Neutral Citation Number: [2013] EWCA Civ 748

Case No: A2/2013/1535

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HONOURABLE MR JUSTICE TUGENDHAT
HQ12D03024

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2013

Before :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LADY JUSTICE RAFFERTY
and
THE RIGHT HONOURABLE SIR STEPHEN SEDLEY

- -

Between:

PETER CRUDDAS	**Respondent**
- and -	
1) JONATHAN CALVERT	**Appellants**
2) HEIDI BLAKE	
3) TIMES NEWSPAPERS LIMITED	

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Mr Richard Rampton QC, Ms Heather Rogers QC & Mr Aidan Eardley (instructed by **Bates Wells Braithwaite**) for the **Appellants**
Mr Desmond Browne QC & Mr Matthew Nicklin QC (instructed by **Slater & Gordon**) for the **Respondent**

Hearing dates: 14th June 2013

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Approved Judgment

Lord Justice Longmore:

1. On 15th March 2012 two undercover journalists working for The Sunday Times but posing as representatives of Middle Eastern investors with money in a Liechtenstein fund met Mr Peter Cruddas a Treasurer of the Conservative Party. They secretly recorded the meeting and allege that he offered access to Ministers for cash and discussed ways round the requirement that contributors to party funds be resident in the United Kingdom.

2. The defendants published 4 articles and an editorial on 25th March 2012. In broad terms the first article said that Mr Cruddas offered access to Ministers for cash and the more the cash the better the access. £250,000 would be premier league for access. It was also reported that Mr Cruddas said he was happy for the proposed donors to find a way around the rule that party donations had to come from UK donors and that he would urge a meeting with "compliance people" to check that that way was legitimate.

3. The second article reminded the reader of Mr Cameron's comments in opposition that secret lobbying was the next big scandal waiting to happen and that the Conservatives would be the party who would "sort all this out". The figure of £250,000 for access was again mentioned. The problem that the money came from a foreign wealth fund was identified and Mr Cruddas reportedly said he was prepared to discuss a range of ways the money could be brought on-shore.

4. The third article was entitled

> "Pay the money this way and the party won't pry."

It reported that Mr Cruddas did not seem perturbed by the fact that foreign donations were prohibited under British election law or that the money was coming from a tax haven because he was sure there were ways to work around it. Forming a UK subsidiary company was one way or the reporters could make the donation themselves as British citizens using money from their Middle Easters clients' finds.

5. A fourth article and an editorial were also written. The first was headed "Rotten to the core" and the second compared the Conservative Party to the Labour Party's "corrupt relationship with its donors while Labour was in office". Those were not relied on as being defamatory in themselves but as being part of the context in which the 3 articles were written.

6. Mr Cruddas has sued the writers of the articles and Times Newspapers Ltd as the publishers of the Sunday Times for both libel and malicious falsehood. Just before the pre-trial review the defendants agreed with Mr Cruddas' proposal that the case was not suitable for trial by jury and trial by judge alone was fixed for the week of 17th June 2013. The parties then decided to ask the judge to make a preliminary ruling on the meaning of the articles for the purpose of both the libel and the malicious falsehood claims. The libel claims required the judge to ascertain the "single meaning" of the articles containing the reports of the meeting and the allegations made because, for the purpose of those claims, the law deems there to be only one meaning. Since Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd [2011] QB 497 held that the single meaning rule did not apply to malicious falsehood

claims, the parties further invited the judge to identify the range of possible meanings which a substantial number of people would consider the articles to have had. In that way the scope of any trial could be confined within reasonable limits.

7. Mr Cruddas pleaded that the natural and ordinary meaning of the articles was as follows:-

> "(1) In return for cash donations to the Conservative Party, the claimant corruptly offered for sale the opportunity to influence government policy and gain unfair advantage through secret meetings with the Prime Minister and other senior ministers.
>
> (2) The claimant made the offer, even though he knew that the money offered for secret meetings was to come, in breach of the ban under UK electoral law, from Middle Eastern investors in a Liechtenstein fund; and
>
> (3) further, in order to circumvent and thereby evade the law, the claimant was happy that the foreign donors should use deceptive devices, such as creating an artificial UK company to donate the money or using UK employees as conduits, so that the true source of the donation would be concealed."

8. The defendants say that the articles meant no more than that what Mr Cruddas said in the course of the meeting on 15th March was "inappropriate, unacceptable and wrong and gave rise to an impression of impropriety". They say further that the articles meant that Mr Cruddas was prepared to contemplate ways in which donations from an overseas fund could be made through using a legal loophole in the form of a UK subsidiary company to make the donation or by having UK individuals making the donation, even though the true source would be concealed.

9. Tugendhat J held [2013] EWHC 1427(QB) that for libel Mr Cruddas' meanings were the relevant single meanings and for malicious falsehood that they were possible meanings. He explained that he considered "corruptly" in the first meaning to mean (inter alia) that Mr Cruddas was guilty of a criminal offence and that that was what the defendants were alleging.

10. The judge then considered an application to strike out paragraph 8 of the defence. That paragraph sought to justify the first meaning relied on by Mr Cruddas by saying that it was true in substance and in fact and particularised the matters relied on in the following way:-

> "8.1 The defendants rely upon what the claimant said during the meeting on 15th March 2012, which is contained in the recording and transcript of the meeting with the claimant. They repeat paragraphs 7.1 – 7.51 above.
>
> 8.2 The defendants' case is that the Articles do not allege that the claimant made such offer "corruptly". If (which is denied) any ordinary and reasonable reader understood the Articles to include such an imputation, the same could only have been

> derived as a result of their concluding that what the claimant had said in the course of the meeting (as reported in the Articles) amounted to corruption. That being so, since the Articles are a true report of the meeting and accurately quote what the claimant said, it follows that if any such reader understood the words in that sense (which the defendants deny), the same reader would necessarily conclude that the defendants have proved the truth of the Articles in that sense.
>
> 8.3 For the avoidance of doubt, although the claimant has not explained what he means by "corruptly" in his meaning, it is denied (if it be alleged by him) that the words bore or could reasonably be understood as bearing any allegation of guilt of any criminal offence."

The judge said (para 117) that he rejected the defendants' denial that the words bore any allegation of guilt of any criminal offence and that the facts relied on in paragraph 7 of the defence did not support the more serious (corruption) meaning pleaded to in paragraph 8. Paragraphs 8.1 and 8.3 of the defence did not therefore amount to justification. As to paragraph 8.2 the judge referred to the witness statement of Mr Witherow, the Editor of the Sunday Times when the articles were published, that in his view blatantly selling access was not corrupt but unethical. The judge seems to have accepted the argument for Mr Cruddas that this showed that by paragraph 8 of the defence the defendants were trying to achieve what the Editor had said was not the defendants' case. In other words the Sunday Times was trying to justify an allegation of corruption when its own editor was saying that he did not think blatantly selling access was corrupt at all.

11. The judge continued (para 121):-

> "The difficulty with the defendants' case in para 8.2 of the amended defence is that the Articles (and the Extracts) do not consist solely of extracts from what the claimant said to the reporters, and they do not set out the whole of what he said to the reporters. In arriving at my conclusion on meaning I have referred to words in the Articles which are not quotations from what the claimant said, but are the defendants' description and interpretation of what he said.
>
> It would be essential for the defendants' argument that they should establish that "the Articles are a true report of the meeting and accurately quote what that claimant said". But they cannot do that. All they can do is state that, in so far as they [sic] Articles contain quotations from what the claimant said, then those quotations are true and accurate. But since the Articles contain both more than what the claimant said, and less than the totality of what he said, the argument in para 8.2 of the amended defence is logically defective."

He therefore struck out paragraph 8 of the defence which left the defendants with no defence of justification. He entered judgment for Mr Cruddas on the libel claims with damages to be assessed.

12. The defendants now seek permission to appeal both the decision that the meaning of the articles is that Mr Cruddas engaged in criminally corrupt conduct as well as that he was prepared to countenance breaches of electoral law. They also seek to reinstate their plea of justification.

13. We heard full argument on the issues from Mr Rampton QC for the defendants and Mr Browne QC for Mr Cruddas. At the end of the argument, we granted permission to appeal and we now proceed to decide the appeal for which we have now given permission.

The libel claims: (a) the single meaning

14. When trial is (as now agreed in the present case) by judge alone, the judge has to determine the meaning of articles which are said to be defamatory. It is presumed that there is a single meaning and, since judges (unlike juries) have to give reasons for their conclusions, that single meaning has to be articulated. The judge agreed that the meaning of the articles was as pleaded by Mr Cruddas and articulated his conclusion in the following way:-

> "In my judgment the single meaning of the Articles is clearly one of corruption. In reaching that conclusion I take into consideration what is, in my judgment, to be understood as an explicit suggestion by the claimant to the reporters to adopt the illegal solution of funnelling their supposed clients' funds through themselves as the nominal donors.
>
> All three meanings pleaded by the claimant in para 6 of the particulars of claim are (subject to what is stated below) the actual single meanings which I find the words complained of bear, and these meanings are plainly defamatory."

He then considered whether the first of the pleaded meanings could be relied on as an allegation of a criminal offence, although no specific offence was identified. He answered this question in the affirmative in paragraph 47:-

> "In the present case the meaning I have found the words complained of to bear is expressed in ordinary language and connotes conduct which is criminal in England and Wales. Whether the connotation is correctly made is another matter."

15. For my part I have no difficulty in agreeing with the judge that the meaning of the words in the articles is the meaning attributed to them by Mr Cruddas but I do have difficulty in agreeing that the word "corruptly" necessarily (or on the facts of this case) connotes that a criminal offence has been committed. It is useful to remind oneself of the principles which guide the court in ascertaining the meaning of allegedly defamatory statements as set out by Sir Thomas Bingham MR in Skuse v Granada Television Ltd [1996] E.M.L.R 279, 285:-

> "1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to ordinary reasonable [reader].
>
> 2) The hypothetical reasonable reader … is not naïve but he is not unduly suspicious. He can read between the lines. He can read in 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) While limiting its attention to what is actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue …
>
> …
>
> 7) The defamatory meaning pleaded by a plaintiff is to be treated as the most injurious meaning the words are capable of bearing and the questions a judge sitting alone has to ask himself are, first, is the natural and ordinary meaning of the words that which is alleged in the statement of claim and, secondly, if not what (if any) less injurious defamatory meaning do they bear?"

16. Applying these principles, I would conclude that the defendants are not asserting that Mr Cruddas was criminally corrupt in offering access to Minister for cash. They are asserting that Mr Cruddas' conduct was "inappropriate", "unacceptable" and "wrong". To some people that may indicate "corruption" but it is not explicitly or implicitly an assertion of any criminal offence. It overeggs the pudding to say that the natural and ordinary meaning of the words used is that offering access to Ministers for cash is to commit a criminal offence and I do not think (particularly in the light of the second of Sir Thomas's principles) that the ordinary reader would so understand it, even if he thought that the conduct was morally unacceptable because it tended to impropriety.

17. In reaching his conclusion the judge took into account the reported explicit assertion that the reporters could adopt the illegal solution of funnelling their supposed clients' funds through themselves as the nominal donors. It seems to me, however, that an offence of knowingly entering any arrangement which facilitates the making of donations to a political party by a person other than a permissible donor contrary to section 61 of the Political Parties, Elections and Referendums Act 2000 is a substantively different offence from that of criminal corruption with its implication of feathering one's own nest or making some personal gain. My conclusion in that regard is fortified by reference to the Bribery Act 2010 and any relevant statutory predecessor such as the Prevention of Corruption Act 1906. Quite apart therefore from the fact that it was not Mr Cruddas himself but the attending lobbyist (Ms Southern) who actually made the suggestion of funnelling the funds through the reporters themselves as nominal donors, I do not think it was right for the judge to

infer from a willingness to breach section 61 of the 2000 Act that Mr Cruddas was being alleged to be personally criminally corrupt.

18. Mr Browne relied heavily on a supposed principle that the meaning of words was a jury question (and thus a question of fact) and that the judge was the best person qualified to reach the right conclusion which should not be "second-guessed" by this court. The meaning of words is not what Mr Browne called a binary question or a question of being right or wrong but a nuanced question which should be left to the judge. He relied on Sir Thomas Bingham's eighth principle in Skuse:-

> "The Court of Appeal should be slow to differ from any conclusion of fact reached by a trial judge. Plainly this principle is less compelling where his conclusion is not based on his assessment of the reliability of witnesses or on the substance of their oral evidence and where the material before the appellate court is exactly the same as was before him. But even so we should not disturb his finding unless we are quite satisfied he was wrong."

He also relied on Berezovsky v Forbes (No. 2) [2001] E.M.L.R 45 at para 16 per Sedley LJ for the proposition that this court should not second-guess the decision of the judge and Cammish v Hughes [2012] EWCA Civ 1655 which followed Skuse.

19. There is, of course, considerable force in this argument. On the other hand imputations of criminal conduct are extremely serious and, if an appellate court thinks that an article just does not bear that imputation, it should say so. It is an important aspect of the law of libel that it should be open to a defendant to justify a lesser defamatory meaning than that alleged by a claimant if that is the right meaning to be given to the article.

20. In Slim v Daily Telegraph [1968] 2 QB 157, the Court of Appeal was faced with a not totally dissimilar situation to the present case. The claimant solicitor said that letters published by the defendant carried the imputation that he had brought improper pressure to bear on council employees and that he was not fit to remain a solicitor. Paull J sitting alone held that that was the natural and ordinary meaning of the words used. This court held that the letters were what was then called fair comment on a matter of public interest. But both Diplock LJ (page 178E) and Salmon LJ (page 181E) said the relevant letter did not mean that Mr Slim had behaved unprofessionally or in any way dishonourably, Salmon LJ also said this (at pages 186-7):-

> "No doubt, even when a libel action has been tried by a judge alone an appellate tribunal may sometimes approach the case by considering, as a matter of law, whether the words complained of are capable of the defamatory meaning which they have been found to bear. If they are, the appellate tribunal will not lightly interfere with the judge's finding of fact. If, however, the appellate tribunal is satisfied that the judge's finding of fact is wrong, it is its duty to reverse him. There is no sensible reason why a judge's finding of fact in a libel action should be more sacrosanct than in any other action. For the

> reasons I have indicated. I am as satisfied as I can be that the judge's decision was wrong."

21. One treats any decision of Tugendhat J in this area of the law with enormous respect but as Salmon LJ says, if one is satisfied that judge's finding is wrong, it is one's duty to reverse him.

22. When, before choosing the silver casket in The Merchant of Venice (II.ix.39), the Prince of Aragon says:-

> "O that estates, degrees and offices
>
> Were not derived corruptly, and that clear honour
>
> Were purchased by the merit of the wearer"

he expresses more pithily and poetically the very view that the Sunday Times articles are espousing. But neither he nor Shakespeare (nor the Sunday Times) were making any assertions of criminality. I am therefore satisfied that the words used in the articles do not carry the imputation that Mr Cruddas was criminally corrupt and if in order to come within Sir Thomas Bingham's eighth principle in Skuse, I have to go this far I will say that I am not merely satisfied but "quite satisfied".

23. As far as the second and third single meanings in relation to UK electoral law are concerned, the position is simpler. I have no doubt that the judge was correct to say (para 39) that the allegation of being prepared to countenance a "loophole in electoral law" does not amount to an imputation of criminality but (para 40) that the allegation of countenancing the funnelling of money through a third party is an imputation of countenancing a breach of section 61 of the 2000 Act already mentioned. All that is impermissible is to leap from the imputation of the crime of breach of electoral law to the imputation of personal criminal corruption. Whether the more limited imputation found by the judge can be justified is another matter.

The libel claims: (b) should paragraph 8 of the Amended Defence be struck out?

24. If the defendants are not alleging criminality in the first of the meanings on which Mr Cruddas relies, must the defence of justification in paragraph 8 of the amended defence nevertheless be struck out?

25. In my view the answer is No. The case should go to trial so that the defendants have the opportunity to justify the lesser meaning which they attribute to their articles.

26. Part of the difficulty is, of course, that the natural and ordinary meaning of the words used on which Mr Cruddas relies which the judge has upheld and with which I agree (subject to the qualification that they do not connote a criminal offence) itself carries an ambiguity in its use of the word "corruptly". Mr Browne in a somewhat over-elaborate submission said that the articles emphasised that there would be secret meetings with the Prime Minister, that such secret meetings would produce awesome advantages for the donors and that such advantages provided a secret opportunity to exert influence over government policy which other less advantaged people would not have. He then submitted that that constituted "corruption" on any view and that the defendants had no defence to the claim that the articles were defamatory. But if Mr

Cruddas chooses to interpret "corruptly" in that sense, the defendants should be allowed to say not only that they have accurately reported his statement and that the report does not amount to an allegation of corruption but also that, if it does, they can justify that allegation.

27. The judge thought that because the articles contained more than quotations from Mr Cruddas and did not, in any event, set out all that he said to the reporters, they could not establish that the articles were a true and accurate report. He said the defence contained in paragraph 8.2 was logically defective because the articles contained both more than what Mr Cruddas has said and less than the totality of what he said. I find it difficult to see how professional journalism could survive if undercover reporters, exposing what they consider to be scandalous, had to report the totality of what the person under investigation had said and no more. The question is whether the report as a whole is a fair and accurate summary of what has been said. If a judge is satisfied that secret meetings were not offered or awesome advantages had not been on offer or secret opportunities to influence government policy were not promised, he will draw his own conclusion. But it cannot be right to strike out the defence of justification merely because the exchanges with Mr Cruddas were summarised and not set out in full.

28. To be fair, I doubt that the judge really contemplated that he could strike out the defence merely for this reason. He had already held that the meaning of the articles was that Mr Cruddas had committed the criminal offence of corruption and that, since the defendants could not justify that imputation, there was nothing left in the case. If one accepts that premise, the order striking out paragraph 8 of the defence is entirely understandable. Once one does not accept that premise, there must be a trial and it would be wrong now to say that the plea of justification must necessarily fail. I do not consider that Mr Witherow's apparent denial that the articles were alleging corruption takes the case anywhere. What the articles mean is for the court to decide not Mr Witherow.

29. There will therefore have to be a trial of the first libel claim. That being so, it would be inappropriate to say that there should be no trial of the second and third libel claims since they are intimately bound up with the more serious first claim. In any event the imputation of countenancing an offence under the 2000 Act is an imputation that is capable of being justified.

Malicious Falsehood

30. Here the duty of the judge at trial is to indicate the reasonably available meanings, decide if a substantial number of persons would reasonably have understood the words to have such a meaning and then decide, in respect of a meaning which is in fact false and damaging, whether the author was actuated by malice.

31. The first question therefore is whether the imputation of criminal corruption is a meaning which reasonable persons could read into the articles. Although I feel certain that the single meaning required by the law of libel does not carry that imputation, I cannot feel certain that a number of reasonable people would not have understood the articles as making an imputation of criminal corruption. I would therefore reject Mr Rampton's invitation that we should declare that, for the purpose

of the malicious falsehood claim, the imputation of criminal corruption is a meaning which is not available for the purposes of malicious falsehood.

32. It might appear that there is a tension, even an incompatibility, between the proposition that a particular meaning is plainly wrong and the proposition that it is nevertheless a possible meaning. The reason why it is not necessarily so lies in the difference between libel and malicious falsehood. In malicious falsehood every reasonably available meaning, damaging or not, has to be considered. In libel, the artifice of a putative single meaning requires the court to find an approximate centre-point in the range of possible meanings. If, instead, a court of first instance selects as the single meaning for libel purposes one of the peripheral meanings in the range relevant to malicious falsehood, an appellate court may very well be satisfied that it has erred, because the single meaning has, generally speaking, to be the (or a) dominant one.

33. As far as the second and third claims are concerned the pleaded meanings are reasonably available meanings. I would moreover agree with the judge (para 113) when he says that the articles allege that the claimant was suggesting a breach of electoral law, in respect of the channelling of client funds through the reporters, not just a breach of its spirit. I would therefore reject Mr Rampton's invitation to allow breach of the spirit of the law to be included as a reasonably available meaning. Whether the imputation was false and whether it was malicious must await a trial of those issues.

Conclusion

34. I would therefore (1) declare that for the purposes of the libel claims the meaning of the articles does not include an allegation of corruption contrary to the criminal law and (2) set aside the orders which (a) strike out paragraphs 7 and 8 of the amended defence, (b) enter judgment for damages to be assessed and (c) grant injunctions against republication. To that extent I would allow this appeal.

Lady Justice Rafferty:

35. I agree.

Sir Stephen Sedley:

36. I also agree.