

THE HIGH COURT

[2021] IEHC 381
[2021 No. 1787P.]

BETWEEN
LIDL IRELAND GMBH

PLAINTIFF

AND

IRISH FARMERS ASSOCIATION, TIM CULLINAN AND BRIAN RUSHE

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 4th day of June, 2021

Introduction

1. This is an application for an interlocutory injunction pursuant to s. 33 of the Defamation Act, 2009 prohibiting the publication or further publication of two identified advertisements published by the defendants in March, 2021, or any statement to like effect.
2. The plaintiff's case is that the advertisements were clearly and unquestionably defamatory and that the court should enjoin any re-publication. The defendants stand over the advertisements. They deny that the advertisements were defamatory and claim that they have a good defence to the action.
3. The plaintiff is a German registered limited liability company which, having established a branch in Ireland – that is to say in the State rather than the island of Ireland – is registered with the Companies Registration Office as an External Company. It operates a well-known chain of supermarkets throughout the country. Part of its business model – or in the modern language its Mission – is "... to strive for greater sustainability across our business ... through the sourcing of our products", to which end it claims that "70% of our products are sourced from within Ireland, and we're proud to support Irish farmers and suppliers. Our customers can choose between popular brands as well as award-winning Lidl own brands."
4. The first defendant is an unincorporated association whose objects are *inter alia* to promote, foster and develop agriculture; to secure an adequate living for the maximum number of families living on the land in Ireland; and to represent, advance and protect the particular interests of its members. The second and third defendants are, respectively, the president and deputy president of the first defendant.

The advertisements

5. On 14th March, 2021 the first defendant published in the *Sunday Independent* and *Irish Farmers Journal* newspapers, and then and since on its website, the following advertisement:-
6. On 18th March, 2021 the first defendant published in the *Irish Farmers Journal* newspaper, and then and since on its website, the following advertisement:-
7. As is apparent, the second advertisement includes a photograph and the signature of the second defendant. The plaintiff's case is that the content of the advertisements or words

to like effect were repeated and republished in radio and print interviews and articles published on various websites.

8. The reference in the second advertisement to a legal threat was to a letter of 15th March, 2021 from the plaintiff's legal department to the IFA complaining that the first advertisement was false and defamatory, calling for a retraction and apology, demanding a proposal of damages, and threatening proceedings in default.

The plaintiff's case

9. The substance of the plaintiff's complaint is succinctly put in the notice of motion by which it seeks an order restraining the further publication of the two advertisements and/or any statements to the effect that (a) the plaintiff's own branded milk is not Irish; (b) the plaintiff is engaged in unlawful or misleading practices; (c) the plaintiff has misled its customers as to the origin of its products.
10. The plaintiff's case is that the advertisements are calculated to undermine it in the eyes of ordinary members of society by falsely implying that the plaintiff sources its milk from outside Ireland, when it sources its milk from Ireland, and that the plaintiff is deliberately attempting to mislead its customers.
11. While the meaning of the advertisements is said to be a matter for formal pleading, the case made on this application is that the "*Exposed*" advertisement in the natural and ordinary meaning of the words and by innuendo meant and means that the plaintiff:-
 - (a) Was guilty of a criminal offence, by supplying misleading information as to the country of origin or place or provenance of its milk;
 - (b) Misled, tricked, or defrauded the public, as to the origin or provenance of its milk;
 - (c) Misled the public to believe that its own-branded "*Coolree Creamery*" milk was sourced in Ireland when, in fact, it was sourced from abroad;
 - (d) Used its branding to drive down the price of milk paid to Irish dairy farmers.
12. With the same caveat, the case made as to the "*Did You Know?*" advertisement is that the words used, in the natural and ordinary meaning of the words and by innuendo, meant and means that the plaintiff:-
 - (a) Was guilty of a criminal offence, by supplying misleading information as to the country of origin or place of provenance of its products;
 - (b) Misled, tricked, or defrauded the public, as to the origin or provenance of its products;
 - (c) Misled the public to believe that "*Coolree Creamery*" was the source of its milk;
 - (d) Misled the public to believe that "*Connell Bakery*" was the source of its bread;

- (e) Misled the public to believe that "*Connell Farm*" was the source of its eggs;
 - (f) Created phantom farms, with the intention of misleading customers as to the origin or place of provenance of their products;
 - (g) Used its branding to drive down the price paid to Irish farmers;
 - (h) Wrongfully threatened or intimidated the IFA.
13. To understand the case made on either side on this application it is useful to pause here to note that while the second advertisement was directed to the plaintiff's "*Connell Farm*" eggs and "*Connell Bakery*" bread, as well as its "*Coolree Creamery*" milk – to which the first advertisement was solely directed – and while the alleged meanings complained of went well beyond the country of origin of the plaintiff's products, the evidence and argument offered on behalf of the plaintiff was very much focussed on the country of origin aspect, specifically on the country of origin of the plaintiff's milk. By contrast, as will be seen, the defendants' evidence and argument embraced the plaintiff's branding policies generally, not only as to the products shown in the photographs but as to other products on offer in the plaintiff's stores.
14. The affidavit of Ms. Ashling Holden, solicitor, on which the motion is grounded, avers to her belief that the statements are defamatory and that the defendants have no defence to the action that is reasonably likely to succeed.
15. In support of her belief that the defendants have no defence to the action that is reasonably likely to succeed Ms. Holden offers four reasons.
16. She says first, that as to the provenance of the plaintiff's milk, there is no need, at least insofar as Lidl is concerned, for consumers "*to be sure that [their] milk is from the Republic of Ireland.*" Ms. Holden deposed that the plaintiff's 1-litre milk is sourced from a farmer owned co-op in Donegal called Arrabawn, and that the plaintiff's 2-litre and 3-litre milk, although packaged in Northern Ireland, is sourced from farms in Ireland.
17. Secondly, she says, looking for the NDC logo would not necessarily tell a customer the origin of the milk. The rules of the National Dairy Council require that its logo may be applied only to milk which is packaged as well as produced in Ireland. The plaintiff's 1-litre milk, said Ms. Holden, is produced and packaged in Ireland and carries the NDC logo. The 2-litre and 3-litre packs, because they are packaged in Northern Ireland, do not.
18. Thirdly, says Ms. Holden, "*Coolree Creamery*" is the well-known brand-name for milk sold by the plaintiff in its Irish stores. "*Coolree Creamery*", "*Connell Bakery*" and "*Connell Farm*" are registered trademarks and the plaintiff has not invented a fake dairy or a phantom farm.
19. Fourthly, she says, the plaintiff has not employed branding to drive down the price paid to farmers, who are paid through milk processors for all milk supplied to the plaintiff.

20. Ms. Holden's evidence as to the provenance of the plaintiff's 2-litre and 3-litre milk was confirmed by Mr. Ruairi Cunningham, who is a director of Strathroy Dairy in Omagh, the plaintiff's supplier of both Irish Fresh Milk and Irish Light Milk, so packaged. Mr. Cunningham explains Strathroy's procedures for collection, storage, pasteurisation and pricing in very great detail upon which it is not necessary to dwell. The uncontested evidence is that all of the plaintiff's 2-litre and 3-litre milk is produced in the State, brought to Omagh for treatment and packaging, and sent to the plaintiff's depots in the State for distribution to its stores in the State.
21. The precise detail of Ms. Holden's evidence as to the provenance of the plaintiff's 1-litre milk was corrected by Mr. Seamus Hannon, who is the national manager of Aurivo Consumer Foods Limited, and in a second supplemental affidavit sworn on the same day, by Ms. Holden herself. The plaintiff's 1-litre milk is supplied and packaged by Aurivo – as opposed to Arrabawn– and is sourced from farms in the State and packaged in the State, and so qualifies for the NDC logo. Besides 1-litre packs of Irish Fresh Milk, Irish Light Milk, Irish Xtra Low Fat Milk, Irish Xtra Whole Milk, Irish Protein Milk, Irish Skimmed Milk, Lactose Free Light Milk and Irish Buttermilk, Aurivo supplies the plaintiff with 500 ml packs of Irish Fresh Milk and 1.75-litre packs of Irish Xtra Low Fat Milk. Mr. Hannon summarised the journey of the milk supplied by Aurivo from the farms on which it is produced to delivery to the plaintiff's distribution depots. For completeness, he said, Mr. Hannon added that Aurivo also supplies the plaintiff with 1-litre cartons of full-fat and low-fat "*organic milk*" [the parenthesis are his] which, he said, is a different product in a different category to the listed milk. Organic milk, it is said, is segregated from other milk and never comes into contact with any other type of milk. As demand for this product outweighs supply, it may be sourced from Northern Ireland as well as the Republic of Ireland.

The defendants' case

22. The defendants' case in answer to the motion was set out in two affidavits of Mr. Cullinan. He describes the first defendant as an unincorporated association whose purpose is to promote the interests of farmers and producers in the State, and the plaintiff as a discount retailer whose business model is to offer its customers low priced products. In doing so, says Mr. Cullinan, the plaintiff has engaged in a number of practices which, in the defendants' view, has misled its customers and in turn impacted on the first defendant's members. The purpose of the disputed advertisements, he says, was to highlight these concerns for the benefit of the first defendant's members and the public.
23. Mr. Cullinan explains that 95% of the milk produced in Ireland, which in the business is called Manufacturing Milk, is used to make various milk products and the other 5%, which in the business is called Liquid Milk, for consumption as such. The supply of milk for liquid consumption is regulated by the National Milk Agency, which was established by the Milk (Regulation of Supply) Act, 1994, but this does not apply to producers who sell to processors outside the State, or to processors established outside the State who sell Liquid Milk into the State. Mr. Cullinan says that the IFA has no difficulty with Northern Ireland products being imported into the State or their quality but that it has an issue

with “*transparency in branding and labelling of products for the benefit of [IFA] members and the public.*”

24. Mr. Cullinan contests the meanings contended for by the plaintiff. He says that while the plaintiff appears to have separated out the issue of the country of provenance and “*the effect of the use of fictitious producers*” in reality there is one central issue, which is whether the plaintiff’s branding strategy is misleading consumers or is capable of misleading consumers.
25. Mr. Cullinan suggests that the true meaning of the advertisements is that there are reasonable grounds to believe that the plaintiff’s branding strategy is misleading consumers or that there are grounds to investigate whether it is. The defendants stand over the truth of that allegation. Mr. Cullinan suggests that the plaintiff’s strategy is to convince consumers that what they are buying comes from specific locally based producers. The defendants’ case is that the plaintiff is using trademarks which suggest that the products are produced by the businesses referred to on the label, which Mr. Cullinan contends are fake or phantom businesses, rather than “*an own brand*” label, or the label of its supplier.
26. Mr. Cullinan exhibited a piece of market research commissioned by the National Dairy Council which asked 733 consumers three questions. The title of the report was “*IFA: Coolree Milk Research*” and according to Mr. Cullinan the three questions were “*about the ‘Coolree Creamery’ brand*”. The first question showed the participant a photograph of two packages of Coolree milk and asked:- “*Where do you think this milk comes from?*” The second question was:- “*Where do you think this milk was produced?*” The third question was:- “*When it comes to purchasing dairy products, how important, if at all, do you feel it is to buy local?*” Of those surveyed, 59% thought that the milk came from the Republic of Ireland, 78% thought that it was produced at Coolree Creamery, and 43% and 39% thought that it was very important or quite important to buy local. Mr. Cullinan suggests that the research indicated that consumers believe the product to be a locally sourced product from a real creamery and he expresses the belief that surveys in respect of the other products in issue would generate similar results.
27. The defendants’ case is that the brand *Connell Farms* is used to suggest that eggs are produced by a specific local producer and in an effort to provide reassurance about provenance and quality.
28. By reference to extracts from social media exchanges and a newspaper article, some of them quite old, Mr. Cullinan suggests that the plaintiff is “*aware of the problems its branding strategy has created and that customers are being misled.*” He pointed to a posting in July, 2016 in which the plaintiff confirmed that it sourced its milk from both the Republic of Ireland and Northern Ireland; a posting in July, 2018 which explained that a logo using the Irish flag was applied to Israeli potatoes which, although produced in Israel, had been packaged in Ireland; and a newspaper article in 2013 in which the plaintiff was reported as explaining the difference between its “*produce of Ireland*” and “*produced in Ireland*” logos: the former of which is applied to products farmed, grown or

reared in Ireland, and the latter of which is applied to products which have gone through a full production process here but may have an imported ingredient. The defendants' case is that the plaintiff's labelling is unclear and misleading.

29. As to what he calls the milk provenance issue, Mr. Cullinan contests that the words used are defamatory, but rather amount to an exhortation to consumers (his emphasis):- "To be sure your milk is from the Republic of Ireland Look for the NCD Logo."
30. The defendants relied also on a report and affidavit of an economist, Mr. Jim Power, who has a particular interest in the agri-food sector and who was commissioned by the IFA to write a report on how (rather than whether) the plaintiff's branding strategy is driving down the price paid to farmers. For present purposes, I need – and indeed ought – to say no more than that the defendants have pointed to evidence which, if accepted, would support their belief that the *Coolree Creamery* brand is used to sell milk more cheaply, which in turn feeds in to the price paid to farmers.
31. In his second affidavit Mr. Cullinan identified three of the plaintiff's products, in addition to those shown in the disputed advertisements, the labelling of which the defendants contend to be misleading. These are "Ballymanor turkey", the country of origin of which is Germany; "Glensallagh unsmoked turkey rashers", which is cured in County Tipperary and marked "Produced in Ireland using EU turkey"; and "Oaklands baby leaf spinach", which is marked below the Irish flag in a heart shaped logo "Packed in Ireland" but in a panel on the bottom right hand corner of the front of the pack "Origin: Italy".

Legal principles

32. Mr. Hayden S.C., for the plaintiff, and Mr. McCullough S.C., for the defendants, were agreed that the threshold test for the exercise by the court of its jurisdiction under s. 33 of the Defamation Act, 2009 was that the court must be satisfied that the words clearly bear the pleaded defamatory meanings and that the defendants clearly have no defence that is reasonably likely to succeed. *Gilroy v. O'Leary* [2019] IEHC 52.
33. As to whether it has been shown that the defendant has no defence that is reasonably likely to succeed, is not sufficient for the defendant to merely assert an intention to plead justification. Rather the court may have regard to evidence adduced by the defendant in support of the justification plea. *Reynolds v Malocco* [1999] 2 I.R. 203 and *Cogley v RTÉ* [2005] 4 I.R. 79
34. It was common case that even if those conditions are met, it does not follow that the court will automatically grant an injunction but must exercise its discretion in considering the balance of justice.

The meaning of the advertisements

35. As I have said, the focus of the evidence adduced and the argument made on behalf of the plaintiff on this application was its milk, specifically the country of origin of its milk. The complaint, in a nutshell, is that the advertisements meant that the plaintiff's own branded milk is not Irish.

36. As to the meaning of the word "*Irish*", the parties are agreed that the word conveys and that they intend it to convey an association with the Republic of Ireland, as opposed to the island of Ireland: but I am not at all sure that a jury would so understand it. Applying the test propounded by Sullivan C.J. in *Sinclair v. Gogarty* [1937] I.R. 377, I am far from convinced that a finding of a jury that the provenance of Irish milk (like Irish whiskey) could be anywhere on the island of Ireland would be set aside as unreasonable.
37. As to so much of the first advertisement as shows a photograph of a package of "*Coolree Creamery Irish Fresh Milk*" branded with the word "*Misleading*", I am not confident to say that that element of the advertisement can only mean that the label is misleading as to the country of origin. Whether by itself or in the context of the advertisement as a whole, I think that the picture could reasonably be understood to mean that the label is misleading as to whether the milk came from, or was processed or packaged in, a creamery called Coolree creamery.
38. As to the meaning of the statement:- "*To be sure your milk is from the Republic of Ireland look for the NDC logo*", I am not satisfied that this can only mean that the plaintiff's milk is not Irish. The plaintiff's case is that the NDC logo would not necessarily convey to the consumer the origin of the milk. I am unconvinced that that is so. The evidence is that the logo may be applied (and that it is applied by the plaintiff) to milk which is both produced and packaged in Ireland: so that the logo does tell the customer the origin of the milk. While I am prepared to contemplate that the advertisement as a whole might be understood as creating a doubt on the origin of the milk, I am not satisfied that it necessarily is to be so understood. I can see the force in the argument that milk that is produced and sold in Ireland is no less "*from*" Ireland because it has been packaged in Omagh, but on the other hand the consumer will know from the NDC logo that the milk was sourced in Ireland without looking at the small print elsewhere on the labelling from which the country of origin will be apparent.
39. The nub of the plaintiff's case on this application is that the first advertisement was misleading as to the origin or place of provenance of the milk and meant that the plaintiff's milk, although in fact sourced in Ireland, was sourced from abroad. The defendants contest those meanings.
40. The meaning of the words complained of is quintessentially a matter for the jury. The plaintiff's case is that the advertisements are misleading as to the country of origin of the products shown. The defendants contest this. I do not on this application say that the words are not misleading as to the country of origin, but it seems to me that the defendants have a *bona fide* case to make that they are not. If, as the advertisements suggest – and I am not to be understood as saying that this is or is not so – the plaintiff's branding strategy is directed to the price paid to dairy farmers, it seems to me that the words in the "*Exposed*" advertisement are at least capable of being understood as a complaint by or on behalf of the dairy farmers – specifically those dairy farmers represented by the IFA and the NDC, i.e. Irish farmers – about the prices paid by the plaintiff to them, or for their products. In other words, the words complained of might

reasonably be understood as a complaint in relation to the prices which Irish farmers are being paid for the milk on sale in the plaintiff's shops. If that is so, it would follow that the milk is Irish milk.

41. As to the statement that *"To be sure your milk is from the Republic of Ireland look for the NDC logo"*, it is common case that the logo may only be applied to milk which is both produced and packaged in Ireland. The plaintiff's case is – and I do not understand it to be contested – that the fact that its 2-litre and 3-litre packs do not carry the NDC logo does not mean that the milk was not produced in Ireland. The plaintiff's case focusses on the word *"from"*, which it equates with produced, so that – as I understand the argument – the words used are to be understood as meaning that milk which does not carry the logo was not produced in Ireland. It seems to me that it must be a matter for the jury to decide whether the word *"from"* means only produced or produced and packed, and, indeed, whether if the logo means that the shopper can be sure that the milk is from the Republic of Ireland, the absence of the logo means that it is not.
42. As far as the *"Did You Know?"* advertisement is concerned, I am not immediately convinced that it could reasonably be construed as being misleading as to the country of origin. If there is any room for doubt as to the identity of the plaintiff's suppliers who are the subject of the complaint (*"their suppliers"*), it is said, in bold print, that *"These products come from our farms ..."*. The premise of the complaint, then, must be that the products are Irish: in the sense used by the parties.
43. Although the defendants contest that the advertisements, specifically the first advertisement, meant that the plaintiff's own branded milk is not Irish, they say that that was the meaning it was true. The defendants point to the evidence of Mr. Hannon that it supplies the plaintiff with 1-litre cartons of full and low-fat *"organic milk"* which may be sourced from Northern Ireland as well as the Republic of Ireland. This is labelled *"Coolree Creamery Organic Fresh Milk"*, and is described as being *"sourced from cows, who happily graze on rich and plentiful pastures throughout Ireland."* While the plaintiff's case is that the *"Ireland"* which is the source of the organic milk is different to the *"Ireland"* which is the source of the ten various milks listed in Mr. Hannon's affidavit, it also contends that *"organic milk"* is a different product. While I can easily understand that organic milk might be regarded as a different product to non-organic milk, it is not obvious to me how the ten listed products – for example a 1-litre carton of Irish Fresh Milk and a 1-litre carton of Irish Buttermilk – might all be regarded as the same product. In any event, it seems to me that the issue is not whether the ten or eleven products supplied to the plaintiff by Aurivo Consumer Foods are the same as each other but whether they are all milk.
44. To the extent that the plaintiff complains that the advertisements mean that its own branded milk is not *"Irish"*, in the sense of sourced from the Republic of Ireland, it seems to me that the defendants can point to evidence that it is not.

Whether, otherwise, the defendants have no defence

45. I observed earlier that while the focus of the evidence and argument on behalf of the plaintiff was on the country of origin of its milk, the defendants' answer to the application was by reference to the plaintiff's branding and branding policies generally.
46. The core of the case and the sting of the alleged defamation, it is said, is that the advertisements accuse the plaintiff of misleading its customers as to the source of its products. The defendants say that the advertisements are true in this meaning and that they have adduced considerable evidence to prove that this is so.
47. From the twelve meanings outlined in the grounding affidavit of Ms. Holden, the defendants have distilled three allegations. The first is that the plaintiff has misled the public as to the source of its products. While the plaintiff has linked this allegation to the illustrated products – its milk, eggs and bread – the sting extends to all of its products. The second is that the advertisements accuse the plaintiff of not supporting Irish farmers by using its branding strategy to drive down the price paid to Irish farmers. And the third is that the plaintiff has been accused of wrongfully threatening and intimidating the IFA.
48. The meaning of the advertisements, it is submitted, is quintessentially a matter for the jury. The plaintiff is not entitled to separate the advertisements from each other or what is said (or not) as to the geographical origin of its milk from what is otherwise said as to the provenance of its products. The sting of the advertisements, it is said, is that the plaintiff misleads the public as to the provenance of its products and the defendants say that they will prove the truth of that by showing that the plaintiff uses the Irish sounding names of fictitious producers or places, that its labels are deceptive and misleading, and that the plaintiff has come up with its own rules for labelling which are designed to mislead.
49. The defendants agree that the advertisements mean (as the first of them said in terms) that the plaintiff's branding strategy is designed to drive down the price paid to Irish farmers. They point to a National Milk Agency report which found that Lidl and Aldi own brands are sold at a discount of 27% to "*processor brands*", and they point to the affidavit of Mr. Jim Power.
50. The defendants also agree that the advertisements impute that the plaintiff is wrongfully threatening or intimidating the IFA but plead that they are true in that meaning also. They point to the initial public statement by the plaintiff following the publication of the first advertisement that "*All of our milk comes from farms in the Republic of Ireland, a fact well known to the IFA*" which, it is said, was untrue, and assert that this action and application were brought with the object of silencing them.
51. Even if the geographical provenance of the plaintiff's milk can be separated from the other issues (which the defendants say it cannot) so that there are separate issues as to the geographical provenance of its milk and the provenance of its products generally, the defendants claim to have a full defence pursuant to s. 16(2) of the Defamation Act, 2009, by which a defence of truth is not to fail by reason only of the truth of every allegation

not being proved if the words proved to have been true do not materially injure the plaintiff's reputation having regard to the truth of the remaining allegations.

52. I have already addressed the arguments as to the meaning of the first advertisement. The plaintiff counters the defendants' alternative argument as to the truth of the sting of the advertisements with an argument that they are impermissibly attempting to prove the truth of a meaning which is far short of the true meaning of the advertisements. It is accepted that a defendant can only prove the truth of an alternative meaning where (a) the words used could convey that alternative meaning to a reasonable reader and (b) where the meaning is defamatory. See for example *Polly Peck plc v. Trelford* [1986] Q.B. 1000, *Lucas-Box v. Newsgroup Newspapers Ltd.* [1986] 1 W.L.R. 147, *Bradley v. Independent Star Newspapers* [2011] 3 I.R. 96 and *Cox and McCullough Defamation: Law and Practice* at paras. 5-22 and 14-52. The plaintiff argues that for a number of reasons the defendants are not entitled to advance a *Polly Peck* defence but the foundation or premise of all of those arguments is that the clear and only meaning of the first advertisement was that the labelling was misleading as to the country of origin and that organic milk is not milk. For the reasons already given, I am satisfied that the defendants have a case to make on both counts.
53. While the defendants confidently assert that they have a full defence, or a cascade of full defences, and that they have adduced extensive – mostly uncontradicted – evidence by which they will prove the truth of the sting of the advertisements, it is important to emphasise that on an application such as this the onus is on the plaintiff and the issue is not whether the defendants have a defence but whether it has been shown that they do not.
54. In *Reynolds v. Malocco* [1999] 2 I.R. 203 Kelly J. (as he then was) noted that there was a divergence of opinion on the proper approach to be taken by the court in applying the rule in *Bonnard v. Perryman* [1891] 2 Ch. 269, which had been approved by the Supreme Court in *Sinclair v. Gogarty* [1937] I.R. 377. Between the approach taken by Murnaghan J. in *Gallagher v. Tuohy* (1924) I.L.T.R. 134 – that the court should not attempt to prejudge a plea of justification – and that taken by the Supreme Court in *Cullen v. Stanley* [1926] I.R. 73 – that a plea of justification did not automatically preclude the grant of an interlocutory injunction – Kelly J. preferred the latter. He found that a rule which would allow the defendant to oust the jurisdiction of the court to intervene in an appropriate case would be inconsistent with the obligations imposed on the court by the Constitution and that the rigid application of such a rule, without an ability for the court to assess whether the plea of justification had any substance or not would provide – as Kelly J. put it – a happy hunting ground for unscrupulous defamers. On the authority of *Reynolds v. Malocco*, and consistently with the statutory test in s. 33 of the Act of 2009, the correct approach is to examine the evidence adduced by the defendants in support of their plea to ascertain whether it has any prospect of success.

55. The test is whether the defendants have identified credible evidence which, if accepted, would allow a correctly instructed jury to find that the statements complained of were true.
56. I referred earlier to the evidence of Mr. Jim Power, economist, who has written a report on the effect of the plaintiff's branding strategy on the the price paid to farmers. Ms. Holden makes the point that Mr. Power's report appears to have been written for the purpose of supporting Mr. Cullinan's evidence and says that Lidl disagrees that there is any connection between the price charged to its customers and the price paid by milk processors to farmers – which Lidl says it has no input into. If in principle the price paid to farmers and the price paid by consumers is dictated by supply and demand, it is not obvious to me that the supermarkets who strike the price which they pay to the milk processors have no input into the price which the processors pay to the producers. Whether, or to the extent to which, this may be a factor of purchasing power or branding strategy is something which could not possibly be decided on an interlocutory application such as this. For present purposes, I need – and indeed ought – to say no more than that the defendants have pointed to evidence which, if accepted, would support their asserted belief that the *Coolree Creamery* brand is used to sell milk more cheaply (or, perhaps, more cheap milk) which in turn feeds in to the price paid to farmers.
57. I also referred earlier to the market research report commissioned by the National Dairy Council called "*IFA: Coolree Milk Research*", which was relied on by the defendants in support of the defence which they would mount to the claim. Specifically, this report is said to establish that consumers believe that the plaintiff's milk is a locally sourced product from a real creamery.
58. There was some discussion in argument as to the weight that could and should properly be given on an interlocutory application to survey evidence.
59. This was one of the questions considered by Costello J. in her judgment *in Galway Free Range Eggs Limited v. O'Brien* [2019] IECA 8, in which the Court of Appeal looked at the judgments of McCracken J. in *Smithkline Beecham plc v. Antigen Pharmaceuticals Limited* [1999] 2 I.L.R.M. 190, and of the Supreme Court in *Hanafin v. The Minister for the Environment* [1996] 2 I.R. 321 and *Jordan v. The Minister for Children and Youth Affairs* [2015] 4 I.R. 232. Having reviewed the authorities Costello J. said, at para 45:-

"45. *It would appear that the law in this jurisdiction is as follows. Survey evidence is admissible in passing off claims to prove the opinions of members of the public on matters as to reputation or the likelihood of confusion. The weight to be attached to such evidence is a matter for the court. In assessing the weight of the evidence, the court should have regard to whether a relevant group was surveyed. So, if consumers were surveyed when the survey should have been of pharmacists, the court likely will attach little weight to the evidence derived from the survey. The reverse should also apply and greater weight should be given to surveys of the relevant group of people or businesses. An assessment of the adequacy of the methodology employed in the survey will be significant in weighting the value of the*

evidence adduced based on the survey. If there are weaknesses in the methodology, the results of the survey are unlikely to be accorded much weight. McCracken J.'s scepticism was expressed in the context of an application for an interlocutory injunction where the evidence could not be tested by cross examination. If, on the other hand, the evidence is so tested at plenary hearing and all other relevant evidence which the parties choose to adduce is led, then his sceptical comments are likely to be of little relevance to a decision on a plenary trial."

60. In *Smithkline Beecham plc* the court did not have the background facts relating to the survey evidence, specifically the questionnaires and answers. In this case, it does. I earlier set out the text of the three questions but as Mr. Cullinan's affidavit shows, they were not open questions. The report shows that the survey was conducted online between 1st and 7th April, 2021, which was after the commencement of the action and the issue and service of the motion. The survey was of 733 adults over the age of 18 years. Quotas were placed on the number of interviews achieved in each demographic grouping (age, gender, region and social class) to ensure that it matched the Irish population.
61. Having been shown a photograph of two packages of what appear to be either the 2-litre or 3-litre packs of "Coolree Creamery Irish Fresh Milk" and asked:- "Where do you think this milk comes from?", the participants were invited to choose between Republic of Ireland, Northern Ireland, Island of Ireland, Don't know, and Other. Unlike the photograph shown in the first advertisement, the photograph shown to the participants in the survey did not show the Lidl name and logo on the neck of the cartons. On the plaintiff's case, milk is "from" the Republic of Ireland if it is produced here. On the defendants' case, the NDC logo will allow the consumer to be sure where the milk is "from". The 59% who answered that they thought that the milk came from the Republic of Ireland must have understood the geographical source of "Irish milk" in the same way that it is used by both the plaintiff and the defendant and, on the evidence, they were correct. However, on one view, at least, the 16% who thought that the milk came from the Island of Ireland were also correct. Since the 2-litre and 3-litre cartons of milk processed in Omagh contain "milk legally imported into the State" (Milk (Regulation of Supply) Act, 1994, s. 5(2)(d)) the 21% who thought it was "from" Northern Ireland might also be fairly be said to have been correct.
62. The second question asked by the survey was:- "Where do you think this milk was produced?" Participants were asked to choose between Coolree Creamery, Other creamery, and Don't know. The only possible wrong answer was the first answer suggested to the participants.
63. The third question was:- "When it comes to purchasing dairy products, how important, if at all, do you feel it is to buy local?" The choices were, Very Important, Quite Important, Neither, Not Very Important, Not at all Important. Forty three percent answered very important and 39% that it was quite important but without a question as to where the

participants might have thought Coolree Creamery was located, I have difficulty understanding how this could justify a conclusion that these participants thought that Coolree Creamery was or was not, for any of them, a “*locally sourced product*”.

64. Mr. Cullinan has deposed to a belief that the results of surveys in respect of the other products would be similar, and I am sure that if the same questions were asked of the same demographic they would be. However, I am not at all sure that any survey in relation to the plaintiff’s products should not have been conducted among Lidl customers rather than the general population, many of whom may not be supermarket shoppers in general or Lidl shoppers in particular. Nor am I sure that the questions asked were sufficiently clear or open to have generated a reliable result. The jury will be in a position to assess the value of the survey evidence when it has been tested and explained but for present purposes I find myself unable to attach any significant weight to it.
65. That said, I am satisfied that the defendants have a *bona fide* case to make that the plaintiff’s brand names and the get-up of the products are calculated to convey that the products are sourced in particular farms in Ireland, and so that the plaintiff’s labelling is misleading. Of course I do not say that it is. That will be a matter for the jury in due course.

Discretion and damages

66. The plaintiff having failed to meet the threshold test for an order under s. 33 of the Act of 2009 the issues as to the adequacy of damages and the exercise by the court of its discretion as to whether there should be an injunction do not arise but I want to touch briefly on the arguments made.
67. The plaintiff emphasises what it says is the seriousness of the defamation, the clear threat of re-publication, the manner in which the defendants are said to have conducted themselves to date, and the speed and diligence with which it has acted to forestall the threat of re-publication. It asserts that damages would not be an adequate remedy because it would be impossible to quantify the damage done to the plaintiff and because it doubts that the IFA and its officers are a mark for an award of damages which would be sufficient to vindicate its reputation.
68. The defendants, citing *Reynolds v. Malocco*, say that damages are the normal remedy for defamation and injunctions are not. They assert that what the plaintiff says about the adequacy of damages is vague and contrary to common sense. The plaintiff, it is said, has sophisticated tracking systems which would enable it to track precisely the performance of any particular product if it wished to and that even if the threshold test were met, the injunction should be refused because damages would be an adequate remedy. The defendants submit that there is no reason to believe that they would not be able to meet an award of damages.
69. In *Reynolds v. Malocco* Kelly J. emphasised that the grant of injunctive relief is always discretionary. Recalling the characterisation by Esher M.R. in *Coulson v. Coulson* (1887) 3 T.L.R. 846 of the jurisdiction to grant an interlocutory injunction in a defamation case as

being one “*of a delicate nature*”, he said that the court must be circumspect to ensure that it does not unnecessarily interfere with free speech. Kelly J. said that he did not wish to set out in a hard and fast manner the factors which the court could or should take into account in the exercise of the discretion but identified one item of particular importance in that case, which was that the defendants were straw.

70. With the important caveats that the question does not arise in this case and that the point was not fully argued, I wonder whether the common law rule that damages are the normal remedy for defamation and injunctions are not may need to be revisited following the creation by the Defamation Act, 2009 of the several new remedies (declaratory orders, correction orders, prohibition orders, and orders for summary disposal) and the fact that the remedy of an interlocutory injunction is now on a statutory footing. It seems to me that the jurisdiction now to be found in s. 33 of the Act of 2009 is no less delicate than the common law jurisdiction which it replaced but I do not believe that it necessarily follows that the court should be hesitant in exercising it in an appropriate case.
71. In *Reynolds v. Malocco* Kelly J. was satisfied to exercise his discretion to grant the injunction sought on the ground – as he put it – that to refuse it would have consigned the plaintiff to a trial where damages would have been an inadequate remedy because of the virtual impossibility of ever recovering any sum awarded. It is easy to see why the court would intervene to prevent the defendants from traducing the plaintiff’s character with impunity, but I wonder whether, nowadays, it would be just that a plaintiff might have to bear a clear and plainly unjustifiable attack on his character simply because the defendant is a mark. Put another way, is a defendant presumptively entitled to launch and repeat what has been shown to be a clear and unjustifiable attack of the plaintiff’s character if he can show that he has the money to pay damages? In the case of an unscrupulous newspaper, for example, a calculation might be made that the revenue that might be earned from a campaign of vilification might very well outstrip any award of damages. Or – and it cannot be that unusual – a plaintiff might have no interest in damages but will want his reputation restored.
72. It seems to me that the delicacy of the jurisdiction to prohibit publication is reflected in the fact that the bar is so high. If a plaintiff assumes and discharges the heavy onus of showing that his action is bound to succeed, it is difficult to see why, irrespective of his means, the defendant should be allowed to make or repeat the defamatory statement.

Summary and conclusions

73. The onus is on the plaintiff to establish that the statements complained of are defamatory and that the defendants have no defence that is reasonably likely to succeed.
74. I am not satisfied that the “*Exposed*” advertisement clearly and only means that the plaintiff’s own branded milk is not Irish.
75. I am not satisfied that the “*Exposed*” advertisement clearly and only means that the plaintiff’s labelling and packaging is misleading as to the country of origin of its products.

76. I am not on this application to say whether the several cumulative and alternative defences which the defendants claim to have will, or are likely to, succeed or to attempt to assess the defendants' likelihood of success but merely to decide whether it has been shown by the plaintiff that the defendants have no defence which is reasonably likely to succeed. I am not so satisfied.
77. For the reasons given, I have concluded that the plaintiff has not met the statutory threshold for the making of an order under s. 33 of the Defamation Act, 2009 and for that reason the application must be refused.
78. Provisionally, it seems to me that the defendants have been entirely successful on the motion and that the plaintiff must pay the costs. Also provisionally, I am inclined to stay execution on foot of the order for costs pending the determination of the action.
79. I will list the matter for mention in two weeks' time to allow the parties to make any submissions they wish as to the appropriate costs order.