Neutral Citation Number: [2013] EWHC 2182 (QB)

Case No: HQ07X01839

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2013

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

GARY FLOOD	**Claimant**
- and -	
TIMES NEWSPAPERS LIMITED	**Defendant**

- -
- -

James Price QC and William Bennett (instructed by **Edwin Coe LLP**) for the **Claimant**
Richard Rampton QC and Kate Wilson (instructed by **Times Newspapers Limited**) for the **Defendant**

Hearing date: 18 July 2013

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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 10 May 2013 I made an order by consent in this libel action, that there be a hearing before a judge alone to determine (1) whether the claimant should have permission to amend his Particulars of Claim and (2) as a preliminary issue the meaning of the article complained of, which was entitled "Detective Accused of Taking Bribes from Russian Exiles". At the hearing on 18 July, after Mr Price had clarified the proposed plea, I gave permission to amend. I reserved judgment on the preliminary issue as to the meaning of the article complained of.

2. The case has a long history. The defendant published the article complained of in the print edition of the The Times for 2 June 2006 and thereafter on the website. On 31 May 2007 the claimant issued proceedings. The defendant advanced two substantive defences, a *Reynolds* defence and justification (truth). The *Reynolds* defence was tried as a preliminary issue in July 2009 before myself, sitting without a jury. I handed down Judgment on 16 October 2009 [2009] EWHC 3275 (QB): [2010] EMLR 8. I held that in respect of a publication in the print edition the *Reynolds* defence succeeded, and in respect of the website publication that it succeeded up to the 5 September 2007, but it failed in respect of later website publications.

3. The Metropolitan Police Service had concluded its investigation into the claimant in the middle of 2007 and had informed the defendant of the outcome via a letter dated 4 September 2007. But the defendant had not carried a report about the outcome. The article complained of had reported that the recipient of the alleged bribes had been code named 'Noah' and that Noah could be a reference to the claimant. The outcome was that the Independent Police Complaints Commission accepted the investigator's final report which concluded:

> "I have been unable to find any evidence to show that Detective Sergeant Gary Flood is 'Noah' or that he has divulged any confidential information for money or otherwise".

4. Both parties appealed my judgment to the Court of Appeal. The claimant was successful to the extent that that court reversed my judgment where I had held that the *Reynolds* defence succeeded: [2010] EWCA Civ 04; [2011] 1 WLR 153. The defendant then appealed to the Supreme Court. That court restored my judgment and held that publications up to 5 September 2007 were protected by *Reynolds* privilege: [2012 UKSC 11; [2012] 2 AC 273. The defendant also appealed against that part of my decision in which I had decided that the *Reynolds* defence failed in respect of website publications after 5 September 2007. The Court of Appeal had upheld that part of my decision. However the defendant subsequently withdrew their appeal to the Supreme Court on that point.

5. As a result of the foregoing, the claimant's claim is now confined to publications on the website from 5 September 2007 to October 2009. At that time there was added to the website an update which reported the outcome of the investigation overseen by the Independent Police Complaints Commission.

6. The legal principles to be applied by a court when determining the question of meaning are not in dispute. Both parties take them from the guidance summarised by Sir Anthony Clarke MR in *Jeynes v. News Magazine Limited* [2008] EWCA Civ 130

at para 14, and earlier authorities referred to there including *Skuse v. Granada Television Limited* [1996] EMLR 278. Mr Rampton emphasises that the article complained of must be read as a whole, a principle derived from *Charleston v. News Group Newspapers* [1995] 2 AC 65.

7. The meaning which the claimant attributes to the website publications of the article of which he complains, as set out in his amended Particulars of Claim at para 4, is as follows:

> "In their natural and ordinary meaning and/or in their innuendo meaning the words complained of meant and were understood to mean that there were, and at the date of publication of the article online complained of there continued to be, strong grounds to believe, or alternatively that there were reasonable grounds to suspect, that the claimant:
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> 4.1 had abused his position as a police officer with the Metropolitan Police's Extradition Unit by corruptly accepting £20,000 in bribes from some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges;
>
> 4.2 had thereby committed an appalling breach of duty and betrayal of trust.
>
> 4.3 had thereby also committed a very serious criminal offence
>
> Particulars of innuendo
>
> It would have been known by the vast majority of the readers of the words complained of that where a person who is employed to perform a public duty takes a bribe to act corruptly in discharging that duty he commits a criminal offence under common law. Such readers would have understood the words complained of to bear the meaning pleaded in paragraph 4.3 above".

8. The defendants accept that the words complained of are defamatory of the claimant. The meaning which they seek to justify is:

> "If and insofar as the article bore the natural and ordinary meaning that:
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> (1) The claimant was the subject of an internal police investigation
>
> (2) There were grounds which objectively justified a police investigation into whether the claimant received payment in return for passing confidential information about Russia's possible plans to extradite Russian oligarchs,

then it is true in substance and in fact ".

9. The website publication bears the date 2 June 2006, being the date on which it was originally published. Immediately under the title are the words "Police are investigating the alleged sale to a security company of intelligence on the Kremlin's attempts to extradite opponents of President Putin." There then follows the by-line naming Michael Gillard. Immediately under that there were added the words "this article is subject to a legal complaint". These were added after the claimant complained, and remained there until October 2009. There then follow the 21 paragraphs of the article complained of which, so far as material, are set out in my judgment of October 2009 at paragraph [5]. It is unnecessary to repeat them in this judgment.

10. One aspect of the dispute between the parties over meaning relates to the level of seriousness of the allegation. It has become customary to refer to three levels of seriousness by reference to *Chase v. Newsgroup Newspapers Limited* [2003] EMLR 1. In that taxonomy level 1 is the most serious, that is to say it is an allegation of actual guilt. However, the distinction between levels of seriousness can be traced back at least as far as the decision of the House of Lords in *Lewis v. Daily Telegraph* [1964] AC 234. In that case Lord Devlin said at page 282 (using the reverse taxonomy):

> "In the present case, for example, there could have been three distinct categories of justification – proof of the fact of an inquiry, proof of reasonable grounds for it and proof of guilt".

11. Mr Rampton submits that the meaning contended for by the defendants in the present case falls between there being the fact of an inquiry and there being reasonable grounds for it.

12. Mr Rampton submitted that the court cannot infer that the readers of the website knew what is pleaded in support of the true innuendo, namely that where a person who is employed to perform a public duty takes a bribe to act corruptly in discharging that duty he commits a criminal offence under common law. I agree that I cannot infer that they would have known that the offence in question was one under common law rather than statute. The readers of *The Sunday Times* are a well educated and well informed section of society. But Mr Rampton submits that readers of an archive on the web will be likely to have reached the article in question through a search engine, and so not be typical of the readers of the current edition of the newspaper. That may well be so. But in my judgment it is very widely known that where a person who is employed to perform a public duty takes a bribe to act corruptly in discharging that duty he commits a criminal offence. In my judgment anyone who reaches the archive in question in this action and is sufficiently interested to read the words complained will probably have that knowledge.

13. Another aspect of the dispute over meaning relates to the effect of the passage of time. Mr Price submits that the reader of the website publication who read it after 5 September 2007 would reasonably understand it to be making a statement not only about events as they were on 2 June 2006, the date at the head of the article, but also about events up to the date at which it was being read. Were that not so, there would be no need for a responsible journalist to update the article by including a reference to

events subsequent to the original publication. But the Court of Appeal had held that the journalist or publisher was under an obligation to do that.

14. Mr Rampton on the other hand submits that the reasonable reader would simply regard the article as part of an archive which referred to events as they were at the date of publication, but not to events or circumstances as they were or became at a later date.

15. Mr Price submits that the first impression given to the reader is that given by the headline, the words immediately under it above the by-line, and the first two paragraphs of the article. These all emphasise the allegation, that a police officer in the extradition unit has taken payment from wealthy Russians for sensitive information. Taken by itself, the effect of the repetition rule would be, as he submits, that that would simply be an allegation of guilt. However, he accepts that read as a whole the article does not allege actual guilt. This is because the article states that "detectives … were told that Noah could be a reference" to the claimant, not that they were in fact references to him.

16. Mr Price stresses that the article is not simply stating there is an investigation. Rather, it sets out the allegations upon which the investigation is focussed, and what is said to be the evidence. This includes "documents detailing the client accounts of ISC… the financial dossier, seen by The Times shows that ISC was paid more than £6,000,000 from offshore companies linked to the most vocal opponents of President Putin of Russia". It is said that "a former ISC insider passed the dossier to the intelligence arm of the anti-corruption squad…" It is said that "anti-corruption detectives are examining the relationship between Sergeant Flood and a former Scotland Yard detective, one of the original partners in ISC. The men admit to being close friends for more than 25 years. Of course, the article goes on to say the men "deny any impropriety and are willing to co-operate with the inquiry". Mr Price submits that the reference to an admittedly close friendship over 25 years suggests grounds to suspect or believe that the claimant has taken bribes.

17. Mr Rampton submits that in using the word "accused" the writer of the headline has over stated the case, and that the reader will understand that when he reaches the end of the article. That is why Mr Rampton emphasises the importance of the decision in *Charleston*. Mr Rampton emphasises that the article reports that the claimant has not been arrested, charged or suspended, but "moved temporarily from his post". He notes that the denials by the claimant and Mr Hunter are not simply added right at the end, as is sometimes done, which can suggest that the denial is treated as formulaic, but rather that the denials are given the prominence in the middle of the article to which I have already referred.

18. Mr Price cites the words of Lord Neuberger of Abbotsbury MR at para 78 :

> "If the original allegations of the publications made against DS Flood in the article on the website had been responsible journalism, … once the report's conclusions were available, any responsible journalist would appreciate that those allegations required speedy withdrawal or modification".

19. He submits that implicit in that statement is recognition that readers of archive material do not just treat it as historical, and relating only to the original time of publication, but that they also treated it as speaking as at the date on which it is being read. It does not follow that it bears the same meaning to a reasonable reader who reads it on the original date of publication as it does to the reasonable reader who only reads it for the first time at a later date. But it must be read on both dates as saying something about the position current as at the date of the reading.

20. Mr Price submits that the addition of the words "this article is subject to a legal complaint" not only did not improve the position from the point of view of the claimant, it made it worse. First, there is no indication from whom the complaint may have come. So those words do not inform a reader that it is the claimant who has made the complaint rather than one of the other persons named in the article. And since the additional words are expressed in the present tense ("is subject to a legal complaint") the reasonable reader would infer that, if there was more recent information as to the outcome of the investigation which cast a different light on the matter, then that too would have been added in the form of an update, so the reasonable reader would infer that the grounds which led to the investigation in the first place, that is to say grounds to suspect or believe the commission of a serious offence, were currently still giving rise to the same concerns.

21. Mr Rampton also referred to a passage in the speech of Lord Mance JSC in the Supreme Court at para 180 (which are to a similar effect to the observations I made in my October 2009 judgment at paragraphs 172 to 173 and 199). At para 180 Lord Mance said:

> "The article, although undoubtedly damaging to DS Flood's immediate reputation, was balanced in content and tone… it did not assert the truth of the reported allegations of impropriety made by the ISC insider, but it identified them as the basis of an investigation in progress to establish whether there had been impropriety".

22. That paragraph, and the corresponding paragraphs in my judgment, was expressed in relation to the defence of responsible journalism. Neither I nor Lord Mance was addressing the issue of meaning. It does not appear to me that the paragraphs in my judgment, or the paragraph in Lord Mance's judgment, take the matter any further on the issue of meaning.

23. In my judgment the website publication obviously does not allege actual guilt. As Mr Rampton submitted, the article is about an investigation and not just about the making of allegations. As was said in *Lewis*, a statement that a claimant is under investigation cannot reasonably be understood as stating that he is guilty because if that were so it would be almost impossible to get accurate information about anything (see page 285).

24. And in my judgment Mr Price's submissions are correct. In particular, if the reasonable reader is a person who would treat the archive material as stating no more than what was the position at the time the material was originally published (in this case June 2006), then there would be no sense in the requirement to update the archive. That is a requirement, as stated by Lord Neuberger, against which the

defendant first appealed to the Supreme Court, and then withdrew their appeal. I reject Mr Rampton's submission that the reasonable fair minded reader would understand that the allegations might, in the interim, have turned out to be ill founded, when the update does not suggest that.

25. In deciding the issue of meaning I am not bound to choose between the meanings put forward by the parties. However, in this case I do accept the submissions of Mr Price that the words complained of actually meant

> "that there were, and at the date of publication of the article online complained of there continued to be, strong grounds to believe that the claimant:
>
> 4.1 had abused his position as a police officer with the Metropolitan Police's Extradition Unit by corruptly accepting £20,000 in bribes from some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges;
>
> 4.2 had thereby committed an appalling breach of duty and betrayal of trust.
>
> 4.3 had thereby also committed a very serious criminal offence.

26. For those reasons I determine that the actual meaning of the website publication for readers who read it in the period after 5 September 2007 and before the update in October 2009 is the meaning pleaded in the preceding paragraph.