[2020] IEHC 501

THE HIGH COURT

[2014 No. 6748 P]

BETWEEN

FELIX GROVIT

PLAINTIFF

– AND –

HENDRIK JAN JANSEN

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 22 September 2020

Introduction

1. This is an application by the defendant seeking to strike out the plaintiff's claim on a number of grounds. The plaintiff died on 26 August 2018 and the proceedings are being continued by an administrator *ad litem*. The defendant, a Dutch national, is currently pursuing the plaintiff (who was born in India, and later became resident and domiciled in the UK) and his son, Stefan Grovit, in legal proceedings in the Netherlands. The defendant is seeking to enforce a substantial money judgment he obtained against a corporate entity, Carigna, personally against the plaintiff and his son (the "Dutch debt proceedings").

2. The within proceedings brought by the plaintiff are in respect of alleged defamation. They also include an application for a negative declaration. The Irish proceedings have had the effect of staying the Dutch debt proceedings since 2016 on the basis that the Irish courts were first seised for the purpose of jurisdiction with the claim for a negative declaration. The defendant now seeks to strike out the plaintiff's claim on the basis that the Irish courts do not have jurisdiction, or, in the alternative, if they have jurisdiction that the proceedings should be struck out on various grounds, including that the words in question benefit from privilege and/or that they were not capable of bearing a defamatory meaning, that the matter is statute barred and that the proceedings are an abuse of process.

3. For the reasons set out below, I have concluded that the Irish courts have no jurisdiction in relation to the negative declaration; that in respect of certain words alleged to be defamatory, they should be struck out on the basis of my jurisdiction under s. 14 of the Defamation Act i.e. that they are not capable of bearing a defamatory meaning, and in respect of other words alleged to be defamatory, that a preliminary issue should be heard as to whether they are statute barred.

Background and Chronology

4. The background to these proceedings is complex as it involves a number of proceedings issued in various jurisdictions. Those proceedings are identified below.

Proceedings by the defendant against Carigna

5. The defendant, a hotelier, operated a hotel in Amsterdam and leased that building from a company called Carigna Investments NV, t/a Chequepoint Netherlands (part of the Chequepoint group). The plaintiff was the founder of this group of companies but was not

a director or shareholder of Carigna. As part of the lease agreement, Carigna had granted the defendant a pre-emption right, so if the building was ever offered for sale, he had first refusal. However, Carigna breached that pre-emption right and sold the building to a third party without first offering it to the defendant in February 1999.

6. The defendant obtained judgment against Carigna on 12 May 2010. It was appealed, was upheld and became final on 13 May 2013. That judgment has not been satisfied. The underlying figure owed by Carigna on foot of that judgment, including interest, is in excess of €15 million.

Article 186 Procedure

7. Following the unsatisfied judgment against Carigna, the defendant decided to bring proceedings against the plaintiff and his son, Stefan Grovit, on the basis that the plaintiff was a shadow director of Carigna and so responsible for the debt. On 16 August 2013, Bos & Partners wrote to the lawyers for the plaintiff and his son notifying them of their intention to make an application to court to summon witnesses, including the plaintiff and his son, to appear and be examined.

8. The application under Article 186 (1) was initiated on 11 October 2013. Article 186 (1) of the Dutch procedural code allows a prospective plaintiff who intends to initiate civil proceedings to ask for the examination of witnesses in advance of the action to decide whether or not to bring proceedings. The defendant sought to depose a number of people in relation to the level of control that the plaintiff exercised over the Chequepoint Group and Carigna.

9. The Order under Article 186(1) was obtained on 20 March 2014. Amsterdam District Court granted the defendant leave to summon the plaintiff and his son to give evidence.

10. Various attempts were made, through email to try to secure the voluntary co-operation of the plaintiff to comply with the Court Order. On 22 April 2014 the Amsterdam court scheduled witnesses to be heard on 19 August 2014 including the plaintiff and his son. On 2 June 2014 the Court of Amsterdam made an Order, confirmed by telephone, that the plaintiff should be summoned by advertisement in a newspaper, De Telegraaf, in the Netherlands on 14 June 2014 and in the Times of London on 19 June 2014 ("the Notice") and the London Gazette, as it was the belief of the defendant that the plaintiff was domiciled in London. There is no written order of the Amsterdam court to this effect. The Notice is set out in full below but in summary, it indicated that Mr. Grovit and his son Stefan Grovit were being summonsed as witnesses at the request of the defendant to a preliminary hearing regarding facts summarised in the petition.

Dutch Debt Proceedings

11. In December 2014 proceedings were issued in the Netherlands entitled *Hendrik Jan Jansen v. Felix Fareed Ismail Grovit & Stefan Carim Ismail Grovit* case number C/13/583768 (the "Dutch debt proceedings") seeking to establish the level of control the

plaintiff and his son exercised over the company Carigna and ultimately to enforce the Carigna judgment against them personally. On 7 September 2016 a stay was granted in those proceedings on the basis that the Irish courts were first seised in the matter having regard to the Irish proceedings described below. In that decision the Court found that as proceedings involving the same parties and the same cause of action had been issued in the jurisdiction of another Member State (i.e. Ireland) the Dutch courts had to stay the proceedings before them. If the Irish Courts were to find that they had jurisdiction the Dutch Courts would decline jurisdiction, otherwise the Dutch Court would then proceed with the application.

Dutch defamation proceedings

12. On 17 May 2013, an article was published in a Dutch financial newspaper, Financielle Dagblad, about the proceedings against Carigna and a short extract from that article was re-published on the website of Bos & Partners, lawyers for the defendant ("the Website statement"). This article became the subject of defamation proceedings in the Netherlands. The plaintiff sought interlocutory relief on the basis that the Website statement was defamatory of him, and he sought an order restraining further publication and an order for its removal from the website of Bos & Partners.

13. Judgement in interlocutory proceedings was given by the Rotterdam District Court on 27 June 2013 in *Grovit v. Hendrik Jan Bos & Bos & Partners Advocaten B.V*. case number C/10/425941/KG ZA 13 512. That court rejected the claims and ordered the plaintiff to pay the costs of proceedings. This was appealed. The Court of Appeal, Civil Law Division, in the Hague gave its judgment on 14 April 2015. It upheld the judgment of Rotterdam District Court and made an order for costs against the plaintiff.

Irish proceedings

14. Prior to the Dutch debt proceedings issuing, a plenary summons was issued in this jurisdiction on 1 August 2014. This plenary summons was later amended. The reliefs sought in the plenary summons were as follows:

    "I. Damages for defamation and unjustified threats to obtain an unfair advantage.

    II. A Declaration that no sums are due to the Defendant by the Plaintiff.

    III. An injunction restraining the Defendant, whether by their servants or agents or otherwise howsoever, from further publishing or causing to be published the same or any statement similar to that published in the Times on the 19th June 2014.

    IV. A correction order under section 30 of the Defamation Act.

    V. An offer to make amends under section 22 of the Defamation Act 2009 by a person who published the statement in respect of which this action is brought and has been accepted.

VI. Such further or other order as this Honourable Court deems fit;

VII. Costs."

15. The Statement of Claim was delivered on 20 November 2014. The thrust of the pleaded case is that both the Notice and the Website statement referred to above in the context of the Dutch defamation proceedings are defamatory of the plaintiff.

16. By Order of O'Malley J. dated 8 December 2014 the plaintiff obtained judgment in default of appearance against the defendant, with an assessment of damages and costs to be made by a judge at a later date. This assessment of damages was carried out by Kearns P. at a hearing in Kilkenny on 9 July 2015 and by Order of 9 July 2015, the plaintiff was authorised to publish a correction notice pursuant to s. 30 of the Defamation Act 2009 and obtained his costs against the defendant. The correction notice was in the following terms:

> *"TAKE NOTICE that on 9th of July 2015, the High Court of Ireland, in proceedings entitled FELIX GROVIT Plaintiff v HENDRIK JAN JANSEN Defendant Record No. 2014/6748P made a correction Order pursuant to s. 30 of the Defamation Act 2009 authorising the Plaintiff in the aforementioned proceedings to publish, in an Irish newspaper, this notice for the purposes of correcting a notice published in the Times newspaper on 19th June 2014 by confirming that, in these proceedings, the Defendant has not contested assertions made by the Plaintiff that the Plaintiff is not a director or shareholder and has not otherwise been involved in the running of a company known as Carigna Investments N.V., nor has the Defendant contested the Plaintiff's assertion that the Plaintiff is not liable for any debt or obligation of the said company or personally indebted to the Defendant".*

Kearns P. made no order as to damages. The correction notice was never published.

17. The defendant brought an application to set aside the orders of O'Malley J. and Kearns P. A hearing took place before Binchy J. who set aside both Orders (*Grovit v. Jan Jansen* [2018] IEHC 22). He did so on terms, including that the plaintiff be entitled to amend the endorsement of claim on the plenary summons to plead the appropriate jurisdiction for the Courts in compliance with O. 4 r 1A of the RSC and that the defendant deliver a defence within a certain time period, that the defendant not be entitled in that defence to enter any plea in relation to the failure to serve a notice of summons, and that the plaintiff swear an affidavit of verification for matters of fact within a certain time period.

18. The notice of motion currently before the Court seeking a strike out of the proceedings was issued on 11 July 2018.

19. On 26 August 2018, the plaintiff died. On 29 June 2020 Allen J. granted an application for a Mr Sowemimo to be appointed administrator *ad litem* and to be substituted as plaintiff.

20. This hearing to strike out the plaintiff's claim came on before this Court on 28, 29, and 30 July 2020. At the hearing of this motion, which was heard over three days both remotely

and in person, on the last day of the motion at 3.45pm counsel for the plaintiff sought to explain the failure on the part of the plaintiff to publish the correction notice. On it being indicated that any explanation could not be accepted since it was not on affidavit, an application was made for liberty to file an affidavit explaining why the correction notice had not been published. Strenuous objection was taken to that proposal by counsel for the defendant on the basis that it would lead to a very real risk of procedural unfairness, given that the plaintiff himself had died and therefore someone else would have to give evidence as to why the plaintiff did not do something in circumstances where the defendant has already moved its application and given that the application had proceeded on the basis that the correction order had not been published without explanation as to the reason for same. The defendant also identified its concern that such an affidavit could be used as a Trojan horse to admit evidence regarding other matters.

21. Binchy J., in his judgment in the matter referred to above, had identified as one factor in his decision to set aside the order of Kearns P. that the plaintiff had not seen fit to act on this decision in publishing the correction notice. Despite an adverse inference having been drawn from the decision not to publish the Order, no action had been taken to publish the notice or to file an affidavit explaining the circumstances in which it was not published. In the circumstances, I ruled that as the plaintiff had already had many opportunities to file further affidavits and given that the hearing was effectively at an end, I would not give liberty to the plaintiff to file any further affidavits at this point.

Summary of the defendant's arguments
Jurisdiction

22. The defendant's first line of argument is that the Irish Courts do not have jurisdiction to hear and determine the plaintiff's claim. At the time these proceedings issued, the Brussels I Regulation, rather than its successor Brussels 1 Regulation (Recast), was the operative regulation. The plenary summons issued on 1 August 2014 included a handwritten endorsement citing Article 5(1) of the Brussels I Regulation as the basis for jurisdiction. Article 5(1) concerns matters of contract and was therefore incorrect. During the set-aside application before Binchy J. it was acknowledged that this was an error and should have been Article 5(3) of the Brussels 1 Regulation which concerns matters of tort. Binchy J. allowed the plaintiff to amend the endorsement on the plenary summons to plead the appropriate jurisdiction. However, when the amended plenary summons was served on 8 March 2018 it cited Articles 7(2) and 35 of the Brussels 1 Regulation (Recast) as the basis for jurisdiction.

23. The defendant submits that the Brussels I Regulation (Recast) cannot be relied upon to found jurisdiction as this Regulation only applies to legal proceedings instituted after it came into force (10 January 2015). The plaintiff cannot amend the plenary summons as he has not made any application to do so. The defendant relied upon the case of *Castlelyons Enterprises v. v Eukor Car Carriers Inc* [2016] IEHC 537 where the endorsement of the plenary summons did not identify the relevant Article of the Brussels I Regulation (Recast) being relied upon and Noonan J. held that failure was fatal. Given the strict approach which must be taken with the rules of special jurisdiction, the

defendant argues that the plaintiff has not identified any jurisdictional basis in which the Court could assume jurisdiction, and therefore the Court should decline jurisdiction.

24. Without prejudice to this argument, the defendant argues that even if the endorsement is amended, the requirement that a harmful event be established under Article 5(3) of the Regulation has not been met. There is no evidence exhibited before the Court of any connection between the Dutch defamation proceedings and this jurisdiction. There is no evidence that that the relevant acts complained of, or that the alleged damage occurred in Ireland. The defendant argues that the plaintiff has failed to discharge the burden of establishing each element of his claim coming within the rules of special jurisdiction.

Negative Declaration

25. In respect of the negative declaration, whereby the plaintiff seeks a declaration that no sums are due to the defendant by the plaintiff, the defendant submits that the Court does not have jurisdiction in respect of this negative declaration. It contended that although permissible, negative declarations have the potential for abuse and the Court must tread cautiously. The defendant also submits that as there are no proper particulars grounding this claim, and as the pleadings do not identify a jurisdictional basis for the claim, the Court could never have jurisdiction over such a claim or the jurisdiction to grant such an order. The defendant invokes the obligation on a party under the RSC to plead particulars to ground a claim and relied upon *Mitchell v. Arthurs* (1883) 17 ILTR 102 to argue that where the obligation to plead sufficient particulars of the civil wrong alleged to have occurred is not complied with, a statement of claim can be struck out.

The Website statement

26. The defendant notes that it is clear from the judgments from the Rotterdam District Court and the Hague Appeal Court that the Dutch courts concluded that the Website statement could not bear the defamatory meaning alleged by the plaintiff. For the plaintiff to obtain the relief he seeks he must establish that the Website statement was defamatory of him, however the Dutch courts have already ruled on this point and it is therefore an abuse of process to litigate this issue again.

27. The defendant further contends that the plaintiff's claim for defamation from the Website statement is statute barred by s. 38 of the Defamation Act 2009 and there has been no application made by the plaintiff to extend the limitation period. There is no evidence before the court that any prejudice that the plaintiff would suffer would "*significantly outweigh*" the prejudice that the defendant would suffer if the direction were given. By contrast, the defendant has averred to the very real prejudice he is suffering by reason of the continued existence of these proceedings, in the form of his Dutch proceedings being stayed.

The Times Notice

28. The defendant submits that these proceedings are an abuse of process which are designed to delay, hinder and frustrate the defendant's attempt to secure judgment against the plaintiff and his son in the Dutch proceedings. Regarding the Notice, the defendant submits that it is difficult to see how such a statement summonsing the plaintiff to appear before the Amsterdam Court on 19 August 2014 "*regarding the facts as outlined in the petition*" could be capable of bearing a defamatory meaning. Without prejudice to that argument, he argues that the Notice was a statement written on the occasion of qualified, if not absolute privilege and therefore the plaintiff's claim on the issue is bound to fail. While the plaintiff pleads that this Notice was published with malice, no evidence or particulars of malice have been pleaded or put on affidavit, and this is fatal to the plaintiff's claim.

29. In summary the defendant submits that these proceedings have been brought for an improper purpose, that is to operate as a block on the prosecution of the defendant's Dutch debt proceedings to hold the plaintiff and his son personally liable for the debt he is owed by Carigna. The defendant considers the proceedings to be vexatious.

Summary of the plaintiff's arguments

30. The plaintiff relies on Article 5(3) and Article 31 of the Brussels I Regulation as the basis upon which the Irish courts should assume jurisdiction. The plaintiff conceded that the amended plenary summons is incorrectly endorsed as the Brussels I (Recast) Regulation was invoked due to inadvertence but says that the Court has a jurisdiction to amend the amended plenary summons under Order 124 of the RSC, relying on *Abama v. Gama* [2015] IECA 179 where the Court of Appeal permitted a plenary summons issued with no endorsement to be amended.

31. Assuming he can amend the Summons, the plaintiff submits that to demonstrate he comes within Article 5(3) of the Brussels I Regulation he can prove publication. During the oral hearing, the plaintiff brought the Court's attention to a report by a Mr Callagher put before Kearns P. that showed that (a) the Times of London (containing the allegedly defamatory Notice) was published in Ireland, and (b) that the Website statement was online and available in Ireland. He relied on the presumption under Irish law that a defamatory statement is harmful.

The Negative Declaration

32. The plaintiff opened a line of jurisprudence to the effect that the Court can make an Order for a negative declaration that no sums are due to the defendant by the plaintiff, including *In the Matter for Mount Carmel Medical Group (South Dublin) Ltd* [2015] 1 I.R. 671, *Gowshank Dedicated Ltd v. Life Receivables Ireland Ltd* [2009] IESC 7 and *Camilla Cotton Oil Company v. Granadex* [1975] 1 LLR 470. The plaintiff asserts that the Court has authority to make a negative jurisdiction, provided it serves a useful purpose. In this case, it would stop the defendant looking for a basis upon which to assert the plaintiff owes him a sum of money. No evidence has been put forward by the defendant to show that the plaintiff is personally indebted to the defendant. The plaintiff points to the correction notice ordered by Kearns P. which he says is in essence a declaration that as of

July 2015 that there was no contest whatsoever that the plaintiff was not liable for any debt.

Defamation

33. Regarding the defamation proceedings, the plaintiff points out that Kearns P. in his judgment found that the plaintiff had been defamed and ordered a correction notice under s. 30 of the Defamation Act 2009. The plaintiff indicated that it will still again seek a correction notice at the defamation hearing. As the plaintiff is dead, he cannot recover damages but can still obtain ancillary relief such as the correction Order. While the defendant argues that these proceedings are *res judicata* and/or an abuse of process as the Dutch Courts dismissed the defamation proceedings, the plaintiff submits that there has been no application by the plaintiff that the Dutch Court was seised of the issues regarding the Website statement. The Dutch proceedings are referred to as "interlocutory proceedings", and the plaintiff argues that (a) they are not final in nature and (b) for the Court to find that these proceedings mean the Irish proceedings are *res judicata* the Court would need guidance from a Dutch lawyer.

34. The plaintiff disputes that the Notice was properly procured and therefore does not accept that this Notice benefits from absolute privilege. The plaintiff argues it is unsafe for this Court to make any final determination on the Notice as the plaintiff has never seen the Order on which authority the notice was made. If the Notice was made under qualified privilege, then the plaintiff argues that this privilege was lost by malice. As to the question of whether the Notice is capable of having a defamatory meaning, the plaintiff opens the case of *Travers v. Sunday Newspapers Ltd* [2012] IEHC 185 in which Hedigan J. held that meaning should be left to the jury. The plaintiff also relied on Kearns P.'s finding that the statement was defamatory.

35. The plaintiff denies that the claim for defamation in respect of the Website statement is statute barred but if it is, says the most the defendant seeks in this respect is an Order for this to be determined as a preliminary issue, at which point it will seek to extend time.

Jurisdiction: Endorsement on the Summons

36. There exists an unfortunate history in relation to the endorsement on the summons in respect of the Brussels Regulation. The Summons originally served referred to Article 5(1) of the Brussels Regulation, which is concerned with contractual claims and could not establish jurisdiction in this case. Liberty was given to amend that endorsement by Binchy J. in his judgment of 17 January 2018 but unfortunately the amendment invoked the wrong Regulation, being the Brussels (Recast) Regulation 2015, rather than the Brussels Regulation I which continues to apply to matters where the facts arose prior to the coming into effect of the Brussels (Recast) Regulation on 2015. In the Defence it was pleaded that, as the proceedings were issued on 6 August 2014, the Brussels Recast Regulation has no application and the Court has no jurisdiction. In the Reply to the Defence, it was pleaded that the plaintiff confirmed that it relies on the provisions of Brussels Regulation I.

37. Despite this, no application was brought to amend the Summons. An application was only made in oral submission at the hearing of the motion to amend the Summons, and no motion papers have been filed. The defendant relied on *Spielberg*, referred to above in the decision in *Castlelyons*, where Finlay Geoghegan J. refused to permit the plaintiff to rely upon a jurisdictional basis not identified at the time the proceedings were issued. Counsel for the defendant accepted that there was a jurisdiction to permit amendment of the Plenary Summons to correct the defective endorsement on the Summons (see *Abama*, which was heavily relied upon by the plaintiff in this regard). However, he submitted no amendment should be permitted here where the plaintiff had already been given an opportunity to mend its hand when Binchy J. gave him liberty to amend but failed to do so.

38. It is surprising that given the previous history of the endorsement, the importance of the correct endorsement and the fact that the Defence (correctly) took issue with the endorsement, no attempt was made to amend the Summons. The Reply had identified the intention to rely on the Brussels Regulation I. An application to amend should have been brought.

39. However, given that from the date the Reply was filed, the Defendant was aware of the plaintiff's intention to rely upon the Brussels Regulation I, I will treat that as a special circumstance justifying the exercise of my discretion under Order 124, rule 1. I will therefore permit an amendment to the Summons to plead the Brussels Regulation I. I should add that given the importance of the correct indorsement, as the basis of the entitlement of the Central Office to issue the proceedings and the explanation to a defendant as to why they are being sued in a jurisdiction different to where they are domiciled, absent the clear intention in the Reply to rely upon the Brussels Regulation, I would not have considered it appropriate to permit amendment.

Jurisdiction: Defamation

40. The guiding principle of jurisdiction as set out in Article 2 of the Brussels I Regulation is that persons domiciled in a Member State of the European Union are, regardless of their nationality, to be sued in the courts of that Member State. Article 3 clarifies the scope of the general rule laid down in Article 2 and provides that a defendant domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Articles 5 to 21 of Brussels I i.e. the rules of special jurisdiction. As the rules of special jurisdiction amount to a derogation from the general rule of jurisdiction based on domicile, the CJEU has held that they should be interpreted restrictively and cannot be given an interpretation going beyond the cases expressly envisaged by the Regulation – see for example Case C-98/06 *Freeport* [2007] ECR I-8319. The Irish courts have recognised this. In *Handbridge Ltd. v. British Aerospace* [1993] 3 I.R. 342 Finlay C.J. held that the onus is on the plaintiff seeking to have his claim tried in the jurisdiction of a Member State other than that in which the defendant is domiciled to establish that such claim unequivocally comes within the relevant exception (see also *Castlelyons*).

41. The plaintiff has sought to invoke Article 5(3) of the Brussels Regulation dealing with the rule of jurisdiction applicable to matters relating to tort, delict or quasi-delict. It provides

that a defendant may be sued "*in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*". As per the confirmation in *Castlelyons*, a plaintiff is obliged to establish each jurisdiction separately i.e. for each distinct claim contained in the pleadings the plaintiff must demonstrate the court has jurisdiction.

42. What is striking about this case is that there is not, on the pleadings, any factual basis linking the claim with Ireland. At the time the proceedings were instituted, the plaintiff's domicile was the United Kingdom. The Website statement alleged to be defamatory was in Dutch, posted on the website of the Dutch lawyers acting for the defendant who were based in Amsterdam. The Notice alleged to be defamatory was published in the Times of London and the Gazette as well as a Dutch newspaper but not in any Irish newspaper. Although it is impossible to understand from the pleadings what the negative declaration relates to (as discussed further below), an implication may be drawn that it relates to the Dutch debt proceedings being proceedings over monies owing by Carigna, a company registered in Curacao in the Dutch Antilles, in respect of a building in Amsterdam where the plaintiff in those proceedings (Mr. Jan Jansen) is a Dutch citizen and the defendant in those proceedings, being Mr. Grovit was domiciled prior to his death in the UK. None of this discloses any connection with Ireland.

43. However, despite this, I have reluctantly concluded that the conditions for establishing jurisdiction in respect of the Notice and the Website statement have been met given the case law of the CJEU in this respect.

Publication

44. The first hurdle a party must surmount when seeking to establish jurisdiction in a defamation case under Article 5(3) is that the words have been published in the Member State where proceedings have been issued. In respect of the Notice, Counsel for the defendant accepts that there is sufficient evidence before the court to prove publication of the Times in Ireland at the date of the publication of the Notice, being 19 June 2014.

45. The question of publication in respect of the Website statement is more difficult. It is not disputed that the Notice was on the website of the Dutch law firm and therefore accessible from any country in the world. There is no evidence of any person in Ireland accessing that website or downloading the article. Nonetheless, in my view the decision of the Court of Justice in Case C-509/09 *Martinez* [2011] ECR I-10269 makes it quite clear that no such evidence is required. *Martinez* concerned a former boyfriend of Kylie Minogue, a French actor named Olivier Martinez. The Sunday Mirror published an article concerning a resumption of their relationship and a meeting. He sued in France. The Mirror sought to challenge the jurisdiction of the French courts. In the course of its judgment, the CJEU described the effect of placing material on the internet, noting that the placing online of content on a website is intended to ensure the ubiquity of that content and that "*that content may be consulted instantly by an unlimited number of Internet users throughout the world*" (paragraph 45) and that the "*scope of the distribution of content placed online is in principle universal*" and "i*t is not always*

possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular member state or, therefore, to assess the damage caused exclusively within that member state" (paragraph 46).

46. At paragraph 51, the Court referred back to Case C-68/93 *Shevill and Others* [1995] ECR I-415, noting that:

> "*instead of an action for liability in respect of all of the damage, the criterion of the place where the damage occurred, derived from Shevill and Others, confers jurisdiction on courts in each Member State in the territory of which content placed online is or has been accessible.*"

The Court had summarised the questions in respect of Article 5(3) as asking how the expression "*the place where the harmful event occurred or may occur*" is to be interpreted in the case of an alleged infringement of personality rights by means of content placed online on an Internet website. It answered that question by noting that the person who alleges rights have been infringed may, instead of an action for liability in respect of all the damage caused, "*bring his action before the courts of each member state in the territory in which content placed online is or has been accessible*".

47. What is notable about the response to that question is that there is no requirement to prove that the material has been accessed or downloaded in the Member State in which the action has been brought. The wording of paragraph 51 of *Martinez* is unambiguous: Article 5(3) confers jurisdiction on courts in each Member State where content placed online *is or has been accessible* (my emphasis).

48. The defendant relies on two Irish cases to support the proposition that evidence must be given that the material is not just accessible but has actually been accessed. However, properly construed, I do not believe that either *Coleman v. MGN Limited* [2012] 2 I.L.R.M. 81 nor *CSI Manufacturing Limited v. Dun and Bradstreet* [2013] IEHC 547 are authority for the proposition that it must be proved that internet material has been accessed in the Member State where proceedings are brought to ground jurisdiction under Article 5(3).

49. In *CSI, Martinez* was considered but because the website in question, generated by a credit rating agency, was available only to subscribers, Kearns P. quite logically held that it must be proven that it had been accessed by a subscriber since accessibility could not be presumed where payment was required to access the site.

50. In *Coleman*, which concerned an allegedly defamatory newspaper article and photograph published in the Daily Mirror, a UK publication, the plaintiff only identified that the newspaper was accessible on-line when the matter came back before the Supreme Court having been adjourned so evidence of sales of the Mirror in Ireland could be produced. No such evidence was produced but when the matter was back before the court, counsel sought to rely upon the presumed publication on the internet of the relevant editions of the Mirror without any evidence of such publication or access from Ireland. The Court held it had no jurisdiction on the following basis:

> *"First there is no pleading that the publication alleged of the relevant articles is by internet publication of the relevant newspaper. Nor could such a pleading be inferred from the words of the Statement of Claim. Secondly, there is a need for evidence of publication to establish the tort of defamation. There is no evidence before the Court that the Daily Mirror was published on-line in 2003. There is no evidence that the daily edition of the Daily Mirror was on the world wide web in 2003. Thirdly, there is no evidence of any hits on any such site in this jurisdiction. These are fatal flaws in the plaintiff's case".*

51. It is difficult to conclude from that extract that a lack of evidence of any hits is a stand-alone ground for holding that there has been no publication. In that case, there were two additional overwhelming problems: internet publication had not been pleaded and there was no evidence of any publication. It is by no means clear that, had internet publication been pleaded and evidence of publication adduced, the court would have taken the same view. The question of the necessity of hits in Ireland does not appear to have been argued before the Supreme Court at all.

52. In the circumstances, I am not persuaded that it is a requirement of Irish law that to establish publication in respect of an internet publication, it is necessary to establish that it has actually been accessed in Ireland. As pointed out by the Court in *Martinez*, to quantify the distribution of material on the internet with certainty and accuracy in relation to a given Member State may not always be possible. Moreover, the wording of *Martinez* is clear and unambiguous i.e. that jurisdiction exists under Article 5(3) where content placed online is or has been accessible. Where, as in this case, there is no contest to the averment that the website containing the statement was accessible in Ireland, there is in my view no scope for adding an additional requirement of proof of access or hits by users in Ireland. Any such requirement would not be in keeping with the judgment in *Martinez*.

Harmful event

53. Given that I find the publication requirement has been satisfied in respect of both the Notice and the Website statement, the next question to be considered is whether damage in Ireland must be separately established in order to demonstrate the "harmful event" referred to at Article 5(3). The defendant cites the dicta of Barrington J. in *Murray v. Times Newspapers Limited* [1997] 3 I.R. 97 where he stated that "harmful event" meant both the publication of the alleged libel and any damage including special damage alleged to flow from it. The defendant also relies heavily on the decision of the CJEU in *Shevill* and particularly paragraph 29 therein in this respect. In *Shevill*, a French newspaper "France-Soir" had published an article allegedly defamatory of an English student working in a bureau de change in Paris run by a French company, Chequepoint SARL. Ms Shevill and Chequepoint sued in the UK and an objection was taken to the jurisdiction of the English court on the basis that no harmful event had occurred in England. The CJEU stated at paragraph 29:

> *"In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or*

legal person occurs in the places where the publication is distributed, when the victim is known in those places"

However, in next paragraph the CJEU observed:

"It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that state to the victim's reputation (paragraph 30).

54. That formulation, i.e. the victim claims to have suffered injury to his reputation is repeated at paragraph 31. In answering the question in respect of the meaning of the term place where the harmful event occurred, the Court held that the victim of a libel by a newspaper article may bring an action for damages either where the publisher of the defamatory publication is established or *"before the courts of each contracting state in which the publication was distributed and where the victim claims to have suffered injury to his reputation which have jurisdiction to rule solely in respect of the harm caused in the state of the court seised".*

55. Of relevance also are paragraphs 38 and 39 where the Court was addressing questions referred that touched on the applicable rules when a national court was assessing whether the event was harmful. The Court noted that the Brussels Convention did not specify the circumstances in which the event giving rise to the harm may be considered harmful to the victim and that those questions are to be settled by the national court applying its own law. It noted that under national law applicable to the proceedings (in this case English law) damage was presumed in libel actions so the plaintiff did not have to adduce evidence of the existence and extent of that damage.

56. When the case returned to the UK Supreme Court the defendant sought to argue that no harm or damage to the plaintiffs had been identified, particularly in circumstances where the second named defendant had no connection with the UK and there was no possibility they could have suffered harm by publication in England. The plaintiffs argued that there was a presumption of damage under English law in libel cases and therefore they did not have to adduce evidence of damage arising from the publication of the article in question. A dispute on jurisdiction could not alter that position.

57. The House of Lords (*Shevill and others v. Presse Alliance SA* [1996] 3 All ER 929) agreed with the plaintiffs, holding that the CJEU had pointed out that what constitutes a harmful event is to be determined by the national court applying its own substantive law and that where English law presumes the publication of a defamatory statement is harmful to the person defamed without specific proof, that was sufficient for the application of Article 5(3). The position is similar in Ireland, as accepted by counsel for the defendant .

58. For similar reasons to those identified by the UK House of Lords, I find that a litigant seeking to establish jurisdiction under Article 5(3) in respect of alleged defamation does not need to establish that specific damage has occurred in order to establish jurisdiction,

since to impose such a requirement would be to alter the normal approach under Irish law, where the CJEU has made clear in *Shevill* that national law, not EU law, determines the circumstances in which the event giving rise to the harm may be considered harmful to the victim. Moreover, *Shevill* makes it clear that the test a national court must apply in deciding whether jurisdiction under 5(3) exists is simply whether the publication was distributed in their jurisdiction and whether the victim claims to have suffered injury to his reputation. Both of these tests are met here.

59. Nor do I consider that there is an additional test, as suggested by the defendant, that the plaintiff must establish in this case that he enjoys a reputation in Ireland. The definition of defamation, as identified at s. 2 of the 2009 Act, construed in accordance with s.6(2), is whether there is "*publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person)*…". That does not require a plaintiff to have any particular level of reputation in order to bring proceedings. Of course, the type and level of reputation of the plaintiff will be relevant in assessing damages but it is not in my view relevant to establishing jurisdiction. Paragraph 29 of *Shevill*, relied on by the defendant for this purpose, read out of context, might suggest that the Court had imposed an additional test of the existence of a reputation in the Member State in which proceedings are sought to be brought but a reading of the entirety of *Shevill*, particularly the answer by the Court to the question posed by the national court (quoted above), make it clear in my view that no such discrete test exists.

60. Accordingly, I find that this court has jurisdiction to hear and determine the claims under Article 5(3) in respect of the Website statement and Notice.

Jurisdiction: Negative Declaration

61. The position is quite different in respect of the plea in the Statement of Claim that has been described as a negative declaration. As set out above, Article 2 of the Brussels I Regulation sets out the principle that persons domiciled in a member state of the European Union are to be sued in the courts of that Member State unless the rules of special jurisdiction apply. It is for the plaintiff to establish that those rules apply in any given case. Here, as identified in the Reply to the Defence, the plaintiff seeks to invoke Article 5(3) of the Brussels Regulation, where a national court has jurisdiction in respect of tort, delict and quasi delict in the courts for the State in which the harmful event occurred. The onus is firmly on the plaintiff to show why the rules of special jurisdiction should apply. In respect of the negative declaration, the plaintiff has put no evidence at all before the court to identify either the nature of the alleged tort, delict or quasi delict, or to identify the State in which the harmful event occurred. The harmful event itself is not identified.

62. There was much discussion at the hearing about negative declarations. But the core principles are uncontroversial. An application for a negative declaration is permitted; their use should be limited due to potential abuse. None of these principles undermine the core obligation on a plaintiff to identify in their pleadings the facts required to establish that the Member State in which proceedings have been brought is the place where the harmful event occurred if they wish to invoke the jurisdiction of a court of that Member State.

63. Here there was no attempt whatsoever to identify any facts relevant to the negative declaration. The totality of the pleadings in this respect may be found at paragraph 9 of the Statement of Claim, headed up "*The Dutch proceedings*", which reads as follows: "*The proceedings which are referred to in the Times Newspaper and on the website of the Defendant's Dutch legal representative refer to proceedings taken in the Netherlands, brought by the Defendant against a company called Carigna Investments N.V. The Plaintiff was neither a Director nor shareholder in Carigna Investments NV*". The prayer for relief includes the following relief at paragraph II – "*A Declaration that no sums are due to the Defendant by the Plaintiff*".

64. It is not possible for the reader of the Statement of Claim to understand anything about the declaration sought to the effect that no sums are due to the defendant by the plaintiff. The sums are not identified; the facts relevant to the plea are not identified; no details of any dispute between the plaintiff and the defendant are specified. No analysis could possibly be carried out by the court as to whether the Irish courts have jurisdiction.

65. This absence of pleading may be contrasted with the position in relation to the pleas of defamation. The facts underlying those pleas are identified in the pleadings and it was therefore possible to carry out an analysis of whether this court has jurisdiction. No such examination is possible in respect of the negative declaration sought. In those circumstances I find that there is simply no basis upon which I can conclude that the negative declaration is in respect of a tort, delict or quasi delict where the harmful event occurred in Ireland.

66. Counsel for the defendant observes that one can deduce from the affidavits that the negative declaration is in respect of the subject matter of the Dutch debt proceedings described where the defendant is suing the plaintiff and his son in respect of a judgment against Carigna not satisfied.

67. A court should not have to guess a cause of action in order to found jurisdiction and I do not propose to do so. However, even if one proceeded on that basis, it becomes clear that there is no basis upon which it could be suggested that the Irish courts have jurisdiction. Those proceedings are brought by the defendant, a Dutch citizen, against the plaintiff, domiciled in the UK. They concern a debt owed by a company Carigna, whose domicile is in the Dutch Antilles. The debt arose in respect of a building in the Netherlands. The Dutch courts will be obliged to identify whether the plaintiff acted as some type of shadow director such that he is liable for the debts of Carigna. That will presumably necessitate an inquiry into the activities of Carigna and of the plaintiff's activities or relations, if any, with Carigna. There is no evidence whatsoever of any involvement of Ireland in any such inquiry or related inquiry. In those circumstances, I cannot see any basis for the Irish courts having jurisdiction in the matter by way of the rules of special jurisdiction. I accordingly decline jurisdiction in respect of this part of the plaintiff's claim.

Section 14 of the Defamation Act 2009

68. Next, I turn to consider the application to strike out the claim made in respect of the Notice under s. 14 to the effect that it is not capable of bearing the defamatory meaning alleged. Section 14 provides that:

14.— (1) The court, in a defamation action, may give a ruling—

(a) as to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff, and

(b) (where the court rules that that statement is reasonably capable of bearing that imputation) as to whether that imputation is reasonably capable of bearing a defamatory meaning, upon an application being made to it in that behalf.

(2) Where a court rules under subsection (1) that—

(a) the statement in respect of which the action was brought is not reasonably capable of bearing the imputation pleaded by the plaintiff, or

(b) that any imputation so pleaded is not reasonably capable of bearing a defamatory meaning, it shall dismiss the action in so far only as it relates to the imputation concerned.

(3) An application under this section shall be brought by notice of motion and shall be determined, in the case of a defamation action brought in the High Court, in the absence of the jury.

(4) An application under this section may be brought at any time after the bringing of the defamation action concerned including during the course of the trial of the action.

69. It is necessary to consider the precise wording of the Times Notice:

"Public Notices

Mr. Felix Fareed Ismail Grovit and Mr. Stefan Carim Ismail Grovit. Through my summons dated 13 June 2014, I have, at the request of Hednrik Jan Jansen, living in Amsterdam, The Netherlands, chosen address (1075AA) Amsterdam, The Netherlands, Koningslaan 17, at the offices of Bos & Partners Advocaten, H.J. Bos, attorney, summoned as witnesses: Mr. Felix Fareed Ismail Grovit and Mr. Stefan Carim Ismail Grovit, both with no known address or whereabouts inside or outside of the Netherlands, to appear in person on 19 August 2014 at 9.30 hrs at the session of the Amsterdam Court Paknassuweg 220, Amsterdam, The Netherlands, to be heard, at the request of Hendrik Jan Jansen under oath as a witness, within the scope the preliminary hearing as allowed by the Amsterdam Court on 20 March 2014, regarding the facts as outlined in the petition which can be inspected at the offices of H.J. Bos, aforementioned, but not exclusively, the position of the witness

of Carigna Investments N.V., trading as Chequepoint Netherlands, from February 1999 up and until February 2013.

R. Erken, t.k – Gerechtsdeurwaarder, Van der Hoeden Mulder Wibautstraat 137a-137b Amsterdam"

70. At paragraph 10 of the Statement of Claim, the plaintiff that the words used in the Times Notice in their natural and ordinary meaning meant and were understood to mean:

    a. *That the Plaintiff is indebted to the Defendant.*

    b. *That the Plaintiff is being called as a witness in proceedings concerning an alleged debt.*

    c. *That the Plaintiff is a debtor.*

    d. *That the Plaintiff has been involved in proceedings which do not relate to him personally.*

71. The case of *Gilchrist v. Sunday Newspapers* [2017] 2 I.R. 714 sets out the principles applicable to a finding under s. 14:

> *"It is not disputed that for the purposes of an application under section 14 (1) of the 2009 Act, the onus rests upon the defendant to establish that the article complained of is not reasonably capable of bearing the imputations and meanings pleaded by the plaintiff. The test to be applied by the court is whether the article, when viewed objectively by the reasonable reader, is capable of giving rise to the pleaded meanings (see Hardiman J. in Travers). It is also not disputed that the role of the judge on a s. 14 application is not to determine the meaning of the words or article published but to delimit the outside boundaries of the possible range of meanings that might be ascribed thereto by the notional reasonable reader. Clarke M.R. in Jeynes v. News Magazines Limited [2008] EWCA Civ 130 helpfully summarised the principles relevant to how the meaning of words should be determined as follows:-*
>
> *"(1) The governing principle is reasonableness.*
>
> *(2) The hypothetical reasonable reader is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.*
>
> *(3) Over-elaborate analysis is best avoided.*
>
> *(4) The intention of the publisher is irrelevant.*

(5) The article must be read as a whole, and any "bane and antidote" taken together.

(6) The hypothetical reader is taken to be representative of those who would read the publication in question.

(7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…'."

72. Applying the principles identified in *Gilchrist*, I find the Notice, when viewed objectively by the reasonable reader, is either not capable of bearing the imputations pleaded by the plaintiff or that the imputations pleaded by the plaintiff are not defamatory or capable of bearing a defamatory meaning.

73. First, the Notice does indeed suggest that the plaintiff is being called as a witness in proceedings (although it does not identify the proceedings as concerning an alleged debt). It also suggests the plaintiff is involved in proceedings which do not relate to him personally, insofar as one can say that being called as a witness is being personally involved in proceedings. Neither of those imputations are capable of bearing a defamatory meaning. Those meanings would not tend to injure the plaintiff's reputation in the eyes of reasonable members of society. I am therefore satisfied that s.14(2)(b) applies and I will dismiss the action relating to the imputations pleaded at paragraph 10(b) and (d) of the Statement of Claim.

74. In respect of the statements at (i) and (iii), in so finding I am conscious that the position of the jury is uniquely important and I should only withhold this matter from them if I am satisfied that it would be wholly unreasonable to attribute a libellous meaning to the words complained of. But having carefully considered the Notice, I cannot identify any aspect of it that could be considered to imply the plaintiff is a debtor or indebted to the defendant. Nor could the words used in the Notice, in their natural and ordinary meaning, mean or be understood to mean the meanings pleaded at (i) and (iii) i.e. that the plaintiff is a debtor or indebted to the defendant.

75. The Notice simply identifies the plaintiff has been summoned as a witness in a preliminary hearing regarding facts outlined in a petition. Those facts are not identified. The last two lines of the petition are difficult to understand, referring to "*the position of the witness of Carigna Investments NV*". At most that might indicate to a reader that evidence might be sought or given in respect of the relationship between the plaintiff and Carigna. But without any further information, one could not possibly infer from that wording that the plaintiff was indebted to the defendant or was a debtor. On any reading of it, the Notice does not suggest that the plaintiff is indebted to the defendant or that the plaintiff is a debtor. To read those words in the way alleged by the plaintiff would be a meaning emerging as the product of some utterly unreasonable interpretation as identified in *Gilchrist*.

76. A similar conclusion was reached by Binchy J., in the application to set aside the judgment in default of appearance, where he observed:

> *"In this case, the Notice says nothing at all of the plaintiff's character. It simply indicates that the plaintiff is required to attend court in the Netherlands as a witness in relation to proceedings referred to in the Notice and, specifically, to give information to the court regarding the position of the witness at Carigna Investments NV. The Notice does not assert any wrongdoing on the part of plaintiff or suggest that the plaintiff is indebted to the defendant".*

77. The plaintiff placed significant reliance on Kearns P.'s decision to the effect that the statement was defamatory and a correction order should be made. He says that in those circumstances no order should be made under s. 14 since another court must have found the statement defamatory in order to grant a correction order. In my view, given that Binchy J. set aside the decision of Kearns P. in its entirety it is not open to the plaintiff to rely on same, or any conclusions therein.

78. But in any case, when one reads the correction notice carefully, it is clear that Kearns P. had not taken the view that the wording of the Notice was defamatory. The Notice simply confirms that, in the proceedings, the defendant has not contested assertions made by the plaintiff that the plaintiff is not a director or shareholder and has not otherwise been involved in the running of a company known as Carigna Investments N.V. and is not liable for any debt or obligation of the said company or personally indebted to the defendant. That is simply a statement of the obvious: given that the defendant did not enter an appearance, he clearly could not have contested any assertions made by the plaintiff. The words "*in the proceedings"* are highly significant in this respect. For those reasons I do not consider that the plaintiff can rely on the decision of Kearns P. to resist an order under s. 14.

79. In those circumstances, I will strike out the claim in respect of the Notice under s. 14. of the Defamation Act.

Privilege

80. The defendant also submitted that I should strike out the plea in respect of the Notice because if it was defamatory, it would benefit either from absolute privilege or qualified privilege. The plaintiff objects to this application on the basis that the defendant in publishing the said Notice was motivated by malice, the reasons for which are set out at paragraph 17 of his Reply of 16 July 2018 i.e. being that no Order of the Dutch Court seeking permission to advertise the Summons has been seen or produced to the plaintiff. Dutch law requires publication in national or local newspaper in the region where the Court is located, being the region of the District Court of Amsterdam and there was no necessity for such a Notice to be published outside the Netherlands (as pleaded at paragraph 14 of the Statement of Claim), and that the plaintiff's counsel had informed the defendant's counsel there was no legal necessity for the said publication.

81. Because I have found for the defendant and made an order under s. 14, there is no necessity to rule on the question of privilege in respect of the Notice.

Abuse of Process

82. Insofar as the Website statement is concerned, the defendant submits that the attempt to litigate this article in Ireland is an abuse of process given that it has already been litigated in the Dutch defamation proceedings referred to above, first at District court level and then at the Hague Appeal Court, albeit at interlocutory stage and against the defendant's lawyer, Mr. van Bos rather than against the defendant himself. For that reason, counsel for the defendant relies primarily on an argument relating to abuse of process rather than *res judicata*, although contends that a finding on *res judicata* is open to the court. Separately, the defendant argues that the conduct of the proceedings in general constitutes an abuse of process.

83. The precise facts are relevant here. First, what was published on the website of Mr. van Bos was the first paragraph of an article published in Financiele Dagblad on 17 May 2013. In the Statement of Claim, this paragraph was translated as follows:

> *"A company of the wealthy British Indian moneychangers Felix and Stefan Mr Grovit is Dutch businessman Henk Jan Jansen for a year or ten millions guilty. To be precise: €12,476,447.04. That is the amount of interest which the guilt of the Grovits on May 31 will be incurred"*

84. In the proceedings before Kearns P. an affidavit was filed by Mr Kieran Friel, a trainee solicitor acting for the plaintiff, sworn on 30 October 2014, identifying the translation as follows:

> "*A company of the wealthy British Indian moneychangers Felix and Stefan Mr Grovit is Dutch businessman Henk Jan Janssen for a year or ten millions guilty. To be precise: €12,476,447.04. That's the amount with interest which blamed the Grovits on May 31 will be incurred."* (Exhibit KF2)

85. A certified translation of the article itself was also put on affidavit by Gerrit Hendrik Pijiffers of Certified Translations Services, with the first paragraph being translated as follows:

> "*A company of the wealthy British-Indian moneychangers Felix and Stefan Grovit has owned the Dutch businessman Henk Jan Jansen several millions for about ten years already. To be exact: €12,476,477.04. That's the amount including interest that the Grovits' debt will have added up to on 31 May".* (Exhibit GHP2).

86. It is alleged that the plaintiff was defamed by the Website statement which was published in Dutch, not by a translation of it. Therefore, I should rely on the most accurate translation of that article, rather than what is pleaded as the translation in the Statement of Claim. The only certified translation is that identified above exhibited by Mr. Pjiffers, and I will therefore treat that as the correct translation of the Dutch words pleaded. It

may be seen from that translation that the only matter capable of bearing a defamatory meaning was the statement that the plaintiff and his son were debtors for c. €12 million.

87. The defendant seeks to have the proceedings struck out on abuse of process grounds on the basis that the plaintiff is relitigating issues already decided against it. Having carefully considered the case law opened, in particular the decisions of the High Court and Court of Appeal in *Jones v. Coolmore* 2019 [IEHC] 652, 2020 [IECA] 116 , *McCauley v. McDermott* [1997] 2 I.L.R.M. 486, and *Bula v. Crowley* [1991] 1 I.R. 220 , it seems to me that the import of that case law is that it is an abuse of process to re-litigate matters that have been finally decided against a party. I fully accept, as was identified in *Jones*, that a matter can be finally resolved at interlocutory level. However, in this case, having reviewed the decisions of the Rotterdam District Court in the defamation proceedings against Mr Jan Bos and Bos & Partners, and of the Hague Court of Appeal of 14 April 2015, I do not think it can be said that the question of the defamatory nature of the Website statement has been finally decided against the plaintiff, although undoubtedly the import of those decisions is that it is unlikely that the plaintiff will succeed at the substantive hearing. This is made clear at paragraph 14 of the Hague Court of Appeal decision where the Court states:

> *"The court of appeal therefore agrees with the district court that the statements made by Bos in his capacity as the lawyer and therefore the representative of Jansen – both separately and jointly and when viewed in association – are not so untrue or damaging to the reputation and good name of Grovit that Bos et al made those statements frivolously. The probable judgment in the substantive proceedings on the merits will be that Bos et al did not act unlawfully by making the statements concerned, nor by confirming those statements and publishing them on the website of Bos & Partners Advocaten".*

88. I am also influenced by the fact that the judgments sought to be relied upon are not judgments of an Irish court, and they are not considering whether the Website statement is in breach of the Defamation Act. Naturally they are applying a different test under Dutch law, which although apparently similar in certain respects, cannot be assumed by me to be identical. For example, at paragraph 5.7 the District Court observed:

> *"When deliberating whether publications such as the article of 17 May 2013 in the FD and the press release of 21 May 2013 were unlawful in respect of the party to which they pertain, this concerns weighing the interest of the fundamental right to freedom of expression enshrined in Article 10 of the ECHR against the interest of the protection of one's good name and reputation."*

And at paragraph 5.10:

> *"The article of 17 May 2013 may contain a coloured and therefore subjective representation of the facts then available, but that is a matter of course, since Bos made the statements in order to represent the interests of his client … for this reason alone, this article cannot be designated as tendentious."*

The Dutch Court concluded, *inter alia*, that the statements in the press release did not expose the plaintiff to rash accusations of an unlawful nature and that it was not probable that fundamental rights and elementary rights, right to privacy, protection of honour and good name, Article 10 of the Constitution, Article 8 of ECHR and Article 17 of the International Covenant on Civil and Political rights had been violated (paragraph 5.11). This account of the approach of the Dutch court demonstrates the different type of examination that is carried out when defamation is alleged.

89. It is also not immaterial, though not determinative, that the Dutch proceedings were brought by the plaintiff in respect of the link on the Bos website to the full article on the website of Financielle Dagblad, as well as in respect of a press release issued by Bos and a further article in Financielle Dagblad, neither of which are the subject of the Irish proceedings. The proceedings were not brought in respect of the extract on the Bos website although in the course of the judgment that extract was referred to (see page 7 of the judgment of the District Court).

90. Nor did the Dutch court specifically address the single allegation made in the Irish proceedings i.e. that the statement that the plaintiff and his son were debtors for the amount owed by Carigna was defamatory. I am less influenced by the fact that the defendant in those proceedings was the law firm and lawyer representing the defendant, rather than the defendant himself, since the defendants in the Dutch defamation proceedings were clearly a proxy for the defendant.

91. For all those reasons, although there were undoubtedly features of the Dutch proceedings that were similar to the Irish proceedings, I cannot conclude that the issuing of the Irish proceedings in respect of the Website statement was an abuse of process as the Dutch proceedings had finally determined the matter. In this respect, I am mindful of the high bar a defendant seeking to strike out proceedings on the basis of abuse of process must circumvent.

92. The defendant also asserts the proceedings are an abuse of process more generally. In particular he points to the following:

- the plaintiff, having passed away, would receive no tangible benefit from the action as the only damages recoverable are special damages which are not claimed;
- the proceedings are brought for an improper purpose, being to block the prosecution of the defendant's Dutch proceedings to hold the plaintiff and his son personally liable for the Carigna debt; and
- consistent with the general characteristic of vexatious litigation, the grounds in this action are those that featured in the Dutch defamation proceedings, being rolled forward and supplemented.

93. I agree that there are certain very odd aspects to these proceedings. There is no discernible reason why they have been brought in Ireland: Mr. Sowemimo, administrator

ad litem, says in his affidavit sworn 4 June 2019, by way of explanation that the late plaintiff was actively seeking to arrange finance for patent rights through the vehicle of an Irish company. As submitted by counsel for the defendant and not contradicted by counsel for the plaintiff, this is the first time such an explanation has ever been provided in these proceedings. But not only does the averment not identify the name of the company or the patent rights or exhibit any relevant documentation, it does not justify the choice of Ireland as the relevant jurisdiction. Accordingly, I remain of the view that no explanation has been given for choice of Ireland as a venue to litigate these matters.

94. Second, no explanation has been given as to why the proceedings are being maintained since the death of the plaintiff. The only remedy that can be obtained since the death of the plaintiff is a correction order as special damages are not sought. In response to a query, Counsel for the plaintiff could not identify what type of correction would be sought, or the purpose of a correction order. Given that the correction order given in 9 July 2015 was not published, even after Binchy J. relied, *inter alia*, upon this failure to set aside the judgment, it is difficult to understand why a corrective order, the form of which has not even been identified, is of such importance to the estate of the deceased plaintiff that proceedings continue to be maintained in Ireland even though the plaintiff had no links to Ireland.

95. In those circumstances, it is very difficult to avoid the inference that Irish proceedings are being maintained so that the Carigna proceedings against the plaintiff and his son will remain stayed in the Netherlands on jurisdictional grounds pending the determination of the Irish proceedings.

96. I have carefully considered whether these facts meet the threshold for determining an abuse of process but on balance, again given the very high bar that must be met when striking out proceedings on this basis – described by Hardiman J. as a heavy burden - I conclude that those facts, although of significant concern, are insufficient to meet the threshold.

Website Statement: Limitation Period

97. The Website statement was published on 17 May 2013. The proceedings were issued on 1 August 2014. *Prima facie* therefore, the plaintiff is out of time to bring the proceedings having regard to s. 38 of the Defamation Act which imposes a one-year limitation period. The plaintiff pleads at paragraph 12 of his Reply to Defence that he will rely on s.11(3A) of the Statute of Limitations 1957 which allows the court to extend the limitation period by a further year. In the Notice of Motion before me, one of the reliefs sought by the defendant is an Order pursuant to Order 25, rule 1 and/or Order 34, rule 2 of the RSC directing that various questions be set down and disposed of in advance of a trial, one of which is whether the plaintiff's claim is barred in whole or part by virtue of the provisions of s. 11 of the Statute of Limitations as amended by s. 38 of the Defamation Act.

98. At the hearing, counsel for the defendant urged me to decide upon the substantive question as to whether the plaintiff's claim is statute barred. However, counsel for the plaintiff indicated he wished to seek an extension of time. The plaintiff is entitled to have

a court adjudicate on whether the claim is statute barred and if so, whether the conditions applicable to an extension, namely whether the interests of justice require the direction and whether the prejudice the plaintiff would suffer if the direction were not given significantly outweighs the prejudice the defendant would suffer if the direction were given.

99. Accordingly, I will direct a preliminary hearing on the issue of whether the plea in respect of the Website statement is statute barred.

Conclusion

100. Having regard to the foregoing, I:

a) Give the plaintiff liberty to amend its Plenary Summons to correct the defective endorsement;

b) Dismiss the proceedings insofar as they seek a negative declaration on the basis that the Irish courts have no jurisdiction in respect of this part of the claim;

c) Dismiss the proceedings insofar as they seek relief in respect of the allegedly defamatory Notice pursuant to s. 14 of the Defamation Act on the basis that it is not capable of bearing the defamatory meaning alleged;

d) Direct a preliminary issue pursuant to Order 25, Rule 1 and/or Order 34, Rule 2 of the RSC as to whether the claim in respect of the Website statement is statute barred.