APPROVED **[2022] IEHC 724**

THE HIGH COURT

2022 No. 6394 P

BETWEEN

ARTEM LOBOV

PLAINTIFF

AND

CONOR McGREGOR

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 23 December 2022

INTRODUCTION

1. This judgment is delivered in respect of an application to restrain the publication of allegedly defamatory statements. The application is made pursuant to Section 33 of the Defamation Act 2009. The plaintiff alleges that the defendant has, since 26 November 2022, published a series of defamatory tweets on the social media platform Twitter. The plaintiff objects, in particular, to his being described as a "*rat*". It is said, variously, that this means that the plaintiff is an informer; a person who has betrayed somebody; a person who reveals confidential information; and a person who double crosses.

2. The publication of the allegedly defamatory tweets takes place against a backdrop whereby the plaintiff and defendant are embroiled in a contractual dispute. The plaintiff alleges that the defendant has breached an oral agreement to pay him five per cent of the proceeds of the sale of the whiskey brand "*Proper 12*". The plaintiff issued specific performance proceedings on 22 November 2022: High Court 2022 No. 5882 P. I will refer to those proceedings as "***the contractual dispute proceedings***" to distinguish them from the within defamation proceedings.

SECTION 33 OF THE DEFAMATION ACT 2009

3. Section 33(1) of the Defamation Act 2009 provides as follows:

> "The High Court, or where a defamation action has been brought, the court in which it was brought, may, upon the application of the plaintiff, make an order prohibiting the publication or further publication of the statement in respect of which the application was made if in its opinion—
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> (a) the statement is defamatory, and
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> (b) the defendant has no defence to the action that is reasonably likely to succeed."

4. As appears, there are two conditions precedent to the statutory discretion to grant an injunction as follows.

5. First, the court must be of the opinion that the relevant statement is defamatory. In the case of an application for an interlocutory injunction, this requires a judge of the High Court to reach an opinion on a matter which is usually the sole preserve of a jury, namely the question of whether a statement is defamatory. This opinion also has to be reached on the basis of affidavit evidence alone.

6. There was some debate in the earlier case law as to the standard to be applied in reaching the requisite "*opinion*". The better view is that the judge must be

satisfied that the words complained of clearly bear a defamatory meaning, rather than merely being capable of bearing such a meaning.

7. The position is summarised as follows in Cox and McCullough, *Defamation Law and Practice* (Clarus Press, 2nd ed., 2022) at §12.57:

> "What this means is that if there is any realistic dispute on meaning, then the matter should be sent for trial and interlocutory relief not be granted. Once again, it is important to highlight the consistent judicial acceptance that difficult issues of fact (including meaning) simply cannot properly be resolved on the basis of affidavit evidence alone."

8. Secondly, the court must be of the opinion that the defendant has no defence to the action that is reasonably likely to succeed. The case law emphasises that it is not sufficient for a defendant merely to assert a defence, especially a plea of truth. Rather, the court must examine the evidence adduced in support of the plea of truth to assess whether that defence has any substance or prospect of success (*Beaumont Hospital Board v. O'Doherty* [2021] IEHC 469).

9. Finally, even where the two statutory preconditions have been met, the court retains a discretion as to whether to grant or refuse an interlocutory injunction. One of the principal factors to be considered in the exercise of this discretion is the constitutional right to freedom of expression. The courts have traditionally been reluctant to grant an interlocutory injunction, which would restrain free speech, on the basis of a truncated hearing, predicated on affidavit evidence alone. It is generally seen as preferable to await the outcome of the trial of the action.

10. The High Court (Allen J.) put the matter as follows in *Beaumont Hospital Board v. O'Doherty* [2021] IEHC 469 (at paragraph 58):

> "The jurisdiction invoked by the plaintiffs on this application is, as has been said, a delicate one. The court must be careful

> not to interfere with free speech or the free expression of opinions, *a fortiori* I think with responsible journalism and the freedom of the press. Orders of the type now sought must be made only in the clearest cases and any doubt resolved against the applicant. On the other hand, journalists, no less than citizens in general, are not entitled to wantonly or recklessly traduce reputations and the court will intervene if it can be shown that statements have been made, and are liable to be repeated, for which there is no reasonable basis."

PROCEDURAL HISTORY

11. The within proceedings were instituted by way of plenary summons on 20 December 2022. On the same day, counsel on behalf of the plaintiff applied *ex parte* for orders restraining the publication of the allegedly defamatory statements. This application was refused but the plaintiff was, instead, given leave to issue a motion returnable to 22 December 2022. The motion was heard by me, sitting as vacation judge, and judgment reserved overnight.

12. Whereas the plenary summons seeks damages under a number of different headings, including intimidation, conspiracy and breach of constitutional rights; the application for an interlocutory injunction was predicated on Section 33 of the Defamation Act 2009. No meaningful attempt was made to rely on the other causes of action pleaded. Certainly, the plaintiff did not attempt to establish that there is a "*strong case*" he is likely to succeed in these causes at the hearing of the action (*Lingam v. Health Service Executive* [2005] IESC 89).

13. The plaintiff has not yet delivered a statement of claim. As discussed below, this is a significant omission given that the tweets complained of are not, on their ordinary and natural meaning, defamatory. Had a statement of claim been delivered, it would have been open in principle to the plaintiff to plead facts extrinsic to the tweets which might establish a defamatory meaning. It is most

unsatisfactory that a plaintiff, who seeks to restrain publication on a summary basis, has not set out his case by delivering a statement of claim.

14. There is a further unsatisfactory aspect of the application. The plaintiff himself has not sworn an affidavit. The explanation for this is that the plaintiff is, seemingly, in Spain. This is not a good reason: the plaintiff first threatened to bring an application for an interlocutory injunction some four weeks ago. It should have been possible to arrange to have an affidavit sworn and notarised within this time.

15. The defendant had less than 48 hours' notice of the application. Counsel on his behalf indicated that his side had not had time to prepare and file an affidavit. Counsel did, however, draw attention to the pleadings and affidavits in the contractual dispute proceedings. Counsel also suggested that the court might deal with the application as an interim application, with the possibility of there being a subsequent hearing on an interlocutory application.

THE ALLEGED DEFAMATORY STATEMENTS

16. The principal complaint made in these proceedings concerns a tweet posted by the defendant on the social media platform Twitter. This tweet is dated 26 November 2022. The tweet is said to have consisted of an audio message wherein the defendant sings "*Artem is a ra-at nah nah nah nah hey, nah nah nah nah hey rat*". This is repeated three times.

17. The plaintiff's solicitor wrote to the defendant's solicitor on 28 November 2022. The letter calls upon the defendant to give an immediate and unconditional undertaking to take down this audio message, and an undertaking not to repeat the said post or use words of a similar effect.

18. The letter asserts that the allegation that the plaintiff is a rat means and can only be taken to mean that he is an informer; a person who has betrayed somebody; a person who reveals confidential information; and a person who double crosses.

19. Crucially, the letter does not reference any extrinsic facts which are said to affect the meaning of the tweet. It is not asserted that a reasonable reader of the tweet would be aware of the contractual dispute between the parties. It is not suggested, for example, that the tweet would be understood as meaning that the plaintiff had betrayed or double crossed the defendant by instituting legal proceedings in respect of an alleged oral agreement in September 2017.

20. The tweet of 26 November 2022 is the only allegedly defamatory statement pleaded in the plenary summons of 20 December 2022. However, in the affidavit grounding the application for an interlocutory injunction, the plaintiff's solicitor refers to a number of other tweets published between 26 November 2022 and 15 December 2022. The plaintiff's solicitor also complains in respect of a number of messages sent directly to the plaintiff on 24 November and 25 November 2022.

21. In a number of these tweets, the plaintiff is referred to as a "*rat*". In some instances, there is a pun on the plaintiff's first name: this is rendered as "*Rartem*" instead of "*Artem*". Another tweet reads as follows:

> "I've decided to write a book. I'm calling it 'coat tail riding rat cunt rest in piss'.

DISCUSSION AND DECISION

22. The first limb of the statutory test under Section 33 of the Defamation Act 2009 requires that the court form the opinion that the statement, which it is sought to restrain, is defamatory. The case law indicates that the court must be satisfied

that the statement is clearly defamatory, rather than merely capable of being regarded as defamatory by a jury at the trial of the action.

23. The only statement expressly identified in the pleadings is the tweet of 26 November 2022. This tweet consists of a voice recording of the defendant singing that the plaintiff is a rat.

24. I am not satisfied that this statement is clearly defamatory. A "*defamatory statement*" is defined under Section 2 of the Act as meaning a statement that tends to injure a person's reputation in the eyes of reasonable members of society. To say that a person is a "*rat*", without more, does not fulfil this definition. The meaning will depend on the context and circumstances of the publication. It is necessary, therefore, to consider the context in which the statement complained of had been published.

25. The starting point for the analysis must be that the statement was published on Twitter rather than a more conventional—and more serious—medium such as a newspaper or television. Useful guidance as to the approach to be taken to determining the meaning to be attributed to a post on social media is to be found in the judgment of the UK Supreme Court in *Stocker v. Stocker* [2019] UKSC 17, [2020] A.C. 593 (at paragraphs 41 to 43):

> "The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read.
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> In *Monroe v Hopkins* [2017] EWHC 433 (QB); [2017] 4 WLR 68, Warby J at para 35 said this about tweets posted on Twitter:
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> > 'The most significant lessons to be drawn from the authorities as applied to a case of this kind seem to be the rather obvious ones, that this is a

> conversational medium; so it would be wrong to engage in elaborate analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter.'
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> I agree with that, particularly the observation that it is wrong to engage in elaborate analysis of a tweet; it is likewise unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on."

26. The statement complained of in the present case appeared in the twitter feed of a world-famous MMA fighter. The target of the insult is also an MMA fighter, albeit now retired from competition. As counsel for the defendant described it, "*trash talking*" is part of that milieu.

27. The initial reference to the plaintiff as a "*rat*" was followed, over the course of the next two or three weeks by a series of other insults. The plaintiff is described, variously, as an "*uncooked sausage*"; *a* "*fanny*"; *a "little blouse*"; *a "fucking shit*"; a "*little jonny head*"; a "*fuckin jackass*"; a "*fucking rat*"; a "*coat tailing rat cunt*"; and a "*fuckin turn coat prick*".

28. This then is the context in which the complained of term, "*rat*", has been used. In order to decide whether the statement is defamatory, it is necessary for the court to form an opinion on what meaning the hypothetical reasonable reader of the tweets would likely attach to them. I am not satisfied that the reader would understand the use of the term "*rat*" to have the meanings sought to be attributed

to it by the plaintiff's solicitors in their letter of complaint. The solicitors contend that the tweet of 26 November 2022 means that the plaintiff is an informer; a person who has betrayed somebody; a person who reveals confidential information; and a person who double crosses. With respect, this involves applying an overly literal interpretation to the term "*rat*", based on its extended dictionary meaning, divorced entirely from the context and circumstances of the publication. It is far more likely that the hypothetical reasonable reader would view the tweets as part of a rant by a "*trash talking*" MMA fighter. As appears, the term "*rat*" is merely one of a series of pejorative terms applied to the plaintiff. Indeed, it is not necessarily even the most insulting.

29. In some cases, the natural and ordinary meaning of a statement will be informed by facts which might reasonably be expected to be known to a hypothetical reasonable reader. It might, for example, be contended that the reader would have knowledge of the facts in a newspaper article which is hyperlinked in the offending tweet. Alternatively, it might be contended that some facts are so notorious that knowledge of same can be imputed to all readers of the tweet.

30. It should be emphasised that this is not the type of case which the plaintiff makes (at least not to date). Rather, the case as presaged in the solicitors' letter prior to proceedings; as set out in the plenary summons and the notice of motion; and as argued before me yesterday, is that the description of the plaintiff as a "*rat"* is defamatory in and of itself and that it bears all of the (dictionary) meanings contended for. I was not asked, for example, to impute any knowledge of the contractual dispute to the hypothetical reasonable reader of the tweets. It has not been suggested that the reader should be taken as understanding that the term

"*rat*" refers to the conduct of the plaintiff in pursuing a claim for breach of contract against the defendant.

31. There would have to be some context before the use of the description "*rat*" would have an injurious effect on reputation. Used in isolation, the word is no more than a term of vulgar abuse. More is required, however, in order to succeed in a defamation action. Mere vulgar abuse is not enough. There must be something in the words that communicates an undermining of the credit or reputation of a prospective plaintiff (*Talbot v. Hermitage Golf Club* [2014] IESC 57 per Charleton J.).

32. In summary: the plaintiff has not persuaded me that any of the tweets complained of are clearly defamatory. The hypothetical reasonable reader would not understand them to have the meanings contended for by the plaintiff. It is more likely that they would be regarded as no more than a rant, a tirade of vulgar abuse by an MMA fighter with a reputation for "*trash talking*". Certainly, there is no reasonable basis for apprehending that the tweets would injure the plaintiff's reputation in the eyes of reasonable members of society. No reasonable member of society would attach any significance to these tweets.

ALLEGED BREACH OF TWITTER'S RULES

33. For completeness, it should be recorded that the plaintiff seeks to place some reliance on an alleged breach of Twitter's own rules. In particular, it is said that the tweets contain "*abusive content*" for the purposes of the rules.

34. An alleged breach of Twitter's rules cannot provide a basis for this court to grant an injunction in proceedings to which Twitter is not a party.

CONCLUSION

35. The plaintiff has failed to meet the first limb of the statutory test under Section 33 of the Defamation Act 2009. Accordingly, the application for orders restraining publication is refused.

36. As to costs, my provisional view is that the defendant, having been entirely successful in resisting the application, is entitled to recover his costs from the plaintiff. I will hear the parties on the question of costs on 11 January 2023 at 10.30 am. I will also give directions on that date as to the exchange of pleadings in the defamation action.

Appearances

Andrew Walker, SC and Liam Bell for the plaintiff instructed by Dermot McNamara & Company
Remy Farrell, SC and Shelley Horan for the defendant instructed by Michael J. Staines & Company

Approved