Case No: QB/2009/APP/0704

Neutral Citation Number: [2010] EWHC 1215 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 May 2010

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

SHAUN BRADY **Appellant**

- and -

KEITH NORMAN **Respondent**

- -
- -

Adrian Davies (instructed by **Petersfields LLP**) for the **Appellant**
Jonathan Crystal (instructed by **Thompsons**) for the **Respondent**

Hearing date: 13 May 2010

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Judgment

Mr Justice Eady :

1. This is an appeal from a decision of Master Leslie of 12 November 2009, whereby in the exercise of the court's discretion he declined to disapply the 12 month limitation period introduced by Parliament in the Defamation Act 1996. The Claimant, Mr Shaun Brady, was seeking the opportunity to sue in respect of words uttered as long ago as 5 June 2006. That tight limitation period applies only to defamation and malicious falsehood claims and was introduced on the recommendation in July 1991 of the Supreme Court Procedure Committee in the Neill Report. It was based on certain specific characteristics of such litigation. In particular, it is obvious that any libel action will engage the rights of the parties, respectively, under Article 8 and Article 10 of the European Convention on Human Rights and Fundamental Freedoms.

2. It is argued by Mr Crystal on behalf of the Defendant, Mr Norman, that there is no basis for interfering with the exercise of the Master's discretion.

3. First, I must turn to the factual background, which is addressed in some detail in Mr Brady's witness statement.

4. On 17 July 2003 Mr Brady was elected as General Secretary of the Associated Society of Locomotive Engineers and Firemen ("ASLEF") and took up office on 18 October of that year, with the intention of serving for a fixed term of five years. It seems there was something of a background controversy between various factions of ASLEF, which is largely irrelevant for present purposes. I understand that Mr Brady had ousted his predecessor, Mr Rix, with support from the rank and file members, whereas this was not altogether popular with the Executive Committee. Be that as it may, Mr Brady's tenure came to an end the following year in rather unfortunate circumstances.

5. I understand that on 20 May 2004 a barbecue was held in the garden of the ASLEF headquarters in Hampstead for members of head office staff. Shortly after 10 pm Mr Martin Samways, who was at that time the ASLEF President, arrived at the party and a scuffle took place between him and Mr Brady. This apparently became known among *cognoscenti* as the "battle of the barbecue".

6. It is not for me to investigate or come to any decision as to how the fisticuffs came about, but it is Mr Brady's case that he intervened because Mr Samways had struck a female employee in the face. Mr Brady claims that he was drunk.

7. A few days afterwards, on 25 May 2004, ASLEF suspended both Mr Brady and Mr Samways and, as it turned out, Mr Brady was never permitted to return to work. Later that year, allegations of forgery were made against Mr Brady and a Mr Blackburn, who was at that time the Assistant General Secretary. These appeared in the *Independent* newspaper on 28 July 2004 and concerned claims that Mr Brady had forged ASLEF cheques. There were later proceedings before an employment tribunal, which ruled in Mr Brady's favour on 1 December 2005 and concluded that "This very damaging allegation could only have come from ASLEF headquarters".

8. Mr Norman, the Defendant in the present proceedings, is the current General Secretary. He attempted to explain the background of the forgery allegations in a letter of 20 August 2004. It appears that Mr Brady had introduced a system under

which all cheques had to be signed by two signatories, and on 1 April 2004 he signed in Mr Blackburn's name a cheque in the sum of £153.40 in favour of Totteridge & Whetstone Locksmiths Ltd. This is said to have been with Mr Blackburn's knowledge and consent. I was told that he authorised it in the course of a telephone call while he was visiting a golf course in Scotland. The cheque related to services rendered by the locksmiths by way of securing ASLEF's premises following a burglary. This incident was later prayed in aid, however, as a ground for Mr Brady's dismissal as General Secretary on 13 August 2004. Two reasons were given; namely the alleged forging of cheques and the "battle of the barbecue".

9. It seems that the employment tribunal was unimpressed by the allegations of forgery and by the way they were addressed in the course of the ASLEF disciplinary procedure. The judgment contains the following passage at [60]:

> " …. [The Executive Committee] did not consider whether Mr Brady had made any personal gain and ignored his explanation that his actions over the cheque signatures were done with Mr Blackburn's agreement and in the best interests of the union. These were all relevant factors. We consider that these [disciplinary] proceedings were only brought in order to ensure that Mr Brady could no longer take an active part in the union's life following expulsion and suspension from seeking election for five years."

10. ASLEF appealed the ruling in Mr Brady's favour but the appeal was dismissed by the Employment Appeal Tribunal ("EAT") on 3 April 2006. In due course, Mr Brady was awarded £55,405 by the employment tribunal. It is to be noted that the forgery allegation was abandoned in the EAT (possibly on legal advice). Despite the adverse outcome before the employment tribunal and the EAT, and the decision of Mr Norman not to pursue the allegation of forgery before the EAT, he referred to the matter again before ASLEF's Annual Assembly of Delegates on 5 June 2006. His speech included the words of which Mr Brady now wishes to complain in defamation proceedings:

> " … The facts are, Conference, that the General Secretary was involved in a fight; the General Secretary was forging cheques and it is a matter of opinion – you can draw whatever opinion you like – as to whether his actions in the media brought the Union into disrepute. What you cannot possibly walk away from is that he was involved in a fight with the then President, and he forged cheques. You cannot get away from that. That is the situation. Unfortunately, because the Union did not get it right, he won his tribunal on the basis of unfair dismissal, on the basis that he was dismissed, believedly [*sic*] by the tribunal, for reasons other than that put forward [by] the employer."

It may be that the word "believedly" appears in the record by mistake. It is possible that what Mr Norman actually said was that Mr Brady's account was "believed by the tribunal". But it matters not for present purposes.

11. There can be little doubt that an allegation of forgery would constitute slander actionable *per se*, since by reason of s.6(2) of the Forgery and Counterfeiting Act 1981 the offence carries a maximum penalty of ten years' imprisonment: see e.g. *Duncan & Neill on Defamation* (3rd edn, 2009) at paragraph 6.02. Furthermore, I understand that in accordance with its usual practice ASLEF published the transactions of its Assembly in a bound volume, which would be circulated to all branch secretaries, and to others, with the result that at some stage the words complained of were republished as a libel. This would have been on the authority of Mr Norman as General Secretary. Mr Brady wishes to sue in respect of both categories of publication (i.e. for slander and libel). He places particular reliance upon the publication of the slander in June 2006 because there would have been representatives of the press present, as well as members of Parliament and fraternal delegates from other unions.

12. There was an earlier libel action based upon a report of the 2006 Annual Assembly that was published in the issue of the ASLEF magazine, *Loco Journal*, for July 2006:

> "ASLEF conference delegates declined to debate a proposition calling for former General Secretary Mr Brady to address conference, coupled to efforts to consider his reinstatement. They felt it was pointless to discuss 'a passed era'.
>
> One compelling reason was that the Certification Officer had ruled the previous week that Mr Brady had legitimately been excluded from ASLEF membership for bringing the union into disrepute … ."

This complaint was tried before Mr Richard Parkes QC and a jury, which awarded Mr Brady £30,000 on 6 October 2008. He also recovered his costs on the indemnity basis: see *Brady v Norman* [2008] EWHC 2481 (QB).

13. It seems that a transcript of the proceedings before the Assembly on 5 June 2006, including the words spoken by Mr Norman on that occasion, had been disclosed in the course of that earlier libel action in about April or May 2008. Unfortunately this appears not to have been spotted at the time. The explanation for this omission, proffered with the benefit of hindsight, is that the issue in the earlier proceedings was that of qualified privilege and what the parties were concerned to investigate was whether or not the *Loco Journal* had been published more widely than to members of ASLEF – and thus outside the scope of qualified privilege. In that context, the transcript did not seem to be of great significance to the person who inspected the two files of disclosed documents. She has explained that in a witness statement. Thus, according to the evidence, Mr Brady did not actually see it until the end of September 2008, a matter of days before the trial began. Mr Crystal expressed scepticism about that. He has argued that Mr Brady must have known from his experience of ASLEF that there would be a transcript of the Assembly proceedings and, moreover, that his supporters, who were seeking his reinstatement, were likely to have reported back to him at least the gist of Mr Norman's accusations. Mr Davies, on the other hand, submits that the Master (at paragraph 6 of his judgment) made a finding of fact that Mr Brady did not acquire actual knowledge, for limitation purposes, until September 2008. What the Master actually said he did was to make an assumption, and I will proceed on that basis too.

14. At all events, parts of the transcript were read out to the jury, including the words spoken by Mr Norman. Once the libel action concluded in October 2008, Mr Brady wished to launch proceedings in respect of the slander of 5 June 2006, since he regarded the allegations on that occasion as being much more serious. Hence his application to Master Leslie by way of a Part 8 claim form for an order disapplying s.4A of the Limitation Act 1980, as contemplated by s.32A. (Both these provisions were substituted by s.5 of the Defamation Act 1996.)

15. There was some delay in making his application, which was launched in June 2009. That has been explained through his solicitor by reference to Mr Brady's very limited funds and, in particular, his inability to persuade his lawyers to act for him on the proposed slander claim (by way of conditional fee agreement) until the bill for their services in the first action had been settled. This only happened at the end of March 2009.

16. It was in this context that Mr Davies referred to the decision of the Court of Appeal in *Gilberthorpe v Hawkins*, briefly reported in *The Times* on 3 April 1995. It was a decision on its own facts. It concerned an application to strike out a libel action for delay, in which some reliance was placed by the plaintiff on his lack of funds by way of explaining why the delay had occurred. McCowan LJ observed that the absence of legal aid in libel proceedings was a factor which should elicit a sympathetic approach from a judge. I am not sure much turns on this. It hardly needs to be stated that impecuniosity may well be a relevant factor for the court to take into account in weighing up the circumstances of a case in which a discretion falls to be exercised, as for example under s.32A.

17. Nonetheless, the Master took the view here that Mr Brady did not act "reasonably and promptly once he actually knew about [the precise words]". He thought the delay of nine months excessive. That was a matter of judgment and his conclusion was surely one that he was entitled to reach.

18. I gather that the Master took issue with the choice of Part 8 procedure. Mr Davies pointed out, however, that the choice was deliberately made on Mr Brady's behalf because of his limited funds and a desire to take matters one stage at a time. He could have issued proceedings and waited for a limitation defence to be pleaded before seeking relief under s.32A, but he not unreasonably took the view that this would be wasteful of time and costs. I would not regard this procedural step as a ground for refusing relief.

19. Mr Davies drew my attention to paragraph 22.07 of *Duncan & Neill*:

> "The policy concerns underlying the short limitation period for defamation actions and echoed in the Pre-Action Protocol for Defamation have tended also to affect the court's approach to a claimant's application under s.32A. Thus, while the delay in question in s.32A(2) is the delay that has occurred after expiration of the limitation period, delay prior to that date is relevant as part of the circumstances of the case, particularly in so far as it may tend to prejudice the administration of justice. Similarly, it has been said that the fact that the claimant's delay after the limitation date may have little additional effect on the

> defendant's ability to defend the claim will not be decisive (except perhaps where the limitation defence can be fairly described as a complete windfall, as when the defendant is well aware of the complaint and proceedings are issued only one day late). However in the context of personal injury claims (where there is a similar statutory power to disapply the limitation period, under s.33 of the Limitation Act 1980) the Court of Appeal has rejected this approach. In *Cain v Francis* [2009] 2 All ER 579, the court held that relevant prejudice to the defendant only arises if his ability to defend the claim on its merits has been adversely affected and that the mere loss of a limitation defence is not to be regarded in itself as 'prejudice' to the defendant. It is submitted that the approach to be adopted in defamation cases may now fall to be reviewed."

Mr Davies submits that the decision in *Cain* represents a change of direction, relevant to both defamation and personal injury claims, and that I should follow this latest guidance from the Court of Appeal rather than adopt the approach sanctioned in *Steedman v BBC* [2002] EMLR 318, which the learned editors had in mind. I need to remember, on the other hand, that no mention was made of defamation cases at all in *Cain*, or of the uniquely short limitation period operating in that regime: nor was the earlier decision of *Steedman* cited. There is no reason why those matters should have been referred to, as they were not relevant to the issues before the Court of Appeal in *Cain*. I need to be a little wary, against this background, when invited to conclude that the later decision must be taken as having *by implication* disapproved the approach in the earlier case.

20. It is necessary first to remember, as was pointed out by Steel J in *Steedman* at [15], that the discretion afforded by s.32A is "largely unfettered". It requires the court to balance any prejudice to the claimant on the one hand and the defendant on the other in allowing the action to proceed or otherwise. All the circumstances of the case must be taken into account in assessing the justice of the matter, with particular reference to the length of, and reasons for, the delay and the extent to which the passage of time since the expiration of the limitation period has had an impact on the availability or cogency of relevant evidence. It is clear that the unfettered nature of this jurisdiction is an important matter for an appellate tribunal to bear in mind when invited to rule upon its exercise by any individual judge.

21. Steel J also drew attention, at [20], to part of the background set out in the Neill Report underlying the recommendation for a reduction in the relevant limitation period:

> "VIII.1 In 1984 the limitation period for bringing defamation claims was reduced from the six-year period, applying to claims of tort generally, to 3 years. This was no doubt based on the general recognition that claims to protect one's reputation ought to be pursued with vigour, especially in view of the ephemeral nature of most media publications. …

> VIII.2 We have canvassed opinion and we have found a wide measure of agreement (not surprisingly) amongst media representatives that the same reasoning would justify an even shorter period. Memories fade. Journalists and their sources scatter and become, not infrequently, untraceable. Notes and other records are retained only for a short period, not least because of limitations on storage. …
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> …
>
> VIII.5 On other occasions, complainants delay the issue of a Writ because the subject of the libel is being investigated by some other means and they wish to await the outcome, rather than have two such inquiries proceeding in parallel. For example newspaper allegations may be the subject of a disciplinary inquiry by a professional or sporting body; there may be criminal proceedings in progress, touching upon the same issues; or a Department of Trade Investigation may be on foot. Again, we can see that delay might be justified in such cases, although there would generally be no reason to keep the potential defendants completely in the dark. We would not expect a plaintiff to receive much sympathy if no relevant complaint had been made within the 12-month period."

It will be noted that some of these policy considerations, largely concerned with media publications, would not appear to be directly germane to the circumstances in the present case. This is not a question of media publication. It is a case of slander by an individual.

22. On the other hand, it was acknowledged by Steel J, also at [20], that the judge at first instance (Sir Oliver Popplewell) was "fully justified" in recognising that libel actions raised somewhat different considerations from personal injury cases. The Master took a similar view here. When one comes to address the question of whether or not the deprivation of a limitation defence gives rise to prejudice, specifically in the context of defamation, it is probably germane to have in mind the observations of Lord Phillips MR in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946, and particularly at [40] and [55]. His Lordship there drew attention to the need, particularly since the coming into effect of the Human Rights Act 1998, to balance competing Convention rights. In the later case of *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB) at [33], Tugendhat J cited those passages in *Jameel* and made the important point:

> "It is not enough for a claimant to say that a defendant to a slander action should raise his defence and the matter go to trial. The fact of being sued at all is a serious interference with freedom of expression … ."

It is true that both in that case and in *Jameel* the court was concerned with whether or not the defamation actions in question were abusive: that is to say, whether or not, in the particular circumstances, they could be taken to be serving the legitimate purpose of such a claim, which is the vindication of the claimant's reputation. Nevertheless, the point may be of significance also when it comes to judging whether or not a particular defendant, in losing his *prima facie* limitation defence, can be said to be suffering significant prejudice. If it is right that the court should regard "being sued at all [as] a serious interference with freedom of expression", then this would plainly be a relevant factor in assessing prejudice – and one which would have no application in the context of personal injury proceedings.

23. These are considerations that lead me to conclude that a judge at first instance should not be too ready to discount entirely the policy factors weighed in *Steedman* simply because a differently constituted court gave greater weight to others in a personal injury case.

24. These arguments are relevant to one of the principal reasons the Master gave (at paragraph 17 of his judgment) for rejecting Mr Brady's application; that is to say, he attached importance to Mr Norman's loss of the limitation defence as a factor in itself. It is said that because of the decision in *Cain* he erred in doing so. I am not persuaded that he did. No doubt there is room for argument as to where the balance should come down as between the parties' competing interests. But I do not, in the light of *Steedman* and the point of principle articulated by Tugendhat J in *Sprague*, believe that the Master was wrong to take this factor into account at all. There was thus no error of law.

25. It then becomes appropriate to ask whether, in coming to his assessment of the rival contentions on prejudice, the Master came to a decision that fell outside the range of reasonably possible conclusions open to him: see e.g. the observations of Lord Fraser in *G v G* [1985] 1 WLR 647, 652.

26. Obviously, when the application of s.32A falls to be considered, the principal potential prejudice to a claimant will be the loss of an opportunity to vindicate his reputation. The present circumstances are unusual because it can be argued with some force that Mr Brady has little or no continuing need for further vindication over the allegation about cheques. As the Master put it, "… he has had a measure of vindication in the first proceedings and the second proceedings". He was vindicated before the employment tribunal, ultimately recovering over £50,000. Moreover, although the words complained of were different in the earlier libel action, these slanderous allegations were also aired in public and Mr Brady nonetheless received another £30,000. It cannot seriously be suggested that anybody still believes that there was anything in the forgery allegation – save to the limited extent that he signed a cheque in Mr Blackburn's name for the reasons I have recounted.

27. I was concerned when I was told that the words spoken by Mr Norman on 5 June 2006 had been read out to the jury in the first action, in case they were taken into account on the issue of damages. There might therefore be a risk of double recovery if he were now permitted to sue on the slander separately. A second claim in such circumstances, quite apart from factors to be taken into account on discretion, might amount to an abuse of process. Mr Davies responded to these concerns by saying that:

a) the argument took him by surprise, as it had not been addressed by the Master or raised in Mr Norman's Respondent's Notice;

b) he had told the jury himself that the transcript was not relied upon in the context of damages; and

c) there was no available transcript of what Mr Parkes QC had told the jury, if anything, as to its relevance.

Accordingly, he submitted that I should be wrong on the evidence to conclude that the jury had taken the slander into account.

28. In these circumstances, I will proceed on the assumption that the jury did *not* include in its award after the first trial any element of compensation or aggravation in respect of the slander of 5 June.

29. Nevertheless, Mr Crystal argues that there must be finality and that the slander should have been brought into the earlier proceedings by Mr Brady, so that it could be wrapped up at the same time and disposed of once and for all: see e.g. *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore Wood & Co* [2002] 2 AC 1. He raised this point in the Respondent's Notice of 1 April 2010. It does not appear to have played a part in the Master's reasoning. On the other hand, accepting for present purposes the Master's assumption as to the date of actual knowledge, I believe it was not feasible to add in the new cause of action in September 2008 and expect it to be ready for trial in the first week of October or, for that matter, reasonable to expect the trial date to be adjourned for six months or a year. I would not, therefore, attach much weight to this argument.

30. One reason the Master gave, at paragraph 17, is not, it seems to me, of any great significance on the facts of this case. He referred to the possible loss of cogency in the available evidence. It is not clear to me what evidence this conclusion was based upon. As Mr Davies has pointed out, Mr Norman has himself not placed any evidence before the court identifying any prejudice he would suffer. There is no reason to suppose that on this occasion Mr Norman would suddenly wish to raise a defence of justification on the forgery allegation, which hitherto he has studiously avoided. It is difficult to see, therefore, what further evidence would be needed – especially having regard to that which has been collected over the years in the various disputes that have come before the courts. There could be no serious dispute over what Mr Norman said or who was present; nor yet as to the republication of his words in written form or as to the scale of circulation.

31. The Master, however, looked at the matter "in the round", as was appropriate. In deciding whether to disapply the limitation period, it was certainly legitimate to weigh up (as he did) whether there remained any need for further vindication, having regard to all that had taken place, and to set that consideration alongside Mr Norman's loss of the limitation defence and the prospect for him of being vexed, yet again, with litigation over the circumstances of the dismissal five or six years on.

32. I have come to the overall conclusion that the Master was, in the light of the unusual circumstances of this case, entitled to exercise his discretion in the way that he did.

On an appeal by way of review, I can see no reason to disturb his decision. It fell within the range of reasonable options open to him.