, who had been delegated the function of posting material on the defendant’s campaigning social media platform. The facts were particular but central to the rationale for the imposition of liability was that part of the task entrusted to the person responsible for the tweet was the posting of material on the platform, and that where the conduct of which complaint was made was undertaken in the course of and for the purpose of executing the task the principal had delegated to the agent, it was proper to impose such

liability. So, it is not necessary that the specific publication be seen in advance nor indeed that the defendant be aware in advance of the circumstances that gave rise to the defamatory statements.

175. Instead, the focus is upon whether the scope of the speaker's authority extends to, or if his or her agency envisages, his making of statements in furtherance of the interests of his employer or principal. The defendant in *Colonial Mutual Life Assurance Society Ltd.* had engaged its agents to encourage the public to do business with it, and it followed that where in the course of so doing they made defamatory comments – even of a kind that had been prohibited by the defendant – liability was properly imposed upon them. That same focus on the relationship between the making of the defamatory statement and the role of the person responsible for it is evident from *Monir v. Wood*. By contrast, a letter on company notepaper sent by a director to object to a golf club application was not within the scope of his function (*Brown v. Marron* [2001] WASC 100), and the same was the case when a hospital consultant sent an e-mail in relation to a proposed vote of no confidence in the Board of an NHS Trust (*Pena v. Tameside Hospital NHS Foundation Trust* [2011] EWHC 3027).

176. Of course, these cases ultimately all reduce themselves to the case specific question of whether the person making the statement had express, implied or apparent authority to communicate with others on behalf of the employer and whether the publication was within the scope of that authority: the rule is stated as follows in *Gatley* 13th Ed. 2022 at para. 9-029:

'a principal is liable for the torts of an agent (whether or not an employee or in a relationship akin to employment) where the principal has instigated,

authorised or ratified the tortious act, or has assumed responsibility for the agent's actions; and where a statement is made in the course of representing the principal within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal'

177.A similar formulation appears in the judgment of Nicklin J. in *Monir v. Wood* who approved this summary of the relevant principles from *Bowstead on Agency* 20th Ed. 2014 at para. 8-177 (now in the 22nd Ed. 2021 at the same paragraph):

'A principal is liable in tort for loss or injury caused by his agent, whether or not his servant, and if not his servant, whether or not he can be called an independent contractor, in the following cases:

(a) if the wrongful act was specifically instigated, authorised or ratified by the principal.

(b) (semble) in the case of a statement made in the course of representing the principal within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal.

(c) where the principal can be taken to have assumed a responsibility for the actions of the agent.'

Application of agency principles

178.In the course of his submissions on this appeal, counsel for the defendant described the various arguments advanced by his opponents on this issue as suffering from a '*deep-seated intellectual confusion*'. The criticism was, in some respects, not without foundation. There was no basis on which it could be said that the defendant was liable for statements made by Mr. Meade pertaining to the defendant's activities simply because he was its Chairman. There was no direct evidence before the Court to establish that at the time of publication the defendant held Mr. Meade out as being authorised to make statements of this kind. Insofar as it was suggested that the fact that Mr. Meade was being asked questions by the interviewer *because* he was Chairman of the association, this in itself does not establish liability – the interviewer cannot confer authority on Mr. Meade by the motivation for his questions. For the same reason, the fact that Mr. Meade answered questions using the plural does not in itself afford a basis for deducing such authority – Mr. Meade could not by his comments confer an authority upon himself that the defendant itself had not assented to or acquiesced in. For these same reasons liability could not alone be imposed on the grounds that it was because of his status as Chairman of the defendant that this part of the interview was '*brought up*' (the trial judge expressed the view that his position as Chairman of the defendant '*most likely explained the reason why he had been invited to give the interview*').

179.It must also be observed that in the course of his charge the trial judge framed the inquiry by reference to whether persons reading the article might have believed that Mr. Meade was speaking on behalf of the defendant (this was often said at the same time as he referenced whether the jury believed he was referring to the plaintiff). Towards the end of this part of his charge he disentangled the two:

'... you have to decide, there are two parts, he was talking on behalf of the Defendant and therefore the next question is ... All right, yeah, but would the ordinary reasonable reader have considered this article to be a reference to Chris Gordon and others?'

180. However, in the course of the judge's ruling on the withdrawal application he referred to '*subsequent correspondence*' as allowing the inference that Mr. Meade was '*expressing the position of the Defendant association and its members*' and in the plaintiff's submissions to this Court, importance was attached to the letter from Messrs. Ward solicitors of 8 October 2014. Moreover, throughout his charge, the judge defined the issue insofar as it concerned this article by reference to '*the capacity*' in which Mr. Meade spoke.

181. I have quoted the letter earlier, but it clearly stated:

- (i) That Mr. Meade was expressing in the course of this interview his opinion '*in his capacity as Chairman of the IRTA*' as to how the Turf Club and the Department of Agriculture carried out their duties;
- (ii) That in doing so, he was expressing '*a properly informed opinion of his **in his capacity as the head of the IRTA***':
- (iii) That '*at all times*' Mr. Meade '*acted in the best interest of Irish horse racing*' (the only event in the letter to which Mr. Meade was connected was the giving of the interview);

- (iv) That on reviewing ‘*all of the alleged defamatory publications which you allege in your letter ... on all occasions the IRTA and its members acted ... on occasions of qualified privilege*’

182. The letter accordingly (a) defended those statements, (b) asserted they were made in Mr. Meade’s capacity as Chairman of the defendant, and (c) proposed a privilege in relation to the statements that was shared between the defendant and its members, a proposition which necessarily depended on a connection between the statements and the authority of the defendant itself. The privilege that was asserted was the privilege of the defendant. However, the defendant could only assert such a privilege if it had an interest in the statement and if the statement was made in pursuance of that interest. I cannot see how it could do this without adopting the statement.

183. Neither party overburdened the Court with case law addressing the very difficult legal issues potentially presented by the plaintiff’s attempt to make the defendant liable for these statements of Mr. Meade. As I have noted, the plaintiff’s focus was upon those authorities addressing the use of the ‘*identification*’ theory in seeking to impose such liability. After the Court drew the attention of the parties to the decision in *Monir v. Wood*, a debate ensued as to whether the effect of this letter had been to effect a ‘*ratification*’ of the defamation. Clearly, the quotation from *Bowstead* cited in that case supports – in theory – the proposition that a defamatory statement made without authority can be so ratified after the event thereby generating tortious liability on the part of the principal. The latest edition of *Gatley* proposes a similar proposition (at para. 9-034). The bare bones of that claim are supported by the article when viewed in the light of the letter – I do not believe that there can be any doubt but that Messrs. Ward

embraced the statements as the defendant's own, Messrs. Ward obviously themselves had authority so to do, they did so in knowledge of all the facts, and the letter did so in a context in which (for the reasons stated by the trial judge) it can be said that the article was amenable to the construction that Mr. Meade was speaking with the authority of the defendant.

184. However, for my part I would be reluctant without detailed argument on the issue to adopt the theory that the doctrine of ratification has any role to play in the contemporary law of tort, which has developed sophisticated principles of vicarious liability and agency to regulate the circumstances in which, and conditions under which, one person may be made liable for the tortious actions of another. I have seen no modern authority in which such liability has been imposed in defamation (although it was envisaged by the decision in *Dawson v. Builli* (1927) 27 SR (NSW) 509), and it strikes me as counterintuitive that by an act that is not itself wrongful (it was *never* suggested that the defendant could be made liable for the contents of the letter of 8 October which of course were sent to the plaintiff's own solicitors), a party could without more be exposed to liability for the tortious acts of another. Indeed, *Bowstead* itself questions whether – outside the very particular context of the torts of conversion and trespass to goods where (as the authors put it) the fields of contract, tort and property overlap and liability is strict – the concept has any role to play in the law of torts (22nd Ed. at para. 2-056).

185. But the letter is significant for a subtly different reason. While there was a spirited debate in oral argument before this Court as to whether the reference there to Mr. Meade speaking '*in his capacity as Chairman*' of the defendant meant that the defendant was accepting that the statement was made with its authority, the letter affords clear evidence

of a state of affairs from which the jury was quite entitled to conclude that the comments of Mr. Meade were viewed by *the defendant itself* as having been made with its authority. The reference to '*capacity*' suggests nothing less – if he was acting in his official capacity, it is hard to my mind to see how he was doing anything other than acting with official authority. This, it seems to me, was the critical significance of the letter: if the defendant – as the entity invested with the power to confer an authority – believed that Mr. Meade acted with such authority, that must afford powerful evidence that he did. The contents of this letter were never disputed by the defendant, were never disavowed or reneged upon by it, and no witness appeared to dispute Mr. Meade's authority to speak on the defendant's behalf. It was certainly open to the jury to find on the basis of this letter having regard to the evidence as a whole (and in particular the absence of any evidence distancing the defendant from the comments in the letter) that Mr. Meade was afforded an authority to act on the defendant's behalf so that when commenting on matters germane to the defendant's representative function in the course of the interview he might reasonably have been found to have been acting as its agent in making the statements in question.

186. I have noted some specific objections made by the defendant to aspects of the judge's decision on the withdrawal application: the fact that the judge referred to the fact that Mr. Meade held himself out as speaking on behalf of the association; the fact that the article was in the nature of a '*colour piece*' or (as it was described by counsel in oral submissions to this Court '*a personal reflection on the state of Irish racing at the time*'); the fact that the judge attached significance to the fact that Mr. Meade did not make it clear that he was speaking on his own behalf rather than of the association; reliance placed by the judge on the fact that the Turf Club had issued a statement in response to

Mr. Meade's comments; and the claim of the defendant that the evidence showed that Mr. Grassick was not aware of the interview in advance. As isolated criticisms, some of these may be well placed – in particular that an agent does not acquire authority to bind or impose legal liability on a principal simply because he says he has that authority or purports to speak in the plural, and there is no basis for imposing such liability simply because a person in the position of Mr. Meade does not make clear that they are speaking personally. They do not, however, detract from the critical fact that Mr. Meade was the Chairman of the defendant whose statements were accepted by the defendant as having been issued in his capacity as such. That implies that insofar as the defendant was concerned, its view was that Mr. Meade was not speaking in a personal capacity, but was doing so *qua* Chairman or, in other words, '*on behalf of*' the defendant. That is, as I have observed, supported by the invocation of privilege. Far from distancing itself from the comments, the defendant was not merely embracing them as its own, but was positively confirming that *its* interests in the protection of trainers were advanced by the comments.

187. The question of '*capacity*' featured in the trial judge's charge. He explained:

'You are not concerned in the case of the article with the mind of Mr. Meade, you are concerned with his capacity, in what capacity did he give the interview ...'

188. That was an entirely reasonable way to frame the inquiry. Having regard to the letter from the defendant's solicitors of 8 October and the other factors I have outlined above, the jury was quite entitled to answer that question as it did.

The issue paper

189.The defendant takes specific issue with question two on the issue paper. It contends that the trial judge erred in his direction in excluding the word and concept of ‘*authority*’ from that question. By pointing the jury towards the issue of whether Mr. Meade could be said to have been acting ‘*on behalf*’ of the defendant, the jury’s mind was not sufficiently drawn to the distinct question of whether the defendant had authorised the comments.

190.I cannot agree with this proposition. As I have explained earlier in this judgment, a person who is expressly or impliedly held out by another to make statements on its behalf may expose the latter to liability in defamation. The finding that the person making the defamatory utterance was doing so ‘*on behalf of*’ the defendant captures the legal test. Indeed, in the course of his charge to the jury the trial judge explained the defence advanced by the defendant in terms that it said ‘*Mr. Meade was acting personally, he was not acting on behalf of or speaking on behalf of agent or being authorised by the Defendant.*’ Or, to put it another way, if Mr. Meade *did* make the statement ‘*on behalf*’ of the defendant it is hard to my mind to see any theory of law on which it would not be liable for the defamation. Certainly, none was identified by the defendant.

VI THE KEADEEN HOTEL: LIABILITY FOR WORDS SPOKEN AT THE MEETING

Background

191.As I have previously noted, the attendees at the meeting in the Keadeen Hotel were Noel Meade, Michael Grassick (the Chief Executive of the defendant) and Michael Halford (a trainer), Liz Doyle and Avril Doyle on behalf of the defendant, and Denis Egan, Neville O'Byrne, and Michael Hickey of the Turf Club. It is common case that at the meeting, most of the talking was done by the Doyles. Arising from this, a plea in the most general terms was advanced in the statement of claim to the effect that each of the defendant representatives at that meeting published '*defamatory statements*' alleging misconduct on the plaintiff's part and seeking to have him removed.

192.It does not appear to be controverted that there was no evidence of any officer of the defendant uttering defamatory words: it was put to Mr. Egan in cross examination that Mr. Meade, Mr. Halford and Mr. Grassick were not participants in the meeting, and his response was that they '*had said very little*', and Mr. Grassick reiterated in his evidence that what he termed '*the Trainers Association*' said very little at the meeting.

193.The defendant sought to have this part of the case withdrawn from the jury, contending that because no defamatory words were ever pleaded, the case insofar as it was based upon the fifth publication should not proceed. It also contended that no words were spoken on behalf of the defendant at that meeting. According to its submissions to this Court, following the closing of evidence in the case, the plaintiff changed his case on this aspect of the claim, contending that the defendant was liable by reason of organising the meeting.

The trial judge's decision

194. Referring to the decisions in *Watts v. Times Newspapers (Schilling and Lom (a firm), third party)* [1997] QB 650 at p. 670 and *Mahfouz v. Brisard* [2005] EWHC 2304 at para. 11, Barton J. said (at para. 62):

'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.'

195. He continued (at para. 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 the 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.'

The issue

196.In addressing the legal implications of this ruling, the following are relevant. First, on the basis of the evidence tendered to the court there was no question of any officer of the defendant making the defamatory statements. Second, while the evidence as to the organisation of the meeting was in places equivocal, it is clear that the defendant had a role in the organisation of the meeting. Mr. Meade's own evidence was that he was '*pretty sure*' that the defendant had sought the meeting, and he also agreed with the suggestion of counsel that the meeting had been '*facilitated*' by the Turf Club. At one point, he explained the purpose of the meeting as follows:

'We had hoped to bring Liz and her mother to meet the senior stewards, let them tell their story and let the senior stewards act on what they heard because their story was, their complaint or whatever you want to say it is,'

197.While the plaintiff is quite correct in submitting that the evidence suggested that the Turf Club was also involved in the organisation of the meeting, there is no question but that the defendant was involved. But most critically (and this) the evidence was that the meeting was *sought* by the defendant. Mr. Meade's evidence was clear: when asked who requested the meeting he said '*I am pretty sure we did*'. The trial judge was, therefore, not mistaken in finding that there was evidence that the defendant had

organised the meeting, although it would have been more accurate to say that it had been one of those so involved.

198. This is important when it comes to the fourth point. It is wrong to baldly propose that the trial judge allowed this publication to go to the jury because the defendant had organised the meeting. So stated, that was not the basis for the judge's conclusion. Instead, he decided the matter as he did because Mr. Meade and Mr. Grassick came to the meeting with the Doyles for the specific purpose of the Doyles communicating to the Turf Club's representatives present the complaints they had previously made to the defendant. Mr. Meade and Mr. Grassick thus not only knew what was going to be said, but – in the words of the trial judge – *'they condoned and supported it'*. It was that knowledge of what was to be said and that support for the persons who they knew were to repeat these statements together with their involvement in putting in place the arrangement to allow that republication to *inter alia* Mr. Egan that gave rise to the legal responsibility. The defendant's agents, to put it another way, had taken positive steps to enable the Doyles to repeat the allegations contained in the letter of June 12 and had participated in the convening of the meeting to that end.

The law and its application

199. I have noted in the preceding section that in *Monir v. Wood Nicklin J.* explained that *'everyone who knowingly takes part in the publication of a libel, or authorises... it, are jointly and severally liable'* (at para. 135). This is no more than an application of the general rules applicable to tortious liability. It follows that a person who knowingly brings another to a gathering for the specific purpose of their repeating of a statement the tenor of which is known to the former, is liable in defamation on this legal basis.

The fact that the person '*organises*' the meeting is not dispositive of whether they face liability but, clearly, the fact that they do so is relevant to the factual issue of whether they have knowingly taken part in the publication. Once that is understood, whether they organised the meeting with the intended audience for the statements or organised the meeting alone is irrelevant: in either event liability might be imposed if the overall factual context is consistent with that level of participation.

200. Of course, Barton J. was concerned in the withdrawal application only with the issue of whether there was a case to go to the jury on the defendant's involvement in the publication. There is no serious dispute around the basic facts, and it cannot in my view be plausibly said that those facts were, viewed as a whole, insufficient to allow the jury to decide that the defendant was legally liable for the publication.

201. The defendant is correct in saying that there was no evidence that the defendant spoke any words. It also says that the case was pleaded on the basis that it did. It should be observed that in the course of its written submissions on the withdrawal application, this very point was alluded to and, it appears, was not addressed in the judge's written judgment. However, I am not convinced that this pleading point carries much weight. The tenor of the statement of claim was clear: the meeting took place on 15 August and '*the Defendant's servants or agents*' published defamatory statements of and concerning the plaintiff, alleging misconduct on his part and seeking to have him removed from his position in the Turf Club. While one can cavil with the accuracy of the description of those making the statements as '*servants or agents*', the essential theory of liability did not end up being far removed from that pleaded – the defendant was liable because it knowingly brought about the circumstances in which defamatory statements which it condoned could and would be made by the Doyles. I do not in those circumstances see

a basis for interfering on pleading grounds with the trial Judge's decision to proceed to send the fifth publication to the jury.

VII THE FIRST AND SECOND PUBLICATIONS: LIABILITY FOR SOLICITORS' COMMUNICATIONS

The issues

202. The first and second publications were merged in the statement of claim. Insofar as the first is concerned, it is stated to have comprised the publication of words similar to those contained in the letter dated 12 June 2014 from Mr. Ward to the Chief Steward of the Turf Club, Mr. O'Byrne. As the trial unfolded, the evidence disclosed that, in substance, the information on the basis of which this letter was drafted was communicated in the course of a meeting at Mr. Ward's office attended by the Doyles, representatives of the defendant, and Mr. Ward and his associates. It was the Doyles who gave the information that formed the basis for this letter, and it reflected handwritten notes they had prepared which, in turn, mirrored their subsequent typed statements. The written statements may have been delivered after the meeting, but they were available to Mr. Ward when he prepared the letter, this being the second publication.

203. In that context – and aside from the issue of malice which I have earlier addressed - the defendant says:

- (i) The evidence did not disclose any defamatory words being published by the defendant: it was instead the Doyles who relayed their account.
- (ii) Apart from the Doyles and Mr. Ward, the attendees at the meeting were from the defendant itself; the defendant, it is said, cannot make a defamatory publication by publishing statements to itself or to its agent Mr. Ward. It makes

no sense, it is said, for the plaintiff to sue regarding statements made *to the Doyles* because the statements of which he complains were made *by the Doyles*.

204. While it is accepted that the first and second statements were inter-related, the defendant says that the failure to withdraw the first from the jury erroneously contributed to the impression of there being more statements at play than there in fact were; as a result, it is said, the damages award is unsafe. It is contended that the fact that the jury held the defendant liable for a statement which the evidence did not indicate was actually made by its officers, demonstrates the extent of the jury's errors.

205. Some aspects of these objections can, I think, be disposed of briefly. There could have been no doubt what the essential complaint was in relation to these publications. The words used in the second publication were plain, and were specifically pleaded (the letter was appended to the statement of claim). The letter was sent not to the plaintiff, but to Mr. O'Byrne, and it contained a most serious allegation – that the plaintiff had set out to entrap Ms. Doyle and, it followed, acted as he did when he knew that in fact it was not her name that appeared on the '*book of evidence*' at all. While it was accepted that the words were spoken on an occasion of qualified privilege, the plaintiff said that this letter had been issued maliciously. All of that was clear.

206. It was the plaintiff's claim that the defendant had during the meeting at Mr. Ward's office spoken the same words as appeared in the letter from Mr. Ward to Mr. O'Byrne. There was similarly no doubt what the complaint was in this regard. The evidence of the meeting in Mr. Ward's office confirmed that those words had, indeed, been spoken to him in the course of the discussion of (as it appeared) 4 June. As matters transpired,

and much as with the fifth publication, the words were spoken by the Doyles, but the Doyles were brought there by the defendant for the purposes of communicating those words to Mr. Ward and his associates.

207. Apart from the question of malice, the essential objection articulated by the defendant insofar as this publication was concerned – that the defendant could not make a defamatory statement to Mr. Ward or his ‘*associates*’ - was not substantiated in argument. While it was contended that there could be no liability for a publication by the defendant to its own agent, no authority was cited in support of that proposition. As I note shortly, there are, by way of contrast, decisions in which liability was certainly countenanced for publication by a person to their own solicitor (see *Gatley* at para. 14-050). All of these operate on the basis that but for the intervention of a privilege of one kind or another, liability could be imposed.

Malice and communications to and from solicitors

208. It might be thought disquieting that a party can find themselves facing liability in defamation for separate events in (a) publishing a defamatory comment about a third party to their own solicitor, and (b) the onward communication by that solicitor of the defamatory comment to another party, particularly in a context where the publishee has an admitted interest in the subject matter of the communication. Indeed, one can see policy objections to the potential for liability arising even where malice in the making of these publications is established. This was a theme taken by the defendant in its replying submissions before this Court, when it referred to the possible implications for the due administration of justice were the law to be such. The point, it should be said, was made clearly in the course of oral submissions to the High Court in the course of

the withdrawal application: if you cannot instruct a solicitor to write a letter to a person who has an interest in receiving it, counsel said, this would be '*a remarkable state of affairs*'.

209.In addressing this argument it is, I think, important to remember that a party is fully entitled to assert a privilege from disclosure of any communications they have with their solicitor made in connection with actual or contemplated litigation, or for the purposes of obtaining legal advice. In practical terms, this will preclude many claims in defamation arising from such communications as it will enable a defendant to resist the production of any evidence of what has transpired as between solicitor and client.

210.The defendant here did not invoke such a privilege: that of course was its prerogative. Indeed one can see why as a matter of strategy some litigants may decide to adopt that course of action when sued for multiple and allegedly related defamations. Where this happens, they remain entitled to assert *at least* a qualified privilege by way of defence to the action in defamation, of the kind relied upon here. There is some authority in which it has been held that communications passing between a solicitor and his client on the subject of which the client has retained the solicitor and which are relevant to that matter enjoy *absolute* privilege in the law of defamation (*More v. Weaver* [1928] 2 KB 520) and there is authority that once one enters the litigation process itself absolute privilege may apply (see *Lincoln v. Daniels* [1962] 1 QB 237). However, the strong weight of authority is that the defamation privilege attaching to communications of the kind in issue in this case from client to solicitor is qualified (*Minter v. Priest* [1930] AC 558 and *Clarke v. Davey* [2002] EWHC 2342). Which of these – qualified or absolute privilege – reflects the law in this jurisdiction (where there may well be competing

constitutional considerations to be factored into the correct legal test) is a matter for another day. Here, only qualified privilege was relied upon.

211. And the same principle must apply to the communication from the defendant's solicitor of 12 June 2014. Had this been addressed to the plaintiff himself, there could have been no question of liability in defamation. But that is not what occurred. The letter was sent to Mr. O'Byrne, the allegations in it were extremely serious and, having regard to Mr. O'Byrne's position in the Turf Club, could have had the significant adverse consequences for the plaintiff. If the sending of the letter was motivated by malice, the fact that it was sent by the defendant's solicitor rather than by the defendant itself, could and should have made no difference. As it happens, *Hennessey v. K-Tel Ireland Ltd.* is an example of qualified privilege being successfully invoked in respect of a letter from a party's solicitor to the opposing side (see pp.17-18 of the judgment of Lynch J.).

212. It follows (a) that the defendant has not substantiated its claim that there there is a legal difficulty in liability being imposed for publications to an agent, (b) here, the defendant was alleged to have, through the meeting in Mr. Ward's office, participated in the publication of defamatory matter to Mr. Ward, (c) in this case there was neither any issue around the privilege from disclosure attending these communications nor the prospect of their enjoying absolute privilege in defamation and (d) it follows that there was no valid objection in theory to liability being imposed for the communications that occurred in the course of that meeting subject, of course, to the plaintiff surmounting the high burden of establishing malice.

VIII MISCELLANEOUS ISSUES

Concurrent wrongdoers

213. Because the defendant is a body corporate, the words alleged to have constituted the various defamations on foot of which the action was brought were uttered by third parties – the persons instructing Mr. Ward in relation to the first and second publications, Mr. Meade in respect of the third, those attending the meeting on 15 August in relation to the fifth, and Mr. Grassick as regards the sixth and seventh. It is both a striking and unusual feature of this case that the plaintiff sought damages against the defendant, but never sought to join those who had actually uttered the allegedly defamatory comments. This raises the question as to the implication of the fact that in relation to each such defamatory statement, the defendant and the person making the statements were concurrent wrongdoers, that is wrongdoers who are responsible to the plaintiff for the same damage (s. 11(1) of the Civil Liability Act 1961). Because the defamations the subject of this case were made in 2014, they became statute barred in 2016, this being the maximum allowable period of limitation for the tort of defamation pursuant to s. 11(2)(c) of the Statute of Limitations 1957, as amended by s. 38 of the Defamation Act 2009.

214. Section 35(1)(i) of the Civil Liability Act 1961 provides as follows:

‘where the plaintiff’s damage was caused by concurrent wrongdoers and the plaintiff’s claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer.’

215.The fact of such responsibility has a particular consequence within the system governing the allocation of liability between concurrent wrongdoers put in place by the 1961 Act. Section 34(1) provides for the reduction of damages of a plaintiff where the damage suffered by him was caused partly by the negligence or want of care of the defendant and partly by the negligence or want of care of the plaintiff ‘*or of one for whose acts he is responsible*’ and the damages awarded against the defendant shall be reduced by such amount as the court ‘*thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant*’.

216.The result of these somewhat roundabout provisions is that where a plaintiff has sued one concurrent wrongdoer but not another and a situation has arisen in which that other wrongdoer has available to him a limitation defence, the plaintiff’s damages *may* be reduced to reflect the fault of that other wrongdoer. In a case of this kind – the plaintiff suggests – the fault of the person making the statement when compared with that of the defendant is such that the plaintiff’s damages should be eliminated.

217.There is, here, a significant leap of logic. The court in addressing a defence of contributory negligence does not mathematically allocate damages according to a formula of fault, instead being mandated to apply a rule dictated by what is ‘*just and equitable*’. How this would apply to a defendant found to be responsible for disparate defamations of distinct agents undertaken as part of a corporate stratagem to undermine a person, is a matter of conjecture. Here, however, the operation of these provisions was never raised in the course of the trial. Neither s. 35(1)(i) in particular nor even contributory negligence in general were pleaded. That being so, it is not feasible for the issues to be addressed now for the first time on appeal. This, I note, was the conclusion

reached by the Supreme Court when a similar situation presented itself in *UCC v. ESB* [2021] IESC 21.

Evidence regarding the fourth statement

218. Noting that the trial judge withdrew the fourth statement from the jury, the defendant attaches significance to the following statement in the charge:

*‘Now, I don’t want anybody at this stage to think that that means you should infer from that that there was no campaign against Mr. Gordon. That issue is still alive. That issue is for determination by you, ladies and gentlemen. **Simply because the fourth alleged defamatory statement has been withdrawn just as a matter of law, doesn’t mean to say that that disappears.** It doesn’t. But insofar as that complaint is made concerns such a petition, that’s gone.’*

(Emphasis added)

219. The highlighted statement, the defendant says, was both wrong and liable to confuse the jury. Moreover, it is contended that the judge did not explain sufficiently to the jury the consequences of withdrawal of the fourth statement. It is said, for example, that he did not definitively state that any evidence regarding the so-called petition should be disregarded in its entirety (as it says it should have been) for the purposes of assessing whether there was a campaign against the plaintiff.

220. I cannot see any error here. Clearly, there was no issue to go to the jury on the fourth statement and it could not, therefore, make any finding in respect of that alleged

defamation. It has not been explained why this precluded the jury from taking account of evidence in and around that statement in determining if there had been a campaign against the plaintiff. In any event, this issue was not raised at the conclusion of the judge's charge and for that reason alone does not afford an appealable ground. The defendant has not identified any aspect of the judge's charge on this issue that was mistaken.

Error in charge as to the fifth defamation

221. The defendant takes issue with a statement made by the trial judge in his oral ruling on the withdrawal application. He said:

'It is clear from the transcript that Mr. Egan actually presented, in fact I asked a question about this myself, the Book of Evidence. What the Defendants were actually being told was the Turf Club's position was that Mr. Gordon had produced a document as part of a Book of Evidence, in other words he had produced his copy of the Book of Evidence, something completely contrary to what the Doyles at all times maintained and that they had been shown this book, they had been shown the lodgement docket on the book and Mr. Egan himself said 'I wrote that.'

222. Noting that the plaintiff's counsel referred to this in his closing speech to the jury, the defendant says that there was no evidence of this, and that this was accepted by the trial judge. The defendant phrases its consequent objection as follows:

‘this mistake of fact in the oral ruling, indicates that the relevant facts may not have been fully appreciated and is a further reason rendering that decision (ie not to withdraw the 5th statement from the Jury) erroneous.’

223. The trial judge corrected this error in the written version of that ruling and the judge advised the jury of that in the course of his charge. I do not see that this was a significant matter and it was, in any event, corrected by the judge.

The sixth and seventh statements

224. It will be recalled that the sixth publication was the first in time and arose from the inspection of Mr. McGuinness’ yard on 4 June 2014. It was alleged to comprise words spoken by Mr. Grassick to Mr. Egan in the course of a telephone conversation the following day in which Mr. Grassick was said to have alleged that the plaintiff had entered upon Mr. McGuinness’ premises while Mr. McGuinness was absent and when he had no lawful authority to do so. There was, as I have explained earlier, some dispute as to what exactly was said on this occasion: Mr. Egan recalled Mr. Grassick as saying that the plaintiff was in Mr. McGuinness’ office when Mr. McGuinness arrived at his property, while Mr. Grassick recalled, first, that he had said that the plaintiff was in Mr. McGuinness’ yard and, then, that he was standing beside Mr. Reardon who, in turn, was at the door of the portacabin office. The jury found this statement to have been actuated by malice.

225. The seventh publication arose from the inspection of Mr. Flood’s premises on 9 July, and comprised a statement by Mr. Grassick to Mr. Egan on 9 August to the effect that

the plaintiff had failed to produce his authorisation when inspecting that property. The jury found that this statement was *not* actuated by malice.

226. The defendant makes the following points around these publications:

- (i) It is said that there was no evidence of malice.
- (ii) Complaint is made that the words were not pleaded.
- (iii) It is said that the evidence that was adduced in relation to these statements was not consistent with malice.
- (iv) It is contended that there was little difference between the two statements so as to warrant the jury in concluding that malice defeated the privilege of the sixth statement but not (as the jury found) the seventh. It is said that no reasonable jury could have so concluded and, indeed, it is argued that the discrepancy between the two findings indicates that the jury did not properly understand the nature of malice.

227. As to the question of pleading, while it is certainly the case that a party is generally required to plead with particularity the words alleged to be defamatory (see *Collins v. Jones* [1955] 1 QB 564, 571-572) the law is clear that this is not an absolute obligation, and that there may be circumstances in which that obligation may be relaxed (*Best v. Charter Medical of England Ltd.* [2001] EWCA Civ. 1588 at para. 13). This is particularly the case where the court is satisfied that the plaintiff has a good claim and is not launching a speculative action (see *Cox and McCullough* at para. 13-54). I have no doubt but that had the defendant sought to strike out the plea advanced in relation to

this alleged defamation in advance of the trial, it would have had a coercive case for obtaining that relief. However, that is not what happened. Instead, it raised particulars as to the words spoken, which were responded to with the assertion that this was a matter of evidence. The issue was not thereafter pursued. By the time they came to apply following the conclusion of the evidence to strike out these pleas, the basis for the plaintiff's claim was clear.

228. Insofar as the issue of malice is concerned, it is important to stress that the sixth and seventh statements differed from the first, second and fifth in that while the latter arose directly from the complaints of the Doyles, the former did not. Nonetheless, the principles I have earlier outlined apply, and the issue now is whether there was any evidence to go to the jury from which the existence of malice as a matter of probability was an inference which the jury would be entitled to draw. The trial judge's conclusion was that because the plaintiff's case was based upon the orchestration by the defendant of a campaign against him, all of the statements were related and, thus, that the evidence of malice relating to the first and second statements, was also relevant to the sixth and seventh. He put it in the course of his judgment on the withdrawal application, as follows (at para. 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.'

229. Here, the defendant makes two points. First, it says that there was no evidence of malice regarding these statements and that none is referred to in the trial judge's judgment. This is mistaken. As the quoted passage makes clear, central to the judge's view of these statements was the contention of the plaintiff that there was an orchestrated campaign to remove him from his position as head of security of the Turf Club. There was evidence of this in the form of *inter alia* the fact of and circumstances surrounding all of the statements, the unquestioning acceptance by the defendant of the account of the Doyles, the statements of Mr. Meade to the *Irish Field*, and the terms of the letter of 12 June. That is what the trial judge found (at para. 84):

'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.'

230. For this same reason the second point made by the defendant is similarly misconceived.

It complains of the fact that the judge (at para. 83) referred to the '*adoption of the Doyles beliefs without question*' and says that this was erroneous. It was not; the whole point was that that (a) there was evidence sustaining the contention that the Doyles' beliefs had been adopted without question, (b) there was a legal basis for concluding (as the judge put it) that this '*amounts to recklessness in the legal sense and/or indifference to*

the truth', (c) each of the statements – including the sixth and seventh – were said to be part of the same campaign against the plaintiff and (d) therefore evidence of malice in relation to one statement was necessarily evidence of malice as regards the other. Indeed, one example shows how interconnected the defamations were: the evidence was that the day after the call relating to Mr. Flood, Mr. Meade contacted Mr. Egan by telephone and requested the immediate suspension of Mr. Gordon, stating that the defendant believed the plaintiff to be '*guilty*' and that the defendant had no confidence in him. The evidence was that the reference to '*guilt*' was to matters relating to the Doyles. Obviously, all of these were – according to the case presented by the plaintiff – connected.

231. From there, the defendant says that such evidence as there was regarding these statements was inconsistent with malice. It points to evidence from Mr. Grassick in relation to both statements. That evidence was as follows.

232. Mr. Grassick (in response to the specific suggestion that he had '*falsely and maliciously*' defamed the plaintiff) said of the sixth statement:

'Sure why would I do that? I was just repeating what Mr. McGuinness had said to me to Mr. Egan which is normal for what would happen between Mr. Egan and myself in similar circumstances, not as serious as this but in similar circumstances.'

233. As to the seventh statement, Mr. Grassick said that '*it was similar*' to the sixth statement and that Mr. Flood:

'had rang me ... and I rang Denis Egan and relayed what Francis had said to me, that Mr. Gordon was in the yard but hadn't presented a letter of authorisation'.

234.It is unclear to me on what basis it is contended that the trial judge was required to conclude that this evidence trumped and negated the other evidence from which the jury might have inferred malice.

235.The sixth and seventh statements were similar, but in point of fact they were not identical. Mr. McGuinness was a member of the executive of the defendant, the publication was closely linked in time to the convening of a meeting with the Doyles and sending of the letter of 12 June, and there was evidence from Mr. Reardon that the allegation was false. The publication regarding Mr. Flood was made for a specific purpose – obtaining an adjournment of the hearing. Obviously, the court cannot know why the jury distinguished between the two publications, but the suggestion that there was no discernible difference between them is not correct.

Admission of inadmissible evidence

236.In the course of his evidence, the plaintiff said that on 23 August he was told by Mr. Egan that he had in turn been told by a horse trainer, Mr. Dermot Weld, that there was a petition in circulation seeking to have him removed as Chairman. According to the plaintiff's evidence, Mr. Grassick had called to Mr. Weld's office and asked him to sign a petition to have the plaintiff removed from his position as head of security of the Turf

Club. Objections were taken to this, and these were addressed by the trial judge on the basis that Mr. Weld would be giving evidence.

237. Mr. Weld did give evidence – under *subpoena*. His evidence in chief when asked about this was as follows:

‘There was no letter. I have never seen a letter to get rid of Mr. Gordon.’

238. That was followed by this question and this answer:

‘Mr. Hickey’s evidence was that you described the letter that you had been asked to sign by Mr. Grassick as a petition to get rid of Mr. Gordon?’

I do not recall that.’

239. Mr. Weld from there gave evidence that he was asked by Mr. Grassick to sign a letter, but that he was occupied at the time (the request was made at a race meeting), asked Mr. Grassick to come back later, but that he had never actually seen the contents of the letter and did not sign it. He then accepted that Mr. Hickey was correct in his recollection of Mr. Weld mentioning having been asked to sign a letter by Mr. Grassick, but said that the letter was not a petition to get rid of Mr. Gordon, but instead was intended to *‘bring all sides together’*.

240. The plaintiff also gave evidence that he had been advised by Mr. Weld that the trainers had a *‘vendetta’* against him. The defendant took issue with the admission of this

statement but, on the basis that Mr. Weld was to be called as a witness, the trial judge overruled the objection, observing:

‘there will be obviously consequences if Mr. Weld was to give other evidence’

241. However, when Mr. Weld was called as witness, he said he did not remember making this statement.

242. Objection was taken to the fact that an e-mail was furnished to the jury but then, the members of the jury having had it overnight, an application was made by the defendant the following day that the e-mail should be removed from the papers before the jury on the basis that it contained prejudicial language and should not have been admitted as evidence. The e-mail was dated 28 August 2014, was sent by Mr. Egan to *inter alia* Mr. O’Byrne and recorded certain information alleged to have been given by Mr. Weld. By that stage, the defendant says, the jury had been exposed to the e-mail and, it is suggested, in fact the removal of the material *‘may have resulted in even more attention being drawn to it’*.

243. It is impossible to my mind to see how these isolated events generate any basis for complaint. The judge gave a direction to the jury in relation to the latter. I have dealt with other aspects of the complaints relating to the alleged petition – the so called fourth publication – earlier.

The refusal to adjourn the trial

244. The defendant's contention was that the jury verdict was rendered unsafe by the pressures felt by them consequent upon the Covid-19 pandemic, and that the trial judge ought to have acceded to its application to adjourn or abandon the trial as a consequence of the lockdown announced by the Government on 17 March. The application was made at the very conclusion of the case, and the Court proceeded with the case only after the judge had consulted with the President of the High Court and the Chief Medical Officer, arrangements being put in place to ensure that the remainder of the case was conducted safely and in accordance with applicable social distancing guidelines. Effectively, the defendant asks that the Court infer from the short period taken by the jury to reach its conclusion that it did not properly address the issues with which it was charged. I cannot see how the court could so conclude, and no authority was identified in which such an inference has ever been drawn.

IX DAMAGES

Disproportionate and excessive

245. It will be recalled that the jury found that the seventh publication was not made maliciously, and that the third was not the subject of a claim of privilege. Thus, its award of €200,000 by way of general damages was in respect of five defamations (the first, second, third, fifth, and sixth publications). The defendant says that this award was excessively high when compared to other awards, referring to the decisions in *Leech v. Independent Newspapers* [2014] IESC 79, [2015] 2 IR 214, *De Rossa v. Independent Newspapers* [1999] 4 IR 432, *Christie v. TV3 Television Networks Ltd.* [2017] IECA 128, [2020] 3 IR 551 and *O'Brien v. Mirror Group Newspapers Ltd.* [2000] IESC 70, [2001] 1 IR 1.

246. It also placed some reliance on the decision of this Court in *Higgins v. Irish Aviation Authority* [2020] IECA 157. The plaintiff in that action was a commercial pilot who, the defendant eventually admitted, had been defamed in e-mails sent by the defendant (a regulatory authority having responsibility for security and standards in aviation matters) to the Civil Aviation Authority in the United Kingdom. The communications were, on any version, very serious for a pilot, implying that he had engaged in misconduct. Following a seven day jury trial the plaintiff was awarded €300,000 in general damages and €130,000 in aggravated damages, these being reduced by 10% to reflect an offer of amends made by the defendant in accordance with the procedure set out in ss. 22 and 23 of the Defamation Act 2009. This Court found the award to have been disproportionate, excessive and unreasonable, reducing the award for general damages to €70,000 and that for aggravated damages to €15,000.

247. As I have earlier noted, following the hearing of this appeal the Supreme Court delivered judgment in that appeal. It set aside the decision of the Court of Appeal in *Higgins* ([2022] IESC 13). All judges (MacMenamin, Dunne, Baker, Woulfe and Hogan JJ.) agreed with that outcome. The majority (MacMenamin, Dunne and Hogan JJ.) agreed that the award for general damages made by the jury was so objectively disproportionate that it should be set aside. Four judges (Hogan J. dissenting) decided that a proportionate award for general damages was, in the circumstances, the sum of €175,000.00 and that the award for aggravated damages should have been €50,000.

248. The judgment of MacMenamin J. helpfully extracted from an extensive analysis of the authorities (including those relied upon by the defendant here) four brackets for the award of general damages in defamation cases. The first, and lowest, applies to what he described as ‘*very moderate defamation*’, meriting awards in the region from 0 to €50,000 (at para. 157). The second was for a ‘*medium “range” of cases where there have been awards of €50,000 to €125,000*’ (at para. 158). The third was for ‘*seriously defamatory material*’ in respect of which the award should be between €125,000 to €199,000 (at para. 159). Finally he referred to a fourth category as follows (in which connection he referenced the decisions in *Nolan v. Sunday Newspapers Ltd. (trading as the Sunday World)* [2019] IECA 141, [2020] 2 IR 490 and *Kinsella v. Kenmare Resources plc and anor.*) (at para. 160):

‘At the top of this general scale there are cases at, or in excess of €200,000, but where the courts have very seldom awarded more than €300,000. In *Nolan*, the Court of Appeal awarded general damages of €200,000, as well as making awards under other headings. In *Kinsella*, the Court of Appeal awarded total damages of €250,000.’

249. MacMenamin J.'s explanation of why *Higgins* fell within the third of these categories is important, and was as follows (at para. 163):

'To summarise, the defamation was very serious, damaging, and concerned the plaintiff, a pilot in a position of trust and high responsibility, in his profession. It alleged conduct worthy of loss of career and criminal prosecution, and all the consequences that could go with it for the plaintiff himself and his family. The plaintiff not only held a position of high trust, but also enjoyed an impeccable reputation in a field where reputation was both personally and professionally highly significant. The material emanated from an important public supervisory and regulatory body, which had a powerful role with regard to the plaintiff's ability and qualification to work. An aggravating factor is that the defamation itself fell into two phases. The later emails were 5 weeks after the earlier emails. The matters were brought to the attention of the Gardaí and the Revenue. The "scot free" email, 5 weeks after the first group, must be seen as, in every way as damaging – and revealing – as what occurred earlier. The jury verdict says much as to the view it took of the defendant's conduct.'

250. There are many parallels between the factors identified in this paragraph, and those presenting in this case. The plaintiff had prior to his assuming his position with the Turf Club in 2010 enjoyed over some thirty years a successful career in the Gardaí (rising to the rank of Superintendent). His integrity or honesty had never been questioned, and each was clearly critical to the position he occupied within the former. As a consequence of the efforts he undertook in a task of some importance to the racing

industry in the State as a whole, he was met over the course of the various publications in issue with claims that he:

- (i) Made an untrue allegation in the hope of entrapping Ms. Doyle into an admission of wrongdoing;
- (ii) Acted in the course of the inspection of Ms. Doyle's premises in a manner that was '*reprehensible*' and such as to bring into question the integrity of the Turf Club;
- (iii) Conducted himself in a manner that was '*unlawful*';
- (iv) Suffered from '*Little Hitler syndrome*';
- (v) Treated members of the defendant '*almost as guilty from the moment the inspection begins*';
- (vi) Acted in the course of those inspections in a manner that was unprofessional, and which failed to treat people properly;
- (vii) Treated those persons '*like criminals*'.
- (viii) Unlawfully entered the premises of a trainer;

251. All of these allegations were communicated to the Chief Executive Officer and Chairman of the plaintiff's employer, allegations (iii) to (vi) were circulated in a newspaper with a readership of 50,000 persons and were (as the jury expressly found) made as part of an orchestrated campaign against the plaintiff animated by the discharge

by him of his professional function. According to the plaintiff, the publications had an impact not merely on his own peace of mind, but also on his ability to discharge those functions: Mr. Meade and Mr. Grassick '*sent him to Coventry*' and boycotted him, resulting in trainers doing likewise. The defendant demanded that the Turf Club bar the plaintiff from stable yards or weigh room areas at race meetings.

252.I agree – having regard to the decision of the jury - with the plaintiff when, in the additional submissions made on his behalf following the Supreme Court decision in *Higgins*, he says the following as regards the proper comparison of the two cases:

- (i) The multiple defamatory allegations made against Mr. Gordon were considerably more serious than those made against Captain Higgins. Mr. Gordon was accused of intentionally doctoring documents for the purpose of entrapment in the course of searching a trainer's yard for unlawful possession of anabolic steroids. He was accused of acting unprofessionally, unlawfully, corruptly and dishonestly in his dealings with trainers and in the carrying out of his role as head of security of the Turf Club.
- (ii) Similar to Captain Higgins, Mr. Gordon was in a position of trust and high responsibility in his role as head of security of the Turf Club.
- (iii) The allegations were of conduct which, had they been true, would have certainly resulted in the destruction of Mr. Gordon's career. Unlike Captain Higgins, for the six years it took for Mr. Gordon to vindicate his

good name the allegations severely affected his career and standing in the racing community where he was boycotted by trainers.

- (iv) Mr. Gordon had an impeccable reputation in an industry where reputation was both personally and professionally significant.
- (v) The campaign of defamation emanated from a powerful and extremely influential group within the horse racing industry who used that power and influence to try and prevent Mr. Gordon investigating their members. To this end they repeated the defamatory allegations to the over-arching public supervisory and regulatory body (Horse Racing Ireland) and successfully petitioned Horse Racing Ireland to exert pressure on the Turf Club to restrict Mr. Gordon in his duties and prevent him from investigating trainers.
- (vi) Publication was extensive and included Mr. Gordon's employer, Horse Racing Ireland and the racing fraternity at large.

253. The case law abounds with the incantation that jury awards enjoy a particular status in law, that appellate courts should be slow to interfere with those awards, and that a threshold of disproportion *and* unreasonableness in the award must be met before a court will, on appeal, accede to the claim of a defendant that the award made in such circumstances is excessive. It was put in the Supreme Court by Dunne J. in *Leech v. Independent Newspapers (Ireland) Ltd.*, at para. 120:

‘an appellate court should only set aside such an award if the appellate court is satisfied that the award is so disproportionate to the injury suffered and wrong done that no reasonable jury would have made the award in all the circumstances of the case’.

254.I think it must follow from the decision of the Supreme Court in *Higgins* that a jury award that is at, or on the cusp of, the correct bracket should not generally be interfered with on appeal. Even if that is not so, it is very difficult to my mind to see how, if the correct level of general damages for the plaintiff in *Higgins* is €175,000, an award to the plaintiff in this case of €200,000 could be so unreasonable or disproportionate as to cause this Court to upset it. For the reasons I have just outlined, the circumstances match many aspects of the defamation in *Higgins* insofar as the claims were extremely serious, had the potential to impact upon the plaintiff’s professional reputation and function, and would inevitably have carried with them very significant upset and distress. Here, to repeat, the claim was that the plaintiff had intentionally misrepresented the contents of documents for the purpose of entrapping Ms. Doyle and acted in an unprofessional and dishonest way with trainers in doing his job.

255.However, in this case the defamations went significantly further. There were five relevant publications. These were found to have been made maliciously and as part of an orchestrated campaign against the plaintiff. They were made directly to his employer and did in fact affect his work insofar as his duties were thereafter curtailed (I do not, I should say, feel it relevant that his duties were curtailed because of these proceedings – given that he prevailed in them). The number of persons to whom they were published was significantly greater than in *Higgins* where only five persons

received the defamatory e-mails. Unlike in *Higgins*, there was no offer of amends and the plaintiff had to live with the allegations for a period of six years until vindicated by the jury verdict. During that period, the allegations circulated in the horseracing industry, and the plaintiff was subject to investigation by the Turf Club and its solicitors. The plaintiff gave clear evidence of the effect all of this had on his personal life and that of his family.

Aggravated and exemplary damages

256. I have noted that in *Higgins* the jury award of aggravated damages in the amount of €130,000 was found excessive, and a sum of €50,000 substituted in its place. That award was found to have been justified by the conduct of the defence from the time after the service of the initiating letter to the making of an offer of amends. Here, there was no offer of amends, and while the defendant did not plead justification the defendant vigorously defended its position throughout the thirty day trial, in part on the basis that the Doyles believed the truth of their allegations and calling the Doyles to so state. His cross-examination was trenchant, and included putting to him that his claims of a campaign against him were ‘*all in his head*’, that he was trying to ‘*poison the jury*’ and that his interpretation of events was excessive. During the trial Mr. Meade had to apologise to the Court for words he had with one of the plaintiff’s witnesses. Mr. Meade suggested at one point in his evidence that the plaintiff had planted evidence. The plaintiff was boycotted by trainers, his removal was pursued through Horse Racing Ireland, and a demand was made that the plaintiff be barred from stable yards or weigh room areas at race meetings. I see no reason to disrupt that award.

257. Nor do I see any basis on which this Court could interfere with the award of exemplary damages. I agree with the plaintiff when, in his submissions, he says that having regard to the findings of the jury that the defendant did not honestly believe the statements and that they were made as part of an orchestrated campaign against him it would have been perverse for the jury not to have awarded exemplary damages. The amount was not, in the circumstances, excessive.

X CONCLUSION

258. The thirty days of transcripts in this case disclose what was clearly, for all involved, a bruising and hard fought trial. It follows ineluctably from the jury findings and award that it concluded that an entirely innocent error on the part of the plaintiff was misinterpreted, and then used by an organisation of racehorse trainers to inhibit the plaintiff in the discharge by him of important duties in the course of his employment. A very serious allegation – that he had knowingly used a concocted document in an attempt to entrap a racehorse trainer into an admission of serious wrongdoing – was transmitted by the defendant to its solicitors and by its solicitors to the plaintiff's employer. The defendant then caused the trainer and her mother to repeat those allegations to a number of senior members of the Turf Club. At the same time, the defendant's Chairman broadcast to the racing community through the newspaper circulated within that group words to the effect that the plaintiff suffered from '*Little Hitler syndrome*', that he treated members of the defendant '*almost as guilty from the moment the inspection begins*' that he acted in the course of those inspections in a manner that was unprofessional, and in which he failed to treat people properly, and instead treated those persons '*like criminals*'. All of these claims were found by the jury to have been related and to have been advanced when the defendant had no honest belief in the allegations against the plaintiff and as part of a campaign against him.

259. The grounds relied upon by the defendant in this appeal against the consequent findings and awards made by the jury are without foundation. While there were many of them – and while all are addressed in the course of this judgment – my conclusions on the principal points made by the defendant are as follows:

- (i) In this case, the trial judge delivered a charge to the jury on the issue of malice that was as clear as it was correct. The evidence before the jury that the defendant failed to take the most rudimentary of steps to check or interrogate the allegations made by the DoYLES when combined with evidence consistent with the plaintiff's claim that the defendant was engaged in a campaign against the plaintiff so as to prevent the continuation of joint inspections of trainers' premises, was sufficient to enable the jury to conclude that there was indeed such malice.
- (ii) Usually, the rules governing legal professional privilege will operate to render it impossible for a claimant to sue in defamation in respect of publications made by a person to his solicitor. Of course it is open to a defendant not to invoke that privilege. Where a defendant does not invoke legal professional privilege and the plaintiff can thus prove a defamatory publication, the weight of authority suggests that the privilege in defamation is qualified and that liability will thus be imposed if the plaintiff discharges the substantial burden of establishing malice. The question of whether (and if so when) such communications should or do enjoy absolute privilege was not before the Court in this case.
- (iii) If Mr. Meade was speaking on behalf of and with the authority of the defendant when he made the allegations he did against the plaintiff in the course of the interview published in the *Irish Field*, the defendant was properly made liable in defamation for those statements. There was evidence before the jury from which it could so conclude, in particular in the form of the letter from the defendant's solicitors to the plaintiff's solicitors of 8 October 2014.

- (iv) The jury was entitled to find the defendant liable for the statements made by the Doyles at the meeting held at the Keadeen Hotel on 15 August. That meeting was suggested by the defendant and the Doyles were brought to the meeting for the specific purpose of repeating the allegations they had made in the office of the defendant's solicitors on 4 June.

- (v) In all of the circumstances, the defendant has not established that the award of €200,000 in general damages made in favour of the plaintiff was either unreasonable or disproportionate, and the jury award of €50,000 for aggravated and of €50,000 for exemplary damages should not be interfered with.

260.Noonan J. and Ní Raifeartaigh J. agree with this judgment. The Court will make arrangements in early course for a hearing on the issue of costs in this Court and in the High Court.