Neutral Citation Number: [2011] IEHC 331

THE HIGH COURT

2010 6827 P

BETWEEN

SEAMUS GRIFFIN

PLAINTIFF

AND

SUNDAY NEWSPAPERS LTD

DEFENDANT

JUDGMENT of Kearns P. delivered the 9th day of August, 2011.

The plaintiff is a former member of the Irish Army and in these proceedings claims damages for defamation arising from the publication by the defendant of an article in the *Sunday World* in its edition dated 27th June, 2010. However, the present application is one brought by the defendant pursuant to s. 14 (1) (a) of the Defamation Act 2009 which seeks to narrow or whittle down the scope of the plaintiff's claim on the basis that certain imputations ascribed to the article are not reasonably capable of bearing the defamatory meaning contended for by the plaintiff.

The relevant section 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 the 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 insofar only as it relates to the imputation concerned.*
>
> *(3) An application made 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."*

THE ARTICLE

On pages 10 and 11 of the edition of the Sunday World newspaper dated 27th June, 2010, an article appeared under the headings "*Exclusive/Members of Elite Unit Moonlighting in War on Somali gangs*" and, in even larger lettering, "*Spooks in Paradise*" with a subheading which read "*Irish Army rangers at the centre of a row over training of Seychelles police unit known as 'The Assassins'*".

Beneath the headings in question were, on page 10, photographs of two men in military attire, one carrying what might be a Kalashnikov rifle and the other, identified as the plaintiff, holding a small child in his arms. Black rectangular squares mask the eyes of both men. Below the headings on page 11 various pictures appear which purport to depict Somali pirates in action above a photograph showing a beach view of the Seychelles. To the right of these photographs, at the extreme right of page 11, appears a further photograph of a person referred to as a "*Somali pirate*" who is photographed holding a number of guns above a heading "*Pirate gangs strike fear on African coast*" which constitutes the heading for a further short column by Niall Donald.

The article complained of by the plaintiff was written by Nicola Tallant, described as "Investigations Editor" and is in the following terms:

> *"It has all the elements of a Bond movie or a best-selling crime thriller.*
>
> *Bugs are found by a team of spooks in the offices of the future president of a paradise island nation.*
>
> *Moonlighting special forces troops are called in from abroad to train a police squad dubbed 'The Assassins' and help them battle 21st century piracy on the High seas.*
>
> *And now, as former allies fall out amid a battle for lucrative security contracts, political and military investigations have been launched to get to the bottom of the whole sensational story.*

But this drama has not been playing out on a movie screen near you. It's the extraordinary real plot of a story unfolding in the sun-soaked Seychelles in the Indian Ocean involving Ireland's elite Army Ranger Wing, a spy firm from Athlone called the 'CIA' and ruthless Somali pirates.

A major military investigation is underway into allegations that members of the elite Army Ranger Wing took leave of absence to give weapons training on the island to a squad of armed police nicknamed 'The Assassins'.

The Irish army's Special Investigation Branch is also probing allegations that one or more of the trio, Seamus Griffin, Mark 'Fred' Conlon and Mark McEneany, was involved in purchasing black market arms from South Africa for the Seychelles.

Scandal

The 'double jobbing' scandal would be deeply embarrassing for the army if any of the allegations are proved.

The officers have also been named in a sensational High Court case in Dublin where they are being sued by private investigation firm, Confidential Investigations Athlone (CIA).

They are named in the action along with a retired army sergeant Niall Scully, and an ex-military intelligence officer Declan Barber.

Scully is currently heading up the Seychelles police drug squad. Along with Barber he owns Aver International Limited, an Irish based security company with a staff of 12, which is also named on the writ.

It is understood that the case involves a row over a multi-million euro contract with the Seychelles President, James Michel.

Michel first employed CIA to sweep his office for bugs in the run up to the elections in the Indian Ocean state back in 2005.

The Sunday World understands that highly trained 'spooks' employed by the company did indeed find listening devices deep in the walls of his building despite nothing turning up in earlier sweeps by both the real CIA and Israeli intelligence personnel.

Since his election President Michel, who was educated by Irish nuns, has formed strong links with ex-Irish soldiers, retired gardaí and justice experts who have been taking up lucrative contracts in the sun-soaked tourist paradise in their droves.

The amount of Irish involvement on the island has become a cause of friction between the government and the opposition whose newspaper has been highly critical of the number of jobs and contracts being given to Irish citizens and the wages and lifestyle they can afford compared to native Seychellois.

This weekend former Criminal Assets Bureau legal advisor Barry Galvin, who has no links to Aver or CIA, is visiting the paradise islands on a contract he has been given to reform the justice system there.

He will also be consulting on the setting up of a crime fighting bureau similar to CAB which he helped spearhead.

Even former Taoiseach Garret Fitzgerald has been out to advise policy makers in the Seychelles on a number of occasions, highlighting the high level of Irish connections to the tiny island nation.

Wranglings

Now the Irish army is being dragged into the financial wranglings with the allegations that serving Rangers worked on contracts which involved weapons training for an elite police squad.

Senior sources say that if the allegations are proved the ramifications will be deeply embarrassing for the army as the Ranger Wing is the most respected and highly trained unit in the defence forces.

In a statement the Defence Forces told the Sunday World. 'An investigation into matters concerning alleged off-duty employment of a number of members of the Defence Forces is ongoing; consequently it would be inappropriate to comment further.'

Earlier this month Sinn Fein's Martin Ferris asked Defence Minister Tony Killeen for a statement on the allegations that serving officers had been implicated in buying illegal arms.

He confirmed that an investigation was underway but refused to comment on the matter saying: 'I am advised by the military authorities that they are conducting an investigation into the matters referred to by the Deputy. In these circumstances it would be inappropriate for me to comment on the matter until this investigation has been concluded.'

Senior army sources say that if evidence is found that any of the three former rangers was involved in purchasing arms they will likely be disciplined and possible (sic) ejected from the army.

Griffin is the only one of the trio who has retired since the alleged double jobbing scandal and Conlon has since moved to the air corps. McEneany is still working in the army's Infantry Weapons Wing.

The alleged arms scandal comes just months after a deeply embarrassing tell all book by a former army corporal which claimed that Irish soldiers serving as peace-keepers in war ravaged Eritrea paid destitute prostitutes in frozen pizzas and chicken for sex.

Controversy

None of the men currently under investigation was involved in this controversy.

Valerie O'Brien who quite the army three years ago claimed that officers serving on a UN mission Eritrea in 2002, used a local brothel all the time and often applauded one another as they came back from spending the night with local women.

In her book 'In the Shadow of Men' she painted a sordid picture of life in the defence forces."

In the statement of claim delivered herein on 22nd July, 2010, it is contended that, in their natural and ordinary meaning, the said article and pictures meant and were understood to mean:-

"(a)That the plaintiff was involved in the illegal purchase of black market arms from South Africa for use in the Seychelles;

(b) that the plaintiff improperly took a leave of absence from the Irish Army to give weapons training to armed police in the Seychelles;

(c) that the plaintiff was training members of an armed police squad in the Seychelles to act as assassins;

(d) that the plaintiff was training members of an armed police squad in the Seychelles in the use of lethal force with illegal, black market weapons;

(e) that the plaintiff was working at a lucrative secondary job which conflicted with his primary employment as an Army Ranger;

(f) that the plaintiff was the subject of a major military investigation;

(g) that the plaintiff, while a member of the most respected and highly trained unit in the defence forces, was involved in activities which were deeply embarrassing to the Irish Army;

(h) that the plaintiff was forced to retired from the Irish Army due to his involvement in a 'double jobbing' scandal;

(i) that there were substantial grounds for believing that the plaintiff had acted in the manner described in paragraphs 5(a) to 5(h) above."

By its notice of motion dated 4th July, 2011 the defendant seeks an order pursuant to s. 14 (1)(a) of the Defamation Act 2009 that the publication by the defendant on 27th June, 2010 is not reasonably capable of bearing the imputations contended for by the plaintiff at paragraphs 5 (a) – 5 (e) or the imputations contended for at paragraph 5 (g) – 5 (h) of the statement of claim and invites this Court to dismiss the plaintiff's claim insofar as it relates to those paragraphs.

The defendants do not seek to challenge the imputations contended for at paragraph 5 (f) and 5 (i) of the statement of claim.

Mr. Oisín Quinn, senior counsel for the defendant, contended that the article made clear at all times 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. A statement that an inquiry or investigation was underway could not be equated by any fair-minded reader as meaning that the plaintiff was guilty of the sort of wrongdoing pleaded in the paragraphs of the statement of claim which were under attack.

In reply, Mr. Paul O'Higgins, senior counsel for the plaintiff, contended that, taken as a whole, the article was well capable of such a meaning, particularly insofar as it alleged that the plaintiff was "*the only one of the trio who has retired since the alleged double jobbing scandal*" and by an earlier reference in the article that "*military investigations have been launched to get to the bottom of the whole sensational story*". He contended that the overall layout and get up of the article went much further than to merely relate that an investigation was in progress and was well capable of being understood to mean that the plaintiff had indeed been engaged in activities which would bear the meanings contended for in the disputed paragraphs of the statement of claim.

THE LAW

Whilst informed by counsel that this was the first occasion upon which the terms of section 14 of the Defamation Act 2009 have been considered by the High Court, there was agreement that the section in question really did little more than codify existing legal principles and did not, of itself, constitute any significant extension of existing legal principles.

In *McGarth v. Independent Newspapers (Ireland) Ltd*. [2004] 2 I.R. 465, Gilligan J. was required to determine a preliminary issue which had arisen in that case as to whether a particular article was capable of bearing the defamatory meaning contended for on behalf of the plaintiff. That he determined the issue by reference to well established legal principles is apparent from the following passage of his judgment when he stated as follows at p. 433: -

"The issue which I have to determine is whether the words are capable of bearing a particular meaning and counsel for the defendant has conceded that he is not entitled to re-argue this issue again before the trial judge if unsuccessful in this application. Counsel for the defendant accepts that he asks the court to determine the issue as a preliminary issue and that that has put the issue in the same position as if it was being determined during the course of the trial by the trial judge. At the trial it is for the judge to decide as a matter of law whether the words are capable of bearing a defamatory meaning on the principle that it is for the court to say whether the publication is fairly capable of a construction which would make it libellous and for the jury to say whether in fact that construction ought, under the circumstances, to be attributed to it. In determining whether the words are capable of a defamatory meaning the court is obliged to construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence and will not consider what person setting themselves to work to deduce some unusual meaning might extract from them. The court should avoid an over elaborate analysis of the article because the ordinary reader would not analyse the article in the same manner as a lawyer or accountant would analyse documents or accounts. In deciding the issue I am satisfied that I am entitled to consider the impression that the article has conveyed to me personally in considering what impact it would make on the hypothetical reasonable reader and lastly, the court should not take a too literal approach to its task."

In *Lewis v. Daily Telegraph Ltd* [1964] A.C. 234, the facts were that the City Fraud Squad in London were enquiring 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 owners of each of the two newspapers who had published front page stories to that effect. It was alleged in the statement of claim that the words were defamatory in their ordinary and natural meaning. It was pleaded in each case that the words meant and were understood to mean that the plaintiffs had been guilty of or were suspected by the police of being guilty of fraud or dishonesty.

The defendants did not deny that the words in their ordinary meaning were defamatory but pleaded justification, namely, that on the date in question, the police were in fact inquiring into the affairs of the company of which Mr. Lewis was chairman. They denied that the words meant or were capable of meaning that the plaintiffs were guilty of fraud.

That case, like the present one, is not one where any innuendo meaning supported by extrinsic facts is alleged. In the course of his speech, Lord Reid made it clear that the defendants were entitled to seek a ruling from the trial judge that the words in the article were not capable of having the particular meaning which the plaintiff attributed to them. He found that they were entitled to such a ruling and that the test must be the same as that applied in deciding whether the words are capable of having any libellous meaning.

However, of particular relevance to the instant case are the observations of Lord Reid in relation to reports about ongoing inquiries or investigations in relation to which he stated as follows (at p. 259):-

> *"In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question. So let me suppose a number of ordinary people discussing one of these paragraphs which they might have read in the newspaper. No doubt one of them might say- 'Oh, if the fraud squad are after these people you can take it 'they are guilty'.' But I would expect the others to turn on him, if he did say that, with such remarks as – 'Be fair'. This 'is not a police state. No doubt their affairs are in a mess or the police would not be interested. But that could be because Lewis or the cashier is being very stupid or careless. We really must not jump to conclusions. The police are fair and know their job and we shall know soon enough if there is anything in it. Wait till we see if they charge him. I wouldn't trust him until this is cleared up, but it is another thing to condemn him unheard.' What the 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. So there was here, in my opinion, misdirection of the two juries sufficiently serious to require that there must be new trials."*

In 1994, Order 82 of the Rules of the Superior Courts was introduced in the U.K., whereby either party at any time after the service of statement of claim could apply to a judge in chambers for an order determining whether or not words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings. The order provides that the judge, on the hearing of the application, if of the view that the words complained of are not capable of bearing the meaning or meanings attributed to them, will dismiss the claim, at least to that extent.

In *Mapp v. Newsgroup Newspapers Ltd*. [1998] Q.B. 520, Lord Justice Hirst adopted a similar imaginary conversation to that portrayed by Lord Reid in Lewis's case to emphasise that the reference to an investigation could not reasonably be read as imputing guilt to the plaintiffs as contrasted with reasonable suspicion of guilt (at pp. 529-530).

The relevant test was again stressed in *Charleston v. Newsgroup Newspapers Ltd*. [1995] 2 A.C. 65, where Lord Bridge of Harwich again emphasised two basic principles to the law of libel when he stated as follows at p. 71:-

> *"The first is that, where no legal innuendo is alleged or arises from extrinsic circumstances known to some readers, the "natural and ordinary meaning" to be ascribed to the words of an allegedly defamatory publication is the meaning, including any inferential meaning, which the words would convey to the mind of the ordinary, reasonable, fair-minded reader. This proposition is too well established to require citation of authority. The second principle, which is perhaps a corollary of the first, is that, although a combination of words may in fact convey different meanings to the minds of different readers, the jury in a libel action, applying the criterion which the first principle dictates, is required to determine the single meaning which the publication conveyed to the notional reasonable reader and to base its verdict in any award of damages on the assumption that this was the one sense in which all readers would have understood it."*

He further stated at p. 72:-

> *"It is precisely the implication of the principle so clearly expounded in these passages which, in a libel action where no legal innuendo is alleged, prevents either side from calling witnesses to say what they understood the allegedly defamatory publication to mean."*

Thus it follows that a plaintiff cannot select an isolated passage or sentence in an article and complain of that alone if other parts of the article throw a different light on that passage. The real test is whether the result of the whole is calculated to injure the plaintiff's character. As Alderson B. stated in *Chalmers v. Payne* [1835] 2 C.M. & R. 156, 159:-

> *"In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together."*

In *Mapp v. Newsgroup Newspapers Ltd*., the court had to consider whether the reference to the suicide of a police officer in conjunction with the report of the existence of an investigation was such as to transform a reasonable suspicion of guilt into something more. In a sense, that is what counsel for the plaintiff contends has happened in the present case when referring to the layout and get up of the article and the portion of the article which states that the plaintiff has now retired from the Irish army.

DECISION

I am satisfied that, on the application of the principles outlined in the proceeding part of this judgment, that the plaintiff's case must be confined to that contended for at paras. 5 (f) and, more importantly, 5 (i) of the statement of claim.

The plaintiff is clearly entitled to argue and make the case that the article as a whole suggested that there were "substantial grounds" for believing that the plaintiff had acted in the manner described at paras. 5 (a) – 5 (h), but in my view is not entitled to contend that the meanings contained in the imputations were that he was actually guilty of such behaviour.

The article contains many statements to the effect that "allegations" only have been raised, allegations which remain to be proved. There are no less than four or five references to the launching of the military investigation and no suggestion whatsoever that it has reached a conclusion or made findings adverse to the plaintiff. Furthermore, the article specifically refers to a statement made by the then defence minister, Tony Killeen, which confirmed an investigation was under way, but stressed that it would be inappropriate for him to comment on the matter until the investigation had been concluded.

I am thus satisfied that while a reasonable reader might well take the view that there were grounds for suspicion, he could not, or should not be permitted, to leap from that conclusion to one of guilt.

I therefore propose to grant the relief sought in the notice of motion herein.