Neutral Citation Number: [2010] EWHC 967 (QB)

Case No: HQ08X03775

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 May 2010

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

SHAHROKH MIRESKANDARI **Claimant**

- and -

ASSOCIATED NEWSPAPERS LTD **Defendant**

- -
- -

David Oliver QC and **Colin Challenger** (instructed by **J Tehrani Solicitors**) for the **Claimant**
Adam Speker (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing date: 21 April 2010

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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 EADY

Mr Justice Eady :

1. In this libel action Mr Shahrokh Mireskandari sues Associated Newspapers Ltd in respect of a number of articles accusing him of dishonesty. On 19 February of this year three applications came before Sharp J, when the Claimant was represented by Mr Ian Winter QC. The first matter to be addressed was an application made on the Claimant's behalf for disclosure of documents, which was not pursued. The second was an application for disclosure against the Claimant which, in the event, was not contested and resulted in a consent order. The third matter before the court on that occasion was an appeal from Master Fontaine which the Judge dismissed, giving her reasons in a short *ex tempore* judgment.

2. The consent order required the Claimant to give disclosure of documents by 1 March, but he failed to comply. In those circumstances, an application was made to Sharp J in writing for her to make an unless order. There is a dispute as to whether the Claimant's solicitors were given notice of that application. Mr Speker, who represented the Defendant before me, told me on instructions that they had been copied in to the letter in question, but Mr Oliver QC, appearing on this occasion for the Claimant, said that no notice had been given. At all events, the Judge made a peremptory order without a hearing, directing that the first three paragraphs of the consent order of 19 February should be complied with by 4.00 pm on 15 March. It is the Defendant's case that this order was not complied with either and that, in consequence, the claim stands as struck out.

3. There is an outstanding application of 12 March to set aside the unless order, on the basis that the order was made without notice and that the Claimant did not become aware of its existence until it was too late for him to comply. It is said on the Defendant's behalf that the Claimant purported to comply with the unless order but only about three hours after the deadline expired (i.e. at about 7.00 pm on 15 March).

4. It is also suggested that the Claimant declined to comply with the order in one particular respect. His supplemental list referred to a document that had been disclosed to the Claimant in other proceedings and which "purports to be a real document in relation to my alleged conviction", but he claims privilege in respect of that item. What is said by the Claimant is that:

> "I have disputed the veracity of this document. I believe that the wording of the Specific Disclosure request made by the Defendant makes it clear that the Defendant has either had sight of this document, is in possession of it already or has been informed by the Solicitors Regulation Authority of the said document. I maintain that this is not a genuine and/or accurate document and the disclosure of this would be highly prejudicial to my claim."

This challenge amounts, in the submission of the Defendant, to a material non-compliance with the unless order.

5. The Defendant argues that there are no proceedings on foot at the moment, in which to make any application, and therefore the appropriate course for the Claimant to

pursue is to have them reinstated (presumably by pressing on with his application to set aside the order of 10 March).

6. It is against this background that an application came before me on 21 April, by way of notice dated 7 April, in which relief is sought in the following terms:

> "An Order requiring the Defendant to disclose to the Claimant the number of matters that they instructed Mrs Justice Sharp to advise on and/or represent them prior to her appointment as a judge in January 2009 and the dates when such instructions were given because the Claimant has learned that Mrs Justice Sharp represented the Defendants in relation to 5 leading cases in 2006 to 2008 and the Claimant believes in itself gives rise to bias and/or the appearance of bias and the Claimant believes that Mrs Justice Sharp represented the Defendants and/or gave advice in many more cases which have not been reported which will certainly give rise to bias and/or the appearance of bias. The targeting of ethnic minorities is an issue in this case and Mrs Justice Sharp may have represented the Defendant in relation to such cases."

The wording of this application is somewhat obscure and the jurisdiction relied upon unclear. Mr Oliver sought to clarify matters in the course of the hearing, when he said that there was no current allegation of bias against Sharp J, but that his client had concerns as to the possibility of apparent bias and sought further information, by means of this application, so as to decide what action to take.

7. There are apparently a number of possibilities that the Claimant's advisers have in mind. There is an outstanding application for permission to appeal to the Court of Appeal in respect of the order of 19 February. Although the proposed grounds make no reference to bias, or to the appearance of bias, Mr Oliver has it in mind that they may seek to add this as a potential ground of appeal. Moreover, depending on any further information obtained, they may at some stage formulate an application to Sharp J to recuse herself in respect of any future hearing. There was an apprehension that she was already the designated trial judge, but at this stage no judge has been assigned.

8. Although there is a dispute between the parties as to whether notice was given of the application for an unless order, and indeed as to whether or not that order was subsequently served, the position on the evidence at the moment would appear to be that the claim has indeed been struck out. Mr Speker would, therefore, be correct in his first submission, which is to the effect that there are no proceedings in which the application can be made. There are, however, further submissions which Mr Speker relied upon in the alternative.

9. He pointed out that the jurisdiction relied upon was not clear. It was not identified in the application notice itself. In the skeleton argument placed before me the only provision cited was that of CPR 31.12, which is in these terms:

> "Specific disclosure or inspection

> 31.12–(1) The court may make an order for specific disclosure or specific inspection.
>
> (2) An order for specific disclosure is an order that a party must do one or more of the following things–
>
> (a) disclose documents or classes of documents specified in the order;
>
> (b) carry out a search to the extent stated in the order;
>
> (c) disclose any documents located as a result of that search.
>
> (3) An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2) … "

The skeleton argument made it clear that it was sub-paragraph (2)(b) that was prayed in aid here.

10. Mr Oliver expanded on the point somewhat in the course of his submissions, indicating that he would wish to rely upon the provisions of CPR Part 18, relating to the court's power to order the provision of further information, in the alternative.

11. In so far as reliance is placed on the disclosure provisions of CPR Part 31, it is apparent that the Claimant's advisers have not identified any document, or class of documents, which they wish to inspect. Furthermore, it is elementary that any order for specific disclosure under these provisions must relate to a document or documents having relevance to the issues in the litigation. I have not considered these in any detail for the purposes of the present application, because it is not necessary to do so. The central issues in the case relate to the Defendant's plea of justification. The *Lucas-Box* meanings are identified in paragraph 5 of the defence:

> "5.1 The Claimant is a fraudster and conman, having masterminded a telemarketing scam in California in which members of the public were defrauded and he was convicted in California in 1991 of a number of offences arising out of his fraud.
>
> 5.2 The Claimant abused Ms Patricia Darcy's trust by involving her, when she was only a teenager, in his fraudulent scam; using her social security number to set up an account for a mobile telephone for himself and spending, without her permission, $1,000 on calls on the telephone; spending or withdrawing an excessive and unauthorised amount of credit ($9,000) on a credit card she lent him; and never paying her back the money he owed her, thus driving her into bankruptcy.

> 5.3 The Claimant has relied upon academic and legal qualifications that were to his knowledge bogus, alternatively there are very strong grounds to so suspect.
>
> 5.4 The Claimant was responsible for co-opting his friend, Commander Ali Dizaei, to act as a consultant advising a client of the Claimant's how to undermine a prosecution brought by Commander Dizaei's own police force, the Metropolitan Police, thereby encouraging and collaborating in seriously improper behaviour on the part of Commander Dizaei involving a clear conflict of interest."

It goes without saying that the subject-matter of the present application is quite different. Any documents there may be relating to instructions given to Ms Victoria Sharp QC (as she then was) could have no bearing on the central issues. Even if one takes account of CPR Part 18, it is clear that any information ordered under that jurisdiction must also relate to issues in the case. Again, the information now sought could not be so categorised.

12. Although no order was attached to the application notice, in the course of the hearing Mr Oliver handed up a draft which identified the relief sought as follows:

> "IT IS ORDERED THAT:
>
> (1) The defendant shall carry out a search in order to ascertain the number of occasions upon which it has instructed Mrs Justice Sharp as counsel (whether through solicitors or on the basis of direct access) between 01.01.2004 and the date of her appointment to the High Court Bench in 2009;
>
> (2) The defendant shall by 4.00 pm on 04.05.2010 serve upon the claimant a list providing the date of each such instruction;
>
> (3) The defendant shall upon that list indicate whether (and if so which) instructions included any of the individuals referred to at paragraph 18 of the claimant's statement dated 06.04.2010 namely Messrs Vaz, Ghaffur, Dizaei or their spouses;
>
> (4) The costs of this application shall be paid by the defendant to the claimant summarily assessed at £ …"

13. It is necessary to explain a little further what the Claimant intends in relation to the individuals named. Paragraph 18 of his witness statement contains the following allegations:

> "I have put this Defendant on notice that the Defendant has a history of racism and that it is my intention to refer to the Defendant's conduct of regularly targeting ethnic minorities in their newspapers. I have also put the Defendant on notice that in particular I will refer to the Defendant having targeted Keith Vaz MP and his wife, Tariq Ghaffur and Ali Dizaei and his former and current wife. I am extremely concerned that Mrs Justice Sharpe [*sic*] may have advised the Defendant in relation to one or more of these matters."

14. The theme of "racism" is continued by reference to a case in which a Mr Sharma sued Associated Newspapers. I tried the case with a jury and Ms Sharp (as she then was) and Mr Ian Winter QC represented the respective parties. At paragraph 19 of his witness statement the Claimant says this:

> "I have referred to the case of Sharma above who was an Air India Executive who was falsely accused of being a sex pest by the Defendant. I believe that the Defendant's decision to publish that story may also have been racially motivated and I may also wish to refer to this case as evidence in my claim of the Defendant targeting ethnic minorities."

Mr Oliver made it clear that his client has no intention of making an allegation of racism against Sharp J, although he may wish to do so in relation to the Defendant. I confess that I remain confused, however, as to the Claimant's intention in view of the sentence contained in the application notice to the effect that "the targeting of ethnic minorities is an issue in this case and Mrs Justice Sharp may have represented the Defendant in relation to such cases". The matter is simply obscure.

15. Mr Speker goes on to argue that, even if the court has the jurisdiction to make an order of the kind now sought, it would be quite unnecessary and disproportionate, since the Claimant says that he already has information about five cases, as a matter of public record, in which Sharp J acted for Associated Newspapers Ltd while she was still at the Bar (in one of which Mr Winter acted for the Claimant). That in itself would hardly provide evidence of bias to an objective onlooker. It is obvious that in any specialist field a judge is likely to encounter cases involving parties who have been in litigation, on one side or the other, in which he or she was engaged while still at the Bar. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 QB 451, at [25], the Court of Appeal observed:

> " … Nor, at any rate ordinarily, could an objection be soundly based on the judge's … previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before [her]."

It has been pointed out that no application was made prior to the 19 February hearing that Sharp J should recuse herself. Nevertheless, if the receipt of instructions from Associated Newspapers is now considered to be evidence of apparent bias by the Claimant or his advisers, then any future argument he wishes to advance to that effect could be founded upon the information already in his possession. I hasten to add that I am making no comment as to the merits of any such argument.

16. What the Claimant is now seeking, or so it would appear, is an opportunity to "fish" for further information in the hope that something more substantive may turn up, so as to enable him to argue at some stage in the future that Sharp J should recuse herself if the litigation comes before her again. I am not satisfied that the court has any jurisdiction to make an order of the kind proposed, whether in accordance with CPR Part 31 or CPR Part 18 or on any other basis. In any event, it seems to me to be unnecessary and I cannot see that it would serve any legitimate purpose.

17. The application is accordingly dismissed.