Neutral Citation Number: [2011] EWHC 3292 (QB)

Case No: HQ10D04868

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

Nigel Waterson	**Claimant**
- and -	
(1) Stephen Lloyd MP	
(2) Rebecca Carr	**Defendants**

- -
- -

Desmond Browne QC & David Hirst (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Richard Rampton QC & Ian Helme (instructed by **Goodman Derrick LLP**) for the **Defendants**

Hearing dates: 8 December 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. On 22 November 2011 I heard applications by each party in this libel action for an order that judgment be entered in his or their favour. The application by the Defendants was for trial of the meaning of the words complained of as a preliminary issue.

2. On 2 December 2011 my judgment was circulated in draft. On 8 December 2011 I handed it down under neutral citation number [2011] EWHC 3197 (QB). As I stated in paragraph 5 of the Judgment:

> "The Defendants do not plead a defence of truth (or justification, as it often called). That means that if I find that either or both of the publications complained of is defamatory, and is a statement of fact, then there is no defence, and I must enter judgment for Mr Waterson".

3. For reasons stated in my Judgment I found that the words complained of in each of the publications were defamatory statements of fact, and not comment or opinion as contended by the Defendant. Accordingly, at para 53 of the Judgment I stated that judgment would be entered for Mr Waterson on the issue of liability, and issues as to the relief to be given would be determined separately, if not agreed.

THE DEFENDANTS' APPLICATIONS

4. On Wednesday 7 December counsel for the Defendants submitted to my clerk in the usual way proposed editorial corrections to the draft judgment which was due to be handed down at 10.30 am the following day. The e-mail continued as follows:

> "Accompanying the corrections is notice of an application that the Defendants intend to issue today. A formal application notice will be issued together with evidence and draft amended pleading as soon as possible. …"

5. What was attached was a three paragraph document headed "Defendants' Correction and Application". The second paragraph gave notice that the Defendants proposed to apply for permission to amend to raise a new defence of justification. The same day an Application Notice was issued. In addition to permission to amend to plead justification, the Defendants asked that the hearing of that application for permission be stayed pending final determination by the Court of Appeal of the application for permission to appeal against my Judgment. They also asked that entry of judgment for the Claimant be likewise stayed pending (a) final determination of the appeal, and (b) final determination of the Defendants' application for permission to amend their defence to plead justification.

6. I heard submissions on the applications in the Defendants' Notice, and after a short adjournment I informed the parties that I had decided to dismiss the Defendants' applications. I said I would give my reasons in writing, and these are they.

THE EVIDENCE

7. The Application Notice was supported by a witness statement of the same date by Mr Nigel Adams, the solicitor to the Defendants. Although a number of days had by then passed since the circulation of the judgment in draft, he included the following paragraphs, and nothing else, by way of explanation for the late application for permission to amend to plead justification:

> "3. The defence served by the Defendants in this litigation pleads the defence of honest comment. The Defendants have not sought in their defence to plead a defence of justification as they considered the words complained of by the Claimant were comment and not fact.
>
> 4. The court has recently been asked by the parties to give a ruling on the meaning of the words complained of and a draft judgment has been circulated ….. in the draft judgment the judge has ruled that the words are fact and not comment.
>
> 5. The Defendants consider that, if the judge's ruling on the words being fact as opposed to comment stands, they can justify the truth of the words complained of. A draft of the amended section of the defence [was attached]".

8. The application for permission to plead justification thus falls to be made in circumstances where the hearing of the action on the issue of liability has been completed and judgment has been handed down, but the order has not been drawn up. The position is similar to that considered by Neuberger J, as he then was, in *Charlesworth v Relay Roads Limited* [2000] 1 WLR 230, 232B-C.

9. Whether the courts should grant permission to amend to raise a new defence is a matter of discretion. The applicable principles for the exercise of that discretion are set out and considered in detail by Neuberger J in his judgment at pages 234H to 239D. I have considered all matters set out in that part of his judgment. At page 236D Neuberger J emphasised the following words in the observations of Lord Griffiths in *Ketteman v Hansel Properties Limited* [1987] AC 189, 220:

> "… Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence".

10. Those words apply directly to the present case. Neuberger J at page 237D stated that it was germane to consider the approach laid down by the Court of Appeal to the admission of new evidence on appeal in *Ladd v Marshall* [1954] 1 WLR 1489, 1491, where Denning L J said that three conditions had to be satisfied before the Court of Appeal would be prepared to receive new evidence:

> "First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly the evidence must be such that, if given, it would probably have

> an important influence on the result of the case, though it need not be decisive; thirdly; the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible".

11. At page 238E to H Neuberger J summarised the principles applicable to the exercise of the court's discretion, as follows:

> "(1) the court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh evidence and/or to hear fresh argument; (2) the court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice; (3) the general rules relating to amendment apply so that: (a) while it is no doubt desirable in general that litigants should be permitted to take any reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs; (b) as with any other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants; (4) quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in *Ladd v Marshall*; (5) almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it; (6) the court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare."

SUBMISSIONS

12. In support of the application Mr Rampton submitted that the principle that should prevail in the present case is principle (3)(a), namely that the Defendants should be permitted to take a reasonably arguable point. He emphasised the words of Peter Gibson LJ in *Cobbold v Grenwich LBC* (August 9,1999, unreported) which are set out in the notes to the White Book (2011) 17.3.5 as follows:

> "The overriding objective of the CPR is that the court should deal with cases justly. That includes insofar as is practical, ensuring that each case is dealt with expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon

> provided that any prejudice to the party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed".

13. Mr Rampton accepted that the witness statement of Mr Adams was of little assistance in explaining why the amendment is applied for so late and in these circumstances. The words complained of were in the spring of 2010 during the campaign for the general election. The claim form was not issued until 22 December 2010 and the Defence was dated 11 March 2011. There then followed requests for further information. In response to a request dated 19 July 2011, solicitors for Mr Waterson gave information about the loan agreement secured by mortgage on his Eastbourne property, which they then amplified in a letter dated 14 October 2011. It is that information submits Mr Rampton that forms the basis of the plea of justification which it is sought to advance. So the information was provided before the Defendants issued their application notice dated 4 November 2011 and before the application notice for summary judgment issued by Mr Waterson on 13 October 2011.

14. Mr Rampton amplified the witness statement of Mr Adams by stating, without waiving privilege, that consideration had been given to the possibility of pleading justification by amendment before the hearing of the preliminary issue, but the Defendants had decided not to take that course. It is well known that if a defendant raises a plea of justification that carries the risk of aggravating the damages if it fails. So no sensible defendant would wish to take that risk if it were not necessary. In the present case the Defendants were so confident in the strength of the defence of honest comment that they did not think it was necessary to take that risk.

15. Even now, Mr Rampton submits, the Defendants should not be put in a position where they should have to make the application for permission to plead justification, with the risks that that entails. They should be permitted to defer that decision until after the Court of Appeal has determined the application for permission to appeal, and if that is granted, until the determination of the appeal itself. The Defendants intend to make an application to the Court of Appeal for permission to appeal. If the application or the appeal fails, then the Defendants will definitely apply for permission to plead justification. If the appeal succeeds they will at that point wish to consider whether or not to make the application to plead justification.

16. Mr Browne submits that Mr Waterson had a legitimate expectation that, if he succeeded on the issue of meaning, then judgment on liability would be entered in his favour. The efficient conduct of litigation and the overriding objective favoured the application of the principle that, as a successful claimant, he should not be deprived of the benefit of the judgment I handed down without very solid grounds. He also relied on the principle (cited by Neuberger J at 237H to 238B) that it is the duty of every litigant "to bring forward his whole case at once and not to bring it forward piecemeal as he found out the objections in his way". Mr Browne observed that in para 11 of the Skeleton Argument submitted for the Defendants on 22 November it was expressly stated that:

> "If and insofar as the Claimant's natural and ordinary meanings can be read as alleging that the Claimant had broken the rules,

> the Defendants do not seek to defend the words complained of in those meanings".

17. The meaning which I have held the words complained of bear is the meaning contended for by the Claimant. The Defendants should not be permitted to resile from that clear statement made at a time when they knew all that they needed to know to plead a defence of justification. It is contrary to established practice and the overriding objective for different defences to be determined piecemeal over the extended period of time contemplated by the Defendants. If the Defendants are to be permitted to plead justification, then they must make their application now, and not at the same time pursue the alternative case of honest comment by way of appeal.

18. Mr Browne submitted that it is not shown that Mr Waterson could be compensated in costs if permission to amend were given. There is no evidence that the Defendants are in a position to pay the costs which have already been incurred, still less that they would be in position to pay the costs resulting from the grant of permission to plead justification.

19. Further, Mr Browne submitted that Mr Waterson's expenses claim has been the subject of scrutiny, and has survived without criticism, on three occasions as pleaded in para 7.6 of the Reply. His expenses were not the subject of criticism in any organ of the national media during the period May to June 2009 or subsequently. His claims were investigated by Sir Thomas Legg, who published his review in February 2010, and stated in relation to Mr Waterson's claims that there were no issues. Thirdly, Mr Waterson's claims were subject to review by his own party, and he was not asked to repay any sum. Nor did he receive any adverse comment on his expenses claim from any person within the party. It has not been suggested that there is any dispute about those matters which are pleaded in the Reply.

DISCUSSION

20. I accept of course that it may be a difficult decision for a Defendant to make whether to plead justification or not. In this case the Defendants undoubtedly did have in October the information they now wish to rely on to support a plea of justification. I do not have to consider whether or not they could have obtained it with reasonable diligence at a very much earlier time. But I note they have not produced any evidence that they could not have obtained it, even before publication of the words complained of.

21. The allegation that they made in the words complained of is a serious one in the meaning which I have determined that they bear. But the meaning has not taken the Defendants by surprise: it is the meaning which Mr Waterson has throughout attributed to the words complained of. If I had determined that that meaning was comment not a statement of fact, it would also have been a serious allegation, although I accept it would be less serious if a comment than a statement of fact. In my judgment it would not be just for this matter to be left hanging over the head of Mr Waterson for the extended period envisaged by the Defendants.

22. The fact that the decision whether or not to plead justification may be a difficult decision for a defendant to make does not mean that defendants should be permitted to depart from the general rule, which requires litigants to bring forward their whole

case at once, and not piecemeal as they find objections in their way. If they were permitted to do that the decision whether or not to plead justification would not be a difficult decision. Defendants would choose not to plead it, knowing that if it turned out that their other defences failed, they could always plead it at sometime in the future.

23. Applying the principles numbered (2) to (4) and (6) in the passage cited in para 11 above leads to the conclusion that the Defendants' applications of 7 December 2011 should be dismissed.

CONCLUSION

24. It is for these reasons that I heard and dismissed the Defendant's application for permission to amend the defence to plead justification.