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A2/2015/2839

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
SWANSEA DISTRICT REGISTRY
(HIS HONOUR JUDGE SEYS LLEWELLYN QC)

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 22 March 2016

B e f o r e:

LORD JUSTICE SIMON

Between:
(1) STEPHANE PARIS
(2) ANGEL GARDEN

Claimants

v

(1) DR ANDREW LEWIS
(2) MELANIE BYNG

Defendants

DAR Transcript of
WordWave International Limited trading as DTI
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(Official Shorthand Writers to the Court)

The **Claimants** appeared in person
Mr J Price (instructed by Bryan Cave) appeared on behalf of the **Defendants**

J U D G M E N T
(Approved)

1. LORD JUSTICE SIMON: This is an application for permission to appeal against the judgment of His Honour Judge Seys Llewellyn QC handed down on 14 July 2015 in which he dismissed the claimants' claims that they had been libelled in a number of electronic communications.

2. There was an oral hearing because the court was informed that the claimants were imminently facing the execution of a charging order which secured the costs which the claimants were ordered to pay to the defendants at the conclusion of the action. The claimants have each availed themselves of the opportunity of addressing the court over the course of an hour and I am satisfied that, taken with their written submissions and the material that they have put before the court, the court is in a position to deal with the application for permission to appeal.

3. It is unnecessary to set out the background and nature of the claim, which is well known to both parties and is in any event set out in paragraphs 12 to 21 of the judgment below. I shall instead confine myself to identifying the various issues which arise on the present application by reference to the very full judgment, which runs to some 64 pages and 270 paragraphs, and followed evidence heard over five days in March 2015 with subsequent written submissions.

4. Although I have referred to this as a very full judgment, the burden of the claimants' oral submissions today is that in material respects it failed to deal with parts of their case.

5. The claimants are a married couple. The first defendant is a business consultant and publishes a blog, "Quackometer". The second defendant is a campaigner against state funding of schools which are based on the educational principles associated with Rudolf Steiner. She is married to Dr Richard Byng, an academic. He was the third defendant until the claim against him was discontinued. All four parties are familiar with posting information and views online in blogs or websites, or comment on blogs or tweets on Twitter.

6. The trial was primarily concerned with five online publications which were said to be defamatory of the claimants: first, a blog posted by the first defendant on 9 November 2012 on a site, "Posterous", and subsequently reposted on the Quackometer blog in April 2013, by which time the claimants say the position had changed, so whether or not it was defamatory on 9 November 2012, they say it was plainly defamatory by the later date; second, three tweets posted by the second defendant on 9 November, linked to the blog post on the first defendant's Posterous website; third, a further tweet posted by the second defendant on 10 November 2012; fourth, a tweet posted by the first defendant about six months later, on 15 May 2013; and finally, fifth, another tweet posted on 20 May 2013.

7. At paragraphs 23 to 35, the judge summarised the law insofar as it was material to the claim and to the defences, in particular whether the words would have been understood

to refer to the claimant, whether the words were defamatory, which involved identifying the meaning to be attached to the words of which complaint was made, as well as the law in relation to the defences of justification and qualified privilege. Importantly in the present context, he referred at paragraph 29 to the change of approach to the law of libel set out in the case of Jameel v Dow Jones [2005] QB 946, which made it clear that where there is limited publication it is necessary to show more than minimal damage.

8. From paragraph 36, the judge set out what he described as the factual background. It is clear that after what began as friendship and shared views about state funding for Steiner schools between the parties, or at least the claimants and the second defendant, the parties developed a considerable antipathy.

9. The summary identified three episodes which the judge considered revealing. The first, at paragraphs 46 to 51, related to an article posted by the second claimant on 29 August 2011 and various exchanges which followed. The judge's conclusion was that the second claimant's aggressive behaviour towards the second defendant was not justified. This was relevant both to the material background and to the defence of qualified privilege, for reasons I will come to.

10. The second episode, described between paragraphs 52 and 94, related to contact between the second claimant and the first defendant between 27/28 February and 7 March 2012, at a time when she was trying unsuccessfully to post comments on his blog. The judge found the first defendant's account of this incident "compellingly persuasive", paragraph 85, and that it was relevant to the issue of malice which arose in relation to the defence of qualified privilege in relation to the first publication, paragraph 89. He also found that the articles by the second claimant attacking the first defendant published on 2 and 7 March 2012 were wholly unfounded and amounted to attacks which opened up a defence of qualified privilege by way of answer to an attack.

11. The third episode, described at paragraphs 95 to 105, related to letters which the claimants wrote to the employers of the second defendant's husband, Dr Byng, in October 2012. It is sufficient to observe that the judge was entitled to the view that this was a deliberate attempt to damage his reputation with his employers on a wholly unjustifiable basis; paragraphs 99 to 101.

12. From paragraph 107 his judgment, the judge dealt with the five publications of which complaint was made. First, the blog of 9 November 2012. The judge seems to have concluded at paragraph 110 that there was very limited publication. That is challenged today.

13. So far as the second and third publications are concerned, the tweets and retweets of 9/10 November 2012, at paragraphs 136, 139 and 140, the judge found the defendants' case as to the "unlikelihood of a retweet" compelling, that the claimants had not established the likelihood of substantial publication of retweets, but that there had been

some direct publication to a relatively small number of persons.

14. Fourth, the tweet of 15 May 2013 was sent to another Twitter user. The words of which complaint was made was "Shame some odd and disturbing people in the world cannot understand 'I want nothing to do with you'". At paragraph 148, the judge found that there had been no actionable publication, because the only recipient who knew that this referred to the claimants had understood the context. Although it was not made clear in the judgment, it would normally follow that the claimants' reputation was not materially damaged in the eyes of the recipient. In any event, in the light of this finding, the judge did not need to make a finding about the defences. Nevertheless, much later in the judgment at paragraph 226, he concluded that the defence of qualified privilege applied to this tweet and the claimants had not shown that the first defendant was actuated by malice.

15. Fifth, the tweet of 20 May 2013 from the second defendant was considered by the judge from paragraph 149. At paragraph 156 he concluded that the claimants had failed to show any sufficient publication.

16. The judge then went on to consider the issue of meaning and justification in relation to each of the publications. First, the 9 November 2012 blog post at paragraph 159, which involved two matters of complaint, (a):

> "They claim their children were expelled because they were being bullied. I understand the school say that it was because of the parents' behaviour ..."

(b):

> "Since February, I have ignored and filtered out their constant harassment by blog tweets and video, both of myself and of others."

17. As to (a), the judge concluded that it was a neutral statement and not defamatory of the claimants when initially published; paragraph 174. So far as the complaint that by April 2013 it was inaccurate, the judge dealt with this at paragraph 236:

> "236. Third, as before, I do not consider that there was any change in contextual circumstance in April 2013 such as to make the phrase used in the blog post either convey, or imply, that expulsion was because of the parents' unreasonable behaviour.
>
> 237. Accordingly I do not consider that posting this on Quackometer's site in April 2013 was defamatory, and I do not consider that the movement of this blog, along with all other material from the Posterous site, is evidence of malice on the part of the first defendant."

18. As to (b), the judge appears to have accepted that the words were defamatory, but noted at paragraph 189 that before 9 November 2012, the claimants had published a

series of comments in which they had accused the first defendant of dishonesty and victimisation of them and that there had been nothing to justify such attacks. As the judge put it at paragraph 190, the claimants' repeated comments sought to denigrate him and force him to publish their comments on his blog. At paragraphs 194 to 204, the judge considered whether there had been harassment of "others", and specifically the second defendant, and set out his factual findings. At paragraph 206, the judge concluded that the comment at (b) was justified in relation to the first defendant.

19. In this context at paragraph 200, the judge set out what he described as an open letter written by the claimants on 12 October 2011 which he plainly thought relevant to the allegations in relation to the second defendant. This includes the following comment of the second defendant:

> "[She] displayed the same seductive grooming types of behaviour that we have had to document at the school and the public mobbing was full of the same xenophobic projections that the school dished out ..."

20. So far as publications two and three are concerned, the tweets and retweets of 9 November 2012, the words complained of are:

> "Lying, bullying, threatening ... how do Angel Garden AKA ... sleep at night?"

Angel Garden is of course the second claimant.

21. The judge agreed with the defendants' submission that this referred to the way in which the claimants had treated the first defendant as described in passage (b) in his blog post of 9 November. It was accepted that this bore a defamatory meaning. At paragraphs 215 to 216, the judge found that the second defendant had justified the assertion that the claimants had been threatening. He then went on to consider the allegation of bullying, and concluded at paragraph 212 that it had what he described as a weak derogatory meaning and that the claimants' conduct in respect of the first defendant, including the threat of legal action, justified the allegation.

22. In relation to the allegation of lying, the judge took a view of the matter which favoured the claimants, since he concluded that the defendants had not proved that the claimants had lied. He concluded rather that the claimants had an unshakable, but an entirely unjustified, belief that the first defendant had victimised them; see paragraph 219. It followed that the defence of justification failed in relation to the "lying" and the judge had to consider in due course the defence of qualified privilege.

23. So far as publication five is concerned, the tweet of 20 May 2013, which set out the second defendant's views about the second claimant and included the words, "Most angels will be welcome. The fallen angel of harassment will not," again, the judge was prepared to take a view which favoured the second claimant. She was not prone to harass people generally. As the judge put it, "Her fierce preoccupation was with

particular individuals"; see paragraph 225.

24. It was at this point that the judge considered the defence of qualified privilege and malice in relation to those matters in respect of which he had found that there had been: (1) a material publication; (2) a defamatory meaning; and which (3) the defendants could not justify. In relation to the first defendant's 9 November 2012 blog, the judge had already found that the defendants could justify the complaint in (b) in relation to the first claimant. At paragraph 224, and again at paragraph 227, he concluded that his defence of qualified privilege was also engaged. So far as the tweets of 9 and 10 November 2013 were concerned, the judge considered that the second defendant's defence of qualified privilege was engaged. At paragraph 225, and again at paragraph 227, the judge referred to the claimants' persistent and repeated public attacks on the second defendant.

25. The issue, then, in relation to both complaints one and two was whether the claimants, the burden being on them, could show that the defendants had been actuated by malice. At paragraph 231, the judge summarised the law in relation to malice in an unobjectionable form, with six enumerated propositions. It is sufficient for present purposes to note that a claimant has to show that at the time of the defamatory publication, the desire to injure the claimant was the defendant's dominant motive, and that intent or reckless indifference to the truth must be shown, irrationality or impulsiveness being insufficient.

26. The judge considered the claimants' case on malice at paragraph 232 onwards. At paragraph 238, the judge found that there was no substance in the allegation against the first defendant. It followed that the claim against him failed.

27. At paragraph 239, he acknowledged that the allegation of malice against the second defendant required "greater recital of the evidence and the facts". It is in relation to the malice as alleged by the claimants against the second defendant that much of today's hearing has focussed.

28. The judge considered this at some length. At paragraph 226 he set out the number of submissions that the claimants had made against allowing a defence of qualified privilege. The judge did not find these easy to follow, but at subparagraph (vii), he said this:

> "(vii) The claimants' closing submissions also state, 'The first defendant's claim to be using the privilege properly for himself is self evidently not true, as he deliberately uses covert authorities without giving any names of others the claimants are supposed to have harassed.' I have tried, but I regret I have failed, to understand this submission.
>
> (viii) More generally the essence of the claimants' submissions is that qualified privilege should not apply in respect of the second defendant, because she was guilty of substantial covert and probation harassment of

themselves."

29. Again, this is echoed in today's submission on behalf of the claimants. The judge went on to say this:

> "This is in my view more properly a plea of malice. In any event, what can be demonstrated is that on a very considerable number of occasions she privately expressed opinions denigratory of the claimants, and on occasions expressed doubt of their trustworthiness (albeit some of the latter self evidently refer to whether the claimants can be trusted to preserve the anonymity or confidentiality of communications by aggrieved Steiner parents). However in my judgment the consistent thread of communications by the second defendant is to encourage people not to engage publicly with the claimants in relation to allegations of what did or did not transpire in relation to the ill-fated holiday in France."

30. From paragraphs 240 to 254, the judge considered private communications from the second defendant which were relied on by the claimants to demonstrate malice on her part. In relation to each, although identifying her strongly expressed opinions about the claimants to people she knew well, he did not identify any invitation to others to promote those views which might have constituted evidence of malice; see for example paragraphs 241, 243 and 249. Importantly in the present context, by 9 November 2012 the judge found that the second defendant was entitled to the view that she was the subject of repeated attacks by the claimants and had responded proportionately; see paragraph 251. That again was the subject of a challenge in the oral submissions, the claimants saying that the judge effectively had it the wrong way round, the claimants were the victims and not the second defendant. Nevertheless, in summary, at paragraphs 252 and 254, he concluded the claimants had failed to prove malice on the part of the second defendant.

31. The question on this application is whether there is a real prospect of successfully appealing the judgment: in this case the judgment of 14 July 2015 and not prior case management decisions. The claimants have advanced their applications for permission to appeal in oral argument under a number of headings in addition to those that I have already referred to. I have sought to summarise a number of the disparate points, although I have done so in a different order to that set out in the claimants' written submissions.

32. First, there is a criticism that they were unfairly prevented from reintroducing claims for covert harassment. This, it is said, prevented them from exploring the issue of malice to the fullest extent in cross-examination. In my view, this is not a properly arguable ground. It was a case management decision which the Court of Appeal is inherently unlikely to overturn. Insofar as it relates to earlier pre-trial decisions, the application for permission is way out of time. Furthermore, the claimants were plainly able to cross-examine the defendants in relation to malice, and the points which they

took were considered in the judgment, as I have already set out.

33. There is a further allegation that there has been an infraction of their Article 6 rights. In my view this has no merit to it.

34. The second criticism amount to a number of detailed objections to the judge's approach to and assessment of the evidence, see for example their submissions at paragraphs 7 to 9 and 12 to 13, and to matters which were on the margins of the case, see for example the claimants' submissions at paragraphs 10 and 11. In my view, the criticism of the judge's assessment of the evidence, particularly in relation to matters at the margins of relevance, do not give rise to arguable grounds. This is because the weight to be attached to the evidence is very much for the trial judge and not for the Court of Appeal.

35. Thirdly, there is a criticism of the judge's conclusions as to the ambit of the publication of the defamatory material; see paragraph 20 of the claimants' written submissions. The judge's approach to the case was to deal first with the extent of publication. This was certainly not the only way of approaching the case, since the extent of publication is usually relevant to damages. However, he identified the very limited publication and republication which was relevant to the Jameel v Dow Jones issue. The points made by the claimants do not in my view undermine the judge's conclusion that the overall level of publication or republication was very limited.

36. Fourthly, there is criticism of the judge's conclusion on the meaning of the words complained of; see paragraphs 17 and 18 of the claimants' submissions. This complaint does not give rise to arguable grounds. The judge's conclusions on meaning are unimpeachable on appeal; indeed, they arguably went too far in the claimants' favour, for the reasons I have already identified.

37. Fifthly, there is criticism of the judge's reliance on the demeanour of the respondents, particularly the first respondent; see for example paragraph 15 of the claimants' submissions. There is nothing in this point. When assessing the issue of malice, a judge is fully entitled to take into account his view of a witness giving evidence and being subjected to cross-examination, including demeanour. The case relied on, Southwark v Nursing and Midwifery Council, is no support for the contrary proposition. The judge's view of a witness is relevant. Nor is there any proper basis for saying that the judge placed too much weight on the witness's demeanour.

38. Sixth, there is criticism of the judge for failing to take into account the effect of the defendants' course of conduct on the claimants, the importance of free speech and the claimants' attempts to avoid litigation, and a number of other matters said to be material; see paragraphs 16, 21 to 26 and 29 to 30 of the claimants' submissions. Again, these were points that were mentioned and urged upon the court by the second claimant.

39. In my judgment, these submissions reveal an underlying difficulty for the claimants.

That difficulty is that they allowed a relatively confined dispute to escalate into unpleasant exchanges. That was unfortunate enough, but for the claimants to then have embarked on an expensive libel action, acting on their own behalf in a difficult and relatively complex area of the law, can only be viewed as a mistake. Even if they had succeeded on every point, the damages awarded would have been modest, and the difficulties they now find themselves in as a result of their view of their claims are of their own making.

40. The order for costs, of which a further complaint is made at paragraphs 26 and 27 of the claimants' submissions, was the natural consequence of the judge's finding in the defendants' favour.

41. For these reasons, the applications for permission to appeal and for a stay of execution of the judge's order are refused.