Neutral Citation Number: [2015] EWHC 478 (QB)

Case No: 3 SA 90091

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SWANSEA DISTRICT REGISTRY

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff
South Wales CF10 1ET

Date: 02/02/2015

Before:

HIS HONOUR JUDGE SEYS LLEWELLYN QC

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Between:

(1) MR. STEPHANE (aka) STEVE PARIS **(2) ANGEL GARDEN**	**Claimants**
- and -	
(1) DR. ANDREW LEWIS **(2) MELANIE BYNG**	**Defendants**

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The Claimants appeared in person.
MR. JONATHAN PRICE (instructed by Bryan Cave LLP) appeared for the Defendants.

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APPROVED JUDGMENT

(Transcript of digital court recording by
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HIS HONOUR JUDGE SEYS LLEWELLYN QC:

1. I have before me a pretrial review for a trial in defamation, which is listed to be heard on 16th March 2015 for five days.

2. Also, I have before me an application, dated 20th January of this year, by which the Claimants seek to amend or, strictly, reamend their Particulars of Claim to reinstate harassment claims which were abandoned in March of last year.

3. It is not necessary, for these purposes, to have set out an extensive background. Put at it shortest, the Claimants themselves are critics of a number of aspects of the Steiner schools and the Steiner method of education, so also are the Defendants. For a time they, having met, made common cause with the Defendant but, after circumstances which I do not propose to detail in any way, namely the circumstances of the sudden truncation of the stay of the Second Defendant's son with the Claimants in France and a disappointment of what had been contemplated as a visit by the daughter of the Second Claimant, this led to the parties not successfully continuing in mutual and mutually supportive dialogue.

4. The claims now are refined to and expressed as a claim for defamation in respect of a blog posted on 9th November 2012 by the First Defendant and republished then by the Second Defendant, a tweet by the Second Defendant dated 10th November 2012, a tweet by the First Defendant dated 15th May 2013 and a further tweet by the First Defendant dated 20th May 2013.

5. The history of the litigation can be crystallised in the following way. On 1st November 2013, when the Claimants were acting as litigants in person, they issued a claim form also claiming an application for an interim injunction, alleging claims under, essentially, five heads:

    i) Of fraudulent misrepresentation as to reputation;

    ii) To be noted now, of harassment;

    iii) Of breach of the Public Order Act;

    iv) Of defamation;

    v) Of fraud contrary to the Fraud Act.

6. The claim against a Third Defendant has now been brought to an end.

7. In March of 2014 the Claimants engaged solicitors and counsel acted for them. At a hearing on 25th March 2014 there was resolution of the claim against the Third Defendant, application for interim injunctions was withdrawn and leave was given for

wholly new and amended Particulars of Claim, which in particular did not pursue any claim for harassment.

8. In the autumn of 2014 there were attempts between the parties to resolve matters by a formal mediation chaired by a retired High Court judge, which commenced on 16th October 2014. I know nothing of the detail or the scope of the negotiations, but it is apparent that there were discussions which continued until January of 2015.

9. In January 2015 the Claimants took over their case by their own representation as litigants in person and solicitors and counsel therefore were no longer instructed. For the moment that is the likely position for the rest of the proceedings, although Ms. Garden, the Second Claimant, told me that it was not certain that they would be acting as litigants in person to the last gasp.

10. However on 20th January 2015 that they made application to the court, in terms, to reinstate the harassment claims which had been set out in the original Particulars of Claim but withdrawn in March of 2014.

11. I have before me, first, their application to do so, supported by a résumé of the grounds for pursuing a claim for harassment under a number of individual, more conceptual headings, A, B, C, D, E, F and so on, with reference to a very large number of individual communications which had been the subject of disclosure by the Defendants, which was due to take place at various dates extended in 2014, until it actually was made on 27th October 2014.

12. Today, and expressly to try to simplify matters, Ms. Garden tells me, (although I have heard both Claimants. it has been Ms. Garden predominantly who has put the matters before me in argument), the Claimants have reduced what they wish to pursue by way of harassment to two pages where, in particular, under (i) to (vii), they have set out what they say is the essence of what they wish to pursue.

13. The Defendants resist the application and appear by Mr. Price of counsel, specialist in this field. Again for the moment to keep to the broadest terms, he does so on the basis that it is very late and would imperil the trial date; and/or that it would lead to very substantial detail still being required which is not yet fully particularised or, indeed, he would say barely particularised; and that although the parties are on the verge of exchanging witness statements, (subject to my directions in the pretrial review), there would be a need entirely to revamp the witness statements in order to canvass and deal with the circumstances of each of the communications on which the Claimants would now seek to rely; and as to whether those communications could be established by the Defendants to be ones of veracity or not; and/or to be the subject of exploration and complaint by the Claimants. Thereby, he argues, such would make a trial on 16th March in reality impossible.

14. As to when a court should be willing or not willing to allow amendment, and/or willing or not willing to allow amendment in respect of a claim which has been abandoned but reintroduced, there is authority which is binding on me and to which I should refer.

15. In the case of *Swain Mason*, which is habitually cited in the courts on issues such as this, the Court of Appeal, (in the shape of Lord Justice Lloyd delivering the principal judgment and Lord Justice Elias and Lord Justice Patten), interfered with the decision of the trial judge, who had allowed an amendment, and so interfered despite the fact that this is a matter of case management and discretion, on the basis that he had not directed himself correctly. The nub of the case is at paragraphs 72 and 73, which I ought to read in full:

> "There, as the court said ..." [that is a reference to Worldwide Corporation Ltd. v GPT Ltd., which the court thought ought to have had more wide publication] "... it is always a question of striking a balance. I would not accept that the court, in that case, sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim; that would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times and that a heavy onus lies on a party seeking to make a very late amendment to justify it as regards his own position, that of the other parties to the litigation and that of other litigants in other cases before the court."

16. I pause to say that that is a statement of principle in 2011, made before the further tightening of approach in the reforms to the Civil Procedure Rules introduced as of 1st April 2013, following Lord Justice Jackson's report on civil litigation. At paragraph 73 Lord Justice Lloyd said:

> "A point which also seems to me to be highly pertinent is that if a very late amendment is to be made it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course or by way of further information if requested, or as volunteered without any request. The opponent must know, from the moment that the amendment is made, what is the amended case that he has to meet with as much clarity and detail as he is entitled to under the rules."

17. As to reintroducing a claim which has been once abandoned, the courts recognise that it is not an inflexible rule that such a claim may not be introduced, but the courts have been throughout heavily motivated by the principle that, (translating from the Latin which we are not allowed any longer to use), it is in the interests of the state and all the people that there should be an end to litigation and that that which prolongs or

defers the end to litigation or reintroduces it is not to be encouraged and positively to be discouraged.

18. At paragraph 61 of the decision in *Hague Plant Ltd.*, the facts of which I need not recite, giving the judgment of the court Lord Justice Briggs said this:

> "The real question for the judge was, having abandoned the de facto [in that case] directorship claim, if sufficient explanation was offered for its reintroduction to overcome the court's natural disinclination to permit a party to reintroduce a claim which it had after careful consideration decided to abandon. In that case he said that against that test it seems to me that the judge is entirely correct to regard the proffered explanations as falling well short of what was required."

19. Here, in the longer 36 page witness statement and enclosures accompanying the original application of 20th January 2015, the Claimants make, over some two dozen pages, reference in appendices to a very considerable number of communications brought to light on disclosure, many of them private between the Defendants but some to third parties.

20. In the two page document produced today, on which the Second Claimant Ms. Garden invites the guidance or assistance of the court as to what the courts would require, it is summarised in two pages which I will not read out in full but I will treat as here read out, (i) to (vii).

21. Is this late compared to what one would expect in a litigation? The answer is self evident. In a litigation which was commenced on 1st November 2013 and where trial is listed for five days on 16th March 2015, an application dated 20th January 2015 is, comparatively speaking, extremely late.

22. Is it, as summarised in the two pages, such as to let the Defendants know, from the moment that the amendment is made, what is the amended case that they have to meet with as much clarity and detail as they are entitled to under the rules? There is only one answer to that, which is, "No".

23. I will give some illustrations of that but, before I do, a part of Mr. Price's submissions was that only some parts of this could be recognised as coming within the potential scope of the tort, that is a wrongful conduct actionable in law, the tort of harassment.

24. In the case of *Majrowski*, the first and significant single point is that the House of Lords, by the opinion of Lord Nicholls of Birkenhead in 2007, held that conduct could not be actionable for the purposes of the Protection From Harassment Act 1996 unless it was of a gravity which would count as criminal under section 2 of that act.

25. As to the content which must be shown by a Claimant, there is an authoritative statement, which has been adopted by a number of other judges and courts since, by Mr. Justice Simon in the case of *Dowson v Chief Constable of Northumbria Police* [2010], which Mr. Price accurately summarises in his skeleton argument as being this:

i) There must be conduct which occurs on at least two occasions;

ii) which is targeted at the Claimant;

iii) which is calculated in an objective sense to cause alarm or distress; and

iv) which is objectively judged to be oppressive and unacceptable.

26. The further observations are that:

i) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs;

ii) A line is to be drawn between conduct which is unattractive and unreasonable and conduct which has been described in various ways, to torment of the victim or of an order which would sustain criminal liability.

27. In particular, and without descending to detail, an essential thread of the Claimants' claim in defamation is that the statements complained of have been such as not merely to be wounding to the reputation of the Claimants, but such as to be likely to lower their reputation and the esteem which they might otherwise enjoy in the eyes of others, to the extent that they have encountered not support and receipt and publication of their views in quarters where, in particular online but very occasionally in meetings, they would otherwise have expected likeminded persons critical of the Steiner system or philosophy of education to join with them, support them and welcome them; but have felt the chill of their views not being published or them not being welcome, illustrated in the pleadings by an occasion when the First Defendant was addressing a public meeting and very publicly declined to engage with them when they, by the First Claimant, sought to place an envelope before him or into his hands.

28. Thus, they say, once the disclosure took place, an exercise concluded on 27th October, on the one hand they were trying to resolve matters by negotiation; but on the other, because of the antipathy which is shown in the private communications of the two Defendants one to another and the strong expressions of opinion by the Defendants to others third parties this shows that what they felt instinctively, (namely that they were shunned by others because of something which had permeated from the Defendants), is now demonstrated to be true and in being demonstrated to be true shows, by concrete evidence, that there was a course of conduct which has resulted in the distress or isolation which they feel, as opposed to that which they suspected.

29. I cannot go into what advice passed between themselves and their representatives, but both in a written statement and to me in court by Ms. Garden it has been said that the reason for withdrawal of the harassment claim in March 2014 was the lack of concrete evidence, whereas now she says there is a demonstration of harassment.

30. As a subchapter, Ms. Garden says to me that there are, on a number of occasions disclosed in the documents the subject of disclosure, observations which are defamatory and, first, that the depth of antipathy and/or what was expressed is relevant to the action in defamation in any event because it would go to show malice

which would dismantle the defence of qualified privilege, which is one of the defences advanced by the Defendants **and/or ought themselves to be actionable;** and, if not open to the Claimants in a claim for harassment, ought to be pursued as instances of defamation.

31. This would be, it seems to me, a recasting of the claims for defamation which are at present sensibly focused on four individual communications in a very wideranging analysis and deployment of other occasions of defamation.

32. If the Claimants are successful in the claim for defamation as presently framed, then they would have publicly established, over a span of some months, defamatory statements for which they will be entitled to ask for damages which will be publicly declaratory of their cause.

33. First, if the claim for defamation were to go off by introducing what might, it seems to me, to be anything from a few to a dozen or dozens of purported subjects of claim for defamation, which have not yet identified to the court as those which would be pursued, that would be recasting the matter to an infinitely more wideranging inquiry in defamation.

34. To some extent, in the Claimants' favour, when I look to see whether this material will extend the time for a trial beyond that which can be accommodated as presently listed, it can be said that the material is the subject of proper questions to be put to the Defendants to explore and/or, the Claimants would say, dismantle the claim to the defence of qualified privilege.

35. **That, I sense, may be right.** However, having considered with care those pages, if this is simply an exploration of whether qualified privilege exists or is undone by malice then **I am satisfied that that can be done in a focused way. Even without disrespect to litigants in person, but just recognising the extent to which the exercise is more difficult in putting questions before the court at a trial, I am satisfied that that such can be done, with appropriate focus, and controlled by a trial judge, and managed within the present time estimate.**

36. Second, although witness statements have yet to be exchanged (and I have indicated that the court would be sympathetic to giving relief against sanction for witness statements to be exchanged after the due date, by reason of the intervening attempts at mediation and settlement), again I presently see no reason why witness statements should not be finalised, exchanged and the subject of crossexamination appropriately within the present trial window.

37. Third, I consider whether the two pages include some matters which could properly be expressed to be within the tort of harassment and whether the extent and intensity of the course of conduct were established to amount to a criminal standard. For example, it includes at (ii), "hiding the personal origins of this campaign". That is a reference to the parting of the amicable ways to which I referred at the outset. "Threatening and shunning them and encouraging proxies to do the same". If that were established in a case which is pleaded in harassment then, if it approaches the criminal standard of conduct, that could be the proper subject of claim.

38. **But I have been troubled that, in essence, this was being founded on disclosure of what, for the most part, have been private communications between the Defendants, as opposed to publications to others and which have been disclosed, in particular, by disclosure of material under process of the court but of which the Claimants never before knew.** I canvassed with Mr. Price whether that could be the subject of the tort of harassment, in that the essence of the **tort is the tormenting of and the direct effect upon a Claimant.** He properly drew my attention to the case of *Majrowski*, where Baroness Hale of Richmond it is at page 66 of her opinion stated that all sorts of conduct may amount to harassment. It includes alarming a person or causing her distress (section 7, subsection 2), but conduct might be harassment even if no alarm or distress were in fact caused, with a reference at 67 to **what I take to be the possibility of injunctive relief, and so I would not exclude the possibility of action even though the course of conduct was not itself in its individual incidence known to the Claimants.**

39. Moreover, as equally Mr. Price very properly drew to my attention, of the criminal offence of harassment it is recognised that even though the subject of criminal and harassing conduct was not aware of it at the time, in that the subsequent learning of conduct could found a criminal charge.

40. However, the two page résumé bristles with difficulties and unresolved matters. (i): "Using problems caused by the Second Defendant and her family as a pretext for pursuing 'a wideranging campaign of harassment and defamation'." The different and individual instances would, in accordance with the guidance which I have cited, need to be given with precision before amendment could be permitted. (ii) "Including substantial covert and proxy harassment of the Claimants". The question would arise by which third parties, on what dates and the subject of what actions, not all of which need to be individually actionable as harassment but which would need to be shown individually for the Defendants to meet the case of harassment. (iii) "Hiding the personal origins of this campaign in covert misrepresentations. Which? When? In what circumstances?

41. "Attacking their work ethics" similar questions because, on the face of the purported pleading, I appreciate put forward as the essence or the spirit of the complaint by Ms. Garden, I would respectfully find it impossible to tell what it covers by looking at the proposed pleading.

42. "Attacking, [in the same (ii)], the Second Claimant's disability". I would not accept the argument by Mr. Price that this is starting to intrude into and overlap with the statutory tort arising from the Equality Act 2010. A claim in harassment can be freestanding, but one would certainly need details of what is being referred to. Likewise, in the same paragraph (ii), "encouraging proxies to do the same without allowing the Claimants any right of reply".

43. In so far as the allegation of claim is based on not allowing the Claimants any right of reply, the objection must be that the Defendants themselves enjoy Article 10 rights **I can take it shortly because Ms. Garden says that that is not needed to be explained to her but that could be resolved on the merits.** However, encouraging proxies to do the same requires identification of which, what, how and on what date.

(iii) "Framing any and all the resulting expressions of protest, distress and anxiety the **Claimants as personal harassment of themselves and their proxies by the Defendants", etcetera. I think I understand what the Claimants are getting at, but it is very hard work and it is certainly not within the guidance given by *Swain Mason* as to what is required.**

(iv) "Blocking the Claimants from any democratic participation on shared interests no matter how relevant their input so far." Doubtless the Defendants can perfectly well identify Article 10 rights of their own, and the fact that there is not, (unless by some prior contractual undertaking or relationship between the parties, such as to an equitable relationship of trust such as requires them to give a voice) an obligation in law by somebody who publishes a blog or a website to accept and publish whatever a correspondent may seek to place on the blog, and they are entitled to say, "No, publish elsewhere". That could be dealt with in a trial, but where it says "and publishing rumour and hearsay but not facts which they could reasonably expected to know" (all this in "(iv)"), one would at the least first require individually particularised details.

(v) "Covertly inciting organisations and individuals to shun the Claimants by portraying them as dangerous and mentally unstable." **I could, by going through the 24 pages of appendices, pick out a number of obvious candidates for this** but I would not be sure, if I were a Defendant, which of those incidents in the appendices were relied upon and which were not. The same applies to (vi) and to (vii).

I have taken enough time to give the extensive difficulties.

44. Would it, if the amendment were allowed, be capable of resolution by a trial on 16th March 2015? I have absolutely no doubt upon this point. Trial on 16th March, over a period of five days, could not possibly be accommodated if we had a fully particularised claim sufficient to meet the *Swain Mason* requirements, even today, and even with a tight timetable for pleading of defence and any reply. I am quite satisfied that once this a positive cause of action in harassment is alleged the trial would be enlarged by some number of days.

45. Lastly, I am not dealing with on the same principles as whether a claim already existing would be struck out; but it is open to the severest doubt whether the matters of which the Claimants complained, and which may quite properly be the subject of a claim in defamation, would amount to conduct on the part of the Defendants which meets the criminal standard for a charge of harassment as a criminal offence.

46. I am satisfied that one would have to vacate this trial with a loss of precious court resources and very great extra expense, in terms of effort, to both parties and in terms of legally represented costs of preparation to the Defendants.

47. The application to amend is refused.

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