Appeal No: A2/2015/2839 A

IN THE COURT OF APPEAL

CIVIL DIVISION

BETWEEN:

(1) STEPHANE PARIS
(2) ANGEL GARDEN

Appellants/Claimants

-and-

(1) ANDREW LEWIS
(2) MELANIE BYNG

Respondents/Defendants

RESPONDENTS' WRITTEN RESPONSE PURSUANT TO

THE ORDER OF LORD JUSTICE SIMON DATED 11 NOVEMBER 2016

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1. These submissions are made on behalf of the Respondents in response to the Appellants' application dated 4 October 2016 for reconsideration of the Order of 22 March 2016 (Ref: A2/2015/2839). References in these submissions are to the Appellant's bundle as provided to the Respondents by the Court of Appeal under cover of a letter dated 14 November 2016.

The Test To Be Adopted For Re-Opening Final Appeals

2. CPR 52.30[1] provides that:

> "*(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—*
>
> *(a) it is necessary to do so in order to avoid real injustice;*
>
> *(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and*
>
> *(c) there is no alternative effective remedy.*

[1] The current numbering – previously CPR 52.17 and recorded as such in the 2016 edition of The White Book.

(2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal."

The Positions Of The Parties

3. The Appellants' application appears to be based solely on an extract from a without prejudice offer made in late 2014 by the Respondents in a good faith attempt to settle the dispute prior to trial (the "**Extract**"). The Appellants' position appears to be that:

   3.1 the Respondents have waived privilege over the Extract;

   3.2 the Extract proves that the Respondents have spread "*malicious lies*" about the Appellant; and

   3.3 as a result that the Second Respondents' defence of qualified privilege is defeated by malice.

4. The Respondents position, in summary, is:

   4.1 the Respondents have not waived privilege over the Extract;

   4.2 if privilege has been waived, the Extract is consistent with the evidence given by the Second Respondent at trial;

   4.3 the Extract does not prove malice on the part of the Second Respondent;

   4.4 the Extract does not bite at all upon the case of the First Respondent, or upon part of the case against the Second Respondent; and

   4.5 the Appellants had prior opportunities to apply to the Court to deploy the Extract either at trial, or in their earlier application for permission to appeal.

<u>The Respondents have not waived Privilege over the Extract</u>

5. The Extract formed part of an offer made, in numerous variations, by the Respondents on a number of occasions in late 2014, including on 22 October 2014 (AD-14). The offers were all expressed to be "*without prejudice, save as to costs*".

6. The Extract, which is taken from wording that was proffered (but not accepted) as a form of statement to be made by the Second Respondent as part of a proposed

settlement, was intended to address the Appellants' concern that, as had been revealed to them in disclosure, various emails sent by the Second Respondent to her friends might be taken to suggest that the Second Respondent's husband had diagnosed the Second Appellant with a mental illness (the "**Emails**"). The Second Appellant found this distressing. In the interests of resolving the litigation the Second Respondent was willing to email those same friends confirming that this was not the case. The Second Respondent was concerned that the Appellants might make use of the statement for other purposes and therefore did not consent to the Extract being circulated by the Appellants, hence the caveat that it should not be used "*for any public purpose*".

7. Unfortunately, no agreement could be reached between the parties. The case proceeded to trial in March 2015 and judgment was handed down by HHJ Seys Llewellyn Q.C. on 14 July 2015 dismissing all of the Appellants' claims. The parties subsequently agreed on a form of order pursuant to which the Respondents' costs were agreed in the sum of £240,000 and the Appellants' agreed to pay those costs by way of a payment of £100 on 20 August 2015; £220,000 on 8 February 2016; and £19,900 on 7 August 2016. The Order was subsequently sealed by the Swansea District Registry on 6 August 2015 (with some typographical errors).

8. The first payment of £100 was made. The Appellants' failed to make any of the further agreed payments. The Respondents' accordingly had to take steps to enforce the costs order. The Respondents' obtained a charge over the Appellants' property at 9 Lon Bryngwyn in Swansea (the "**Property**") and proceeded to enforce by way of an application for an Order for Sale. The application for the Order for Sale was given case number C00SA374 by the Swansea County Court (the "**Costs Enforcement Application**").

9. As part of the Costs Enforcement Application, the Respondents' submitted a witness statement setting out how the debt had arisen and making reference to the numerous attempts that the Respondents had made to settle the litigation with no order as to costs in support of their application that it was in the interests of justice and fairness that the costs order should be enforced by way of an Order for Sale.

10. The Costs Enforcement Application was subsequently compromised between the parties by way of a consent order in which the Appellants' agreed to vacate the Property by 15 October 2016 in return for the Respondents' agreement that they would not look to

recover further sums from the Appellants' than could be obtained by sale of the Property. When the Appellants' finally vacated the Property on 31 October 2016 it was discovered that they had caused thousands of pounds worth of damage to the Property prior to vacating it. The Respondents are in the process of selling the Property.

11. It is the Respondents' submission that the disclosure of the Extract in the Costs Enforcement Application formed part of the permitted use of the privileged correspondence which was made "*save as to costs*". The document containing the Extract was deployed to enforce a costs order against the Appellants. It was not deployed in the underlying libel claim. Accordingly, it is the Respondents' submission that privilege in the Extract has not been more generally waived such that the Extract can be deployed in the current application.

The Extract is Consistent with Trial Testimony

12. Further or in the alternative, the Respondents further submit that the Extract cannot be considered "*new evidence*" as it does not contradict, and in fact confirms, the testimony on the subject given by the Second Respondent at trial.

13. The Extract states that the Second Respondent confirms that there "*has been no clinical assessment of* [the Second Appellant's] *mental health by* [the Second Respondent's] *husband*, [the Second Appellant] *is not his patient and he has never diagnosed her with any mental health issue. Any comments* [the Second Respondent had] *made which might suggest otherwise are untrue…".*

14. During her testimony at trial, the Emails were put to the Second Respondent. The Second Respondent confirmed that her husband had not made any clinical judgement about the Second Appellant's mental health, which she described as *"impossible because* [the Second Appellant] *is not his patient"* (AD-36); that any conclusions as to the Second Appellant's mental health formed her own opinion based on her research; and that no diagnosis had been made by her husband (see transcript at AD-34 to 42).

15. The Appellants appear to submit that the Extract amounts to an admission that the Second Respondent did not honestly believe the Second Appellant to be mentally ill. The words of the Extract do not bear that meaning. The Extract simply confirms that the Second Respondent's husband was never in a position to make a formal diagnosis of the Second Appellant's mental state, and that he accordingly did not make any such formal

diagnosis. The Second Respondent gave evidence to that effect at trial. The Extract is perfectly consistent with the Second Respondent having concluded, on the basis of her own observations and research, that the Second Appellant is mentally ill.

16. The Respondents further note that the Second Respondent was cross-examined as to the extent to which the position she adopted in her oral evidence summarised in paragraph 13 was inconsistent with her position in private correspondence in the Emails. The Respondents submit that confronting the Second Respondent with the wording of the Extract would have added nothing to that cross-examination.

The Extract does not Prove Malice

17. The Appellants' grounds for appeal appear to proceed on the basis that the Extract proves that the Second Respondent spread "*malicious lies*" about the Second Appellant and that this is sufficient to prove malice for the purpose of defeating the defence of "Reply to Attack" qualified privilege found to be applicable in this case by HHJ Seys Llewellyn Q.C..

18. This likely stems from a misapprehension of the difference in the meaning of "*malice*" in everyday language and "*malice*" as a term of art in defamation actions. It is trite law that a claimant cannot prove "*malice*" by asserting that the defendant bore them general ill will, generally disliked the claimant, or published material which they knew would be defamatory of the claimant. The law is conveniently summarised by Eady J in Henderson v London Borough of Hackney [2010] EW HC 1651 (QB) at [34]:

> "*There must be something from which a jury, ultimately, could rationally infer malice; in the sense that the relevant person was either dishonest in making the defamatory communication or had a dominant motive to injure the claimant.*".

19. Firstly, the Extract does not confirm that the Second Respondent spread "*malicious lies*". At its highest the Extract is evidence that the Second Respondent acknowledged that the Emails could have been mis-interpreted to suggest that her husband had made a formal diagnosis of the Second Appellant's mental health. The Extract is perfectly consistent with the Second Respondent having herself come to an honest belief that the Second Respondent was mentally ill.

20. Secondly, the Emails were not the subject of the defamation action, which proceeded to

trial on the basis of postings by the Respondents on the internet and on Twitter. The defamation action, as it specifically related to the Second Respondent, related to i) postings by her on Twitter linking to a blog post written by the First Respondent (of which more below), and ii) a tweet which was re-tweeted by the Second Respondent and related to the characterisation of the Appellants' conduct towards the First Respondent (the "**Re-Tweet**"). The Re-Tweet read:

"*Lying, bullying, threatening…. How do [the Appellants] sleep at night?*"

21. If (which the Respondents do not admit) the Extract proves that the Second Respondent knowingly lied about the Second Appellant's mental health, that would not establish malice in respect of the Re-Tweet.

22. The Appellants did apply to re-amend their amended particulars of claim to include causes of action based on the Emails. Permission to re-amend was refused by HHJ Seys Llewellyn Q.C. by Order dated 4 February 2016, after the Appellant's application had been heard at the pre-trial review. The Appellants did not apply for permission to appeal against that decision.

The Extract Does Not Bite On The Case Of The First Respondent Or Part Of The Case Against The Second Respondent

23. Nothing in the arguments advanced by the Appellants can suggest that the position of the First Respondent is in any way affected by the Extract. He would still be successful and would be entitled to be awarded his costs in full.

24. As mentioned above, as well as the Re-Tweet, the case against the Second Respondent involved 3 Twitter postings she made which linked to a blog post written by the First Respondent. HH Judge Seys-Llewellyn Q.C. concluded that this blog post was not defamatory of the Appellants. Accordingly, it would not assist the Appellants if they were to prove that the Second Respondent was malicious in respect of those postings.

25. Accordingly, the Appellants' arguments, if successful, could only re-open the case in respect of a single publication against the Second Respondent. This would be entirely disproportionate.

The Appellants Should Have Previously Applied To Use The Extract

26. The line of authorities applying Unilever PLC v The Proctor & Gamble Co. [2000] 1 WLR 2436 makes it clear that any privilege in "*without prejudice*" communications cannot "*act as a cloak for perjury, blackmail or other "unambiguous impropriety*"". In such circumstances, it is open to a litigant to apply to the court to waive any privilege in the material.

27. If the Appellants took the view that the Extract would have fatally undermined the Second Respondent's defence by showing that the Second Respondent gave untrue evidence at trial, the proper course of action was for them to apply to the trial judge to admit the document containing the Extract. Failing that, they could have applied to the Court of Appeal to do so as part of their previous application for permission to appeal. They chose not to do so. Nor have they explained these failures.

28. Absent such an explanation, the Respondents invite the Court to conclude that the Appellants' true reason for not making such an application before now is that such an application would have caused the trial judge and/or the Court of Appeal to appreciate the generous terms upon which the Respondents were prepared to compromise the claim, and to draw adverse conclusions from the Appellants' refusal to accept the Respondents' offer.

29. For the avoidance of doubt, had the Appellants made any such application before now to adduce the Extract, the Respondents would have taken the position that the Extract did not reveal any "*unambiguous impropriety*", or, indeed, any wrongdoing at all.

Conclusion

30. The Respondents generally submit that this further application is prompted by the Appellants' various grievances against the Respondents rather than by an analysis of the claim which the Appellants actually took to trial. The Respondents submit that the Appellants' conduct of the trial, and of the subsequent appellate proceedings, has focussed upon these wider grievances rather than in establishing the Appellants' specific pleaded claims, and in seeking to rebut the Appellants' pleased responses to those claims. The Appellants may sincerely believe that the Extract generally discredits the integrity of the Second Respondent, or confirms other allegations the Appellants make against the

Respondents.[2] That does not mean that the Extract is of any relevance to the actual case tried before HHJ Seys-Llewellyn Q.C..

31. For the reasons set out above the Respondents submit that the Appellant's application should be denied as:

31.1 There is no new evidence for a trial judge to consider, either because the evidence relied on by the Appellants is privileged or because it is consistent with the evidence before the judge at trial

31.2 The Extract was evidence that was available to the Appellants at trial;

31.3 The trial judge was not misled, deliberately or otherwise, by the Respondents;

31.4 The Appellants could have applied to the trial judge and/or the Court of Appeal to introduce this material; and/or

31.5 There are no exceptional circumstances which would make it appropriate to re-open the appeal as there has been no injustice.

32. The Respondents submit that the Appellants application is totally without merit and seek a declaration to that effect.

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[2] For the avoidance of doubt the Respondents do not accept this. It is not appropriate to discuss this further in this submission.