Neutral Citation Number: [2014] EWHC 4104 (QB)

Case No: HQ13D03108

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 December 2014

Before :

SIR DAVID EADY
Sitting as a High Court Judge

- -

Between :

SABBY MIONIS	**Claimant**
- and -	
(1) DEMOCRATIC PRESS SA **(2) JOHN FILIPPAKIS** **(3) ALEXANDER TARKAS** **(4) ANDREW KAPSABELIS**	**Defendants**

- -
- -

Richard Rampton QC and **Jane Phillips** (instructed by **Mishcon de Reya**) for the **Claimant**
Adam Speker (instructed by **Reynolds Porter Chamberlain**) for the **Defendants**

Hearing date: 12 November 2014

- -

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.

.....

SIR DAVID EADY

Sir David Eady :

1. On 13 November 2013, the parties to this libel action entered into a confidential settlement agreement scheduled to a Tomlin order of the same date. Each side had the benefit of advice from experienced London solicitors during the negotiations. It was part of the agreement that it should be governed and construed in accordance with English law (clause 12.1) and that any dispute arising out of it should be subject to the exclusive jurisdiction of the English courts (clause 12.2). The Claimant now alleges that the Defendants are in breach of its terms and seeks an injunction against each of them, with a view to enforcement, and also an inquiry as to damages occasioned by the alleged breaches. The terms of the settlement were to be regarded as confidential, subject to certain specified exceptions, which included such disclosure as was "necessary to implement and/or enforce any part of the settlement agreement" (clause 11.3.4).

2. The background concerns a series of articles published in the Greek language newspaper *Demokratia* from 29 October 2012 to 13 May 2013, which are said on the Claimant's behalf to form part of "a sophisticated campaign against him" and to have included "gratuitous and deeply offensive personal attacks upon him". There were altogether 18 such articles, all of which were published on the front page of the newspaper's website and most of them on the front page of the hard copy editions. The claim was limited, as I understand it, to such publications as took place within the jurisdiction of England and Wales. It is accepted that the newspaper is not published here in hard copy but the Defendants accept that it may have been read here "by a very few people on the internet".

3. The subject matter of the articles was the so called "Lagarde list", which had been passed in 2010 by the then Finance Minister of France, Mme Lagarde, to the Greek government with a view to helping the relevant authorities to identify any individuals involved in tax evasion. The list consisted of a spreadsheet containing the names of approximately 2000 Greek citizens linked to bank accounts held at the Geneva branch of HSBC. Although I understand that the list had originally been passed in confidence, it was published in full (both in hard copy and online) on 27 October 2012 by *Hot Doc* magazine. The contents of the list thus became widely known and this underlies an innuendo meaning pleaded in the libel action.

4. The Claimant is described as a businessman and philanthropist. He was until 2009 the chief executive of CM Advisers Ltd ("CMA") which was the management company of CMA Global Hedge, an investment company listed on the London Stock Exchange. The essential and oft repeated theme of the articles sued upon, it is said, is that he had knowingly and dishonestly facilitated tax evasion on a large scale and that, following publication of the list, he immediately sought to shut down his businesses in order to cover his tracks. The Claimant denies the truth of any of these charges and the libel proceedings were commenced in June 2013.

5. The settlement agreement was entered into a few months later. As the second Defendant put it in his witness statement (at para. 19), this was "purely a business decision" for the Defendants. (They had made a challenge to the jurisdiction of the court which remained outstanding at the time of the settlement agreement and was never resolved.) The Claimant agreed to forego any damages or costs because, he says, he wanted to bring the campaign to an end so that he "could sleep well at night".

What he obtained thereby, in particular, were the Defendants' undertakings (i) to publish an article (accompanied by a photograph of him) the truth of which he warranted in all material respects (clause 2.2), (ii) not to repeat the offending allegations (clause 3.1), and (iii) not to publish, in any jurisdiction, any articles or statements which "refer to" the Claimant or his "immediate family", a concept expressly defined as including his mother, father, brother or children, but subject to certain exceptions as to reports of court proceedings or parliamentary inquiries (clause 3.2) .

6. In exchange for these concessions the Defendants were relieved of the pressures of litigation. Mr Rampton QC borrowed a phrase of Bean J from *Small v Turner* [2013] EWHC 4362, at [9]. Until the settlement, he said, they had been "staring down the barrel of an extremely expensive defamation action".

7. It will be noted that the restrictions imposed upon the Defendants' future conduct went in certain respects beyond anything the court would have been able to grant if the Claimant had proceeded successfully to trial. The standard form of injunction, when granted at the close of a successful libel claim, would prevent only publication of the words complained of and "any similar words *defamatory of the claimant*" (emphasis added). Specifically, however, these Defendants are not permitted to refer to the Claimant or members of his family in any way; they are not merely prevented from publishing words that are defamatory, false, in breach of privacy or otherwise *prima facie* unlawful. That does not mean in itself that the terms of the agreement are unenforceable. Parties are, in general terms, allowed to negotiate an agreement, by way of settling litigation, which goes wider than the scope of legal remedies obtainable from the court.

8. It is now suggested by reference to a witness statement from the Claimant's solicitor, that there have been breaches of clause 3.2. The first breach relied upon is to be found in two articles published in the issue of *Demokratia* dated 20 January 2014 (both in hard copy and online). The second breach alleged relates to the edition dated 23 June 2014. The second Defendant has explained in his witness statement that, in his view, "… we took sufficient steps to disguise the Claimant and his brother's identity to satisfy our obligations under the settlement agreement". Evidence has been produced from some 20 witnesses, however, to say that they read the 23 June article as referring to the Claimant in the light of their background knowledge of him and of the Lagarde list. Moreover, submits the Claimant, any reasonable reader with some knowledge of the rather notorious background would understand these articles to refer to the Claimant (and the June article also to his brother).

9. The solicitor's witness statement explains that the Defendants' original allegations about the Claimant had become common knowledge and, in particular, the often repeated assertion to the effect that he was behind half the money referred to in the Lagarde list. As Mr Rampton put it, the Defendants made him the "central character" or "chief fixer". It had been said, for example, on 29 October 2012 (in the first of the articles complained of) that a female secretary was named on that list and that she managed half a billion Euros on behalf of the Claimant. He himself was reported as confirming that she did indeed handle the money together with one Solomon Levy and a lawyer called Stavros Papastavrou (who is known to have acted for the Claimant). He denied, on the other hand, that there was anything unlawful about this. Other articles in the series were referred to also, as making it clear that he was

supposed to be linked to these vast sums (those dated 3, 5, 9 and 11 December 2012 and 22 February 2013). There is no need at the moment to recite these in detail. Suffice it to say that the Claimant's advisers now submit that such had been the prominence of the Defendants' allegations about the Claimant's role in relation to these suspect monies that they had become "indelibly etched into the public mind".

10. Against that background, the coverage of 20 January 2014, while not actually naming the Claimant, referred to Mr Papastavrou and stated that he had in relation to "certain unusual bank transfers amounting to 5,397,856 Euros between 2005 and 2011 represented some sort of temporary assistance to a person in his social and professional circles". That description would be quite enough, says the Claimant, to identify him in view of the supposed links highlighted in the original series of articles (for reasons set out in paragraphs 18 and 19 of his solicitor's witness statement). It is important to note, however, that the original articles had been removed from the website by this time in accordance with the settlement agreement. Nonetheless, for present purposes, I can assume that the Claimant would have been so identifiable to a significant number of readers.

11. The article dated 23 June 2014 is said to represent an even more "blatant" breach of the agreement. It also broadens the scope of the defamatory allegations, referring to allegedly fraudulent documents (in respect of which the Claimant again denies involvement). As noted above, the second Defendant effectively admitted in his witness statement that the Claimant and his brother were indeed the subject of the article but thought that they had been sufficiently "disguised". It is submitted that the unnamed "businessman" in this article can only be the Claimant. That is because various pointers are mentioned which had been supplied in earlier articles (including those dated 9 December 2012, and 8, 9, 10, 11 and 14 January, 27 February, 6 March and 13 May 2013). Again, I will assume in the Claimant's favour that there were readers able to identify him.

12. Mr Speker resists the allegations of breach and relies on a number of arguments:

    i) Clause 3.2 is too vague to be enforceable;

    ii) Even if it is not, it should not be enforced as a matter of public policy, having regard to the Court of Appeal decision in *Neville v Dominion of Canada News Co Ltd* [1915] 3 KB 556 and/or to the values enshrined in Article 10 of the ECHR;

    iii) In any event, on a reasonable construction of clause 3.2, neither the publication of 20 January nor that of 23 June 2014 amounts to a breach.

    It is the first of these submissions that seems to me the most significant.

13. It may be relevant to have Article 10 in mind, as an aid to construction, in so far as clause 3.2 appears, upon close examination, to be genuinely ambiguous or unclear: see e.g. *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] EMLR 88. (The facts were quite different. The court was there concerned with the question whether a judge should have taken the "exceptional" step of overriding an express obligation of confidentiality.) It would be a material factor, too,

as and when the court comes to consider whether it would be appropriate to grant an injunction constraining a party's right of free expression: *ibid*., at [61].

14. I was reminded of the well known words of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912-13, where he stated that "the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean".

15. It seems clear that the words "refer to" appearing in clause 3.2 must have been intended by the parties to bear their everyday meaning. Mr Speker submits that they should not be construed in an artificial or technical way and implies that the use of the words in a libel context is unduly technical. Mr Rampton contends, however, that it is natural in an agreement the whole purpose of which is to settle a libel action that "refer to" should be given the same meaning as that in which it is generally understood in that area of law. I am not sure that there is much of substance between counsel in this particular debate. It seems to me that the use of the words "refer to" in a libel context accords with ordinary usage. As illustrated in *Gatley on Libel and Slander* (12th edn) at para 7-2, words are taken to refer to a person if reasonable readers would understand them so to refer. The test is an objective one. It is also relevant here to have in mind the comment of the learned editors of *Duncan & Neill on Defamation* (3rd edn) at para 7-02:

> "If reasonable people would so understand the words, the defendant will not escape liability though he may have tried to disguise the reference to the claimant by using initials or asterisks or a fictitious name or some other subterfuge …"

16. The second Defendant's evidence includes an admission, as I have said, that in some instances they were intending to refer to the Claimant but *thought* that they had taken sufficient steps to disguise him. If, despite those efforts, reasonable people would still understand the words to refer to the Claimant, then that is enough to establish reference. "Ordinary" people would see the sense of that principle also: there is nothing technical or artificial about it. We do not in everyday speech take "reference" to be confined, for example, only to direct reference by name.

17. I would accordingly construe clause 3.2 as embracing indirect reference as well as direct. Yet the clause still needs to be interpreted in the context of what the contracting parties understood at the time of the agreement. I have in mind what Lord Hoffmann described as "the relevant background": see the *West Bromwich* case, at p.913, cited above.

18. It was from the outset recognised by the Claimant and his advisers that the Defendants had a right and indeed a duty to report accurately and fairly on the developing story of the Lagarde list. That was expressly stated in early correspondence and reaffirmed by counsel in the course of submissions. This gives rise to a tension, however, when it comes to construing the scope of the restrictions sought to be imposed on their freedom of expression by the terms of the agreement. If it be right that they are to be restrained from mentioning the Claimant, not only directly but also indirectly, then problems are bound to arise if it is going to be alleged that the mention of other persons (mentioned in the Lagarde list or with connections to HSBC accounts in

Switzerland) is tantamount to impermissible indirect reference to the Claimant. This is all part of the "relevant background" context against which the words of the agreement must be construed.

19. I need to consider the practical difficulties confronting the Defendants whenever they contemplate publishing an article in the course of exercising their right to cover the Lagarde list controversy (all of which would have been foreseeable at the time the contract was entered into). It is clearly a matter of legitimate public interest in Greece and elsewhere in Europe. Because it has been alleged, whether by the Defendants or anyone else, that the Claimant has played such a significant role in the investment or management of the vast sums of money in the Swiss bank accounts, it is likely that his name will be linked in the minds of reasonable readers with any allegation on the subject. If any such risk is to be eliminated, the Defendants are likely to be severely inhibited in what they can cover (and particularly as compared to their competitors). In reality, their capacity to carry out their duty to cover that important story will be seriously restricted. That will impact not only on their own freedom of communication, but also on the public's right to be informed (in various jurisdictions).

20. The second Defendant has given evidence as to how they have tried to achieve compliance with the settlement agreement. Their difficulties are compounded by the fact that the agreement is governed by English law. They need to have regard to that, with such advice as they have available, when determining the viability of any proposed article.

21. They were aware that express restrictions had been imposed on referring in any way to members of the Claimant's immediate family, but other protagonists with whom he was (or was said to be) connected (such as the secretary, Mr Levy and Mr Papastavrou) had not been mentioned in clause 3.2 of the agreement. In so far as they would be referred to from time to time, there were difficult decisions to be made as to how far their involvement could be legitimately covered without indirectly referring also to the Claimant.

22. The court should always strive to give effect to the true intention of contracting parties. Here, I do not find it easy to identify an underlying common intention between the parties. I doubt whether they were *ad idem* on the scope of the restrictions to be imposed. One way of testing it would be to apply the response of the "officious bystander". When clause 3.2 was being negotiated, suppose someone had put a question along the following lines: *If you want to refer, in a forthcoming article, to individuals associated with the Claimant, would you need to ensure that it is so worded that no reasonable reader would take the passage to be referring indirectly to him?* I suspect that the Defendants would have replied in the negative, but I would be confident that they (standing in the shoes of the reasonable onlooker) would *not* have reacted by saying, "*Of course we would*".

23. Mr Rampton cited one article dated 22 October 2014 as an example of how it is possible for the Defendants, if they take the trouble, to publish an article on the Lagarde list which does not offend against the terms of the agreement. I have no doubt that it would be relatively easy to avoid any reference to the Claimant, even indirectly, by erring on the side of caution, were it not for the fact, expressly acknowledged by the Claimant, that the Defendants had to go on covering the

Lagarde story. In my view, the difficulties of interpretation that would repeatedly arise, almost every time an article on that subject was contemplated, would render clause 3.2 too vague and uncertain, as to the scope of the obligation imposed, for it to be enforceable. What a contracting party is required to do or to refrain from doing needs to be spelt out clearly, and especially so when it is sought to limit the right to communicate information and ideas. It follows that I cannot hold the Defendants to be in breach of its terms in the light of the evidence adduced.

24. So too, there would be a corresponding inhibition in granting an injunction to enforce it. Its terms would leave so many uncertainties as to how it was to be carried into effect that it would be unenforceable by process of contempt.

25. Any inquiry as to damages would clearly be inappropriate for the reasons I have given.

26. If I am right in holding clause 3.2 to be unenforceable, it by no means follows that the whole agreement is unenforceable and of no effect. There is a severability provision (clause 9.1):

> "If any provision of this Settlement Agreement is found to be void or unenforceable, that provision will be deemed to be deleted from this Settlement Agreement and the remaining provisions of this Settlement Agreement will continue in full force and effect."

27. In such circumstances, the parties would have to use their reasonable endeavours to find a valid and enforceable replacement, so as to give effect to the "spirit and intent" of the agreement (clause 9.2). It is not for me to speculate as to whether such an exercise is likely to have a successful outcome, but it would appear to be the next step for the parties to take if my conclusions are correct.

28. Finally, I would observe that the Claimant is not without a remedy in respect of the January and June publications, since it would still be open to him (subject to any jurisdictional challenge) to sue in separate libel proceedings.

29. I have for the above reasons decided that I must reject the Claimant's present applications.