Neutral Citation No.: [2008] NIQB 137 | *Ref:* **GIL7332**

Judgment: approved by the Court for handing down | *Delivered:* **01-12-08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MAX MURRAY

Plaintiff;

-and-

INDEPENDENT NEWS AND MEDIA (NI)

Defendant.

_____

GILLEN J

[1] In this matter the plaintiff has issued libel proceedings against the defendant following publication of an article in the morning, later and on line editions of the Belfast Telegraph on 13 February 2008. Paragraph 2 of the Statement of Claim describes the impugned words as follows:

> "Under the headline "Lawyers prison trips are bugged" and the headline "We do it all the time, conceded senior jails chief" "A senior prison chief has admitted that jail conversations between inmates and their Solicitors have been routinely bugged in Northern Ireland. As the national row over the prison bugging of M P Sadiq Khan continued, it emerged that the Northern Ireland Prison Service considers court surveillance "a very important tool". Deputy Director Max Murray made the admission in a recent court case that was referred to in the House of Lords yesterday".

The said editions also carried a photograph of the plaintiff with the words "Murray – Admission".

[2] Paragraph 4 of the Statement of Claim was couched in the following terms:

> "4. In their natural and ordinary meaning the words meant and were understood to mean:
>
> (i) That the plaintiff was involved in the routine bugging of jail conversations between inmates and their Solicitor.
>
> (ii) That the plaintiff engaged in unlawful practices.
>
> (iii) That the plaintiff had little or no regard for the law."

Application

[3] The defendant has brought a two fold application. In the first place, an application pursuant to Order 82 Rule 3A of the Rules of the Supreme Court (Northern Ireland) 1980. Under this provision, the court may rule whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the Statement of Claim.

[4] In addition the defendant applies pursuant to Order 18 Rule 19(1)(a), (b) and (d) and/or the inherent jurisdiction of the court which provides that a plaintiff's claim may be struck out on the grounds that it discloses no reasonable cause of action and/or that it is scandalous, frivolous or vexatious and/or that it an abuse of the process of the court.

The defendant's case

[5] The defendant asserts that the words complained of are not capable of bearing any of their meanings contended for in paragraph 4 of the Statement of Claim. In particular the defendant asserts that the plaintiff is not named as having carried out of the activities referred to in the article. Rather, the actions are those of the Northern Ireland Prison Service. The plaintiff is identified only as a spokesman or mouthpiece of the Northern Ireland Prison Service and would be so regarded by the ordinary reader. His reputation is no more impaired than that of any spokesman on behalf of any government department. To that extent the plaintiff is not, asserts Mr Simpson QC on behalf of the applicant, identified to any reasonable reader of the article as being responsible for any of the actions of the Northern Ireland Prison Service.

Principles to be applied under 82 Rule 3A

[6] The Rules for determining whether words are capable of bearing a particular meaning are well established and rarely controversial. The starting point is that the judge's function is to delimit the range of meanings of which the words are capable and to rule out any meanings outside that range. This is distinct from the jury's role which is to decide what meaning within that permissible range the words actually bear. In the leading Northern Ireland authority of Neeson v. Belfast Telegraph [1999] NIJB 200, Carswell LCJ approved the principles set out by Sir Thomas Bingham MR in Skuse v. Granada Television Limited [1996] EM LR 278 at 285-286 as follows:-

> "(1) The court should give to the material complained of the natural and ordinary meaning which would have conveyed to the ordinary reasonable viewer watching the programme once . . .
>
> (2) The hypothetical reasonable reader (or viewer, 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 may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not abid for scandal and someone who does not, and should not, select one bad meaning where other non defamatory meanings are available . . .
>
> (3) While limiting its attention to what the defendant has actually said or written the court should be cautious of an over cautious of an over elaborate analysis of the material in issue . . . (A television) audience would not have given (the programme) the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article . . . in deciding what impression the material contained would have been likely to have on the hypothetical reasonable viewer (the court is entitled) (if not bound) to have regard to the impression it made on (it).
>
> (4) The court should not be too literal in its approach.

> (5) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right thinking members of society generally . . . or would be likely to affect a person adversely in the estimation of reasonable people generally . . ."

I add to that outline the following matters by way of clarification. First, it is immaterial whether the defamatory imputation is conveyed by words of direct assertion or by suggestion, for insinuation may be as defamatory as an explicit statement and even more mischievous.

[7] Secondly, it is important to recognise that the statement must be capable of bearing an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense drawing on his own knowledge and experience of human affairs. This is quite different from saying that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they perceive to arrive at a conclusion unfavourable to the plaintiff. (See Manonbendro Chakrivarti v. Advertiser Newspapers Limited [1996] 65 SASR 527, a decision of the Supreme Court in Australia.

[8] Finally, it is important to ensure that the words complained of are read in context and the article is taken as a whole.

My conclusion on the application under Order 82 Rule 3A

[9] I am conscious of the admonition of Carswell LCJ in Neeson's case at page 28H when he said:

> "We have devoted very careful consideration to the individual meanings propounded in the Statement of Claim, and propose to express our conclusions on them as shortly as we can. We are conscious that this matter is very much one for the jury and that where we decline to rule out a particular meaning pleaded it will still be open to the jury to hold that the words do not in their view bear the meaning. We feel accordingly that it is better that we should not discuss our reasons for our conclusions in any greater detail than is strictly necessary."

I intend to follow the same policy in this instance.

[10] I have come to the conclusion that a jury could properly hold that the plaintiff was regularly involved in the routine bugging of jail conversations between inmates and their solicitor by virtue of the wording of the impugned

headline, sub headline and content together with the juxtaposition of the photograph and the words there under. I only observe that it will be a matter for the trial judge whether to leave the issue to the jury and at this stage I am slow to prevent this plaintiff from advancing such a claim. In short I could not rule out the possible meanings relied on by the plaintiff.

Principles governing an application under Order 18 Rule 19(1)(a)(b) and (d) and/or the inherent jurisdiction of the court

[11] The court should only exercise its power to strike out in a clear case. In Buttes Gas and Oil Company v. Hammer [1975] 1 QB 557, Roskill LJ described the matter as follows at page 577:

> "This is a striking out application, and in relation to any striking out application two things at least are clear. First, in considering any application to strike out, the courts will not go outside the pleadings themselves. Secondly the courts will only exercise their undoubted right to strike out all or part of the pleadings in a very clear case."

In such application, the court is deciding no more than that the plaintiff's pleaded case is arguable and it does not following from a decision to allow the pleading that the trial judge is bound to leave the plaintiff's case to the jury (see Morgan v. Oldham Press [1971] 1 WLR 1239. Where the cause of action has some chance of success when only the allegations and the pleading are considered.

[12] The court may also strike out a Statement of Claim if it appears to it that the Statement of Claim is an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings. The level however at which this relief has to be pitched in order to succeed is well captured in the words of Lord Diplock in Hunter v. Chief Constable of the West Midlands Police when, discussing inherent power of the court, he said:

> "The inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people."

The classic instance of such a case would be if this instant matter came within the terms of Derbyshire CC v. Times Newspapers Limited [1993] AC 534 as

submitted by Mr Simpson. In that case the House of Lords held that at common law, and without reference to the guarantee of freedom of expression in Article 10 of the European Convention on Human Rights, an organ of local government may not bring an action for defamation. This rests not upon any absence of likely damage to such a body, but upon the likely chilling effect and free speech of granting a right of action. Though the case concerned a local authority the same rule applies to an organ of central government. Neither the Crown nor a government department which has corporate status may sue for defamation.

[13] I am satisfied that the Northern Ireland Prison Service is an executive agency of the Northern Ireland Office and as an agency of government would not be entitled to maintain an action for defamation. If the plaintiff maintained this action merely in his position as a mouthpiece/spokesman for the organisation the circumstances where the impugned statements were not capable of being interpreted as referring to him as an individual then I would have acceded to the defendant's application.

[14] Interestingly the Court of Appeal in the Derbyshire case had relied upon Article 10 of the Convention (in contrast to the House of Lords). In the context of this case Mr Simpson also stressed that the domestic courts and the European court have emphasised the importance of freedom of expression in a democratic society in the context of Article 10. Mr Simpson was correct to emphasise that any infringement of free speech must be deemed to be necessary in a democratic society which implies the existence of a pressing social need and the exceptions … press freedom contained in Article 10(2) of the Convention are to be strictly construed and the need for any restrictions to be established convincingly. (See Observer and Guardian v. UK [1992] 14 EHRR 153). Even where there is a demonstrable pressing social need the court must decide whether the particular infringement is proportionate to the legitimate aim of providing redress to persons whose reputations are damaged by publication.

[15] In this instance however I am not persuaded that this is a plain and obvious example of an agency of government or merely a spokesman of that agency who is attempting to maintain an action for defamation. I am satisfied at this stage that the plaintiff has some chance of success in establishing the proposition that he, as an individual member of the Northern Ireland Prison Service, has been referred to in a defamatory manner and that accordingly pleadings in the Statement of Claim constitute a reasonable cause of action. In terms it is not plain and obvious that this plaintiff is not accused by the defendant as having carried out the activities referred to in the article and that he is merely a spokesman of the Northern Ireland Prison Service. Such a finding is not a carte blanche for spokespersons to issue defamatory proceedings … on organs of government have been defend. On the contrary, I make it clear that the Derbyshire decision is clear law to the contrary. The

finding of this court is that it is not plain and obvious that the word complained of do not carry the implication that it was the plaintiff who carried out the offending actions alleged in the impugned article.

[16] Once again I borrow the phraseology of Carswell LCJ in noting that it will still be open to the jury to hold that the words do not bear such a meaning and that in fact the actions impugned are those of the Northern Ireland Prison Service. At this stage it is my conclusion however that this is not plain and obvious.

[17] In all the circumstances therefore I dismiss the defendant's application on both grounds.

Article 10(1) in terms expresses and absolute right, that of freedom of expression. That right to freedom of expression includes freedom to impart information and ideas without interference by public authority. Prima facie that right will be interfered with by a public authority if the maker of the statement is sued for defamation. That an action for defamation is a prima facie interference with the right is recognised by Article 10(2) which provides that the exercise of the freedoms referred to in Article 10(1) may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputation of others. To allow a local government authority to sue for liable would impose such a substantial restriction upon freedom of expression. However anyone who publishes a statement, which reflects adversely upon the conduct by an organ of government of its affairs, risks liability to any individual member of that organ or government who can prove that the publication defames him or her personally. The rationale behind this principle is that the ability to take such proceedings against a body such as the Northern Ireland Prison Service might well restrict or prevent public discussion of matters of public importance despite the willingness of any person wishing to take part in that discussion to take every reasonable precaution to avoid defamatory imputation against any identifiable individual.