Neutral Citation Number: [2009] EWCA Civ 667

Case No: A2/2009/1412

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEEN'S BENCH DIVISION
Mr Justice Eady
HQ07X02981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2009

Before :

LORD JUSTICE RIX
LORD JUSTICE WILSON

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Between :

RICHARD DESMOND	**Claimant / Respondent**
- and -	
TOM BOWER	**Defendant / Appellant**

- -
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Miss Adrienne Page QC (instructed by **Messrs Wiggin LLP**) for the **Appellant**
Mr Ian Winter QC and Mr David Sherborne (instructed by **Messrs Schillings**) for the **Respondent**

Hearing dates : 06th July 2009

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Judgment

Lord Justice Rix :

1. This is the judgment of the court.

2. In this appeal (we have given permission to appeal in the course of the hearing), we are concerned with an application to issue a witness summons for one Jafar Omid to attend the trial court and produce documents. Eady J, who began the trial on the day of the hearing of this appeal, 6 July 2009, refused permission to issue that summons at a pre-trial review held on 1 July 2009. The chronology has been foreshortened by the fact that witness statements were exchanged as recently as 22 June 2009. The application with which we are concerned was issued on 30 June 2009. The court's permission is necessary to issue the summons because it has been issued less than seven days before the commencement of the trial (see CPR 34.3(2)(a)). If it had been issued with seven days to spare, no permission would have been necessary, but the trial judge would have been entitled to deal in due course with any objection of Mr Omid and/or all questions of the admissibility of the evidence or documents which he will have been summoned to give or produce.

3. It is first necessary to set the scene in relation to the alleged libel with which we are concerned. The claimant is Mr Richard Desmond, the proprietor of (among other titles) the Express Newspapers. The defendant is the journalist and author, Mr Tom Bower. The trial arises out of a book written by Mr Bower about Conrad Black, Lord Black of Crossharbour, called *Conrad & Lady Black – Dancing on the Edge*, which was published on 6 November 2006 in hardback and on 6 August 2007 in paperback. At page 337 of the paperback version is to be found the passage complained of, which is set out in full at para 3 of the particulars of claim and which it is unnecessary for us to repeat here. Mr Desmond complains of the following meaning to be given to that passage:

> "that motivated entirely by his personal desire to get revenge against Conrad Black for losing an earlier court battle with him, the Claimant had directly ordered the Editor of the Daily Express to run a horrifically damaging story about Mr Black's (and Hollinger's) financial dealings, wholly indifferent as to whether the story was in fact true or false, in a vindictive and completely unjustified attempt to damage Mr Black's reputation and that despite his reputation for being a tough businessman and the fact that the story was actually true, the Claimant allowed himself to be ground into the dust by Mr Black by accepting an abject and humiliating settlement."

4. The *Lucas Box* meaning ascribed by Mr Bower (at para 6 of his amended defence) to the passage in the book is as follows:

"(a) the Claimant, *[who treated Express Newspapers as his personal vehicle to serve his own agenda,]* dictated that Lord Black and Hollinger, against whom he bore a grudge, be the subject of damaging attacks, not caring about the truth and fairness of what was written; and

(b) the Claimant, having insisted upon Lord Black and Hollinger being attacked by Express Newspapers to satisfy his own animus against Lord Black, climbed down when in the presence of Lord Black at a mediation of Hollinger's libel claim, allowed himself to be taken in by Lord Black's assurances of the financial health of Hollinger and submitted his newspaper to a public settlement that gave vindication to Lord Black's pursuit of his critics."

5. The articles on which Lord Black had sued were published in the Sunday Express in November 2002, and the libel action to which they gave rise was settled in September 2003. At that time the editor of the Sunday Express was and still is Mr Martin Townsend.

6. The passage in italics in para 4(a) above was included in Mr Bower's original defence but was struck out, with numerous other particulars of justification which followed, by Eady J in his judgment given on 19 November 2008 (2008 EWHC 2952 (QB)). The judge struck out such passages because he considered that the claim concerned "a distinct incident, and it is the truth of that incident that has to be proved by the defendant" (at para 12). The judge considered that "the real issue between the parties" was a focused issue (para 14) although he did not say in terms what that was. However, it clearly related to the specific incident regarding the publication of the Express article about Lord Black and Hollinger, Hollinger's libel claim and its settlement. Examples of the material struck out by the judge are various passages regarded as "general and unparticularised", or entirely collateral matters such as staff disagreements on stories about schoolchildren held hostage and murdered by Chechen separatists, or the opening of the memorial fountain in Kensington Gardens, or Mr Desmond's control of the content of pornographic magazines or television channels, or his bullying of staff, or his concern with asylum seekers and immigrants, or other newspaper proprietors and their families. The judge said that the investigation of all these matters would be completely disproportionate and would prolong the trial unduly. However, the judge did leave in other allegations of justification, such as that "Upon purchasing Express Newspapers, the Claimant immediately made his presence felt on the editorial floors of the Express" (amended defence, para 6.2); or that the "true measure of this hostility lay in his insistence upon highly negative articles being published by Express Newspapers about Black" (at para 6.5); or that some "extraordinarily offensive conduct towards senior executives of the Telegraph Group…was all in service of his personal agenda to dole out punishment and put pressure upon Black" (at para 6.5); or that a previous editor of the section of the Sunday Express in which the Black/Hollinger articles had appeared had "issued a public statement…in which…he said: "I'm sickened by the continual interference of the

proprietor in allegedly objective reporting and above all in the inflammatory hate-stirring headlines on asylum seekers"" (at para 6.9).

7. In his judgment of 19 November 2008 Eady J went on to consider the separate question of similar fact evidence. Mr Bower's counsel had argued that, notwithstanding that certain material had been excised by the judge from the particulars of justification, it might nevertheless be admissible as similar fact evidence. In this connection the judge referred to the leading case in the civil context of *O'Brien v. Chief Constable of South Wales Police* [2005] UKHL 26, [2005] 2 AC 534. He summarised:

> "The first question, it emerges, is whether or not the evidence which is proposed to be introduced is relevant in the sense that it is probative of any of the issues in the case, that is to say, of course, the pleaded issues in the case.
>
> The second question which arises, if the first hurdle is overcome, is whether or not the material should be admitted or whether it is, for example, too prejudicial for its probative value, if any."

8. In that context the judge stressed the importance of the distinction between the role of a pleading and the role of evidence. He said: "One does not introduce into the pleading evidence which is intended to support and make out the pleaded facts." He stressed that he did not as yet have before him the witness statements in the case. He indicated that if in due course the witness statements were to seek to reintroduce the matters which he had struck out of the pleadings, his "preliminary view" was that they would fail the two *O'Brien* tests. He concluded, however, as follows (at para 27):

> "Having said that, I recognise that it is too early to be ruling on matters of evidence, not least because I do not have the statements. If such statements are introduced when witness statements are in due course exchanged, it may be appropriate at that stage for me or the trial judge, if it is someone different, to rule upon those matters, but I think it is right, as [counsel for Mr Desmond] submits, that it would be inappropriate to attempt to give a definitive ruling on hypothetical witness statements at this stage."

And so the matter of similar fact evidence was specifically left over at that time.

9. Mr Desmond had served his original reply in May 2008 and an amended reply on 2 April 2009. At para 6.12 of that reply, and perhaps in the original reply which is not before us, in responding to particulars of justification, Mr Desmond pleaded

that "the job of editing newspapers belongs to the editor, and the Claimant did not interfere with this."

10. When witness statements came to be exchanged, on 22 June 2009, Mr Desmond reverted to his pleaded case about not interfering with the job of editors, see for instance at para 35, as did Mr Townsend in his witness statement, see for instance at paras 8 and 21.

11. Also exchanged on 22 June 2009 were the basic documents which tell the story about which Mr Bower now seeks to obtain the evidence of Mr Omid (the "Pentagon affair"). The substance of that evidence is described in Mr Bower's application dated 30 June 2009 and is based on two documents in particular, Mr Omid's particulars of claim in his libel action (with other claimants) against Mr Desmond (issued on 16 July 2008) and the Statement in Court by which that action was settled by Mr Desmond at the beginning of February 2009. The essence of this material is as follows. Mr Omid is the managing director of a hedge fund called Pentagon Capital Management plc ("Pentagon"). Mr Desmond had invested substantial sums in Pentagon for himself, and a relatively small sum (of £50,000) for his son. In 2007 Mr Desmond withdrew his personal investments but retained the investment for his son. After the recent market collapse Pentagon was required to suspend the ability to repay its investors pending an orderly winding down of its assets. Nevertheless Mr Desmond wanted his son's investment (most recently valued at £75,000) to be repaid. Mr Omid explained that Pentagon could not show any preference. On 10 July 2008 Mr Omid telephoned Mr Desmond. The call was recorded and a transcript of the telephone conversation is set out in Mr Omid's particulars of claim. Mr Desmond said that the £75,000 was on his mind all the time. He demanded a cheque for £75,000 or "we are going to be enemies...the worst fucking enemy you'll ever have". Mr Desmond put down the telephone as Mr Omid began to respond. On the same day Mr Omid sent Mr Desmond a conciliatory email of explanation and looked forward to a meeting scheduled for a fortnight later. Mr Desmond responded briefly to say that there was no point in a meeting. On 13 July an article appeared in the Sunday Express which is set out in Mr Omid's particulars of claim and which was alleged to be defamatory of the claimants. The particulars allege:

> "4.18 In all the circumstances the irresistible inference is that the Defendant was behind the publication of the article. It is a further irresistible inference that the reference to "Next week" at the end of the article was intended to send a message to the Claimants that if they did not pay, there would be further negative publicity.
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> 5. The natural and ordinary meaning of the article is that:-
>
> 5.1 The Claimants are intending to keep for themselves £1 billion of their investors' money, while dishonestly promising to return it to them…

5.5 The Claimants have a longstanding and cynical business practice of exploiting their long suffering small investors in order to make massive gains for themselves at their investors' expense."

12. Those particulars of claim were dated 15 September 2008. They were signed on behalf of Mr Omid and the other claimants by their solicitor with a statement of truth.

13. At the beginning of February 2009 a settlement Statement was read out in court. It contained the following:

"The article alleged that Lewis Chester and Jafar Omid were intending to keep for themselves £1 billion of their investors' money whilst dishonestly promising to return it to them. It was also alleged that investors had been dishonestly hoodwinked. It was suggested that Mr Chester and Mr Omid had refused to answer legitimate journalistic enquiries. The article also alleged that they together with David Chester have a longstanding and cynical business practice of exploiting their small investors in order to make massive gains for themselves at their investors' expense.

The truth is that there is no basis for these allegations. In fact information has been provided on a regular basis to investors and very substantial sums have already been returned to them since the decision was made in March 2008 to wind down the funds managed by Pentagon. No attempt was made to put the allegations to anyone at Pentagon before publication of the article. There is no truth in the suggestion that Lewis Chester, David Chester or Mr Omid have prospered by exploiting small investors, to the contrary Pentagon funds have performed well.

What the article did not mention was the involvement of Sunday Express proprietor Richard Desmond. Mr Desmond had investments with Pentagon which were fully refunded in 2007. However a family member had a very small continuing investment which Pentagon advised was not within their control and would have been unlawful to repay. Mr Desmond accepts that it was his comments in the presence of Sunday Express journalists that prompted the Sunday Express to publish the article.

I am pleased to inform your Lordship that a settlement has been agreed between the parties and that the Defendants are here today…to apologise for publishing the article. An apology has been published in the Sunday Express. In addition the Defendants have agreed to pay the Claimants a substantial sum in damages together with their legal costs…"

14. Eady J refused to grant permission to issue the witness summons to Mr Omid. He did so in the following terms:

> "It is said to be justified on the basis of being similar fact evidence, but it is to be noted that it relates to events subsequent to the issues which are central in the case. At page [540] of the *O'Brien* case, to which I was referred, it is clear that Lord Bingham is there contemplating previous matters as being brought in by similar fact evidence.
>
> Mr Thwaites submits that there is no reason in logic why subsequent events should not be admitted, but of course one has to remember that, in relation to justification in a libel action, subsequent material is normally only permitted if it is there to justify a general *Lucas Box* meaning relating to a trait of character, the subsequent evidence being an example of that trait of character. Here, in the light of my ruling last year, these issues were confined to specific events rather than general allegations about character.
>
> It seems to me that the events of 2008 are not relevant to any pleaded issue and to issue the witness summons would be inconsistent with the earlier ruling I gave narrowing the issues. Therefore I refuse to sanction it."

15. On behalf of Mr Bower, Miss Adrienne Page QC submits that there are three errors of law in that passage. First, the judge erred in saying that *O'Brien* did not sanction similar facts which had occurred subsequently to the matter in issue. Secondly, the judge erred in excluding the relevance of *O'Brien* from defamation actions unless there was a general plea going to a trait of character. That was to confuse relevance and means of proof. Similar fact evidence could be deployed, as in *O'Brien* itself, to make it more probable that a party had acted in a specific way alleged. Therefore the Omid evidence sought to be deployed was relevant to the pleaded case. Thirdly, the judge erred in saying that Mr Bower's application was inconsistent with the judge's November 2008 judgment narrowing the issues. The Omid evidence had not then been considered; in any event the judge had then reserved the issue of similar fact evidence, even though he had narrowed the pleaded issues.

16. In response on behalf of Mr Desmond, Mr Ian Winter QC did not dispute Miss Page's submitted errors save to the extent that they were encompassed in his essential broad submission that the Omid evidence was wholly irrelevant (in part because it had not been pleaded) and its introduction would be wholly prejudicial and disproportionate. Even though the judge had never considered such evidence before, for instance in November 2008, and even though the judge had then distinguished between pleadings and evidence and reserved the question of evidence for a subsequent occasion, nevertheless the Omid evidence was so wholly illegitimate an exercise of seeking to bring an entirely collateral matter into play, another trial within a trial, that the judge's ultimate decision was

justifiable. In this context he relied on what Ralph Gibson LJ had said in *Bookbinder v. Tebbit* [1989] 1 WLR 640 at 648, especially in the concluding passage –

> "A plaintiff ought to be able, if he can, to prove the untruth of a specific mistaken or false charge without having to face the burden of a trial directed to any number of preceding incidents of expenditure or of cutting expenditure in which he was concerned."

17. It is important to emphasise what arguments Mr Winter did not, ultimately, press upon the court. There was a great deal in his and Mr Sherborne's skeleton argument about the judge's decision being pre-eminently an exercise in case management with which an appellate court should be very slow to interfere, especially in libel actions, with their tendency to pass beyond manageable and economic bounds: see, for instance, *Polly Peck plc v. Trelford* [1986] QB 1000 at 1032C/E, *McPhilemy v. Times Newspapers* (1999) EMLR 751 at 773, *GKR Karate v. Yorkshire Post No 1* (2000) EMLR 396 at 404. That is all sound wisdom. However, the fact of the matter is that the judge's reasoning was essentially a matter of law, not case management. Indeed, when refusing permission to appeal, the judge did so only on the basis that it seemed to him that "the matter is clearly covered by existing authority and principle". In the event, Mr Winter's oral advocacy contained nothing along the skeleton's lines about case management, and we think he was realistic in this.

18. Nor did Mr Winter press upon the court in his oral advocacy either the judge's view about *O'Brien* not being concerned with similar fact evidence subsequent to the incident under specific examination, or any submission relevant only to matters of reasonable grounds or fair comment, where of necessity only matters prior to the defamation in question can be relevant. *O'Brien* was itself concerned with both prior and subsequent events; and *Cohen v. Daily Telegraph Ltd* [1968] 1 WLR 916 is a good example of the difference between, for instance, fair comment and justification: see at 919, where Lord Denning MR acknowledged that subsequent events are potentially relevant to justification. It is interesting to observe that Lord Denning appears to have considered that subsequent events should be pleaded ("to enable him to know the case he has to meet and open the way to discovery"), but that does not alter the fact that in the present case the judge adopted a firm distinction between pleadings and evidence.

19. Nor did Mr Winter ultimately press upon the court his own altered strategy, about which he told us he had informed the judge at the pre-trial review last week and on the basis of which he said that he had opened the case to the jury on the first morning of trial. That strategy was to eschew all references in Mr Desmond's reply or in his or Mr Townsend's witness statements as to Mr Desmond's

proprietorial recognition of his editor's independence. However, there has been no amendment to para 6.12 of the reply, nor has the content of the witness statements been reviewed for admissibility as required at a pre-trial review. In any event, the fact remains that the judge's reasons for refusing the application said nothing about such a strategy nor its significance one way or the other.

20. Ultimately, therefore, Mr Winter relied on a broad submission that the Pentagon affair was wholly collateral, irrelevant, non-probative and thus inadmissible; and that any probative value was wholly outweighed by its negative aspects, of prejudice to Mr Desmond and to the proportionate conduct of the trial. That submission was powerfully made, but we do not accept it. We consider the Pentagon affair to be quite unlike the collateral matters with which the judge was for the most part dealing in November 2008, such as, for example, Chechen separatists, staff bullying, or asylum seekers and immigrants. The Pentagon affair, as it is presented to the court, is about a published story in which Mr Desmond had a personal interest, where he was motivated by an animus against a person or business with which he had dealings, where the story was published without putting the allegations to the parties concerned, and where in consequence Mr Desmond chose to or had to settle as best he could. In each case the published story was a financial one. The same editor, Mr Townsend, was in post in both cases. There may be some differences, but there are striking similarities. Assuming the transcript of the telephone conversation can be proved, which of course we cannot know at present, there cannot be doubt about what was said by Mr Desmond to Mr Omid. There cannot in any event be dispute about what Mr Desmond accepted in his settlement Statement in Court. It seems to us, therefore, that contrary to Mr Winter's submission, there is a cogent argument to the effect that this is material which is well within *O'Brien*. In Lord Bingham's words at para 7: "the matter which requires proof would be more probable". *O'Brien* was a case where a specific allegation of police malicious prosecution was sought to be proved by previous and subsequent instances not personal to the claimant. The jury, it may be said, are entitled to ask themselves whether Mr Desmond is the kind of man who would act towards Lord Black and his company, Hollinger, in the way in which the pleading of justification alleges. Standing back from the formalities and taking a broad and non-technical approach to the case, one might conclude that that is the "real issue at trial". Moreover, the Pentagon affair may be said to fall within a limited compass and not to expand the length or complexity of the trial to any great extent. And that Mr Desmond cannot be said to be unfairly or unduly prejudiced by exploration of a matter for which he accepted personal responsibility.

21. Ultimately, however, all such matters are for the judge of the trial. Unlike Mr Winter, who wanted us to rule on such matters on this appeal, on the basis that they could only be decided in his favour, Miss Page acknowledges that they should ultimately be left for the judge of trial. All that she asks of us is that we should sanction the issue of the witness summons to Mr Omid. That would at least ensure that the witness and evidence would be available to the court, and the court

would then adjudicate on the *O'Brien* questions of relevance and admissibility in the light of our judgment, the submissions if any on behalf of Mr Omid, and the evidence that will by then have been given by and on behalf of Mr Desmond. It would be unfair if, just because of the technical question of permission being needed because of the lack of seven days notice, the court of trial was not placed in a position where it could review the evidence on its own merits and at a time when it falls to be given. We agree, and it is for these reasons that at the conclusion of argument last night we allowed the appeal and granted permission to issue the witness summons for Mr Omid and his documents.

22. In conclusion, we compliment solicitors and counsel for the manner in which this appeal has been efficiently facilitated under pressure of time constraints.