

BETWEEN

AMY O'BRIEN

PLAINTIFF

AND

INDEPENDENT STAR LIMITED

DEFENDANT

**Judgment of Mr. Justice Cian Ferriter delivered on the 26th day of November 2021**

**Introduction**

1. This is an application by the Defendant for an order pursuant to s.14 (1) (a) of the Defamation Act, 2009 to strike out various defamatory meanings contended for by the Plaintiff in respect of an article appearing in the Defendant's *Irish Daily Star* newspaper on 27th April, 2016, on the basis that none of those meanings is reasonably capable of bearing the defamatory imputations contended for by the Plaintiff.

**The article**

2. The article was published in the *Irish Daily Star* on Wednesday 27th April, 2016 on the front page and over the course of the following pages 2, 3, 4 and 5. The front page is headed (under the strapline "Gangland Exclusive") "*Kinahans: we'll kill 15 more*" and then in a sub- heading "*Cartel draws up hit list of Hutch rivals*". The main article then continues on pages 2 and 3. The strapline across the top of these two pages reads "*War on street: mob vow to kill again*" and contains a picture of a man in a balaclava pointing a pistol.
3. The main headline, across these two pages is "*Kinahans to wipe out 15 more Hutch men*".
4. Underneath that headline is the heading "*So who's in the firing line?!*" A number of individuals are then featured either by name or alias in some eight smaller panels underneath that headline. One of the individuals identified is "Keith Murtagh". There is a picture of Mr. Murtagh and a box panel underneath that which reads:

*"The 32-year-old convicted criminal from north inner city Dublin was the real intended target of the hit that saw innocent Martin O'Rourke killed by mistake - and the Kinahans' killers are still coming for him".*

5. The body of the article under the by-line "*Exclusive, Michael O'Toole crime correspondent*", starts on page 2 with the paragraph: "*The Kinahan drugs cartel has drawn up a hit list of fifteen more people and five more people it wants to murder in its deadly feud with the rival Hutch gang, it has emerged.*" The article goes on to state that "*the Kinahan gang have compiled a list of fifteen targets on the Hutch side – and want them all dead.*" The article says that "*sources told The Star the mob drew up a list after carrying out its own extensive investigations into the Hutch gang attack on the Regency Airport Hotel in February – in which leading cartel member David Byrne (33) was shot dead*".

6. The article further states that: *"Sources say the Kinahans believe they have identified all of the six-strong gun gang as well as six other people involved, including spotters and get away drivers. They have also identified people involved in planning the attack."*
7. In a paragraph highlighted in bold in the body of the article, it states as follows: ***"The Kinahans also planned to kill the key Hutch associate who was dressed up as a woman in the attack – as well as convicted criminal Keith Murtagh who was a target of the botched hit this month that saw innocent Martin O'Rourke (24) shot by mistake"***.
8. The last paragraph of the substantive article (which appears on the bottom right hand corner of page 2 of the newspaper) is headed (in bold) **"Help"**. This section of the article contains two paragraphs and reads as follows:

*"Meanwhile, The Star has also learned that the Kinahans have now threatened a woman who fled Ireland over her relationship with one of the men on their hit list.*

*She was contacted while she was outside Europe and told she had to help the Kinahans kill her partner – or she would be killed herself."*

#### **The Plaintiff's proceedings**

9. The Plaintiff issued High Court proceedings on 17th June, 2016 claiming damages for defamation in respect of the contents of the article. She delivered her Statement of Claim on 23rd June, 2016, with her affidavit of verification being sworn the day before, 22nd June, 2016.
10. Although the Plaintiff is not named in the article, she pleads that she is identifiable from the contents of the article and that the two paragraphs under the heading "Help" (as set out above) were intended to and do in fact refer to her.
11. The Plaintiff pleads that *"she can and has been identified as the woman referred to in the article by persons who possess the following knowledge of and concerning the plaintiff:*
  - (a) *That the plaintiff has been in a relationship with the Keith Murtagh referred to and named and identified in the said article.*
  - (b) *That the said Murtagh has been expressly identified and named by the Defendant as an intended target of the Kinahan gang and has been on the aforementioned hit list.*
  - (c) *That the plaintiff has been outside of Europe in that the plaintiff has been in Australia."*
12. The Plaintiff pleads (statement of claim, paragraph 8) that the relevant paragraphs in the article are false in that she did not flee the country, she has not been threatened by the Kinahan gang, and that she has not been asked by the Kinahans to kill her partner.

13. She then pleads, at paragraph 9 of her Statement of Claim, that the publication of the article is defamatory ***"in that the said statements and in particular the statement that the plaintiff has been asked by members of the Kinahan gang to kill her partner in their natural and ordinary meaning mean and are understood to mean that:***

- a) *The Plaintiff is a criminal.*
- b) *The Plaintiff is involved in serious criminal activity.*
- c) *The Plaintiff has involvement with and/or links with gangland criminals.*
- d) *The Plaintiff is a gangland criminal and/or a member of a gangland criminal feud*
- e) *The Plaintiff is amenable to an approach by criminal elements in order to carry out serious criminal acts such as murder.*
- f) *The Plaintiff is someone with a propensity to carry out serious criminal acts such as murder on behalf of criminal gangs.*
- g) *The Plaintiff is associated with and/or connected with criminal gangs to the point that the said criminal gangs can and have in fact asked her to commit an act of murder on their behalf.*
- h) *The Plaintiff has and in the circumstances close link with and/or ties to the said criminal gangs."*

14. At paragraph 10 of her Statement of Claim, the Plaintiff pleads that:

*"Alternatively, the aforementioned false statements by innuendo mean and/or are understood to mean:*

- a) *That the Plaintiff is a criminal.*
- b) *That the Plaintiff is involved in serious criminal activity.*
- c) *That the Plaintiff has involvement with and/or links with criminal gangs*
- d) *That the Plaintiff is a member of a criminal gang.*
- e) *That the Plaintiff is amenable to an approach by criminal elements and in order to carry out serious criminal acts such as murder.*
- f) *That the Plaintiff has a propensity to carry out serious criminal acts such as murder for and on behalf of criminal gangs.*
- g) *That the Plaintiff is associated with and/or connected with criminal gangs to the point that the said criminal gangs can and have in fact asked her to commit an act of murder on their behalf.*

*h) That the Plaintiff has and in the circumstances close links with and/or ties to the said criminal gangs."*

15. The Plaintiff in her Statement of Claim goes on to plead as follows:

*"[13] Further by reason of the publication of the said statements the Plaintiff has suffered loss and damage.*

*[14] The Plaintiff also claims aggravated and punitive damages.*

*[15] The article complained of has been crafted in such a way as to maximise the damage to the Plaintiff's good name and reputation. The Plaintiff has been characterised as an individual involved in crime who has established and/or forged links with persons identified by the Defendant as criminals engaged in acts of ruthless criminality. The Plaintiff is a law abiding citizen. She is a young woman. The fact that she has been characterised as an individual involved in crime and as establishing or forging links with persons identified as members of a criminal gang is as serious an attack against her good name and reputation as can possibly be conceived.*

*[16] The Plaintiff lives in a close-knit inner city community. Contact has been made with her by persons who have read the article. Because of the background and circumstances wherein persons who have at times tenuous links to the rival criminal gangs who have been murdered, the Plaintiff is understandably in fear for her life. She has been shunned by her friends and associates. They have stated that they do not want to have anything further to do with her and because as a result of the damaging statement as published by the Defendant, they perceive her as having close links with the Kinahan gang and/or perceive her as someone who is and by reason of the manner in which she has been characterised, at risk of being killed. The article when read as a whole and the offending portion thereof portrays the Plaintiff as somebody who has been asked to carry out murder. This has been a source of ongoing distress and anxiety for this young Plaintiff. The damage caused by the publication of the offending article has been compounded by the fact that the Defendant having been called upon to acknowledge the wrong caused to the Plaintiff, has steadfastly refused and/or neglected to do so. The Defendant by its said conduct continues to allow the characterisation of the Plaintiff as someone who is involved in crime and/or serious crime and/or is linked with and/or associated with criminal gangs who remain in being. This stance as taken by the Defendant has served to compound and prolong the damage done to the Plaintiff's good name and/or reputation. The Plaintiff pleads an entitlement to seek aggravated and/or punitive damages arising out of the serious damage done to her good name and reputation by reason of the aforementioned characterisation and by reason of the Defendant's conduct in its defence of these proceedings to include in particular and to date the Defendant's failure to accept that it is wrong and that it has defamed the Plaintiff in the manner as pleaded and to make any or any appropriate and/or reasonable offer of amends."*

16. The Defendant filed its Defence on 10th May, 2017. The Defence puts in issue the question of identification, denying that the Plaintiff is identified or identifiable from the article.
17. The Defence denies that the article is defamatory of the Plaintiff. The Defendant pleads (at paragraph 6 of its Defence) that: *"if, contrary to the contention of the defendant, the plaintiff was identified in the article, then the words do not convey a defamatory meaning. It is not defamatory to say of a person that she has been threatened or contacted by criminals."*
18. The Defendant further pleads a defence under s. 26 of the Defamation Act, 2009 (i.e. the defence of fair or reasonable publication on a matter of public interest) in respect of the article.

#### **The Section 14 application**

19. In its s. 14 application, the Defendant seeks to have struck out each of the defamatory meanings pleaded at paragraphs 9(a) to (h) and 10(a) to (h) of the Statement of Claim (as set out above) save for those at paragraphs 9 (c) and 10 (c) i.e. that *"the plaintiff has involvement with and/or links with the gangland criminals"* (paragraph 9(c)) and that *"the plaintiff has involvement with and/or links with criminal gangs"* (paragraph 10(c)).

#### **The applicable legal principles**

20. The correct approach to the application of s.14 has been authoritatively considered most recently by the Court of Appeal in its judgment in *Gilchrist v. Sunday Newspapers Ltd & Ors* [2017] 2 IR 714 (*"Gilchrist"*).
21. In that case, Irvine J. (as she then was) stated as follows:

*"[36] Section 14(1) of the 2009 Act provides as follows:-*

*"(1) The court, in a defamation action, may give a ruling-*

- (a) As to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff, and*
- (b) (where the court rules that that statement is reasonably capable of bearing that imputation) as to whether that imputation is reasonably capable of bearing a defamatory meaning, upon an application being made to it in that behalf."*

*[37] It is not disputed that for the purposes of an application under s.14(1) of the 2009 Act, the onus rests upon the defendant to establish that the article complained of is not reasonably capable of bearing the imputations and meanings pleaded by the plaintiff. The test to be applied by the court is whether the article, when viewed objectively by the reasonable reader, is capable of giving rise to the pleaded meanings (see *Hardiman J. in Travers v. Sunday Newspapers Limited* (Unreported, Supreme Court, 12 October 2015)). It is also not disputed that the role of the judge on an application pursuant to s.14 of the 2009 Act is not to determine the meaning*

*of the words or article published but to delimit the outside boundaries of the possible range of meanings that might be ascribed thereto by the notional reasonable reader. Clarke M.R in Jeynes v. News Magazines Limited [2008] EWCA Civ 130, (Unreported, Court of Appeal of England and Wales, 31 January 2008) helpfully summarised the principles relevant to how the meaning of words should be determined as follows:-*

*"[14] ... (1) the governing principle is reasonableness;*

- (2) the hypothetical reasonable reader is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings available;*
- (3) over-elaborate analysis is best avoided;*
- (4) the intention of the publisher is irrelevant;*
- (5) the article must be read as a whole, and any 'bane and antidote' taken together;*
- (6) the hypothetical reader is taken to be representative of those who would read the publication in question;*
- (7) in delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation'."*

*[38] Guidance as to the general approach to be adopted by a court when faced with an application pursuant to s.14 of the 2009 Act may be found in the helpful decision of Walsh J. in Quigley v. Creation Limited [1971] 1 I.R. 269 albeit that his judgement is one which addresses the circumstances in which a judge should, or should not, withhold a particular meaning from the jury. This is what he said at p.272 of his judgement:*

*'In defamation, as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of a defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied it would be wholly unreasonable to attribute a libellous meaning to the words complained of.'* "

22. Based on those principles, it is clear that in considering this application I should not seek to determine the meaning of the words published but, rather, reading the words complained of in the context of the article as a whole, I should seek to delimit the outside

boundaries of the possible range of meanings that might be ascribed thereto by the reasonable reader. In approaching that exercise, I should have regard to the seven principles identified by Clarke M.R. in **Jeynes v. News Magazines Ltd** [2008] EWCA Civ 130 as referred to in the extract from the decision of Irvine J. in **Gilchrist** set out above.

23. It is also clear (as was fairly accepted by counsel for the Defendant at the hearing of the application) that I ought not strike out a pleaded defamatory meaning pursuant to s. 14 unless satisfied that **"it would be wholly unreasonable to attribute a libellous meaning to the words complained of"**.

#### **The parties' submissions**

24. At the hearing of this application, counsel for the two parties put their respective cases with commendable concision. Counsel for the Defendant submitted that any reasonable reader of the article as a whole would not take the impugned meanings from the article but, rather, would take from it that the Plaintiff (assuming she is identifiable as the woman in question at all) was in a personal relationship with a man whom the Kinahan gang regarded as a legitimate target and that, rather than being depicted as a perpetrator or potential perpetrator of a crime, she was depicted as a victim of crime.
25. It was submitted that there was absolutely no suggestion in the article that she intended to carry out the act of murder of her partner, or any other serious crime. It was submitted that the article read as a whole, and, in particular, the two paragraphs which are the focus of the Plaintiff's defamation claim, could not reasonably convey the impugned meanings or, as the authorities equally put it, it would be wholly unreasonable to determine that those meanings could be found by a jury.
26. It is submitted by counsel for the Defendant that this was a case of the Plaintiff identifying "strained, forced or utterly unreasonable" meanings in circumstances where many other non-defamatory, innocuous meanings were available. He emphasised, as is borne out by a consideration of the authorities including the case of *Lewis v. The Daily Telegraph* (considered by Kearns P. in *Griffin v. Sunday Newspapers Ltd* [2012] 1 IR 114 at 122), that there was a significant and critical distinction between a statement to the effect that one was suspected of being guilty and a statement to the effect that one was in fact guilty; by analogy, he submitted that principle applied on the facts here, the critical difference being between a statement to the effect that the Plaintiff was involved in criminality or likely to perform serious criminal acts, on the one hand, and the fact that the Plaintiff happened to be personally linked with a criminal or alleged gangland crime member, through a personal relationship, on the other.
27. Counsel for the Plaintiff for his part submitted that the impugned statements in the article were more than capable of bearing the defamatory meanings as pleaded. He focused, in particular, on the published words to the effect that the Plaintiff (assuming she is so identified) *"was contacted while she was outside Europe and told she had to help the Kinahans kill her partner – or she would be killed herself"*. It was submitted that that statement was perfectly open to the meaning that the Plaintiff was contacted with a view to killing her partner because she was somebody who was sufficiently involved in

criminality to be capable of perpetrating such acts or that she was otherwise involved in her partner's criminal activities or in gangland type activities such as to render her amenable (or even vulnerable) to such an approach. He emphasised that the Defendant had a very high bar to clear on this application, i.e. that it was "*wholly unreasonable*" to say that any of the impugned defamatory meanings were capable of arising here and that such bar was not cleared in the circumstances.

### **Discussion**

28. In accordance with the principles identified in *Gilchrist*, it is not for the Court on this application to determine the meaning of the words published but rather "*to delimit the outside boundaries of the possible range of meanings that could be ascribed thereto by the notional reasonable reader*".
29. In my view, the defamatory meanings pleaded by the Plaintiff can be reasonably grouped into two distinct categories of meaning.
30. The first category includes the defamatory meanings which the Defendant accepts can arguably arise in relation to the article (although the Defendant of course denies that such meaning will ultimately succeed) namely "*that the plaintiff has involvement with and/or links with gangland criminals*" / "*that the Plaintiff has involvement with and/or links with criminal gangs*" (Statement of Claim, paragraphs 9(c) and 10(c)). It seems to me that, just as that meaning is open to the reasonable reader, so too are the meanings at paragraphs 9(h) and 10(h) of the Statement of Claim "*that the plaintiff has and in the circumstances close links with and/or ties to the said criminal gangs*".
31. In my view, on the application of the applicable test, it can also be said - just about - that it is within the limits of the range of possible defamatory meanings to say that it would follow from these potential links and associations that the article is open to the meaning "*that the plaintiff is involved in serious criminal activity*" (Statement of Claim paragraphs 9(b) and 10(b)) and "*that the plaintiff is a criminal*" (Statement of Claim paragraphs 9(a) and 10(a)). In my view, this is so on the basis that it would be open to a reasonable reader to take the view from the article (and in the context of innuendo, the extraneous information as to the fact of her relationship with Mr Murtagh and the fact that she had been in Australia) that the Plaintiff's ties to a gangland criminal are such that she might be taken to be complicit to some degree in his criminal activity such as to render tenable the meanings that she is "*involved in serious criminal activity*" and that she is thereby "*a criminal*" herself.
32. In that regard, it is relevant to take into account that the meanings at paragraph 10 of the Statement of Claim are meanings said to arise by innuendo in circumstances where the Plaintiff pleads that there are readers who would know that she has been in a relationship with Mr Murtagh and that she has been in Australia.
33. It seems to me that while the non-defamatory meanings contended for by the Defendant (to the effect that the article depicts the Plaintiff as a victim and in no way complicit in any criminality) are open to a jury to find, and might well ultimately prevail, it cannot be



said that this category of defamatory meanings “*can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation*”. In my view, it could not be safely said at this point that the meanings in this category are so wholly unreasonable that the notional reasonable reader (as embodied in the jury) could not find for some or all of the meanings contended for within this category.

34. However, in my view, on the application of the applicable legal principles, the second group of meanings strays outside the boundaries of the possible range of meanings that might be ascribed thereto by the reasonable reader. These meanings are the meanings at paragraphs 9(d) to (g) and 10(d) to (g) of the Statement of Claim i.e.

- d) *The Plaintiff is a gangland criminal and/or a member of a gangland criminal feud (paragraph 9(d)) / the Plaintiff is a member of a criminal gang (paragraph 10(d))*
- e) *The Plaintiff is amenable to an approach by criminal elements in order to carry out serious criminal acts such as murder.*
- f) *The Plaintiff is someone with a propensity to carry out serious criminal acts such as murder for and on behalf of criminal gangs.*
- g) *The Plaintiff is associated with and/or connected with criminal gangs to the point that the said criminal gangs can and have in fact asked her to commit an act of murder on their behalf.*

35. This category of meanings effectively seeks to place the Plaintiff in the eyes of the reasonable reader of the article as someone who is herself amenable to committing murder and/or is herself a gangland criminal in a gang depicted in the article as being known for carrying out murderous acts. I do not see that the reasonable reader could find that any of those meanings are present within the boundaries of the possible range of meanings that might be reasonably ascribed to the article.

36. Accordingly, I propose to strike out the meanings in this second category (i.e. the meanings at paragraphs 9(d) to (g) and 10(d) to (g) of the Statement of Claim) by way of Order pursuant to s.14 (1)(a) Defamation Act, 2009.

37. The effect of this Order is that the proceedings, if they ultimately proceed to trial, will involve the trial only of the remaining pleaded meanings being the following meanings (whether by way of natural and ordinary meaning and/or by way of innuendo):

- a) *The Plaintiff is a criminal.*
- b) *The Plaintiff is involved in serious criminal activity.*
- c) *The Plaintiff has involvement with and/or links with gangland criminals / that the Plaintiff has involvement with and/or links with criminal gangs*

- h) The Plaintiff has and in the circumstances close links with and/or ties to the said criminal gangs.*