Neutral Citation Number: [2015] EWCA Civ 121

Case No: A2 2013 3675

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
Dingemans J.
[2013] EWHC 3355 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2015

Before :

LORD JUSTICE McCOMBE
LADY JUSTICE SHARP
and
MR JUSTICE MITTING

- -

Between :

Paul Elliott	**Appellant**
- and -	
Richard Rufus (in bankruptcy)	**Respondent**

- -
- -

David Price QC (of **David Price Solicitors and Advocates**) for the **Appellant**
Jonathan Barnes (instructed by **Simon Smith, Solicitor**) for the **Respondent**

Hearing date: 10 December 2014

- -

Approved Judgment

Lady Justice Sharp :

1. The claimant in this action for libel, Richard Rufus, is a former professional footballer, as is the defendant, Paul Elliott. On 1 November 2013, Dingemans J rejected an application made by the defendant pursuant to CPR PD 53 para 4.1 after service of the Particulars of Claim but before service of the defence, that the claim should be struck out on the ground that the words complained of were incapable of bearing a meaning defamatory of the claimant. I would not interfere with his decision, and I would dismiss this appeal.

2. The claimant and the defendant are former friends and business colleagues. The claimant assists in community work through the Charlton Athletic Community Trust. The defendant has had a long and distinguished involvement in various anti-racism initiatives in football; in particular, he is a former trustee of the "Kick it Out" anti-racism campaign and he was awarded a CBE for his services to equality and diversity in football.

3. The two men fell out about a business venture and it is common ground that as a result, the defendant sent a private SMS text message to the claimant in which Mr Elliott used an extremely offensive word, and that the use of that word was offensive and wrong. On 18 February 2013, both men were then the subject of what was described as an "exclusive" article in the Sun newspaper (the Sun article) which made the text public. The Sun article (which is still available online) is set out in the Particulars of Claim. It is entitled: "N-word slur by CBE Ace, Anti-racism chief's rant", and contained prominent photographs of both the claimant and the defendant. It said: "A football anti-racism champion has sparked a race row after calling another black man "n*****". It said that the defendant had sent the claimant a text message about a business venture which had gone wrong, and set out the content of the text itself (with the offensive word suitably modified) which said: "Ur a stupid man n*****…You dog, Ur history my friend." The Sun article went on to say that the defendant insisted the term was not offensive because of the nature of the conversation, and because it was between two black men. It also said that the row was likely to embarrass the Football Association chairman, who had recently praised the defendant for his work, saying it was "an example to us all".

4. On 23 February 2013, the defendant issued a Press Release which forms the subject matter of this action. The Press Release was published on the 'Kick it Out' website. It was headed "Paul Elliott CBE resigns as Kick it out Trustee". It said that the defendant "has released the following statement to clarify this decision: "Earlier this week, a former friend and business colleague, made public a (sic) SMS text message I sent him, in which I used a term which is widely known as being derogatory to my community. I regret using it; it is inappropriate and not part of my everyday vocabulary. As an advocate of high-standards of public behaviour and integrity in public life, I know the use of this word sends out mixed messages and contradicts my position as a Kick it Out trustee.""

5. The claimant's case as pleaded is that the words complained of meant "By way of innuendo" that the claimant, "as a former friend and business colleague had acted dishonourably and betrayed the Defendant and deliberately harmed his reputation by making public a private SMS Text communication sent by the Defendant to the Claimant which was inappropriate in that it contained a term that is widely knows

(sic) as being derogatory of the Black community, and which contradicted the Defendant's role as a Kick it Out trustee causing his resignation from it." Though not relevant to this appeal, I should mention that the claimant maintains that he did not make the text public, and had nothing to do with the fact that it became public.

6. The claimant was not named by the defendant in the Press Release, but it is pleaded (and accepted that for the purposes of the application it should be assumed) that those who had read the Sun article, and the wide reporting of it that followed in the national press, on chat forum sites and on Twitter before the Press Release was published would have understood when they read the Press Release that the claimant was the "former friend and business colleague" referred to. It also appears to be common ground, again for present purposes that the Sun article can be relied on as context.

7. The argument before the judge fell within a relatively narrow compass; and one might think, rightly so, for a number of reasons. First, the defendant's simple overarching point was that the Press Release was clearly not defamatory because, put shortly, right-thinking members of society generally would plainly not think the worse of the claimant for having made public a text message in which the defendant called the claimant a "n*****". The ancillary point was made that the words "dishonourably", "betrayed" and "private" in the pleaded meaning had been tacked on to create a defamatory meaning, and should be excluded under CPR 53 PD 4.1(1). The claimant's case on the other hand, was (to use Mr Barnes's encapsulation of the case on meaning below) that the words complained of, read in conjunction with the Sun article, at the very least arguably implied that the claimant had spitefully and publicly knifed the defendant by leaking his "n-word" text message into the public domain.

8. Secondly, the threshold of exclusion is a high one. The judge's task under CPR PD 53 para 4.1 is no more and no less than to "pre-empt perversity": see *Jameel v The Wall Street Journal Europe Sprl [2004] EMLR 6*. Though this issue normally arises in the context of rulings made about the meanings pleaded by the parties, it seems to me a similarly high threshold applies to the question whether words are capable of being defamatory of the claimant. The Court of Appeal therefore discourages appeals on such rulings: see *Berezovsky v Forbes* [2001] EWCA Civ 1251; [2001] EMLR 45.

9. Thirdly, the legal principles in relation to applications of this nature are well-established as the judge said, and there was little, if any, dispute between the parties as to those that applied. The judge took them for the most part from the appendix to Mr Price QC's skeleton argument produced for that hearing.

10. Thus, the judge referred to the frequently cited summary of the law by Sir Anthony Clarke MR in *Jeynes v News Magazine Limited* [2008] EWCA Civ 130 at paragraph 14, where the Master of the Rolls said:

> "14. The legal principles relevant to meaning…may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning

> where other non-defamatory meanings are available. (3) Over elaborate analysis is best avoided. (4) The intention of publisher is irrelevant. (5) The article must be read as a whole and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the product of some strained, or forced or utterly unreasonable interpretation…"…(8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory way."

11. To this I would only add that the words "should not, select one bad meaning where other non-defamatory meanings are available" are apt to be misleading without fuller explanation. They obviously do not mean in a case such as this one, where it is open to a defendant to contend either on a capability application or indeed at trial that the words complained of are not defamatory of the claimant, that the tribunal adjudicating on the question must then select the non-defamatory meaning for which the defendant contends. Instead, those words "are part of the description of the hypothetical reasonable reader, rather than as a prescription of how such a reader should attribute meanings to words complained of as defamatory": see *McAlpine v Bercow* [2013] EWHC 1342 (QB) paras 63 to 66.

12. So much for the approach to construction. As to whether the words in the meaning they bore were defamatory, the judge said correctly that there are a number of legal definitions of 'defamatory', and directed himself by reference to what Sir Thomas Bingham MR said in *Skuse v Granada Television Limited* [1996] EMLR 278 at 286 where he said:

> "A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally."

13. The judge went on to say that it was not enough that the words should damage the claimant in the eyes of a section of the public only, see *Modi v Clarke* [2011] EWCA Civ 937; and that it was not in dispute that to be regarded as defamatory, an allegation must pass a certain threshold of seriousness: see *Thornton v Telegraph Media* [2010] EWHC 1414 (QB); [2011] 1 WLR 1985; [2010] EMLR 25 at para 16.

14. Finally, on the law, the judge also set out his analysis of what he had described as the 'informer' cases. Neither side had addressed them in their skeleton arguments, but the judge was handed copies of some cases said to fall into that category, which were then briefly addressed in oral argument and in later written submissions.

15. The judge headed this section of his judgment: "Right-thinking members of society and the informer cases." He said there had been a number of cases where the courts have considered whether a "right-thinking member of society" would think any less of a person who reports wrongdoing, or acts as an informer, and he thought the cases that fell into this category established (i) that it cannot be defamatory to say of a person that he is acting disloyally in reporting a crime to relevant authorities, even if that statement exposes the person to odium or contempt from a section of society such as criminals: see *Mawe v Pigott* (1869) Ir.R 4 C.L. 54 and *Byrne v Deane* [1937] 1 KB 818; and (ii) unless the person is reporting a crime, it may be defamatory to say of a person that they have acted disloyally, even if the person was acting lawfully in carrying out the disloyal activity: see *Myroft v Sleight* (1921) 90 LJKB 883. As I read this part of his judgment, the judge was not using the "informer" cases to guide his approach, but simply considering whether what they established, precluded a finding that the words in this case were defamatory of the claimant.

16. Having dealt with the law, the judge gave these reasons for deciding that the press release was capable of bearing a defamatory meaning of the claimant:

> "29. In the end there was not much serious dispute about the potential meaning of the press release in the context of the Sun article, because it was accepted that the clear meaning was that Mr Rufus had made public the text message.
>
> 30. That then leaves the issue of whether the meaning set out in paragraph 29 above can be defamatory, and whether right-thinking members of society would consider Mr Elliott's use of the word so wrong that they would not think any the less of Mr Rufus for having made it public.
>
> 31. In my judgment right-thinking members of society are well aware: (a) of the ordinary weaknesses and failings of mankind; (b) that in private communications between former friends, even the most well-intentioned and hard-working people (such as Mr Elliott), might say things which should never be said. In these circumstances right-thinking members of society could, in my judgment, take the view that sending a private communication to the public, with the inevitable consequence that the former friend would lose his office, was both disloyal and wrong.
>
> 32. Therefore right-thinking members of society might conclude that the press release was, in its context, defamatory. This would be because in their judgment it meant that Mr Rufus had acted disloyally to his former friend by making public his private text message, in which Mr Elliott had used an extremely offensive and wrong word. This was in circumstances where Mr Rufus was not reporting the text to any relevant authorities, but to the public.
>
> 33. Although the pleaded meaning in the Particulars of Claim might be considered somewhat elaborate (and it is only fair to

> point out that Mr Barnes was not responsible for the pleading), I reject the Defendant's submission that the words betrayal or dishonour have been tacked on to create a defamatory meaning, as the words are capable of meaning that Mr Rufus acted disloyally. I also reject the submission that the pleaded word "private" before the text adds nothing. The press release referred to making the text "public", and, as appears above, right-thinking members of society might consider that the words meant that Mr Rufus had acted disloyally to his former friend by making public his private text message, in which Mr Elliott had used an extremely offensive and wrong word. I do not consider that this is the most serious of libels, but the words are capable of being defamatory.
>
> 34. I should record that in ascertaining the meaning, and in assessing whether the meaning is capable of being defamatory, I have taken no account of what Mr Elliott himself appeared to have intended to say by issuing the press release, and have not taken account of the online comments reported in the Particulars of Claim.

17. The online comments to which the judge referred were amongst a large number of publications post-dating the publication of the Press Release that the claimant relied on in the Particulars of Claim in support of a claim for aggravated damages.

18. It is clear from paragraphs 33 and 34 of his judgment, that in determining whether the words were capable of being defamatory of the claimant, the judge had regard to the inferential defamatory meaning he considered the words complained of were capable of bearing. I think he was right to do so. It was accepted that read literally, the Press Release simply meant the claimant had made the text public. But in order to determine whether the relevant words were capable of bearing a defamatory meaning of the claimant, the judge had to consider what (defamatory) inferences or implications the ordinary reasonable reader could draw from them. As Lord Reid said in *Lewis v Daily Telegraph* [1964] AC 234 at p.258 "… [M]ore often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning."

19. In this respect of course, since the court is putting itself in the shoes of the notional ordinary reader, it must allow for "a certain amount of loose-thinking": per Lord Reid in *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at p.1245, or, as Lord Devlin put it in *Lewis* at p.257 the fact that a laymen reads in an implication much more freely than a lawyer. It is also important to bear in mind that such a person would normally read (or hear) the relevant words once and would therefore get a broad impression of what is said; and that the layman would not engage in the sort of minute analysis (textual or legal) that a lawyer would.

20. Mr Price's argument on this appeal has focused on the question of disloyalty. The centre point of his argument is that right-thinking members of society could not conclude that someone's conduct was (reprehensibly) disloyal, when it led to the

public exposure of wrong-doing by another. This argument is based on two propositions. First, the notion of the "arbitrium boni" or "ethical benchmark" which Mr Price submits should guide the court's approach to the question of what is or is not defamatory. Mr Price says that reference to the 'informer cases' has made a straightforward case unduly complicated. I am inclined to agree. But he nonetheless says those cases, in particular *Byrne v Deane*, support this aspect of his argument. The second and related part of Mr Price's argument is that the link between what is unlawful and what is defamatory should be as close as possible. Against that twin background, he says it cannot be defamatory to say of someone that they have lawfully made public, in exercise of their right to freedom of expression, information which the public has a right to know; and if there was no obligation on the part of the claimant not to make the text public, it cannot be defamatory of him to say that he did so.

21. I do not think attempts to gauge what is or is not defamatory by reference to the "arbitrium boni" add anything to the current legal analysis. The answer to the question whether words are defamatory depends in part on the attitude of society generally at the time that the words were published (or as is also said, on the notional views of "right-thinking members of society" or ordinary reasonable members of society). The phrase "arbitrium boni" is merely another way of describing the same concept. In *Byrne v Deane* for example, at p. 833, Slesser LJ described the "arbitrium boni" as "the view which would be taken [of the allegation] by the ordinary good and worthy subject of the King". Similarly, in *Myroft v Sleight* after referring to a passage from Spencer Bower's *Treatise on Actionable Defamation* (1908) at p.286-7 which said: "No thug or anarchist or member of a secret revolutionary society, has ever yet invoked the aid of British justice to protect him against an insinuation of tenderness to human life, or submission to law and crime…The law can only take notice of the arbitrium boni", McCardie J concluded at p.886 that the cases showed the words complained of "must be such as would injure the plaintiff's reputation in the minds of ordinary, just and reasonable citizens."

22. The allegation in *Byrne v Deane* was that the plaintiff, a member of a Golf club, was guilty of underhand disloyalty in reporting to the police, the presence of illegal gaming machines on club premises. The court held by a majority (Slesser and Greene LJJ, Greer LJ dissenting) that to say of a man that he had put in motion the proper machinery for suppressing crime could not be defamatory of him. It followed that though he might be regarded as disloyal by those who took a contrary view, this was not a view that the law would support.

23. The fact that the courts would reject the notion that *right-thinking* members of society *generally* would think the worse of someone who was 'disloyal' to criminals and who reported their crimes to the authorities is not surprising. It is well-established that the court will reject claims based on harm to a claimant's reputation amongst a section of society, particularly, a section whose views are "wrong headed" or anti-social. It does not follow that in determining what is or is not capable of being defamatory one can simply equate "suppression of crime" with "freedom of expression on a matter of public interest", as Mr Price suggests and thereby create a general 'bright line' formula by which to decide this case.

24. Equally problematic in my view are Mr Price's attempts to link the notions of what is defamatory with what is lawful (the argument being that because the claimant owed

no obligation to the defendant to keep the text private under the law of confidence or privacy it cannot be defamatory of him to say that he made the text public, whatever the factual context might otherwise be). The conduct imputed to the claimant may have been lawful in that sense (though whether all the readers who read the Sun article and the Press Release would have understood this to be the case may be doubted). But I do not think this aspect of the argument takes the defendant's case anywhere. It is true that to allege that someone acted unlawfully would normally (save for trivial examples or those that do not pass the threshold of seriousness) defame him or her. It is not the law however that merely because conduct is lawful, it cannot be defamatory of someone to say that they engaged in it.

25. The real point is that the law of defamation must be sufficiently flexible to take account of the subtleties both of language, and of the human response to what is published in a particular place and time, within the limits of the established principles of law by which, in this case, the judge correctly directed himself. In the end, as the judge recognised, the application turned on the particular words used in their context. It is possible (and no more) that those who read the Press Release thought both that the defendant should not have said what he did, but the worse of the claimant for having made what was essentially a private row public, given the circumstances. It is equally possible that such people could infer from what was said that the claimant owed the defendant some residual loyalty, having regard to their past friendship, and by going public, was acting in a way that was both disloyal and wrong.

26. Sir Stephen Sedley, who refused permission to appeal on the papers, said he did not think there was a realistic prospect that the Court of Appeal would differ from the judge's view that the words, in context, are capable (no more) of imputing disloyalty or untrustworthiness to the claimant. He said (and I agree): "One can test it by asking whether people would now think worse of the claimant had the allegation been true. It is by no means certain that the answer would be no. The fact that such indiscretions are regularly leaked (or sold) to the media does not mean that to be a source is morally inconsequential. It may be as lofty an act as the D now submits or as base an act as C contends. It's for a court to say."

27. At the oral permission hearing, the court was persuaded to make an order that if this court decided in favour of the claimant on this appeal, it should then go on to decide what the words complained of actually meant. This was not the issue (one of law) decided by the judge, and I think the matter should go back to the court below for determination. CPR 52.11 provides that every appeal will be limited to a review of the decision of the lower court unless (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of the individual appeal it would be in the interests of justice to hold a re-hearing. Though the step between deciding the issues raised by this appeal and actual meaning might be thought to be a short one, the decision on actual meaning is a primary decision of fact which has yet to be made, and it is not open to this court to make it.

28. It is unfortunate as Mr Price says that the parties could not agree that the actual meaning should be determined as a preliminary issue by the judge, not least because of the cost implications where the claimant is now bankrupt. The defendant wanted the issue to be determined by the judge, but the claimant would not agree. However as this claim arose before the coming into force of the Defamation Act 2013, meaning could not be determined as a preliminary issue unless both sides consented, because,

theoretically at least, it might usurp the function of a jury. It may be no comfort for the defendant in the particular circumstances of this case, but the amendment made by section 11 of the Defamation Act 2013 to the right to trial by jury provided for in section 69 of the Senior Courts Act 1981, so that defamation actions will be tried without a jury unless the court otherwise orders, means this is not a problem that is likely to arise in the future.

29. For the reasons given, I would dismiss this appeal.

Mr Justice Mitting:

30. I agree.

Lord Justice McCombe:

31. I also agree.