Neutral Citation [2016] IEHC 711

THE HIGH COURT

[2014 No. 4612 P]

[2014 No. 4610 P]

BETWEEN:

DANIEL WARD

AND

SEAN QUINN

PLAINTIFFS

AND

THE DONEGAL TIMES LIMITED

AND

LIAM HYLAND

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 8th day of November, 2016

1. The plaintiffs claim damages for defamation in respect of two articles published by the first named defendant and written by the second named defendant, in his capacity as editor and journalist for the first named defendant, on 25th September and 9th October, 2013.

2. The first named plaintiff, Mr. Daniel Ward, was and is financial controller of Donegal Town Enterprise Scheme Limited which runs and operates an inshore leisure boat, known as the Donegal Bay Waterbus. The second named plaintiff, Mr. Sean Quinn, was and is the CEO of the Donegal Town Enterprise Scheme Limited which operates the Donegal Waterbus.

3. The first named defendant is a limited liability company with registered offices at The Diamond, Donegal Town, County Donegal and is the publisher of The Donegal Times, a newspaper circulating mostly in County Donegal. The second named defendant is a Director and/or Shareholder and/or Manager of the second named defendant for which he works as journalist and editor.

4. Plenary summons' in respect of both actions issued on 21st May, 2014 and each defendant entered an appearance on 28th May, 2014. The statements of claim were delivered on 16th June, 2014. An offer to make amends pursuant to section 22 of the Defamation Act 2009 ("the 2009 Act") was made by the defendants in respect of each plaintiff on 11th December, 2014. This offer was accepted by the plaintiffs by letters dated 10th February, 2015.

5. In the absence of agreement between the parties as to the terms and conditions of the offer of amends, the matter came on for trial before this Court on 26th and 27th May, 2016 to assess damages and costs pursuant to section 23 (1) of the 2009 Act. When the matter came on for trial, the Court was informed that a further related action in these proceedings, brought by Donegal Town Enterprises Limited had been resolved. Proceedings were adjourned until 16th June when the matter recommenced. Oral evidence was given and written and oral submissions were received by the Court.

The impugned articles

6. The first article, the subject of these proceedings was published on page 25 of the 25th September, 2013 edition of the Donegal Times in the section entitled "An Editor's Diary by *Liam Hyland*". The text of this article is as follows:

> "**Friday 13th**: A new company has been formed, Donegal National Hostel Limited. Its registered address is c/o Sean Quinn, Killymard, Donegal Town and its named directors are David Kearney, Co. Dublin and William Curran, Co. Dublin; who are also directors of 5,123 other Irish companies, 1,185 of which are now closed. With a purpose to renovate the National Hotel, the newly formed company intends to re-open it as an accommodation establishment. It's been a great year on the water. Well done to them. Roll on the Annual General Meeting, and a set of figures that members can take home with them."

7. The second impugned article was published on page 25 of the 9th October, 2013 edition of the Donegal Times again in the section entitled "An Editor's Diary by *Liam Hyland*". The text of this article is as follows:

> "**Saturday 28th**: Well done to the Waterbus boys who are winding down after a very successful year. In the months April to end of September, the vessel carried over 40,000 passengers – at €15 a go – you can work out the math. Then the bar takings. Being easily the most successful voluntary enterprise in town, this Community Scheme, already debt free, should be ready to deliver a fair amount of dosh to local groups, worthy charities, and organisations like Town Chamber and Bosco. With the committee and crew working for nothing, almost all turnover should translate into profit. Maith a gasurí."

8. The plaintiffs claim that the words published in these articles were defamatory of and concerning the plaintiffs. The first named plaintiff, Mr. Ward's, statement of claim states that the articles and, in particular, the words set out therein, in their natural and ordinary meaning and/or by way of innuendo meant and were understood to mean that:

a. The plaintiff participated in financial malpractice and mismanagement of monies associated with the Donegal Waterbus;

b. The plaintiff was willing to act as financial controller of an enterprise that was engaging in financial malpractice;

c. The plaintiff acted improperly, unethically and/or corruptly.

The first named plaintiff states that the publication of the words complained of has gravely injured his reputation in his personal and professional capacity and has exposed him to public scandal and contempt and caused him great embarrassment and distress in his job as financial controller that requires the utmost integrity and propriety. I am satisfied on the evidence that this is so.

10. The second named plaintiff, Mr. Quinn, claims that the words set out in the articles in their natural and ordinary meaning and/or by way of innuendo meant and were understood to mean that:

a. The plaintiff did not carry out his function of CEO with due care, diligence and the utmost good faith;

b. The plaintiff was party to financial malpractice and mismanagement of monies associated with the Donegal Waterbus;

c. The plaintiff was willing to act as CEO of an enterprise that was itself engaging in financial malpractice;

d. The plaintiff acted improperly, unethically and/or corruptly in his position as CEO.

He claims that the publication of the articles injured his reputation in both his professional and personal capacity and has exposed him to public contempt and distrust and caused him grave embarrassment and distress. I am satisfied that this is so.

11. The plaintiff's claim includes a claim for aggravated and/or exemplary damages.

Sequence of events
12. Letters were sent on behalf of Mr. Ward and Mr. Quinn by McCanny & Co. solicitors to the Donegal Times and Mr. Hyland respectively on 4th December, 2013 complaining about the articles. They set out in detail the alleged defamatory nature and effect of the articles.

Mr. Ward's letter
13. The letter sent on behalf of Mr. Ward to the Donegal Times refers to both articles published by the Donegal Times on 25th September and 9th October, 2013. It states:

> "Those articles clearly show the continuous malevolent and malicious publication regarding the Donegal Waterbus and have been motivated by personal vindictiveness and ongoing malice which has continued through numerous articles published by you down the years since February 2009".

14. It notes that Mr. Ward prepares and calculates the figures for the purpose of preparing the company accounts of Donegal Town Enterprises Limited to be presented by the board of the company to the AGM. It states:-

> "This article is an attempt to slur by innuendo Mr. Ward's personal and professional reputation and the reference to the accounts in this article is clearly libellous of our client."

15. In relation to the article published on 9th October, 2013, it is claimed that the reader was invited to multiply the figure of 40,000 passengers by €15 to conclude that the turnover of the waterbus business was €600,000 .The letter states:

> "You and your paper are well aware that when you say 'you can work out the math' that this is factually incorrect as there are substantial discounts given to various types of groups of passengers… The purpose of these articles is to give an exaggerated picture of, in the first instance, the turnover of the business and then, in the second instance, to indicate there is a limited overhead by virtue of 'with the committee working for nothing – almost all turnover should translate into profit'. Since you are fully aware that the full adult fare is €15, you cannot but be aware of the 'family friendly discounts' being advertised several hundred times every year as the van with the PA system advertising this passes your open office window many times every day. Furthermore by your family connection and social connection with past officers of the company, you would be fully aware of the custom and practice to discount coach group tours. Finally, on this point, you would most definitely know that Mr James White, who is bringing 10,000 plus passengers to the waterbus annually since March 2012, is paying substantially less than the full ticket price due to such volume. In any event, DTES Ltd accounts are freely available on the CRO website and you could have accessed this information, as you have previously done and obtained the real level of turnover as opposed to the inflated figure that has been implied by you through your newspaper.
>
> What this article does is to platform the innuendo that the figures that will be presented at the AGM will not accurately reflect the turnover or the expenses, thereby casting a grave and malicious slander on our client in his role as financial controller…
>
> The libellous materials which you have published in the recent past and referred to above have so far not been actioned by our client although we have corresponded with you in this regard. Our client has been extremely patient and did not wish to become involved in further litigation with yourself and the Donegal Times but you have continued to ignore previous requests to cease your disparaging articles about the waterbus, its directors and employees. It is now clear however, that you have ignored these requests and that the publication of the articles referred to in this letter demonstrate clear levels of malice on your part against our client and despite the fact that Mr Bustard successfully sued you and the Donegal Times you have thought it proper and acceptable to publish articles which are libellous, malicious and untrue. Our client is no longer able to accept the continuous attempt to denigrate his personal and professional reputation and that of the company. He and his fellow directors have worked tirelessly to improve and expand this flagship tourism product only to have innuendo thrown out by your paper to the general public in an attempt to create a frenzy of concern regarding the financial probity of our client, the employees, the directors and the company itself.
>
> Our client has suffered much hurt, distress and embarrassment and damage to his professional reputation as a financial controller given the fact that it is a job which requires the utmost integrity and propriety.
>
> Unless an apology in the terms attached is published on the front page of the Donegal Times in its next edition, and an undertaking is given not to publish any further material suggesting financial impropriety on the part of our client, and that further you pay damages in a sum to be assessed, then High Court proceedings will be issued against you without further notice… these proceedings will include a claim for punitive and exemplary damages based on the clear malice that you have evinced through the articles referred to above and our clients will of course seek the full costs of these proceedings against both the newspaper and the editor personally as joint defendants."

Mr. Quinn's letter

16. The solicitor's letter sent on behalf of Mr. Quinn sets out in similar terms the defamation as alleged by him against Mr. Hyland. This letter also refers to the articles of the 25th September and 9th October, 2013 and states that "[t]hose articles carried serious innuendos in relation to the financial aspects of the business and the management thereof". It sets out the contents of the articles sequentially, dealing first with the paragraph that indicated that Mr. Quinn was involved in a new company and speculating as to the financial dealings of the Waterbus. The article states:

> "a new company has been formed Donegal National Hostel Limited. Its registered address is c/o Sean Quinn, Killymard, Donegal Town and its named directors are David Kearney, Co. Dublin and William Curran, Co. Dublin who are also directors of 5,123 other Irish companies, 1,185 of which are now closed… It's been a great year on the water. Well done to them. Roll on the Annual General Meeting, and a set of figures that members can bring home with them."

The letter states that "[i]t is clear from this assertion that…either Mr. Quinn intends to run an unsuccessful business or that he will in some way strategically allow the business to close thereby benefiting himself in some financial way". It goes on to assert that there is then a "reference to the AGM of the Donegal Waterbus Company….with a scandalous suggestion that a set of figures would be presented to the members which would not bear scrutiny outside the room of the AGM". The plaintiff, through his solicitor states that "the totality of this article is again an attempt to slur by innuendo Mr Quinn's reputation and the whole tenor of this article is clearly libellous of our client."

17. The letter also sets out the misleading figures regarding the Waterbus' profit as implied by the article of the October, 2013. It refers to the invitation extended in the article for the reader to "work out the math" stating that "you and your paper are well aware that when you say [this], that this is factually inaccurate as there are substantial discounts given to various types of groups of passengers." The letter goes on to make the point that:

> "[w]hat this article does is to platform the innuendo that the figures that will be presented at the AGM will not accurately reflect the turnover or the expenses, thereby casting grave and malicious slander on our client, by hinting that he would stand over any such impropriety. The reality is that the accounts are audited and are filed in the Companies Registration Office".

18. The letter then makes reference to previous alleged libellous materials published in the past and the fact that these "have so far not been actioned by our client although we have corresponded with you in this regard". It goes on to say:

> "[o]ur client is no longer able to accept the continuous attempt to denigrate his personal and professional reputation and that of the company… Unless an apology in the terms attached is published on the front page of the Donegal Times in its next edition, and an undertaking is given not to publish any further material suggesting financial impropriety on the part of our client, and that further you pay damages in a sum to be assessed, then High Court proceedings will be issued against you without further notice. We would advise that these proceedings will include a claim for punitive and exemplary damages based on the clear malice that you have evinced through the articles referred to above…"

19. In response to these letters, RDJ Glynn, solicitors for both defendants, wrote to the plaintiffs by letters dated 21st January, 2014. These letters, though worded slightly differently, set out in similar terms, the defendants' position. The letters stated that the defendants "denie[d] that the articles carried any innuendos in relation to the financial aspects of the business or that there has been a continuous malevolent and malicious publication regarding the Donegal Waterbus". The letters went on to state that their:

> "clients are willing to offer the publication of a reasonable clarification in words to be agreed with your client explaining that in fact, as a standard procedure, when a new company is incorporated it is often done through professional company formation agents who because of the nature of their work are directors of multiple companies, many of whom ultimately cease trading or "are closed" but in circumstances where those professional company formation agents have no part in the operation of the company."

They further stated that they were willing to receive a draft clarification for consideration from the plaintiffs with suggestions as to the position in the newspaper where it should be placed and a date of publication to be agreed upon. An apology was not at this stage forthcoming.

20. By letters dated the 7th March, 2014 to both plaintiffs, the defendants repeated their offer to publish a clarification and, "if appropriate and wording can be agreed, a form of apology for any misunderstanding caused by the article, which can be published on a date to be agreed and, should your client require it, on the front page of the required edition of the newspaper."

21. In response to these two letters the plaintiffs' solicitors wrote two similar letters to the defendants' solicitors on 21st March, 2014. These letters stated "we note from your letter that there is no attempt to make an offer of an apology to our client". The letters state in respect of the offer to publish a clarification, "we feel that this offer is merely an attempt to thinly massage the damage done to our client's reputation". In response to the suggested apology to the plaintiffs as formulated, the plaintiffs' solicitors stated that they "were at a loss to comprehend [the] wording of misunderstanding as there is total clarity that [our clients'] professional and personal reputation[s] were lacerated by your client's venomous article."

22. The letters also state that the defendants' offer of clarification and a form of apology for any misunderstanding caused by the article seemed to suggest that the plaintiffs "would be satisfied with this, in total satisfaction in respect of the damage to our client(s') reputation and the outrageous libel caused to [them]". This letter clearly rejects the proposal put forward by the defendants in their letters dated 21st January, 2014 and 7th March, 2014 as entirely inadequate.

23. On 23rd May, 2014, Plenary Summons' issued and Statements of Claim were delivered on 16th June, 2014.

24. The defendants' solicitors wrote to the plaintiffs' solicitors on 22nd July, 2014 to suggest that the issues between their respective clients be referred to mediation, pursuant to the Rules of the Superior Court (Mediation and Conciliation) 2010, No. 502 of 2010 and S.I. 209 of 2011 European Community (Mediation) Regulation 2011.

25. This suggested mediation never came to fruition and a motion for judgment in default of defence issued against the defendants on the 14th October, 2014.

26. On the 11th December, 2014 the defendants' solicitors again wrote to the plaintiffs' solicitors to make an offer of amends pursuant to section 22 of the Defamation Act 2009. The offers to both Plaintiffs were "in respect of the entire of the statement".

27. On the 10th February, 2015 the plaintiffs indicated their willingness to accept this offer to make amends and requested details of the defendants' offer concerning:

> "1. The retraction and apology
>
> 2. Damages in respect of the two publications".

Offers of amends

28. On the 3rd March, 2015 the defendants' solicitors wrote to the plaintiffs' solicitors making the following offer:

> "(a) Our client proposes to publish the following apology
>
> 'DONEGAL TOWN ENTERPRISE SCHEME LIMITED, SEAN QUINN AND DANIEL WARD – APOLOGY
>
> In the Donegal Times on 25 September 2013 and 09 October 2013 we published two editorials about the Donegal Bay Waterbus. We accept that the editorials were misleading in terms of the inferences to be drawn in relation to the finances of the Donegal Bay Waterbus. We wish to retract the statements made in the said editorials and also wish to apologise to Donegal Enterprise Scheme Limited and to Sean Quinn and Daniel Ward, the CEO and Financial Controller of Donegal Town Enterprise scheme Limited respectively, which runs and operates the Donegal Bay Waterbus, for any upset and distress caused.'
>
> (b) Our client proposes to publish the apology noted at (a) in the next available edition of the Donegal Times, subject to your client's agreement, on page 3.
>
> (c) Our client is prepared to pay your client a sum of €25,000 in compensation together with the costs to be taxed in default of agreement. As you are aware, there are related proceedings involving Mr Ward and Donegal Town Enterprise Scheme Limited. The three sets of proceedings are virtually identical. While we are agreeing to pay your client's costs to be taxed in default of agreement, we respectfully submit that there would be significant duplication across the three matters and therefore there should not be three full sets of costs."

29. By letter dated the 10th July, 2015 the plaintiffs' solicitors wrote to the defendants' solicitors to advise that the offers were not accepted by the plaintiffs.

30. A notice of motion subsequently issued on 23rd July, 2015 and the matter came on for trial before this Court on 26th May, 2016.

Evidence

31. The nature and effect of the defamatory statements contained in the articles as outlined in the extracts from the initiating letters set out above were largely confirmed by the evidence of Mr. Ward and Mr. Quinn which was in its essential features unchallenged.

32. Mr. Ward, a native of Donegal, qualified as a civil engineer and was first employed on a project in Donegal Town in 1979. Thereafter, he worked in New York from 1985 for a period of approximately ten years following which he returned to Ireland. He married in 1992 in Glenties and he and his wife returned to New York but intended to return home if the opportunity arose. In 1994 they returned home and purchased a bar and he developed it as a business until it was sold in or about 2004.

33. He became involved in the waterbus venture for Donegal Town in or about 1997 and contributed to the project with others. He became friendly with Mr. Quinn. He devoted himself on a full-time basis to the waterbus project under and within Donegal Town Enterprise Limited which appointed him as financial controller in or about 2009. He also carried out a wide variety of jobs as required on the waterbus during its operational season.

34. Mr. Ward described the devastating effect of the publication of these articles on his standing and reputation in the community. He could not understand how Mr. Hyland could write the material contained in the articles. He and his family were extremely embarrassed by the articles which circulated in his home town, surrounding towns and Donegal Town. He considered himself to be sociable and outgoing but he felt people were now "looking the other way" on his approach. He considered that his good name had been blackened. There was a cloud over his reputation personally and in his work which required probity and honesty. He had behaved correctly in his professional and business life. His financial work with the waterbus was subject to audit and was fully recorded and a matter of record.

35. He withdrew socially. He continued to golf but went out early in the morning to avoid people. He had been involved in training with his local football club which he stopped. He restricted his involvement in the club because of the articles and decided not to seek any club position because he was fearful that the club's interests or fundraising might be tarnished by his involvement. He suffered many sleepless nights as a result of the personal distress and that of his family caused by the articles and the damage they inflicted on his reputation. He believed that Mr. Hyland wrote the articles knowing that they were untrue and felt that he had been wrongfully accused of embezzlement.

36. Mrs. Ward fully corroborated the serious effect which the damage caused to her husband's reputation in the community had on her husband and his social and personal life. In particular, she noted his reluctance to become involved in fundraising events in the community in case they might become tainted by association with him because of the articles.

37. Mr. Quinn gave evidence of the effect of the articles on his personal and professional reputation. He also was a native of Donegal. Following the early death of his father, he was reared with his three siblings by his mother in Donegal. He obtained a scholarship and having qualified as a mechanical engineer, he embarked on a very successful career with a major supplier and manufacturer of machine tools and lifting equipment. He was one of the group's youngest directors. In or about 1990 he took the opportunity to move with his family to Donegal where he invested in and ran a bar, large bed and breakfast and other business interests. He became involved in the waterbus company in or about 1997 as did Mr. Hyland. There were originally twenty members of the scheme who funded it with subscriptions of 500 each. In 2005 he and Mr. Ward were elected as directors of the company. He became chief

executive officer.

38. In 2005/6 a new waterbus was commissioned and entered service profitably providing tours around Donegal Bay for considerable numbers of tourists. It provided a badly needed attraction to increase tourist numbers in the town. Mr. Hyland was said to have commenced "uncomplimentary" coverage of the company in or about February 2009.

39. Mr. Quinn states that he was well known throughout Donegal where he has many relations and friends. He was motivated on his return to Donegal with his family to become involved in the community. He had established in his business life a good reputation based on honesty and integrity. He found the allegations contained in the articles to be devastating, hurtful and offensive. He was being portrayed as a person engaged in large scale embezzlement of the profits of the community enterprise company. He had four school-going children who heard their father described as a person "on the take" as a result of these articles. He was trying to hide his embarrassment from his wife and children. It was physically upsetting and caused him sleepless nights of worry. He found that ordinary engagement with people was affected by the articles. When he entered his local barber shop a silence would descend. He has curtailed socialising and does not go out for a drink very often. He feels restricted to his own home by reason of the embarrassment caused to him by the contents of the articles. He attends early mass to avoid a greater crowd at a later one.

40. I am satisfied on the evidence that the publication of these articles brought the plaintiffs into public ridicule and contempt and damaged their good names and reputations personally and professionally for which they are entitled to damages. I am also satisfied that I must in fairness to the defendants take proper account of the fact that the Donegal Times is a local newspaper which has a limited circulation in Donegal, where most of its interested readership resides. Its circulation was said to be approximately 5,000 copies and it had an internet presence at the time, though no formal evidence was adduced to support that figure which was offered by counsel.

41. The assessment of damages must be calculated on the basis of common law principles and the 2009 Act.

The 2009 Act

42. Section 22 of the 2009 Act provides that:

> "22. (1) A person who has published a statement that is alleged to be defamatory of another person may make an offer to make amends.
>
> (2) An offer to make amends shall—
>
> (a) be in writing,
>
> (b) state that it is an offer to make amends for the purposes of this section, and
>
> (c) state whether the offer is in respect of the entire of the statement or an offer (in this Act referred to as a " qualified offer ") in respect of—
>
> (i) part only of the statement, or
>
> (ii) a particular defamatory meaning only.
>
> (3) An offer to make amends shall not be made after the delivery of the defence in the defamation action concerned.
>
> (4) An offer to make amends may be withdrawn before it is accepted and where such an offer is withdrawn a new offer to make amends may be made.
>
> (5) In this section " an offer to make amends " means an offer—
>
> (a) to make a suitable correction of the statement concerned and a sufficient apology to the person to whom the statement refers or is alleged to refer,
>
> (b) to publish that correction and apology in such manner as is reasonable and practicable in the circumstances, and
>
> (c) to pay to the person such sum in compensation or damages (if any), and such costs, as may be agreed by them or as may be determined to be payable,
>
> whether or not it is accompanied by any other offer to perform an act other than an act referred to in paragraph (a), (b) or (c)."

43. S. 23 of the 2009 Act concerns the "Effect of offer to make amends"; sub-s. (1) (c) states that:

> "if the parties do not agree as to the damages or costs that should be paid by the person who made the offer, those matters shall be determined by the High Court or, where a defamation action has already been brought, the court in which it was brought, and the court shall for those purposes have all such powers as it would have if it were determining damages or costs in a defamation action, and in making a determination under this paragraph it shall take into account the adequacy of any measures already taken to ensure compliance with the terms of the offer by the person who made the offer".

44. Section 24 of the Act concerning "Apology" provides :

> "(1) In a defamation action the defendant may give evidence in mitigation of damage that he or she—
>
> (a) made or offered an apology to the plaintiff in respect of the statement to which the action relates, and

(b) published the apology in such manner as ensured that the apology was given the same or similar prominence as was given to that statement, or offered to publish an apology in such a manner,

as soon as practicable after the plaintiff makes complaint to the defendant concerning the utterance to which the apology relates, or after the bringing of the action, whichever is earlier."

45. Section 31 of the Act sets out the factors which the Court must address and take into account when assessing damages:

"(1) The parties in a defamation action may make submissions to the court in relation to the matter of damages.

(2)….

(3) In making an award of general damages in a defamation action, regard shall be had to all of the circumstances of the case.

(4) Without prejudice to the generality of subsection (3), the court in a defamation action shall, in making an award of general damages, have regard to—

(a) the nature and gravity of any allegation in the defamatory statement concerned,

(b) the means of publication of the defamatory statement including the enduring nature of those means,

(c) the extent to which the defamatory statement was circulated,

(d) the offering or making of any apology, correction or retraction by the defendant to the plaintiff in respect of the defamatory statement,

(e) the making of any offer to make amends under section 22 by the defendant, whether or not the making of that offer was pleaded as a defence,

(f) the importance to the plaintiff of his or her reputation in the eyes of particular or all recipients of the defamatory statement,

(g) the extent (if at all) to which the plaintiff caused or contributed to, or acquiesced in, the publication of the defamatory statement,

(h) evidence given concerning the reputation of the plaintiff,

(i) if the defence of truth is pleaded and the defendant proves the truth of part but not the whole of the defamatory statement, the extent to which that defence is successfully pleaded in relation to the statement,

(j) if the defence of qualified privilege is pleaded, the extent to which the defendant has acceded to the request of the plaintiff to publish a reasonable statement by way of explanation or contradiction, and

(k) any order made under section 33 , or any order under that section or correction order that the court proposes to make or, where the action is tried by the High Court sitting with a jury, would propose to make in the event of there being a finding of defamation.

(5) For the purposes of subsection (4) (c), a defamatory statement consisting of words that are innocent on their face, but that are defamatory by reason of facts known to some recipients only of the publication containing the defamatory statement, shall be treated as having been published to those recipients only.

(6) The defendant in a defamation action may, for the purposes of mitigating damages, give evidence—

(a) with the leave of the court, of any matter that would have a bearing upon the reputation of the plaintiff, provided that it relates to matters connected with the defamatory statement,

(b) that the plaintiff has already in another defamation action been awarded damages in respect of a defamatory statement that contained substantially the same allegations as are contained in the defamatory statement to which the first-mentioned defamation action relates.

(7) The court in a defamation action may make an award of damages (in this section referred to as "special damages") to the plaintiff in respect of financial loss suffered by him or her as a result of the injury to his or her reputation caused by the publication of the defamatory statement in respect of which the action was brought…."

46. Section 32 entitled "Aggravated and punitive damages" provides:

"32. (1) Where, in a defamation action—

(a) the court finds the defendant liable to pay damages to the plaintiff in respect of a defamatory statement, and

(b) the defendant conducted his or her defence in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement, the court may, in addition to any general, special or punitive damages payable by the defendant to the plaintiff, order the defendant to pay to the plaintiff damages (in this section referred to as "aggravated damages") of such amount as it considers appropriate to compensate the plaintiff for the aggravation of the said injury.

(2) Where, in a defamation action, the court finds the defendant liable to pay damages to the plaintiff in respect of a defamatory statement and it is proved that the defendant—

(a) intended to publish the defamatory statement concerned to a person other than the plaintiff,

(b) knew that the defamatory statement would be understood by the said person to refer to the plaintiff, and

(c) knew that the statement was untrue or in publishing it was reckless as to whether it was true or untrue,

the court may, in addition to any general, special or aggravated damages payable by the defendant to the plaintiff, order the defendant to pay to the plaintiff damages (in this section referred to as "punitive damages") of such amount as it considers appropriate.

(3) In this section "court" means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury."

47. It is submitted by the plaintiffs that the defendants merely accept that the editorials were misleading, but not defamatory and that the nature, and extent of the apology offered was disingenuous and hollow. They submit that the Court should have regard to the genuineness of the apology and that the defendants intentionally published defamatory material concerning them which could have been verified or clarified with ease.

48. It is further submitted that the failure by the second named defendant to attend at any point in the trial is a further expression of his lack of remorse or regret. Although counsel for the defendant expressed an apology to the plaintiffs, it is submitted that this was simply an attempt to garner credit before the Court.

Damages

49. The Supreme Court decision in *Leech v. Independent Newspapers (Ireland) Limited* [2014] IESC 79 considered the factors to be taken into account when determining an award of damages. The Court in Leech quoted the decision of Hamilton CJ. in *De Rossa v. Independent Newspapers* [1999] 4 I.R. 432 - which applied the principles set out in *John v. MGN Ltd***.** [1997] QB 586 – with approval. The Court in *de Rossa* stated:

" The factors to be taken into account in determining the damages to be awarded are clearly set out in many cases and in particular in the judgment of the Court of Appeal in *John v. MGN Ltd.* [1997] QB 586 at page 607 of the report where it is stated as follows:

'The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way'."

This is the starting point in determining the appropriate level of damages to be awarded.

In *Christie v. TV3* [2015] IEHC 694, O'Malley J. reviewed the authorities concerning the assessment of damages in this jurisdiction.

Aggravated damages

50. A number of factors were advanced as evidence upon which the court should make an award in respect of aggravated damages. These were the lateness of the apologies offered, the content of the apologies and the subsequent publication of two further articles by the defendants which were said to have repeated the defamatory statements. Gatley on Libel and Slander (12th ed.) considered aggravated damages in the context of subsequent publications at para 9.19 :

"The question whether, and if so in what circumstances, a claimant in a libel action is entitled to increase the damages recoverable in respect of the single publication complained of by relying on subsequent publications which are not themselves sued on as separate causes of action has been considered in two important cases: *Collins Stewart Ltd v The Financial Times (No. 2)* [2005] EWHC 262 and *Clarke t/a Elumina Iberica UK v Bain & Prolink Holdings* [2008] EWHC 2636 (QB). The effect of these two decisions is, it is suggested, as follows. First, subject to general case management principles, evidence of subsequent publications in respect of which no claim is brought is admissible in so far as the later publications substantially repeat the same imputation and shed light on the motive or state of mind of the defendant in making the imputation in respect of which the claim is brought. Thus where the subsequent publications help to prove the existence of a malicious motive or establish the existence of malice they may be led in evidence. Second, where the evidence also establishes another cause of action, then the jury must be cautioned against giving damages in respect of that cause of action. Moreover, in such a case the defendant is entitled to plead matters which would afford him a defence to that cause of action, if it had been pleaded as a separate cause of action, including issues of meaning."

51. In the case of *Turner v. MGN* [2005] EMLR 25, Eady J. states, at para. 71 that the court should:

"…as well as looking at the nature of the defamation and the extent of the publication, take into account relevant aspects of the conduct of the defendant from the time of publication up to the conclusion of the case, including such matters as the absence of an apology or persisting in a plea of justification not supported by evidence. These could be considered under the heading of compensatory damages or, as appropriate, aggravated damages."

52. In the Supreme Court decision in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305, it was held that damages in tort may be assessed under three possible headings:

> "(a) Ordinary compensatory damages…
>
> (b) Aggravated damages: being compensatory damages increased by reason of
>
> > (i) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or
> >
> > (ii) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or
> >
> > (iii) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wrongedplaintiff up to and including the trail of the action.
>
> (c) Punitive or exemplary damages…"

The Court should have regard to these principles in considering the level of damages to be awarded to each of the plaintiffs, in particular the manner in which the wrong was committed. It is the plaintiffs' case that the publications were a deliberate attempt by the defendants to lower them in the eyes of society and in particular, their readership. However, these principles must be applied with due regard to the provisions of the 2009 Act already quoted.

53. The court must also consider whether the amount of general damages appropriate in these cases should be reduced or mitigated because of the offers of amends made as set out above. They contain two elements, the correction or apology offered and the amount of compensation proposed.

Compensation and Offers of Amends
54. The defendants offered the sum of €25,000 in compensation to each of the plaintiffs in the offers of amends of 3rd March 2015. The offers were unacceptable to each of the plaintiffs as they were considered to be inadequate.

55. There is no authority in this jurisdiction as to whether the court should be informed of the amount or figure contained in the declined offer of amends when determining the amount of damages to be awarded. In England, it is considered to be inappropriate, under similar legislation, to reveal the amount of compensation offered to the trial judge. In that jurisdiction where an offer has been made and accepted, but the quantum of damages remains in issue, the judge must engage in a two-stage process, outlined by Eady J. in *Turner*:

> "The first stage is to identify the figure I should award at the conclusion of a hypothetical trial in which the defendant had done nothing to aggravate the hurt to the claimant's feelings (*e.g.* by pleading justification or by insulting cross-examination) and nothing to mitigate (*e.g.* by the publication of an apology). At the second stage, I must consider to what extent, if at all, that figure should be discounted to give effect to any mitigating factors of which this defendant is entitled to take advantage."

The Court should first identify a figure in advance of applying mitigating factors or aggravating factors. Eady J., stated that it would ordinarily be preferable if the amount of compensation contained in such offers were not disclosed to the trial judge. As Leggatt L.J. in *Kiam v. Neil & Another* [1995] EMLR 1 stated:

> "Obviously they cannot be permitted to disclose that amount, otherwise a defendant could always make an offer, and if it was refused he would then be at liberty to reveal the amount of it whilst studiously avoiding any submissions relating to the merits of the sum offered. That would circumvent all the rules of practice which prohibit counsel from canvassing specific figures with the jury in order to avoid what Lord Denning MR regarded as 'an auction".

56. The plaintiffs in this case sought the disclosure to the Court of the figure offered to demonstrate the negligible and/ or minimal value that the defendants placed upon the plaintiffs' reputations. While no serious objection was raised by the defendants and the court was made aware of the sum contained in the letter making the offer of amends, I do not consider that the amount contained in the letter should be considered a significant factor in determining the amount of damages to be awarded. In many cases the parties place a much higher value on the furnishing of an apology than an amount of money that may accompany such an offer. A defendant may well be constrained for financial or other reasons from making a higher offer. Furthermore, I do not consider that introducing a figure previously offered but rejected assists in the proper assessment of damages for the reasons given by Leggatt L.J. The assessment of damages is made having heard all the evidence and submissions. It is not a process that lends itself to exact calculation or prediction. There is a range of damages within which a client may be advised that a successful claim may fall. In particular, I am not satisfied that a jury should be informed of the figure offered and since this trial must be conducted on the same principles as a jury trial, I see no basis upon which to factor that figure into the ordinary process of assessment or when considering whether to make an award of aggravated damages. In this regard I am persuaded by the English authorities relied upon.

57. The only other possible relevant basis for considering the amount of the offer is in respect of the degree of mitigation to which the defendants may be entitled in respect of an offer of amends. It might be claimed that the amount offered is so low as to be derisory or to constitute a further aggravating factor. The offer of amends is directed towards the restoration of damaged reputation at an early stage. The main emphasis of the provisions lies on the correction and/or apology which it contains. The definition in s.22 (5) states that an offer to make amends means an offer to make a suitable correction and a sufficient apology and to publish that correction and apology in such a manner as is reasonable. S.25(c) then provides that an offer also includes "an offer to pay such sum in compensation or damages (if any)…as may be agreed by them or as may be determined to be payable…". Of course the making of an offer of amends must be taken into account under s.23 (4) but the amount set out in the offer should not be imbued with an exaggerated significance thereby permitting the mischief which the English authorities seek to avoid. In addition, the assessment of damages should not become an inquiry as to why a particular amount was offered, why it was refused, what would have been acceptable as an offer or within what range it ought to have been made or might reasonably have been accepted. The section envisages the assessment of damages by the court if agreement cannot be reached but the other elements of the offer are accepted.

58. I do not consider that the offer of compensation in this case should inform the level of damages or any mitigation thereof to which the defendants may be entitled.

Aggravating factors
59. Sections 22 and 23 of the 2009 Act were enacted to facilitate an easier and more expeditious means of settling disputes, without the need for recourse to the court. In *Christie* it was argued, inter alia, that the apology proffered did not admit defamation. It was further argued that any reduction for the purposes of section 22 should be modest, given that the section envisages an offer of compensation before proceedings are issued. The plaintiffs submit that the apology must be adequate and the actions of the defendant throughout the action, from publication to the offers to make amends should be considered in determining whether the failure to make or offer an adequate apology or delay in doing so entitles the plaintiffs to aggravated damages.

60. It is submitted that the fact that the defendants failed to make an offer of amends until one year after the initiating letter was received is relevant. In *Angel v. Stainton* [2006] EWHC 637 the English High Court was satisfied that a delay in making an offer of amends could be treated as aggravating conduct. In that case an unqualified offer to make amends was left until the day before the defence was due. Eady J. did not consider this to be "early" in the case and concluded that a lesser reduction than might otherwise apply when the offer was early should be made.

61. The relevance of the adequacy of the apology was briefly considered by O'Malley J. in *Christie*, who stated that "it does not seem appropriate to allow further mitigation in the absence of a more comprehensive apology". It was submitted that this suggests that the Court may have regard to the content and nature of the apology and I am satisfied that this is so. At common law the absence of an apology may support an application for aggravated damages. However, when an offer of amends is made under s.22 one must have careful regard to the timing and content of any purported correction or apology. The section is not to be abused by the advancement of artfully drawn but nevertheless hollow or ineffectual corrections or apologies accompanied by very low offers of compensation cloaked in the formality and terminology of section 22 to secure a significant reduction in damages for an egregious wrong. The plaintiffs claim that the defendants in this case have not offered a real apology and certainly not one for which any significant mitigation should be allowed. On the contrary, they seek aggravated damages for the fact that it is entirely inadequate.

62. Initially the defendants denied that the articles were defamatory. Offers of correction were made to Mr. Ward, who, it was said was not mentioned, in either article. An opportunity to clarify the respective fares charged to various categories of passenger was made on 21st January, 2014. This was followed on the 7th March by an offer to publish a "clarification" and "if appropriate and wording can be agreed a form of apology for any misunderstanding" caused by the article of the 9th October on the front page of the newspaper. In default of accepting this offer the defendants stated that they would defend the proceedings fully. There was an offer of mediation following delivery of the Statements of Claim. An offer of amends was finally made "in respect of the entire of the Statement" which was then accepted, the full terms of which proved unacceptable as outlined above.

63. It seems to me that when delay occurs in offering an apology but one is then tendered by the defendants, the court must be mindful of the intention of s.22 to facilitate settlement and avoid further court process and hardship for the defamed plaintiff. In this case there was a complete failure to accept the fact of defamation until the offer of amends. I do not regard the terms of the letter of 7th March as an acceptance of the defamatory nature of the publications which required an apology. The delay therefore continued until at the earliest 11th December, 2014 over a year later.

64. The terms of the apology finally offered to the plaintiffs on the 3rd March are regarded by them as equivocal because they refer to the editorials as "misleading in terms of the inferences to be drawn in relation to the finances of the Donegal waterbus". However, this is followed by a proposed retraction of the statements and an apology for any upset and distress caused. One can appreciate why the terms of the proposed apology were deemed insufficient but it was nevertheless an apology tendered at a late stage. In my view its inadequacy (if any) is more properly to be considered under the provisions of s.22 rather than as an event requiring an award of aggravated damages.

65. The plaintiffs also submit that two further articles published by the first named defendant, on 24th June, 2015 and 27th January, 2016 are relevant aggravating factors that should be taken into consideration for the purposes of assessing damages. The plaintiffs complain that the articles reflect the state of mind of the defendants in relation to these proceedings. Both are published post the offers to make amends. The first article was published after the making of the offers but before they were declined. The second was published in the knowledge that apologies had been offered and declined and that the proceedings in which the defendants would seek to rely upon them were continuing. The defendants were clearly aware that they sought to mitigate the damages that might be awarded in respect of similar material which was for that purpose accepted by them as defamatory of and damaging to the plaintiffs. The first in particular, refers to threats to bring the newspaper to court "for daring to question ticket money declarations" and company registration files. This is a clear reference to the acknowledged defamatory material contained in the articles in suit.

66. I accept the defendants' submission that these articles, if defamatory, may be the subject of a separate cause of action against the defendants. If such proceedings were taken they would be subject to pleading. The defendants would be liable for any further damage caused to the plaintiffs. They would also be entitled to plead any defence which they might consider open to them in the circumstances. It is therefore submitted that it would be unfair to the defendants to allow the Plaintiffs to introduce these articles as a basis for seeking aggravated damages in these proceedings. It is submitted that such repeat publications are relevant to malice which is not pleaded (*Collins Stewart v. Financial Times* (No.2) [2006] EMLR 5). Furthermore, it is claimed that when an offer of amends is made and accepted the issue of malice does not arise (*Bowman v. MGM* [2010] EWHC 895). I have considered the two articles in the context of the claim for aggravated damages. I am not satisfied in the circumstances of this case to rely upon them in relation to a claim of malice or of conduct that would justify an award of aggravated damages. The plaintiffs adduced these articles during the course of the hearing. It would have greatly assisted the case if the matter had been the subject of pleadings and particulars and made part of the cause before the court, a course which was open to the plaintiffs. I am not satisfied that aggravated damages are recoverable in this respect. However, I am satisfied that these two articles are relevant to an understanding of the nature and extent of the apologies advanced as part of the offers of amends. They must be read in the context of the dynamic of the proceedings at the time of their publication which the court is entitled to consider as part of the overall circumstances of the case.

67. The disparagement of the plaintiffs' case is relevant to the question of whether mitigation ought to apply in respect of the offers to make amends. Mr. Ward and Mr. Quinn are once again specifically identified and subjected to sustained critical comment especially in the second article which refers to the generation of €1 million in profits by the company since 2005 with the added comment that "where it all went can only be explained by the two boys". The plaintiffs claim that the two articles are evidence of subsequent post publication conduct in respect of the two articles in suit and justify a reduction to a low level or zero of the amount in mitigation which the plaintiffs ought to be granted under s.22.

68. I am satisfied that the later articles are evidence of behaviour that tends to undermine the supposed purpose of the offers to make amends namely, the prompt restoration of character and the reduction for the plaintiffs of the stress of litigation. Clearly, the evidence of the plaintiffs was that they considered these further publications which occurred following the making of offers of amends

which contained apologies and accepted that they had been defamed and entitled to damages to be insincere and dishonest. The later articles are contrary to the spirit and intention of the s.22 process invoked in this case and undermine the purported basis upon which they were advanced. They assist the court in understanding the defendants' attitude to the plaintiffs' claim. The apologies offered have a hollow ring. I am satisfied that they are a factor to be considered in exercising the court's jurisdiction under s.22. I am satisfied that the apologies made were late in coming, inadequate in addressing the central core of the defamatory statements by stating that the editorials were simply "misleading" and advanced with little sincerity in the light of the timing and content of the subsequent articles.

Offers to Make Amends as Mitigation
69. Eady J. in *Nail v. Jones and News Group Newspapers Ltd.* [2004] EWHC 647 states at para.35:

> "The offer of amends regime provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows that from that point on that he has effectively "won". He is to receive compensation and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrongdoing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced. Whereas juries used to compensate for the impact of the libel down to the moment of verdict, once an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the apology is published, it is also hoped that reputation will to a large extent be restored…"

The plaintiffs claim that the offers should not have any deflationary effect on the level of compensation as the defendants published the two later articles reiterating the defamation and referring to these ongoing proceedings.

70. The Court in *Nail* noted at para. 41 that damages are to be assessed "as of the date of assessment, not the date of publication. The conduct of the defendant after publication can, therefore, aggravate or mitigate the damage and the award." *Leech* and *Christie* are also authority for the proposition that compensatory damages may cover additional injury after the original publication and that a court could take into account the conduct of the defendant from the time of publication up to the conclusion of the case.

71. O'Malley J. in *Christie* examined the percentage reduction to be applied due to the existence of mitigating factors under s. 22. The learned judge stated that the court may look at the nature of the defamation and the extent of the publication. In addition, it may take into account relevant aspects of the conduct of the defendant from the time of publication up to the conclusion of the case, including such matters as the absence of an apology. The learned Judge further stated that these factors could be considered under the heading of compensatory damages or, as appropriate, aggravated damages.

72. Pursuant to s. 23 (1) the Court "shall take into account the adequacy of any measures already taken to ensure compliance with the terms of the offer by the person who made the offer". The plaintiffs submit that the wording "shall take into account" enables the Court to look beyond the mere existence of a section 22 offer and examine the circumstances surrounding that offer. I am satisfied that this is correct. Therefore I am satisfied that the court ought to have regard to all the circumstances of the case including the post- offer publications by the defendants concerning the plaintiffs.

Percentage reduction, if any
73. O'Malley J. in Christie stated that in determining the appropriate sum to award under s.22, the following should be taken into account:

> i. The fact that an unqualified offer of amends has been made.
>
> ii. The measures taken in compliance with the offer (s. 22 (1) (c)).
>
> iii. The matters set out in s. 31 (4) of the Act.

O'Malley J. in that case reduced the award by one third on the basis of aggravating and mitigating factors, considering the conduct of the defendants and the apology offered as mitigating factors. O'Malley J. stated, in that case:

> "I consider it appropriate to allow a discount in the region of one third, to take account of the offer to make amends and the apology, and a failure, in the running of the action, to take responsibility for the fact that the plaintiff was damaged in his reputation as a result…"

It is submitted that a reduction of one third in this case would be overly generous in consideration of the aggravating factors in the present case. The plaintiffs submit that the defendant has failed to acknowledge that the articles were defamatory or untrue and furthermore that the disingenuous apologies, in addition to the post offer of amends publication of defamatory statements should be also be taken into account.

The defendants' submissions
74. The defendants submit that there are a number of reasons that damages awarded in this case should be modest and discounted to a significant degree.

75. The defendants also rely on *Christie* in their submissions on the appropriate approach to assessing damages where an offer of amends has been made. O'Malley J. in that case observed that the matters to which a court should have regard in making an award of general damages could be grouped together within the common law headings of gravity, extent of publication, impact of the defamation and the conduct of the defendant.

76. O'Malley J. reviewed the English case-law concerning a similar provision and concluded that, the same principles apply to the assessment of defamation damages as apply to the determination of compensation pursuant to an offer of amends as was made clear in the cases of *Abu v. MGN Ltd* [2003] 1 WLR 2201 and *Cheese v. Clark and Associated Newspapers* [2003] EWHC 137. O'Malley J. added that:

> " 80. Since the principles to be applied in a hearing of this nature are precisely the same as those applicable to conventional libel proceedings, account must be taken of issues such as mitigation, aggravation and causation of loss".

77. The two-stage process, as identified in the judgment of Eady J in *Turner* was affirmed as "settled practice" in the case of *Bowman v. MGN Ltd* [2010] EWHC 895. This judgment quoted the two-step process as summarised in Duncan & Neill on Defamation (3rd edition) as follows:

> "19.12 If the court determines compensation under the offer to make amends procedure, the assessment is on the same principles as in a defamation action. The usual principles on the elements of compensatory damages, mitigation, aggravation and causation apply; and there is no reason why exemplary and/or special damages should not be recoverable in an appropriate case. To determine the appropriate amount of compensation, the courts have adopted a two-stage process: first, to arrive at a figure which would have been awarded after trial (assuming no aggravation or mitigation of damages); secondly, to decide to what extent that figure should be discounted to give effect to any mitigation. The fact that the offer to make amends procedure has been adopted by the defendant is, of itself, a mitigating factor. Indeed, if an early offer to make amends is accepted and an agreed apology published, there is 'bound to be substantial mitigation'. There is, however, no standard percentage discount where the offer to make amends procedure is used; each case must be assessed on its own facts."

78. As already noted, the approach adopted by Eady J. in *Nail* is approved by O'Malley J. in *Christie* when dealing with the issues of quantum of damages and discount in the context of an offer of amends. In *Nail* the mitigating factors, concerning the offer of amends and the published apology led to a reduction of 50% in relation to quantum.

79. O'Malley J. observed, regarding the approach taken in the Court of Appeal's decision in *Nail* [2004] EWCA Civ 1708 that:

> "97. In concluding that there had been no error of principle in the approach taken by the trial judge, the Court of Appeal stressed that there could not be a conventional or standard percentage discount when an offer to make amends is accepted and an agreed apology published. *"Each case will be different and require individual consideration"*. However, most such cases will exhibit substantial mitigation."

80. The defendants therefore acknowledge that damages, as well as a discount or reduction of damages are case specific. However, the defendants underline that the approach of the English courts is to allow a discount of up to 50% when there are mitigating factors present.

81. The defendants submit, by reference to s. 31 (4) of the 2009 Act, in relation to the nature and gravity of the alleged defamation in the articles, that the alleged defamatory words cannot bear the meanings contended for in their natural and ordinary meaning and that the meanings contended for rely on innuendo. It is argued that where the plaintiffs have to rely on innuendo to advance their case, a conservative approach to damages is appropriate, and that this was a relevant consideration in the case of *Bowman v. MGN Ltd.* [2010] EWHC 895 where a 50% discount was made.

82. The defendants also contend, in relation to the means of publication of the defamatory statements and the extent to which it was circulated, that the Donegal Times is a small print publication. Although they maintain a website, it is little more than a front page and the Donegal Times is no longer providing selected articles from the print edition online. They submit that the Donegal Times is a local newspaper that covers issues relating to Donegal Town and its immediate surroundings and its circulation is primarily within that area. Its circulation is in the region of under 5000 copies a fortnight.

83. Regarding the offer of an apology, correction or retraction the defendants contend that, through their lawyers, they have engaged with the plaintiffs and made genuine efforts to resolve the situation. However, they submit that the plaintiffs made no attempt to advance an apology in a form of wording agreeable to them, and instead rejected the proposed apology set out by the defendants in correspondence. The defendants submit that the plaintiffs' non- engagement with the defendants should affect the quantum of damages.

84. In relation to the offers to make amends under s. 22 of the 2009 Act, the defendants submit that their unqualified s. 22 offers made in December 2014, are relevant to the Court's consideration. The defendants submit, having regard to the dicta of O'Malley J. in *Christie* where she stated that a Court may take into account "all of the circumstances of the case", that the following matters are relevant:

> i. There is an issue as to identification. In the passages set out in the Statements of Claim, Mr. Ward is not named. Mr. Quinn is named in one passage, regarding the registered address of the newly formed company.
>
> ii. Both articles appear towards the back, on page 25 of approximately 30 pages.
>
> iii. A significant period of time elapsed between the publication of the articles and the issuing of proceedings. A period of two months elapsed between the defendants' offer of amends and the plaintiffs' acceptance. A further period of four months elapsed before the plaintiffs' rejected the defendants' proposed terms.
>
> iv. The plaintiffs did not engage with the defendants' suggestion of mediation and instead requested delivery of the plaintiffs' defences.

85. The Defendants also reject the plaintiffs' submission that they are entitled to aggravated damages because of two articles published after the articles the subject matter of these proceedings. They submit that:

> (a) It remains unclear whether the plaintiff says that these publications go to malice or aggravation.
>
> (b) There is no question of alleging malice in a case where an offer of amends has been accepted; *Bowman v. MGM* [2010] EWHC 895 at para. 19. This is because, if a plaintiff wants to allege malice, then he should not accept the offer of amends in the first place.
>
> (c) Malice was not pleaded.
>
> (d) Subsequent publications may be admissible as to malice, but not as to aggravation (Gatley (12th ed.) 32.57 and *Collins Stewart v Financial Times (No. 2)* [2006] EMLR 5.)
>
> (e) Section 32 of the 2009 Act provides that aggravated damages may be recoverable where the defendant "conducted his or her defence in a manner that aggravated the injury caused to the plaintiff's reputation by the

defamatory statement".

(f) A claim for aggravated damages was not pleaded (I am satisfied that it was).

(g) Aggravated damages are not recoverable in respect of these subsequent publications.

(i) The defendants do not accept that these subsequent publications simply repeat the material of which complaint was made, or that the plaintiffs would be entitled to damages on account of those publications. Those publications have to be seen in context.

86. The defendants submit that the Court must approach the question of damages as if they were to be assessed in a fully contested defamation action heard without a jury and that the damages should be relatively modest and the discount which the Court should apply generous.

Conclusion

87. Having regard to all the evidence as outlined above and based upon the principles as helpfully set out and elaborated upon by O'Malley J. in *Christie*, the court is satisfied that each plaintiff suffered very serious damage to their respective personal and professional reputations as set out earlier in the judgment. They have suffered in their communities which they sought to serve by bringing in employment and tourism. These two articles have had a very significant effect on their day to day lives and social engagement within the community. The circulation of the Donegal Times is limited but in a small rural area a newspaper can have a very large effect on local views and the regard and esteem that neighbours will have for each other. This attack on the plaintiffs' character amongst their extended family, friends, neighbours and colleagues in their local community has had and continues to have devastating and longstanding consequences which are clear from the evidence which I have heard and accept. Though the nature of the claims set out in the respective statements of claim is slightly different in each case, it seems to me that the same false allegations of dishonesty and misappropriation of the waterbus monies is laid clearly against them without any basis whatsoever. The defamatory meaning is accepted following the making of the offer to make amends. I am satisfied that a sum of €120,000 as general damages, is appropriate as compensation for the defamation of Mr. Ward and Mr. Quinn, contained in the two articles penned by Mr. Hyland and published by the newspaper edited by him. The tone of the articles was calculated to diminish their standing and their contents were untrue.

88. I must also consider the offers to make amends in both cases. I do not consider that an apology was offered early in this case. Indeed the defendants maintained initially that there had been no defamation. They insisted that if the defendants wished to correct matters that were misleading they would be given the opportunity to do so. There was little or no appreciation demonstrated that an egregious wrong had been done to the plaintiffs in these articles. This stance was maintained until the offers of amends were made and accepted. However, the contents of the apologies offered have been rightly criticised for their emphasis on an acceptance that the editorials were "misleading in terms of the inferences to be drawn in relation to the finances of the Donegal Bay Waterbus". The statements were then withdrawn in the proposed apology. There was no reference to the central allegation and core element of the defamatory allegations of which legitimate complaint had been made in the statements of claims and initiating letters, namely clear allegations and innuendos concerning the misappropriation and mishandling of waterbus money. This was then followed by the surprising publication of the two further articles rehashing the same material described above while these proceedings were pending. In those circumstances the defendants claim mitigation of the amount of damages to be awarded on the basis of the principles set out above. I note that the discount that may be awarded in England may extend to up to 50%. However, each case depends on its own facts. In *Christie*, 33 ⅓ % only was allowed because of the manner in which the proposed apology was framed. I am conscious that in certain circumstances the publication of the two later articles might constitute a basis to consider an award of aggravated damages. However, in this case the publication occurred in the course of the proceedings while the offers were under consideration in one instance and the proceedings pending in the second. Therefore I consider the articles to be more relevant to the mitigation issue. I do not consider that the defendants engaged adequately with the concept of an apology within the spirit and intention of s.22. For the reasons set out above I am satisfied that a much reduced level of mitigation should be allowed in all the circumstances. I will allow a reduction of 20% on the general damages awarded in each case in recognition of the offers to make amends, as I am obliged to do under the case-law. There will be a reduction of €24,000 in respect of the offers to make amends in each case. Therefore, each plaintiff is entitled to a sum of €96,000 in damages against the defendants.