Case No: A2/2010/1562

Neutral Citation Number: [2011] EWCA Civ 107
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE HON MR JUSTICE EADY
HQ09X02747

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2011

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LADY JUSTICE SMITH
and
LORD JUSTICE AIKENS

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Between :

SHAUN BRADY	**Appellant**
- and -	
KEITH NORMAN	**Respondent**

- -
- -

Mr Adrian Davies (instructed by **Petersfields Llp**) for the **Appellant**
Mr Jonathan Crystal (instructed by **Thompsons Solicitors**) for the **Respondent**

Hearing date: 19th January 2011

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Judgment

President of the Queen's Bench Division:

1. This is the judgment of the court.

2. By section 2 of the Limitation Act 1980, an action founded on a tort may not be brought after the expiration of six years from the date on which the cause of action accrued. By section 57(2) of the Administration of Justice Act 1985, this six year time limit was reduced to three years for actions for libel and slander. By the Defamation Act 1996, the time limit was yet further reduced to one year, and thus it appears in section 4A of the 1980 Act as amended. The amendments reducing the time limit for defamation actions no doubt had regard to the fact that libel and slander can often be torts of transient effect.

3. Section 32A of the 1980 Act enables the court to disapply section 4A if it appears to the court that it would be equitable to allow the action to proceed having regard to the degree to which the time limit prejudices the claimant and to the degree to which disapplying the time limit would prejudice the defendant. Disapplying the time limit will always prejudice a defendant, because he will lose his limitation defence. So said Lord Diplock in *Thompson v Brown* [1981] 1 WLR 744 at 750B. Refusing to disapply the time limit will always prejudice the claimant, because he will continue to be met with a complete statutory defence to his claim irrespective of the merits. The balance between those prejudices will vary depending on the facts of particular cases, and a judicial decision as to what is equitable will likewise vary from case to case. To take an obvious example, if a claimant is by mistake a few days late in starting a libel action, when the defendant has been expecting the claim because the parties have operated the pre-action protocol, and if there are no serious evidential problems affected by delay, the claimant may be heavily prejudiced if the limitation period is not extended, and the defendant will lose no more than a fortuitous windfall if the period is extended.

4. In acting under section 32A, the court is required by section 32A(2) to have regard to all the circumstances and in particular to the length of and reasons for the delay; to the date when all or any of the facts relevant to the cause of action became known to the claimant and to the extent to which he then acted promptly and reasonably; and to the extent to which relevant evidence is likely to be unavailable or less cogent because of the delay.

5. Sections 11 and 12 of the 1980 Act provide a special time limit (3 years, subject to sections 11(4) and (5) and 12(2)) for actions in respect of personal injuries or death. Section 33 provides for a discretionary exclusion of those time limits in terms which are much the same as those in section 32A. In particular, by section 33(1), the court has to decide whether it would be equitable to allow the action to proceed having regard to a balance of prejudice equivalent to that in section 32A.

6. In *Steedman v BBC* [2001] EWCA Civ 1534, [2002] EMLR 318, this court decided in a libel action that the court's discretion under section 32A to disapply the one year limitation period was largely unfettered and should be applied according to its terms. The court considered, as had Lord Diplock in *Thompson v Brown*, that a direction under the section was always highly prejudicial to the defendant; and that the expiry of the limitation period was always in some degree prejudicial to the claimant depending on the strength or otherwise of the claim and defence. The claimant would

suffer some, perhaps minor, prejudice, even if he had a cast iron claim against his solicitor. The court had to consider all the circumstances, including the specific matters referred to in the section. The defendant's ability to defend the action notwithstanding the delay was important, but not decisive unless the limitation defence might properly be seen as a complete windfall. David Steel J, who gave the first judgment, referred to the judgment of Parker LJ in *Hartley v Birmingham City Council* [1992] 1 WLR 968, an appeal concerning a personal injury claim where the proceedings had been issued inadvertently one day late. Parker LJ, having referred to what Lord Diplock had said in *Thompson v Brown*, said that, because prejudice resulting from the loss of a limitation defence will almost always be balanced by prejudice to the claimant from the operation of the limitation provisions, the loss of the defence as such would be of little importance. What was of paramount importance was the effect of the delay on the defendant's ability to defend. David Steel J pointed out that *Hartley v Birmingham* was a remarkable case on its facts and that it was a personal injury action. The first instance judge in *Steedman* had been justified in considering that libel actions raised somewhat different considerations. The progressive reduction of the limitation period from 6 years to 1 year was explained by considerations in the recommendations of the working group of the Supreme Court Procedure Committee chaired by Neill LJ, passages from which David Steel J quoted. These considerations included that claims to protect one's reputation ought to be pursued with vigour in view of the ephemeral nature of most media publications. David Steel J said that, although the effect of the delay on the ability of the defendant to defend a defamation action remains important, it is not to be regarded as in any way decisive, except perhaps where the limitation defence can fairly be described as a complete windfall. He concluded his judgment saying that failure to act promptly prejudices both parties and the court.

7. Hale LJ said at paragraph 33 that it is for the claimant to make out a case for the disapplication or relaxation of the normal rule. Brooke LJ referred in paragraph 41 to the very strong policy considerations underlying modern defamation practice and endorsed what Eady J had said in *Clarkson v Gilbert* (26th February 2001) that defamation and malicious falsehood claims have been placed in a special category with regard to limitation. Brooke LJ said at paragraph 46 that the experience of the judges in this highly specialist field needs to be taken carefully into account before there is any question of reintroducing a more relaxed limitation regime for defamation cases.

8. *Steedmann v BBC* is binding on this court. It was not referred to the court in the more recent decision of *Cain v Francis* [2008] EWCA Civ 1451; [2009] QB 754. This is not perhaps surprising, because *Cain v Francis* concerned two personal injury appeals in which the first instance judges had adopted rather different approaches to the application of section 33 of the 1980 Act. Each claim arose from a road traffic accident in which the defendant drivers' insurers had accepted liability but the claims had subsequently become statute barred under section 11 of the 1980 Act. In the first case, the delay in issuing the claim was one day and the defendant had had early notification of the claim and every opportunity to investigate it. This court held that the first instance judge had been wrong to consider that the loss of the limitation defence would amount to real prejudice to the defendants. In the second case, the delay was a year. This court held that the judge was entitled to hold that this had not

significantly prejudiced the defendant and that it was equitable to allow the claim to proceed.

9. Smith LJ gave the first and main judgment. She referred to *Thompson v Brown* and *Hartley v Birmingham City Council* and to earlier cases. She referred to passages in *Hartley v Birmingham* in particular in which Parker LJ noted that limitation was a fortuitous and technical defence to a claim which in justice the defendants ought to meet; and that what is of paramount importance is the effect of the delay on the defendants' ability to defend. She said at paragraph 57 that, in a case where the defendant has had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall and the prospect of its loss, by the exercise of the section 33 discretion, should be regarded as either no prejudice at all or only a slight degree of prejudice. She said at paragraph 69 that the defendant, who had an obligation to pay damages, only deserves to have that obligation removed if the passage of time has significantly diminished his opportunity to defend himself. Parliament cannot have intended that the financial consequences of having to pay damages if the arbitrary time limit is removed should be taken into account. That was because, in fairness and justice, the defendant ought to pay the damages if, having had a fair opportunity to defend himself, he is found liable. Maurice Kay LJ agreed. Sir Andrew Morritt C also agreed. He said at paragraph 82 that it did not appear to him that the loss of a limitation defence should be regarded as a head of prejudice at all if the delay had not caused the defendant prejudice in its defence.

10. The present appeal concerns a defamation action in which the claimant claims damages for slander and libel, where Eady J upheld the decision of the Master declining to disapply the 12 month limitation period. Eady J's judgment of 26th May 2010 may be found at [2010] EWHC 1215 (QB) and it may be referred to for greater detail than this judgment need contain.

11. On 30th June 2009, the claimant, Shaun Brady, issued a Part 8 claim form seeking the disapplication of section 4A of the 1980 Act in respect of a defamatory publication on 5th June 2006. The proceedings were thus started more than 2 years outside the limitation period, but both the Master and Eady J proceeded, somewhat benevolently perhaps, on the basis that Mr Brady did not acquire actual knowledge of the publication until September 2008. The facts in summary are as follows.

12. Mr Brady was elected as General Secretary of the Associated Society of Locomotive Engineers and Firemen on 17th July 2003, and took up office on 18th October 2003. His tenure of that office came to an end the following year, as a result of a scuffle that took place at a barbecue at the ASLEF headquarters in Hampstead on 20th May 2004 between Mr Brady and Mr Samways, the Union's president. On 25th May 2004, Mr Brady was suspended.

13. On 28th July 2004, allegations of forgery of ASLEF cheques were made against Mr Brady in a newspaper. Mr Brady had introduced a system under which cheques had to be signed by two signatories. On one occasion he had signed a cheque in the Assistant General Secretary's name with that person's knowledge and consent. This incident was later used as a ground for Mr Brady's dismissal as General Secretary on 13th August 2004. The other ground for his dismissal was the scuffle in May 2004.

14. Mr Brady brought a claim for unfair dismissal. The Employment Tribunal was unimpressed by the allegations of forgery and the manner in which ASLEF had conducted its disciplinary procedure. The Tribunal ruled in Mr Brady's favour on 1st December 2005, awarding him £55,405. ASLEF's appeal was dismissed by the Employment Appeal Tribunal on 3rd April 2006. The forgery allegation had been abandoned in the Employment Appeal Tribunal.

15. Despite these rulings, Mr Norman, the respondent, then the current General Secretary, referred again to the matter before ASLEF's Annual Assembly of Delegates on 5th June 2006. His speech included the following words, which are those of which Mr Brady wishes to complain in these 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 by the tribunal, for reasons other than that put forward by the employer."

16. There was an earlier libel action based on a report of the 2006 Annual Assembly published in the issue of the ASLEF magazine for July 2006, in which it was said:

> "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 past 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 action was tried before Mr Richard Parkes QC and a jury, which awarded Mr Brady £30,000 on 6th October 2008. He also recovered his costs on an indemnity basis. Although the transcript of the proceedings of 5th June 2006 was disclosed during that libel action, the passage relied on in the present proceedings was not spotted at the time. As we have already noted, the Master and Eady J both made assumptions that Mr Brady did not acquire actual knowledge of that passage until September 2008.

17. At the conclusion of the first libel action, Mr Brady sought to launch proceedings in respect of what Mr Norman had said on 5th June 2006. His explanation for his delay in launching his Part 8 application was that he lacked the necessary funds to bring the action, and that his solicitors were reluctant to act until the bill for the first action had been settled.

18. The Master had regarded the loss of the limitation defence as a matter of prejudice to the defendant. It was submitted to Eady J that this was wrong in the light of *Cain v Francis* which, it was said, represented a change of direction which was relevant to defamation actions as well as to personal injury actions. Eady J noted that *Steedman v BBC* had not been referred to in *Cain v Francis* nor had the uniquely short limitation period for defamation actions. He was wary of concluding that *Cain v Francis* had by implication disapproved *Steedman v BBC*.

19. Eady J referred to *Steedman* and said that the unfettered nature of the discretion was an important matter for an appellate tribunal to have in mind when invited to rule upon its exercise by an individual judge. Eady J referred, as had David Steel J, to passages from the Neill Committee's report. He noted that David Steel J had said that the first instance judge in *Steedman* had been fully justified in recognising that libel actions raised somewhat different considerations from personal injury cases. Eady J referred to a passage in the judgment of Tugendhat J in *Lonzim plc v Sprague* [2009] EWHC 2838 QB to the effect that the fact of being sued for slander is itself a serious interference with freedom of expression. That would be a factor relevant to prejudice which would have no application in personal injury proceedings. Eady J concluded that a judge at first instance should not be too ready to discount entirely the policy factors which weighed in *Steedman* simply because a differently constituted court of appeal gave greater weight to other factors in a personal injury case. He was not persuaded that the Master was wrong to attach importance to the loss of the limitation defence. The Master's assessment of the rival contentions of prejudice was not beyond the range of reasonably possible conclusions. The claimant had lost the opportunity to vindicate his reputation. But unusually he had already achieved a measure of vindication in the two earlier proceedings. It could not seriously be suggested that anybody still believed that there was anything disreputable in the forgery allegation. The judge did not attach much weight to the submission that Mr Brady should have brought the present slander allegation in the earlier proceedings. He largely discounted evidential difficulties. The Master had, however, looked at the matter in the round and was entitled to exercise his discretion in the way that he did.

20. The ground of appeal is that *Steedman v BBC* and *Cain v Francis* cannot be reconciled, being concerned with two very similar and sequential sections of the 1980 Act; that *Cain v Francis* should be preferred; and that the judge was wrong to hold that the Master was entitled to proceed on the basis that the loss of a limitation defence can itself constitute prejudice to a defendant. Mr Davies submits that Mr Brady's explanation for the delay in bringing the proceedings should be accepted as reasonable. He submits that the only defence ever contended for was qualified privilege and that this was bound to fail because there were people at the meeting whose presence would not sustain privilege. The ability of the defendant to defend himself had not been compromised. He submits that this was a very serious slander and that there has been no evidential prejudice.

21. We reject the contention that *Cain v Francis* cannot be reconciled with *Steedman v BBC*. Certainly in a personal injury case where the defendant has had proper opportunity to investigate the facts and has admitted liability, the loss of a fortuitous windfall limitation defence will often, depending on the facts, be regarded as of little or no prejudicial weight and likely to be outweighed by the prejudice of the claimant in accidentally losing his claim. Considerations in defamation claims are likely to be

different. The policy behind the much shorter limitation period is clear. The defamatory impact of libel or slander is likely to be transient and Parliament evidently intended that a claimant should assert and pursue his need for vindication speedily. As Hale LJ said in *Steedman*, it is for claimants to make out a case for the disapplication of the normal rule and, in our judgment, the Master and the judge were fully entitled to hold that Mr Brady had not done so. The present case is far removed from a personal injury claim in which the defendant ought, if he is held liable, to pay damages. The delay is more than 2 years and, on one view, the explanation for the delay between September 2008 and June 2009 is not persuasive. It is not a case in which the prejudice to the defendant from the loss of the limitation defence is so fortuitous that it is balanced out of existence by prejudice to the claimant in losing a claim which the defendant ought in justice and fairness to meet. *Steedman v BBC* and *Cain v Francis* do not articulate different and conflicting principles. They represent differing manifestations of the application of the same principles to be derived from the different circumstances to which adjacent sections of the 1980 Act are applicable.

22. For these reasons we dismiss the appeal.