Case Nos: IHJ/10/0129
IHJ/10/0186

Neutral Citation Number: [2010] EWHC 1068 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2010

Before :

MR JUSTICE TUGENDHAT

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Between :

Hays Plc	**Claimant**
- and -	
Jonathan Hartley	**Defendant**

- -
- -

Mr David Sherborne (instructed by **Schillings**) for the **Claimant**
Mr David Price (instructed by **David Price Solicitors & Advocates**) for the **Defendant**

Hearing dates: 5 and 6 May 2010

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Judgment

Mr Justice Tugendhat :

1. There are two applications in this libel action. On 17 February 2010 the Claimant gave notice of its application to strike out of the Defence, or obtain summary judgment upon the Defendant's defence of qualified privilege, on the ground that it discloses no reasonable ground for defending the action. On 12 March the Defendant gave notice of his application to strike out the whole claim as an abuse of process, on the ground that it reveals no real or substantial tort and can yield no benefit to the Claimant, alternatively on the ground that it is brought for the dominant purpose of achieving some collateral purpose.

THE PARTIES

2. The Claimant is a substantial public company well known for carrying on business as a specialist recruitment agency.

3. The Defendant carries on business as an independent news and press agency under the name KNS News (formerly known as Ketts News Service). By means of websites he invites members of the public to make known to him stories which he then seeks to publicise by supplying them to newspapers and other publishers. He had worked as a journalist on local and national newspapers for eight years before joining Ketts News Service, and had been a publicist for five years by the time of the events in question in this action. He has made a witness statement in which he describes KNS as a small service business dependent on himself and his business partner. He states that his only asset of any substance is his family home, where he lives with his wife and two children, and which is subject to a substantial mortgage. It will be necessary to consider the nature of his business in more detail later, in relation to his defence of qualified privilege.

4. The Claimant in this action was formerly the employer of three employees ("the Employees").

CHRONOLOGY

5. In 2008 the Employees made serious allegations about the Claimant. The Claimant's case is that the allegations meant that it had committed or condoned gross acts of racism on the part of its senior employees, of which three instances in particular are given ("the Allegations of Racism"). The Employees advanced these allegations and other allegations in proceedings they brought against the Claimant in an Employment Tribunal in December 2008. Before that, in July or August 2008, they had communicated to the Defendant some of their complaints.

6. On about 7 January 2009 the Defendant in turn communicated the Allegations of Racism to a journalist ("the Journalist") on the Sunday Mirror ("MGN"). Subsequently, on about 9 January 2009, the Employees themselves communicated these allegations to the Journalist.

7. On 11 January 2009 MGN published these allegations in an article in the Sunday Mirror ("the Article"). The Article is in the form of a report of the proceedings commenced in the Employment Tribunal under the heading "'KKK CHANTS' AND RACIST ABUSE CLAIM AT TOP FIRM But recruitment bosses fight 3 black

workers' tribunal case". The Article also sets out the Claimants' side of the case, namely that "These allegations are completely untrue". The Article also sets out what the Claimant's defence to the each of the three allegations is expected to be.

8. For the purposes of the law of libel and slander these various communications (other than the complaint in the Employment Tribunal) constituted a number of publications, both of libels and slanders, each of which may give rise to a separate cause of action. These included publications as follows:

   i) The publications by the Employees to the Defendant

   ii) The publications by the Defendant to the Journalist (a re-publication)

   iii) The publications by the Employees to the Journalist

   iv) The publications by MGN to the world in the Sunday Mirror (also a re-publication).

9. It is important to state at once that the Allegations of Racism were a very serious matter for the Claimant. This follows from the fact that racist conduct is unlawful, and is seriously so. Such allegations might impede the recruitment of the best qualified employees, or make people reluctant to deal with the Claimant. These are the sort of allegations which persuaded a majority of the House of Lords that a trading corporation such as the Claimant should be able to recover general damages in defamation without pleading or proving special damage: see eg *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2007] 1 AC 359 [16]-[17] ("*Jameel v WSJ* ").

10. On 31 March 2009 the Claimant sued the Employees ("the Employee libel claims"). The causes of action it sued on were the publications orally and in writing by the Employees to the Journalist on 9 January. The words complained of were the Allegations of Racism. It pleaded the re-publication by MGN on 11 January, but not as a separate cause of action. The Claimant pleaded that that republication was a consequence of the publication of 9 January for which it claimed damages. The Claimant did not plead the publication by the Employees to the Defendant in July or August 2008, whether as a cause of action, or as a consequence giving rise to damage. But the Claimant did plead the publication to the Defendant in July or August 2008 as part of their case that the Employees were responsible for the republication by MGN on 11 January.

11. On 5 June 2009 the Employees filed their Defence, which is settled by Leading and Junior Counsel. They denied that they were "responsible for" the publication to the Journalist on 9 January 2009. They pleaded defences of justification and qualified privilege. As part of the plea of qualified privilege they identified the Defendant, and set out their account of their contacts with him in paragraph 10, which has 36 sub-paragraphs. The case is not easy to follow. At sub-paragraph 10.4 they said that they had contacted the Defendant in August 2008 "to see if there would be some media interest in the story". They said the Defendant suggested that they contact him again after they had commenced proceedings in the Employment Tribunal by filing Form ET1. They stated that they had contacted the Defendant again as suggested, and had

sent him their Form ET1, and they set out an account of conversations between each of them and each of the Defendant and the Journalist.

12. Their account of the conversations between themselves and the Defendant and between themselves and the Journalist covers sub-paragraphs 7 to 32. The gist of their case seems to be that although they each had a number of such conversations, and the Journalist proposed sending a photographer, no one mentioned to the Employees that it was proposed to publish the Article, and that they did not authorise the publication of the Article. They admitted sending the Form ET1 to the Defendant, but not to the Journalist.

13. However, in sub-paragraphs 33 to 36 they advance what I take to be an alternative case, namely the defence of qualified privilege. I make no comments on the merits of the plea. It was set out as follows:

> "[The Employees] spoke to [the Defendant] and [the Journalist] in order to provide them (and the public) with information about the proceedings they had brought against the Claimant under the Race Relations Act 1976. [The Employees] wanted the public to be made aware of the racial discrimination and harassment that they had been subjected to by employees of the Claimant and the failure of the Claimant appropriately to address the Defendant's concerns… In all the circumstances, [the Employees] had a common and corresponding interest in the subject matter of the words complained of. Further and alternatively, [the Employees] published the words complained of, if they did, which is denied, responsibly and in the reasonable protection of their own interests and [the Journalist] had a corresponding and legitimate interest in hearing and receiving the same".

14. There was thus an issue in the Employee libel action as to whether the Employees had spoken the words complained of as a slander, and as to whether they had published the libel to the Journalist, or authorised the Defendant to publish it to the Journalist.

15. On 14 July 2009 the Claimant sued the Defendant in this action. The causes of action it sued on were the publications orally and in writing by the Defendant to the Journalist on about 7 January. The words complained of were in substance the Allegations of Racism. The Claimant again pleaded the re-publication by MGN on 11 January, but (again) not as a separate cause of action. The Claimant pleaded the republication by MGN in support of its claim for damages. It said that the republication was a consequence of the publication of 7 January for which it claimed damages.

16. On 18 September 2009 the Defendant filed a Defence. He admitted the publication by himself to the Journalist of the words complained of as the libel. He raised a defence of qualified privilege. He denied that he was liable for any damage caused to the Claimant by MGN's publication of the Article. He stated that the claim against himself was an abuse of the process of the court.

17. On 26 October 2009 the Claimant filed a Reply. The Claimant denied that the Defendant could avail himself of the defence of qualified privilege, and pleaded specifically to a number of the matters of fact pleaded in support of that case in the Defence. But the Claimant does not allege malice in any form. The Claimant is critical of the Defendant's conduct, but does not allege that the Defendant knew that the words complained of were false, or was reckless as to whether they were true or false.

18. On 19 November 2009 the hearing in the Employment Tribunal commenced. On 8 December 2009, after 12 days of the Employees' case, those proceedings were stayed to enable the parties to carry into effect an agreement by which they had settled the disputes between them, including the Employee libel action ("the Settlement Agreement"). The terms of the Settlement Agreement included a provision for a statement to be made to the public ("the Public Statement") as follows:

> **The Agreed Public Statement**
>
> a. KS, RB and CD [ie the Employees] confirm they have withdrawn their claims at the employment tribunal without any money being paid to them by Hays Plc.
>
> b. Hays Plc confirms it has withdrawn and discontinued its defamation claim at the High Court without any money being paid to it by KS, RB or CD.
>
> c. KS accepts that there is no evidence to suggest that the spoken words or physical actions in a meeting dated July 2007 were motivated by racial discrimination.
>
> d. KS, CD and RB accept that there is no evidence to suggest that either the words spoken by or the physical actions displayed by Hays Plc staff members and contractors at a meal dated 26th June 2008 were motivated by racial discrimination.
>
> e. The parties acknowledge that whilst a viral email relating to President Obama (which entered Hays Plc email system from external sources on 5th November 2008) was racially offensive, the matter was fully investigated and properly dealt with by Hays Plc.
>
> f. KS, CD and RB accept that there is no evidence to suggest that Hays Plc is an institutionally racist company.
>
> g. The parties wish to express regret that their employment dispute entered the public domain via an article on the Sunday Mirror published on 11 January 2009."

19. The Article had appeared not only in print but also on the MGN website. The terms of the Public Statement were added by MGN to its website as an update to the web version of the Article. The Settlement Agreement provided that any media organisation which had published anything referring to the Employees' claim against

the Claimant, or the Employee libel action was to be provided by the Claimant with a copy of the Public Statement. But Mr Price informed me that it was the Defendant who in fact provided a copy to MGN, which resulted in its inclusion on their website.

THE EFFECT OF THE SETTLEMENT AGREEMENT

20. The Claimant might have taken the practical view that with the Public Statement it had either achieved its objective, or had come as near to doing so as was reasonably attainable in the circumstances. While paragraphs c to f of the Public Statement could be more categorical (instead of saying only that there was no evidence), taken in conjunction with the statement in paragraph a, they are an admission by the Employees that the Allegations of Racism were without foundation.

21. However, if taking that view meant that the Claimant discontinued the action against the Defendant, the consequence would be an exposure to the risk of an adverse costs order. Claimants who discontinue normally have to pay the costs of the defendant. The Defendant is represented under a CFA. The potential exposure to costs on each side in this action is now well into six figures. The Claimant's estimated future costs as at 2 November 2009 were £135,000, and much has happened since then. In reality the Claimant has no expectation of recovering any significant part of its costs against the Defendant if it wins. But it naturally wishes to avoid paying the Defendant's costs, which include the CFA uplift.

22. The Claimant has decided to carry on with the action against the Defendant. I have to decide whether it is entitled to do that.

23. Before addressing that question I remind myself of two matters. First, the Claimant is a corporation, and second the Claimant has decided not to sue MGN, and has given reasons for that decision.

24. The fact that the Claimant is a corporation is highly material for two reasons. First, in this case the Claimant does not claim to have suffered any financial loss. Its claim is for general damages. While the same principles as to damages apply in respect of individuals and corporations for damage to reputation, a corporation is not entitled to damages for injury to feelings, and cannot recover aggravated damages. Accordingly, as Mr Sherborne accepts, any damages that might be awarded in this action must be kept strictly within modest bounds. See *Jameel v WSJ* [27] (Lord Bingham of Cornhill) and *Collins Stewart Ltd & Anor v The Financial Times Ltd.* [2005] EWHC 262 (QB); [2006] EMLR 5 [35].

25. The second reason why the fact that the Claimant is a corporation is material is that it is not said in this case that the words complained of are an infringement of any right under Article 8 of the European Convention on Human Rights. Companies enjoy certain rights under Art 8, and in some cases damage to reputation can be an interference with a person's rights under Art 8. But that is not this case. It follows that the only Convention right engaged in these proceedings is the right of the Defendant to freedom of expression under Art 10.

26. The Claimant did not have to say why it has not sued MGN. A Claimant is free to choose who to sue and who not to sue. But its solicitors have given the reason. In his second witness statement dated 29 April 2010, Mr Dunlavy states:

> "… the Claimant chose not to [sue MGN] because there was a potential *Reynolds* defence available to the Sunday Mirror as well as a potential defence of neutral reportage. The Defendant has always known this … since it was set out in the witness statement of Ms Afia served on the Defendant on 22 July 2009…"

27. The Claimant has given little away by this candour. Each side in this action is represented by highly experienced specialist lawyers. That assessment of the strength of MGN's position is one that any such lawyer is likely to have reached. At times Mr Price has referred to it as a concession. I do not put it that high. I regard what Mr Dunlavy states as an assessment, which is realistic, of what is likely to be the position.

28. The Defendant could have pleaded in his Defence that there is a *Reynolds* or neutral reportage defence to the republication by MGN. He has not in fact done so. What he has pleaded (in paragraph 23 of his Defence) is:

> "Further the Claimant has made no complaint about the Article and has indicated through the witness statement of … [Ms] Afia that 'the Article, whilst defamatory of the Claimant, did at least include in part the Claimant's response to the allegations as a result of the Sunday Mirror having contacted it prior to publication'".

29. Mr Price has indicated that should the outcome of the Defendant's application turn on the point, he would apply for permission to amend the Defence to plead that there is a defence of *Reynolds* privilege or neutral reportage in respect of the republication by MGN. But the Defendant would prefer not to have to assume that burden if he does not have to, and submits that he should not be required to do that. I cannot, as at present advised, see any basis for refusing such an application if it were made. The reality of the situation may well be that the Claimant would have no real prospect of defeating a defence of *Reynolds* privilege or neutral reportage if it were raised by the Defendant in respect of the republication by MGN. But I do not make that assumption. However, the admitted balance, and references to the case of the Claimant, in the publication by MGN are such that any damages that might be awarded against MGN, or against the Defendant in respect of the republication by MGN, would in my judgment be modest.

30. On 16 December 2009 Master Fontaine made an Order for Directions in terms agreed between the Claimant and the Defendant.

31. On 18 January 2009, following the issue of an Application Notice by the Defendant, the Claimant disclosed the Settlement Agreement. On the same day solicitors for the Defendant wrote asking (in the light of that agreement and the Public Statement) what the Claimant hoped to achieve by pursuing its claim against the Defendant. On the same day solicitors for the Claimant replied. They acknowledge that by the Public Statement the Claimant had received "some vindication", but said that the Claimant had not received any damages, and that it was now seeking damages and vindication from the Defendant. They pointed out that the claims against the Employees and against the Defendant are on different causes of action: the Employee libel action is on the publication by the Employees, the present action is on the publication by the

Defendant. They stress that the republication in the Article is pleaded in respect of damages only and not as an independent tort.

32. In the Order for Directions disclosure was ordered. It in fact took place in January 2010. The Order also fixed a trial window between 13 April and 2 July 2010. The next step ordered was that the Claimant attend the Clerk of the Lists to fix a trial date within the Trial Window, such appointment to be not later than 29 January 2009. The Claimant did not do this. What the Claimant did do was to issue its application of 17 February. If successful, that would limit the scope of the action, but it would not dispose of the action one way or the other. In effect the Claimant made clear an intention to press on with the action to trial (if no settlement were reached meanwhile).

THE PRINCIPLE OF ABUSE OF PROCESS

33. The Defendant's case on abuse of process is advanced on two separate bases. First, he submits that what is alleged in this claim did not ever, alternatively does not now, amount to a real and substantial tort (*Jameel v Dow Jones & Co Inc)* [2005] QB 946. Second, he submits that the Claimant has pursued this claim for a purpose collateral to the permissible purpose of pursuing a defamation action, but for which it would not have sued the Defendant (*Goldsmith v Sperrings* [1977] 1 WLR 478).

34. The principle established in *Jameel v Dow Jones* is as follows;

> "40 We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the defendant may well be to challenge the claimant's resort to English jurisdiction or to seek to strike out the action as an abuse of process. We are shortly to consider such an application.....
>
> 54 … An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. …
>
> 55 There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention

> rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.
>
> 56 We do not believe that *Duke of Brunswick v Harmer* 14 QB 185 could today have survived an application to strike out for abuse of process. The Duke himself procured the republication to his agent of an article published many years before for the sole purpose of bringing legal proceedings that would not be met by a plea of limitation. If his agent read the article he is unlikely to have thought the Duke much, if any, the worse for it and, to the extent that he did, the Duke brought this on his own head. He acquired a technical cause of action but we would today condemn the entire exercise as an abuse of process....
>
> 69 If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will 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.
>
> 70 … 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. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR".

35. The proper purpose of defamation proceedings is to vindicate and protect the claimant's reputation, *(Jameel v WSJ* [24]). The principle established in *Goldsmith* was explained by Bridge LJ at p503

> "… 'court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused' [*In re Majory* [1955] Ch. 600, 623]….

> … what is meant by a "collateral advantage"? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land - these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by product of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it."

36. I must also bear in mind the words of Scarman LJ at p498G:

> "Neither wealth nor power entitles a man to censor the press. If, however, his purpose be to vindicate and protect his reputation, the use of all remedies afforded him by the law for that purpose cannot be an abuse of the court's process. It is never easy to determine a man's purpose. Ordinarily this task of judgment is tackled only after trial. In the instant case, we are being asked to pass judgment on the respondent's purpose upon a preliminary application, the effect of which, if successful, will prevent him bringing to trial actions in each of which (it was admitted in argument) he is pleading a cause of action recognised by the law. It is right, therefore, that to obtain before trial the summary arrest of a plaintiff's proceedings as an abuse of the process of the court, the task of satisfying the court that a stay should be imposed is, and should be seen to be, a heavy one: see *Shackleton v Swift* [1913] 2 K.B. 304, 311-312.
>
> Unless the court is satisfied, a stay is a denial of justice by the court - a situation totally intolerable."

37. In addition, Mr Price submits that today the continuation of these defamation proceedings infringes the Defendant's right to freedom of expression. That argument was advanced in *Goldsmith*. Bridge LJ held that it was not a consideration he could take into account in that case.:

> "If the true issue be, as upon the authorities it must be, what was (and is) the purpose of Sir James Goldsmith in pursuing the rights given him by law against the secondary distributors, Sir James Goldsmith is not putting the press in peril. If his purpose be illegitimate, his actions will be stayed. If it is not, he is exercising rights given him by law. If, therefore, there be in these proceedings a threat to press freedom, the threat comes, not from Sir James Goldsmith, but from the law itself, in that it provides a cause of action against distributors as well as publishers. That is a matter for Parliament, not the courts. So long as the cause of action exists, it may be invoked unless it can be shown that it is being used to secure a collateral advantage".

38. However, I must take that argument into account for the reasons given in the passage from *Jameel v WSJ* cited above. Since *Goldsmith* Parliament has intervened by the Human Rights Act 1998.

THE CLAIMANT'S PURPOSE

39. As Mr Price observes, there is no evidence before me from an officer of the Claimant, whether direct or indirect. The evidence is from the Claimant's solicitors. The two witness statements of Mr Dunlavy are expressed entirely in objective terms. He does not identify any officer or employee of the Claimant as his source. The facts he verifies are all ones which he can set out from information available either publicly or from his conduct of the proceedings. He refers to what he says are the Claimant's rights.

40. It thus appears to be common ground that, in the words of Scarman LJ at p499F:

> "[the Claimant's] purpose must be objectively ascertained, that is by reference to what a reasonable man placed in his situation would have in mind when initiating or pursuing the actions".

41. Mr Price took me in detail through the correspondence and the steps taken by the Claimant in the action with a view to establishing that the Claimant's purpose in the present case was only to obtain information and documentation to assist in its rebuttal of the defence in the Employee libel action. He submitted that the proper course for obtaining evidence was by the procedures for obtaining evidence from third parties, which normally involves the applicant paying the third party's costs of providing the evidence. The Employee's denial of responsibility for publication was too weak to justify suing the Defendant.

42. Mr Sherborne submitted that the purpose of suing the Defendant was to obtain vindication of the Claimant's reputation. The Employees' defence was weak, but the fact is that they did deny publication, and they appeared to be asserting that they had acted at the instigation of the Defendant. The claim against the Employees might have

failed. The claim against the Defendant stood a good prospect of success. That the libel had been published to the Journalist by the Defendant was the Employees' case, and it was in due course admitted by the Defendant. Vindication could be obtained in the claim against the Defendant.

43. I accept that one of the purposes for which the Claimant sued the Defendant, and one of the advantages they in fact obtained from that course, was to obtain evidence as to the publication of the words complained of by the Employees. But I do not accept that that was the main purpose, and I do not accept that, in the circumstances of this case, that purpose was collateral or illegitimate.

44. All litigation is inherently unpredictable to a degree. The Employees' denial of publication, and their claim to have been instigated solely by the Defendant and the Journalist, were each implausible, but not impossible. The allegations against the Claimant were very serious. The Claimant sued the Defendant for the legitimate purpose of vindicating its reputation, and did so in good faith.

45. That is my finding in relation to the period up to the Settlement Agreement. Different considerations may apply to the continuance of the action following that settlement. I shall consider below in more detail what remains for the Claimant to achieve in this action. But as to the Claimant's purpose, I have little doubt. Its main purpose must be to limit or avoid an exposure in costs that might follow if it were to discontinue. That may or may not be a sufficient reason for it to be allowed to proceed in accordance with the principle in *Jameel v Dow Jones*. But it is not a collateral purpose such as is referred to in *Goldsmith*. And Mr Price does not submit that it is.

REAL AND SUBSTANTIAL TORT

46. It is the Defendant's case that, in the action against himself, the Claimant can in practice achieve no more than they have already achieved by the Public Statement. He stresses that the publication relied on as against himself is to a single publishee, the Journalist. He states in his witness statements that, while he believed the allegations of the Employees to be credible, he does not know whether they are true or false, that following the Public Statement it appears that they are not true, and that any withdrawal of the allegations by himself would be meaningless. The only way in which the Claimant's reputation is said to have been damaged by the Defendant is by the publication to the Journalist and the republication in the Article. So far as the Article is concerned, MGN has put the Public Statement on the Sunday Mirror website, and so far as the Journalist is concerned, the injury to the Claimant's reputation is minimal, and in any event a written withdrawal by himself would be pointless.

47. In order to see what is now at stake in this action it is helpful to review the correspondence between the parties.

48. The Claimant (through its solicitors) first wrote to the Defendant on 24 June 2009. At that time they were concerned with the Defendant both as potential source of evidence and as potential defendant to new proceedings. They made requests for the preservation of evidence which the Defendant acceded to. They asked to be told the Defendant's case on the Employees' denial of responsibility. He declined. They asked him to "undertake not to publish any material that is defamatory of our client". On 1

July Mr Price replied to that request adopting the Claimant's own form of words: "Our client has no intention of publishing anything that is defamatory or your client".

49. On 7 July 2009 the Claimant wrote to the Defendant asking that he make an apology and statement in open court, "indemnify our client for all its costs in this matter" and pay "very substantial damages", and an undertaking never to repeat the allegations complained of. Mr Price wrote on 14 July stating the Defendant had a defence of qualified privilege for his communications with MGN.

50. There then followed two ancillary disputes between the parties. The Claimant issued its Claim Form and Master Fontaine made an order under CPR 5.4C on 20 July 2009 preventing access to the court file by a non-party. The Order also contained an injunction: "The Defendant shall not disclose a copy of any of the statements of case in these proceedings to any third party, save for the purposes of these proceedings". This is surprising. A Master has no jurisdiction to grant an injunction, and an application for such an injunction should not be made without notice unless there is a compelling reason. The witness statement of Ms Afia did not draw either of these points to the attention of the Master. Nor does it appear to me to include any evidence of a threat of publication by the Defendant such as would have entitled the Claimant to an injunction on the merits of the application.

51. On 9 September the Defendant gave notice that he would apply to set aside the Order of 20 July. Following inconclusive correspondence on this point, he issued an application notice on 16 November which was dismissed by Master Eastman on 20 November. There then arose a second dispute, when the Claimant declined to provide the Defendant with a copy of the Settlement Agreement. On 21 December 2009 Sir Charles Gray gave permission to the Defendant to appeal the orders of Master Fontaine of 20 July. On 11 January 2010 the Claimant did disclose a copy of the Settlement Agreement and on 14 January the Claimant consented to the discharge of the Order of 20 July 2009. These two disputes gave rise to costs, and to a substantial correspondence as to who was to pay them, which the Claimant eventually agreed to do.

52. On 18 January 2010 Mr Price asked, in the light of the Public Statement, what the Claimant hoped to achieve by pursuing the claim against the Defendant. This and the Claimant's response is set out in paragraph 31 above.

53. On 4 March Mr Price for the Defendant wrote again to ask what these proceedings could now achieve for the Claimant. He threatened to apply to strike out the claim. He wrote: "there is no realistic threat of any further publication by our client and he made clear before proceedings were issued that he had no such intention".

54. On the same day solicitors for the Claimant re-iterated that the Claimant sought vindication and damages. They added the Claimant was also entitled to an injunction against the Defendant. They asked in open correspondence for damages of £5,000, a letter withdrawing the allegations, and undertaking not to repeat the allegations, and costs.

55. On 11 March 2010 solicitors for the Claimant wrote that, in addition to the vindication and damages previously referred to, the Claimant was entitled to an injunction. They said the damages were of secondary importance. They did not accept

that there was no realistic threat of any further publication by the Defendant. They said that the persistence with which the Defendant pursued his application to set aside the Order of 20 July 2009 and the presence of a journalist at another hearing suggested otherwise. They said that the statement in Mr Price's letter of 1 July (paragraph 48) was unclear, because the Defendant had not admitted that the words complained of were defamatory. They repeated their previous requests and quantified their claim for damages at £5,000.

56. On 29 March Mr Price wrote in terms which the Claimant accepts are unambiguous. He wrote that the Defendant has no intention of publishing the allegations of which the Claimant complains.

57. There is nothing wrong in a claimant seeking an undertaking from a defendant not to repeat words complained of, whether or not the claimant would be entitled to an injunction. Defendants commonly offer such an undertaking, especially if they have no intention of repeating the words. But as a matter of law, a claimant is not entitled to an injunction unless there is good ground for apprehending a wrongful repetition: *Jameel v Dow Jones* [74]-[76].

58. As from 29 March, the Claimant accepts that the pursuit of an injunction can no longer be relied upon as a legitimate aim for the Claimant to pursue. In my judgment it never was. The Defendant's involvement in this affair is in his business capacity. He has no personal knowledge of the matters which are the subject of the words complained of. His only interest in any republication would be on a business basis. From the date on which this action was commenced there was no realistic prospect of the Defendant repeating the words complained of. He would have been very unwise and unreasonable to do so before the Settlement Agreement. It would have been the height of folly for him to do so after the Public Statement. There is nothing to suggest he would do that.

59. That leaves vindication and damages as the only remedies which the Claimant can pursue. Mr Sherborne referred me to a number of well known cases on the jurisdiction to strike out a claim for abuse of process. In none of them are the significant facts at all similar to those in the present case. In my judgment the significant facts are that the Claimant is a corporation, that the Defendant is a professional intermediary and not the originator of the words complained of, that the action is brought on a publication to a single individual, the Journalist, that the republication gave proper coverage to the Claimant's case (so any damages would be likely to be modest) and that the Claimant has received vindication both from the originators of the words complained of (in the form of the Public Statement) and from MGN (in the form of the republication on their website of the Public Statement). That damages would on any view be modest is accepted by Mr Sherborne. In so far as the damages may have value as money they are not worth pursuing. If the Claimant pursued this action to trial and won, there is little prospect that it would be able to enforce any award that it might have. The Defendant would be unable to pay any significant part of the damages and costs that might be awarded against him. Damages in defamation actions have an additional value: they are symbolic. They mark the seriousness of the defamation and are a part of the vindication. But in the present case, the sum itself could not be so high as to add any value in terms of vindication to the Public Statement.

60. For these reasons alone I would hold that the pursuit of this action after the Settlement Agreement was and is an abuse of the process of the court. There is simply nothing of value that it can achieve for the Claimant.

61. Finally, I consider the Art 10 rights of the Defendant. In the event nothing turns on this in my judgment. But in case I am wrong in my conclusion so far (namely that there is no further legitimate aim to be pursued by the Claimant) I set out my view on this point. If an award of £5,000 is a legitimate aim for the Claimant to pursue in this action at this stage, then this action is in my view not a proportionate means of pursuing it. As argued by Mr Comyn QC in *Goldsmith*, and as established in *Jameel v Dow* Jones [40], a libel action can constitute an interference with the freedom of expression of the defendant. I find that to be so in the present case. The costs and the demands on the limited resources of the court that would be involved, and the devastating effect on the Defendant, would not be commensurate with a (probably irrecoverable) award in favour of the Claimant, having regard to the vindication already achieved by the Claimant in the form of the Public Statement. The Defendant's role in the matter was a narrow (though important) business role. The Claimant's solicitors speak of the role of a publicist in harsh terms: Mr Dunlavy's witness statement refers to him as "hawking stories around the press for commercial gain… for his own financial reasons" (first witness statement paragraph 8). But that is simply his personal view. Mr Dunlavy also rightly refers to the Defendant as a journalist (second witness statement paragraph 4), although unlike most journalists, the Defendant regards himself as providing a service to the source of story and not just to the newspaper which circulates the story to the public. In my judgment journalists may work in many different ways, and it is not just journalists who provide their services exclusively to the media who are entitled to be regarded as serving a function which may be of benefit to the public.

62. The court now recognises that the defences available to a defendant in defamation proceedings are not the only means by which the law gives effect to the principle of freedom of expression. As the court noted in *Jameel v Dow Jones* [55] the Claimant must be pursuing the legitimate purpose of protecting its reputation. If it is not doing that, or if the means by which it is doing it are disproportionate, the court may have regard to the principle of freedom of expression in deciding whether or not the claim should be allowed to go forward at all. For example, in *Dee v Telegraph Media Group Ltd*. [2010] EWHC 924 (QB) (28 April 2010) [29] Sharp J had regard to Art 10 in deciding an issue on meaning in a libel action. As the court said in *Jameel v Dow Jones* [40], it will be rare that the pursuit of a legitimate libel action by a claimant is held to be a disproportionate means of pursuing the aim of vindication of the claimant's reputation. But on the particular facts of this action, I find that to be the case here.

63. In holding that the pursuit of this action is an abuse of process, I mean no criticism of the Claimant or their lawyers. The word "abuse" has a special meaning in the law and implies no subjective wrongful state of mind on the part of the Claimant or its lawyers. I have already recorded my view that the Claimant was faced with a seriously defamatory allegation. It had every reason to pursue its legal rights, and to do so forcefully. It chose, quite properly, not sue the Defendant in the first instance. Claimants in defamation actions are normally careful in their choice of whom to sue. They do not sue all the many potential defendants that are available in most cases. But

once the Employees had denied responsibility for publication, it was prudent for the Claimant to preserve its rights against the Defendant.

64. But the fact that the Claimant acted reasonably in preserving its rights and suing the Defendant, is not a reason why it should be entitled to continue pursuing the Defendant once it has become clear that it has achieved its objective in the action against the Employees. If the Employees had been good for the money, it might have been expected that the Claimant would have sought to recover from the Employees the costs that they would incur in discontinuing their action against the Defendants. If they had taken their action against the Employees to trial, and won, they might have expected to obtain an order that the Employees pay the costs of the Claimant and the Defendant. It has always been the Claimant's case that it sued the Defendant because it was prompted to do so by the denial of publication pleaded by the Employees. But the fact that Claimant chose not to do that (no doubt for good reason) is not a reason why the Defendant should have to continue defending this action.

DAMAGES FOR REPUBLICATION BY MGN

65. Mr Price advanced a separate argument that it would be contrary to Art 10 for the Defendant to be held liable for the republication by MGN on the particular facts of this case, namely where it must be taken that MGN would have had a defence under *Reynolds* or neutral reportage.

66. The argument required consideration of *McManus v Beckham* [2002] EMLR 40 [39], *Slipper v BBC* [1991] 1 QB 283, *Clift v Timms* [1997] QCA 61, *Belbin v McLean* [2004] QCA 181 [30] and *Baturina v Times* [2010] EWHC 696 [52]-[54]. He submits that where the commercial republisher has a *Reynolds* defence, or may have one, and is not sued, it is not consistent with Art 10 that a journalist who played the role of an intermediary should have to bear the burden of raising and proving the republisher's defence. He may not have access to the witnesses and other evidence to enable him to do so.

67. In *Collins Stewart Ltd & Anor v The Financial Times Ltd*. [2005] EWHC 262 (QB); [2006] EMLR 5, 112-3 paragraphs [24]-[28] Gray J made some important observations on the difficulties that may ensue when a claimant chooses to sue on a republication only in support of a claim for damages, and not as a substantive cause of action. This is a difficult topic. Since I do not have to address it, it is better that I should not do so.

CLAIMANT'S APPLICATION TO STRIKE OUT QUALIFIED PRIVILEGE

68. This too is a subject which I am not required to address, given the conclusion that I have reached. But I shall state my conclusions shortly.

69. Mr Price submits that the occasions on which the Defendant published the words complained of to the Journalist were protected by common law duty and interest qualified privilege (see *Adam v Ward* [1917] AC 309). He also submitted that they gave rise to a *Reynolds* privilege. Both submissions involve a development of the law. It seemed to me that if he succeeded on *Reynolds* he did not need duty and interest privilege, and if he failed on *Reynolds* privilege, he could not succeed on duty and

interest privilege (see *Seaga v Harper* [2008] UKPC 9; [2009] 1 AC 1 [15]). So I considered only the argument on *Reynolds* privilege.

70. The gist of the case pleaded by the Defendant is as follows. The subject matter of the words complained of was a matter of public interest. This much was accepted by Mr Sherborne for the purposes of this hearing only. The Defendant is a journalist who solicits and receives from members of the public stories that they wish to be publicised by the press or other media. The Defendant's practice, which he followed in this case, is to seek to filter out stories which are obviously false, and to forward them on to another journalist to be given further investigation. For example in the present case, the Defendant did nothing about the story when it was first offered to him in about August 2008, but waited until he received the information in the form in which it was submitted to the Employment Tribunal. The Defendant does not assume all the tasks that would have to be performed before publication to the world at large could be held to be responsible journalism. For example, he does not check the story with the subject of the story whom might be defamed. He has established relationships with other journalists. He does not publish to the world at large, and his understanding with the journalists to whom he does publish stories is that they, or the organisations for which they work, will carry out the tasks necessary to be performed if publication to the world is to be counted as responsible journalism. He published the words complained of to the Journalist and through him to MGN on that understanding. They agreed that MGN would need to take legal advice. He was justified by events: MGN did publish to the world, and they did so in a form which met the requirement of responsible journalism.

71. Mr Price submits that it is not necessary for the Defendant to have acted as if he was the person who made the publication to the world at large. He acted responsibly in confining his publication to one publishee in the circumstances and on the understanding set out above. That is sufficient. The Strasbourg Court has recognised the need to give protection to sources in the different context of disclosure of sources. But the same principles require *Reynolds* privilege to be afforded to at least an intermediate source such as the Defendant. See *Financial Times v UK* Application no 821/03 [2009] ECHR 2065 [59]. *Reynolds* privilege may in principle extend to any person who publishes material of public interest in any medium: *Seaga* [11].

72. Mr Sherborne submits that this argument is hopeless. He submits that *Reynolds* represents an exception to the general principle that a publisher of a libel is liable for the republication unless he can prove the truth of the allegations or some other established defence. On the facts of this case the Defendant's argument has no application, because on his own case he looks to the originator of the story as his principal. The Employees obviously had an axe to grind, but the Defendant did not check the story or ask the Claimant for its side of the case. The Defendant's argument is authoritatively closed to him by *Malik v Newspost* [2007] EWHC 3063 (QB). He is in effect to be treated as the originator of the words complained of, and the originator cannot claim *Reynolds* privilege. Anyone who claims *Reynolds* privilege must satisfy all the requirements for responsible journalism set out by Lord Nicholls.

73. Mr Price submits that *Malik* is distinguishable. In that case the defendant Mr Scott was the writer of a letter published in a newspaper. The action was brought on the publication to the world at large, not (as in the present case) on the publication to the single addressee of the letter. The letter was a reader's letter intended for publication

in the form in which it was sent, and the writer was not performing the function of a journalist even on an ad hoc basis (see paragraphs [7]). So there was no reason for the claimant in that case to sue the writer of the letter on the publication to the single addressee.

74. In my judgment the point raised in the Claimant's application is not one which I ought to decide on an application to strike out or for summary judgment.

75. In *Reynolds* the first defendant was the corporate commercial publisher, Times Newspapers Ltd. There were three personal defendants, two said to be the writers of two articles, and the editor. During the trial the action was discontinued against one of the personal defendants on the basis that he bore no responsibility ([2001] 2 AC at p134C). The plaintiff succeeded against all the remaining defendants, obtaining an award of 1p. In giving the leading opinion Lord Nicholls did not need to consider the roles of the two remaining individual defendants. His conclusions at [2001] 2 AC 204-5, including the well known list of ten matters to be taken into account, are not directed to each of the defendants individually. On the facts of that case, all the remaining defendants failed on their appeals.

76. But in the present case it is necessary to consider what might have happened if the corporate defendant D1 had succeeded, on the basis that (acting through its representatives) it had satisfied the requirements of responsible journalism. Suppose the individual defendants worked on the story performing different roles, so that only one of the individual defendants D2 had taken steps to verify the information and sought comment from the subject of the story, while the other D3 had done neither of these things, but had confined himself to receiving information from the source or sources. The appeals of D1 and D2 would then have succeeded. Would the appeal of D3 failed? My provisional view is that that would be contrary to the principles that the House of Lords was formulating. I see no principle on the basis of which each defendant has individually to satisfy all the criteria for responsible journalism, regardless of whether he is one of a number of individuals contributing to the final publication in circumstances where the roles are shared out or the tasks distributed. If that provisional view is right, the next question arising is: would it make any difference if D3 was not employed by D1, but freelance, or if (like the Defendant) he was providing a service to the source?

77. That as it seems to me is the question that is raised in this case. This is a point which is an important one and may be fact sensitive.

CONCLUSIONS

78. For the reasons set out above, I strike out the action, while making clear that I do not consider that this reflects adversely on the Claimant or its advisers. It is a consequence of their success in the Claimant's proceedings against the Employees.