



Neutral Citation Number: [2006] EWHC 1062 (QB)

Case No: HQ04X03998

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 May 2006

Before:

THE HON. MR JUSTICE GRAY

Between:

MOHAMMED HUSSEIN AL AMOUDI

Claimant

- and -

(1) JEAN CHARLES BRISARD

Defendants

(2) JCB CONSULTING INTERNATIONAL SARL

Desmond Browne QC and Jonathan Barnes

(instructed by **Nabarro Nathanson**) for the **Claimant**

Adam Speker (instructed by **Reynolds Porter Chamberlain**) for the **Defendants**

Hearing dates: 5 May 2006

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.

.....
THE HON. MR JUSTICE GRAY

Mr Justice Gray:

The questions

1. This application raises the question whether and, if so, in what circumstances it is open to a claimant complaining of an item on an Internet website open to general access to rely on a presumption that substantial publication of that item has taken place within the jurisdiction of the court. The Claimant, Mr Mohammed Hussein Al Amoudi, contends that there is such a presumption, albeit a rebuttable one. The Defendants, M. Jean Charles Brisard and JCB Consulting International SARL, maintain that no such presumption exists, rebuttable or otherwise. Their case is that the Claimant must prove publication in the ordinary way.
2. In the event that the Claimant is successful on that question, I am asked to strike out or in the alternative to give summary judgment in favour of the Claimant in relation to those parts of the Defence which deny that there was publication on the website within the jurisdiction.

The background facts

3. I can take the background facts against which those questions fall to be resolved quite shortly.
4. The Claimant is described as a prominent and respected international businessman who is well known in the major financial centres of the world, including London. He was born in Ethiopia but has made his home in Saudi Arabia. He is said to spend a total of approximately two to two-and-a-half months a year in England for business and personal reasons. He has a home in London.
5. The first Defendant, M. Brisard, who is a French national resident in Switzerland, asserts that he is an author and international expert and investigator on terrorism financing. The second Defendant was a limited liability Swiss company of which M. Brisard is the managing partner, the majority shareholder and one of the two authorised signatories. The company is said by M. Brisard no longer to be in existence.
6. The claim is in respect of two publications. The first is entitled "OSAMA BIN LADEN ECONOMIC ENVIRONMENT JULY 2001 FINAL REPORT Jean Charles Brisard". That "Final Report" was described on the Defendants' website as "...a 'First International Report on the Al Qaeda financial network for the intelligence community' published by the French National Assembly (Money Laundering Committee), October 2001". The Claimant's case is that the extracts from that publication which are the subject of his complaint bore the following meanings defamatory of the Claimant:
 - i) that he is or, alternatively, there are strong grounds to conclude that he is, a knowing participant in the economic, financial and/or terrorist networks of the terrorist Osama Bin Laden and/or is likely to have knowingly facilitated ties with the said network; and/or

- ii) that, being himself a part of the vast financing system that is the trademark of Osama Bin Laden's terrorist operations, he has knowingly financed and/or facilitated the financing of Osama Bin Laden's terrorism.
7. The second publication described itself in the following terms: "TERRORISM FINANCING – routes and trends of Saudi terrorism financing – report prepared for the President of the Security Council United Nations Dec 19, 2002 – New York, USA, Jean Charles Brisard – JCB Consulting". Within the body of the document the Claimant is listed as one of the "Main individual Saudi sponsors of Al Qaeda". I do not need to set out the defamatory meaning which the Claimant says this publication bears.
8. I should record without comment that the Claimant challenges the Defendants' description of the two publications and in particular disputes the claim that the second publication was prepared for anyone at the United Nations.
9. A Defence has been served on behalf of both Defendants. It contains no substantive defence. What is for present purposes relevant is that the Defendants join issue with the Claimant on his claim that there was any publication within the jurisdiction of this court of either of the reports sued on.

The pleadings in relation to the issue of publication

10. In relation to the issue of publication, a convenient starting point is to set out the way the Claimant puts his case in the Particulars of Claim:
 3. Until at least May 2004 the Defendants owned and maintained a website at <http://jcbconsulting.com> that was at all material times open to general access by any user of the Internet.
 4. Until the date identified in paragraph 3 above the Defendants published or caused to be published on the Internet at <http://www.jcbconsulting.com> to a substantial but unquantifiable number of readers in this jurisdiction [the words complained of]."

The same formulation is to be found in paragraph 9 of the Amended Particulars of Claim dealing with the second publication complained of.

11. The reason why there is no complaint of publication prior to 9 December 2003 is that any claim in respect of earlier publication would have been statute- barred: the claim form was issued 9 December 2003 and the limitation period in defamation is one year. The Defendants claim that the website was disabled on 12 February 2004 and that it became totally inaccessible from 28 March 2004. These claims are hotly contested by the Claimant.
12. Pursuant to an Order of Master Eyre dated 28 July 2005, the Claimant amended the Particulars of Claim to particularise his case for saying that publication within the jurisdiction took place. The added particulars assert that the purpose of the Defendants' website was to promote publicly and to the world at large the business of

both Defendants including in the UK and recite various admissions said to have been made by or on behalf of the Defendants in regard to the accessibility of their website and the number of hits made on it. In addition the Claimant relies on a number of occasions when various individuals both within and outside the jurisdiction downloaded the words complained of.

13. The Defence contains a useful preliminary summary of the Defendants' case, which, so far as material, states that it is the Defendants' case:

“... ”

2.3 That in the relevant period the reports containing the words complained of were not downloaded within this jurisdiction;

2.4 Alternatively, if and insofar as the Claimant can prove that the reports were downloaded within this jurisdiction within the relevant period, they were downloaded by lawyers acting for the Claimant or for others named in the reports or by persons or friends or business associates of the Claimant and hence reliance upon such publications amounts to an abuse of process as defined by the Court of Appeal in *Jameel v Dow Jones* [2005] 2 WLR 1614;

2.5 That, save as identified in 2.4 above, the Claimant has failed to plead publication to third parties who downloaded the words complained of in the relevant period;

2.6 That a jury properly directed could not reasonably infer from the matters pleaded at 4A and 9A that the words were published to a 'significant but unquantifiable number of readers in the jurisdiction';

... ”

2.8 That any proved publication (which is denied) would result in no more than nominal damages (the Claimant having chosen not to plead facts and matters to support his claim in damages despite being invited to do so at the hearing before Master Eyre and before service of the Amended Particulars of Claim); and

2.9 That, in the light of the above, the cost of pursuing this action will be wholly disproportionate to the outcome”.

14. In answer to the Claimant's contention that the website was at all times open to general access by any user of the Internet, it is pleaded in paragraph 5 of the Defence:

“5.1 It is admitted that the Defendants were responsible for the owning and maintaining of the website at the address

incorrectly set out. The correct address was <http://www.jcbconsulting.com>.

5.2 It is not admitted that the website was open to general access by any user of the Internet since it is not within the Defendants' knowledge that that was the case but it is admitted that no restrictions were placed upon access by the Defendants..."

15. Later on in the Defence the Defendants plead to the detailed particulars contained in paragraphs 4A and 9A of the Amended Particulars of Claim. There is no need for me to recite these parts of the Defence.

The progress of the action

16. The action has made slow progress, in part because the Defendants, when acting in person, made an application to stay the proceedings on the ground of *forum non conveniens* and, after they instructed solicitors, on the ground that the action is an abuse of the process. No order was made on those applications when the case came before Master Eyre in July 2005. At that time it was not suggested on behalf of the Claimant that there was any presumption that publication had taken place within the jurisdiction.
17. Thereafter on 21 December 2005 M. Brisard served his List of Documents. In it he claims that documents relating to persons accessing the website www.jcbconsulting.com are no longer in his control. He explains that the webmaster no longer works for the Second Defendant and reasonable enquiries have been made of him for documents. He adds that the Second Defendant moved offices in 2003 and some of the documents relating to website access have not been retained.
18. In consequence of these unfortunate events, the only documents which have been disclosed by the Defendants in relation to the number of hits on the website are monthly summaries of the number of hits said to have been recorded broken down by country. The provenance of those summaries is unclear. On the face of them it appears that the number of hits made on the website from the United Kingdom has been few. The summaries do, however, record a large number of hits where the country from which they were made is either not known or not recorded. It is an open question whether some at least of these unsourced hits have been made from this country.
19. The Claimant does not accept that these summaries reveal the true position. What is clear, however, is that disclosure has not provided the Claimant with the assistance in relation to the issue of publication which, understandably, had been expected.
20. Although the trial is due to start on 6 June, witness statements have still not been exchanged. There is no reason to suppose that they will cast any further light on the issue of publication within the jurisdiction.

The argument for the Claimant

21. The rebuttable presumption for which the Claimant contends is that the Defendants published or caused to be published on the Internet to a substantial number of readers in this jurisdiction the two items complained of. By “substantial” is meant sufficient readers of the publication to justify judgment. It is accepted that the presumption is formulated in those terms in order to avoid the charge that the Claimant is claiming in respect of only a nominal publication with the result that his claim would be struck out as an abuse of the Court’s process: see *Jameel v Dow Jones* [2005] QB 946. In any event Mr Desmond Browne QC for the Claimant argues that, in light of the very serious charges levelled against the Claimant of connections with international terrorism, which the Defendants do not assert to be justified, it would be extraordinary to deny the Claimant relief on abuse of process grounds.
22. The Claimant relies by analogy on the accepted practice that where the publication complained of is to the world at large (as in the case of publication in a newspaper or a book), the claimant is not expected to plead or prove publication to individual publishees: see *Fullam v Newcastle Chronicle* [1977] 1 WLR 651 and *Gatley on Libel and Slander*, 10th Edition and Supplement, 2005 at paragraph 26.5. Mr Browne accepts that there is no existing authority to the effect that the rule for newspaper and book publication applies to Internet postings or openly accessible web pages. However, citing a dictum of Kirby J in *Gutnick v Dow Jones* [2002] HCA 56 at paragraph 67 to the effect that the Internet will require almost every concept and rule in the field [of defamation] to be reconsidered in the light of this unique medium of international communication, Mr Browne argues that it should be assumed, unless and until the contrary is proved, that material available on the Internet will have been read by a substantial number of readers in the jurisdiction. He says it would be illogical not to do so, especially given the ease of access provided by search engines.
23. So far as authority is concerned, Mr Browne suggests that a decision of mine in *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EMLR 876 is distinguishable on its facts. He relies strongly on a dictum of Sedley LJ in *Steinberg v Pritchard Englefield & another* [2005] EWCA Civ 288 at paragraph 21 that, in the circumstances of that case, the inference of substantial publication of a letter posted on the internet was irresistible. Finally, Mr Browne points out that, as it happens, damages have already been assessed by the English court in respect of another publication by the present Defendants on the same website: see *Mahfouz v Brisard & others* [2004] EWHC 1735 (QB).

The argument for the Defendants

24. In his impressive skeleton argument on behalf of the Defendants, Mr Adam Speker starts by pointing out that the Claimant already relies on the presumption of damage, in that he asserts no fact beyond the presumption to support his case on damage. The Claimant also relies on the presumption of falsity. If he is to be entitled to the benefit of a further presumption in relation to publication, the Claimant will, in the absence of rebutting evidence from the Defendants, be entitled to judgment in the action, including injunctive relief and perhaps a declaration of falsity pursuant to section 9(1)(a) of the Defamation Act, 1996. All this in a case where, as Mr Speker further points out, the Claimant has chosen not to sue the Defendants in either the United States or Saudi Arabia or Switzerland or any other jurisdiction. In these

circumstances he suggests that the court should be particularly cautious about acceding to the present application.

25. Mr Speker maintains that what the Claimant is seeking by this late application is a change in the law. Not only is it undesirable for an application like this to be made so late in the day for the reasons given by Brooke LJ in *Waple v Surrey County Council* [1998] 1 WLR 860 at 869D-F; by May LJ in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 and by Simon Brown LJ in *McPhilemy v Times Newspapers Ltd (No 3)* [2001] EMLR 832, it is also misconceived because under English law there is no presumption of law that, merely because a report is available on the Internet, it has been published to a substantial number of readers. Mr Speker asks rhetorically what are the facts or conditions which, according to the Claimant's case, give rise to the presumption relied on. In any case it is, he says, wholly unclear what is meant in this context by the term "substantial" and how the jury would be supposed to assess damages.
26. Mr Speker accepts that in publications to the world at large (such as newspapers or books) the claimant is not required as a matter of practice to plead that publication took place to any particular individual. In such cases sale and circulation figures are invariably available with the result that the jury are able to infer substantial publication and would be perverse not to do so. In the present case by contrast, it is submitted that publication over the Internet takes place if and only if the material is accessed and downloaded by a third party within the jurisdiction. Mr Speker accepts that the jury may draw an inference to that effect at trial but at this interim stage the Claimant does not and cannot assert that a jury would be perverse not to do so.
27. In support of his argument Mr Speker relies on the refusal of Eady J in *Hewitt v Crunwald* [2004] EWHC 2959 (QB) in rather different circumstances to make the assumption, which he described as "formulaic" that a substantial but unquantifiable number of readers would have understood the words complained of to refer to the claimants. He relies also on my decision in *Loutchansky* and by analogy on the reluctance of the Court of Appeal in a trademark case, *800 – Flowers Trade Mark* [2002] FSR 12 at paragraphs 136-137, to infer the use of a mark in the United Kingdom from the mere fact that the mark had been placed on the Internet from a location outside the UK. The Defendants' case is that the issue of publication should be left to the jury to determine on the evidence, if necessary by inference, the extent of the publication of the two items complained of.

Discussion and conclusion

28. It is clear from the terms of the Application Notice, as well as from the skeleton argument of the Claimant, that the preliminary ruling sought by the Claimant is that there is a presumption that the words complained of were published via the Internet to a substantial but unquantifiable number of readers in the jurisdiction of the Court. However, it became apparent during the course of the oral hearing that there was disagreement between the parties as to the difference, if any, between a presumption (in this case a rebuttable presumption) on the one hand and an inference. The uncertainty was highlighted by the heavy reliance placed by the Claimant on *Steinberg*, in which case Sedley LJ described the inference of publication as being "irresistible".

29. The current (16th) edition of *Phipson on Evidence* describes the relevance of presumptions at paragraph 6-16 in these terms:

“Certain presumptions of fact and law are recognised by the courts. Presumptions may be rebuttable or irrebuttable. Where a presumption operates, the court may or must draw a certain conclusion. On most occasions this will be in the absence of evidence in rebuttal, thus assisting the party who bears the burden of proof on that issue. The effect of a presumption may be to require less evidence than would otherwise be necessary, or to make it unnecessary to call any evidence at all. Some presumptions are irrebuttable, in that the court is bound to draw a certain conclusion, whether or not there is evidence to contrary effect; in such circumstances evidence in rebuttal will be inadmissible.”

The editors then deal at paragraph 6-17 with the different types of presumption as follows:

- “(a) *Rebuttable presumptions of law*: where a rebuttable presumption of law applies in favour of a party, on the proof or admission of one fact, another fact is to be presumed. Once the presumption applies, the persuasive or evidential burden (as the case may be) is on the other party to disprove the presumed fact.
 - (b) *Irrebuttable presumptions of law*: where an irrebuttable presumption of law applies, on proof or admission of a basic fact, another fact will be presumed and the other party is barred from calling any evidence in rebuttal...
 - (c) *Presumptions of fact*: presumptions of fact are invariably rebuttable. Where a presumption of fact applies, on the proof or admission of a fact, another fact *may* be presumed. But unlike rebuttable presumptions of law, presumptions of fact do not shift the persuasive or evidential burden. Strictly speaking, the term ‘presumption of fact’ is a misnomer. It describes the readiness of the court to draw certain repeated inferences as a result of common human experience”.
30. Those paragraphs appear to me to make clear that the presumption for which the Claimant contends in his Application Notice and in his skeleton argument is a rebuttable presumption of law. That is to be distinguished from a presumption of fact, which label is described in *Phipson* as “a misnomer” and which is in my view more appropriately described as an inference which the tribunal of fact may, depending on the circumstances, draw as a result of common human experience.
31. The question which I therefore have to decide is whether the Claimant is right to say that there is a rebuttable presumption of law, in the sense which I have indicated, that

the publication on the Internet of the two items complained of was to a substantial but unquantifiable number of people within the jurisdiction.

32. As to that the general rule, as stated by the editors of the current edition of *Gatley*, at paragraphs 6.1 and 32.5, is that the claimant bears the burden of proving that the words complained of were read or seen by a third party. From that proposition it would appear to follow that, in the case of an Internet libel, it would be for the claimant to prove that the material in question was accessed and downloaded. This is what the editors of *Gatley* suggest at paragraph 32.7. I do not accept that *Fullam* is authority for any contrary proposition; it decides no more than that for the purpose of pleading publication in a case where the claimant relies on an innuendo meaning, it is sufficient for the claimant to assert that the publication was to a substantial but unquantifiable number of readers possessing the knowledge of extrinsic facts necessary for them to understand the words in their innuendo meaning.
33. It is well known (and juries are routinely so directed) that some facts are capable of direct proof, whereas others may properly be proved by inference. Thus publication of the items complained of in the present case to a particular individual could be proved by calling that individual to say that he or she accessed the items and downloaded them within the jurisdiction. A wider publication may be proved by establishing a platform of facts from which the tribunal of fact could properly infer that substantial publication within the jurisdiction has taken place. As I read the observations made (obiter) by Sedley LJ when refusing an application for permission to appeal in *Steinberg*, he was simply saying that on the facts of that case the inference that a substantial number of people would have accessed Mr Steinberg's letter was irresistible. He was not in my view suggesting that there was any presumption to that effect.
34. Contrary to the submission of the Claimant, I consider that my decision in *Loutchansky* is in point. The facts in that case were that the claimant was complaining of the posting on the website of *The Times* of an article defamatory of the claimant which had been published in the newspaper. The evidence showed that a large number of visits had been paid to the website but there was no direct evidence how many of these visitors, if any, accessed the article complained of. In my judgment I said this:

“14. In the present case, whilst it is not pleaded [counsel for the claimant] contends that the evidence is that 12.5 million direct visits are paid to *The Times*' website each month. He therefore submits that it can safely be assumed that a number of those visits would have been paid in order to gain access to the particular article about the Claimant, which is complained of in this action. [He] further draws attention to the publicity and promotional material put out by the Defendants advertising the existence of their website and the facility with which access to it can be obtained. [Counsel for the defendants], however, contends that, for a number of reasons, the basis for any such inference of publication having taken place is simply not made out. He points out that the two articles complained of had been placed online on the date when

they were published, namely September and October 1999 respectively. The complaint made by the Claimant, in respect of those publications, is confined to a period commencing on February 21, 2000. [He] suggests that the articles, being respectively five and six months' old, are unlikely to have been visited so long after their original publication. He also draws attention to the fact that the name of the Claimant was misspelled in the original articles, so that the search engine would not have enabled a person to type in the word "Loutchansky", and so gain access to the articles complained of. For these and other reasons which I need not recite, [counsel for the Defendants] submits that it cannot be presumed, merely because the article was available on the website, that anyone would in fact have read it after February 21, 2000. Moreover, he contends that this is a situation where it is incumbent on a claimant to prove affirmatively that publication took place, and that the court should not permit a claimant to establish publication on the basis of mere inference. Speaking for myself, I understand the force of many of [counsel for the Defendant's] observations. However, it appears to me that proof of publication in a defamation action is no different from proof of a number of other propositions that may fall to be established in the course of such an action. It is possible for publication, as for other propositions, to be established by inviting a tribunal to draw inference from the platform of facts. That, as it appears to me, is what [counsel for the Claimant] is inviting the tribunal in the present case to do.

15. I consider that the law in *Gatley*, albeit ante-dating website publications over the Internet, accurately sets out the applicable principles. I accept that a publication may be established as a matter of inference if the underlying facts justify the inference being drawn.

...

20. ... In the present case it appears to me to be an open question whether or not visits were paid to *The Times'* website, and as a result of such visits being paid, access was obtained to the article complained of. That appears to me to be an open question of fact. I see no reason why it should not be decided by the jury as other questions of fact fall to be decided and that is my ruling in this case."

35. What I said in my judgment in *Loutchansky* appears to me to be consistent with what is now to be found in the section of *Gatley* dealing with proof of publication under the heading "Inferences" at paragraph 32.6. I believe it is also consistent with what Dr Matthew Collins says at paragraph 5.04 of "*The Law of Defamation and the Internet*" (2nd Edition):

“Proof that Internet communications have been published is therefore not usually a difficult task. Every e-mail message which has been received and seen by a recipient, other than the person defamed, who is capable of understanding it, has been published. So too is every message posted on a bulletin board and every web page which is accessible to computer users, if it can be proved that any third person capable of understanding it has displayed and seen the message or web page on a computer screen. The claimant bears the burden of proof. That burden will generally be discharged by proving that at least one person, other than the claimant, saw, read or heard the communication. In the case of generally accessible web pages and bulletin boards with many subscribers, it may be inferred that publication has occurred”.

36. I think that further assistance on the question which I have to decide can be derived from *Jameel v Dow Jones Inc.* That was another claim in respect of a libel on a Saudi businessman in respect of an article published on an internet website which was said on behalf of the claimant to be available to between five and ten thousand subscribers within the jurisdiction. The claimant in that case invited the inference to be drawn that a substantial number of readers of the main article would have read the page to which the hyperlink led. The defendant publishers adduced evidence that only five subscribers within the jurisdiction had been able to access the alleged libel via the hyperlink. Of those five, three were members of the claimant’s “camp”. The Court of Appeal struck out the claim as an abuse of process on the ground that the extent of the publication within the jurisdiction was minimal and did not amount to a real and substantial tort. It appears to me to be of some significance that there was no suggestion made on behalf of the claimant in the context of that case that he could rely on any presumption of publication. The fact that the Court of Appeal struck out the claim provides some support for the view that an argument in favour of the existence of a presumption of publication would not have found favour with the court.
37. For the above reasons I am unable to accept that under English law a claimant in a libel action on an Internet publication is entitled to rely on a presumption of law that there has been substantial publication. I am not dissuaded from that view by the outcome of the separate action previously brought by Mr Mahfouz against the present Defendants.
38. Finally, I should for completeness add that, whatever the position may turn out to be at trial, I do not think it would be right for me to conclude at this stage and before exchange of witness statements that it would be perverse for a jury to draw any other inference than that there was substantial publication of the two items complained of within the jurisdiction.
39. It follows that I do not accede to the application of the Claimant that those passages in the Defence which deny publication should be struck out or that summary judgment should be entered for the Claimant on the issue of publication.