

## THE HIGH COURT

2007 320 CA

BETWEEN

HENRY TOLAN

PLAINTIFF

AND  
AN BORD PLEANÁLA

DEFENDANTS

**Judgment of Mr. Justice Hedigan delivered on the 29th July, 2008**

This is a case that comes before me as an appeal from the Circuit Court. In it, the plaintiff claims,

- (a) A mandatory injunction directing the defendant to remove from the planning file a letter written by one Gerard Lynam, dated 13th October, 1999, and all documents referring thereto;
- (b) Damages for defamation;
- (c) Other reliefs;
- (d) Aggravated damages.

The case arises from the act of a public representative in writing and having delivered to the defendants, a letter that contained false and scurrilous allegations against the plaintiff. This letter purported to be written in connection with the plaintiff's application for planning permission for a house. The letter was received by the defendant, even though it acknowledged at the time of reception, that it contained nothing relating to planning issues. It remains on the file to this day. From this reckless and irresponsible act by a public representative, has flowed enormous distress, grief and suffering for the plaintiff and his wife, whom everyone agrees, and this court reiterates and emphasizes, are entirely innocent of the scurrilous allegations made against them. When the existence of this letter came to his notice, the plaintiff and his wife made enquiries about it. Apparently, the contents of this letter were being bandied about among elected representatives and others. The plaintiff was refused access to the letter by the defendants because it had not decided whether to circulate it for comment.

Following discussion with the public representative in question, he agreed that he had mistaken the plaintiff's identity for that of someone else. He agreed he was wrong, and through his solicitors, advised the defendants of this fact. He thereby explicitly withdrew the letter and asked the defendants to ignore the entire substance of it. At the same time, under separate letter, the public representative apologised to the plaintiff. The plaintiff assumed the letter would be forthwith removed from the file.

The decision of the defendants in his application at the time was to refuse him permission. He had been given planning permission by the local planning authority for the construction of a house. The plaintiff and his wife, at the first opportunity, attended at the offices of the defendant to inspect the file. To their dismay, they found the letter still remained thereon, although together with a document stamped heavily in red, 'WITHDRAWN', around which were staple marks and together with an envelope. The letter was not sealed, was readily available for inspection and according to the plaintiff was, in fact, highlighted by the document with 'WITHDRAWN' written on it.

The plaintiff went to see the Secretary of An Bord Pleanála, Mr. Collins, and met with him and with a Mr. Carlton. He asked the Board to remove the letter. Mr. Collins said it would take a High Court order. The plaintiff subsequently wrote on a number of occasions to the defendants, asking for the removal of the letter. His letters remained unanswered. He telephoned on numerous occasions; according to his wife, she was sure that he was making a pest of himself and that the defendant was simply ignoring him. Finally, he issued these proceedings in June 2002. In their defence, the defendants essentially argued that they are bound by Regulation 72 (a) of the Local Government Planning and Development Regulations 1994, as amended, which require them to keep available for inspection by members of the public, "the documents relating to an appeal". They claim either absolute or qualified privilege in respect of their maintaining this letter on their publicly accessible files. It is admitted that they have known, since 22nd December, 1999, when Mr. Hanafin, solicitor, wrote, on behalf of the public representative, that this letter contained matters that were entirely false.

I will take the essential issues as they have presented them to me, one by one. Firstly, there has clearly been publication by reason of the maintenance of the letter on this publicly accessible file. The evidence is that at least three people have inspected the file, in addition to the plaintiffs. These were: Sandra Bissett, Frank Connolly and Dara McElligot, although this last on the instructions of the plaintiff. It is also noteworthy, that when they inspected the file, the plaintiffs found that the offending letter was open and unsealed and located one-third of the way into the file. The defendants' case is that it had been placed in a sealed envelope, close stapled to the 'WITHDRAWN' document at the back of the file. On this basis, clearly, it had been inspected before by somebody else. As for the claim by the defendants that it was sealed and close stapled, human nature tells us anyone seeing such a thing on a file will search that document first.

It is reasonable to infer that many people, including local interest groups, have inspected the file. Moreover, the un-contradicted evidence of the plaintiffs is that they were shunned by many of their neighbours, which is sufficient, I think, to infer a fairly wide level of publication. In my view, therefore, there is no doubt but that there has been substantial publication. Secondly, there can be no doubt as to the meaning of the words in the letter. They are profoundly damaging to the plaintiff and, indeed, to his wife. They are suggestive of all manner of criminal and/or antisocial activity. They are written by a public representative, which gives them even more weight, they are cloaked in the garb of authority by being on the file of An Bord Pleanála. Any member of the public could have been, and still can be fooled, into according them some credibility. The attendant letters may not even be read, or if read, may not be fully understood. The meaning is profoundly damaging. Thirdly, in relation to the existence of the privilege claimed, the burden of establishing privilege is on the defendants. It is clear that no statutory privilege is accorded to the defendants. The only claim they can make is that they are required to maintain documents relating to an appeal, available for public inspection. They have no statutory provision according them immunity. Clearly, therefore, they must be very careful what they allow to be carried on their file. There can, in my view, be no question of an absolute privilege in the absence of the clearest statutory provision. The role of statutes is replete with examples of privilege accorded, but not here. I have been referred to two examples; s. 52 of the Medical Practitioners Act 1978, and s. 77 ss. 2 of the Investment Intermediaries Act 1995.

As to whether there is a qualified privilege involved here, no evidence has been called to the existence of an honest belief in the words published. As the defendants did not, and have not, at any stage attempted to claim that the words were true, this is unsurprising. Clearly, the defendants have no belief whatever in the truth of the words and, indeed, acknowledge them as false.

Regulation 72 (A) requires the Defendants to retain on the file any document submitted relating to an appeal. Does the definition of "document relating to an appeal" include the document in this case? Reply No. 6 of the Replies to Particulars, dated 23rd June, 2003, states explicitly that the document in question did not contain any matters relating to planning issues which pertained to the proposed development. There was, in my view therefore, no duty on the Defendant to retain the letter on the file. This pleading by the defendant is, I note correct, because the defendants have acknowledged through Ms. Morrin who received the letter at the offices of the Defendant, when the letter was delivered first, that it contained no information relevant to the application. In the result, in my judgment, no qualified privilege exists here to protect the defendant.

Fourthly, in this case, the plaintiff, the victim of a gross falsity, written in a letter to the defendants, asked them to remove this letter from their file, which was open to the public. The response was that they would not do so unless ordered to by the High Court. I consider this response from a public body to be entirely inadequate. They were aware that present on their file, which was, and remains readily accessible to the public, false and highly defamatory statements about a citizen. Their response should have been immediate and effective. Instead, they purported to throw upon the plaintiff the onus of moving in the High Court, with all the attendant risk, financial and otherwise, at a time when he was planning to come back before them with a further application, and at a time when he was in considerable financial hardship.

The response of An Bord Pleanála fell far short of the State's duty to vindicate the good name of the plaintiff. They did not even seek legal advice as to what they might do. Their action, in allegedly sealing the letter in an envelope on the file, was a transparently inadequate response, all but certain to attract attention rather than deflect it. I therefore find for the plaintiff on liability in this matter.

In considering damages, after some careful consideration, I have decided not to award aggravated damages. I do so because the defendants were not the origin of the defamation in question. I do not want to be taken in this regard as approving in any way the actions of the Board. The administrative indifference shown to the plaintiff in this case, has no place in modern Ireland and deserves the fullest criticism. It does not, however, lead me to award aggravated damages. The plaintiff, clearly, is entitled to general damages, and taking into account the amount already recovered by him from the other parties to this sorry tale, I award the sum of €75,000. As to the injunction required, I will make an order directing the removal from the file of the letter of 13th October, 1999, from Councillor Gerard Lynam to An Bord Pleanála, together with all other documents which refer expressly, or by implication, to the said letter.