



Neutral Citation Number: [2010] EWHC 2859 (QB)

Case No: HQ1D00267

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

Chris Lance Cairns

Claimant

- and -

Lalit Modi

Defendant

Andrew Caldecott QC and Ian Helme (instructed by **Collyer Bristow**) for the **Claimant**
Desmond Browne QC and Matthew Nicklin (instructed by **Carter Ruck**) for the **Defendant**

Hearing dates: 4 November 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. In this libel action the Claimant complains of two publications referring to him on 5 January 2010. One was a message from the Defendant on Twitter.com (“the Tweet”). The other was an article in the online cricket magazine Cricinfo UK (“the Cricinfo Article”) repeating words said by the Defendant. The question to be decided at this hearing is whether the Court should order the trial, as a preliminary issue, of the extent to which the Tweet was read within England and Wales (“the jurisdiction”).
2. That issue is said to be relevant in two ways. Whether there were any such readers, and if so how many, is of course relevant both to liability for defamation and to damages. But that is not the main reason this question arises now. The main reason why it arises now is that the Defendant issued an Application Notice dated 15 June 2010 asking for an order that service of the proceedings out of the jurisdiction be set aside on the ground (amongst others) that the Claimant has not satisfied the court that a real and substantial tort has occurred within the jurisdiction. They have since accepted that this point can be raised only in respect of the Tweet.
3. The grounds relied on are derived from *Jameel v Dow Jones & Co* [2005] QB 946 (“*Jameel*”). In that case at paragraph [70] the Court said:

“If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but, subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake.”
4. The claim form was issued on 22 January 2010. There is no issue before me as to the Cricinfo Article.

THE PARTIES

5. The Claimant is a well known cricketer who has enjoyed a very distinguished career. Since 1988 he has played both in New Zealand and in England. He spent some twenty seasons in England. By the time he retired from test cricket in 2004 he had won 62 caps for his country. He captained New Zealand on seven occasions.
6. At the time the claim form was issued the Defendant was chairman and commissioner of the Indian Premier League (“IPL”) and Vice President of the Board of Cricketing Control for India (“BCCI”). He was one of the most influential men in cricket. He was suspended from these positions in April 2010 and ceased to occupy them in September 2010.

THE PROCEEDINGS

7. In the Particulars of Claim dated 21 January 2010 it is pleaded that the Tweet meant that the Claimant was guilty of match fixing. It is pleaded that the Cricinfo Article also meant that he was guilty of match fixing, alternatively that there are strong grounds to suspect that he is guilty of match fixing.
8. There is no issue before me as to the meaning of the two publications, so it is not necessary to set out the words complained of. The meaning of the Tweet, is more serious than the meaning pleaded in respect of the Crickinfo Article. These different levels of meaning are sometimes referred to as *Chase* Level 1 (actual guilt) and *Chase* Level 2 (grounds to suspect guilt).
9. On 11 January 2010 solicitors for the Claimant had sent a letter before action. The letter stated that the Defendant had known since October 2008 that the Claimant has denied being involved in match fixing. It stated that he has denied there has ever been any responsible suggestion since that time to the effect that the denial might be untrue. The letter refers to words attributed to the defendant on a website dated 8 January 2010:

“let him sue us, then we will produce what we have in court”.
10. On 5 February 2010 and 2 June 2010 Master Kay and Master Roberts respectively made orders giving the Claimant permission to serve proceedings first on the Defendant in India, and later on his solicitors in London.
11. On 15 June 2010 the Defendant issued the first of his two Application Notices. He asked for the two orders to be set aside on a number of grounds. The only ground which is still live is that the Claimant has not satisfied the court that a substantial tort has occurred within the jurisdiction.
12. It was by letter dated 27 October 2010, a few days before the hearing, that the Defendant’s solicitors informed the Claimant that he would not pursue arguments that the case should be tried in India, and would accept the validity of service upon him. That letter included the following:

“It seems to us that before directions can be made about the service of a Defence, the question of whether a substantial tort has been committed within the jurisdiction in relation to the Tweet should be determined before the Judge (either on 4 November or another date) by way of preliminary issue pursuant to the court’s general case management powers as the issue has very significant costs implication for the conduct of the case going forward....

We would not expect the court to determine this issue on the basis of conflicting written evidence from two experts. For our part we do not envisage having any further evidence to serve on this question and we would be content to invite the judge if it was agreed that the matter should be dealt with by way of a

preliminary issue, to hear oral evidence from both experts on 4 November and then to make a ruling.”

13. The suggestion that I should resolve the issue of publication on 4 November was not pursued. At the start of the hearing Mr Caldecott for the Claimant submitted that the proper course in the events that had occurred was for the issue of service to be resolved by a further order of the court. This was agreed. The order I made by consent was that the Defendant’s admitted receipt of the Claim Form and Particulars of Claim from his office in India on 1 June 2010 be deemed to be valid service of these documents.
14. The experts referred to in the letter of 27 October are Dr Lawrence Godfrey, instructed by the Claimant, and Mr Henderson, instructed by the Defendant. Dr Godfrey made his first witness statement on 3 September 2010. Mr Henderson made his statement on 1 October. Dr Godfrey made his second witness statement on 11 October. On 18 October Lucy Middleton of the Defendant’s solicitors made a statement. She gave evidence of fact. She had attempted to find contact details for all of the individuals in the jurisdiction who had been identified as potential readers of the Tweet by Mr Henderson.
15. On 2 November the Defendant issued his second Application Notice. The order applied for is different from that suggested in the letter of 27 October. Mr Caldecott submits that the difference is significant. Mr Browne submits that it is not. What is sought in that Application Notice is:
 - “1. The issue of the extent of publication of [the Tweet] be tried as a preliminary issue as follows (“the Preliminary Issue”):
Mode of trial Judge alone
Time estimate: 1 day
Trial window: 6 December 2010 to 11 February 2011...
 2. The Defendant’s application to dismiss the Claimant’s claim in relation to [the Tweet] be adjourned until the Preliminary Issue has been determined”.
16. An order in those terms, submits Mr Caldecott, would have the effect of delaying resolution of this issue to the period to 11 February 2011. It also envisages two separate hearings before a direction for service of Defence takes effect (and he notes that there is no direction as to service of a Defence in the draft order). The first hearing would be the Preliminary Issue and the second would be the Application to strike the proceedings out as an abuse of process, as envisaged in the Application Notice dated 15 June 2010.
17. In response to that, I understood Mr Browne to accept that there should be at most only one hearing to deal with both issues, namely publication of the Tweet and the Defendant’s application to strike out for an abuse of process. But he submitted that it was important that the determination of the issue of publication should also be tried as a preliminary issue in the action (and not just for the purposes of the application to strike out), so that it would have been determined once and for all. If the action then proceeded to a trial by judge and jury, the Judge would be able to direct the jury as to the extent of publication. He called this a “win-win” situation: the time spent

determining the issue of publication, that is the Preliminary Issue, would have been used to good effect whether or not the strike out application was successful.

EVIDENCE AS TO PUBLICATION

18. Since I am not deciding the issue of publication, but only how that issue is to be determined, I need say very little about the evidence.
19. In his first witness statement Dr Godfrey identified the different ways in which a tweet might be distributed, whether directly or indirectly. In brief, he concludes that the number of individuals (who he refers to as “followers”) who would probably have received in the jurisdiction a direct and automatic communication of the Tweet from the Defendant at 200 to 800. He also expressed the opinion that the number of individuals who probably received a communication of the Tweet in the jurisdiction by other means substantially exceeded the number of followers. But he gives no estimate of the additional figure.
20. For the Defendant, Mr Henderson adopted a different approach. Nevertheless, on a number of points, Mr Henderson noted that there was broad agreement between the two of them as to the resulting estimated figures. Mr Henderson arrived at an estimate of 90 followers in the jurisdiction. He then discounted this by half to reflect the probability (in his view) that half the followers would not in fact have read the Tweet once they had received it, and by further amounts for other factors. He arrived at an estimate of 35 readers of the Tweet in the jurisdiction. He gives no estimate of readers other than followers.
21. In his second witness statement Dr Godfrey expresses reservations about Mr Henderson’s approach. But in the light of information which Mr Henderson had obtained Dr Godfrey reduced his own estimate of readers in the jurisdiction who received the Tweet directly to a figure around 100.
22. Miss Middleton states that she conducted internet searches with a view to finding contact details of individuals who Mr Henderson had identified as followers of the Defendant at the relevant time. She then attempted to contact them and ask them questions to establish whether they had read the Tweet or not. For many she could find no contact details. Of those she spoke to, only 2 confirmed to her that they had, and one of them said that he had been in Hong Kong at the time.

SUBMISSIONS OF Mr BROWNE

23. Mr Browne submits that the power to decide in which order, and how, issues are to be resolved is particularly important in libel actions: see the notes to the White Book (2010) p12 note 1.4.7. It can be difficult to manage libel actions, given that trial may be with a jury. This opportunity should be taken now, before the Defence is served. There has not yet been an order as to mode of trial. The evidence has been prepared. It is true it has been prepared for a challenge to jurisdiction which has not been pursued, but there is no suggestion that any further evidence on the point will become available. Such is the difference in seriousness between the meaning pleaded in respect of the Tweet, and that in respect of the Cricinfo Article, that the trial will be very different if it is confined to the Cricinfo Article.

24. Here, if the Defendant is right on the extent of publication of the Tweet in the jurisdiction, then the claim in respect of that is liable to be struck out as an abuse of process. And if it is not struck out, then there will be a saving of time and costs if the issue has been resolved by a judge alone. The issues between the experts are not ones that would be suitable to be decided by a jury, given their technical nature.
25. Mr Browne has also taken me to the history of the case to support a submission that the Claimant's case on publication is speculative, and has been revised down considerably. And Mr Browne accepts that the Court cannot assess the conflicting expert evidence on paper. It would have to be called and tested, and that can only be done at a trial, which he submits should be the trial of a preliminary issue.
26. Mr Browne referred to *Jameel* paragraph 68 where the court went on to say:-

“At the end of the day the trial will determine whether the publications made to the five subscribers were protected by qualified privilege. If they were not, it does not seem to us that the jury can properly be directed to award other than very modest damages indeed. These should reflect the fact that the publications can have done minimal damage to the claimant's reputation. Certainly this will be the case if the three subscribers who were in the claimant's camp prove to have accessed [the words complained of] in the knowledge of what they would find on it and the other two had never heard of the claimant.

69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he would have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.”

27. Mr Browne submits that the question whether proceedings are an abuse of the process or not can properly be judged on the proceedings as they are brought, and need not await the service of a defence, or any commitment by a defendant to serve a particular defence.

SUBMISSIONS OF Mr CALDECOTT

28. Mr Caldecott is critical of the exercise carried out by Miss Middleton. He accepts that it is for the Claimant to prove publication within the jurisdiction. But publication of words from the internet can be proved by establishing a platform of facts from which the tribunal can properly infer that substantial publication within the jurisdiction as taken place: *Al-Amoudi v Brisard* [2006] EWHC 1062 (QB); [2007] 1 WLR 113 para 33. Miss Middleton's method of proving publication is one that is open to a claimant, but it is not the only method. The Claimant has not chosen to rely on that method. Its limitations are that it depends upon the availability of contact

details and the willingness of individuals contacted by a solicitor to respond to the questions asked.

29. Further, Mr Caldecott submits that the republications of the Tweet for which Claimant claims that the Defendant is liable (as discussed in *Slipper v BBC* [1991] 1 QB 283, 300) are likely to be substantial. The Defendant and the Claimant are both very prominent in the world of cricket, which is itself a sport with a very large following in the jurisdiction. And the allegation in the Tweet is sensational, and upon a matter which was topical at the time the Tweet was broadcast.
30. So the court may infer that publication in the jurisdiction was much greater than the estimated figures for followers who received direct communication from the Defendant. On the Claimant's case the estimated figures, whether 100 or 35, are not the extent of publication.
31. Mr Caldecott submits that the difference between the experts has already been narrowed by Dr Godfrey's second witness statement. Once the experts have met, and the parties have considered the extent of such differences as may then remain between the experts, it may well be that a trial of the issue would be disproportionate and unnecessary. Mr Browne accepted that in the usual way the experts would be directed to have a meeting with a view to narrowing issues. Given the late stage at which the issue was raised, in particular the Defendant's change of position on 27 October, there has been no time for that meeting to take place or for any attempt to be made to reach an agreement between the parties on the issue.
32. A trial of the issue would be costly in time and money, and the difference between the experts as it stands today does not have so great a potential impact on the outcome of the case as to justify that expenditure.
33. The primary purpose of these proceedings is vindication, that is, to ensure that the allegation complained of should not be repeated in the future. For that purpose it may not be necessary to resolve any dispute there may be between the parties as to the number of readers in the jurisdiction.
34. In any event, the *Jameel* type of abuse of process does not depend on numbers alone. The Claimant has resided in this jurisdiction in the past, and expects to return to live here again. There have been recent cases in which the court has declined to strike out claims based on a direct communication to a single publishee.
35. It is well known that libel actions need to be brought to a conclusion as speedily as possible. There have already been very long delays in this case (whether or not either side is to blame for that). The strain on the Claimant in living in the present uncertainty is great (as he says in his witness statement). It is not just or fair that this state of affairs should continue.
36. Mr Caldecott submits that the application for a Preliminary Issue is premature. The Defendant has made no response to the letter of claim. The Pre-Action Protocol for Defamation paragraph 3.4 provides that the defendant should provide a full response to the letter of claim as soon as reasonably possible. Any response should include, if the claim is rejected, the defendant's explanation of the reasons why it is rejected,

including a sufficient indication of any facts on which the defendant is likely to rely in support of any substantive defence.

37. Mr Caldecott submits that the position on any possible defence is most unsatisfactory.
38. There is a witness statement made on 23 September 2010 by the solicitor for the Defendant, Mr Stephenson. It was made in support of the application to set aside service, which included the ground (not now pursued) that India was the most appropriate place for the trial of the action. The events in question in the case all occurred in India he said. He said that the witnesses with whom his firm had spoken had indicated that for the time being they do not wish their identities to be revealed. One is said to be an official of ICL who in October and November 2008 was involved in investigation of a match fixing allegation. Another is said to be a former player in an Indian team at a time the Claimant was captain. It is said that neither is currently resident in India, but both have confirmed to the Defendant's solicitors that they independently interviewed players from the team concerning events which took place while the Claimant was captain. There then follows some two pages of evidence, towards the end of which it is recorded that the Claimant denied that he had any involvement in match fixing.
39. The contents of the witness statement are such that the most that Mr Browne could say about any possible defence to the action, if it proceeded, was that "justification is a live issue". He explained that the Defendant would have to consider whether evidence could be obtained, and he referred to the possibility of evidence by video link. There was no suggestion of any other defence.
40. Mr Caldecott referred to *Jameel* para 74ff:

"74. Where a defamatory statement has received insignificant publication in this jurisdiction, but there is a threat or a real risk of wider publication, there may well be justification for pursuing proceedings in order to obtain an injunction against republication of the libel. We are not persuaded that such justification exists in the present case.

75. There seems no likelihood that Dow Jones will repeat their article in the form in which it was originally published. It has been removed from the website and from the archive....

76... we do not believe that a desire for [an injunction] has been what this action has been about, or that the possibility of obtaining an injunction justifies permitting this action to proceed."
41. Mr Caldecott submits that the situation is very different in the present case. Even if the publication in this jurisdiction can be described as insignificant, there remains a threat and a real risk of wider publication. He did not challenge the Defendant's case that the Tweet was removed after a period of some 16 hours and has not been republished in its original form by the Defendant. But the words attributed to the defendant on 8 January, as set out in the letter of 11 January, together with the evidence of Mr Stephenson referred to above, and the stance adopted by the

Defendant on the issue of justification all support the submission that there is in the present case a real risk of wider publication.

DISCUSSION

42. I prefer, and accept, the submissions of Mr Caldecott. It is true that the Claimant's case on publication of the Tweet within the jurisdiction has been revised down. But I express no views as to it being speculative. It would not be appropriate for me to express a view to that effect now. Nor do I accept that if the Defendant's evidence on publication, as it now stands, were accepted by the court, then the claim in respect of the Tweet would be liable to be struck out. That is not a matter before me now. There is more to abuse of process than the number of publishees.
43. I am not prepared to assume that the experts would reach no further agreement between them if they met in what is now the usual way under CPR 35. But even if they did not, I doubt if the claimant would require the difference between them to be determined by a trial on oral evidence. A claimant's primary concern in a libel action is vindication, not damages for what has been suffered in the past. So the damage that has occurred before the action is brought may not give an indication of the importance of the claim. Vindication includes a retraction, or a verdict for the claimant, or a judgment to the effect that the allegation complained of is false. If one of these is achieved, then it may be unnecessary to pursue a further remedy by way of injunction. So a claimant can legitimately and reasonably pursue a claim where the publication that has already occurred is limited, when his purpose is to prevent, or at least limit, further publications to a similar effect being made in the future. But that is subject to there being a real prospect of further publication if the action is not pursued. A retraction or judgment in favour of a claimant can be expected to have the effect of preventing or limiting republication, even if a claimant is not asking for an injunction.
44. I am also concerned at the idea of a trial of an issue of fact as part of (or a preliminary to) an application to strike out for abuse of process. The jurisdiction recognised in *Jameel* has proved very useful. It has been applied in a number of different circumstances in various judgments in this court. But it must not be seen as an additional hurdle which claimants must overcome, increasing the complexity and cost of litigation, instead of reducing it. Even if I had taken the view that the issue of publication would very probably have to be decided in any trial of the action, I would still have been reluctant to order that it be tried now.
45. I accept that in many cases the question whether an action is an abuse of the process of the court can be, and is, decided on the basis of the claimant's claim. But that is not always the case. In *Jameel* a defence had been served (paragraph 16) and it included what the judge had described as "defences by way of qualified privilege on various basis" (paragraph 68). The court had been invited to proceed on certain assumptions as to the numbers of readers of the words complained of. If there were to be no defence of justification, then it is even less likely that there would be any advantage in the trial of an issue as to publication.

CONCLUSION

46. For these reasons I dismiss the applications made by the Defendant. I invite the parties to agree directions for the service of a Defence and the further progress of the action.