THE COURT OF APPEAL

CIVIL

Record No.: 2013/11584P

Court of Appeal Record No.: 2016/160

Finlay Geoghegan J.
Peart J.
Irvine J.

BETWEEN/

PATRICK BENEDICT GILCHRIST

PLAINTIFF / RESPONDENT

- AND –

SUNDAY NEWSPAPERS LIMITED, COLM MCGINTY AND NICOLA TALLANT

DEFENDANTS / APPELLANTS

Record No.: 2013/11583P

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ISABEL ROGERS

PLAINTIFF / RESPONDENT

- AND -

SUNDAY NEWSPAPERS LIMITED, COLM MCGINTY AND NICOLA TALLANT

DEFENDANTS / APPELLANTS

Judgment of Ms. Justice Irvine delivered on the 21st day of June 2017

1. This judgment relates to two appeals brought by the defendants/appellants against the order and judgment of the High Court (MacEochaidh J.) of the 15th March, 2016. In particular, it addresses the *ex tempore* judgment of the High Court judge which refused an application brought by the defendants in both actions seeking orders pursuant to s. 14(1)(a) and (b) of the Defamation Act 2009 ("the 2009 Act").

Background
2. The plaintiff/respondent in the first of the above-entitled proceedings, Mr. Patrick Benedict Gilchrist ("Mr. Gilchrist"), is a former member of An Garda Síochána who, prior to his retirement, had attained the rank of Detective Inspector. It is common case that whilst so employed he was involved in the State's Witness Protection Programme ("WPP").

3. Ms. Isabel Rogers ("Ms. Rogers"), the plaintiff in the second of the above-entitled proceedings, is a psychotherapist by profession. It does not appear to be in dispute that she was retained for the purpose of providing professional services in the context of the State's WPP. Mr. Gilchrist and Ms. Rogers are now married to each other and reside in England.

4. By separate proceedings each issued on the 22nd October, 2013, Mr. Gilchrist and Ms. Rogers commenced proceedings against Sunday Newspapers Limited, its editor, Mr. Colm McGinty, and Ms. Nicola Tallant, a journalist employed by Sunday Newspapers. They are claiming damages for defamation arising out of articles authored by Ms. Tallant which were published in the Sunday World on the 9th and 16th June, 2013. For the purposes of this judgment, I will refer to the three defendants as "the Newspaper" as nothing turns on the individual involvement of the three defendants.

5. Insofar as these appeals relate to applications brought by the Newspaper concerning the meanings which Mr. Gilchrist and Ms. Rogers seek to impute to the article of the 16th June, 2013, I have decided to reproduce the text of that article in full immediately below. For reasons to do with the pleadings which I will later explain, some of the text appears in italics, some in bold print and other parts have been underlined. I will then describe some of the more significant features of the earlier article insofar as the principal complaint made on this appeal is that the High Court judge erred in law when he concluded that the article of the 16th June was reasonably capable of bearing the imputations and meanings pleaded by the plaintiffs by reference to the "get up", photographs, headlines and text of the earlier article of the 9th June, 2013.

Article of 16th June, 2013
6. The article of the 16th June, 2013 appears below a photograph of Ms. Rogers and Mr. Gilchrist with the following headline and text:

"Force faces investigation on spending"

"The Garda Síochána have been given two weeks to disclose a raft of receipts and documents relating to monies alleged to have been spent by the Special Detective Unit to protect State witness Dave Mooney.

The State has to furnish the details of its spending, including fees paid to a "doctor" who is not registered on the medical councils in Ireland or the UK and who went on to marry Mooney's Garda handler.

The High Court has ordered the discovery of all documents, including the bills charged by therapist Isabel Rogers who, it is claimed by Mooney, was passed off as a doctor to examine him.

Last week the Sunday World revealed how Rogers and former top cop Benny Gilchrist are at the centre of the case.

Divorced

It is understood Gilchrist later left his wife, divorced and married Rogers.

The investigation into funds and expenses is believed to have examined how the pair travelled first-class around the world and stayed in five-star hotels with other SDU officers at the expense of the State.

During the trial of CIRA extortionists Billy Clare and Martin Kelly it was claimed that almost €40,000 was spent on the State witness Mooney.

However, the businessman disputes this. He says he lived for about €130 a week in safe houses as he waited to give evidence and had to make that stretch to grocery shopping, medical supplies and even his clothing.

He is taking the case because he says he was promised a Green Card to go to the US and a new identify after his evidence helped successfully jail Kelly and Clare, but instead he says he got nothing and is still living in Ireland in fear for his life."

Article of 9th June, 2013

7. The earlier article of the 9th June, 2013 is what can only be described as a colourful, eye catching report spread over two pages with approximately one third of the total area given over to the text of the article. There are two photographs of Ms. Rogers, one with Mr. Gilchrist and one of her on her own. Beside the latter photograph is the following headline: "PROBE: Isabel Rogers is not registered with the medical councils in either Ireland or England (left) with Benny Gilchrist". There are three photographs of Mr. Gilchrist. Alongside one of these is the caption: "STUNNED: Gilchrist refused to comment". There is also a photograph of two cars beneath which is the caption: "LAVISH LIFESTYLE: Flash cars parked outside the home of Gilchrist and Rogers".

8. The two main headlines to the article are printed in a large bold font and read "THE WORLD IS WATCHING COPS UNDER SPOTLIGHT" and "WITNESS PROTECTION", beneath which are three headlines set out in large bold type and in bullet point format. These read as follows:-

> "• Landmark case set to expose the "shambles" at heart of secret Garda unit
>
> • Doctor who assessed witnesses wasn't registered with Irish Medical Council
>
> • She became the lover of cop handler who was probed over unit's cash"

9. There then follows the text of the article which deals with the author's "Special Investigation" into Mr. Gilchrist and Ms. Rogers where she details her understanding of the role of Mr. Gilchrist and Ms. Rogers in relation to the State's WPP. She refers to a "probe" set to re-ignite accusations concerning Mr. Gilchrist's expenditure and lifestyle while carrying out his role and the fact that he was previously investigated for suspected misappropriation of funds. She refers to "thousands in cash" paid to Ms. Rogers for one brief examination of a witness within the WPP. The article reports that accusations had been made to the effect that Ms. Rogers had travelled first class around the world at the expense of the State, to the fact that she was not a medical doctor and that she had passed herself off as such. It also reports that the Newspaper had "tracked down" Mr. Gilchrist and that when he had been contacted he was in no mood to talk. The article also referred to the affluent lifestyle, home and cars enjoyed by Mr. Gilchrist and Ms. Rogers.

The claims of Mr. Gilchrist and Ms. Rogers

10. The statement of claim in each action was delivered on the 14th November 2013.

It is important in this regard to make clear that while the Newspaper's applications pursuant to section 14(1) of the 2009 Act were directed to the imputations alleged by each plaintiff in relation to the article of 16th June, 2013, the statement of claim in each case claims that the two-page article published on the 9th June, 2013, which I have used my best endeavours to describe, was grossly defamatory of and concerning the plaintiffs. In the case of Mr. Gilchrist, some 15 defamatory imputations are pleaded while there are 17 defamatory imputations pleaded in the case of Ms. Rogers.

11. At para. 9 of his statement of claim, Mr. Gilchrist, having set out the words which appear in italics above from the article of the 16th June, 2013, claims that the Newspaper falsely and maliciously published those words and/or statements of him and that:-

> "In their natural and ordinary meaning, whether or not in combination with the reference to the article of the 9th June 2013, the said words and/or statements meant and/or were understood to mean that:-
>
> (a) the plaintiff was responsible for improperly passing off his lover as a 'doctor' to examine a witness on the Witness Protection Programme;
>
> (b) the plaintiff had arranged for the payment of inappropriate payments of fees to his lover.

12. At para. 10 of his statement of claim, Mr. Gilchrist pleads that the Newspaper falsely and maliciously published the words and/or statements which are underlined in the article above and which he states in their natural and ordinary meaning meant or were understood to mean that:-

> (a) He had misappropriated State funds (either funds meant for the witness or otherwise), to his own use and that of his lover, for use in travelling first class around the world and staying in five star hotels (or other inappropriate spending);
>
> (b) he had misappropriated State funds (either funds meant for the witness or otherwise), to his own use and that of his lover, for use in travelling first class around the world and staying in five star hotels (or other inappropriate spending),

with the result that witness in question was abandoned and left in fear of his life;

(c) he had made false promises to Mr. Mooney in return for his participation in the Witness Protection Programme;

(d) he had acted inappropriately and unprofessionally in his role as an officer within the Witness Protection Programme.

13. Insofar as Ms. Rogers is concerned, at para. 7 of her statement of claim, in respect of the text which is printed in bold in the article of the 16th June, 2013 reproduced above it is asserted that the Newspaper falsely and maliciously published those words and statements concerning her and that:-

> "In their natural and ordinary meaning and/or by innuendo from the words and/or statements themselves, the said words and/or statements meant or were understood to mean that:-
>
> (a) The plaintiff fraudulently passed herself off as a medical doctor to Mr. Mooney and to An Garda Síochána;
>
> (b) the plaintiff concealed her fraud until the Sunday World revealed it;
>
> (c) the plaintiff carried out tasks for which she was not professionally qualified including medical assessments;
>
> (d) that any fees paid to the plaintiff, were on foot of improper bills and/or demands made by her;
>
> (e) that the plaintiff was the beneficiary of State funds spent inappropriately;
>
> (f) that the plaintiff participated with members of An Garda Síochána in spending money inappropriately;
>
> (g) the plaintiff had taken advantage of her role and had dishonestly misappropriated tax payers' money to enrich herself and/or derive other benefits from her appointment and her role including first class travel and five star accommodation;
>
> (h) the plaintiff so enriched herself with the consequence that monies intended for a witness under the scheme were misappropriated to her use leaving the witness abandoned and in fear of his life."

The Newspaper's application

14. The Newspaper issued a motion pursuant to s. 14 of the 2009 Act in each set of proceedings. In Mr. Gilchrist's proceedings the Newspaper's application was directed to both articles whereas in Ms. Roger's case the application was confined to the imputations that might reasonably be sustained by the article of the 16th June, 2013. This appeal is only concerned with whether the words contained in the article of the 16th June, 2013 are capable of bearing the imputations and meanings pleaded on behalf of Mr. Gilchrist and Ms. Rogers.

15. The Newspaper's argument focused upon the difference between an article which would suggest to the reasonable reader that a person had actually engaged in particular activities or was guilty of certain identified wrongdoing and one which, like that of the 16th June, 2013, might reasonably be considered to bear the imputation or be understood to mean that the person was suspected of doing those things or was perhaps under investigation for the wrongdoing reported. The Newspaper accepted that the article had undoubtedly reported, in the context of an order for discovery made in High Court proceedings, that a Mr. Dave Mooney, who was a participant in the State's WPP, had made wide ranging allegations concerning the conduct and lifestyle of Mr. Gilchrist and Ms. Rogers while working for the State's WPP. However, the Newspaper's case is that the article was not reasonably capable of meaning that each of those allegations were true and that Mr. Gilchrist and Ms. Rogers were guilty of the misconduct alleged.

Judgment of the High Court Judge.

16. The trial judge commenced his analysis of the defendants' application by focussing upon the article of the 9th June, 2013 which the Newspaper maintains is not admissible for the purposes of the meaning to be attributed to the article of the 16th June, 2013. He states in his *ex tempore* judgment that the impression created by the article of the 9th June, with its dramatic photographs of flashy cars and of people taken without their knowledge when combined with the lack of clarity as to the nature of the investigations referred to therein, compelled him to refuse the Newspaper's application given that he was satisfied that the reasonable person of normal intelligence who read the article would likely be left with the same impression. He was satisfied that he could read the publications in conjunction with each other as he was of the view that the reader of the article on 16th June was likely to have read the article featured in the same newspaper the previous week. The High Court judge then considered the article of the 16th June noting that insofar as the article refers to an investigation it was not at all clear what the investigation was, whether it was an investigation by the court, by a judge, the police force or, indeed, the newspaper itself. The High Court judge emphasised the fact that the investigation had not been contextualised in the article which left open a number of different possibilities.

17. The trial judge set out that the case made by the defendants is that at their height the articles indicate that the plaintiffs are the subject of certain investigations and that a reasonable reader would not read into the text that they are guilty. He distinguished the facts of the present case from those in *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234 and *Griffin v. Sunday Newspapers* [2011] IEHC 331 where there clearly were actual investigations under way. He noted from the article of the 9th June, 2013 that the investigation referred to was being carried out by the newspaper itself and this was to be inferred from the dramatic photographs, the fact that individuals were being door-stepped, photographs were taken without their knowledge and people were being tracked down. The lack of specificity as to what investigations were being conducted and by whom seemed to compel the trial judge to reach the conclusion that he should refuse the defendant's application.

18. In summary, it would seem that the High Court judge refused the Newspaper's applications for three reasons:-

> 1. He considered that the meanings which the plaintiffs sought to attribute to the article of the 16th June, 2013 might be determined by the reasonable reader based on the assumption that they had read the article of the 9th June and in the context of the impression that that article would likely have had on them when it came to considering the meaning of the article of the 16th June, 2013.
>
> 2. Taking judicial notice of the fact that people who read Sunday newspapers tend to do so on a loyal basis, the fact that the articles were only one week apart allowed the court to take the view that persons reading the second publication would likely have had some memory of the first article and were prompted to connect the material contained in the two articles;

3. The fact that the investigations mentioned in the articles had not been contextualised left open the meanings contended for.

Submissions

19. Mr. Oisín Quinn S.C., on behalf of the Newspaper, submits that the trial judge erred in law while considering the s.14 application, which required him to consider whether the article of the 16th June, 2013 was reasonably capable of the meanings contended for by the plaintiffs, when he looked to the content of the article of the 9th June 2013 for that purpose. He accepted that the decision in *Travers v. Sunday Newspapers Ltd* (see Hedigan J. in High Court [2012] IEHC 185 and *ex tempore* judgment of Hardiman J. in Supreme Court delivered on 12th October, 2015 (upholding the High Court decision)) was clear authority for the proposition that, when ruling on meaning, the court could look to the impression created by the "get up" of the article concerned, including its photographs and headlines. However, he submits that it was not authority that when considering meaning in the context of one article, the court was entitled to look back on the content or "get up" of an earlier article, as had occurred in the present case.

20. Counsel submits that the *decisions in Bradley v. Independent Star Newspapers [2011] 3 I.R. 96 and Hayward* v. Thompson [1982] Q.B.47 do not support the entitlement of a plaintiff to rely upon an earlier article for the purposes of considering the meanings that may be imputed to a later publication. Those cases concerned the entitlement of a jury to consider a later publication purely for the purposes of identifying the person about whom an earlier highly defamatory article had been written.

21. It is submitted that the big difference between the present case and the identification cases such as *Bradley and Hayward* is that the reasonable reader is expected only to remember the name of the person about whom the earlier article had been written. In the present case, the jury would be asked to proceed on the basis that the reasonable reader should be assumed to have bought both papers and at the time of reading the second article had remembered the previous article sufficiently well to allow them to interpret the latter article in light of the initial article. This was not a reasonable assumption.

22. Counsel for the Newspaper submits that the High Court judge acted impermissibly when he referred back to the article of the 9th June, 2013 when deciding whether the article of 16th June, 2013 was reasonably capable of bearing the imputations and meanings contended for by the plaintiffs. It would not be reasonable to assume that the reader of the later article would have had a copy of the earlier article beside them as they were reading it even if there was a reference to the earlier article therein. Neither was it realistic to suggest that the reasonable reader would have remembered enough about the first article such that it would have informed their view of the meaning of the second article. There could be no reliable analysis of what an article actually meant if its meaning was to be gleaned by reference to the impression left by on the mind of the reasonable reader by an earlier article.

23. When considering the imputations and meanings which the article of the 16th June, 2013 might reasonably bear, the article was not to be treated in the same manner as a statement published in a book or one published in a book which was serialised or, for that matter, something that may have been published in a two day exposé in a newspaper, as was the case in *Galloway v. Telegraph Group Ltd*. [2004] EWHC 2786 (QB). In such cases, it is expected that the reader will carry forward the impression created by what is essentially the earlier part of the same publication.

24. Mr. Quinn submits that if this Court should conclude that the trial judge erred in law in looking to the earlier article of the 9th June, 2013 as to the meanings that might be ascribed by the notional reasonable reader to the words in the article of the 16th June, 2013, then it must proceed to examine the article of the 16th June on its own merits to see if, applying the correct test, the article is capable of bearing the imputations and meanings contended for by the respondents in their respective statements of claim. He submits that the meanings which Mr. Gilchrist and Ms. Rogers seeks to impute to the article of the 16th June, 2013 are perverse and could not be allowed to go to a jury.

25. In particular, Mr. Quinn places emphasis on the distinction between a statement as to a party's guilt or culpability in respect of some particular type of action and a statement that they are or were suspected of or under investigation in respect of their conduct. He relies upon the judgment in *Lewis v. The Daily Telegraph* [1964] A.C. 234 and, in particular, the decision of Reid LJ. He submits that the ordinary reasonable reader would be expected to be suspicious about the conduct of Mr. Gilchrist and Ms. Rogers as a result of what was printed in the article of the 16th June but that such a reader would likely postpone judgment on their actions to the outcome of the case referred to in the article. Counsel emphasises that it is not alleged in either statement of claim that the article is defamatory because it means there was an investigation into Mr. Gilchrist's conduct or that Mr. Gilchrist was suspected of the actions referred to at paras. 9(a) and (b) but that the article could be taken to mean that he did those acts. Likewise, in relation to Ms. Rogers, the claim of defamation is that the article is stated to mean that she had done each of the matters referred to at paras. 7(a) to (h) inclusive. The article is not claimed to be defamatory because Mr. Gilchrist or Ms. Rogers were merely suspected of those actions. They might, as Mr. Quinn observed, have opted to claim that they had been defamed because the Newspaper alleged that they were suspected of these things but they had not chosen such an approach.

26. Mr. Quinn also submits that it was irrelevant for the purposes of the s. 14 application that there was a lack of clarity as to precisely what investigation had been carried out or might have been underway in respect of the conduct of Mr. Gilchrist or Ms. Rogers. The article was not claimed to be defamatory because it had reported that there was or had been an investigation into their conduct. According to Mr. Quinn, the plaintiffs had "gone for broke" in claiming that the article meant they were actually guilty of the conduct mentioned therein. Accordingly, the High Court judge had erred in law when he factored into his consideration the fact that it was unclear as to what, if any, investigation was being referred to in the two articles. It was submitted that any such lack of clarity could not be relied upon to support a claim that the reasonable reader might understand the publication to mean that the plaintiffs were guilty of rather than merely under investigation or suspected of the conduct identified therein.

27. Mr. Quinn concedes that if the High Court judge was entitled to consider the range of imputations and meanings which the article of the 16th June might reasonably bear having regard to the impression created by the earlier article of the 9th June 2013, that his s. 14 application and, by necessity, this appeal cannot succeed. T hat he has adopted such a position is perhaps not surprising in light of the fact that the same meanings were pleaded by Mr. Gilchrist and Ms. Rogers in respect of the article of the 9th June, 2013 yet no application was brought under s. 14 seeking to strike out those meanings as ones which would be wholly unreasonable.

The plaintiff's submissions

28. Mr. Dermot Gleeson S.C., on behalf of Mr. Gilchrist and Ms. Rogers, submits that the trial judge was correct as a matter of law when he concluded that he could consider whether the article of 16th June, 2013 was reasonably capable of bearing the imputations and meanings contended for by them in their statements of claim by reference to the content and "get up" of the earlier article of 9th June, 2013. He submits that there is no logical distinction that can be drawn between these two articles and a letter which forms part of a chain of correspondence or the serialisation of a book in a newspaper or a series of television programmes when it comes to

consider the meaning of an allegedly defamatory statement or publication. In such cases, meanings are to be determined by looking at the entirety of the publication. In particular, he relies upon the decision in *Galloway v. The Telegraph Group Ltd.* [2004] EWHC 2786 (Q.B.) and [2006] EWCA Civ 17 in which the court considered the meanings to be imputed to a number of articles concerning the plaintiff published by the newspaper in two consecutive editions. Of importance, Mr. Gleeson submits, is the fact that the article of the 16th June, 2013 refers the reader back to the earlier article. He also relies upon the fact that the article of 9th June remained online and was capable of being accessed by anyone who read the article of 16th June, 2013.

29. The decision in *Travers v. Sunday Newspapers Ltd.* [2012] IEHC 185, according to Mr. Gleeson, makes clear that a judge should not withdraw a question of meaning from a jury unless satisfied that it would be "wholly unreasonable" to leave the question go to the jury. Meaning had to be ascertained from the context in which the words complained of were published and in this case that context included not only the article of the 16th June and its contents but also the "get up", photographs and headlines of the earlier article of the 9th June, 2013. He highlighted a number of comments, headlines and photographs in the article of the 9th June, 2013, all of which he maintained imputed guilt to his clients rather than an imputation that they were merely suspected or were being investigated in respect of certain conduct. The clear implication was that they had done or been responsible for all of the things stated in the article. Mr. Gleeson also highlights the fact that no application was made by the Newspaper to strike out the same meanings as are pleaded in respect of the article of the 16th June, 2013 insofar as they are repeated in the context of the article of the 9th June, 2013. Accordingly, regardless of whether the Newspaper was or was not successful on this appeal, these meanings would be going before a jury in any event concerning the article of the 9th June, 2013 and that was another reason why the appeal should not be allowed.

30. Applying the principle in *Travers* to the present case, in particular the requirement that the court import by way of context the language and photographs used in the earlier article, counsel for the plaintiffs submits that whether what was written on the 16th June, 2013 implied guilt on the part of Mr. Gilchrist or Ms. Rogers was a matter that had to be left to the jury.

31. If the trial judge was not entitled to consider whether the article of the 16th June, 2013 was reasonably capable of sustaining the imputations and meanings pleaded in the context of the earlier article of the 9th June, 2013, Mr. Gleeson nonetheless seeks to argue that when read on its own the imputations and meanings pleaded in the article of the 16th June can reasonably be sustained. He submits that it is the broad impression conveyed by a defamatory publication that has to be considered and not the meaning of each word under analysis. A statement of suspicion, he argues, may in fact impute guilt. He relies in this regard upon the decision of Devlin LJ. in *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234 and, in particular, his warning at p. 285 that:-

> "A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire (…) One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. (…) loose talk about suspicion can very easily convey the impression that a suspicion is well founded."

Mr. Gleeson also relies upon that part of his judgment to the effect that the layman reads in an implication or meaning into a publication much more freely than a lawyer will.

32. Mr. Gleeson also submits that the Newspaper's reliance upon the decisions in *Lewis and Griffin v. Sunday Newspapers* [2012] 1 I.R. 114 is misplaced. The facts in both of those cases established that there had in fact been an actual investigation. Accordingly, it was reasonable for the defendants in those cases to then assert that there was a difference between a publication which stated specifically that a party was being investigated in respect of some wrongdoing and one where it was to be inferred from the article that they had actually been found guilty of wrongdoing. Here there was no investigation of Ms. Rogers and, insofar as there was an investigation into Mr. Gilchrist, that was in respect of alleged misuse of overtime and he had been fully investigated and exonerated. *Lewis* and *Griffin* could therefore be distinguished on their facts.

Discussion

33. It is not disputed that the Newspaper's appeal raises two substantive issues. The first of these is whether the trial judge erred in law in concluding that it was legitimate for him to consider the contents of the article of the 9th June, 2013 for the purposes of deciding upon the meaning of the article of the 16th June, 2013. The second issue is whether, excluding any consideration of the earlier article of the 9th June, 2013, the words contained in the article of the 16th June, 2013 are reasonably capable of bearing the meanings pleaded on the plaintiffs' behalf.

34. Section 14(1) of the Defamation Act 2009 provides as follows:-

> 14(1) "The court, in a defamation action, may give a ruling–
>
> (a) as to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff, and
>
> (b) (where the court rules that that statement is reasonably capable of bearing that imputation) as to whether that imputation is reasonably capable of bearing a defamatory meaning,
>
> upon an application being made to it in that behalf."

35. It is not disputed that for the purposes of an application under section 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*). It is also not disputed that the role of the judge on a s. 14 application 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 helpfully summarised the principles relevant to how the meaning of words should be determined as follows:-

> "(1) The governing principle is reasonableness.
>
> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

(3) Over-elaborate analysis is best avoided.

(4) The intention of the publisher is irrelevant.

(5) The article must be read as a whole, and any "bane and antidote" taken together.

(6) The hypothetical reader is taken to be representative of those who would read the publication in question.

(7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…'."

36. Guidance as to the general approach to be adopted by a court when faced with a s. 14 application may be found in the helpful decision of Walsh J. in *Quigley v. Creation Limited* [1971] 1 I.R. 269 albeit that his judgment 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 judgment:-

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

37. It is also well settled law as is set out, for example, in the decision of Hedigan J. in *Travers v. Sunday Newspapers Limited* [2012] IEHC 185 that the words complained of must be construed in the context in which they appear. That case involved an article written by the newspaper which the plaintiff maintained was defamatory on the basis that the hypothetical reasonable reader would likely conclude that he had been involved in his own kidnapping. The newspaper brought an application pursuant to s. 14(1) of the 2009 Act seeking an order declaring that the publication was not reasonably capable of bearing the imputations and meanings contended for by the plaintiff i.e. that he was a willing participant in his own kidnapping with the result that he enjoyed significant material wealth which had allowed him purchase expensive cars and holidays abroad. The newspaper, in pursuing the application, relied upon the fact that there were many phrases in the article which suggested the plaintiff's innocence and in particular the headline had stated that the robbery had nothing to do with him. It had also reported that he had been released from Garda custody without charge, that he had reported the matter to An Garda Síochána and had been distraught during the kidnapping.

38. However, the plaintiff relied upon what is commonly described as the "get up" of the whole article to submit that the overall impression created by the article was that he was a willing participant in the heist and that he had benefited financially from it. He relied upon the fact that the article had included a large colour photograph of him standing in front of a Ferrari along with captions such as "high life" to submit that the notional reasonable reader would be capable of attributing to the article the meanings which the newspaper sought to strike out. The plaintiff argued that the judge should not remove from the jury decisions about the overall meaning of the article particularly when the average reader is drawn to large colour photographs and headlines more than they are to the small text that may be contained in the article.

39. Hedigan J. concluded that the article, when viewed in the context of the photographs and captions, depicted a style of life that was not normally associated with the lifestyle of a bank clerk. He further held that, when viewed objectively from the viewpoint of the hypothetical reasonable reader, the publication was capable of giving rise to the meanings contended for. Thus it was he expressed himself satisfied that it would be unduly prejudicial to the plaintiff not to allow the meanings which the newspaper had sought to challenge be put before the jury.

40. In his *ex tempore* judgment delivered on the appeal, Hardiman J. upheld the decision of the High Court. In so doing, he relied upon the decision in *Lewis v. Daily Telegraph Limited* [1964] A.C. 234 as support for the proposition that whether a particular publication is capable of bearing the meanings pleaded by a plaintiff is a question of impression and the court had to consider the whole of the publication, which included the "get up" - headlines, pictures and captions. All of this had to be taken into account. Further, he specifically rejected the submission made by counsel for the newspaper that if any part of the article was logically inconsistent with the implication claimed that no other part of the article could be capable of that implication.

41. It is also beyond doubt that it is permissible for a jury to look at a second article to see to whom an earlier article, which is alleged to be defamatory of a plaintiff, refers. It is not the case, however, that a plaintiff can attempt to establish that an innocent earlier publication could be rendered defamatory by a consideration of facts later revealed in a distant publication as was the case in *Grappelli v. Dereck Block Ltd.* [1981] 1 W.L.R. 822.

42. A case in point is that of *Bradley v. Independent Star Newspapers* [2011] 3 I.R. 96, in which Hardiman J. concluded that the High Court judge had erred in law, having belatedly concluded that a second newspaper article was admissible for the purpose of establishing the identification of persons referred to in the earlier article, in failing to so advise the jury.

43. In *Bradley,* the first article published by the newspaper described two brothers as the most dangerous criminal gang operating in Dublin. They were alleged to have made several million euro from their crimes and to have benefited from a string of cash in transit robberies. The two brothers were not named. Some months later, the newspaper published another article which was clearly about the plaintiffs. It gave their names and published, as part of the second article, a photograph of the first article and also a picture of Mr. Bradley on another page beside a headline "We are *not* ATM thieves". Underneath the photograph of the earlier article was a headline: "Star Sunday June 13th - We first told of CAB probe".

44. Starting at para. 48 of his judgment, Hardiman J. commenced his consideration concerning the extent to which a second article might be relied upon to establish whether another article was published "of and concerning" the plaintiff. In reaching his conclusion, he relied upon the decision in *Hayward v. Thompson* [1982] Q. B. 47, where, in relation to two articles published in a Sunday newspaper on consecutive Sundays, the trial judge had ruled that it was permissible for the jury to look at the second article to see to whom the first article referred because a grave injustice would occur if this was not to be permitted. In *Hayward*, the court was concerned with what is referred to as the "Scott affair". The allegation was that a man called Andrew Newton had been paid £5,000 to murder Mr. Norman Scott who had claimed to have had a homosexual relationship with Mr. Jeremy Thorpe.

45. In *Hayward*, the first article published by the newspaper claimed that the names of two more people connected with the affair had been given to the police and that one was a wealthy benefactor of the Liberal Party. Mr. Hayward was a well known philanthropist who had given significant sums to the Liberal Party but he was not named in the first article. However, a week later, a second article published by the newspaper contained his name. As a result, Mr. Hayward claimed damages for the libel contained in

the first article. The trial judge ruled that the second article could be considered by the jury in order to determine to whom the first article referred.

46. What is important about the decision in Hayward is that the words in the first article were clearly defamatory on their face and were intended to refer to the plaintiff. The only question unresolved by the first article was the identity of the person about whom the article had been published. It was not a case in which the first article contained what would otherwise have been an innocent statement which the plaintiff sought to contend could later be rendered defamatory by some fact which emerged in a later article.

47. Hardiman J., in the course of his judgment in Bradley, explained why a second article might be admissible to establish the identity of a person the subject matter of an earlier publication. He did so by reference to the following brief extract from the judgment of Sir Stanley Rees in *Hayward* where at p. 72 he stated that if the second article was not admissible as to the identity of the person the subject matter of the first article:-

> "… it would be open to a newspaper to publish a virulent libel without identifying the person defamed but adding a statement that the victim would be identified in a week's time. The newspaper could then a week later publish the name of the person defamed without attracting liability for libel."

48. At para. 64 of his judgment, Hardiman J. compared the facts in *Hayward v. Thompson* to those before him in *Bradley*. He stated that the only thing lacking in the first article was an express statement as to the identity of the people in question and that this information was later supplied by the same author and publisher in a subsequent edition of the same newspaper allied to which the second article had boasted of being the first to reveal in its original article that the brothers who were then named were the subject of a "massive" Criminal Assets Bureau investigation.

49. At para. 69 of his judgment, he stated as follows:-

> "[69] This does not mean, however, that evidence that the same author and publisher have published a subsequent article linking the plaintiffs by name to the allegations previously made of two unnamed brothers of the same age as the plaintiffs, who are also brothers of the stated ages, is inadmissible and must be excluded from consideration in an action based on the first article. To do so would be highly unrealistic, in the sense that it would exclude from the jury's consideration material which every person of normal intelligence would consider relevant to the question, who was the first article published about? It is one thing to say that intention is neither necessary nor sufficient to constitute a libel: it is quite another to say that a specific article undoubtedly published in the same newspaper by the same journalist, who was an employee of the same defendant, must be excluded from consideration on the *question of identification*." (my emphasis added)

50. Accordingly, it is well established law in this jurisdiction that a plaintiff can seek to rely upon a second article published by the same newspaper for the purposes of establishing the identity of the person about whom an earlier article was published. However, the decisions in *Bradley and Hayward* provide no support for the approach which the High Court judge was urged to take by the plaintiffs in the present proceedings when called upon to consider the outside boundaries of the meanings that the reasonable reader might attribute to the article of the 16th June, 2013.

51. Mac Eochaidh J. was urged to consider the meaning of the article of the 16th June, 2013 not merely by reference to the impression that that article's own headlines, "get up" and captions would likely have on the reasonable reader, as in *Travers*, but based first on the assumption that they had read the earlier article and as to the likely impression that that article would have had on them when it came to their consideration of the imputations and meanings that might be borne by the later article. In other words, the High Court judge found that the article of the 9th June was to be part of the "context" for the purposes of considering the meaning to be attributed to what was published in the article of the 16th June, 2013.

52. It is certainly true to say that there are cases in which a plaintiff may seek to rely on more than one article published by the same newspaper to establish the imputations and meanings for which they contend. The following is what is stated in *Gatley on Libel and Slander* (12th ed., Sweet and Maxwell 2013) concerning that entitlement at para. 32.27:-

> "Where either party relies for meaning on more than one article in the same newspaper, the key issue is whether the articles are sufficiently closely connected to be regarded as a single publication, and it makes no difference of principle whether the articles are on continuation pages or a different part of the same newspaper. So also in the case of an internet libel, where it may be appropriate to put in any other page from which the reader would have proceeded (e.g. by hyper-link) to the words complained of. Articles in other issues of a newspaper, before or after the article complained of, may on occasion be properly regarded as part of the context, for instance where the article is part of a series. Where the libel is contained in a letter, a previous letter (referred to in the letter complained of and read by the publishee of the alleged libel) may be put in evidence."

53. The first of these scenarios would appear to involve an assessment of whether the reasonable reader who has read one of two articles concerning the same matter in a particular paper on a given day is likely to have read both such that the impression created by one can likely be stated to have influenced their impression of the other. Matters such as whether the articles refer to each other might prove material. However, the articles, the subject matter of the instant proceedings, do not fall into this category as they were written a week apart even if there is a reference in the article of the 16th June 2013 to the fact that: "Last week the *Sunday World* revealed how Rogers and former top cop Benny Gilchrist are at the centre of the case". There was nothing in the article of the 9th June, 2013 to indicate that its content might be relevant to anything which might later be published concerning Mr. Gilchrist or Ms. Rogers. It was published as a stand-alone article.

54. The decision of the English High Court in Galloway v. Telegraph Group Ltd. [2004] EWHC 2786 (QB) is a good example of the second scenario referred to by Gatley above. That was a case in which the plaintiff successfully established his entitlement to have the jury bear in mind, when it came to consider the meaning of articles published by the newspaper on a particular day, the impression created by other articles published about the plaintiff in the same newspaper the previous day.

55. Eady J. explained that such an approach was warranted on the facts of that case because the law requires that the natural and ordinary meaning of words should be determined by reference to the context in which they were published. He set this out as follows:-

> "48. Context is always important. In order to determine the natural meaning of the words of which a claimant complains, it is necessary to take into account the context in which they were used and the mode of publication. Thus, a claimant

cannot seek to isolate a passage in an article, and complain of that alone, if other parts tend to throw a different light on that passage: see e.g. per Lord Bridge in *Charleston v News Group Newspapers* [1995] 2 AC 65, 70.

49. Context is perhaps especially important in this case, where the Claimant is complaining of parts of newspaper articles spread over two days and consisting of a total of thirteen pages. The context would thus include other parts of the coverage of which no complaint is made. In particular, it is necessary to take account of the content of the Baghdad documents (set out above) which were reproduced in the newspaper for readers to consider.

50. Furthermore, when judging the meaning of the 23rd April articles, it is necessary to bear in mind that many readers will have had a general impression of their reading from the day before. It is legitimate to take that into account when assessing the meaning of the second day's coverage. The reverse is not the case, since it is not permitted when attributing a meaning or meanings to a published article to refer to subsequent material."

56. However, it is important to recognise just how unusual the facts of Galloway were. The perceived importance of the story was such that the newspaper gave over thirteen pages on two successive days to what I will describe as a highly charged report concerning Mr. Galloway's alleged financial involvement with the Saddam Hussein's regime. I should say that it is not clear from either the High Court decision or that of the Court of Appeal whether the articles printed on the first day gave any indication that the story would be continued the following day. Clearly if such an indication had been given the reader would have been encouraged to carry over their consideration of Mr Galloway's conduct to the following day, much like what would occurr where a story is serialised.

57. However, regardless of whether there was, or was not, an indication that the story would be followed up the following day, the facts in *Galloway* are very different from those which arise in the present procceedings. While the first article of the 9th June, 2013 was indeed a large exposé covering two pages there was no indication that it was to be, for example, the first of a two part series concerning the conduct of Mr. Gilchrist and Ms. Rogers. Neither did it suggest that the story would be continued the following week at which point further "revelations" would be made such that the reader might be expected to hold in their head all that had been published until the following week. There was nothing in the article of the 9th June, 2013 from which it could be inferred that the person who had read it would, when they purchased the next issue, be looking to find anything further written concerning the plaintifffs.

58. Even if it be the case that a court should assume that the hypothetical reasonable reader buys the same newspaper each Sunday, is it to be assumed that they read every article every week and remember its contents so that if they should come across an article about a matter which happened to be the subject matter of an article the previous week they should have remembered it with sufficient particularity so that it is safe to assume that their impression of the second article was informed by an accurate impression of the first? I suggest not.

59. There would simply be far too many variables if this was the approach to be taken. The articles under consideration on the present appeal are simply not sufficiently proximate or otherwise connected to each other to warrant the approach taken by the High Court judge which was to conclude that the article of the 9th June was part of the relevant context to be considered when seeking to attribute meaning to the article of the 16th June, 2013.

60. Accordingly, and particularly in light of the fact that no clear legal authority has been produced to support the position advanced by the plaintiffs on facts equivalent to those which arise for consideration on this appeal, I have come to the view that it would be wrong in law if a jury in these proceedings was to be permitted to rely upon the article of the 9th June, 2013 when it came to its consideration as to the imputations or meanings which might reasonably be borne by the article of the 16th June, 2013. It is noteworthy that the plaintiffs do not argue that the imputations and meanings for which they contend can only be sustained in reliance on the context created by the article of the 9th June, 2013.

61. I should also state that the fact that the earlier article of the 9th June. 2013 will, in any event, be before the jury because of the separate claims for defamation stated to arise from that publication, is not a valid reason for contending that the jury should be permitted to consider the meaning of the later article by reference to the earlier one. That, in my view, is legally impermissible and would risk a wholly, unjust result.

Is the article of the 16th June considered in isolation from the article of the 9th June, 2013 reasonably capable or supporting the imputations and meanings pleaded?

62. Given that the High Court judge erred in law when, for the purposes of considering the Newspaper's application under s.14 of the 2009 Act, he considered the meanings of the article of the 16th June, 2013 in the context of the impression that the article of the 9th June would likely have had on the reasonable reader, it might well be said that the s. 14 application ought properly be referred back to the High Court for a re-consideration of the application absent any consideration of the article of the 9th June, 2013. However, the trial of these proceedings is due to take place later this month and in circumstances where this Court has heard this particular issue fully argued by the parties, I am satisfied that the justice of the case is best served for this Court to address the issue *de novo*.

63. Having fully considered the submission of the parties and the relevant authorities, and in particular the decisions in *Lewis* and *Griffin*, I am not satisfied that the article of the 16th June, 2013 is capable of bearing the imputations and meanings contended for by Mr. Gilchrist at paras 9(a) and (b) and 10(a) to (d) of his statement of claim or those contended for by Ms. Rogers at paras.7(a) to (h) of her statement of claim.

64. In *Lewis*, the newspaper reported that the Fraud Squad was enquiring into the affairs of a limited company of which Mr. Lewis was the chairman. In his proceedings, Mr. Lewis alleged that the words in their ordinary and natural meaning meant or were understood to mean that he had been guilty of fraud or dishonesty. The Newspaper *inter alia* denied that the words meant or were capable of meaning that he was guilty of fraud or dishonesty and at the conclusion of the evidence submitted to the trial judge that such a meaning should be withdrawn from the jury. The trial judge ruled that the words could bear the meaning alleged in the innuendo relied upon and directed the jury that they might so find.

65. The Court of Appeal reversed the decision of the trial judge and in doing so sought to draw a distinction between publications in which a person was stated to be under investigation and those which imputed guilt with several members of the court giving helpful guidance. The following observations of Reid LJ. at p. 259 are apt in the context of the present case:-

"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 has 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'. 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 has been 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 that 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."

66. For my part, I agree with Reid and Morris LJJ. in *Lewis* that it is indeed a grave thing to say that someone is fraudulent and that is quite a different thing to say that they are suspected of fraudulent conduct and that the reasonable reader will discern the difference. Whilst I accept that a court must assume that such a reader may occasionally engage in loose thinking, they should nonetheless be credited with knowing the difference between an article which reports that a person is suspected of wrongdoing from the article that implies that thay actually committed that wrong.

67. I have considered the article of the 16th June, 2013 bearing this guidance in mind. The article is replete with references to "investigations" and "allegations" all of which are stated to be material to an upcoming High Court case which would likely throw greater clarity on the conduct of Mr. Gilchrist and Ms. Rogers. In my view, while the reasonable reader might be *suspicious* (my emphasis) as to whether they were guilty of the conduct alleged, only an unduly suspicious reader would conclude that they were actually engaged in the activities which were stated to be under invesigation. That being so, I am satisfied that the article of the 16th June, 2013 is not reasonably capable of bearing the imputations and meanings pleaded by Mr. Gilchrist and Ms. Rogers. This is particularly so given that the article of the 16th June, 2013 was not one where the Newspaper's reference to the plaintiffs as being under investigation, a matter which is repeated four times in the article, could in the mind of the reasonable reader have been overborne by any imputation of actual guilt generated by the accompanying photograph. That photograph was a benign one, which was not reasonably capable of imputing actual guilt, as was clearly the case in relation to the photograph in *Travers*.

68. Finally, it is perhaps worth recording that the High Court judge in making his decision that the article of the 16th June was reasonably capable of bearing the imputations and meanings pleaded, albeit impermissibly influenced by the article of the 9th June, 2013, was clearly influenced by the fact that it was not clear from the articles as to what, if any, investigation/investigations had been or were being carried out into the conduct of Mr. Gilchrist and Ms. Rogers and if so, by whom. However, any confusion in the mind of the reasonable reader concerning the nature of any such investigation was, in my view, irrelevant to his consideration as to whether the meanings pleaded might be permitted to be considered by the jury. Whether or not there was any investigation and if so the nature of that investigation could only have been of relevance if the Newspaper had delivered a defence of truth to a complaint made by the plaintiffs that it was defamatory to say they were under investigation for the conduct referred to in the article. However, no such plea is made and the plaintiffs, as Mr. Quinn described it in the course of his submissions, have instead opted to "go for broke" in alleging that the article imputes or means that they were guilty of the conduct alleged rather than defamatory by reason of reporting that they were, or had been, under some type of investigation for such conduct.

Conclusion

69. For the reasons earlier set out in this judgment, I am satisfied that the High Court judge erred in law when he concluded that in determining whether the article published by the newspaper on the 16th June, 2013 was capable of bearing the meanings contended for by Mr. Gilchrist at paras. 9(a)-(b) and 10(a)-(d) of his statement of claim and by Ms. Rogers at para. 7.(a)- (h) of her statement of claim, that it was legitimate to consider that article in the context of the impression that the earlier article published on the 9th June, 2013 would likely have had on the reasonable reader.

70. Accordingly the High Court judge failed to lawfully rule upon the Newspaper's applications pursuant to s. 14 (1) of the 2009 Act.

71. In other circumstances it might have been appropriate to remit the Newspaper's s. 14 applications back to the High Court to be determined there absent any consideration of the earlier article of the 9th June, 2013. However, in circumstances where the plaintiffs' trials are imminent and this Court has had the benefit of considering all of the materials and submissions as were available to the High Court judge, I am satisfied that the justice of each case is best served by this court determining the Newspaper's applications de novo in accordance with the prevailing principles.

72. For the reasons earlier stated, I am satisfied that the article of the 16th June, 2013, when considered in accordance with those principles, is not reasonably capable of bearing the imputations and meanings pleaded by Mr. Gilchrist at paras. 9(a)-(b) and 10(a)-(d) and Ms. Rogers at para. 7(a)-(h) of their respective statements of claim.

73. Accordingly, I would allow the Newspaper's appeals.