

## THE HIGH COURT

[2010 No. 2657 P]

BETWEEN:

SHANE TRAVERS

PLAINTIFF

v.

SUNDAY NEWSPAPERS LIMITED

DEFENDANT

**Judgment of Mr. Justice Hedigan delivered the 15<sup>th</sup> day of May 2012**

1. The plaintiff resides at 177, Ardilaun, Portmarnock, Co. Dublin. The defendant is a limited liability company, having its registered office at 5<sup>th</sup> Floor, Independent House, 27-31 Talbot Street, Dublin 1.

2. The defendant seeks the following relief:-

1. An Order pursuant to section 14(1) of the Defamation Act 2009 that the publication by the defendant on 31<sup>st</sup> January 2010 which is the subject matter of these proceedings is not reasonably capable of bearing the following imputations contended for by the plaintiff:-

- (i) The imputation contended for at Paragraph 7 (i) of the Statement of Claim.
- (ii) The imputation contended for at Paragraph 7 (ii) of the Statement of Claim.
- (iii) The imputation contended for at Paragraph 7 (v) of the Statement of Claim.

2. An Order pursuant to section 14(2) b of the Defamation Act 2009, striking out paragraphs 7(i), 7(ii) and 7 (v) of the Statement of Claim, and dismissing the Plaintiffs claim insofar as it relates to those paragraphs, and such further or consequential orders as are necessary.

**Background Facts**

3.1 In the substantive proceedings, the plaintiff seeks *inter alia* damages for defamation in respect of an article published by the defendant on the 1<sup>st</sup> January 2010, under the headline "€7.6m tiger raid was nothing to do with me". The proceedings were commenced by way of plenary summons issued on 12<sup>th</sup> March 2010. The statement of claim was delivered on the 12<sup>th</sup> May 2010. A full defence was delivered by the defendant on the 13<sup>th</sup> June 2011. At paragraph J of the defence, it is pleaded *inter alia* that the words and photographs published by the defendant do not bear the meanings set out at paragraph 7 of the statement of claim, save those pleaded at paragraph 7 (iii) and 7 (iv). At paragraph 4 of the defence, it is pleaded *inter alia* that the material published by the defendant is true in substance and in fact but in its natural and ordinary meanings, and not the meanings pleaded by the plaintiff.

The within application is one brought by the Defendant pursuant to s. 14 (1) (a) of the Defamation Act 2009, wherein the defendant seeks orders from this Court that certain of the meanings contended for by the plaintiff at paragraph 7 of the statement of claim are meanings that are not reasonably capable of arising from the publication by the defendant in respect of which the plaintiff sues. That is, of the five meanings contended for by the plaintiff, the defendant maintains that three of those meanings are not reasonably capable of arising there from.

3.2 Section 14 of the Defamation Act 2009 provides as follows:-

"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."

3.3 The plaintiffs statement of claim contends at paragraph 7 that, in its natural and ordinary meaning the impugned publication meant and was understood to mean that:

(1) The plaintiff was, in some way, a willing participant in the organization and carrying out of the largest bank heist in the history of the State.

(2) The plaintiff had in some way benefited and/or gained financially from the bank heist to such an extent as to enable him to enjoy material wealth and riches associated with expensive cars and holidays abroad.

(3) The plaintiff was, and remains, suspended from his duties at Bank of Ireland, his place of employment, pending the outcome of a Garda or criminal investigation.

(4) The plaintiff had not satisfied his employers that he was not a member of the group or party who had carried out the said bank heist.

(5) That the plaintiff had some inside information on the said bank heist which he had not disclosed to persons in authority and/or to An Garda Síochána.

The defendant seeks a ruling and an appropriate order pursuant to s.14(1)(a) of the Defamation Act 2009, that the publication by the Defendant on 31<sup>st</sup> January, 2010 is not reasonably capable of bearing any of the imputations contended for by the plaintiff at paragraphs 7 (i), 7 (ii) and 7 (v) of the statement of claim.

#### **Defendants Submissions**

4.1 The defendant submits that in an application such as the present, the question of whether a publication is capable of bearing a particular meaning is a question of law for the judge. The procedure set out in section 14 of the Defamation Act 2009 reflects a practice that had existed both in this jurisdiction and in England and Wales, whereby it is for the judge to lay down the limits of the range of the possible defamatory meanings of which the words are capable, and for the jury to determine the actual meaning of the words within that permissible range. It is stated in *Gatley on Libel and Slander* 11<sup>th</sup> Edition, at p.103 that:-

"In ruling on meaning, the court is not determining the actual meaning of the words but delimiting the outside boundaries of the possible range of meanings and setting the "ground rules" for the trial."

The defendant submits that in the present application, the Court is fully entitled to delimit the range of meanings which the words are reasonably capable of bearing.

4.2 In *Duncan and Neill on Defamation*, 3rd Edition, at p.33 the authors state *inter alia* that:-

"The natural and ordinary meaning of the words is the meaning ascribed to the words by the court as the meaning the words would convey to the notional reasonable reader. Where there is a possible range of meanings, a single or 'right' meaning is selected as the natural and ordinary meaning".

In *Jeynes v. News Magazines Limited* [2008] EW CA Civ 130 The Court of Appeal in England and Wales outlined what is meant by the so-called "reasonable reader", Clarke M.R. stated at paragraph 14:-

"The legal principles relevant to meaning ... may be summarised in this way: (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...' .... (8) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense."

4.3 A mere reference to a person being under suspicion does not amount to an inference of guilt. In *Lowry v Smyth*, (Unreported), High Court, 10th February 2012, Kearns P. refused an application for summary judgment by the plaintiff under the 2009 Act, and in so doing, referred to the meanings of the words complained of as follows:-

"In relation to the other matter complained of, I certainly believe it is open to the defendant to argue that to report the mere fact that a tribunal is investigating a person's possible involvement in a series of property transactions with a possible link to the awarding of a mobile phone license is not necessarily defamatory per se. Two cases amply bear out this proposition. Both were cited to this court in *Griffin v. Sunday Newspapers* [2011] I.E.H.C. 331, in which the defendant newspaper sought an order under s.14 (1)(a) of the Defamation Act 2009 to narrow down the scope of the plaintiffs claim on the basis that certain imputations ascribed to an article were not reasonably capable of bearing the defamatory meanings contended for by the plaintiff.

That case concerned a newspaper article which stated that there was a military investigation underway into allegations that members of the Army Rangers Wing took leave of absence to give weapons training to police in the Seychelles. The issue which the court had to consider was whether a statement that an inquiry or investigation was under way was of itself indicative of wrongdoing and of having the defamatory meanings contended for by the plaintiff.

In the course of argument, reference was made to two cases which provided considerable assistance.

In *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234, the facts were that the City Fraud Squad in London were inquiring into the affairs of a limited company of which Mr. Lewis was chairman. Both he and the company of which he was chairman issued writs against the newspapers who had issued front-page stories to that effect. It was alleged that the words were defamatory in their ordinary and natural meaning and were meant and were understood to mean that the plaintiffs had been guilty of fraud or dishonesty. In the course of his judgment Lord Reid stated as follows in relation to reports about ongoing investigations (at p. 259):-

"What an ordinary man, not avid for scandal, would read into the words 'complained of must be a matter of impression. I can only say that I do not think he would infer guilt of fraud merely because an inquiry is on foot. And, if that is so, then it is the duty of the trial judge to direct the jury that it is for them to determine the meaning of the paragraph but that they must not hold it to impute guilt of fraud because as a matter of law the paragraph is not capable of having that meaning."

A similar view was expressed by Lord Justice Hirst in *Mapp v. Newsgroup Newspapers Ltd.* [1998] Q.B. 520, to emphasize that the reference to an investigation could not reasonably be read as imputing guilt to the plaintiffs as contrasted with reasonable suspicion of guilt. In that case the court had to consider whether the reference to the suicide of a police officer in conjunction with a report of the existence of an investigation was such as to transform a reasonable suspicion of guilt into something more.

In *Griffin*, this Court endorsed the approach taken by Lord Reid in *Lewis* and by Hirst L.J. in *Mapp* to hold that, while the impugned article contained many statements to the effect that allegations had been raised, there was no suggestion that these allegations had been proven or that findings had been made adverse to the plaintiff."

It is clear therefore that a mere reference to a person being under suspicion does not amount to an or inference of guilt.

4.4 The defendant submits that it now well settled law that it is unreasonable to infer guilt from a statement of suspicion. At paragraph 7 (i) of the plaintiff's statement of claim, the meaning being contended for by the plaintiff is that the plaintiff has criminal responsibility for the robbery. The defendant submits that this contended meaning cannot arise, for a number of reasons but not least since it essentially involves the plaintiff in arguing that the publication excludes the possibility of his being entirely innocent. The headline sets out the plaintiff's position that the robbery was nothing to do with him. The words above the headline state that he has been released but that the investigation is ongoing. In the third paragraph of the article it is stated that the plaintiff is denying any involvement in the tiger kidnap, and that the plaintiff was "forced" to stuff four laundry bags with money. Further on in the article it is stated that he was released without charge from Garda custody. It is further stated that the defendant "...understands that [the plaintiff] insists that he had nothing to do with the heist", that the plaintiff was "forced" to drive to the Bank, that the plaintiff reported the matter to Gardai, that on the morning of the raid he arrived at the Bank distraught, and a caption refers to "...the house where [the plaintiff] was kidnapped". In light of these examples the defendant submits that the hypothetical reasonable reader would not take the meaning contended for by the plaintiff from the article.

#### **Plaintiffs Submissions**

5.1 The plaintiff submits that the defendant is not entitled to an Order pursuant to section 14(1) (a) of the Defamation Act, 2009 as sought in the Notice of Motion. The question for determination is whether or not the words are reasonably capable of carrying the meanings contended for by the plaintiff. The plaintiff relies on *Gatley on Libel and Slander*, 11<sup>th</sup> ed, 2008, the learned author states as follows at page 101:-

"Although it has been said that the question as to meaning that the words convey to the ordinary person should be a simple and straightforward one, as befits a law that governs the everyday life and actions of all levels of persons in the community yet, only in a very simple case are words capable of conveying a single, clear, indisputable imputation.....Logically anterior, therefore, to the question of whether the words are capable of being defamatory in law is the question of what meaning or meanings the words are reasonably capable of bearing. Where an action for defamation goes to full trial it may be before a jury and the jury is then the arbiter, subject to the limited powers of the court of appeal of what the words do convey and whether they are defamatory. In this sense, therefore, the meaning of words is a question of fact. But it is for the judge to rule whether the words contended for are capable of bearing the meanings contended for and if so whether any of those meanings is capable in law of being defamatory. The judge's function in this regard is no more and no less than to pre-empt perversity."

5.2 Meaning is something peculiarly for the jury and neither party is allowed to adduce evidence of meaning. The test laid down by the Supreme Court in *Quigley v. Creation Ltd.* [1971] IR 269 is that a trial judge should not withdraw a question of meaning from the jury unless it is satisfied that it would be "wholly unreasonable" to leave that question to the jury. *Quigley* concerned a well known actor who took a libel action against the publisher of a magazine article. The actor contended that the ordinary meaning of certain words in the article was that he did not work in Ireland and that he chose to work and live in London because the rewards and opportunities there were better than in Ireland. The plaintiff actor was successful before a jury and the publisher appealed. On appeal, the publisher submitted that the relevant words and their meaning as found by the jury were incapable of being defamatory because they only amounted to a statement that the plaintiff had left Ireland to improve his financial position. In disallowing the appeal, the Supreme Court per Walsh J. stated:-

"In defamation, as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of a defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied that it would be wholly unreasonable to attribute a libelous meaning to the words complained of. In determining this matter, the judge will construe the words in accordance with a fair and natural meaning such as would be given to them by reasonable persons of ordinary intelligence in our own community..."

5.3 In *Magee v. MGN Limited* [2003] IEHC 87 Mc Kechnie J. referred to the "unique" role of the jury in determining questions of meaning. That case involved an individual who had been convicted of the Brighton bombing. The plaintiff claimed to have been defamed by an assertion fifteen years later *inter alia* that he was not a supporter of the peace process in Northern Ireland. That case involved a different application than the application the subject matter of the motion before the Court. It was an application to strike out the plaintiff's claim as frivolous and vexatious. McKechnie J. considered that he could not conclude at that stage of the proceedings that the plaintiff's proceedings must fail. He stated as follows at paragraph 35:-

"...it seems to me that I cannot say at this stage of the within proceedings that the plaintiffs claim must fail. In other words that it cannot possibly succeed. In other words that before a properly representative jury he could not even argue

that the imputations as alleged were defamatory of him. I cannot agree that this is necessarily so. In such altered circumstances I believe that the existence or not, as the case may be, of damage to reputation, is at least capable of argument. Such a finding, one way or the other, as Griffin J. said in *Barrett v. Independent Newspaper Ltd.* [1986] I.R. 13 at p. 28, is to a considerable extent, "a matter of opinion" as distinct from judgments as to actual fact and. Furthermore in my view, there is no doubt but that society's opinion is capable in a way recognised by law of changing from time to time either to lead or to respond to events or other social changes. In my opinion, therefore given this crucial role which a jury plays on an issue such as this in a libel action, I cannot, as previously stated, conclude with certainty that right thinking members of society generally could not, despite the plaintiffs past, hold in his favor in the present proceedings."

5.4 The plaintiff submits that the article meant that he was:-

- (i) "In some way, a willing participant in the organization and carrying out of the largest bank heist in the history of the State".
- (ii) That he "in some way benefited and/or gained financially from the bank heist to such an extent as to enable him to enjoy material wealth and riches associated with expensive cars and holidays abroad"
- ...
- (v) That he "had some inside information on the bank heist which he had not disclosed to persons in authority and/or to An Garda Síochána".

The article includes a photograph of the plaintiff standing in front of a Ferrari and it includes captions such as "high life". The plaintiff submits that this Court should not remove from the jury, decisions about the overall meaning of the article. This is particularly so when it has to be conceded that the average reader is drawn to large colour photographs and headlines more than to the small text of the article. It is further submitted that because the article is reasonably capable of bearing the meanings contended for by the plaintiff, the defendant's application must fail.

#### **Decision of Court**

6.1 The within application is one brought by the defendant pursuant to s.14 (1) (a) of the Defamation Act 2009, wherein the defendant seeks orders from this Court that certain of the meanings contended for by the plaintiff at paragraph 7 of the statement of claim are meanings that are not reasonably capable of arising from the publication by the defendant on which the plaintiff sues. That is, of the five meanings contended for by the plaintiff, the defendant maintains that three of those meanings are not reasonably capable of arising.

6.2 Section 14 of the Defamation Act 2009 provides as follows:

"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."

6.3 The plaintiff's statement of claim contends at paragraph 7 that, in its natural and ordinary meaning the publication meant that:-

- (i) The plaintiff was a willing participant in the carrying out of the bank heist.
- (ii) The plaintiff had gained financially from the heist to such an extent as to enable him to enjoy expensive cars and holidays abroad.
- (iii) The plaintiff remains suspended from his duties at Bank of Ireland.
- (iv) The plaintiff had not satisfied his employers that he was not a member of the group who had carried out the heist.
- (v) That the plaintiff had some inside information on the bank heist.

The defendant seeks a ruling and an appropriate order pursuant to s. 14 (1)(a) of the Defamation Act 2009, that the publication by the defendant on 31st January, 2010 is not reasonably capable of bearing any of the imputations contended for by the plaintiff at paragraphs 7(i) 7 (ii) 7(v) of the statement of claim.

6.4 It is well established that a judge should not withdraw a question of meaning from the jury unless satisfied that it would be

"wholly unreasonable" to leave that question to the jury. The test laid down by the Supreme Court in *Quigley v. Creation Ltd.* [1971] IR 269 where Walsh J. stated as follows at 272:-

"In defamation, as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of a defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied that it would be wholly unreasonable to attribute a libelous meaning to the words complained of. In determining this matter, the judge will construe the words in accordance with a fair and natural meaning such as would be given to them by reasonable persons of ordinary intelligence in our own community..."

6.5 In determining an application such as this it seems to me that the same principles apply. I accept therefore that the Court must take into account the "unique" role of the jury in determining questions of meaning see *Magee v. MGN Limited* [2003] 1 EHC 87 cited above.

6.6 Written words must be construed in the context in which they appear. The hypothetical reasonable man that is referred to in *Jeynes v. News Magazines Limited* (cited above) whilst not overly suspicious can read between the lines and determine what is actually meant by the article. There may well be phrases present that are attributable to the plaintiff which claim his innocence, however it seems to me that the fact that the article sets out the plaintiff's denial of involvement in the bank robbery does not preclude the plaintiff from alleging the meanings for which he contends. The article includes captions such as "high life" beside a photograph of the plaintiff standing in front of a Ferrari. It is plain that some meaning must be adduced by the reasonable reader from the presence of such a photograph. The high life Ferrari style is not normally associated with the life style of a bank clerk. By juxtaposing the photo with the text, the defendant has it seems to me very arguably suggested the plaintiff is not to be believed. Whether this is so is a matter for the jury. It seems to me that the article when viewed objectively from the viewpoint of the hypothetical "reasonable reader" is capable of giving rise to the meanings contended for at paragraphs 7(i) 7(ii) and 7(v) of the statement of claim. I am satisfied therefore that it would be unfairly prejudicial to the plaintiff to prevent the pleas contended for at paragraphs 7(i), 7(ii) and 7(v) of the statement of claim from being put before the jury at the trial of the action. In light of these findings the defendant's application is refused.