Neutral Citation No. [2013] NIQB 96 | *Ref:* **GIL8981**

Judgment: approved by the Court for handing down | *Delivered:* **26/09/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

_____

BETWEEN

JANICE MAWHINNEY

Plaintiff

and

SIOBHAN FITZPATRICK

Defendant

_____

GILLEN J

Introduction

[1] This is an appeal against an Order made by Master Bell on 8 April 2013 that the Statement of Claim in this matter be struck out on the basis that there is no reasonable cause of action pursuant to Order 18 r 19(1)(a).

[2]Where relevant to this matter Order 18 r 19 provides as follows:

> "19.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading of the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> ……

(2) no evidence shall be admissible on an application under paragraph (1)(a)."

Background

[3] As appears from an amended amended Statement of Claim which was before me, this action arises out of what the plaintiff alleges was said to two named persons during the course of a meeting with the defendant. The two persons were allegedly children's day care providers and members of an organisation named "Early Years" which provides information and training for parents, childcare providers, employers and local authorities in relation to early child care and education. The plaintiff had been dismissed on or about 25 October 2010 from her position in this organisation on account of having forwarded an email received by her from a member of Early Years which contained inappropriate images of children.

[4] Where relevant, the amended amended Statement of Claim pleads as follows:

"7(a) Ms Deirdre Kelly was a playgroup leader. Ms Heather Patton owned and was Director of a playgroup. Prior to her dismissal the plaintiff had worked for these playgroups and the two said persons had a longstanding association with her. After her dismissal and with their full awareness of the plaintiff's above mentioned appropriate clearances following her dismissal, and with their full confidence in her, their playgroups had been engaging the plaintiff as before, only then as an independent Early Years specialist.

8. At the said meeting, the following three claims and statements, which were defamatory of the plaintiff, were made to the said persons Deirdre Kelly and Heather Patton by the defendant:

(i) an email which the plaintiff had forwarded when employed by Early Years and for which she had been dismissed, contained images of serious sexual abuse involving children;

(ii) the email was an attempt by a paedophile ring to infiltrate Early Years; and

(iii) the plaintiff would never work with children again.

8A The defendant repeatedly used the word "serious" in relation to the circumstances of the plaintiff's dismissal. Words spoken by the defendant in making the said three claims and statements above included:

(i) "The email contained at least two images of children being sexually abused."

(ii) "it is the tip of the iceberg" and "an attempt by a paedophile ring to infiltrate Early Years".

(iii) "Janice Mawhinney will never work with children again".

9. The said three claims and statements and each of them referred to the plaintiff and were untrue.

10. In their ordinary and natural meanings the said claims and statements amounted to, were understood by the said Deirdre

Kelly and Heather Patton as meaning, and meant the following, namely that:

(a) There had been criminal activity on the part of the plaintiff.

(b) This criminal activity had been in co-operation and association with others.

(c) The plaintiff presented a danger to children.

(d) The third claim and statement, a prediction, could be made for reasons connected with child safety and protection issues.

(e) The third claim and statement could be made for the reason that the plaintiff had been found and could be considered to be an unsuitable person in her chosen career and profession which was working with children.

……

13(c) The defendant had made two of the said claims previously.

Particulars

On 14 January 2011, on the occasion of an Early Years' Board Development Day and dinner at Coco Restaurant the defendant spoke to the aforesaid Ms Deirdre Kelly the following words:

> "Janice Mawhinney is finished. Finished."
> "She will never work with young children again."
>
> The defendant on that said occasion on 14 January 2011 also said to Deirdre Kelly:
>
> "Were you aware that there are two images of children being sexually abused?"

[5] In the course of submissions and a skeleton argument, Mr Colton QC, who appeared on behalf of the plaintiff with Mr O'Hare, indicated that when the application first came before the Master on 26 November 2012, the Master had indicated that he was minded to make an Order in favour of the defendant but was prepared to adjourn the hearing to give the plaintiff an opportunity to consider whether, through seeking of further instructions or consultation, amendment might be made to the Statement of Claim. The Master was apparently also considering as relevant other aspects of what was pleaded, including potential meanings of the alleged statements and whether they were necessarily defamatory. The hearing was adjourned for this purpose. An amended Statement of Claim was served on 7 February 2013 which included paragraph 8A which Mr Colton asserts contained the actual words allegedly spoken by the defendant. Amendments also included , with particulars, pursuant to Order 82 Rule 3(6), the setting out of words spoken on another occasion (a dinner of 14 January 2011) by the defendant to one of the two persons in question, Ms Deirdre Kelly.

[6] By letter dated 25 February 2013 solicitors for the defendant wrote to the plaintiff's solicitors indicating the view that amendments to the Statement of Claim did not deal with the issues raised before the Master. It was further stated that the alleged year of the dinner occasion referred to in the amendment was incorrect, having been 2011 and not 2012. On receipt of further instructions from Ms Deirdre Kelly the plaintiff's solicitor wrote to the defendant's solicitors explaining that the date had been incorrectly pleaded and arose from a misunderstanding. Accordingly, a further or amended amended Statement of Claim was served in March 2013 to correct this error.

[7] Mr Colton asserted that at the adjourned hearing on 8 April 2013 Master Bell did not consider that the Statement of Claim as amended complied with what was required and accordingly he ordered that the Statement of Claim be struck out on the basis that there was no reasonable cause of action.

The defendant's case

[8] Mr Cush, who appeared on behalf of the defendant, evinced a vigilant dissatisfaction with the fresh pleadings and made the following points during the course of a well-structured skeleton argument, skilfully augmented by oral submissions.

- The words set out at paragraph 8 of the amended amended Statement of Claim are in effect meanings rather than the words complained of. In short, the plaintiff has failed to comply with the obligation to set out the actual words spoken verbatim, in order that the defendant may know the certainty of the charge and be able to shape her defence.

- Paragraph 7(a) adds nothing to the Statement of Claim and should be struck out as an irrelevancy.

- The matters set out in paragraph 8 are not capable of bearing a meaning that there hasbeen criminal activity on the part of the plaintiff.

- The use of the word "included" indicates that other words, not pleaded, may be relied on

- The contents of paragraph 13(c) constitute a separate cause of action and having been made on 14 January 2011 any action arising therefrom is statute barred.

The plaintiff's case

[9] Mr Colton QC, who appeared on behalf of the plaintiff with Mr O'Hare, in an equally persuasive skeleton argument and skilfully presented oral submissions made with admirable economy, advanced the following points:

- Order 18 Rule 19 should only be invoked when a case for the plaintiff is unarguable.

- It could not be seriously argued that the contents of paragraph 8(a) did not contain the actual words relied upon as having been spoken by the defendant. Mere use of the word "included" did not derogate from these, particularly in circumstances where Mr Colton gave an undertaking in court before me that there was no intention to adduce further words used.

- The defendant was now aware with certainty of the charges that are to be made and can shape her defence accordingly. Indeed, in pre-action correspondence the defendant made clear and unequivocal denials that the statements in question had been made.

- In any event ,whilst it is the duty of the plaintiff to plead the words complained of, it is enough if the Tribunal of fact is satisfied that those words actually express the substance of what was said. In this case the substance of what was said has clearly been set out.

- If the defendant wishes to plead the statute of limitations against any part of the amended amended Statement of Claim, then it is open to her to do so in her defence.

Principles governing this application

[10] It is well settled law that Order 18, r19 is only to be invoked in plain and obvious cases. A Statement of Claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. (See Lonrho PLC v Fayed [1992] 1 AC 448, at 469.)

[11] There is no doubt that the law requires reassuring clarity in this area of defamation. Plaintiffs cannot proceed on the basis of glimpses and suggestions, turning phrases until they catch the light. Hence it is unsurprising to find in *Gatley on Libel and Slander* 11th Edition at paragraph 28.13 the author asserting

"the actual words spoken had to be set out verbatim in order that the defendant may know the certainty of the charge and may be able to shape his defence. It is not sufficient to allege that the slanderer used such – and – such words, or words to an alleged effect."

[12] In Best v Charter Medical of England Ltd [2002] EMLR 18 at paragraph 7 *et seq* the Court of Appeal said:

> "A crucial question in defamation actions is always whether the words used have a defamatory meaning, and it is therefore impermissible to plead the meaning but not to plead the words used. The words may be capable of bearing more than one meaning, and in such circumstances the claimant must plead the meaning he asserts that the words have. But the defendant may wish to contend that that

> is not how the words would reasonably be understood. He may also wish to try to justify any defamatory allegation, but he cannot make that decision until the claimant sets out the allegations which it is said he published. It follows that it is not enough for a claimant to plead the gist of what was allegedly said or written; he must set out the words with reasonable certainty, a test long established.
>
> "8.[It]would not normally suffice for a claimant to plead that the defendant made a statement "to the effect that" a claimant was a liar or had behaved in a discreditable way. To do that … is to plead the meaning of the words used and one does not know whether that meaning derives from inference or not."

[13] The flow of authority points to a line of cases establishing an exception to the normal rule which finds a valuable illustration in British Data Management PLC v Boxer Commercial Removals PLC [1996] EMLR 349. In that case the court emphasised the "narrow limitations of this principle". Thus the exception to the normal rule only operates where the claimant can satisfy the court that he has a good cause of action, because there is credible evidence that the defendant on a particular occasion and to a particular person made a defamatory statement about him of a specified nature. Unless there is evidence that there is a good cause of action in defamation, an order for further particulars or interrogatories will amount to a fishing expedition. But if the claimant can meet that test, then the precise words may be ascertained by an order for further information so that both sides may then have the benefit of a properly pleaded claim. (See also Best v Charter Medical of England Ltd at paragraph [13]).

[14] A further illustration of the overall principle is to be found in the Privy Council decision of Buchanan v Jennings (Attorney General of New Zealand intervening) [2004] UKPC 36 where at paragraph [5] Lord Bingham said:

> "Where an oral statement is complained of, it is rarely possible (in the absence of a recording, a transcript or a very careful note) for a plaintiff to establish the precise words used by the defendant. But the law

> does not demand a level of precision which is unattainable in practice. The plaintiff must plead the words complained of, but it is enough if the Tribunal of fact is satisfied that these words accurately express the substance of what was said."

Conclusion

[15] Applying these principles to the instant case I have come to the conclusion that I must reverse the order of the Master and refuse the application of the defendant in this action for the following reasons which I can state with reasonable brevity.

[16] First, Order 18 r19 is robustly contrived so as to ensure that a Statement of Claim should not be struck out unless the case is unarguable. The law inclines to caution in this area. I am not satisfied that this is a plain and obvious case for striking out the pleadings of the plaintiff. I do not believe it can be plausibly contended that the plaintiff should be driven from the judgment seat in this case on the basis that the case made before me is unarguable.

[17] I do not consider that the words relied on in this amended amended statement of claim are vague or speculative. I find nothing that is worryingly oblique in the terminology invoked in the amended amended statement of claim. By use of inverted commas surrounding the words set out in paragraph 8a of the amended amended statement of claim the plaintiff has made it clear that these are the verbatim words to be relied on. To that extent the plaintiff can plausibly argue that these are not merely meanings. Consequently I am satisfied that the amended amended statement of claim repaired the deficit that the Master originally observed.

[18] Mr Colton has assured me that the word "included" in the amended amended Statement of Claim is not a means of keeping the door open for further allegations. He has accepted that he will be confined on his pleadings to the words set out in paragraph 8(a), subject of course to the rider that I have mentioned above in the Privy Council case of *Buchanan*. Those words as pleaded are arguably plain and clear.

[19] I also find weight in the submission of Mr Colton that in pre-action correspondence the defendant made clear and unequivocal denials that the statements in question had been made and I find no hint of uncertainty as to the nature of the case that the defendant knew she was facing.

[20] I am satisfied that the words relied on by the plaintiff are capable of bearing the meaning that the plaintiff had engaged in criminal activity.

[21] So far as the fresh allegation in paragraph 13(c) is concerned, it is open to the defendant to plead that this is a statute- barred aspect of the claim and that matter can then be determined at the appropriate stage in the trial process.