Neutral Citation Number: [2011] EWHC 159 (QB)

Case No: HQ09X02550

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

Sarah Thornton	**Claimant**
- and -	
Telegraph Media Group Ltd	**Defendant**

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- -

Justin Rushbrooke (instructed by **Taylor Hampton**) for the **Claimant**
David Price (of David Price Solicitors and Advocates) for the **Defendant**

Hearing dates: 27 January 2011

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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 TUGENDHAT

Mr Justice Tugendhat :

1. The Defendant applies for permission to amend its Defence to a claim for malicious falsehood. The claim was issued as long ago as 16 June 2009 and has a most unfortunate history. It is the subject of the following judgments: by Sir Charles Gray given on 12 November 2009 [2009] EWHC 2863, by Sedley LJ given on 29 March 2010 [2010] EWCA Civ 510, by myself given on 16 June 2010 [2010] EWHC 1414 (QB) and again by Sedley LJ given on 14 October 2010 [2010] EWCA Civ 177.

2. The Claimant, Dr Thornton, is the author of a book entitled *Seven Days in the Art World* ("the Book"). According to the flyleaf of the Book it consists of a series of seven fly-on-the-wall narratives based on seven different days covering events in the contemporary art world. In her Particulars of Claim she describes herself as "an author, freelance writer and former full time academic, specialising in the sociology of culture and in ethnography".

3. The Defendant publishes *The Daily Telegraph* both in printed form and on its dedicated website.

4. The book review with which this action is concerned was published in the issue of *The Daily Telegraph* for 1 November 2008. The author of the review was Ms Lynn Barber, who is herself an author and journalist. She has not been joined as a Defendant in the action.

5. Dr Thornton complains of only part of the article, and only part of what she complains of is relevant to the application that is before me. I have italicised the part of the review which is the subject of Dr Thornton's complaint, and with which this application is concerned.

> "Seven Days in the Art World by Sarah Thornton: review
>
> Confronted with reflexive ethnographic research on the art market, Lynn Barber isn't buying
>
> Sarah Thornton is a decorative Canadian with a BA in art history and a PhD in sociology and a seemingly limitless capacity to write pompous nonsense. She describes her book as a piece of "ethnographic research", which she defines as "a genre of writing with roots in anthropology that aims to generate holistic descriptions of social and cultural worlds". *She also claims that she practices "reflexive ethnography" which means that her interviewees have the right to read what she says about them and alter it. In journalism we call this "copy approval" and disapprove…."*

6. The claim is based on two separate causes of action: defamation and malicious falsehood. The proceedings so far have all related to the claim for defamation: see my judgment at paragraphs [10]-[12]. One of the three meanings attributed by Dr Thornton to the words complained of, and said to be defamatory, was:

> "(6.2) That [she] had given her interviewees the right to read what she proposed to say about them and alter it, a highly reprehensible practice which, in the world of journalism was known as "copy approval"."

7. One of the defences relied on was honest comment. Sir Charles Gray struck out that defence in respect of this meaning. The Defendant applied for permission to appeal, but, following the first Judgment of Sedley LJ adjourning the permission hearing, the matter came back before me. I granted the Defendant's application for summary judgment in respect of the claim in defamation on the words set out above in italics. Paragraph [6.2] of the Particulars of Claim has therefore been struck out. The Defendant nevertheless pursued its application for permission to appeal to the Court of Appeal from the judgment of Sir Charles Gray. Mr Price argued that what Sir Charles Gray had said had an adverse impact on the defence the Defendant wished to advance to the claim in malicious falsehood. In his second judgment Sedley LJ refused permission to appeal, saying that what Sir Charles Gray had found did not determine the issue in the malicious falsehood claim.

8. The judgments referred to above all related to the second of the three meanings which are alleged to be defamatory. The other two meanings relied on in support of the claim in defamation are not relevant to anything which I now have to decide.

9. The claim in malicious falsehood is pleaded in the Particulars of Claim as follows:

> "7. Further or alternatively, the said words were false in the following respects:
>
> Particulars of falsity
>
> 7.1 The claimant did not give her interviewees the right to alter what she proposed to say about them in "*Seven Days"*.
>
> 7.2 There was no basis on which the Claimant's practice of reflexive ethnography could fairly or properly be described as the giving of "copy approval".
>
> 7.3 The latter entails providing an interviewee with a right of veto and/or amendment in respect of proposed material prior to publication. By contrast the Claimant retained complete editorial control over the content of "*Seven Days*". She remained free to use or ignore any feedback that was provided to her by interviewees, entirely as she saw fit".

10. There follows (Particulars of Claim paragraph [8]) an allegation of malice. The Particulars of Malice incorporate the Particulars of Falsity cited above. The particulars then go on to plead that Ms Barber knew that the Claimant had not granted the right to interviewees to alter what she proposed to say about them, and knew that she (Ms Barber) had no basis for saying that Dr Thornton did do that. It is also pleaded that Ms Barber had an improper and dominant motive to vilify the Claimant.

11. The Defence to the claim in malicious falsehood as originally pleaded reads as follows:

> "9. Paragraph [7.1] [of the Particulars of Claim] is not admitted. Paragraph [7.2] is denied. As regards paragraph [7.3], copy approval in a journalistic context involves the grant of a right to approve what is to be published about an interviewee. The second and third sentences of paragraphs [7.3] are not admitted.
>
> 10. Paragraph 8 is denied. Ms Barber believed what she wrote about the Claimant's practice of reflexive ethnography and was not motivated by any wish to vilify the Claimant.
>
> 10.1. … It is denied that Ms Barber knew the Claimant had not granted the right to interviewees to alter what she proposed to say about them and/or that she had no basis for making such a claim. There are no grounds for making such an allegation against Ms Barber. Ms Barber expressed her honest opinion about the Claimant's practice of reflexive ethnography on the basis of the material referred to in paragraph [7] [of the Defence] above…"

12. It is in paragraph [7] in the unamended Defence that the Defendant pleaded the defence of honest comment to the claim in defamation in respect of which I gave summary judgment in favour of the Defendant. That part of the Defence thereafter became irrelevant. It has been deleted from the draft amended Defence as a consequence of the order that I had made. However, the Defendant now applies to re-introduce much of the same material into that part of the Defence which relates to the claim in malicious falsehood.

13. Mr Rushbrooke accepts that to some extent that is permissible, but he opposes the application to amend in respect of other parts as irrelevant and wrong in law. He submits that if pleaded in that way in the original Defence, the passages to which he objects would have been struck out under CPR Part 3.4(2)(a) as disclosing no reasonable grounds for defending the claim. It is the test applicable under CPR Part 3.4(2)(a) that is to be applied to this application by the Defendant for permission to amend the Defence. It is therefore necessary to consider first the elements of the tort of malicious falsehood.

14. The elements of the cause of action in malicious falsehood are very simple: see Duncan & Neill on Defamation 3rd ed paragraph [26.01]. In such a claim it is necessary for the claimant to prove:

    1) That the words complained of were false;

    2) That they were published maliciously;

    3) That the Claimant has thereby been caused actual pecuniary damage, or that she is exempted from doing so by the provisions of the Defamation Act 1952 s3.

15. The Defamation Act 1952 s3 applies if the words are published in permanent form and were calculated to cause pecuniary damage to the Claimant including in respect of her profession. That is the basis relied on by Dr Thornton.

16. The burden of proof of each of these three elements of the cause of action lies on the Claimant.

17. The part of the proposed amendment to which Mr Rushbrooke objects is the addition to what was paragraph [9] of the unamended Defence (renumbered as paragraph [7] in the draft amended version) the following words:

> "For the avoidance of doubt, the Defendant will allege that the words on which the malicious falsehood claim is based ("which means that her interviewees have the right to read what she says about them and alter it. In journalism we call this 'copy approval' and disapprove") were comment and that an honest person could express comment on the basis of the facts set out below. Accordingly, the words cannot be regarded to be false".

18. The "facts set out below" are the same facts as had been previously pleaded as the basis of the plea of honest comment (namely the part of the Defence which has been made irrelevant by my earlier judgment). These matters are essentially extracts from, or references to, the contents of the Book. Mr Rushbrooke does not object in principle to the Defendant re-introducing those references to the contents of the Book, but he submits that they are relevant only to the Defendant's plea that Ms Barber was not malicious, and irrelevant to the issue of falsity.

19. In order fully to understand why these statements of case have reached the position they have reached it would be necessary to recite in more detail the unhappy history of this litigation. But what matters is the draft amended Defence in the form in which it is now before the court. I prefer to consider only the words which the Defendant is applying for permission to include in its amended Defence, and to judge them on their merits. Too great a focus on the history of the litigation is unprofitable and likely to lead to confusion.

20. The question raised by the proposed amendment is this: is it the law that the words complained of cannot be regarded as false if they are comment which an honest person could express on the basis of the contents of the Book which are identified?

21. Mr Rushbrooke submits that for the first constituent of the cause of action in malicious falsehood the inquiry is simple. The only question is: has the claimant established that the words complained of are false? There is no occasion to enquire whether they are comment or not. "Comment" is a concept derived from the law of defamation. It is not a concept that has hitherto been introduced into the law of malicious falsehood. Of course, there are certain statements that cannot be said to be either true or false, such as value judgments and certain kinds of opinion. And in the law of defamation such statements are referred to as "comment" for the purpose of the defence of honest comment. But the word "comment" serves no purpose in the law of malicious falsehood. All that matters is whether the claimant can prove the falsehood of the words complained of. Even a statement of opinion may be the subject of a malicious falsehood action, if the claimant's case is that the opinion expressed by the

defendant was not one that the defendant truly held: Gatley on Libel and Slander 11th ed paragraph 21.5.

22. Mr Price submits that (for the purposes of both defamation and malicious falsehood) some statements can be shown to be false simply because they are statements of fact. Statements of fact can be true or false. But he says there is a particular category of statement of fact, which is expressed to be the opinion of the writer and which the writer has inferred from other facts. These two types of statement of fact are concepts familiar in the law of defamation.

23. In defamation the defence of honest comment is available not only to expressions of opinion which cannot be said to be true or false but also to statements of fact which can be seen to be the opinion of the defendant, which he has inferred from other statements of fact. For example, in *Kemsley v Foot* [1952] AC 345 at 357 Lord Porter quoted with approval from Odgers on Libel and Slander (6th ed, 1929) at page 166 the following passage. The editors wrote that (for the purposes of the defence now known as honest comment) if the defendant:

> "sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed comment".

24. The effect of this principle in the law of defamation is that there are certain statements of fact which are defamatory, but for which a defendant can successfully raise a defence of honest comment, without having to rely on a defence of truth or justification. Of course, in order to succeed in a defence of honest comment, the defendant must also satisfy the other conditions the law attaches to that defence. One of these conditions is that the comment must be one which an honest person could have made on the facts proved by the defendant ("the objective criterion"). And even if the objective criterion is satisfied, the defence of honest comment can be defeated if the claimant establishes that the defendant was actuated by express malice. In this context that means that the claimant must prove that the defendant did not honestly believe in the truth of what she said. See now *Spiller v Joseph* [2010] UKSC 53; [2010] 3 WLR 1791 at paragraphs [67]-[68].

25. In my judgment Mr Rushbrooke is clearly right. The words "an honest person could express comment on the basis of the facts set out below. Accordingly, the words cannot be regarded to be false" are irrelevant and wrong in law. The preceding words ("For the avoidance of doubt, the Defendant will allege that the words on which the malicious falsehood claim is based (…) were comment") are otiose. It is clear from the original pleading, in particular paragraph [10.1], that it is the Defendant's case that the relevant part of the words complained of is a statement of opinion.

26. Mr Price was unable to cite any authority in support of his proposition. The authority that he did cite was *Quinton v Peirce* [2009] FSR 17 paragraphs [80]-[81]. But I accept Mr Rushbrooke's submission that in those paragraphs Eady J is simply applying the ordinary principles.

27. In paragraph 25 Eady J refers to the defendant advancing:

> "what appears to be a defence analogous to fair comment (normally, of course, confined to the tort of defamation). The object of this is, I take it, to demonstrate that a significant part of [the defendant's] leaflet consists of comment or inference (as opposed to allegations of verifiable fact), which in itself would not be susceptible to a claim of injurious falsehood".

28. But in para [81] Eady J said:

> "[The defendant] was entitled to cite the Correspondent piece … to illustrate why he thought [what he did]. He was not in my judgment, in expressing that opinion, significantly misrepresenting the essential fact (ie the degree of prominence given to the press release)".

29. In para [81] Eady J then went on to consider malice.

30. Even if Mr Price's submission were correct, Eady J said nothing that supports it. Eady J held that there was no falsehood. Mr Price's submission would only have been relevant in that case if Eady J had held that there was a falsehood. He would then have had to consider whether the objective criterion was satisfied. And, if he held it was satisfied, then he would not have had to consider malice. Eady J plainly did not follow that course. This case provides no authority for Mr Price's proposition.

31. In his skeleton argument Mr Price submits that where the words complained of are recognisable as comment:

> "the issue in relation to falsity in a malicious falsehood claim should not be whether the comment is true or false, but whether it has a sufficient factual basis".

32. There is no authority for this proposition and I consider it to be contrary to principle. The effect of the objective criterion in defamation is this: if a defendant draws a false inference of fact, then provided an honest person could have believed that inference to be true, the defendant is not liable, unless the claimant can prove that the defendant did not believe the inference to be true. The effect of introducing the objective test into malicious falsehood would be the opposite: if a defendant draws a false inference of fact, then provided an honest person could have believed that inference to be true, he is not liable, *even if* the claimant could prove that the defendant did not believe the inference to be true.

33. Mr Price also argues that a difference between defamation and malicious falsehood is justified in principle because a claimant in defamation is enforcing an Art 8 right which requires to be balanced against the defendant's Art 10 rights, whereas in malicious falsehood the defendant has Art 10 rights but the claimant has no Art 8 rights.

34. I do reject that submission. First, that is not always the position. Some defamation claims involve Art 8 rights, but not all. And some malicious falsehood claims also involve Art 8 rights, although less frequently than in defamation claims. Second, there is no public interest in the assertion of facts or opinions which the writer does not

believe or does not hold. So Art 10 does not in any event support Mr Price's argument.

35. In *Spiller* at paragraph [110] it is recorded that Mr Price contended in that case for the reform of the law of honest comment in defamation so that the defendant's state of mind would be wholly irrelevant, and the defence would depend upon the objective criterion or test: Did facts exist that might have led a prejudiced and obstinate commentator to express the derogatory opinion expressed by the defendant. The Court held at paragraph [111] that such a reform would go beyond changes that could properly be made by the Supreme Court in the orderly development of the common law. The same must apply to the reform in the law of malicious falsehood that Mr Price contends for. On any view that could not be open to a judge at first instance, and it seems unlikely that even the Supreme Court would entertain it.

36. Mr Price reminds me of the principle that it is generally wise not to give summary judgment in cases where the relevant law is uncertain or in a state of development. But I see no uncertainty in the law of malicious falsehood.

37. There were other arguments addressed to me upon which I do not need to make a decision, having regard to the conclusion that I have reached.

38. One of the points advanced by Mr Rushbrooke was that the case set out in the draft amendment is bound to fail in any event. The test for this is a high one, given that the trial is to be with a jury. Mr Rushbrooke argues that there is nothing to support the allegation of Ms Barber, and Dr Thornton denies it. Further, there is no single meaning rule in malicious falsehood (*Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] EMLR 23) and it cannot be disputed that a substantial proportion of the readers of the relevant words complained of would take them to be statements of fact and not as inference drawn from other facts. I would not be minded to accept that this argument can prevail at this stage. It is true that the statement by Dr Thornton in paragraph [7.1] of the Particulars of Claim (that she did not give her interviewees the right to alter what she proposed to say about them) is simply not admitted in the Defence. There is no affirmative case to contradict it. But the burden of proof is upon a claimant in malicious falsehood, and this is not an issue which I can withdraw from the jury at this stage.

39. Another point advanced by Mr Rushbrooke was in relation to the delay that has occurred before the Defendant has applied for permission to amend. That delay, since my earlier judgment, is certainly very long, and little by way of explanation has been advanced for it. But the draft amendment raises no new issue of fact, and I would not have refused it on grounds of delay alone. Rather, I will invite the parties to submit a draft timetable so that I may make directions which should lead to the early trial of this action.

40. For these reasons I refuse permission to the Defendant to amend the Defence in the form of the new paragraph [7].