THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number: 2023/132
High Court Record Number: 2016/5727P
Neutral Citation Number [2024] IECA 62

Noonan J.

Binchy J.

O'Moore J.

BETWEEN/

WILLIAM BIRD

PLAINTIFF/RESPONDENT

-AND-

ICONIC NEWSPAPERS LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 20th day of March, 2024

1. The periodic publication of what has become known as the Tax Defaulters List has been a part of Irish life for decades. The list is scrutinised by interested members of the public, either with a sense of moral disapproval or a feeling of enormous relief or, sometimes, a combination of the two sentiments.

2. The respondent to this appeal, Mr. Bird, is a businessman who lives in Castleconnell, County Limerick. The appellant, Iconic Newspapers, is a Dublin company which publishes a number of titles including the Limerick Leader. On the 8th June, 2016, Iconic Newspapers published an article in the Limerick Leader to be carried in that newspaper's edition of the 11th June, 2016. The headline read: -

> "Major settlements with Revenue in Limerick"

3. The relevant section of the article read: -

> "Funfair/amusement activity operator William Bird, of Henry Street, reached three separate settlements for under declaration of corporation tax and VAT, under declaration of PAYE/PRSI and VAT, and under declaration of corporation (sic), in relation to three companies under his name.
>
> In total, the monies paid ta the Revenue in his case amounted to €183,595."

4. Mr. Bird had made no such settlements with Revenue. The settlements detailed in the Limerick Leader article had been made by three different companies. These were William Bird (Rollercoaster) Limited, William Bird (Sales) Limited and William Bird Tramore Limited. Mr. Bird had nothing whatsoever to do with any of these three companies, at any time. These settlements with Revenue which gave rise to the Limerick Leader article were ones in which Mr. Bird had no involvement. The suggestion that he had personally settled with Revenue was completely erroneous.

5. The primary defence mounted by the Limerick Leader to these proceedings was one of qualified privilege. While para. 22 of the Limerick Leader's defence claimed that the words complained of were published on an occasion of qualified privilege, and then went on to refer to s. 18 of the Defamation Act, 2009, the common law, and *"the provisions of the*

Constitution, as interpreted in light of the provisions of the European Convention of Human Rights Act, 2003", the central issue on the appeal was the scope and meaning of s. 18 of the Defamation Act, 2009 and in particular s. 18(2). There was also a separate secondary issue about the level of costs awarded to Mr. Bird by the trial judge, who limited these costs to those applicable to Circuit Court proceedings as the jury awarded Mr. Bird a sum within the jurisdiction of the Circuit Court (€75,000).

6. This judgment will therefore be arranged under the following headings: -

(i) The facts of the case;

(ii) The ruling of the High Court;

(ii) The arguments on appeal;

(iv) My decision on the appeal;

(v) The costs issue;

(vi) Conclusion.

The facts of the case

7. The edition of Iris Oifigiúil published on Tuesday 7th June, 2016 carried a list of settlements with Revenue. These settlements were entered into by persons who had failed to make full or proper returns to Revenue in respect of a range of different taxes. The format of the publication is that there are eight columns. The first column gives the name of the taxpayer, the second column provides the address of the taxpayer and the third column gives the occupation of the taxpayer. The fourth column sets out the amount of tax to be paid on foot of the arrangement, the fifth column gives a figure for interest and the sixth column

quantifies the penalties applicable to the individual settlement. The seventh column gives the total of the settlement, and *"additional particulars"* are then given in the eighth and final column. The relevant entities for the purpose of the Limerick Leader article were the three companies I have described at para. 4 of this judgment. The address for each of them is given as 97 Henry Street, Limerick. The occupation for each of them is given as: -

> "Funfair/amusement activity operators"

8. The figures for each are different, but the additional particulars given relating to these settlements make it plain that the settlements were procured on foot of a Revenue audit, and involved the under declaration of various taxes.

9. The article in question was written by Ms. Anne Sheridan, who was at the time a journalist with the Limerick Leader. Ms. Sheridan gave evidence at the trial of the action. In her evidence, she accepted that it was a serious matter for a person to be identified as a tax defaulter, that it was a criminal offence to fail to pay taxes lawfully due, and that it would be *"quite upsetting"* to be incorrectly identified as a tax defaulter; p. 55 of the Transcript of Day 2.

10. Ms. Sheridan accepted that it had been an error to identify Mr. Bird as having been somebody who had made a settlement with Revenue of the type described in the article. When asked, in her direct evidence, how this error had occurred, Ms. Sheridan replied: -

> "I honestly don't know. All I can say is that I made an honest mistake when I was typing it up"; p. 35 of the Transcript for Day 2.

11. Ms. Sheridan went on to give evidence that she *"didn't have the time …"* to *"double check each and every aspect"* of the 20 individuals listed in the article as being tax defaulters; pp. 42 and 43 of the Transcript of Day 2.

12. Ms. Sheridan also described the way in which the Tax Defaulters List was made available to the Limerick Leader. She said: -

> "On a quarterly basis Revenue would send out a list of settlements that they have reached with various individuals across the country. So, it's a national wide list. The list is sent out to all media outlets, national and media, local media, radio stations and newspapers obviously as well. It would be emailed out generally to the News Editor of various publications. It might also be sent to journalists individually as well too if they have perhaps written about Revenue stories in the past."

This description appears at p. 21 of the Transcript of day 2.

13. She went on to give evidence that on either the 7th or 8th June, 2016, at 2:40pm, the email setting out the list of Revenue defaulters was sent to the Limerick Leader from an individual in Revenue. This email was made available to Ms. Sheridan, who printed it off, analysed it, and read it to *"find any references in the first instance that relate to Limerick or relate to Limerick people"*; p. 28 of the Transcript of Day 2. The piece that resulted from this analysis was, according to Ms. Sheridan, *"of general public interest and people are interested to see what happens in their area"*; p. 29 of the Transcript.

14. Ms. Sheridan accepted that *"clearly as I am reading it now …"* the relevant listings related to companies and *"not to an individual"*; p. 34 of the Transcript.

15. Ms. Sheridan also gave evidence about the *"considerable time pressure …"* that she was under in respect of this story; p. 37 of the Transcript. Towards the end of her cross-examination, however, Ms. Sheridan accepted that the Limerick Leader as a publication *"didn't scrutinise this article before it was published…"*; p. 65 of the Transcript.

16. Following publication of the article, solicitors for Mr. Bird wrote (on the 10th June, 2016) complaining about the piece, setting out its defamatory meaning, and seeking within 14 days a full apology from the newspaper and proposals as to compensation to be paid to Mr. Bird in respect of the injury to his reputation occasioned by the article.

17. There was a prompt response on the 13th June, 2016 from Eugene Phelan, the news editor of the Limerick Leader. Mr. Phelan's position was a surprising one. It was that he had spoken with Ms. Sheridan, that he could not see any inaccuracy in the article, and that the *"information was got from the Revenue Commissioners."*. He referred to the link from the Revenue which gave the list of tax defaulters and he said that, on clicking the link, *"you will see the name William Bird, of 97 Henry Street, and the three companies associated with him in named address."*

18. Mr. Phelan's email then set out the three companies.

19. In this response, Mr. Phelan does not seem to have adverted to the fact that (contrary to the article his newspaper published) the settlements with Revenue were not with an individual, but rather with three companies. In addition, this email does not engage at all with the contents of Mr. Bird's solicitor's letter to the effect that he is not a tax defaulter.

20. On the 14th June, 2016 Mr. Bird's solicitors responded, stating: -

> "In your email, you again repeat the inaccuracy about our client. William Bird the person, has not been identified by the Revenue, as a tax defaulter. Three entities that have been detailed have been William Bird (Rollercoaster) Limited, William Bird (Sales) Limited and William Bird Tramore Limited. If the Limerick Leader had taken the trouble to carry out Company Office searches, against these three entities

(copies enclosed) it would have revealed that our client is not a director or shareholder of these companies and in fact has nothing whatsoever to do with same."

21. On the 28th June, 2016 the solicitors for Iconic Newspapers denied that the article carried the meanings contended for by Mr. Bird's solicitors, and instead suggested the following: -

"Rather, we believe that it would have been understood to mean the three companies associated with Mr. Bird were in default and that he, on behalf of the companies, had negotiated settlements with the Revenue Commissioners."

22. Of course, even this meaning would have been both untrue and highly damaging to Mr. Bird. The letter went on to propose a *"clarification/apology"* which included the following: -

"We take this opportunity to clarify that the settlements in question were not connected with Mr. Bird personally but were connected with William Bird (Rollercoaster) Limited, William Bird (Sales) Limited and William Bird Tramore Limited. Mr. Bird did not enter into any personal settlement with the Revenue Commissioners as the tax defaults in question were not personal defaults but were corporate defaults. We take this opportunity to clarify this issue and we apologise to Mr. Bird for any confusion caused by our report."

23. This *"clarification/apology"* is notable for its failure to acknowledge anywhere that Mr. Bird had nothing at all to do with these companies. Rather, the contrary impression is given which is that these were *"corporate defaults"* of companies with which Mr. Bird was associated.

24. Unsurprisingly, given the failure of the parties to resolve matters through correspondence these proceedings issued.

The Ruling of the High Court

25. As already noted, para. 22 of the defence pleaded as follows: -

> "22. Without prejudice to the foregoing, the defendant pleads that the words complained of were published on an occasion of qualified privilege, whether pursuant to s. 18 of the Defamation Act, 2009 and/or the common law and the provisions of the Constitution, as interpreted in light of the provisions of the European Convention on Human Rights Act, 2003."

26. The following particulars were offered: -

> "Acting in good faith, the article was published as part of the defendant's lawful and legitimate duty to report on matters of concern and/or interest to the public at large, namely settlements made with the Revenue Commissioners".

27. The trial of the action ran for five days before Mr. Justice Owens. Evidence was given by Mr. Bird, Mr. Bird's son Patrick, and Mr. Bird's solicitor Yuliya Lennon. The final witness for Mr. Bird was Mr. Brian Twohy, a Limerick Businessman. The evidence on behalf of Iconic Newspapers was given by Ms. Sheridan and by Mr. Brian Keyes, the Editorial Director for Iconic Newspapers.

28. On the third day of the hearing, an application was made by counsel for Iconic Newspapers to withdraw the case from the jury on the grounds that the publication occurred on an occasion of qualified privilege. It was further submitted on behalf of Iconic Newspapers that the privilege had not been vitiated by any malice or recklessness on its part.

Ultimately, the trial judge did not decide the second issue. He determined the application solely on the basis that the publication was not an occasion of qualified privilege. In light of that finding, he declined to consider any possible loss of that privilege.

29. The judgment in the High Court runs to seven pages of transcript. The Ruling was delivered immediately after the conclusion of the submissions of counsel. It begins with the following question: -

> "Really the issue is in this particular matter is when can a journalist, in effect, rely - or a newspaper really - in effect, on its own mistake to make material, which did clearly not come into existence on an occasion of qualified privilege into something on which they can claim qualified privilege?
>
> The answer is that they can't. The reason really I have come to that conclusion is as follows. The legal rules concerning qualified privilege, as I said, relate to, in my view, the occasion on which words are published."

30. The trial judge then went on to consider what was the occasion of qualified privileged which it was claimed arose here. He concluded that *"the occasion of qualified privilege was the publication by Revenue of the list of tax defaulters under s. 1086(3) of the Taxes Consolidation Act, 1997*"; p. 59 of the Transcript at Day 3.

31. The trial judge went on (at p. 63 of the Transcript): -

> "Just as the Revenue cannot include defamatory material in a/the? section 1086 list of defaulters by mistake by including something in relation to a person who is not in fact a defaulter in the list, and whether it is a mistake or deliberately, negligence in my view is irrelevant in this, it's also a newspaper which reports something and does not engage in fact a fair and accurate reporting on the material, is that side of the

> occasional privilege. The reporter is stating facts which are not in fact within the occasion of privilege. The public interest? lies in receiving things. The defendant has no duty or interest in communicating that sort of extra thing which is outside the statute and the public has no corresponding interest in receiving that for the purposes, in my view, of section 18(2) of the legislation."

32. Having referred to portions of s. 18(2) of the 2009 Act - to which I will return - the judge concluded (at p. 64 of the Transcript): -

> "Well, the information contained in the statement is not within the occasion of qualified privilege within the meaning in section 18(2). Really, it seems to me that that is the end of it.
>
> In my view the business about the defendant believing on reasonable grounds that the public at large has an interest in receiving the information, couldn't be relevant. But even if it wasn't relevant in relation to this how could there be reasonable grounds for believing on any objective view that the public has an interest at all in receiving information which is flat out inaccurate and where the mistake in fact resides with the author of the material and rather with somebody else. That couldn't be the law. So there's no basis, in my view, in which the defence of qualified privilege can go to the jury. I am afraid in relation to it if I answer the question that I asked originally occasions of qualified privilege do not in fact excuse these types of categories of journalistic mistake."

33. The ruling, inevitably, bears many of the hallmarks of one delivered in the midst of a hard-fought jury trial. That is not, however, to downplay the fact that the trial judge's analysis was clear. In brief, he found that the issue for him to decide was whether or not there was an occasion of qualified privilege. That, undoubtedly, was the correct approach

to take in principle and is acknowledged as such in the submissions (both written and oral) made to this court on behalf of Iconic Newspapers. Secondly, he unequivocally found that this was not an occasion of qualified privilege. In that regard, he was influenced by the fact that what had been said by the Limerick Leader to the public was plainly fundamentally inaccurate, and the trial judge felt that that should be taken into account considering whether or not an occasion of qualified privilege arose. This last view is strongly disputed by counsel for Iconic Newspapers. It is to those arguments, and the other submissions of the parties on appeal, that I will now turn.

Submissions on the appeal

34. In their submissions, counsel for Iconic Newspapers stressed the need for the court to consider whether or not an occasion attracted qualified privilege, as opposed to a communication doing so. As I have already stated, this is exactly the approach adopted by the trial judge. The extent of the difference between the trial judge and the appellant is restricted to what, precisely, was the privileged occasion.

35. Much more contentious was the submission made on behalf of Iconic Newspapers that s. 18(2) of the 2009 Act, if properly applied, provided a full defence to Mr. Bird's claim in these proceedings.

36. One unusual feature of the appellant's submissions was that s. 18(2) was focused on individually, and any consideration of any other provision of the 2009 Act was excluded in the arguments made on behalf of Iconic Newspapers. The position taken on behalf of the defendant was a straightforward and focused one. On a plain reading of the wording of s. 18(2) of the Defamation Act, 2009, did Iconic Newspapers meet the requirements of that subsection? This approach had the disadvantage that, in its proposed construction of s. 18(2), Iconic Newspapers nowhere sought to put this subsection in the context of the Act as a

whole, or to explain how its version of the scope of the subsection was consistent with the balance of the 2009 Act. In addition, this attempt to construe s. 18(2) other than in the context of the Act in which it appears was replicated by a reluctance to construe s. 18 as a whole by reference to the law of qualified privilege which existed at the time of the enactment of the 2009 legislation.

37. Section 18(2) of the Defamation Act, 2009 reads as follows: -

> "(2) Without prejudice to the generality of *subsection (1*), it shall, subject to *section 19,* be a defence to a defamation action for the defendant to prove that—
>
> (a) the statement was published to a person or persons who—
>
> (i) had a duty to receive, or interest in receiving, the information contained in the statement, or
>
> (ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and
>
> (b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons…"

38. Much of the arguments made on behalf of Iconic Newspapers resolved themselves into a contention that Iconic Newspapers had a social duty or social interest – within the meaning of s. 18(7) of the Act – to communicate to the general public information about the persons on the Tax Defaulters List. Equally, it was argued, the general public had a social duty or social interest in receiving such information. It was argued that this was the case even if the information was wrong, as confining a defence of qualified privilege to situations where the information was accurate would mean that *"in practical terms qualified privilege would be*

rendered redundant as a defence"; para. 50 of the written submissions of Iconic Newspapers.

39. The submissions on behalf of Mr. Bird were to the effect that the consequences of the Iconic Newspapers' submissions, if correct, *"would be enormous and would wholly undermine the constitutional protection afforded to one's good name"*; para. 6 of the Bird written submissions. It was submitted that qualified privilege at common law related, in the main, to communications between individuals or limited groups of individuals. It was submitted that: -

> "The concept of qualified privilege sits uncomfortably at common law with mass publication. The doctrine of so-called *Reynolds* privilege was judicially developed … Those criteria [set out in *Reynolds*] were given a statutory footing in Ireland in section 26 of the Defamation Act, 2009."

40. It was submitted that s. 26 (set out in para. 75 hereafter) had not been pleaded by Iconic Newspapers as a defence as it would have failed. It was further argued that, at common law, it was only in *"exceptional circumstances"* that a defence of qualified privilege could apply to a publication to the public at large; *Kinsella v Kenmare Resources* [2019] IECA 54 *per* Irvine, Baker and Whelan JJ. The current case, it was argued, was not one of the exceptional cases to which such common law qualified privilege could be applied.

41. Having submitted that a section 26 defence could not have succeeded, it was also submitted that no defence under s. 18(3) of the 2009 Act - importing privilege in cases of *"fair and accurate reports"* - was pleaded because likewise that could not have been successful. Counsel for Mr. Bird argued, therefore, that s. 18(2) could not bear the meaning contended for by Iconic Newspapers as this would render several other provisions of the same Act inexplicably redundant. It would create a situation where some forms of reports or

communications were published on a privileged occasion only when they were properly researched, or were fair or accurate, but that other similar reports to the world at large were published on occasions of qualified privilege even in the absence of any attempt to establish their accuracy.

My decision on the appeal

42. Section 18(1) of the 2009 Act reads: -

> "18.— (1) Subject to *section 17*, it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of this section, have been considered under the law (other than the Act of 1961) in force immediately before such commencement as having been made on an occasion of qualified privilege."

43. I accept the submissions made on behalf of Iconic Newspapers that here the occasion is the publication by the Limerick Leader of the list of tax defaulters. To that extent, I would part company with the trial judge in as much as he suggested that the occasion was the publication by the Revenue Commissioners of the list. However, the fundamental question remains, which is whether or not the publication by the newspaper is an occasion of qualified privilege. In understanding s. 18 of the Act, it is necessary to consider the pre-existing common law of qualified privilege and also the context of the 2009 Act in which the subsection appears.

44. In *Nolan v Laurence Lounge* [2018] IEHC 352, MacGrath J., in setting out the rationale for the *"duty/interest"* requirement upon which the defence case relies, referred with approval to the speech of Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at 149: -

> "'The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue ... For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege."

45. The reference appears at para. 70 of the judgment of MacGrath J. That judgment, described as *"innovative"* by the authors of Cox and McCullough on *Defamation Law and Practice* (2nd edn., 2022) is important for a number of reasons, not least the view expressed by the judge (at para. 116 of *Nolan*) that the defence of qualified privilege may apply *"in circumstances other than those where mutuality of interest or duty exists."* However, the observations and findings of MacGrath J. in *Nolan* on that important issue do not relate to the questions to be decided on this appeal. As already observed, both before the High Court and in the submissions before this court the question is whether or not a defence of qualified privilege pursuant to s. 18(2) of the Act has been made out by Iconic Newspapers. Whether or not a defence of qualified privilege under s. 18(1) has been made out, potentially involving situations other than those that arise from a mutuality of interest, is simply not a question to be decided in these proceedings.

46. The reference by MacGrath J. to the speech of Lord Diplock is of considerable assistance in focusing on exactly what qualified privilege at common law involved. At its heart, the defence required mutual duties or interests. These duties or interests could be legal, moral, or social. In addition, the interest or duty in receiving the information was, in Ireland, something that must actually exist and not just be something that the communicator believed to exist.

47. The requirement that a body to which information is communicated had a duty or interest in receiving it was conclusively established in *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436. In that case, the communication was to the Irish Medical Association. At p. 449 of the report, Henchy J. found: -

> "In those circumstances this Court is being asked to hold that the communication sent by the defendant to the IMA is protected by qualified privilege because, although the IMA in fact had no duty or interest in the matter, the defendant honestly and reasonably believed that it had. However, such a version of the law would run counter to two Supreme Court decisions: *Reilly v Gill & Ors.* [1946] 85 ILTR 165 and *Kirkwood Hackett v Tierney* [1952] IR 185. While the point does not seem to have been specifically argued in those cases, it is clear from the observations made in the judgments that the Court in each of those decisions was firmly of the opinion that an occasion of qualified privilege cannot exist unless the person making the communication has a duty or interest to make it and the person to whom it is made has a corresponding duty or interest to receive it. It would require exceptional circumstances before this Court should overrule such a clearly held and repeatedly expressed opinion.

> I have no difficulty in rejecting the submission, which has only slender judicial support, that the occasion is one of qualified privilege if the person making the communication *honestly believes* that the person receiving the communication has a duty or interest in receiving it. I cannot believe that the guarantee in Art. 40.3.1 of the Constitution that the State will protect, and, as far as practicable, by its laws defend and vindicate the personal rights of the citizen, would be effectuated if a right to defame with impunity is recognized on such a purely subjective basis. An occasion of qualified privilege is to be given recognition only to the extent that it is necessary under Art. 40.6.1 to recognize, on an objective basis, the right to express freely convictions and opinions. The constitutional priorities would be ignored if the law considered an occasion of qualified privilege to depend only on the honest opinion of the communicator as to the existence of a right or duty in the other person to receive the communication. The constitutional right to one's reputation would be of little value if a person defamed were to be deprived of redress because the defamer honestly but unjustifiably believed that the person to whom the words were published had a right to receive the communication.
>
> I consider, therefore, that the only part of the defendant's submission which warrants serious consideration is the contention that a defendant is entitled to the defence of qualified privilege if he *honestly and reasonably believed* that the person to whom he published the words complained of had a duty or interest as to the matters referred to in the communication."

48. Notwithstanding the view of Henchy J. that this last formulation might be considered seriously, he nonetheless was not prepared to revisit the decisions in *Reilly* and in *Kirkwood Hackett*.

49. This aspect of the Irish law of qualified privilege is of relevance for two reasons. Firstly, it emphasises in admirably clear terms the need to ensure the protection of the reputation of the citizen. Secondly, the specific rule with regard to the honest and reasonable belief of the communicator that the recipient has a duty or an interest in receiving the information is of importance when one considers the proper construction of s. 18(2).

50. Given the rationale for the defence of qualified privilege as set out in *Horrocks v. Lowe* it is unsurprising that the cases tend to focus on communications between individuals, or at least relatively small groups of persons. As Charleton J. observed in *Leech v. Independent Newspapers* [2007] IEHC 223:-

> "The classic case, which is often repeated in many of the textbooks, is that one has visitors to one's house, or one's business, and one knows that one's employee has a dubious reputation and one comes to the conclusion, perhaps wrongly, that he or she may steal and so the person informs his or her guests that the employee is a thief. Now, as it turns out, the information you have as to a dubious reputation is incorrect, the employee is not a thief and he or she takes a defamation action against you in relation to what you have said. In those circumstances, because you have a duty in protecting those who come into your home, or into your business premises, and because your guests have an interest in relation to receiving that information with a view to their own protection, a situation of privilege arises."

51. As we shall see later in the judgment, Charleton J. then proceeded to consider the decision of the House of Lords in *Reynolds v Sunday Times Newspapers* [2002] 2 AC 127. However, the *ex tempore* judgment in *Leech* is a helpful illustration of the limits to the defence of qualifying privilege.

52. The limits are also illustrated by the judgment of this Court in *Kinsella v. Kenmare Resources plc.* That case involved the publication of a press release by the defendant company, found to be defamatory of the plaintiff. This Court found that the press release was not published on an occasion of qualified privilege, despite the fact that it set out alleged activities on the part of the plaintiff who was the chairman of the defendant company. The submission of *Kenmare,* and the Court's response, appears at para. 101 of the judgment:-

> "101 It was contended on behalf of Kenmare that the class of persons who had an interest in receiving the Press Release was 'primarily the business community, investors, potential investors and shareholders. But in practical terms, that is almost the domestic public at large'. However, the duty to publish under the traditional qualified privilege rubric is ordinarily confined to an individual or group of individuals who are likely to be directly affected by the information communicated, which in the present case was the shareholders, investors or employees of the company."

53. I will come shortly to the general propositions concerning the availability of qualified privilege in respect of publications to the world at large. However, before doing so it is instructive to apply to the facts of this case the response of the court to the submission of *Kenmare* recorded at para. 101 of the judgment. It cannot convincingly be said that every member of the public reading the Limerick Leader article would have been *"directly affected"* by the information about tax defaulters contained in the article.

54. The judgment in *Kinsella* goes on to refer to a number of authorities considered by the Court for the purpose of assessing the application of the defence of qualified privilege to publications to the world at large. The conclusions of the Court are to be found at paras. 106 and 107: -

> "106. It is clear from the aforementioned jurisprudence that a defence of qualified privilege is only available in respect of private communications and does not generally extend to mass media publications due to the fundamental requirement of reciprocal duty and interest.
>
> 107. The common law recognised that only in exceptional circumstances could publication to the world at large be protected by qualified privilege. Such a contention was advanced in *Reynolds v. Times Newspaper Ltd* [2001] 2 A.C. 127 based on the proposition that an incremental development of the common law was warranted by the creation of a new category of occasion that would be privileged on the subject matter alone - mainly political information. This argument was in turn closely based on the High Court of Australia decision in *Lange v. Australian Broadcasting Corporation* (1997)189 C.L.R. 520 where that court held that qualified privilege would exist for all publications of political information subject to the publisher proving reasonableness of conduct."

55. I have already mentioned that, in his judgment in *Leech*, Charleton J. (having set out the individual and private nature of the sort of occasion that ordinarily attracted qualified privilege) then proceeded to consider the judgments in *Reynolds. Reynolds* was also considered by Ó Caoimh J. in *Hunter v. Duckworth* (Unreported, High Court, 31st July 2003). In all of these judgments the court noted the aspects of the *Reynolds* defence which either encouraged or required the publisher to act responsibly in verifying the information which it was disseminating. In this appeal, it was accepted by counsel for Iconic Newspapers that s.26 of the 2009 Act *"aims to capture the Reynolds defence"*; p.17 of the DAR Transcript.

56. In *Hunter,* in *Leech,* and in *Kinsella* both this Court and the High Court have (to varying degrees) suggested that in the context of mass media publications the appropriate

standards to which the publisher is to be held are those set out in the judgments in *Reynolds.* Whether or not *Reynolds* constitutes a standalone defence developed initially by the common law (and now to some extent embodied in s.26 of the 2009 Act) or is instead a newly discovered aspect of the defence of qualified privilege is, happily, an issue that does not have to be addressed in this judgment. If it is the case that the *Reynolds* defence represented a version of qualified privilege which has survived the enactment of the 2009 Act by virtue of s.18(1), that does not avail Iconic Newspaper as they have not pleaded it. I also believe that it is not a defence which could in any event have been successfully pleaded by Iconic Newspapers given its failure to take any steps to verify the information, to seek any comment from the plaintiff, or to include in the article the gist of the plaintiff's side of the story; see the judgment of Charleton J. in *Leech* at pp. 2-3. If, on the other hand, the *Reynolds* defence was not an aspect of the law of qualified privilege in Ireland prior to the enactment of the Defamation Act in 2009, then there is no Irish authority supporting the application of the defence of qualified privilege to publications addressed to the world at large.

57. Some emphasis was placed by counsel for Iconic Newspapers on para. 107 of the judgment of this Court in *Kinsella,* and in particular to the reference to the *"exceptional circumstances"* in which publication to the world at large could be subject to a qualified privilege plea. It was submitted that the Court of Appeal did not identify what these exceptional circumstances would be, but that in principle qualified privilege could be pleaded notwithstanding the fact that the publication in issue was a general one.

58. I think this is to misunderstand what was said by the court in *Kinsella.* Plainly, this Court found that the defence was *"only available in respect of private communications…"* and that *"only in exceptional circumstances…"* could publication to the world at large be protected by the privilege. It is for the publisher, who raises the defence in the first place, to

show that the circumstances are so exceptional that the mutuality of interests or duties are to be found notwithstanding the fact that the recipient of the information is the public in its entirety. No effort was made in these proceedings to show that this case was an exceptional one. Instead, Iconic Newspapers relied completely on the proposition that the public as a whole had a societal interest in receiving information about tax defaulters, and that the newspaper had a corresponding and societal interest in transmitting this information.

59. It is difficult to see what is so exceptional about the tax affairs of an unknown Limerick businessman that members of the public have an individual interest in learning about them. There is, in fact, nothing exceptional about this situation. If the appellant is correct, it means that a privilege would attach to occasions where a publisher communicated honestly but incorrectly that an individual had been convicted of a serious criminal offence. During the course of the oral argument on the appeal, the Court asked the following question of counsel for the appellant:-

> *"Well, Can I ask you this, perhaps by way of example … I mean if the Limerick Leader or some other newspaper reports on a criminal case in the courts and publishes my name and address as? the person convicted of murder or some other heinous crime, I mean clearly the report is a matter of public interest and it may well be that an honest mistake was made because the accused had a very similar name and home address to mine. I have no remedy in those circumstances?...*
>
> *Counsel: No, as I said at the outset, that is unpalatable but that is we say … what the law says, for better or for worse."*

60. This logical but far-reaching concession illustrates vividly the perils of the construction of s.18(2) for which Iconic Newspapers contends. It argues that there is a public interest in identifying tax defaulters, as this will deter people from cheating on their taxes.

Equally, it would follow that there is a public interest in the identification of murderers, burglars, or fraudsters because of the public oblique that this would involve, as a consequent decrease in such crimes that publication would encourage**.** Once that belief is honest, even if profoundly mistaken and arising from the error on the part of the publisher itself, qualifying privilege is available as a defence.

61. If this is the law, we have moved a very considerable way from the concerns (which I respectfully share) set out by Henchy J. about the need to defend the reputation of the individual. I have already set out the relevant portion of the judgment of the Henchy J. in *Hynes O'Sullivan.* I will not do so again. However, it is worth remembering at this point the statement by Henchy J. that the constitutional right to a reputation *"would be of little value"* if a defamed individual could not sue because of an honest but unreasonable and mistaken belief on the part of the publisher as to the accuracy of the communication.

62. Approaching the construction of s.18(2) by reference to the authorities, therefore, I believe the correct analysis is as follows. The defence of qualified privilege was, prior to the 2009 Act, one which required a mutuality of duty or interest. This could include a social duty or interest. Inevitably, in practice this confined successful deployment of the defence of qualified privilege at common law in Ireland to situations involving individuals (or groups of individuals) rather than the public at large. The requirement at law was that there be an actual duty or an interest on the part of the recipient in obtaining the relevant information; it was not enough if the communicator believed both honestly and reasonably that the recipient had such duty or interest in being told the relevant information. From 2003 onwards, there was a receptiveness on the part of the courts in Ireland to the introduction as part of Irish common law of the Reynolds defence. Even if the Reynolds defence was part of Irish law, it may not have been *"properly characterised as species of qualified privilege"* : para. 41 of

the judgment of Collins J. in *Desmond v. The Irish Times* [2020] IEHC 95. Qualified privilege was, at most, only available in exceptional circumstances in cases of publication to the world at large.

63. Against that background, the impact of the 2009 Act is I believe clear. Section 15 of that Act abolished all existing defences to actions in defamation, unless such defences were preserved by the provisions of the Act itself. The defence of qualified privilege was maintained by s.18(1) of the 2009 Act. That subsection did not, however, expand the common law defence of qualified privilege.

64. Section 18(2) is stated to be *"without prejudice to generality of subsection (1)".* As counsel for Iconic Newspapers put it, in an important part of the reply on the appeal, *"Section 18(2) fine tunes and largely repeats the common law…"*; para. 51 of the DAR Transcript. Section 18(2) reverses the judgment of the Supreme Court in *Hynes O'Sullivan v. O'Driscoll,* in that it is now sufficient that a publisher *"believed upon reasonable grounds"* that the recipient with the information had a duty or interest to receive it. To that extent, counsel is absolutely correct in submitting that one particular aspect of the common law was varied by the enactment of s.18(2). In my view, the reversal of *Hynes O'Sullivan* represents the change to the preexisting law of qualified privilege effected by s.18(2). No part of section 18 (2) of the 2009 Act dilutes the requirement as to the need for mutuality of duty or interest as it was understood at common law. Indeed, the subsection repeats these requirements.

65. I should now consider the position if Iconic Newspapers are correct in their construction of s.18(2). It would mean that the essentially individual nature of qualified privilege has been completely reversed. It would mean that the observations of this Court in *Kinsella* at paras. 106 and 107 of the judgment have also been set at nought. More importantly, it would mean that qualified privilege would provide a full defence to any

publisher who honestly shares information with the public at large about, say, the commission of a serious criminal offence even if this information is incorrect. This scenario is not only *"unpalatable"*, to use the phrase of counsel for Iconic Newspapers; it would be arguably inconsistent with the constitutional entitlement to the protection on an individual's good name, as set out by Henchy J. in *Hynes O'Sullivan.*

66. Such a dramatic change to the law is something which, if intended by the legislature, one would have expected to see spelt out in the clearest of terms; see Murray J. in *Heather Hill Management v An Bord Pleanala [2022] IESC 43* .

67. Given the limited and confined scope that qualified privilege has had in our common law, I do not believe that the wording of the Act upon which Iconic Newspapers relies can possibly bear a meaning which would involve an enormous expansion in the scope of that defence, at the expense of the rights of the individual. My conclusion is that regard is supported by a construction of s.18(2) in the context of the Act as a whole.

68. There are two other provisions that should be taken into account in considering the case made by Iconic Newspapers. The first of these is s.18(3) which provides:-

> "(3) Without prejudice to the generality of subsection (1), it shall be a defence to a defamation action for the defendant to prove that the statement to which the action relates is—
>
> (a) a statement to which Part 1 of Schedule 1 applies,
>
> (b) contained in a report, copy, extract or summary referred to in that Part, or
>
> (c) contained in a determination referred to in that Part"

69. Schedule 1 of the 2009 Act deals with *"Statements having Qualified Privilege."*

70. Part I deals with a range of reports of proceedings such as, for example, proceedings *"in public of a house of any legislature… of any state other than the State", "proceedings in public of anybody duly appointed, in the State, on the authority of a Minister of the Government, the Government, the Oireachtas, either house of the Oireachtas or a court established by law in the State to conduct a public inquiry on a matter of public importance", "proceedings in public of any international conference to which the Government sends a representative or observer or at which Government of states (other than the State) are represented".* These are simply examples. However, in each case the report must be a *"fair and accurate one".* The report by the Limerick Leader of the Tax Defaulters List in Iris Oifigiúil was neither fair nor accurate.

71. In particular, counsel for Mr. Bird emphasised the following entry in Part I of Schedule 1 of the 2009 Act:-

> "12. A fair and accurate report or copy or summary of any notice or other document issued for the information of the public by or on behalf of any Department of State for which a Minister of the Government is responsible, local authority or the Commissioner of the Garda Síochána, or by or on behalf of a corresponding department, authority or officer in a Member State of the European Union."

72. It is submitted, with some force, that the publication in Iris Oifigiúil of the Tax Defaulters List is such a *"notice or other document…"* I accept that this is so. If this is correct, then , on the case made by Iconic Newspapers, there is a fundamental inconsistency between two provisions of the Act. As it happens, they are to be found cheek by jowl with each other. If Iconic Newspapers is correct in its submission as to the scope of s.18(2) then its misrepresentations of the Tax Defaulters List enjoys qualified privilege under subsection

(2), but it would not enjoy qualified privilege under subsection (3) in respect of the very same list because it has failed to report on the contents of that List in a fair or accurate way.

73. It is unlikely that the Oireachtas wished for such an extraordinary result.

74. The second relevant provision is section 26. I have referred to this earlier on a number of occasions. As Collins J. observed in *Desmond* the Reynolds defence *" has some similarity to, but also many significant differences from, the defence of fair and reasonable publication created by section 26 of the 2009 Act."* However, the novelty of section 26 and the similarities it bears to the Reynolds defence can permit it to be treated as in some way analogous to the defence set out by the House of Lords in *Reynolds.*

75. Section 26(1) provides:-

> "(1) It shall be a defence (to be known, and in this section referred to, as the "defence of fair and reasonable publication ") to a defamation action for the defendant to prove that—
>
> (a) the statement in respect of which the action was brought was published—
>
> (i) in good faith, and
>
> (ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,
>
> (b) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and
>
> (c) in all of the circumstances of the case, it was fair and reasonable to publish the statement."

76. In assessing fairness and reasonableness, subsection (2) sets out certain matters which may be taken into account. These include the extent to which the statement concerned refers to the performance of public functions, the seriousness of the allegations, the context and content, the extent to which the statement drew a distinction between suspicions, allegations and facts, the extent to which there were exceptional circumstances necessitating the publication of the statement on the date on which it was published, the adherence with the standards of the Press Council (if relevant), the extent to which the plaintiff's version of events was *"represented in the publication concerned and given the same or similar prominence as was given to the statement concerned",* the extent to which *"a reasonable attempt was made by the publisher to obtain and publish a response from [the plaintiff]",* and what steps were taken to verify the material concerning the plaintiff.

77. It will be seen immediately that, if any of the last three considerations were taken into account in this case, Iconic Newspapers would in all likelihood have failed to establish the defence under section 26.

78. If section 18(2) means what Iconic Newspapers says it means, then section 26 would be completely unnecessary. When asked about the interaction between s.18(2) and s.26 of the 2009 Act, counsel for Iconic Newspapers initially responded that s.26 *"is intended to apply, one would imagine, to the mass media style journalism"*; p.8 of the DAR Transcript. When counsel was reminded that the appellant also argued that s.18(2) applied to the mass media, he submitted that *"the mass media will publish different types of articles"*; p.9 of the DAR Transcript. Counsel then accepted that s.18(2) also captured investigative journalism and in depth research pieces. He was then asked:-

"Judge: Alright. Then if that's the case what's the point of section 26?

Counsel: One may wonder why the legislature designed it that way."

79. Unfortunately for Iconic Newspapers, its construction of s.18(2) renders s.26 entirely redundant and, I have already noted, is at loggerheads with the operation of one aspect of s.18(3). Even adopting an approach towards the construction of the 2009 Act which aims at internal consistency, s.18(2) does not bear the meaning contended for by the appellant. When one also takes into account the appropriately limited scope of the defence of qualified privilege at Irish common law, and the transformative expansion of the defence contended for by Iconic Newspapers, I have concluded that the proper construction of s.18(2) of the 2009 Act is that it modestly amends the law of qualified privilege by abolishing the rule in *Hynes O'Sullivan* and (for the purpose of a defence under that subsection) restates the need for mutuality of interest and duties. It does not have the effect contended for by the appellant. In particular, s.18(2) requires a defendant to show that the persons receiving the information were subject to such a duty or interest to do so that they were likely to be directly affected by the information communicated to them, as described by this Court in *Kinsella.* In addition, the defence of qualified privilege as provided for by s.18(2) can only be available in exceptional circumstances where there is publication to the world at large, and no such special circumstances were established in this case.

80. I would therefore dismiss this appeal on the qualified privilege issue.

Costs

81. As already noted, the jury awarded Mr. Bird €75,000. Counsel for Mr. Bird applied for a special certificate pursuant to s. 17(2) of the Courts Act, 1981 (as amended). That provision reads: -

> "(2) In any action commenced and determined in the High Court, being an action where the amount of damages recovered by the plaintiff exceeds €64,000 but does not exceed €75,000, the plaintiff shall not be entitled to recover more costs that he

> would have been entitled to recover if the proceedings had been commenced and determined in the Circuit Court, unless the judge hearing the action grants a special certificate, for reasons stated in the order, that, in the opinion of such a judge, it was reasonable in the interests of justice generally, owing to the exceptional nature of the proceedings or any question of law contained therein that the proceedings should have been commenced and determined in the High Court."

82. Two reasons were advanced on behalf of Mr. Bird as to why a special certificate should be granted. The first was that, had the award to Mr. Bird been one euro more, he would have been entitled to High Court costs. That in itself, it was said, constituted an exceptional factor justifying High Court costs. Related to this was a submission that an award of the jury was to be respected, and had a quality of *"near sanctity"*; p. 27 of the Transcript for Day 5.

83. The second reason advanced at the hearing was that the qualified privilege plea was one which constituted an attempt by Iconic Newspapers *"to introduce in this case a unique and novel principle of law …"*; para. 27 of the Transcript for Day 5. This was, counsel submitted, an exceptional question of law.

84. In response, counsel for Iconic Newspapers submitted that the section restricted the award of costs in circumstances where a plaintiff did not obtain damages of more than €75,000, and that this legislation should be respected. It was then submitted that the court had found that the award was *"spot on"*, and as the award was less than the sum that would entitle the plaintiff to High Court costs, Mr. Bird should be restricted costs at the Circuit Court scale. Finally, there was a two pronged submission on qualified privilege. Firstly, counsel argued that (as the qualified privilege plea had not been put to the jury) in fact the jury had not been required to consider *"complex and arguably exceptional matters…"*; p. 30 of the Transcript for Day 5. This submission, in itself less than convincing, was coupled

with an argument that the qualified privilege point could have been equally well-argued in the Circuit Court.

85. In his ruling, the trial judge agreed with this last submission. He found that his decision on the qualified privilege issue, delivered in an *ex tempore* judgment, was of no precedent value, was *"only an intermediate ruling by a trial judge in the High Court"* (para. 31 of the Transcript) and that the action was one which did not have *"too many difficult points in it…"*; p. 32 of the Transcript.

86. In his ruling, the trial judge did not engage with the primary submission of Mr. Bird, which is that the plaintiff had lost out on High Court costs by a whisker that this in itself is a factor to be considered on the application for High Court costs.

87. On the appeal, both parties relied upon the judgment of Irvine J. (as she then was) in *Savickis v Governor of Castlerea Prison (No. 2)* [2016] 3 IR 292. Neither party made submissions on the standard of review of the judgment of the High Court on costs. However, that standard is well established. The High Court judge is entitled to exercise a discretion, not to be interfered with on appeal unless (among other things) this court is satisfied that the High Court did not sufficiently take into account relevant factors in making its decision on the costs issue.

88. In *Savickis*, Irvine J. held (at para. 25):-

> "25. Further, the fact that s. 17(2) of the 1981 Act as substituted by s. 14 of the Courts Act, 1991 permits the trial judge to grant a 'special certificate' if the damages awarded fall between €31,743 and €38,092 and thereby allows the plaintiff who falls only marginally short of the Court's jurisdiction to argue in favour of High Court costs. It is only if a plaintiff's claim falls manifestly short of the High Court

jurisdiction, as occurred in the present case, that they will necessarily be penalised for not pursuing their claim on the lower court."

89. This passage of the judgment of this court acknowledges that, as must be the case, a plaintiff who secures an award *"only marginally short"* of the jurisdiction of the High Court is entitled for that reason alone to careful consideration of an application for an order for costs at the High Court level. In this case, the difference between the award secured by Mr. Bird and the award which would have given him High Court costs could not have been smaller. The High Court judge did not explain why he was refusing to award Mr. Bird High Court costs given that the plaintiff had fallen short of a High Court award by the narrowest of margins.

90. The judgment of Irvine J. in *Savickis* goes on (at para. 26): -

"26. The scheme provided for in s. 17 of the 1981 Act is also one which, in my view, seeks to curtail the potential abuse by litigants of the process of the court itself. It is destined to protect scarce resources. Litigants who have modest claims must be encouraged to pursue their claims in the appropriate jurisdiction. They cannot be given unlimited access to the superior courts which must be preserved for litigation of a different calibre and importance."

91. These observations touch on the second submission made on behalf of Mr. Bird to the trial judge. This argument was considered carefully and fully by the High Court judge, but in a way that understated the real difficulties involved in the raising of the qualified privilege issue by Iconic Newspapers. In initiating the proceedings in the High Court, it may not have been apparent to Mr. Bird or his legal advisors that the s. 18(2) defence would have been raised by Iconic Newspapers in the fashion which it was. However, the plea was introduced at a relatively early stage in the proceedings - with the delivery of the amended defence -

and from then on was a central part of the litigation. In my view, the trial judge understated the complexity and difficulty of the issue, and its exceptional nature. This may well be because, to the trial judge, this plea did not present the same difficulties as it has to me. Be that as it may, objectively the defence of qualified privilege which was at the centre of the defence of this action was a complex one, with potentially far-reaching consequences should it have succeeded. Section 17(2) expressly provides that the exceptional nature of any question of law can justify the grant of a special certificate. That does not suggest any disrespect to the Circuit Court, in which this action could have been taken. Instead, it recognises the phenomenon identified by Irvine J. in *Savickis*, which is that the exceptional nature of the legal point creates litigation of *"a different calibre and importance"* which should (at least in the first instance) be decided by the High Court.

92. Fundamentally, I do not think that the trial judge gave proper consideration to the exceptional question of law which, I have found, he correctly decided. Equally, I do not think that he gave appropriate consideration to the fact that the difference between the award by the jury to Mr. Bird and the figure which would have entitled him to High Court costs was gossamer thin. Each of these two factors should have carried more weight in the trial judge's exercise of discretion with regard to costs. In my view, a proper consideration of these matters leads to a conclusion that the successful plaintiff should be awarded costs on the High Court scale. I would therefore allow the appeal of Mr. Bird on this issue.

Conclusion

93. I would dismiss the appeal of Iconic Newspapers against the decision of the trial judge on qualified privilege. I would allow the appeal of Mr. Bird on the question of costs. As Mr. Bird has succeeded on both issues, my provisional view is that he is entitled to the costs of the appeal and cross-appeal. Should Iconic Newspapers wish to argue for a different order

as to costs, they should notify the Court of Appeal Office within 14 days of the date of this judgment and directions will then be given for submissions on the costs of the appeal.

94. Noonan and Binchy JJ. agree with this judgment and the orders which I propose.