



Neutral Citation Number: [2007] EWHC 3098 (QB)

Case No: HQ07X01937

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/07

Before:

THE HON. MR JUSTICE EADY

Between:

Kevin Blackwell
- and -
News Group Newspapers Ltd
Mark Irwin
Kenneth Bates

Claimant

Defendants

Jonathan Crystal (instructed by Hextalls LLP) for the Claimant
Mark Warby QC and Jacob Dean (instructed by Carter-Ruck) for the Third Defendant

Hearing date: 18 December 2007

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 HON. MR JUSTICE EADY

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1. The Claimant is a former manager of Leeds United Football Club, his employment having been terminated on 20 September 2006. He sues over an article appearing in *The Sun* on 7 May 2007 proclaimed as a "Bates Exclusive" and with the heading "There are too many f*****g time wasters out there...chancers trying to make a turn off Leeds Utd". Only the Third Defendant, Mr Bates, remains in the action (the other two defendants having reached terms of settlement). Mr Mark Warby QC, appearing for Mr Bates, now seeks to demonstrate that there is an unassailable defence of qualified privilege and that the plea of malice is unsustainable. He applies for summary judgment under s.8 of the Defamation Act 1996. In the alternative, he claims summary judgment under CPR Pt 24 in respect of one or more issues, with a view to limiting the scope of the trial.
2. The words selected for complaint form a relatively small part of the overall article. That is understandable because the Claimant is only mentioned in those few passages. The words complained of include the heading quoted above and continue as follows:

"I'll tell you now, Dennis Wise is staying as manager. Unlike that cheeky sod Kevin Blackwell, he's not in the excuse making business.

Blackwell said the club wouldn't have been relegated last week if he'd still been in charge. He's right. We would have been relegated in December.

He lost control of the dressing room and left it in complete disarray".

3. The natural and ordinary meanings are pleaded at paragraph 4 of the Particulars of Claim:

"4.1 the Claimant shamelessly excused and avoided responsibility for his actions;

4.2 the Claimant's managerial incompetence would have resulted in Leeds being relegated in December and

4.3 the Claimant lost control of the dressing room and left it in complete disarray"

I have no doubt that these words are capable, in their proper context, of bearing those meanings. Moreover, a jury would not be perverse to conclude that the words are defamatory and, in particular, reflect on the Claimant's professional competence as a football manager. Mr Warby developed a convincing argument that readers would not understand the Claimant to be one of the "f*****g timewasters" or "chancers" referred to, but that would be for a jury to determine. He is at least described as a "target" and apparently in that context.

4. Mr Warby's first line of attack was to rely on the form of privilege at common law known as "reply to attack". He argues that on the largely undisputed facts the court is

now in a position to rule in his client's favour and hold that the defence of privilege is bound to succeed. I should therefore set out in full the basis for the plea of privilege:

"10.1 At the time of the Claimant's dismissal from the Club in September 2006 the Claimant and Leeds United Association Football Club Ltd ("LUAFC") issued a press release. The Claimant and the Third Defendant agreed that they would not make any further public statements relating to the Claimant's time at Leeds and his dismissal.

10.2 The Claimant contended that he had been wrongfully dismissed and issued proceedings in the Employment Tribunal against ... LUAFC. The Claimant's dissatisfaction with his dismissal and the fact that he had commenced proceedings against LUAFC had been widely published.

10.3 On 4 May 2007, the day before the press briefing, the following article appeared in *The Sun*:

Kev's dig

Kevin Blackwell reckons he would have kept Leeds in the Championship.

The Luton boss was axed by United after just eight games this season – four months after leading them to the play-off final.

United will almost certainly be relegated on Sunday but Blackwell insists he would have saved them. He said: 'I know what I can do. I'm a bloody good manager.'

10.4 On the same day the following article appeared in the *Daily Mirror*:

Kev: I'm saviour

Former Leeds manager Kevin Blackwell says he could have saved the club from relegation had he not been sacked.

Blackwell, now in charge of Luton, was dismissed in September, despite taking Leeds to the Championship play-offs.

He said: 'I know what I can do. I'm a bloody good manager. I turned the club around from nothing. Now they are all but relegated so draw your own conclusions'.

10.5 Those statements by the Claimant were reported elsewhere in the press at around that time.

10.6 The said statements by the Claimant (in breach of the agreement referred to above in paragraph 10.1) are an attack on

the Third Defendant's conduct and competence in his capacity as chairman of the Club and the attack on the decisions made by his and LUAFC both to dismiss the Claimant from his position as manager of the Club and to appoint Dennis Wise in the Claimant's place.

10.7 The Third Defendant was aware of the Claimant's attack at the time he gave the press briefing on 5 May 2007. He referred to the attack at the briefing, expressly introducing the allegations complained of by quoting the Claimant's words.

10.8 The reference to the Claimant's attack was reported in the words complained of, thereby making it clear to readers of the article the context in which the Third Defendant made his comments. A large proportion of those readers are in any event likely to have read the 'Kev's dig' article in *The Sun* just 3 days earlier.

10.9 The Claimant's attack having been published in *The Sun*, the *Daily Mirror* and elsewhere in the press the manner of the Third Defendant's publication of his reply in *The Sun* was legitimate and went no wider than necessary in order to inform those interested.

10.10 The Third Defendant's reply was confined to matters relevant to the Claimant's conduct and competence in his role of manager of the Club and thereby to the attack made by the Claimant on the Third Defendant and on LUAFC.

10.11 In the circumstances the Third Defendant was entitled to reply to the attack made upon him by the Claimant, and the readers of *The Sun* had a corresponding and legitimate interest in receiving that reply".

5. Mr Crystal, for the Claimant, argues that there was here no "attack", certainly no attack by his client, to which Mr Bates needed to reply. Moreover, even if there was an attack, he went beyond the bounds of any reasonable response. Mr Warby's rejoinder is that the true basis of his plea is that there was, in any event, a legitimate interest on the part of Mr Bates to make the allegations he did, and a corresponding interest in the readers of *The Sun* to see what he had to say. The notion of an "attack" is not essential to the plea he puts forward. Nevertheless, as it is so pleaded, I consider that my first task is to address whether there was an attack on the Claimant and, if so, what exactly it was directed to and by whom it was made.
6. Mr Crystal argued that what the Claimant was doing was defending, or "puffing", his own competence and professional skill. Not only was he not primarily attacking Mr Bates, but it is the fact that Mr Bates was not mentioned at all. The facts about Leeds United's demise are well known and no doubt those who are interested in football would have discussed how it came about and expressed opinions as to the contributory factors and where responsibility lies. At the beginning of May 2007, at the end of the season, the Club went into administration and automatically 10 points

were deducted under the Championship rules. It is not simply a question of whether Mr Bates or the Claimant was "to blame". In other words, merely because the Claimant was denying personal responsibility and, to an extent, trumpeting his own virtues, it by no means follows as a necessary implication that he was ascribing blame to Mr Bates. Moreover, the reason why the Claimant is supposed to have been "a cheeky sod" is not that he had had the effrontery to criticise Mr Bates but because he was in "the excuse-making business"; that is to say, he was defending his own record and reputation.

7. Sometimes, in this context, two issues become intertwined and difficult to separate. First, one has to decide whether the relevant defendant was indeed replying to an attack so as to give rise to an occasion of privilege. That may be either on behalf of himself or on behalf of another person whose reputation he had reason to defend: See e.g. *Vassiliev v Frank Cass & Co Ltd* [2003] EMLR 33. Secondly, it may be necessary to enquire if the response was so excessive or disproportionate as to fall outside the scope of any privilege that might otherwise be available. Here, Mr Crystal puts his argument both ways.
8. I do not accept that what Mr Bates said can be characterised as responding to "an attack", whether on himself or any other individual he was seeking to protect. He was holding forth about a number of "targets" who were in his sights at the time, of which the Claimant happened to be one. He was simply "having a go" at those he thought had contributed to Leeds United's problems, as no doubt have hundreds of other fans and commentators.
9. Can the privilege be more broadly based? Can it be said, irrespective of whether Mr Bates was responding to an attack that there was in any event a sufficient common and corresponding interest between him and *The Sun's* readers to give rise to a privileged occasion? I cannot see that there is.
10. Many people hold forth about "the beautiful game" from a variety of stand points and with varying degrees of authority and knowledge. When the readership runs into millions, as in the case of this newspaper, there must be some cogent reason of public policy why defamatory remarks need to be accorded a cloak of privilege. If Mr Bates wishes to attribute or spread the responsibility for the Club's woes, that is his entitlement; but I do not accept that public policy requires that he should be allowed to attack whomsoever he pleases to millions of people under cover of privilege. There was no duty on his part to do so; nor a legitimate common and corresponding interest in the subject-matter as between him and *Sun* readers. I conclude that, if the jury hold that the Claimant has been defamed, Mr Bates must rely on the alternative defences for justification and/fair comment, as appropriate.
11. That brings me to Mr Warby's subsidiary arguments. He submits that if and insofar there are defamatory allegations about the Claimant contained in the article they are plainly to be characterised as comments. Moreover they are comments which a person could honestly express on the undisputed facts: see e.g. *Cheng v Tse Wai Chun* [2001] EMLR 777.
12. Mr Crystal argued that to say of the Claimant that if he had still been in charge as manager at Leeds "we would have been relegated in December" is an assertion of fact. Mr Warby, on the other hand, suggested that any reader would know that a club

could not be relegated part way through the season and would thus appreciate a bit of hyperbolic hypothesis when they saw it – amounting to a robust comment about the Claimant's supposed hopelessness.

13. I am of the view that in this respect Mr Warby is correct, but that is not the end of the story. The allegation of “losing control of the dressing-room” is one which is capable of being categorised as an assertion of fact. A jury would not, in my view, be perverse if it so held. I accept that it could be characterised as comment also, since “losing control” may be a matter of opinion and degree. I am not prepared to rule that the words are bound to be classified as comment only or that, on the undisputed facts, the defence of “honest comment” is bound to succeed. There would be at least some tasks for a jury to perform.
14. I turn to the submissions on malice. The principles are well known. As was made clear, for example, in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840, a judge is required (at whatever stage is appropriate) to ensure that time is not wasted by allowing a plea of malice to go forward if either the plea itself or the evidence in support of it does not disclose a case more consistent with the presence of malice than with its absence.
15. In the present case, the plea of malice is to be found partly in the particulars of claim and partly in the reply. It is necessary to set out how it is put. First, in the particulars of claim it is said:

“6.1 in May 2007 Leeds United entered administration and was relegated for the first time to the First Division of the Football League;

6.2 such took place whilst the Third Defendant was Chairman of Leeds United and the words complained of were part of a wider article in which he attempted to blame others for the misfortunes of Leeds United:

6.3 the words complained of are part of a cynical attempt by the Third Defendant to absolve himself from any responsibility for such misfortunes despite their having occurred whilst he was chairman of Leeds United;

...”

16. I bear in mind that it is important to see if there is any material on which a jury could infer that Mr Bates knew what he was saying to be false or, at least, was recklessly indifferent as to its truth or falsity: *Horrocks v Lowe* [1975] AC135, 150. It seems to me that, so far, the allegations are equally consistent with the absence of malice, in that sense, as with its presence. The reference to “a cynical attempt” is what Mr Warby categorises as “rhetoric” and amounts to no more than bare assertion.
17. Next I turn to the reply:

“70.1 Paragraphs 6.1-6.3 of the Particulars of Claim are repeated.

70.2 The Third Defendant caused the publication of the words complained of (7 May) at a time when he knew the Claimant would obtain judgment for damages for wrongful dismissal (10 May).

70.3 The factual basis of the words complained of is false. The Third Defendant used inflammatory and exaggerated language. He has not made or offered any correction or apology to the Claimant in respect of any of the words complained of but has instead sought to defend the words complained of by pleas of justification and fair comment which are inaccurate and unfounded in the respects specified above.

70.4 In the premises, it is to be inferred that;

(a) the Third Defendant's dominant motive was to give vent to his personal spite or ill-will towards the Claimant and harm his reputation and/or

(b) the Third Defendant had the improper motive of falsely blaming the Claimant for the misfortunes of the Club and wrongly excusing himself from such responsibility and/or

(c) the Third Defendant could not have an honest and reasonable belief in what he caused to be published."

18. On Mr Warby's analysis, these particulars also fail to come up to scratch. Inflammatory and exaggerated language is not of itself evidence of malice, since it is equally consistent with strength of feeling and sincerity of belief. Moreover, it is now well settled that restrictions upon Article 10 rights should be concerned with matters of substance rather than form or mode of expression.
19. Also, it is well settled that the absence of a correction or an apology does not provide evidence of malice – still less so where the defendant in question seeks to defend his publication by way of justification or fair comment. Again, this is entirely consistent with honesty of belief. Accordingly, there is no sufficient factual basis upon which a jury could draw any of the three inferences invited. If they were to do so, without more, I am quite prepared to hold that any such conclusion would indeed be perverse.
20. In the result, I decline to grant summary judgment but, in accordance with the provisions of CPR Pt 24, I rule that the Claimant is entitled to judgment on the issue of qualified privilege and that Mr Bates is also entitled to judgment on the issue of malice.